No. 14-1945

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

STEPHEN V. KOLBE; ANDREW C. TURNER; WINK'S SPORTING GOODS, INC.; ATLANTIC GUNS, INC.; ASSOCIATED GUN CLUBS OF BALTIMORE, INC.; MARYLAND SHALL ISSUE, INC.; MARYLAND STATE RIFLE AND PISTOL ASSOCIATION, INC.; NATIONAL SHOOTING SPORTS FOUNDATION, INC.; MARYLAND LICENSED FIREARMS DEALERS ASSOCIATION, INC.,

Plaintiffs-Appellants,

and

SHAWN J. TARDY; MATTHEW GODWIN,

Plaintiffs,

v.

MARTIN J. O'MALLEY, Governor, in his official capacity as Governor of the State of Maryland; DOUGLAS F. GANSLER, in his official capacity as Attorney General of the State of Maryland; MARCUS L. BROWN, Colonel, in his official capacity as Secretary of the Department of State Police and Superintendent of the Maryland State Police; MARYLAND STATE POLICE,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Maryland at Baltimore

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

John Parker Sweeney
T. Sky Woodward
James W. Porter, III
Marc A. Nardone
BRADLEY ARANT BOULT CUMMINGS LLP
Attorneys for Plaintiffs-Appellants
1615 L Street, NW, Suite 1350
Washington, DC 20036
202-393-7150

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INTRODUCTION

Because this Court requires strict scrutiny of restrictions on Second Amendment rights that reach into the homes of law-abiding citizens, the State goes to great pains to persuade this Court to hold what no other federal court – not even the District Court below – has thus far: that the Prohibited Firearms and Magazines are not protected by the Second Amendment. The State essentially asks this Court to abandon both Supreme Court and its own precedent to support the Act's intrusion into the exercise of a fundamental right in Plaintiffs' homes.

The State consistently draws false parallels between the Prohibited Firearms and those used by the military in a vain attempt to persuade this Court to avoid applying its established standards for Second Amendment challenges in favor of those newly-minted by the State. Because undisputed material facts establish that the Prohibited Firearms and Magazines are typically possessed by law-abiding citizens for lawful purposes, the State's creative efforts to save the Act must fail.

Because the Act prohibits possession in the home by law-abiding citizens of an entire "class" of traditionally lawful firearms, as did the District of Columbia laws struck down by the Supreme Court in *Heller*, this Court need not resort to further scrutiny to direct entry of judgment for Plaintiffs. If the Court does engage in a balancing test, however, this Circuit's precedent dictates that the only appropriate level of constitutional scrutiny is strict scrutiny because the

prohibitions restrict the exercise of Second Amendment rights by law-abiding citizens in the home. Even under intermediate scrutiny, the State has failed to carry its burden to establish, through admissible undisputed facts, that there was substantial evidence before the Maryland General Assembly supporting a tight fit between the Act and the purported government interest in public safety, and that the Act was narrowly tailored for that purpose.

ARGUMENT

I. THE STATE'S ARGUMENTS THAT THE PROHIBITED FIREARMS AND MAGAZINES ARE NOT PROTECTED BY THE SECOND AMENDMENT ARE UNPRECEDENTED AND MERITLESS.

In *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008), the Supreme Court made clear that the Second Amendment protects firearms "typically possessed by law-abiding citizens for lawful purposes." The Court then contrasted its holding that "the sorts of weapons protected were those 'in common use at the time,'" *id.* at 627, with the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id.* The Supreme Court provided a bright-line distinction between arms that are "in common use," and protected, and arms that are "dangerous and unusual," and therefore unprotected. The Prohibited Firearms and Magazines are undoubtedly protected.

A. The State Does Not Refute That the Prohibited Firearms Are the Most Commonly Sold Long Guns in the Country.

The Prohibited Firearms have been sold in the civilian market for over half of a century. JA 2259. Unlike machineguns, semi-automatic long guns like the popular AR-15 are among firearms that "traditionally have been widely accepted as lawful possessions." *Staples v. United States*, 511 U.S. 600, 612 (1994). These modern firearms have long been popular with civilians and are becoming even more popular because of their utility for many lawful purposes (including self-defense, hunting, and competitive shooting), accuracy, and ease of use. Opening Br. 11-12.

Even the State has conceded that the AR-15 and AK-47, both prohibited by the Act, are the two most popular types of semi-automatic long guns in the country. JA 2744. In 2012, nearly one million AR-15 and AK-47 style rifles were either manufactured or imported into this country for sale, which comprised 20% of all firearms sold in that year. JA 1877, 1879. This was more than double the number of Ford F-150 trucks sold that year, and the F-150 was the most commonly sold vehicle in the United States. JA 1877-78. There are over 8 million Prohibited Firearms in the United States, Opening Br. 8, and there can be no doubt that the Prohibited Firearms are commonly owned.

B. The State Does Not Refute That the Prohibited Magazines Are Ubiquitous and Used in Self-Defense.

The State does not argue that the Prohibited Magazines are not commonly owned for self-defense, *see* State's Br. 18-27. Any such contention is waived. *See Town of Nags Head v. Toloczko*, 728 F.3d 391, 395 n.4 (4th Cir. 2013) (recognizing that arguments not raised in an opening brief are waived). It is undisputed that the Prohibited Magazines number approximately 75 million, JA 1880, and are commonly kept and used for lawful purposes including self-defense. JA 2887-88.

C. The State's "Unusually Dangerous" Standard Has No Basis in Law.

Presumably recognizing that the Prohibited Firearms and Magazines are commonly owned, the State has devoted five pages of its brief to arguing for a new standard: "unusually dangerous." State's Br. 18-23. The State plays on the legal standard "dangerous and unusual" to coin a novel standard that has no basis in *Heller*, *McDonald v. City of Chicago*, 561 U.S. 742 (2010), or any of this Court's Second Amendment decisions. The State cannot cite to a single legal decision in which the standard it articulates was employed, or even considered, *see* State's Br. 18-23, and does not ground its standard in any case law. The State's "unusually dangerous" standard is unworkable for a number of reasons. First, the standard cannot be reconciled with the holding of *Heller*. In *Heller*, the Supreme Court was

faced with a challenge to a ban on handguns, which are used in the military, JA 2259, and are the firearms most frequently used in crime, JA 2297, assaults on law enforcement officers, JA 2280, and mass shootings. JA 629. Under the State's reasoning, handguns are indisputably more dangerous than the Prohibited Firearms. Yet, focusing not on their military or criminal use but solely on their popularity among law-abiding citizens, the Supreme Court held handguns to be protected by the Second Amendment. The State's arguments why the Prohibited Firearms and Magazines are "unusually dangerous" could only lead to handguns being considered "unusually dangerous," undermining both the principle and the holding of *Heller*.

Nowhere does any court imply that firearms that are similar to those used by the military are without Second Amendment protection. The *Heller* Court's note regarding the M-16 does not support the State's argument, as it is undisputed that the Prohibited Firearms are not fully automatic. JA 2739. Just as the Court in *Heller* provided a bright-line distinction between commonly owned arms and dangerous and unusual arms, it also has recognized a bright-line distinction between fully-automatic firearms like the M-16 and semi-automatic firearms like the AR-15, *see Staples v. United States*, 511 U.S. 600 (1994), which has been the basis for the longstanding regulation of automatic firearms in the National Firearms Act for 80 years. *Heller*, 554 U.S. at 628.

The District Court here opined: "The Supreme Court indicated in *Heller I* that M-16 rifles could be banned as dangerous and unusual. Given that assault rifles like the AR-15 are essentially the functional equivalent of M-16s - and arguably more effective - the same reasoning would seem to apply here." JA 179 (internal citation omitted). This determination, which lies at the heart of the decision below, underscores the fatal flaws in that decision. First, it relies on two material disputed facts: whether AR-15s are the "functional equivalent" of M-16s and whether AR-15s are "more effective" than M-16s. Second, it reveals a fundamental misunderstanding of the attributes of the Protected Firearms. As demonstrated above, there is a bright-line distinction, drawn by the military, Congress, and the Supreme Court, between fully-automatic and semi-automatic firearms. Furthermore, even if one were to accept as true the State's manifestly fallacious contention that semi-automatic fire is more dangerous or effective than fully-automatic, M-16s can be fired in semi-automatic, making it logically impossible for the AR-15 to be "more effective."

Because the State concedes, State's Br. 18, as it must, that all firearms are dangerous, what distinguishes unprotected firearms from protected firearms is not their relative "dangerousness," but that they are unusual or uncommon. In *United States v. Fincher*, 538 F.3d 868 (8th Cir. 2008), the Eighth Circuit determined that machineguns are not protected by the Second Amendment, but not because they

are "unusually dangerous." Instead, the court held – consistent with *Heller* – that, "[m]achine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use." *Id.* at 874. "In common use" is the only appropriate standard, even when considering prohibitions on fully-automatic military firearms.

The State's "unusually dangerous" standard can only lead courts into the quagmire of factual disputes over relative "dangerousness" that both Congress and the Supreme Court have carefully avoided, and should be rejected.

D. The Second Amendment Protects Arms Kept for Any Lawful Purpose and Does Not Require Prohibited Arms to Be Necessary for Self-Defense.

The State argues the Prohibited Firearms and Magazines are not protected by the Second Amendment because "there is no evidence that they are commonly owned for self-defense." State's Br. 24. This argument distorts both the *Heller* standard and the evidence before this Court.

The *Heller* Court observed that "[t]he traditional militia was formed from a pool of men bringing arms 'in common use at the time' for lawful purposes like self-defense." *Heller*, 554 U.S. at 624. The Supreme Court acknowledged the connection between firearm ownership and self-defense but chose not to condition Second Amendment protection of a firearm on its actual use or necessity in self-

defense. Instead, the Supreme Court conditioned Second Amendment protection on whether or not the firearm was kept for lawful purposes. This is made clear by the Court's opinion in *McDonald*, which expressly rejected Justice Breyer's contention that courts would have to find "answers to complex empirically based questions," including "[w]hat sort of guns are necessary for self-defense." *McDonald*, 561 U.S. at 922-23. Given that it is undisputed that the Prohibited Firearms are used for lawful purposes, JA 2335, they are protected by the Second Amendment.

Even if the State were correct that there must be evidence of use for self-defense, the record contains expert testimony from Buford Boone (former Special Supervisory Agent who oversaw the FBI's Ballistic Research Facility in Quantico, Virginia), Dr. Gary Roberts, and Guy Rossi that the Prohibited Firearms are ideal for self-defense because they are easy to control, highly accurate, have limited penetration capability with respect to missed shots, and are effective at deterring aggressors. JA 2087, 2179-82, 2130-31. Moreover, Plaintiffs' expert James Curcuruto testified that a survey of 21,942 owners showed that one of the primary reasons for their purchase of a Prohibited Firearm was home defense. JA 1878. Plaintiff Andrew Turner, a wounded veteran with partial paralysis of his dominant hand, testified that he uses his regulated firearm (now prohibited) to ensure his ability to defend his home. JA 1855-56. The State's expert witness Daniel Webster, a leading Maryland gun control advocate, acknowledged the commonsense

understanding that Prohibited Firearms are kept by law-abiding citizens for self-defense in the home, JA 2291, and the Bureau of Alcohol, Tobacco, Firearms, and Explosives has confirmed this fact. JA 740. No court that has considered this issue has accepted the State's argument that the Prohibited Firearms are not used for self-defense.

Because the State does not contest that the Prohibited Magazines are commonly kept for self-defense, it argues instead that the Prohibited Magazines are not protected by the Second Amendment because "there is no evidence that firing more than 10 rounds is necessary for self-defense." State's Br. 25. Here, again, the State attempts to create a new standard – "necessary" for self-defense. Clearly, "necessity" is not the correct standard for determining Second Amendment protection because the *Heller* Court rejected the District's argument that its handgun prohibition was constitutional because the District permitted the use of other firearms in self-defense and, therefore, handguns were not necessary. *Heller*, 554 U. S. at 629. Just as the State cannot argue that handguns are not commonly kept for self-defense, it cannot credibly argue that the Prohibited Magazines are not commonly kept for self-defense. Thus, it changes the test it would have this Court apply. There is no basis in the law for requiring "necessity" as a condition for Second Amendment protection, and doing so would run counter

to Supreme Court precedent focusing on the popular choice of law-abiding citizens.

E. The Prohibited Magazines Are Protected by the Second Amendment Because They Are Integral to the Function and Utility of Protected Arms.

The State asserts that the Prohibited Magazines are not protected by the Second Amendment because they are not "arms." State's Br. 26-27. This argument is completely devoid of any support beyond a dictionary definition of the word "arm." The State's argument is beside the point.

Magazines are protected by the Second Amendment because they are components that are integral to the function and usefulness of semi-automatic firearms. JA 2341. The Act's ban of all magazines above a capacity of 10 burdens rights protected by the Second Amendment because it prohibits protected items. The Act in effect eliminates firearms capable of firing more than 10 rounds without reloading, which restricts an individual homeowner's exercise of Second Amendment rights. As the United States District Court in Colorado found, such prohibitions strike at the very core of the Second Amendment because they impact law-abiding citizens' ability to defend themselves in the home. *Colo. Outfitters Ass'n v. Hickenlooper*, Case No. 13-cv-01300-MSK-MJW, 2014 U.S. Dist. LEXIS 87021 at *46 (D. Colo. Jun 26, 2014).

By asking this Court to hold that the Prohibited Firearms and Magazines are outside the scope of the Second Amendment, the State is asking this Court to reject the decisions of every other federal court to have considered similar issues. *See* Opening Br. 10, 12-13. This argument does not withstand scrutiny under the Supreme Court's decision in *Heller* and should be rejected.

II. THE STATE ASKS THIS COURT BOTH TO IGNORE *HELLER* AND TO ABANDON ITS OWN SECOND AMENDMENT JURISPRUDENCE BY ADOPTING INTERMEDIATE SCRUTINY.

While this Court has not had occasion to consider a prohibition of protected firearms that extends into the homes of law-abiding citizens, its prior decisions involving the Second Amendment make clear that such a law must be analyzed under more exacting standards than intermediate scrutiny.

A. Nothing in This Court's Precedent Precludes Using the *Heller* Analysis to Find the Act's Prohibition of a Traditionally Lawful Class of Firearms Categorically Unconstitutional Without Further Scrutiny.

In *Heller*, the Supreme Court did not think it necessary to articulate and apply a level of constitutional scrutiny to overturn the District of Columbia's handgun ban because the law "amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for" the lawful purpose of self-defense. *Heller*, 554 U.S. at 628. The Act also is a "prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for" lawful

purposes including self-defense. For this reason, this Court should hold it unconstitutional without resort to any level of interest-balancing.

The District Court found that the Act prohibits a "class" of arms. JA 181. It is undisputed that the Prohibited Firearms and Magazines are popular and are commonly kept and used for lawful purposes, including self-defense. Therefore, the Prohibited Firearms and Magazines are protected by the Second Amendment. Thus, the Act cannot be reconciled with the Supreme Court's decision in *Heller* and should be held unconstitutional without further consideration.

B. This Court Has Declared That Strict Scrutiny Is Appropriate Where a Restriction on Second Amendment Rights Reaches into the Homes of Law-abiding Citizens.

As Plaintiffs demonstrated in their opening brief, Opening Br. 29-32, this Court's uninterrupted line of post-*Heller* decisions declare 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 (4th Cir. 2011). The State attempts to avoid this precedent by asserting that this Court has rejected the mandatory imposition of strict scrutiny whenever a law implicates a fundamental right, and asserts that this Court should instead examine the extent to which the right is infringed before determining the level of scrutiny to apply. This argument fails for several reasons.

This Court already has made clear what it considers to be a sufficient burden to trigger strict scrutiny: laws that intrude upon the rights of law-abiding, responsible citizens to own protected firearms within their homes. *See* Opening Br. 29-32. This approach is echoed by other courts. In *Tyler v. Hillsdale County Sheriff's Dep't*, No. 13-1876, 2014 U.S. App. LEXIS 23929 (6th Cir. Dec. 18, 2014), the Sixth Circuit engaged in an exhaustive review of Circuit precedent regarding the level of scrutiny that should be employed in a Second Amendment case, recognizing: "The Fourth Circuit employs a hybrid approach, applying intermediate scrutiny to laws burdening the right to bear arms outside of the home but applying strict scrutiny to laws burdening the core right of self-defense in the home." *Id.* at *36 (internal quotations omitted).

Essentially, the State asserts that strict scrutiny is not warranted because the Act leaves available other firearms for self-defense. The Supreme Court rejected this argument in *Heller* when it stated that permitting long guns did not save the District's handgun prohibition. *Heller*, 554 U.S. at 629; *see also* Opening Br. 27.

C. Even If This Court Applies Intermediate Scrutiny, the State Asks This Court to Ignore Applicable Standards.

1. Intermediate Scrutiny of a Prohibition on Protected Arms Requires a Tight Fit Between the Restriction and Government Interests to Ensure the Law Is Narrowly Tailored to Accomplish Its Purpose.

Intermediate scrutiny requires that a law impacting fundamental liberties be narrowly tailored. *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 662 (1994); *Heller v. District of Columbia*, 670 F.3d 1244, 1258 (D.C. Cir. 2011) ("*Heller II*"); *Satellite Broadcasting and Comm. Ass'n v. FCC*, 275 F.3d 337, 356 (4th Cir. 2001). While narrow tailoring of a prohibition on protected arms in the intermediate scrutiny context does not require a law to be the least restrictive means of accomplishing the government's interest, it does require that the law be a tight fit to the asserted interest. *Heller II*, 670 F.3d at 1258.[1] Part of the determination of whether a law is properly tailored requires the consideration of less restrictive alternatives. *McCullen*, 134 S. Ct. at 2530. The rationale behind this requirement is that if there is a less restrictive alternative that would accomplish the government's asserted interests, then the fit between the challenged law and the interest is likely not sufficiently "tight." *Id*. at 2534-2541.

[1] In *Heller II*, the only federal appellate case to review a prohibition on protected arms, the D.C. Circuit applied the "tight fit" standard under intermediate scrutiny. The "tight fit" standard is also true to the Supreme Court's intermediate scrutiny holdings, which require "a close fit between ends and means." *McCullen*, 134 S. Ct. at 2534.

2. The State Fails to Address Effective Less Restrictive Alternatives to Either the Firearm or the Magazine Ban.

Plaintiffs established that there existed less restrictive alternatives in place prior to the Act that achieved the State's asserted interest of public safety. Opening Br. 18-19. This demonstrates that the Act prohibits significantly more protected conduct than is necessary. *See McCullen*, 134 S. Ct. at 2540.

The enhanced background check process for the now Prohibited Firearms ensured that the individuals who purchased those firearms were law-abiding, responsible citizens. Opening Br. 18. This system was effective in preventing the now Prohibited Firearms from being used in crime, insofar as every law enforcement officer and expert acknowledged that these firearms are rarely, if ever, used in crime in Maryland. *E.g.*, JA 2280, 2297, 2324. The previous process was manifestly less restrictive as well, permitting law-abiding citizens to acquire the now-prohibited Protected Firearms. The State introduced no evidence, nor even argued, that the previous process was ineffective in serving the State's interests.

Similarly, Maryland had in place since 1994 a prohibition on magazines with a capacity greater than 20 rounds. Opening Br. 18-19. This permitted law-abiding, responsible citizens to acquire the standard capacity magazines with a capacity of 11-20 rounds that are standard equipment with nearly every semi-automatic firearm sold. The State has never offered an explanation as to why it has

chosen 10 rather than 20 as the magic number beyond which magazines become offensive to public safety.

3. The State Fails to Demonstrate that the District Court Found There Was Substantial Evidence Before the Legislature, But Argues Incorrectly That "Some" Evidence Is Enough.

The State does not dispute that *Turner Broadcasting* requires the District Court and this Court to "assure that, in formulating its judgments, [the Maryland General Assembly] has drawn reasonable inferences based on substantial evidence." *Turner Broad.*, 512 U.S. at 666. Nevertheless, the State insists that the District Court correctly upheld the Act on the basis of evidence the Maryland General Assembly never considered, and without a finding that the Assembly drew its inferences "based on substantial evidence," because there was "some" substantial evidence before the legislature. *Id; see also* State's Br. 52-55. The State's arguments fail.

The District Court did not have the discretion to uphold the Act solely on the basis of evidence the Maryland General Assembly never considered. Instead of "assur[ing] that … [the Maryland General Assembly] has drawn reasonable inferences based on substantial evidence," *Turner Broad.*, 512 U.S. at 666, the District Court substituted its own *ex post facto* evidentiary judgments for inferences the legislature purportedly drew at the time.

The State offers three responses on this point, none of which has merit. First, the State argues that this Court's Second Amendment jurisprudence has departed from *Turner Broadcasting* to uphold gun control laws on the basis of information the legislature never considered. *See* State's Br. 52. The State is wrong. On its face, *Woollard* did not "rel[y] exclusively on evidence not before the legislature[.]" State's Br. 52. Instead, this Court held that "[t]he General Assembly's findings are buttressed by more recent evidence proffered by the State in these proceedings." *Woollard v. Gallagher*, 712 F.3d 865, 877 (4th Cir. 2013). Likewise, *Staten* did not "rel[y] heavily" on post-enactment evidence in contravention of *Turner Broadcasting*. State's Br. 52. There, this Court expressly concluded that the "legislative history" of the challenged act supported the government's position, and only then considered the government's post-enactment social science evidence. *United States v. Staten*, 666 F.3d 154, 161-62 (4th Cir. 2011).

Second, the State argues that even if Second Amendment challenges are subject to *Turner Broadcasting*'s requirements, the Act should be upheld exclusively on the basis of post-enactment evidence because the legislative record is thin. State's Br. 53 (arguing that the legislature was not "obligated . . . to make a record of the type that an administrative agency or court does," and the District Court permissibly "look[ed] to evidence outside the legislative record in order to confirm the reasonableness of Congress's predictions"). The District Court here

did not accept the legislature's record and look outside it only for confirmation, but instead created a new record from post-enactment evidence, deriving all the evidence from outside the legislative record. The District Court did not cite to any of the evidence that was actually before the Maryland General Assembly. *See* Opening Br. 52. In any event, when a legislative record is "less extensive," the reviewing court must still determine that the legislature's predictions "were supported by substantial evidence in the legislative record," even if it then "look[s] to evidence outside the legislative record in order to confirm the reasonableness" of those predictions. *Satellite Broadcasting and Comm. Ass'n v. FCC*, 275 F.3d 337, 357 (4th Cir. 2001). A thin legislative record does not change the merely confirmatory nature of post-enactment evidence.

Third, the State argues that the Maryland General Assembly was not required to create its own record "when such a record had already been created" by other jurisdictions. State's Br. 55. This argument lacks a critical element: the State offers no evidence (or even an assertion) that the Maryland General Assembly actually relied upon or even considered records created by other jurisdictions. All the State says is that the legislature "had access" to other jurisdictions' records, based on the self-serving post-enactment letter opinion of the Defendant Attorney General. State's Br. 55; *see also White River Amusement Pub. Inc. v. Town of Hartford*, 481 F.3d 163, 172 (2nd Cir. 2007)("While a municipality may rely on

the studies conducted by other towns, it may not simply rely on its knowledge that such studies exist.").

This Court's precedent aligns with its sister Circuits on this issue (*see* Opening Br. 51-52 (citing cases from the Second, Eighth, Ninth and Tenth Circuits)) – *Satellite Broadcasting* specifically affirmed that this Court's role is to "decide whether Congress's factual predictions . . . were supported by substantial evidence in the legislative record," and that it reviews extra-record evidence only "to confirm" the legislature's predictions. 275 F.3d at 357-58. This Court should not now depart from that precedent or consensus.

The State now argues that there was "some" substantial evidence before the legislature, and this is sufficient to meet the *Turner Broadcasting* requirement. State's Br. 53. This argument fails for two reasons. First, the District Court did not cite, rely on, or find "substantial" the evidence that was actually before the Maryland General Assembly. Instead, the District Court focused exclusively on extra-record evidence. The District Court did not find, let alone "assure," that the legislature's inferences were "based on substantial evidence." *Turner Broad.*, 512 U.S. at 665.

Second, the sum total of this evidence is not substantial. It is inadequate by any measure. The Governor's testimony was four sentences long and merely explained – but did not offer any evidence for – the law. Webster's testimony was

a paragraph long and adverse to the State's present interests: it relied on Christopher Koper's 1997 study finding that the Federal Ban had no impact on crime and that the Prohibited Firearms were not overrepresented in mass shootings. By way of comparison, this evidentiary record is substantially thinner than those found inadequate in other cases involving constitutional challenges to legislative enactments. *See, e.g.*, *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009) (finding two expert studies and a press release, together with "several hundred pages of material on which the legislature purportedly relied" inadequate as a supporting legislative record); *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995) (concluding that legislative record was inadequate to support the challenged law because "[t]here [wa]s, simply put, a failure of proof as to any of the facts *Turner Broadcasting* would require that we consider to justify according deference").

Indeed, this evidentiary record is so much thinner than the one this Court found adequate in *Satellite Broadcasting* as to be qualitatively different from that record. *See* 275 F.3d at 348 (describing legislative hearings that spanned two years, "extensive" legislative record, and consuming nearly four pages of the Federal Reporter summarizing the evidence comprising the legislative record). Compared to that record, four sentences and a paragraph is different by an order of

magnitude. It is no wonder the State can only muster "some substantial evidence" to describe this inadequate legislative record.

III. THE STATE DOES NOT REFUTE THAT THE DISTRICT COURT FAILED TO APPLY PROPERLY RULES 701 AND 702.

The State offers two mutually exclusive responses to Plaintiffs' contention that the District Court erred when it upheld the Act based upon expert evidence that did not satisfy Rules 701 and 702. First, the State insists the "District Court also properly exercised its gatekeeping rule under Rule 702." State's Br. 57. This argument runs headlong into the District Court's opinion, in which the court refused to apply Rule 702 on the ground that "applying such a standard [the 702 standard] here would misapprehend the court's inquiry." JA 163.

Second, the State argues that the District Court was *not* obligated to apply Rule 702 to expert evidence, and properly rejected the "scientific certainty" requirement out of "defer[ence] to the predictions of the legislature." State's Br. 58. This argument also fails. Although a legislature is free to consider whatever evidence it wishes in determining whether to enact a proposed statute (the Federal Rules of Evidence do not control legislative chambers), a constitutional challenge to a statute unfolds in the courtroom, which *must* consider only that evidence which is admissible under the Federal Rules. The District Court's failure to apply Rule 702 in this case was reversible error.

This Court requires every expert witness to be able to state his or her opinion to a reasonable degree of scientific or medical certainty. *E.g. Fitzgerald v. Manning*, 679 F.2d 341, 350 (4th Cir. 1982). This standard requires only that an expert be able to state that his or her conclusion "was more likely than not." *Burke v. Town of Walpole*, 405 F.3d 66, 91 (1st Cir. 2005). The "reasonable degree of certainty" standard serves to exclude expert testimony that is based on nothing more than a guess and is necessary to carry out the Supreme Court's instruction that expert opinions must be based on "more than subjective belief or unsupported speculation" *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 590 (1993). For instance, because Dr. Koper was not able to state any of his conclusions relied upon by the District Court to a reasonable degree of certainty, *see* JA 2315-16; 2319-21, his opinions should have been excluded.

Neither Rule 702 nor case law interpreting it permits any exception to the Rule for constitutional challenges to statutes. On its face, Rule 702 "makes no relevant distinction between scientific knowledge and technical or other specialized knowledge." *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999). Instead, "[the Rule] makes clear that any such knowledge might become the subject of expert testimony." *Id.* (internal quotation marks omitted). "Hence, as a matter of language . . . the Rule applies its reliability standard to all scientific, technical, or other specialized matters within its scope." *Id.* Accordingly, Rule 702,

"in respect to all such matters [as are described in the Rule], establishes a standard of evidentiary reliability." *Id.* at 149.

Kumho Tire makes clear that the reviewing court's reliability inquiry is mandatory, not discretionary. The inquiry may be flexible, and the court may have discretion to admit or exclude certain evidence, but the court does not enjoy the discretion to refuse to conduct the required analysis: "[Rule 702] requires a valid connection to the pertinent inquiry as a precondition to admissibility. And where such testimony's factual basis, data, principles, methods, or their application are called sufficiently into question, the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline." *Id.* (internal quotation marks and citation to *Daubert* omitted).

Second Amendment challenges to legislative enactments are not excepted from Rule 702. In *Heller II*, the district court conducted on remand a robust Rule 702 analysis in the Second Amendment challenge to the District of Columbia's firearm registration provisions. *Heller v. District of Columbia*, 952 F. Supp. 2d 133 (D.D.C. 2013). There, the District Court considered Rule 702 challenges to three of the District's experts, ruling that "Federal Rule of Evidence 702 . . . governs the admissibility of such testimony." *Id.* at 139 (also observing that, "Under Rule 702, trial courts are required to act as gatekeepers who may only admit expert testimony if it is both relevant and reliable.").

Federal district courts addressing other kinds of constitutional challenges have also applied Rule 702 to the government's expert evidence. *See* Opening Br. at 55-56. In particular, *Many Cultures, One Message v. Clements*, 830 F. Supp. 2d 1111 (W.D. Wash. 2011), *vacated on other grounds*, 520 F. App'x 517 (9th Cir. Mar. 28, 2013), specifically illustrates how a court conducting a *Turner Broadcasting* analysis must subject empirical evidence offered by an expert witness to support the legislature's prediction to a Rule 702 reliability analysis. *See id.* at 1178-79.

The opinions of Dr. Koper, upon which the State and District Court chiefly rely, suffer from the fatal flaw of being contradictory to the studies he actually performed. *See* JA 2998-99. This Court recognized the impropriety of an expert testifying contrary to that expert's own studies when it affirmed the decision of the district court to exclude an expert who testified regarding causation when the expert's testimony was not supported by the studies he performed on the issue. *Newman v. Motorola, Inc.*, 218 F. Supp. 2d 769 (D. Md. 2002) *aff'd* 78 Fed. Appx. 292 (4th Cir. 2003)(unpublished)(*per curiam*). This holding reflects the iron-clad principle that an expert's opinion must be based on sufficient facts or data. Fed. R. Evid. 702(b). The studies of the federal ban conducted by Dr. Koper show that it had no effect on crime, the seriousness of injury in firearm crime generally, or the criminal use of the firearms prohibited by the federal ban. JA 410, 504.

Notwithstanding his studies, Dr. Koper testified that he expected the Act to have an impact on the criminal use of the Prohibited Firearms. The central supposed prediction of the legislature is supported only after the fact by the say-so of the State's expert, which is itself contradicted by that expert's own studies of the ineffectiveness of other prior bans.

The District Court also erred in its application of Rule 701, with respect to the testimony of Henry Stawinski. *See* Opening Br. 53-54. The State's assertion that Plaintiffs did not challenge below Stawinski's opinions related to the penetration capabilities of rounds fired from the Prohibited Firearms is plainly wrong, as the opinion identified by the State in its brief, State's Br. 56, was challenged by Plaintiffs as improper lay opinion testimony. JA 3047-48.[2] More importantly, however, Stawinski never claims to have observed any firing of rounds from Prohibited Firearms through walls or other building material such that he could form a lay opinion based on facts actually observed, as required by Federal Rule of Evidence 701.

The District Court erroneously relied on the testimony of Dr. Koper, Dr. Webster, Lucy Allen, and Mr. Stawinski, all of which should have been inadmissible under the Federal Rules of Evidence. Opening Br. 52-57. The

[2] It was not until the State filed its opposition to Plaintiffs' Motion to Exclude that Stawinski was identified as a lay witness offering opinion testimony, as opposed to an expert, and so Plaintiffs did not have occasion to address Rule 701 issues until their Reply.

foundation upon which the District Court constructed its opinion was not sound. This Court should make clear that inadmissible opinion testimony cannot form the basis to deny Plaintiffs their constitutional rights.

IV. THE STATE DOES NOT ADDRESS THE CONTESTED ISSUES OF MATERIAL FACT, AND THE STATE'S ACCUSATIONS THAT PLAINTIFFS ARE "CHERRY-PICKING" FACTS DEMONSTRATES THAT THE DISTRICT COURT WEIGHED IMPERMISSIBLY THE DISPUTED EVIDENCE.

In their opening brief, Plaintiffs listed 14 separate material facts upon which the District Court relied in granting summary judgment to the State as well as the specific portions of the briefing below that disputed these facts. Opening Br. 59-61. Rather than addressing these disputed material facts, the State simply dismisses them as not material or not disputed.

The State compounds this failure by relying directly in its brief on 13 of the 14 facts that Plaintiffs demonstrated were in dispute. *See* State's Br. 2-4 (first disputed fact); *Id.* at 3 (second disputed fact); *Id.* at 4 (third disputed fact); *Id.* at 19, 36 (fourth disputed fact); *Id.* at 6, 34 (fifth disputed fact); *Id.* at 5-6, 21 (sixth disputed fact); *Id.* at 36, 56-57, 60 (seventh disputed fact); *Id.* at 21-22 (eighth disputed fact); *Id.* at 37-38 (ninth disputed fact); *Id.* at 56-57 (tenth disputed fact); *Id.* at 37, 45-46 (eleventh disputed fact); *Id.* at 39-42; 52 (thirteenth disputed fact); *Id.* at 50-51 (fourteenth disputed fact). The State cannot make its case without relying on facts that Plaintiffs have effectively disputed.

Rather than "cherry-pick[ing]" Koper's testimony as the State suggests, State's Br. 58, Plaintiffs demonstrated that the State's (and the District Court's) reliance on Koper's opinions was improper. Koper and the State's other expert witnesses made admissions in their depositions and reports that contradict Koper's opinions that the Act will be effective in curtailing the criminal misuse of the Prohibited Firearms and Magazines and that the Act closed the loopholes in the federal ban. Opening Br. 60. Plaintiffs' demonstration of contradictory facts is not "cherry-picking" but rather identifying issues of material fact that preclude the grant of summary judgment. The District Court's use of contradicted evidence shows it weighed and relied impermissibly upon disputed evidence.

Not only has the State failed to address the disputed material facts relied upon by the District Court, it now asks this Court to affirm the District Court's grant of summary judgment based on those same disputed facts. The State's request must be rejected.

V. THE STATE'S FOURTEENTH AMENDMENT ARGUMENTS ALSO FAIL.

A. Plaintiffs Are Not Differently Situated From Retired Law Enforcement Officers.

The State dismisses Plaintiffs' equal protection arguments by hanging its hat on the incorrect claim that Plaintiffs are not similarly situated to retired law enforcement officers. State's Br. 44-46. The State's assertion that retired law

enforcement officers are not similarly situated to Plaintiffs by virtue of the fact that they have received general firearms training and some were trained to use the banned firearms was rejected as a matter of law by the only federal court to consider a similar challenge, *see Silveira v. Lockyer*, 312 F.3d 1052, 1091-92 (9th Cir. 2002) (holding the retired law enforcement officer exception to California's "assault weapon" ban was a denial of equal protection under rational-basis review), which the State blithely dismisses as wrongly decided.

In any event, the facts demonstrate that retired law enforcement officers have received varying levels of training by virtue of their careers, JA 2337, just as the Plaintiffs have received varying levels of training in their lives (*e.g.*, Plaintiff Turner received extensive firearm training as part of his training while on active duty in the Navy. Sealed Appendix 65.). Varying levels of training do not create a material distinction between retired law enforcement officers and Plaintiffs, and this Court should follow the well-reasoned opinion of the Ninth Circuit and find that the retired law enforcement officer exemption renders the law unconstitutional under the Fourteenth Amendment's equal protection clause.

B. The State's Arguments That the Term "Copies" Is Not Vague Do Not Comport with Supreme Court Precedent.

The State's defense requires that a citizen be intimately familiar with the internal components of every Prohibited Firearm. State's Br. 46-52. The Supreme Court, however, has already rejected the notion that a firearm owner can be

expected to know even the most critical internal components of his or her firearm, specifically in the context of the AR-15. In *Staples*, *supra*, the Supreme Court was confronted with a challenge to a conviction for possessing an unregistered machinegun. The possessor contended that he did not know that the firearm, which was an AR-15, had been modified to fire automatically. The Court held that the conviction could not stand, because the Government had not proven the defendant knew the firearm was capable of fully-automatic fire and thus did not knowingly violate federal law. Importantly, the Supreme Court rejected the Government's argument that the defendant should have been presumed to have knowledge that the firearm's internal components had been modified. *Staples*, 511 U.S. at 611-15.

Here the State would arrest a citizen whose firearm, while not listed as one of the 68 prohibited models, had operational components interchangeable with those of a Prohibited Firearm. It is equally inappropriate for the State to require a citizen to be familiar with the internal components of every Prohibited Firearm and to compare them to any firearm he or she wishes to purchase on pain of criminal sanctions and forfeiture of Second Amendment rights. This is a much more demanding task than is involved in determining if a firearm is capable of fully-automatic fire. This impossibly high standard of knowledge required under the Act to determine if a firearm is a "copy" sets a trap for the unwary. The term "copies" as it is used in the Act is unconstitutionally vague.

CONCLUSION

The State asks this Court to apply less rigorous standards of constitutional and evidentiary law than would be applied in any other constitutional context because this case involves firearms. The Supreme Court, however, has declared that the Second Amendment is not to be treated as a "second-class right" notwithstanding its "controversial public safety implications." *McDonald v. City of Chicago*, 561 U.S. 742, 780, 783 (2010). The Maryland General Assembly acted in derogation of the Second Amendment rights of Plaintiffs and hundreds of thousands of law-abiding, responsible citizens when it passed the Act. Plaintiffs ask this Court to vindicate their interests and safeguard their constitutional right to keep and bear popular arms of their choice in their homes.

Respectfully submitted,

/s/ John Parker Sweeney
John Parker Sweeney
T. Sky Woodward
James W. Porter, III
Marc A. Nardone
Attorneys for Plaintiffs-Appellants
Bradley Arant Boult Cummings, LLP
1516 L Street, NW, Suite 1350
Washington, DC 20036
(202) 393-7150
jsweeney@babc.com

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(ii) because this brief contains 6,872 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)(5) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

Dated: January 16, 2015

/s/ John Parker Sweeney
John Parker Sweeney
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of January, 2015, Appellants' Reply brief was served, via electronic delivery to all parties' counsel via the Court's appellate CM/ECF system which will forward copies to Counsel of Record.

/s/ John Parker Sweeney
John Parker Sweeney
Attorney for Plaintiffs-Appellants