No. 14-1945

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Stephen V. Kolbe; Andrew C. Turner; Wink's Sporting Goods, Incorporated;

Plaintiffs-Appellants,

v.

Martin O'Malley, Governor, in his official capacity as Governor of the State of Maryland;

Defendants-Appellees.

(caption continued on inside front cover)

On Appeal from the United States District Court
for the District of Maryland
(Catherine C. Blake, District Judge)

BRIEF OF DEFENDANTS-APPELLEES

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December 31, 2014

(caption continued from front cover)

Atlantic Guns, Incorporated; Associated Gun Clubs Of Baltimore, Incorporated; Maryland Shall Issue, Incorporated; Maryland State Rifle And Pistol Association, Incorporated; National Shooting Sports Foundation, Incorporated; Maryland Licensed Firearms Dealers Association, Incorporated,

Plaintiffs-Appellants,

and

Shawn J. Tardy; Matthew Godwin,

Plaintiffs,

v.

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.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 14-1945 Caption: Stephen V. Kolbe, et al. v. Martin O'Malley, Governor, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Martin O'Malley, Governor, Douglas F. Gansler, Attorney General, Marcus L. Brown, Superintendent,
(name of party/amicus)

and the Maryland State Police

who is Defendants-Appellees, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Matthew J. Fader Date: September 19, 2014

Counsel for: Defendants-Appellees

CERTIFICATE OF SERVICE

****

I certify that on September 19, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Matthew J. Fader (signature) September 19, 2014 (date)

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ISSUES PRESENTED FOR REVIEW

1. Did the district court correctly uphold the constitutionality of Maryland's legislation banning assault long guns and large-capacity magazines under the Second Amendment as a regulation of dangerous and unusual firearms and magazines and as a reasonable fit to the State's substantial interest in protecting public safety and reducing the harms associated with firearm violence?

2. In rejecting the plaintiffs' equal protection challenge to the legislation's exceptions for retired law enforcement officers, did the district court correctly conclude that retired law enforcement officers are not similarly situated to the general public with respect to training in and use of firearms and large-capacity magazines?

3. In rejecting the plaintiffs' due process challenge, did the district court correctly conclude that Maryland's assault weapons ban is a constitutional regulation that is not vague in all of its applications?

STATEMENT OF THE CASE

The plaintiffs challenge two provisions of the Firearm Safety Act of 2013, Chapter 427 of the 2013 Laws of Maryland ("Firearm Safety Act" or "Act"): (1) a ban on the possession, purchase, sale, or transfer of specifically-enumerated assault long guns, their copies, and copycat weapons (the "assault weapons ban"); and (2) a ban on the purchase, sale, or transfer within Maryland of firearm magazines

with a capacity of more than 10 rounds (the "large-capacity magazines ban"). The bans are extensions of much older Maryland laws banning assault pistols, regulating the same firearms, and banning magazines with a capacity in excess of 20 rounds. The bans also address the same general subject as bans enacted by other states and the federal government beginning in 1989.

I. MILITARY-STYLE ASSAULT LONG GUNS

The Firearm Safety Act bans specifically-enumerated military-style assault long guns, mostly semiautomatic rifles, and their copies. (J.A. 690-718.) The central focus of the plaintiffs' claims is the AR-15 (J.A. 1417, 1427, 1858-59), a semiautomatic version of the Army's M16 rifle, which has been adopted by militaries around the world. The AR-15 was developed after World War II as a selective-fire automatic rifle[1] designed to meet then-new U.S. Army specifications, which called for a weapon that: (1) would fire a round that would penetrate body armor and a steel helmet; (2) hold a detachable 20-round magazine; (3) weigh less than 6 pounds fully loaded; and (4) allow rapid fire of multiple rounds in a controlled, yet spread pattern. (J.A. 928-30, 933-38, 942.)

With modifications suggested by the Army, including adding a flash suppressor (J.A. 929), the design performed so well that the military concluded that

[1] A "selective-fire" firearm can be fired in automatic mode (one trigger pull releases multiple rounds of ammunition) or semiautomatic mode (one trigger pull releases one round) mode.

the "hit-and-kill potential in combat-style tests" of a 5-man squad armed with AR-15s equaled or exceeded that of an 11-man squad armed with M14 rifles. (J.A. 930.) In field testing in Vietnam, troops reported that "[a]mputations of limbs, massive body wounds, and decapitations had all been caused by the very high velocity AR-15 projectiles." (J.A. 968.) The Army adopted the AR-15, and renamed it the "M16," to replace the selective-fire M14 as the Army's standard-issue service rifle. (J.A. 936.)

Colt subsequently manufactured for sale to the civilian market a "slightly modified" version of the AR-15 that was semiautomatic, but otherwise retained all military features and capabilities. (J.A. 933, 1050.) The semiautomatic AR-15 is thus "the civilian version of the military's M-16 rifle." *Staples v. United States*, 511 U.S. 600, 603 (1994). Since the expiration of Colt's patent, copies of the AR-15 have been manufactured by at least dozens of different companies. (J.A. 1375, 1417-18, 1456, 1877; S.A. 39.) In marketing AR-15 copies, many of these manufacturers stress its military origins and features. (*See, e.g.*, J.A. 1693, 1710, 1726.)

Shortly after World War II, the Soviet Union began producing the AK-47, the "most produced military firearm in history." (J.A. 1071-76, 2258.) Like the AR-15, the AK-47 was developed for military use, and automatic versions of that firearm have been adopted by many militaries around the world. (J.A. 1071-73.)

Functionally, the M16 and automatic AK-47 differ from their semiautomatic counterparts, the AR-15 and semiautomatic AK-47, in only one respect: the former are capable of automatic fire. (J.A. 225 (¶ 36), 1119, 1370, 1391, 1411, 1413, 1420, 1440, 1450, 1457, 1466, 1473, 1475.) Although the rate of fire of semiautomatic assault rifles is limited by the speed at which an individual can pull a trigger (J.A. 1441, 1482), "semi-automatics still fire almost as rapidly as automatics." *Heller v. District of Columbia*, 670 F.3d 1244, 1263 (D.C. Cir. 2011) ("*Heller II*"). Automatic firing of all the ammunition in a 30-round magazine takes 2 seconds, whereas a semiautomatic rifle can empty the same magazine in approximately 5 seconds. *Id.*; *see* U.S. House of Representatives Report No. 103-489 (1994) at 18 (citing testimony that "semiautomatic weapons can be fired at rates of 300 to 500 rounds per minute") (J.A. 1120). Thus, Congress has found that automatic and semiautomatic rifles are "virtually indistinguishable in practical effect." *Id.*; *see Heller II*, 670 F.3d at 1363 ("[I]t is difficult to draw meaningful distinctions between the AR–15 and the M–16.").

In fact, the United States Army considers the M16 to be *more* effective when used in semiautomatic mode in almost all combat situations, and discourages automatic fire because it "is rarely effective." (J.A. 1164-69, 1181.) Similarly, many law enforcement agencies instruct officers to use selective-fire firearms only in semiautomatic mode. (J.A. 257-58 (¶¶ 19, 23).)

II. REGULATION OF MILITARY-STYLE ASSAULT WEAPONS AND LARGE-CAPACITY MAGAZINES

A. Federal Regulation of Semiautomatic Assault Weapons and Large-Capacity Magazines

Coinciding with the heavy marketing of assault weapons to the civilian population beginning in the 1980s, their use in a spate of mass shootings and other crimes drew national attention. (J.A. 289, 1114-17, 1255-63.) In 1989, the United States Department of the Treasury's Bureau of Alcohol, Tobacco & Firearms ("ATF") investigated whether, for purposes of import restrictions, a sporting purpose was served by semiautomatic assault rifles.[2] (J.A. 731.) The ATF's thorough investigation found that such firearms constituted "a distinctive type of rifle distinguished by certain general characteristics which are common to the modern military rifle," a "weapon designed for killing or disabling the enemy." (J.A. 735.) Those characteristics included:

- the ability to accept a detachable magazine;
- folding or telescoping stocks, of which "the predominant advantage is for military purposes";
- pistol grips;
- the ability to accept a bayonet;

[2] The ATF did not investigate the appropriateness or use of semiautomatic assault rifles for self-defense. Although the report investigated and rejected the claim of some evaluators that such guns were suitable for hunting (J.A. 740-41), it merely noted that certain evaluators recommended the firearms for "home and self-defense" (J.A. 740), but did not investigate such claims.

- a flash suppressor, which disperses muzzle flash to conceal a shooter's position;
- a grenade launcher; and
- night sights.

(J.A. 735-36.)

The ATF found that the "semiautomatic assault rifles were designed and intended to be particularly suitable for combat rather than sporting applications," and that while they were in fact used by some "for hunting and target shooting," they were "not generally recognized as particularly suitable for these purposes." (J.A. 741.) Therefore, the ATF recommend a ban on importation of most such firearms. (J.A. 742.)

Also in 1989, the United States Congress began holding hearings on the subject of semiautomatic assault weapons. (J.A. 1115.) In 1994, the House of Representatives issued a report summarizing its findings. (J.A. 1103-48.) Congress found that semiautomatic assault weapons were "the weapons of choice among drug dealers, criminal gangs, hate groups, and mentally deranged persons bent on mass murder"; that their use was increasing, as reflected in crime gun traces and based on testimony of law enforcement officers; and that their criminal use had caused law enforcement agencies to upgrade their own weaponry. (J.A. 1115-17.) After reviewing the findings of the 1989 ATF report, and specifically the characteristics that often distinguish semiautomatic assault long guns from

traditional sporting guns, along with other "expert evidence," Congress concluded that the characteristics are not "merely cosmetic, but do serve specific, combat-functional ends." (J.A. 1119-20.) Thus, Congress concluded, the "net effect of these military combat features is a capability for lethality—more wounds, more serious, in more victims—far beyond that of other firearms in general, including other semiautomatic guns." (J.A. 1121-22.)

Based on these findings, in 1994, Congress enacted a ban on assault weapons and large-capacity magazines. Pub. L. No. 103-322, 108 Stat. 1796 (1994); 18 U.S.C. §§ 921-22 (repealed). The federal ban was intended to be a prohibition on those semiautomatic weapons having features that are useful in military and criminal applications, but that are unnecessary in shooting sports or for self-defense. (J.A. 1119-22.) The federal ban applied to a list of 18 models and variations of semiautomatic assault weapons by name, along with their "duplicates and copies," and to other semiautomatic firearms that shared two or more of a set of identified military-style features. 18 U.S.C. §§ 921(a)(30)(A)-(D) (repealed), 922(v)(1) (repealed). The ban also prohibited "large capacity ammunition feeding devices" capable of holding more than ten rounds. 18 U.S.C. §§ 921(a)(31)(A) (repealed), 922(w)(1) (repealed). However, the federal ban applied only to assault weapons and magazines manufactured after September 13, 1994, and did not prevent the possession, transfer, sale, or receipt of any firearms

or magazines manufactured before that date. 18 U.S.C. §§ 921(a)(31)(A) (repealed), 922(v)(2) (repealed), 922(w)(2) (repealed). The federal ban expired on September 13, 2004.

In 1998, the ATF issued another report updating its study. (J.A. 750-875.) The 1998 report confirmed the ATF's earlier conclusions but pointed to an additional factor disqualifying semiautomatic assault rifles for importation: the ability to accept a large-capacity magazine. (J.A. 753, 776.)

B. State Regulation of Semiautomatic Assault Weapons and Large-Capacity Magazines

States began responding to the increasing militarization of the civilian firearms market in the late 1980's. In 1989, California enacted the first state assault weapons ban, Cal. Penal Code §§ 12275-12290. Just months before Congress passed the 1994 federal assault weapons ban, Maryland enacted a ban on assault pistols and on the transfer of magazines with a capacity of more than 20 rounds. 1994 Md. Laws, Ch. 456. In the same law, Maryland regulated what are now identified as assault long guns by requiring that purchasers first complete an application and subject themselves to a background check. *Id.* That requirement was in effect until it was replaced by the Act now under review.

In 2008, after the Supreme Court's *Heller* decision, the District of Columbia conducted three public hearings before enacting a firearms law that included, among other regulations, a ban on assault weapons and large-capacity magazines.

Heller II, 670 F.3d at 1248. Those regulations were upheld in relevant part by the D.C. Circuit in *Heller II*, 670 F.3d at 1262-64.

On December 20, 2012, a series of tragic mass public shootings with assault long guns, large-capacity magazines, or both, culminated in the murder of 20 elementary school students and six teachers in Newtown, Connecticut using a Bushmaster AR-15 and several large-capacity magazines. (J.A. 1187-237.) Maryland, like several other states, responded by enacting new or more rigorous limitations on such firearms and magazines.

C. The Firearm Safety Act of 2013

On April 4, 2013, the Maryland General Assembly passed the Act as a comprehensive effort to promote public safety and save lives. The legislation includes provisions addressing mental health issues, the establishment of a handgun qualification license requirement for purchasers of handguns, and a ban on armor-piercing bullets, among others. (J.A. 1183-85.) As relevant to this case, the Act generally prohibits, after October 1, 2013, the possession, transfer, or receipt of "assault long guns" and "copycat weapons" (collectively "assault weapons"), as defined in the law. Md. Code Ann., Crim. Law ("CR") §§ 4-303(a), 4-301. "Assault long guns" are defined by reference to the same list of long guns that has been regulated since 1994. Md. Code Ann., Pub. Safety ("PS") § 5-101(r)(2). The ban allows anyone who owned an assault long gun or copycat

weapon before October 1, 2013 to continue to possess it, CR § 4-303(b)(3), but, in contrast to the federal ban, prohibits transfers of such weapons, CR § 4-303(a)(2).

The Act also generally prohibits, among other things, the manufacture, sale, receipt, or transfer of "a detachable magazine that has a capacity of more than 10 rounds of ammunition for a firearm." CR § 4-305.

III. PROCEDURAL HISTORY

The plaintiffs filed their initial complaint on September 26, 2013. (J.A. 9.) In their third amended complaint, the plaintiffs challenge both the assault weapons and large-capacity magazine bans as infringements of the right to keep and bear arms secured by the Second Amendment. (J.A. 38-46.) The plaintiffs also claim that certain exceptions in the Act for retired law enforcement officers violate the Equal Protection Clause of the Fourteenth Amendment, and that, in banning "copies" of specifically-enumerated assault long guns, the Act is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment. (J.A. 46-53.)

After discovery, the parties filed cross-motions for summary judgment and the plaintiffs moved to exclude evidence. (J.A. 14-16.) On August 12, 2014, the district court granted the State's motion for summary judgment, denied the plaintiffs' motion for summary judgment, and denied the plaintiffs' motion to exclude evidence. (J.A. 18, 155-202.)

Reviewing the Second Amendment claim, the district court applied the two-pronged analysis required by this Court. (J.A. 170.) Although expressing serious doubt that the banned firearms and magazines implicated conduct protected by the Second Amendment (J.A. 178), the Court nonetheless assumed that they did, and proceeded to consider whether they would withstand the applicable level of scrutiny (J.A. 79). Following this Court's guidance (J.A. 180-82 & n.30), the district court determined that intermediate scrutiny should apply to the challenged law because the law "does not seriously impact a person's ability to defend himself in the home." (J.A. 181.)

Applying intermediate scrutiny, the lower court relied on evidence not subject to genuine dispute regarding the features and dangerousness of the banned firearms and magazines. (J.A. 186-89.) The lower court rejected the plaintiffs' counter-arguments, which it concluded either misapprehended the intermediate scrutiny standard or were based almost entirely on mischaracterizations of Professor Koper's statements. (J.A. 190-92.)

The district court also rejected the plaintiffs' equal protection challenge to the Act's exceptions for retired law enforcement officers, whose training and experience with firearms, the court found, renders the officers not similarly situated to the general public. (J.A. 193-96.) Finally, the district court concluded that the Act is not void for vagueness (J.A. 193-201), observing that "[e]ven the

plaintiffs' own statements confirm that [in the Act] there is an identifiable core of prohibited conduct" (J.A. 200). Upon entry of summary judgment for the defendants on all counts (J.A. 155), this appeal followed (J.A. 3051).

SUMMARY OF ARGUMENT

Maryland's bans on assault weapons and large-capacity magazines are constitutional regulations of dangerous and unusual weapons and magazines. The Act offers a reasonable fit with the State's compelling interest in protecting public safety and reducing the negative effects of firearms violence. The banned firearms and magazines were developed, and are most suited, for military-style assaults. They are also disproportionately used in mass public shootings and murders of law enforcement officers. The banned firearms are not commonly used for self-defense, and more than ten rounds are rarely, if ever, required for self-defense. Thus, the banned firearms and magazines do not fall within the scope of the Second Amendment's protection.

Even if assault weapons and large-capacity magazines fell within the protection of the Second Amendment, the State has satisfied its burden under intermediate scrutiny to demonstrate a reasonable fit between the bans and the State's compelling interest in protecting public safety and reducing the negative effects of firearms violence. In addition to reports compiled by federal agencies and the United States Congress, as well as evidence collected by other jurisdictions

and described in case law, the State produced testimony of several law enforcement officers and social scientists to support the legislature's predictive judgment that the bans Act will further the State's compelling interests. Maryland's bans are reasonable regulatory measures that are consistent with the Second Amendment.

The Act's exceptions for retired law enforcement officers do not offend the Equal Protection Clause because retired law enforcement officers and other members of the general public are not similarly situated with respect to firearms training or use. The plaintiffs' pre-enforcement facial vagueness challenge to the Act's ban on "copies" of specifically-enumerated firearms fails because the language is not impermissibly vague in all of its applications, as evidenced by the plaintiffs' own testimony. The Court should affirm the district court's grant of judgment in favor of the defendants.

ARGUMENT

I. STANDARD OF REVIEW

Although this Court reviews de novo a grant of summary judgment, *Woollard v. Gallagher*, 712 F.3d 865, 873 (4th Cir.), *cert. denied*, 134 S. Ct. 422 (2013), evidentiary rulings pertinent to summary judgment are reviewed for abuse of discretion, *Supermarket of Marlington, Inc. v. Meadow Gold Dairies, Inc.*, 71 F.3d 119, 126 (4th Cir.1995).

II. MARYLAND'S BANS ON ASSAULT WEAPONS AND LARGE-CAPACITY MAGAZINES ARE CONSTITUTIONAL.

A. The Supreme Court's Second Amendment Precedent Recognizes the States' Constitutional Authority to Enact Reasonable Firearms Regulations.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const., amend. II. In *District of Columbia v. Heller*, the Supreme Court overturned a District of Columbia law that imposed a "complete prohibition" on the possession of handguns in the home. 554 U.S. 570, 629 (2008). After engaging in a textual and historical analysis, the Court concluded that: (1) the amendment codified a pre-existing right, *id.* at 592; (2) the right is an individual right, not dependent on militia service, *id.*; and (3) "whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and

home," *id.* at 635. Identifying handguns as the class of arms "that is overwhelmingly chosen by American society" for the lawful purpose of self-defense in the home, the Court held that the District could not ban all of them from the home. *Id.* at 628.

Although the Court declined to speculate about other conduct that might fall *within* the protection of the Second Amendment, *id.*, it observed, notwithstanding the amendment's unconditional language, that "the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. Indeed, the Court identified a non-exhaustive set of types of laws that it presumed would fall *outside* the protection of the amendment. *Heller*, 554 U.S. at 626-27 & n.26.

Two years later, in *McDonald v. City of Chicago*, the Supreme Court held that the individual Second Amendment right is "fully applicable to the States." 561 U.S. 742, 750 (2010). Nonetheless, the Court observed that "'state and local experimentation with reasonable firearms regulation will continue under the Second Amendment.'" *Id.* at 785 (citation omitted).

B. This Court Applies a Two-Prong Analysis to Challenges Brought Under the Second Amendment.

In applying *Heller* and *McDonald*, this Court has adopted a two-pronged approach to analyzing Second Amendment claims. *Woollard v. Gallagher*, 712 F.3d 865, 874-75 (4th Cir.), *cert. denied*, 134 S. Ct. 422 (2013); *United States v.*

Chester, 628 F.3d 673, 680 (4th Cir. 2010). The first question is "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *Chester*, 628 F.3d at 680 (internal quotation marks and citation omitted). If not, the challenged law is valid. *Id.* If the burdened conduct is within the scope of the Amendment's protection, the second prong requires the application of "an appropriate form of means-end scrutiny." *Id*.

This Court has cautioned against "circumscrib[ing] the scope of popular governance" by pushing the Second Amendment right beyond that identified by the Supreme Court: "This is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights." *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (Wilkinson, J., writing for the court).

C. The Bans Do Not Burden Conduct Falling Within the Scope of the Second Amendment.

When the Supreme Court in *Heller* struck down bans on the possession in the home of all handguns, the "quintessential" and "most popular weapon chosen by Americans for self-defense in the home," 554 U.S. at 629, the Court emphasized that the Second Amendment right is "not a right to keep and carry any weapon whatsoever in any manner whatsoever for whatever purpose," *id.* at 626. Thus, the Court explained, because the right is distinct from its initial militia

purpose, the Second Amendment does not preclude bans on military weapons, such as "M-16 rifles and the like[.]" *Id.*

The Court further recognized that its 1939 decision in *United States v. Miller* had described the types of weapons protected by the Second Amendment as those "in common use at the time," *id.* at 627 (quoting *Miller*, 307 U.S. 174, 179 (1939)), a limitation the *Heller* Court found "fairly supported" not by the militia-focused rationale of *Miller*—which the *Heller* Court rejected—but by the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons,'" *id.* at 627.

Although the Supreme Court did not explain what it meant by "in common use" or "dangerous and unusual," it is thus appropriate to consider those concepts grounded in the historical tradition on which *Heller* relied. Focusing, as the plaintiffs do, solely on the number or "popularity" of firearms owned, Appellants' Br. at 8-9, 24, 27, would make the constitutionality of a ban dependent on the time at which it was enacted, with particularly dangerous weapons suddenly becoming entitled to constitutional protection upon reaching an imaginary "constitutional" numerosity threshold, but less dangerous firearms permitted to be forever restricted if banned early enough. Under such a regime, constitutional protection would hinge upon the manufacturing decisions and marketing efforts of firearms manufacturers. Although some other courts appear to have adopted a focus on

numbers, *see, e.g.*, *Colorado Outfitters Assoc. v. John W. Hickenlooper*, ___ F. Supp. 2d ___, 2014 WL 3058518, Civ. A. No. 13-cv-01300-MSK-MJW, at *14 (D. Colo. June 26, 2014); *Shew v. Malloy*, 994 F. Supp. 2d 234, 246 (D. Conn. 2014); *New York State Rifle & Pistol Ass'n v. Cuomo*, 990 F. Supp. 2d 349, 365 (W.D.N.Y. 2013) ("*NYSRPA*"), it presents a circular argument for constitutionality that cannot be what the Supreme Court intended. Instead, the core focus of the inquiry should be on whether the firearms are "dangerous and unusual."

Moreover, a focus on "common use" begs the question of "common use" for what purpose. Although the plaintiffs contend this means "common use" for any lawful purpose, the *Heller* Court explained that the core of the Second Amendment right was self-defense. 554 U.S. at 599. Entirely absent from *Heller* is any discussion of the right as one intended to protect an individual's desire to shoot, or possess, a particular firearm. *See Hickenlooper*, 2014 WL 3058518, at *13.

1. The Banned Firearms and Magazines Do Not Fall Within the Protection of the Second Amendment Because They Are Dangerous and Unusual.

All "arms," and especially all firearms, are necessarily dangerous. Thus, to fall outside the scope of the protection of the Second Amendment as "dangerous and unusual," an arm must presumably be unusually dangerous. With the exception of an inability to fire in automatic mode, the banned firearms are the same as firearms that the world's militaries have chosen to supply to their soldiers

on the battlefield. From their ability to fire large numbers of devastatingly-effective rounds at the enemy over very short periods of time, to the features designed to make them more effective in the battlefield, these weapons have been designed, and continue to be used, specifically for their dangerousness in battle. Unsurprisingly, the banned semiautomatic firearms and the military's automatic versions are "virtually indistinguishable in practical effect" (J.A. 1120), that is, in their functioning, dangerousness, and killing capacity. (J.A. 1120-22, 1391-94, 1411.) Indeed, as discussed above, even weapons capable of automatic firing are viewed as even more effective for most military and law enforcement purposes in semiautomatic mode. Many of the features of the banned assault long guns have been found to "serve specific, combat-functional ends," and their "net effect . . . is a capability for lethality—more wounds, more serious, in more victims—far beyond that of firearms in general, including other semiautomatic guns." (J.A. 735-36, 798-99, 884-87, 1120-22.)

Large-capacity magazines, a feature common, but not unique, to assault long guns, serve an obvious utility in offensive assaults by allowing the shooter to fire more rounds before having to pause to reload. Thus, "magazines capable of holding large amounts of ammunition, regardless of type, are particularly designed and most suitable for military and law enforcement applications." (J.A. 789, 891.) The same capability can enable a criminal using a large-capacity magazine to fire

more rounds without having to reload. (J.A. 266 (¶ 49), 1478-79; *see also* J.A. 230-31 (¶¶ 54-56).) It also ensures that private citizens, who the plaintiffs emphasize are likely to miss with the vast majority of shots they take, will hit many more things other than their intended targets when they fire more rounds from a larger magazine. (J.A. 1373, 1401-04, 1407-08, 1432, 1445, 1495.)

The dangerous and unusual character of assault weapons and large-capacity magazines is also evident from their over-representation in mass shootings. (J.A. 289-90 (¶¶ 10-11, 15), 347-53 (¶¶ 16-18, 23-28, 36-40), 2518-19 (¶¶ 25-27).) At the time of the 1994 federal ban, all assault weapons (including both pistols and long guns) comprised 1% or less of the civilian gun stock (J.A. 349 (¶ 19)), but evidence from before the federal ban suggests that assault weapons or large-capacity magazines were involved in 40% of mass shooting incidents (J.A. 350 (¶ 24), 292-93 (¶ 15)). As discussed below at 23-24, assault long guns currently represent no more than 3% of the civilian gun stock. Still, a recent media investigation by *Mother Jones* magazine reviewing publicly-available data on 62 public mass shootings between 1982 and 2012, found that 21% of those incidents involved an assault rifle, and more than half involved assault weapons, large-capacity magazines, or both. (J.A. 350 (¶ 25), 1239-45.) Recent studies also indicate that over the last three decades large-capacity magazines were used in 85% of mass shootings where the magazine capacity was known (34 out of 40

shootings). (J.A. 652 (¶ 15).) In mass shootings in which large-capacity magazines were used, the average number of shots fired was 75. (J.A. 652-53 (¶ 16).)

Further analysis has demonstrated that mass shootings that involved assault weapons resulted, on average, in more fatalities (10.5 to 7.7) and more injuries (14.1 to 6.4) than those that did not. (J.A. 2516 (¶ 18).) Moreover, mass shootings involving large-capacity magazines had significantly higher numbers of fatalities (10.19 to 6.35) and casualties (12.39 to 3.55) than when large-capacity magazines were not involved. (J.A. 352-53 (¶ 38).) These effects have been corroborated by other studies, including one finding that gun incidents in Baltimore in which a victim was shot were more likely to involve large-capacity magazines than were those in which no one was wounded. (J.A. 354 (¶ 42).)

Assault rifles and large-capacity magazines are also disproportionately represented in murders of law enforcement officers. (J.A. 227-28 (¶¶ 45-46), 292-95 (¶¶ 15, 18), 347 (¶ 16), 349 (¶¶ 22, 23), 351-52 (¶¶ 29, 35), 2518-19 (¶¶ 25-27). Thus, a study of murders of on-duty officers in 1994 found that assault weapons were used in 16% of the murders, and large-capacity magazines were involved in 31% to 41% of the murders. (J.A. 294 (¶ 18).) Although the plaintiffs point out that law enforcement officers are killed more frequently by other means, officers are still killed by banned firearms disproportionately compared to their

ownership. Of the 493 law enforcement murders from 2003 through 2012, 92 (18.7%) were committed by rifle, and 55 (more than 11% of total murders) with rifles using the caliber of ammunition used most commonly in AR-15s and AK-47s.[3]

The plaintiffs have failed to raise a genuine dispute as to any of these facts. They cannot generate a genuine dispute as to the banned firearms' degree of dangerousness merely by relying, as they do, on testimony claiming that some of the same attributes that make the banned firearms and magazines so useful for military applications and in mass public shootings also can be useful in self-defense scenarios. Such testimony merely evidences the plaintiffs' desire to possess those dangerous weapons and magazines themselves; it does nothing to cast doubt on their dangerousness. *See NYSRPA*, 990 F. Supp. 2d at 368.

The plaintiffs also claim, erroneously, that the banned assault weapons are not unusually dangerous because other firearms not currently banned are as dangerous or because other firearms shoot higher-caliber ammunition. As to the first contention, Maryland has banned the firearms it identified as most harmful to public safety. (J.A. 211 (¶ 29), 229 (¶¶ 51-52).) Additional firearms can be added as appropriate. (*Id.*) Moreover, the fit of the law is required to be reasonable, not

[3] *See* Law Enforcement Officers Feloniously Killed with Firearms, Table 35, available at http://www.fbi.gov/about-us/cjis/ucr/leoka/2012/tables/table_35_leos_fk_with_firearms_type_of_firearm_and_size_of_ammunition_2003-2012.xls (last visited Dec. 31, 2014).

perfect. As to the second contention, the fact that higher-caliber firearms may fire more powerful rounds does not necessarily make them more dangerous. The United States Army replaced the higher-caliber M14 with the M16—both selective-fire weapons—because it found its troops could inflict more damage on the enemy with the lower-caliber, but still superior, firearm. The plaintiffs' attempts to focus on individual facets of firearms, rather than the dangerousness of the firearms as a whole, does not create a genuine dispute of material fact.

In sum, assault weapons and large-capacity magazines are dangerous and unusual arms that fall outside of the scope of the Second Amendment.

2. The Banned Firearms Are Not Commonly Owned, Especially Not for Self-Defense.

Even if the touchstone for protection under the Second Amendment were "common use," the banned firearms are not commonly owned or commonly used for self-defense. Even based on the plaintiffs' disputed claim about the number of assault weapons in circulation—"at least 8 million," Appellants' Br. at 8—such firearms comprise less than 3% of the more than 300 million firearms in this country, William J. Krouse, Congressional Research Service, *Gun Control Legislation* 8 (2012), *available at* http://fas.org/sgp/crs/misc/RL32842.pdf (last visited Dec. 31, 2014). Moreover, the absolute number of assault weapons vastly exceeds the number of people who own them. Plaintiff NSSF contends that assault weapons owners owned an average of 3.1 such weapons in 2013. (J.A. 174-75.)

Thus, less than 1% of the American population actually own the banned firearms. That percentage does not equate to "common" ownership as that term is widely understood. (J.A. 178, 1837-38 (Testimony of Professor Laurence H. Tribe before Senate Judiciary Committee)); *see also* American Heritage Dictionary of the English Language 372 (5th ed. 2011) (defining "common" as "relating to the community as a whole," "widespread," or "prevalent").

Even if the banned firearms were somehow deemed to be commonly owned, there is no evidence that they are commonly owned for self-defense. The plaintiffs have failed to identify a single incident in which an individual in Maryland has used an assault weapon in self-defense, and Maryland law enforcement officers were similarly unaware of any such incident. (J.A. 208, 223, 260, 277, 279.) To the contrary, the record indicates that most people choose to keep firearms other than banned firearms for self-defense. (S.A. 13-14, 25, 35, 54, 75, 82; *but see* S.A. 45.) There is also no evidence that the banned firearms are commonly *possessed* for self-defense, and the dearth of evidence of their use for that purpose indicates they are not.

In an effort to substantiate their claim that assault weapons are commonly possessed for self-defense, the plaintiffs rely on two sources, neither of which actually supports the proposition. First, the plaintiffs rely on a self-selected group's reported responses to an industry survey that identified defense as one of a

number of reasons why someone—not necessarily the respondents—might purchase a "modern sporting rifle," a term the plaintiffs admit is undefined and not co-extensive with the banned firearms. (J.A. 2663-65 (Curcuruto Dep. 69-73, 80).) As the district court correctly determined, those survey responses do not constitute evidence that assault weapons are actually commonly owned for self-defense. (J.A. 179 n.28.) Second, the plaintiffs take out of context an assumption stated by one of the State's expert witnesses, Daniel Webster, that assault weapons are used for self-defense. In fact, Professor Webster is unaware of a single example of an assault long gun being used in self-defense. (J.A. 2510 (¶¶ 4-5).)

Similarly, there is no evidence that firing more than 10 rounds is necessary for self-defense, and Maryland law enforcement officials are unaware of a single example of an individual needing to fire more than 10 rounds in self-defense. (J.A. 208, 223, 226, 260-61, 262, 277, 279.) In the single known case when more than 10 rounds *were* fired, it appears that a number of the rounds were fired as the perpetrators were fleeing the scene. (J.A. 260-61, 1438-39.) Moreover, two separate analyses of an NRA collection of reports of citizen self-defense incidents over two periods totaling eight years found only a single incident in which more than 10 shots were fired. (J.A. 650-51.) Put simply, there is no evidence that assault weapons or more than ten rounds are commonly used, much less necessary, for self-defense by law-abiding citizens.

3. Large-Capacity Magazines Are Not Protected Arms.

The large-capacity magazines banned by the Act also fall outside the scope of the Second Amendment's protections because they do not "constitute bearable arms." *See Heller*, 554 U.S. at 582. In answering what types of "arms" are protected by the Second Amendment, the Supreme Court in *Heller* observed that the "18th-century meaning" of "arms" "is no different from the meaning today": "'weapons of offence, or armour of defence.'" *Id.* at 581 (quoting 1 Dictionary of the English Language 106 (4th ed.) (reprinted 1978)). Another late 18th-century legal dictionary cited by the Court defined arms as "'any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.'" *Id.* (quoting 1 A New and Complete Law Dictionary). Thus, the Supreme Court held, the amendment's protection "extends, prima facie, to all instruments that constitute bearable arms." 554 U.S. at 582.

A large-capacity detachable magazine is not an "arm"; it is not itself a "weapon[] of offence," or a thing taken "to cast at or strike another." Indeed, large-capacity magazines are not even ammunition, but instead are devices used for feeding ammunition into firearms that can easily be switched out for other devices that are of lower capacity but still capable of feeding ammunition, up to 10 rounds at a time. Moreover, using magazines permitted by the Act will cause neither firearms nor ammunition to operate any differently than they would using

large-capacity magazines. (J.A. 1397-98, 1408-09.) The plaintiffs did not identify a single firearm that cannot be operated effectively with a magazine holding 10 rounds or less. Thus, even if a ban on *all* detachable magazines could implicate the Second Amendment's protection, a prohibition only on magazines holding more than ten rounds does not.

For all of these reasons, the banned firearms and magazines fall outside the scope of Second Amendment protection.

D. Even if the Act's Bans Implicate the Second Amendment, the Law Is Constitutional.

1. If Heightened Scrutiny Is Warranted, Intermediate Scrutiny Is the Applicable Standard of Review.

Even if the Act's bans fall within the scope of the Second Amendment's protection, they survive constitutional scrutiny. In determining the appropriate level of scrutiny, this Court assesses the "burdens on Second Amendment rights . . . tak[ing] into account the nature of a person's Second Amendment interest, the extent to which those interests are burdened by government regulation, and the strength of the government's justifications for the regulation." *Masciandaro*, 638 F.3d at 470. Like most other federal appellate courts to have considered the question, this Court has applied intermediate scrutiny to regulations that implicate conduct protected by the Second Amendment, but do not substantially burden the core right of in-home self-defense by responsible, law-abiding citizens. *Woollard*,

712 F.3d at 878-79; *Masciandaro*, 638 F.3d at 471; *Chester*, 628 F.3d at 683; *see also Kachalsky v. County of Westchester*, 701 F.3d 81, 96-97 (2d Cir. 2012), *cert denied*, 133 S. Ct. 1806 (Apr. 15, 2013); *United States v. Marzzarella*, 614 F.3d 85, 97-98 (3d Cir. 2010); *National Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 207 (5th Cir. 2012), *cert denied*, 134 S.Ct. 1364 (Feb. 24, 2014); *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010); *Jackson v. City of San Francisco*, 746 F.3d 953, 965 (9th Cir. 2014); *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010); *Heller II*, 670 F.3d at 1262; *but see Tyler v. Hillsdale County Sheriff's Dept.*, No. 13-1876, 2014 WL 7181334 (6th Cir. Dec. 18, 2014) (generally adopting strict scrutiny for Second Amendment challenges, although commenting that the decision "is likely more important in theory than in practice"); *Peruta v. County of San Diego*, 742 F.3d 1144, 1175-78 (9th Cir. 2014) (criticizing use of the intermediate scrutiny standard by other federal appellate courts, including this Court), *call for en banc consideration pending*, No. 10-56971, Order, Dkt. Entry 161 (9th Cir. Dec. 3, 2014).

Similarly, in addressing challenges to state assault weapons and large-capacity magazine bans post-*Heller*, federal courts have also generally applied intermediate scrutiny, and rejected application of strict scrutiny, because such bans do not substantially burden the Second Amendment right. *See Heller II*, 670 F.3d

at 1261-62; *Shew*, 994 F. Supp. 2d at 246-47; *NYSRPA*, 990 F. Supp. 2d at 366-67; *Hickenlooper*, 2014 WL 3058518, *14-15.

These courts, relying on evidence similar to that presented here, universally have upheld the bans at issue in those cases. *See Heller II*, 670 F.3d at 1261-64; *Shew*, 994 F. Supp. 2d 234; *NYSRPA*, 990 F. Supp. 2d 349;[4] *Hickenlooper*, 2014 WL 3058518; *see also Kampfer v. Cuomo*, 993 F. Supp. 2d 188 (N.D.N.Y. 2014); *People v. James*, 94 Cal. Rptr. 3d 576, 585-86 (Cal. Ct. App. 2009) (holding that the Second Amendment does not extend to assault weapons).[5]

Maryland's bans, similar to those upheld by other federal courts, do not substantially burden an individual's ability to acquire any amount of ammunition or any number of firearms for legitimate in-home self-defense or any other lawful purpose. The Act imposes no burden on ownership of handguns, the weapon deemed by the Supreme Court to be the "quintessential" self-defense weapon, or on many types of long guns. As discussed above, the banned firearms are rarely used for self-defense, and more than 10 rounds are rarely, if ever, needed for self-

[4] On December 9, 2014, the Second Circuit held argument in the *Shew* and *NYSRPA* cases.

[5] Prior to *Heller*, state court decisions, without exception, held that assault weapons and large-capacity magazines were not protected under state constitutional provisions. *See, e.g.*, *Benjamin v. Bailey*, 662 A.2d 1226, 1230-35 (Conn. 1995); *Robertson v. City & County of Denver*, 874 P.2d 325, 331-33 (Colo. 1994); *Arnold v. City of Cleveland*, 616 N.E.2d 163, 166-73 (Ohio 1993) .

defense. Accordingly, if any form of heightened scrutiny is implicated, it is intermediate scrutiny.

The plaintiffs' insistence on strict scrutiny misinterprets the Supreme Court's decision in *Heller*, as well as decisions of this Court. *Heller* itself offered reassurance that its ruling would not lead to wholesale overturning of laws: it "should not be thought" that prior decisions upholding firearms restrictions "would necessarily have come out differently" under *Heller's* interpretation of the right to keep and bear arms. 554 U.S. at 624 n.24. The plaintiffs mistakenly interpret the majority's rejection of the interest-balancing test advocated by Justice Breyer as a rejection of intermediate scrutiny; to the contrary, the majority distinguished that "judge-empowering 'interest-balancing inquiry'" from the "traditionally expressed levels" of scrutiny, which it identified as "strict scrutiny, *intermediate scrutiny*, rational basis." *Id.* at 634 (emphasis added). Moreover, *Heller* identified a number of presumptively lawful regulatory measures, *id.* at 626-27 & n.26, and, in *McDonald*, predicted that "state and local experimentation with *reasonable* firearm regulation will continue under the Second Amendment," 561 U.S. at 785 (emphasis added).

The plaintiffs also misinterpret isolated statements of this Court as requiring the application of strict scrutiny. Appellants' Br. at 30-31. To the contrary, this Court has "rejected the proposition that [it] must 'apply strict scrutiny whenever a

law impinges upon a [fundamental] right.'" *Woollard*, 712 F.3d at 878 (quoting *Chester*, 628 F.3d at 682) (alteration in *Woollard*). Instead, this Court determines the applicable standard of scrutiny based on "the extent to which [a person's Second Amendment] interests are burdened by government regulation," *Masciandaro*, 638 F.3d at 470. As the district court correctly discerned (J.A. 183), no decision of this Court supports the application of strict scrutiny in this case. Any burden on the exercise of the core Second Amendment right is clearly not substantial or severe.

Under intermediate scrutiny, the State must demonstrate that the challenged regulation "is reasonably adapted to a substantial government interest," *Masciandaro*, 638 F.3d at 471, meaning that "there is a 'reasonable fit' between the challenged regulation and a 'substantial' government objective," *Chester*, 628 F.3d at 683. "[T]he State must show a fit that is reasonable, not perfect," and makes this showing by demonstrating that its "interests are substantially served" by the challenged law. *Woollard*, 712 F.3d at 878 (citations and internal quotation marks omitted). The challenged law need not "'be the least intrusive means of achieving the relevant government objective[s],'" *id.* at 878-79 (quoting *Masciandaro*, 638 F.3d at 474), nor must it aim to "strike at all evils at the same time," *Buckley v. Valeo*, 424 U.S. 1, 105 (1976) (citations and internal quotation marks omitted); *see also Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S.

483, 489 (1955) (legislature "may select one phase of one field and apply a remedy there, neglecting the others").

To meet its burden, the State may "resort to a wide range of sources, such as legislative text and history, empirical evidence, case law, and common sense, as circumstances and context require." *United States v. Carter*, 669 F.3d 411, 418 (4th Cir. 2012). Thus, in *Woollard*, the State met its burden through declarations of three experienced law enforcement personnel, submitted with the State's summary judgment motion, who presented evidence that the challenged law "advances the [State's] objectives." 712 F.3d at 877-80 & n.6. This Court has also permitted the government to satisfy its burden through submission of scholarly social science evidence. *United States v. Staten*, 666 F.3d 154, 163-67 (4th Cir. 2011).

It is not the State's burden to prove that the legislature made the correct policy decision, nor is it the Court's role to weigh the evidence in support of and in opposition to a legislative enactment and determine for itself which is more persuasive. That "'is the legislature's job, not [this Court's]," and the Court "cannot substitute [the plaintiffs'] views for the considered judgment of the General Assembly. . . ." *Woollard*, 712 F.3d at 881 (quoting *Kachalsky*, 701 F.3d at 99). "In the context of firearm regulation, the legislature is 'far better equipped than the judiciary' to make sensitive public policy judgments (within constitutional

limits) concerning the dangers in carrying firearms and the manner to combat those risks." *Kachalsky*, 701 F.3d at 97 (quoting *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 665 (1994)); *Drake v. Filko*, 724 F.3d 426, 436-37 (3d Cir. 2013) ("When reviewing the constitutionality of statutes, courts accord substantial deference to the [legislature's] predictive judgments." (internal quotation omitted)); *Heller II*, 670 F.3d at 1269.

Thus, the existence of evidence challenging the legislature's judgment is not sufficient to invalidate the law. The ultimate question is not whether the State's evidence is undisputed, but whether it constitutes substantial evidence in support of the legislature's judgment.

2. The Act Is Reasonably Adapted to the State's Substantial Interests in Protecting Public Safety and Reducing the Negative Effects of Firearms Violence.

Advancing public safety and reducing the negative effects of firearms violence are substantial government interests, *Woollard*, 712 F.3d at 877-78, a point conceded by the plaintiffs below (J.A. 184). Thus, the Court need only determine whether the bans on assault weapons and large-capacity magazines are "reasonably adapted" to these substantial government interests. The Firearm Safety Act easily satisfies that test. In addition to the conclusions of the ATF reports, Congressional findings supporting the federal assault weapons ban, and the findings of the D.C. Circuit in *Heller II*, the State has produced substantial

evidence, in the form of testimony from experienced law enforcement officials,[6] opinions of experts,[7] and empirical data, showing that its bans on assault weapons and large-capacity magazines are reasonably adapted to protecting public safety and reducing the negative effects of firearms violence.

The law enforcement officers testified that the banned assault weapons are particularly dangerous firearms that were specifically designed for military applications with features primarily useful for military and law enforcement applications, not sport shooting or self-defense. (J.A. 206-07 (¶ 12), 223-24 (¶¶ 32, 33), 257-58 (¶¶ 20-21), 261 (¶ 33), 282 (¶ 44); *see also* J.A. 346 (¶ 13), 288 (¶¶ 7-8) , 638 (¶¶ 10-11).) Moreover, although not capable of automatic fire, they are "absolutely devastating weapons" that can still expend enormous firepower in a brief period of time. (J.A. 225 (¶ 36); *see also* J.A. 206-07 (¶ 12), 262 (¶ 36).) Use of the banned firearms and magazines by untrained civilians also poses risks to

[6] The State presented declarations and deposition transcripts from Maryland State Police Superintendent Marcus Brown (J.A. 204-13, 2466-83), Baltimore County Police Chief James W. Johnson (J.A. 215-34, 2432-64), Baltimore City Police Commissioner Anthony W. Batts (J.A. 252-69, 2416-30), and Prince George's County Police Deputy Chief Henry P. Stawinski (J.A. 271-84, 2485-501), who represent a combined 100 years of law enforcement experience. (J.A. 204-06, 215-17, 252-76, 271-72, 275.)

[7] The State presented declarations and published works from Christopher S. Koper, the primary author of the only academic studies to examine the effects of the 1994 federal assault weapons ban (J.A. 343-634); and Daniel W. Webster, Professor of Health Policy and Management and Director of the Johns Hopkins Center for Gun Policy and Research at the Johns Hopkins Bloomberg School of Public Health, who has studied gun violence issues for more than two decades (J.A. 286-341).

innocent bystanders, including those behind walls and doors, who may be at risk of being hit by errant rounds. (J.A. 226 (¶ 38), 264 (¶ 42), 278 (¶¶ 29-30, 33, 35-36), 1557.) That risk is aggravated by "the tendency . . . for defenders to keep firing until all bullets have been expended[.]" *Heller II*, 670 F.3d at 1263-64 (quoting testimony). (*See* J.A. 1446 (testimony of plaintiffs' witness John Josselyn that "[i]t's not uncommon to have the police arrive on a scene and see someone there still pulling the trigger, even though the gun is long empty").)

The law enforcement officers further testified that limiting magazine capacity to no more than 10 rounds is likely to save lives, a conclusion bolstered by lessons learned from recent tragedies in which shooters were tackled, and potential victims escaped, while shooters paused to reload. (J.A. 230-31 (¶¶ 54-56), 280-81 (¶¶ 39-40); 1321-22, 1325, 1327-67); *see also Heller II*, 670 F.3d at 1264 (quoting testimony that the "'2 or 3 second pause' during which a criminal reloads his firearm 'can be of critical benefit to law enforcement'"). Those results are to be expected given that a shooter who has to load ten 10-round magazines to fire 100 rounds, as opposed to a single 100-round drum, will necessarily give bystanders nine more chances to intervene, offer victims nine more chances to escape, and confront the gun or magazine with nine other opportunities to jam. (J.A. 266 (¶ 49).)

Assault weapons and other firearms equipped with large-capacity magazines are capable of wounding and killing larger numbers of people because of their capacity for rapid firing of high numbers of rounds in a short period of time. (J.A. 347 (¶ 15).) The best available evidence indicates that attacks with assault weapons and other firearms with large-capacity magazines generally result in more shots fired, persons wounded, and wounds per victim than other gun attacks. (J.A. 345 (¶ 9), 347 (¶ 15).) Thus, as discussed above, the banned firearms and magazines are disproportionately represented both in murders of law enforcement officers and in mass public shootings, where their use also corresponds with more fatalities and more injuries than occur in comparable incidents that do not involve banned firearms or magazines. In contrast, there are no studies or systematic data indicating that the banned firearms or magazines are necessary for home self-defense. (J.A. 295-96 (¶ 20).)

Although the banned firearms are not used in crime with the frequency of handguns, they are used in crime, including, for example, the Bushmaster semiautomatic rifle used to carry out the so-called "D.C. Sniper" murders. (J.A. 208-09, 227-28, 264-65, 282.) Assault weapons are also particularly dangerous for law enforcement, as rounds from them will easily penetrate the soft body armor worn by most law enforcement personnel. (J.A. 209, 227-28, 278-79, 295, 1384, 1387-88, 1486.) Although rounds from other long guns will also penetrate such

soft body armor, it is the combination of that capacity and their other features that makes the banned firearms such threats to law enforcement. (J.A. 209, 278-79, 2510-11.) Assault weapons also allow criminals to engage law enforcement officers effectively at much greater distances, thereby making it more difficult for law enforcement officers to control situations. (J.A. 209, 227-28, 265.) Large-capacity magazines are also particularly dangerous, because more shots available means more shots fired, more hits, and more death and injury. (J.A. 209, 227, 266, 280.)

Some Maryland law enforcement agencies allow specially-trained officers to carry assault weapons, but only in situations that do not resemble civilian self-defense scenarios, including engaging criminals in hostile territory, tracking down and apprehending fleeing assailants, and addressing barricade and hostage situations. (J.A. 207-08, 220-22, 257-59, 263, 274-77.) Such situations, which require law enforcement officers to take aggressive action to protect public safety, may require the use of tools that are not appropriate for civilian self-defense. (J.A. 207-08, 222, 263-64, 276-77.)

Moreover, because criminals obtain most of their firearms through "law-abiding" people—through straw purchases, purchases on the secondary market from legal owners, and theft—reducing the availability of the banned firearms and magazines through lawful channels is critical to reducing their availability to

criminals. (J.A. 228, 232, 266, 284; *see also* J.A. 359 (the federal ban, which allowed the continued sale of banned firearms and magazines, did not halt straw purchases and secondary sales by which criminals acquire such firearms and magazines).)

Thus, the testifying law enforcement officers all concluded that assault weapons and large-capacity magazines are unusually dangerous, and Maryland's bans will promote public safety by reducing their availability for use by criminals, reducing the threat from unintentional misuse by otherwise law-abiding citizens, and helping protect law enforcement officers. (J.A. 210, 212, 219, 231-32, 234, 256, 267-69, 284.) Major national law enforcement organizations agree that such bans are important steps in protecting public safety and reducing the negative effects of firearms violence. (J.A. 217-18, 236-51.)

The plaintiffs argue strenuously, and erroneously, that the country's experience with the federal assault weapons ban demonstrates that Maryland's bans will not be successful. In doing so, they rely, again erroneously, on findings of Professor Christopher Koper, the primary author of the only academic studies to examine the effects of the federal ban. As the district court correctly found, the plaintiffs' contentions mischaracterize Professor Koper's findings, cherry-pick passages of his published works out of context, and ignore his testimony explaining his conclusions about Maryland's laws. (J.A. 161-64, 191-92.)

For example, Professor Koper's studies of the federal assault weapons ban, published in 1997, 2004, and 2013 (J.A. 384-634), identified a number of important exemptions and limitations of the federal ban that undermined its effectiveness (J.A. 355-56). Perhaps most prominently, the federal ban's grandfather provisions were significantly broader than Maryland's. Whereas the federal law exempted any assault weapon manufactured before its effective date, the Maryland exemption is limited to assault weapons actually owned before the Act's effective date. (J.A. 355-56 (¶¶ 50-51), 231 (¶¶ 57-58).) And whereas the federal bans allowed the free sale and transfer of any of the grandfathered assault weapons and large-capacity magazines (J.A. 355), the Maryland ban generally prohibits sales and transfers (J.A. 304-05 (¶ 33), 362 (¶ 78)).[8] Thus, unlike the federal ban, the Maryland Act is designed to stop the legal flow of commerce in the "banned" firearms and magazines.

Notably, under the federal ban, large-capacity magazines manufactured before the effective date of that ban continued to be imported into the country by the *millions*, and freely and legally sold once they arrived. (J.A. 776 (1998 ATF Report); *see also* 355-56 (¶ 51).) Under the Act, by contrast, transfer within the State is generally illegal. (J.A. 304-05 (¶ 33), 362 (¶ 78).) Although the plaintiffs baldly speculate that criminals will venture out-of-state to obtain large-capacity

[8] The ban includes certain exemptions. *See* Md. Code Ann., Crim. Law §§ 4-302, 4-305(a).

magazines, the evidence suggests that criminals are rarely so motivated. (J.A. 210-11 (¶ 28), 231-32 (¶¶ 59-61).)

The federal ban also prohibited "copies and duplicates" of specifically-named assault weapons, but manufacturers found it relatively easy to evade that provision because it was interpreted to cover only firearms that were exact copies in all respects, including external features that could be modified with comparative ease. (J.A. 356 (¶ 52).) Based on these limitations in the federal ban, as well as the significant increase in manufacture of covered firearms and magazines before the ban took effect that were then available to be freely bought and sold thereafter, Professor Koper concluded that any effect of the federal ban on crime generally was likely to be small and gradual. (J.A. 359 (¶ 66), 297 (¶¶ 22-23).) Nonetheless, evidence demonstrates that crimes with assault weapons declined shortly after the ban was enacted, although much of that drop appears to have been attributable to a reduction in use of assault pistols, which tend to be more frequently used in crimes and thus are easier to measure. (J.A. 357 (¶¶ 55-58), 304 (¶ 33).)

With respect to large-capacity magazines, the limitations described above meant that the data available at the time of Professor's Koper's 2004 study did not yet show a reduction in the use of large-capacity magazines in crimes. (J.A. 358 (¶¶ 60-62), 297 (¶ 23).) However, a subsequent analysis by the *Washington Post* demonstrates that in Virginia, the share of crime guns with large-capacity

magazines declined substantially during the period of the federal ban, and rebounded after the ban expired. (J.A. 358-59 (¶¶ 64-65), 298-99 (¶ 25), 1246.) Ultimately, Professor Koper concluded that if the federal ban had remained in effect over the long-term, it could have reduced the lethality and injuriousness of gunshot victimizations. (J.A. 359-60 (¶¶ 67-68); *see also* J.A. 299-300 (¶¶ 26-27).)

Even modest reductions in the number of crimes involving banned firearms and magazines are used can have significant impacts on public safety by forcing criminals to use less lethal weapons and magazines. (J.A. 347 (¶ 15), 360 (¶ 69).) Unsurprisingly, all other things being equal, there is a significantly greater chance of death for an individual who has sustained multiple gunshot wounds than for an individual who has sustained only a single gunshot wound. (J.A. 720-28.)

Thus, Maryland's bans, especially the large-capacity magazine ban, "have the potential to prevent and limit shooting injuries in the state over the long-run" and are therefore "likely to advance Maryland's interest in reducing the harms caused by gun violence." (J.A. 364 (¶ 86); *see also* J.A. 304 (¶ 33) (the bans are "likely to advance Maryland's interest in reducing the harms caused by gun violence.").) This benefit is expected because Maryland's ban is "likely to meaningfully limit the number of long guns with military-style characteristics in Maryland, and to further reduce and/or prevent increases in the use of such weapons in crime." (J.A. 362 (¶ 78).) Similarly, if Maryland's ban "is allowed to

operate over the long-term, it should reduce the number of [large-capacity magazines] in circulation and potentially reduce the number and lethality of gunshot victimizations." (J.A. 363-64 (¶¶ 80-83).) The Act is thus "likely to advance the State's interest in protecting public safety." (J.A. 2518-19 (¶¶ 26-27).)

The plaintiffs fault the defendants for not proving that Maryland's bans will reduce overall crime or the number of assaults and robberies committed with firearms. However, the purpose of the bans is to reduce the availability of assault long guns and large-capacity magazines so that when a criminal acts, he does so with a less dangerous weapon and less severe consequences. As with the federal ban, those consequences should not be expected to be realized immediately, but can be expected to develop over the long term as availability decreases. (J.A. 359-60 (¶¶ 67-71), 362-64 (¶¶ 77-86), 2517-18 (¶¶ 22-23).)

In a final attempt to impugn the State's evidence, the plaintiffs now rely on flawed evidence that they declined to present to the district court, in the form of opinion testimony of Professor Mark Gius.[9] Appellants' Br. at 15-16. The

[9] In discovery, the plaintiffs proffered an expert report by Professor Gius, who had authored a flawed study concluding that the federal assault weapons ban significantly *increased* crime, and that state assault weapons bans had no effect on crime. However, discovery revealed that Professor Gius's methods and conclusions were flawed in many ways, including his lack of any knowledge regarding the assault weapons bans as to which he purported to reach conclusions (*see, e.g.*, J.A. 2547-48 (pp. 96-100), 2568-69 (pp. 196-99), 2556 (p. 130)); indeed, Professor Gius actually relied in his study on his erroneous belief that Maryland banned assault long guns many years before it did so (J.A. 2562 (pp. 153-54)).

plaintiffs should not be permitted to raise here evidence that was never admitted or considered by the district court, and as to which the defendants would have raised a *Daubert* challenge. *See, e.g.*, *Karpel v. Inova Health System Services*, 134 F.3d 1222, 1227 (4th Cir. 1998) ("[I]ssues raised for the first time on appeal generally will not be considered."). Moreover, Professor Gius's opinions are both inapposite and, as revealed by his deposition testimony and a defendants' rebuttal expert report, wholly unreliable. (J.A. 2524-71, 2573-602; S.A. 85-114.)

Even if there were a genuine dispute as to whether state-level bans will be effective, it is not the State's burden to prove to a scientific certainty that its law will have the effects predicted by the legislature, or to prove that there is no dispute about the evidence. Rather, it is the State's burden to show that, with proper deference to the legislative judgment, the evidence supports "a reasonable fit between the legislative policy choice and the governmental objective." *Woollard*, 712 F.3d at 881-82. The State has met that burden. Accordingly, the district court's judgment should be affirmed.

Before the district court, the plaintiffs chose not to reference Professor Gius's flawed opinions regarding the effectiveness of either the federal assault weapons ban or state assault weapons bans, instead citing him solely for the number of murder victims killed by rifles and the infrequency of mass shootings. (J.A. 2835, 2897.)

III. THE BANS' EXEMPTIONS FOR RETIRED POLICE OFFICERS DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

The Act does not run afoul of the Constitution by permitting the transfer of an otherwise banned firearm from a local law enforcement agency to a retired officer if the weapon: (1) is sold or transferred on retirement, or (2) was "purchased or obtained by the person for official use with the law enforcement agency before retirement." CR § 4-302(7). Nor is the Equal Protection Clause violated by the Act's exemption of retired law enforcement officers, along with active law enforcement officers, from the ban on large-capacity magazines. CR § 4-305(a).

The Equal Protection Clause provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the law." U.S. Const., amend. XIV, § 1. This requirement that "persons similarly-situated should be treated alike," *City of Clebourne v. Clebourne City Ctr., Inc.* 473 U.S. 432, 439 (1985), "'does not take from the States all power of classification,'" but "'keeps governmental decision makers from treating differently persons who are in all relevant respects alike,'" *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001) (citations omitted). "To succeed on an equal protection claim, a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Id.* Only if that showing has been made does a court

proceed "to determine whether the disparity in treatment can be justified under the requisite level of scrutiny." *Id.*

Retired law enforcement officers are not similarly situated to other citizens with respect to the Act's exceptions. Law enforcement officers are differentiated by their experience of having been entrusted with the statutory duty to protect public safety, and the corresponding statutory authority to detain, arrest, and use force against other citizens to carry out their duty. Thus, a law enforcement officer is "not to be equated with a private person engaged in routine public employment or other 'common occupations of the community' who exercises no broad power over people generally." *Foley v. Connelie*, 435 U.S. 291, 298 (1978).

Retired law enforcement officers are also differently situated, as a class, with respect to firearms training and use. In Maryland, a law enforcement officer's authority to carry a firearm, including an assault weapon, is conditioned upon the officer's successful completion of extensive initial and continuing firearms classroom instruction, training, and qualification on that firearm. *See generally* Code of Maryland Regulations ("COMAR") 12.04.02.03A, 12.04.02.06A, 12.04.02.06B(2), 12.04.02.06B(3), 12.04.02.07, 12.04.02.08A, 12.04.02.08E. Law enforcement officers also are trained on safe handling and safe storage of firearms, including in their homes. COMAR 12.04.02.10D. Law enforcement officers are required to receive judgment training on the use of deadly force and "emotional,

mental, and psychological preparation needed for the possibility of a deadly force shooting situation." COMAR 12.04.02.10C.

In addition, law enforcement officers must receive exhaustive additional training to use assault weapons, including how and when they may be used and techniques to minimize the risk of harm to innocent civilians, and must undergo additional periodic re-qualification specifically on those assault weapons. (J.A. 259 (¶ 27), 220-21 (¶¶ 18-22).) Thus, the plaintiffs lack any basis for their claim that law enforcement officers could satisfy the exceptions without having received training on banned firearms. Their assertion is clearly false with respect to the exception allowing transfer of a firearm originally obtained for that individual's official use, CR § 4-302(7)(ii), and there is no evidence that any law enforcement agency would or could transfer to a retiree upon retirement a firearm on which that officer had not been trained. All of these extensive training requirements imposed on Maryland's law enforcement officers differentiate them, as a class, from other citizens.

IV. THE ACT IS NOT VOID FOR VAGUENESS.

The plaintiffs similarly lack any valid basis for their contention that the Act's application to "copies" of the specifically-enumerated firearms renders it unconstitutionally vague on its face under the Due Process Clause. "Facial challenges are disfavored" because they "often rest on speculation," they "run

contrary to the fundamental principle of judicial restraint that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,'" and they "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented. . . ." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450-51 (2008) (citations omitted). Indeed, this Court has held that "[f]acial vagueness challenges to criminal statutes are allowed only when the statute implicates First Amendment rights." *United States v. Klecker*, 348 F.3d 69, 71 (4th Cir. 2003); *see United States v. Sun*, 278 F.3d 302, 309 (4th Cir. 2002) (declining to consider a facial vagueness challenge to the Arms Export Control Act). First Amendment cases warrant special vagueness concerns, with respect to speech in particular, because "'vagueness may in itself deter constitutionally protected and socially desirable conduct.'" *Sun*, 278 F.3d at 309 (quoting *United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 36 (1963)). No such special concern is at issue here and, thus, the plaintiffs' pre-enforcement facial vagueness challenge fails without need for further analysis.[10]

[10] Recognizing differences between the types of fundamental rights codified in the first two amendments, this Court has rejected a prior attempt to import substantive First Amendment principles into Second Amendment jurisprudence. *Woollard*, 712 F.3d at 883 n.11 (rejecting prior restraint argument).

Even if the Act were properly subject to a pre-enforcement facial vagueness challenge, the plaintiffs would need to establish that "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). In other words, the plaintiffs can only prevail if they prove that "the enactment is impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates Inc.*, 455 U.S. 489, 497 (1982); *Sabri v. United States*, 541 U.S. 600, 609 (2004). A statute can be impermissibly vague if it: (1) "'fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits'"; or (2) "'authorizes or even encourages arbitrary and discriminatory enforcement.'" *United States v. Lanning*, 723 F.3d 476, 482 (4th Cir. 2013) (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)); *see also Martin v. Lloyd*, 700 F.3d 132, 135 (4th Cir. 2012) (holding a statute is void for vagueness only when it is "'so standardless that it authorizes or encourages seriously discriminatory enforcement'" (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).) These inquiries do not require "mathematical certainty" of language, *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 371 (4th Cir. 2012), and "need not spell out every possible factual scenario with 'celestial precision,'" *United States v. Hager*, 721 F.3d 167, 183 (4th Cir. 2013) (citation omitted).

Although the plaintiffs attempt to identify specific examples of firearms as to which they claim the Act is vague, such individual examples are irrelevant in the

context of a facial challenge to the statute. "[W]hen a statute is challenged for facial vagueness, the issue is not whether plaintiffs can posit some application not clearly defined by the legislation. The issue is whether all applications are impermissibly vague." *Richmond Boro Gun Club v. City of New York*, 97 F.3d 681, 685 (2d Cir. 1996) (rejecting vagueness challenge to assault weapons ban).

The plaintiffs cannot sustain their burden of proving that the Act is impermissibly vague in all of its applications. In fact, the plaintiffs' own allegations in support of their Second Amendment claim demonstrate clearly that they are aware of specific banned firearms that are in their possession; that they have previously sold; or that they wish to buy, sell, or otherwise transfer, but know that they are prohibited from doing so by the Act. (J.A. 1444, 1458, 1459, 1502-03, 1851 (¶¶ 5-6), 1855 (¶ 3), 1858-59 (¶ 6), 1861 (¶ 4), 1864-65 (¶¶ 5-7), 1867-68 (¶¶ 5-6), 1870-71 (¶¶ 5-6); S.A. 39.) In the district court, not a single plaintiff identified a firearm he wanted to buy, sell, or transfer, but was uncertain as to whether or not it was a copy. The plaintiffs' facial vagueness challenge cannot be sustained.

Moreover, the record contains no evidence that the Act poses a risk of arbitrary and discriminatory enforcement. The same list of assault long guns and their "copies" which today defines "assault long guns" has been part of Maryland law defining "regulated firearms" since 1989. That definition has long existed,

with significant potential criminal consequences for failing to comply with the application process required for regulated firearms, without a single known arrest based upon confusion as to the word "copies." Nor have the plaintiffs identified any facts that would suggest that the MSP might engage in arbitrary or discriminatory enforcement. To the contrary, the MSP is available to provide guidance to consumers who have questions about specific firearms for which they do not otherwise obtain answers. (J.A. 668-69 (¶¶ 11-13).) Although the plaintiffs complain that the MSP will first direct consumers with questions to manufacturers, who presumably are the best experts with respect to their own products, there is no legal requirement for the MSP to do otherwise.

In addition, in a formal opinion, the Attorney General of Maryland concluded that to be a "copy" of a specifically-enumerated assault weapon requires not just cosmetic similarity, but "a similarity between the internal components and function of the firearms." 95 Op. Att'y Gen. Md. 101, 108 (2010). Relying on that advice, the Maryland State Police ("MSP") issued a Firearms Bulletin explaining that it considers a firearm that is cosmetically similar to one of the specifically-enumerated assault weapons to be a copy only if it also possesses "completely interchangeable internal components necessary for the full operation and function of any one of the specifically-enumerated assault weapons." (J.A. 668, 678-86.) Thus, the MSP is guided, and constrained, by its published guidance, which has

been distributed to all Maryland firearms dealers and which is available to the public. (J.A. 667.) Such administrative interpretations are an accepted method by which the government can clarify potentially vague statutory terms. *See Hoffman Estates*, 455 U.S. at 504 (A jurisdiction "may adopt administrative regulations that will sufficiently narrow potentially vague or arbitrary interpretations of the ordinance.").

Finally, relevant considerations in a vagueness challenge include the legislative goals of the statute and the evils the statute was designed to remedy. *Wilson v. County of Cook*, 968 N.E.2d 641, 652 (Ill. 2012) (rejecting vagueness challenge to ban on assault weapons and their "copies" (citation omitted)). Absent some manner of capturing firearms that are essentially the same as those that are listed, new manufacturers could escape the law entirely, and listed manufacturers could simply change the names of their firearms. *See id.*; *Coalition of N.J. Sportsmen, Inc. v. Whitman*, 44 F. Supp. 2d 666, 679-80 (D.N.J. 1999), *aff'd*, 263 F.3d 157 (3d Cir. 2001); *Bailey*, 662 A.2d at 1228.[11] Indeed, with respect to a firearm like the AR-15, whose patent expired long ago, at least dozens of manufacturers now produce copies under various brand and model names. (J.A.

[11] Courts that have found assault weapons bans impermissibly vague have done so based on language not included in Maryland's Act. *See, e.g.*, *Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250, 253 (6th Cir. 1994) (finding prohibition on "slight modifications" of specific manufacturers' guns void for vagueness); *NYSRPA*, 990 F. Supp. 2d at 377 (finding provision regulating "semiautomatic versions of an automatic rifle, shotgun or firearm" was "excessively vague").

1456.) The application of the law to "copies," as a means to prevent circumvention of the ban, constitutes a key to achieving the legislative goal of protecting public safety, by addressing a problem that plagued efforts to enforce the earlier federal ban. (*See* J.A. 1602-03, 1666-67, 1670-73, 1679.)

V. THE PLAINTIFFS' REMAINING OBJECTIONS ARE MERITLESS.

The plaintiffs also challenge the district court's decision on a number of evidentiary grounds, none of which have merit.

A. The District Court Did Not Err in Considering Evidence that Was Not Before the General Assembly at the Time the Firearm Safety Act Was Adopted.

As demonstrated by *Woollard*, 712 F.3d at 877 & n.6, in which this Court relied exclusively on evidence not before the legislature in upholding Maryland's wear-and-carry permit statute, and *Staten*, 666 F.3d at 163-66, in which this Court relied heavily on scholarly articles and government reports published after the legislative enactment at issue, there is no requirement in Second Amendment challenges that *any* of the evidence relied on by the government need have been before the legislature at the time of the enactment, much less, as the plaintiffs incorrectly suggest, all such evidence. *See also Carter*, 699 F.3d at 418 (The government may meet its burden by "resort to a wide range of sources, such as legislative text and history, empirical evidence, case law, and common sense, as circumstances and context require.").

Even under the First Amendment cases on which the plaintiffs rely, a legislature "is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review," *Turner Broad.*, 512 U.S. at 666, and courts may "look to evidence outside the legislative record in order to confirm the reasonableness of Congress's predictions," *Satellite Broad. & Commc'n Ass'n v. FCC*, 275 F.3d 337, 357 (4th Cir. 2001) (citing *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195-96 (1997)).[12]

Even if this Court were to depart from its Second Amendment jurisprudence and adopt *Satellite Broadcasting's* requirement that there must have been *some* substantial evidence before the legislature, the State has met that burden. First, prior to passing the Act, the General Assembly held hearings, including hearing testimony from Baltimore County Police Chief Johnson that, as the district court observed, was substantially the same as his testimony in this case. (J.A. 168; *see* J.A. 215-34, 2432-64.) The district court was provided with a link to that testimony (J.A. 2944), which is a public record available through the official

[12] With the exception of *Satellite Broadcasting*, the other cases relied on by the plaintiffs applied strict scrutiny, not intermediate scrutiny, and are inapposite for that reason as well. *See, e.g., Kitchen v. Herbert*, 755 F.3d 1193, 1210 (10th Cir. 2014); *Video Software Dealers' Ass'n v. Schwarzenegger*, 556 F.3d 950, 960-61 (9th Cir. 2009); *Landell v. Sorrell*, 382 F.3d 91, 110 (2d Cir. 2004); *Carver v. Nixon*, 72 F.3d 633, 638 (8th Cir. 1995).

website of the Maryland General Assembly.[13] The General Assembly also received expert testimony that the banned firearms and magazines "are commonly used in mass shootings," that greater ammunition capacity leads to more victims injured or killed, and that incidents in which a law-abiding citizen might need more than ten rounds "are likely to be extremely rare." (J.A. 2608-09, 2368.) The General Assembly also had before it the record developed by the District of Columbia in support of its own assault weapons and large-capacity magazine bans, as described in *Heller II*. (J.A. 2609 (stating that the General Assembly relied on *Heller II* and social science research supporting the holding in that case).) Thus, the General Assembly's predictive judgments in this case are supported by substantial evidence in the legislative record, confirmed by evidence outside that record. *See Satellite Broad.*, 275 F.3d at 358-60, 363-64 (relying on brief excerpts of testimony from one or, at most, two witnesses before Congress to find, in

[13] The plaintiffs complain that the defendants did not provide a written transcript of this testimony, but the video of the testimony is publicly available: http://mgahouse.maryland.gov/house/play/8697a09e-c001-4bb4-a558-f365e3c5422b/?catalog/03e481c7-8a42-4438-a7da-93ff74bdaa4c (last visited Dec. 31, 2014; Chief Johnson's testimony begins at 7:05). Although the plaintiffs claimed below that they were unaware of the existence of Chief Johnson's testimony, several plaintiff representatives were actually present in the room at the time (*see* J.A. 3014-15), and it was expressly disclosed in the Attorney General's April 30, 2013 bill review letter (J.A. 2608, 2716-21). In any event, the district court was able to take judicial notice of the publicly-available testimony before the legislature. *See, e.g.*, *Adarand Constructors v. Slater*, 228 F.3d 1147, 1168 n.12 (10th Cir. 2000) (taking "judicial notice of the content of hearings and testimony before . . . congressional committees and subcommittees").

combination with statistical data generated "since [the legislation's] enactment," that Congress's predictive judgments were supported by substantial evidence).

Second, the General Assembly was not required to create a new legislative record when such a record had already been created. The General Assembly had access not only to the record described in *Heller II*, but to extensive evidence generated by Congress and the ATF in connection with the federal assault weapons ban and import restrictions. *See* discussion above at 5-8. When legislation is not novel, a legislature is not required "to conduct new studies or produce evidence independent of that already generated" by other jurisdictions. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986); *see also Carandola v. Bason*, 303 F.3d 507 (4th Cir. 2002) (government may rely on evidentiary foundation set forth in other cases).

B. The District Court Did Not Abuse Its Discretion in Admitting Evidence.

In a misplaced effort to undermine the district court's thorough and well-reasoned review of the evidence, the plaintiffs challenge the lower court's exercise of discretion in making certain evidentiary determinations. At the outset, the plaintiffs are wrong that this Court reviews such evidentiary rulings *de novo*. *See Supermarket of Marlington, Inc.*, 71 F.3d at 126 (applying abuse of discretion standard to evidentiary rulings). More specifically, as both the Supreme Court and this Court have held, abuse of discretion is the proper standard for reviewing a

district court's decisions regarding the admissibility of expert testimony. *General Elec. Co. v. Joiner*, 522 U.S. 136, 138-39 (1997) (holding, in review of a trial court's grant of summary judgment and related evidentiary rulings, that abuse of discretion is the proper standard to review a trial court's decision to admit or exclude scientific evidence under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)); *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 260 (4th Cir. 2005) (same).

The plaintiffs' complaints with respect to the testimony of Chief Stawinski fail in several respects. As the district court explained, Chief Stawinski's testimony with respect to penetration capabilities of assault long guns is based on personal observation and experience. (J.A. 166, 278 (¶ 31).) To the extent the plaintiffs now challenge Chief Stawinski's testimony from ¶ 33 of his declaration, that "[a]lthough rounds from many handguns can also penetrate through such materials, the rounds from assault weapons like the AR-15 are more dangerous and effective once they do so": (1) the plaintiffs did not challenge that testimony below (*see* J.A. 3006 (Pls. Mot. to Exclude, challenging only ¶ 30 of Stawinski Declaration)); (2) in context, coming after describing how such rounds penetrate bullet-resistant glass, that testimony is also founded on personal knowledge and experience (J.A. 278-29); and (3) Chief Stawinski's testimony is actually confirmed, not contradicted, by the plaintiffs' evidence.

As to the last point, the plaintiffs misunderstand the implications of their own evidence in arguing that handgun rounds are necessarily more dangerous than assault rifle rounds because some handgun shots penetrate farther through human tissue (or gelatins designed to mimic human tissue) *after* going through an intermediate barrier (such as a wall) than do rounds from some assault weapons. Appellants' Br. at 54 (citing J.A. 2168-69.) As plaintiffs' expert Buford Boone explains, the "most desirable range of penetration" of ammunition, for purposes of incapacitating a human being, is 12 to 18 inches. (J.A. 2177.) When a round "underpenetrates" *or* "overpenetrates" this range, it is less likely to cause damage to vital organs. (*See id.*; J.A. 2377 (ATF PowerPoint).) The plaintiffs' evidence also demonstrates that, unlike certain handgun rounds, certain rounds fired by assault weapons continue to achieve the ideal 12-18 inch penetration range into a human body *after* being fired through an intermediate barrier. (J.A. 2177-78, 2371-97 (ATF PowerPoint).) Thus, logic dictates that the superiority of rounds fired from assault weapons in not "overpenetrating," and thus in maintaining the ideal penetrating range to incapacitate a human being, would make them *more*, not *less*, dangerous to an innocent person on the other side of a wall. In any event, this issue does not call into question the predictive judgment of Maryland's legislature.

The district court also properly exercised its gatekeeping role under Rule 702, which the Supreme Court has emphasized is "a flexible" inquiry, *Daubert*,

509 U.S. at 594, when it admitted the expert testimony of Professor Koper. (J.A. 160-64.) Though the plaintiffs do not challenge Dr. Koper's credentials and expertise, they erroneously contend that his testimony could only have been admitted if he had concluded, as a scientific certainty, that Maryland's bans will be effective. The district court properly rejected that contention, explaining that, in assessing firearms regulations, "courts will defer to th[e] predictions" of the legislature. (*See* J.A. 163-64.) Such predictive judgments need only be supported by "substantial evidence" (J.A. 164), not by proof to a scientific certainty. Further, the district court debunked the plaintiffs' attempts to undermine Dr. Koper's research, which were, and continue to be, based on mischaracterizations of Dr. Koper's statements and cherry-picked findings that are presented out of context. (J.A. 162, 2513-19 (Koper decl.).)

Finally, the district court also acted well within its discretion in admitting the expert opinions of Lucy Allen and Daniel Webster that were based, in part, on their analysis of the *Mother Jones* data. The plaintiffs fail to explain why the *Mother Jones* data—compiled from published, publicly-available reports about public mass shootings in the last 30 years—would be unreliable absent peer review. The same set of data was reviewed and analyzed by Professor Webster, Dr. Allen, and Professor Koper,[14] was provided to the plaintiffs in discovery, and is available for

[14] The plaintiffs do not challenge Professor Koper's testimony on this basis.

further review and testing by anyone. No rule requires that an expert witness independently assemble such a publicly-accessible collection of data before making use of it. Nor have the plaintiffs presented any reason to doubt the reliability of the data.

C. The District Court Did Not Rely on Evidence Subject to a Genuine Dispute of Material Fact.

Finally, in a portion of their brief perhaps most notable for the complete absence of analysis or explanation, the plaintiffs contend that the district court was precluded from awarding summary judgment due to the existence of genuine disputes of material fact. Appellants' Br. at 59-61. However, the alleged disputes raised by the plaintiffs are not material, not genuine, or not either. As discussed above, the plaintiffs failed to raise a dispute of material fact regarding whether the banned firearms have features making them especially useful in military-style assaults. Further, in labeling as disputed the proposition that "the AR-15 is 'essentially the same as the military's M-16 rifle,'" *id.* (quoting district court opinion at J.A. 186), the plaintiffs ignore the district court's actual discussion, which analyzes undisputed facts regarding the difference between semiautomatic and automatic fire (J.A. 186-87). In effect, the plaintiffs agree that the only difference between the AR-15 and M16 is the capacity for automatic fire, but they attribute a significance to that difference that is unsupported by the record. That does not create a genuine dispute of material fact.

There is also no dispute that rounds from the prohibited firearms, unlike most handgun rounds, have the capacity to pierce soft body armor worn by law enforcement officers, as do rounds fired by many other long guns. Nor did the district court find otherwise. The plaintiffs' other purported factual disputes all rely on misrepresentations of the district court's findings or misrepresentations as to the evidence. In awarding summary judgment to the defendants, the district court did not resolve a single genuine dispute of material fact in their favor.

CONCLUSION

The judgment of the United States District Court for the District of Maryland should be affirmed.

Respectfully submitted,

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December 31, 2014

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,993 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) and the type style requirements of Fed R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I certify that, on this 31st day of December 2014, the foregoing Brief of Defendants-Appellees was served on all counsel of record through the CM/ECF System.

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