

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

STEPHEN V. KOLBE, et al.

PLAINTIFFS

VS.

CIVIL NO. CCB-13-2841

MARTIN J. O'MALLEY, et al.

DEFENDANTS

Baltimore, Maryland

July 22, 2014

The above-entitled case came on for a motions hearing before the Honorable Catherine C. Blake, United States District Judge

A P P E A R A N C E S

For the Plaintiffs:

John Parker Sweeney, Esquire
Marc A. Nardone, Esquire
James W. Porter, III, Esquire
Sky Woodward, Esquire

For the Defendants:

Matthew J. Fader, Esquire
Jennifer L. Katz, Esquire
Dan Friedman, Esquire

Gail A. Simpkins, RPR
Official Court Reporter

P R O C E E D I N G S

1
2 THE CLERK: The matter now pending before this
3 Court is Civil Case Number CCB-13-cv-2841, Kolbe, et
4 al. versus O'Malley, et al. Counsel for the
5 plaintiffs are John Sweeney, Marc Nardone, James
6 Porter, III, Sky Woodward. Counsel for the defendant
7 are Dan Friedman, Matthew Fader, Jennifer Katz. This
8 matter now comes before the Court for a motions
9 hearing.

10 THE COURT: All right. Good morning again,
11 everyone, and I am looking forward to hearing from
12 you. Having talked briefly to counsel yesterday, I
13 understand that the defendant is going to proceed
14 first, and I'm happy to hear from you.

15 MR. FADER: Thank you.

16 Good morning, Your Honor, may it please the
17 Court.

18 When this lawsuit was filed last October, only
19 one federal court had decided the constitutionality of
20 assault weapons and large-capacity magazine bans in
21 the wake of the Supreme Court's landmark decisions in
22 Heller and McDonald. That decision of the D.C.
23 Circuit has now been joined by federal district courts
24 in New York, Connecticut, and with respect to
25 large-capacity magazines, Colorado, in unanimously

1 holding that such laws do not violate the right to
2 keep and bear arms codified in the Second Amendment.

3 THE COURT: There are no cases that have decided
4 to the contrary?

5 MR. FADER: That's correct, Your Honor.
6 Although each of those courts either assumed or found
7 that the laws at issue burdened the Second Amendment
8 right in some way, they unanimously held that any such
9 burden is minimal, that intermediate scrutiny applied
10 to those challenges, and that evidence similar to that
11 presented in the record before this Court was more
12 than sufficient to meet the government's burden under
13 intermediate scrutiny.

14 This case, like those, presents the issue of
15 whether the Maryland's General Assembly acted within
16 its constitutional discretion when it enacted bans on
17 particularly dangerous firearms and magazines,
18 firearms designed for modern military assaults, and
19 both firearms and magazines disproportionately used in
20 mass public shootings and murders of law enforcement
21 officers.

22 The arguments the plaintiffs make in advocating
23 their position ignore the evidence presented in the
24 case, conflict with controlling Supreme Court and
25 Fourth Circuit precedent, and also contradict the

1 persuasive decisions of the now five other federal
2 courts to have upheld similar laws.

3 I want to start by articulating a few things
4 that this case is not about. First, this case is not
5 about whether the Second Amendment is important. The
6 Supreme Court has held that it is a right that
7 preexisted the Constitution, that is fundamental to
8 our concept of ordered liberty. The State's position
9 in this case is not in conflict with that.

10 This case is also not about whether the Second
11 Amendment stands alone as an absolute right that does
12 not need to accommodate under any circumstances other
13 important public interests, including public safety.
14 The Supreme Court has held just as firmly that, like
15 other guarantees in the Bill of Rights, the Second
16 Amendment is not unlimited, notwithstanding its
17 absolute sounding language.

18 This case is also not about what the Supreme
19 Court has determined to be the central component of
20 the Second Amendment right, which is self-defense
21 within the home. The evidence in this case is clear
22 that the firearms at issue are used only extremely
23 rarely in self-defense cases, that more than ten
24 rounds are fired in self-defense only extremely
25 rarely, if ever, and that other firearms and magazines

1 can and are used far, far, more often in self-defense.

2 THE COURT: Let me ask you, what is the state of
3 the evidence on whether these weapons are commonly
4 used for either hunting or marksmanship, target
5 practice?

6 MR. FADER: With respect to hunting, Your Honor,
7 I think that the state of the evidence is that there
8 is no evidence that they are commonly used for
9 hunting. There is evidence that some people have used
10 them for hunting, but there is no evidence that they
11 are commonly or frequently used for hunting, nor is
12 there any evidence that they serve any better purpose
13 for hunting than hundreds of different firearms that
14 are still lawful to be purchased in the State of
15 Maryland.

16 With respect to marksmanship, there is evidence
17 that there are marksmanship competitions that are
18 specifically created for these firearms. So there is
19 evidence that, to the extent that these are owned,
20 that a purpose for which people frequently own them is
21 marksmanship and to participate in some of these
22 competitions, or because these firearms are so similar
23 to firearms used in military combat, competitions have
24 been created for people to use them in scenarios that
25 imitate that.

1 But with respect to that issue, Your Honor, the
2 defendants' position is that that is not a use, the
3 competitive sporting purpose is not a use that is
4 protected by the Second Amendment as historically
5 understood.

6 The Supreme Court identified the central
7 component of that right as self-defense. It also
8 noted that individuals at the time of the founding
9 would have found its use for hunting to be at least
10 equal to the sense of the importance of the use for
11 militia purposes. It never mentioned competitive
12 sport shooting. I think that the individuals who
13 ratified the Second Amendment in 1791 would have
14 found, in looking at the purpose of this amendment,
15 the expenditure of thousands of rounds of ammunition
16 in sport to be not something protected by their
17 understanding of the Second Amendment, which is what
18 the Supreme Court has determined should guide the
19 courts in analyzing that amendment.

20 THE COURT: It appears from the McDonald case
21 that the appropriate date for the historical analysis
22 might also include 1868, or approximately, when the
23 Fourteenth Amendment was ratified. Is there anything
24 that would suggest that at that time competitive
25 marksmanship was within the scope of the right?

1 MR. FADER: Certainly nothing that's within the
2 record before Your Honor, and nothing that I'm aware
3 of. There's nothing to indicate the competitive
4 marksmanship was understood to be protected.

5 Certainly shooting to gain competency with the
6 firearm, but that's something much different than the
7 competitive sports shooting for which these are used
8 today.

9 THE COURT: Since we are talking about this
10 issue at the moment of common use, and you probably
11 would get to this anyway, but what is again in the
12 record -- let me be sure I understand your position --
13 on the numbers of assault weapons, I'll just call
14 them, banned weapons in Maryland?

15 MR. FADER: The state of the record -- oh, in
16 Maryland.

17 THE COURT: In Maryland, and in the United
18 States.

19 MR. FADER: In the United States, the state of
20 the record is that -- the plaintiffs have alleged that
21 their numbers are that 8.2 million of those firearms
22 were around through the end of 2012.

23 That is using a definition for what the
24 plaintiffs have defined as modern sporting rifles,
25 which is not necessarily coextensive with the assault

1 rifles described in the Maryland law and appears to be
2 an amorphous definition that the plaintiffs use as
3 whatever manufacturers describe as being a modern
4 sporting rifle.

5 But even taking that as the number, we would
6 take that as, for summary judgment purposes, the upper
7 limit of what numbers there would be. A witness
8 called by the defendants as a hybrid fact expert
9 witness, Chief Johnson, identified the number as five
10 million. So it's I think fair to, for the purpose of
11 the summary judgment record, to treat it in that
12 range.

13 The plaintiffs have also, one of their expert
14 witnesses identified a study that they say shows that
15 the average owner of one of these firearms owns more
16 than three of them, 3.1 of them. So for determining
17 how extensive ownership of these is, then it would
18 appear that fewer than three million Americans, less
19 than one percent of the population would own one of
20 those firearms.

21 The state with respect to Maryland is that --
22 let me get the exact numbers, but it is also that well
23 fewer than one percent of the population, if you go by
24 numbers of what has been sold as regulated firearms in
25 the State, would own them.

1 The total number of assault weapons sold through
2 2012, according to the data by the Maryland State
3 Police, would have been 43,647. The number through
4 2013, as of the last data for the last brief that was
5 filed, was 58,075. There would be more that were
6 processed after that from 2013.

7 If you include what has been referred to as the
8 Type O firearms, which are receivers that could be
9 used to build an assault rifle, or could be used to
10 build something that would still be lawful under this
11 law, even adding all of those, the numbers would be
12 69,072 through 2012, or 92,515 through 2013.

13 THE COURT: Okay. Thank you.

14 MR. FADER: The Fourth Circuit has described a
15 two-prong test for addressing Second Amendment claims.
16 The first prong asks whether the law being challenged
17 burdens conduct protected by the Second Amendment as
18 historically understood.

19 The second prong asks, if the law does burden
20 such protected conduct, does the law satisfy the
21 applicable test under means and scrutiny?

22 The plaintiffs' suggestion that this Court
23 ignore binding Fourth Circuit precedent in favor of a
24 split Ninth Circuit panel decision that expressly
25 disagreed with the Fourth Circuit's decision regarding

1 handgun wear and carry law is obviously untenable.

2 Moreover, the plaintiffs simply misread the
3 Supreme Court's decision in Heller. The Supreme Court
4 in Heller did not even suggest that no standard of
5 scrutiny would be applicable. To the contrary, the
6 Supreme Court stated under any of the standards of
7 scrutiny that we have applied to enumerated
8 constitutional rights, banning from the home the most
9 preferred firearm in the nation, to keep and use for
10 protection of one's home and family, would fail
11 constitutional muster. The Supreme Court thus implied
12 that it would look to a means and scrutiny test. It
13 just didn't need to identify which one in that case.

14 THE COURT: And in any event, it's quite clear
15 that that's the Fourth Circuit's approach.

16 MR. FADER: It certainly is, Your Honor.

17 THE COURT: On the means, and on the level of
18 intermediate scrutiny, and then I'll let you come back
19 to the first prong, there has been a recent submission
20 by the plaintiffs of I guess the McCullen case from
21 the Supreme Court. They appear to suggest that that
22 might change or affect the standard for intermediate
23 scrutiny that should be applied in this Second
24 Amendment case.

25 Do you want to respond to that.

1 MR. FADER: Certainly, Your Honor. Thank you.

2 That case does not define the standard for
3 intermediate scrutiny. In fact, the phrase,
4 intermediate scrutiny, is used only once in the
5 Supreme Court's decision in McCullen, and it is in
6 reference to a completely different case.

7 The issue where the Supreme Court referenced
8 intermediate scrutiny was to say that it was not
9 impermissible for the Supreme Court to address the
10 first prong of a standard of scrutiny test first, and
11 then proceed to the second prong, even if it was
12 ultimately going to find that the law didn't satisfy
13 the second prong.

14 The Supreme Court referenced that it had done so
15 in a different case employing intermediate scrutiny.
16 That's the only mention of intermediate scrutiny in
17 that case.

18 What the Supreme Court did was apply
19 straightforwardly a test that it has used in specific
20 circumstances dealing with First Amendment cases
21 involved in time, manner, place restrictions, and that
22 case specifically dealing with buffer zones outside of
23 abortion clinics. It did not purport to redefine
24 intermediate scrutiny.

25 In fact, courts articulate an intermediate

1 scrutiny test in many different ways, and that has
2 been true with respect to intermediate scrutiny as
3 applied in the First Amendment context. There are
4 many different articulations of that standard. The
5 Supreme Court did not purport to change that in any
6 way.

7 In fact, the Fourth Circuit's articulation of
8 the means and scrutiny standard is fully justified by
9 Supreme Court cases articulating the standard in very
10 similar terms.

11 For example, in Clark versus Jeter, 486 U.S.
12 456, the Supreme Court articulated the intermediate
13 scrutiny standard as to withstand intermediate
14 scrutiny, a statutory classification must be
15 substantially related to an important governmental
16 objective, pretty much exactly what the Fourth Circuit
17 has articulated as the intermediate scrutiny standard
18 for this case.

19 That has not been overruled, and the McCullen
20 case didn't purport to overrule it. It simply is the
21 case that courts have articulated that standard in
22 different ways in different cases. This Court, of
23 course, sits in the Fourth Circuit, which has
24 articulated it in the way that it has been described
25 in our papers.

1 Under the Fourth Circuit's test, the first
2 question is does the law burden conduct within the
3 scope of the Second Amendment as historically
4 understood?

5 The concept of scope as the Supreme Court has
6 defined it is based on history and tradition. It's
7 not established in the Constitution. The Supreme
8 Court was clear in Heller that the right codified in
9 the Second Amendment preexisted the Constitution. The
10 Supreme Court said this is not a right granted by the
11 Constitution, and it is not dependent on the
12 Constitution for its existence. So the scope of the
13 amendment is defined by history and traditional.

14 Just as the Supreme Court stated in Heller that
15 it would border on the frivolous to argue that only
16 arms in existence in the 18th Century were protected
17 by the Second Amendment, so it would border on the
18 frivolous to argue that our understanding of the
19 limitations on that amendment would only be
20 limitations that were actually in existence at the
21 time of the Second Amendment. And in fact, the
22 limitations that the Court identified in Heller as
23 presumptively lawful are limitations that were not in
24 place at the time of the Second Amendment.

25 There were not concealed carry laws at that

1 time. Those arose in the early 19th Century. There
2 were not prohibitions on felons and the mentally ill
3 to carry firearms. Those arose in the 20th Century.
4 There were not the same protections on carry a firearm
5 into sensitive places.

6 So these are all limitations recognized by the
7 Supreme Court as presumptively lawful, which clearly
8 have as their purpose the protection of public safety
9 and which demonstrate that the Second Amendment is not
10 unlike all other constitutional rights, but in fact
11 sits within the other rights guaranteed by the Bill of
12 Rights as being subject to certain limitations, which
13 the Supreme Court has analyzed under means and
14 scrutiny standards.

15 Plaintiffs try to avoid looking at the issue of
16 scope in that context by glomming onto a single phrase
17 in the Heller decision, and they articulate numerosity
18 as the sole issue in defining whether something is
19 within the scope of the Second Amendment right.

20 Although there are some other courts that have
21 also addressed that issue using numerosity as the
22 threshold, the defendants believe that that misreads
23 the Heller case for several reasons.

24 First, in Heller, the common use concept came
25 into the decision not as a discussion of what is

1 absolutely protected by the Second Amendment, but as a
2 description of one of a number of limitations on that
3 right. The Court identified that the Second Amendment
4 does not protect weapons that are not in common use at
5 the time.

6 The justification that the Court identified for
7 that limitation was not any historical focus on
8 numbers, but the historical practice of allowing a ban
9 on possession of weapons that are dangerous or
10 unusual. That's the historical justification the
11 Supreme Court pointed to.

12 Moreover, focusing only on numerosity is
13 inconsistent with the other limitations that the
14 Supreme Court identified in Heller, an inexhaustive
15 list of presumptively lawful limitations that have
16 nothing to do with numerosity, and it also conflicts
17 with common sense.

18 If the threshold is simply how many of the
19 firearms there are, what is that number, and is there
20 a day whereby successful marketing campaigns or
21 successfully identifying a price point for certain
22 weapons, there is a magical transition into
23 constitutional protection for weapons that the day
24 before were not protected?

25 It also raises questions about when you would

1 look to the issue of common use with respect to a
2 particular law. California enacted an assault weapons
3 and large-capacity magazine ban in 1989, when the
4 record is clear that there were far, far fewer assault
5 rifles in existence.

6 THE COURT: As you suggest, a number of courts
7 have looked at this numerosity issue and whether
8 something is in common use.

9 Do you think there is an appropriate part of the
10 Heller/McDonald analysis that does focus on the number
11 of weapons, but just that is not sufficient in itself
12 to define scope?

13 MR. FADER: I think the Supreme Court clearly
14 stated that the Second Amendment does not protect
15 firearms -- does not protect arms that are not in
16 common use at the time.

17 In Heller, the Supreme Court analyzed Miller and
18 said our conclusion from Miller, what they were really
19 saying is firearms not in common use at the time do
20 not get Second Amendment protection.

21 So I think the Supreme Court's focus on that was
22 for that purpose of identifying that limitation. I do
23 not think that it established the converse and said
24 anything that is in common use, no matter how
25 dangerous, no matter how much it affects public

1 safety, is necessarily protected. I don't think that
2 it established that counterpoint.

3 THE COURT: Does it involve an analysis, which
4 we were talking about a little bit earlier, about the
5 use, I mean if they are common, but the use is
6 something other than self-defense?

7 MR. FADER: I think it certainly could, Your
8 Honor. I think that's not something that the Supreme
9 Court articulated. But in light of the Supreme
10 Court's focus in Heller, I mean Heller was all about
11 what the Second Amendment is.

12 Is it a militia-centric right that doesn't
13 provide individual rights, or is it for another
14 purpose? The Supreme Court looked and said it's not
15 for the purpose of militia. That's why it was
16 codified in the Second Amendment, but that's not what
17 the right meant, and the right meant that you had a
18 right for self-defense, and they also said that some
19 people believed the right was equally important for
20 hunting.

21 Certainly the Supreme Court has identified that
22 focus on purposes, and what people viewed the purpose
23 as being at the time the Second Amendment was ratified
24 as being relevant. So I think it would be relevant to
25 that discussion, but I don't think that the

1 discussion -- as would be relevant issues of how
2 dangerous the firearms are and what risks they pose to
3 public safety, because that's what the Supreme Court
4 identified as the historical justification for the
5 common use limitation.

6 So I think all of those, not a focus simply on
7 how many are there, would be relevant to that
8 discussion.

9 One other scope point that I want to address
10 briefly --

11 THE COURT: Sure.

12 MR. FADER: -- with respect only to the
13 large-capacity magazines is whether they fall within
14 the scope of the Second Amendment at all. I don't
15 think that the particular issues that the defendants
16 have raised here have been addressed by other courts;
17 although, other courts certainly have looked at this
18 with respect to numerosity issues and found that
19 magazines are protected.

20 But magazines are not arms themselves. The
21 Supreme Court identified the definition of arms at the
22 time of the Second Amendment as the same as today,
23 weapons of offense, which a magazine by itself is not,
24 nor are large-capacity magazines necessary to operate
25 any firearm. There is no evidence in this case that

1 there is any firearm that cannot be operated with a
2 magazine with a capacity of ten rounds or less.

3 THE COURT: But certainly there are some
4 firearms that must have a magazine.

5 MR. FADER: At least they must have a magazine
6 to fire more than one round. If you can put one in
7 the chamber without a magazine, you can use that one
8 round. But there are firearms that need magazines,
9 but not magazines with a capacity of more than ten
10 rounds, and that's the only thing that is banned by
11 Maryland law, is magazines with more than ten rounds.

12 THE COURT: I think it's a little bit different
13 argument, though, to say that a magazine, which at
14 least to some degree would be seen as an integral part
15 of the firearm which is not banned, or which may come
16 under additional protection, to say that an integral
17 part of that weapon doesn't constitute a bearable arm.

18 There may be other reasons why, obviously, that
19 you are arguing that they don't need to be more than
20 ten rounds. I'm just saying I have a little bit of a
21 difficulty with saying that LCM's are not even within
22 the protection of the Second Amendment at all.

23 MR. FADER: I think the answer is the difference
24 between a large-capacity magazine and a magazine with
25 ten rounds or less. This is not a law that affects

1 all magazines, and there is no firearm --

2 There's no arm. It's the right to keep and bear
3 arms that's protected. There's no arm that functions
4 differently or that can't function without a magazine
5 of ten rounds or less, and that's why the defendants
6 believe that those are outside the scope.

7 THE COURT: Okay.

8 MR. FADER: If the laws do burden conduct that
9 is protected by the Second Amendment to some degree,
10 the question becomes what level of scrutiny to apply.

11 The Fourth Circuit has identified the assessment
12 of which level of scrutiny should apply as taking into
13 account burdens on Second Amendment rights, the nature
14 of a person's Second Amendment interests, the extent
15 to which those interests are burdened by the
16 government regulation, and the strength of the
17 government's justification for the regulation.

18 Here, as every court that has considered this
19 issue has held --

20 THE COURT: Let me just back up a minute since
21 you are moving into the burden analysis. Is the State
22 taking the position that the analysis should stop at
23 the first prong, that they are dangerous and unusual
24 weapons, or that there is enough sufficient burden on
25 the Second Amendment that I would not even need to

1 move into the means and scrutiny?

2 Obviously you would argue the full set of both
3 prongs, but do you take that first position?

4 MR. FADER: Yes, Your Honor. There are two
5 prongs to the test. In order to prevail in this case,
6 the plaintiffs have to prevail on both prongs. The
7 defendants would need to prevail on one or the other,
8 and the defendants do take the position that these
9 laws fall outside the scope of the Second Amendment as
10 historically understood based on the historical
11 tradition of prohibiting, of allowing the prohibition
12 of dangerous and usual firearms.

13 THE COURT: Okay. That's what I thought. I
14 just wanted to be clear.

15 Now so far the other courts that have looked at
16 this, my recollection is that they have all at least
17 assumed, without necessarily deciding, that there is a
18 burden on the Second Amendment, and they have moved
19 past that first prong.

20 MR. FADER: That's true, Your Honor. Some have
21 assumed, some have found, but they all have moved on
22 to the second prong of the analysis. That's
23 consistent with the way the Fourth Circuit has treated
24 other laws, other Second Amendment challenges, where
25 it has assumed a burden on the Second Amendment rights

1 and gone on, without even discussing the burden issue
2 to uphold the statutes based on an application of
3 intermediate scrutiny. So that's a method that would
4 be open to the Court as well.

5 As every court that has considered the issue has
6 held, intermediate scrutiny would apply to Second
7 Amendment challenges to assault weapons and
8 large-capacity magazine bans, because even if there is
9 a burden on the Second Amendment rights, it is a small
10 one.

11 The Fourth Circuit stated first in Chester, and
12 has gone on to repeat in other cases, we do not apply
13 strict scrutiny whenever a law impinges upon a right
14 specifically enumerated in the Bill of Rights. And
15 indeed, the evidence is clear that this law does not
16 infringe on any central component of the Second
17 Amendment right, and any burden that it imposes is
18 minimal because there are many other firearms,
19 including the firearm the Supreme Court, the class of
20 firearms the Supreme Court has identified as
21 overwhelmingly chosen by Americans for the lawful
22 purpose of self-defense, the handguns that are all
23 still available, used for those purposes that the
24 Second Amendment serves.

25 The intermediate scrutiny test, as identified by

1 the Fourth Circuit, asks whether there is a reasonable
2 fit between this law and the government's substantial
3 interest, and that is the test that this Court uses
4 sitting in the Fourth Circuit.

5 As far as an application of the intermediate
6 scrutiny standard, the evidence that is before this
7 Court certainly support a reasonable fit between the
8 bans at issue and the government's substantial
9 interest in protecting public safety and reducing the
10 negative effects of firearm violence.

11 These firearms are primarily useful for
12 offensive military-style assaults, not for defensive
13 purposes or for hunting. They were designed for use
14 in Militaria and are still adopted by militaries
15 around the world as the most effective firearms, with
16 the sole exception that those firearms are automatic
17 as opposed to semiautomatic firearms.

18 But a 30-round clip in a semiautomatic AR-15 can
19 still be emptied in five seconds, causing the D.C.
20 Circuit and other courts to treat it as virtually
21 indistinguishable from the M16 military version.

22 Moreover, as has been discussed in the briefs,
23 the United States Army and law enforcement agencies
24 have determined that even selective fire weapons that
25 have the capacity to fire in automatic or

1 semiautomatic mode are more effectively used for their
2 military and law enforcement purposes in semiautomatic
3 mode.

4 These firearms and magazines are also
5 disproportionately used in mass public shootings and
6 murders of law enforcement officers.

7 Large-capacity magazines have been identified as
8 used in 85 percent of mass shootings where the
9 magazine capacity is known. Sometimes those numbers
10 are given as 50 percent of mass shootings because
11 shootings where the magazine capacity isn't known are
12 treated as being in the non-large-capacity magazine
13 category. But where that magazine capacity is known,
14 the numbers show 85 percent. The average number of
15 shots fired in those cases is 75.

16 From 1982 to 2012, 21 percent of mass public
17 shootings involved an assault rifle, and more than 50
18 percent used large-capacity magazines. Even worse,
19 when these firearms and magazines are used, the data
20 show that they result in more fatalities, more
21 injuries than in situations in which they are not
22 used.

23 THE COURT: Let me ask you to address the
24 question of the evidence a little bit. Obviously
25 there are several motions to exclude that have been

1 filed.

2 Regarding Mr. -- is the correct pronunciation
3 Mr. Koper?

4 MR. FADER: Yes.

5 THE COURT: Obviously he has been cited in any
6 number of cases that have looked at this. Do you know
7 if any of those other cases involved a motion to
8 exclude? Was there a challenge even to the
9 admissibility of Mr. Koper's evidence?

10 MR. FADER: I'm not aware of any challenge in
11 any of those cases. No, Your Honor.

12 THE COURT: Can you tell me a little bit more
13 about the issue involving the Mother Jones data and
14 any other database that Ms. Allen, among others, might
15 have relied on? What exactly, and where is it from?

16 MR. FADER: The Mother Jones database, Your
17 Honor, Mother Jones Magazine has collected information
18 on mass public shootings that have occurred beginning
19 in 1982, and it is consistently updated. It's based
20 on public press reports, which, by the way,
21 differentiated from all of the other information in
22 the cases cited by the plaintiffs where the data that
23 was at issue was information by a private individual
24 saying I think my business would have made tons of
25 money if the contract hadn't been breached, and that

1 was data that was a black box that was inaccessible to
2 anybody else.

3 Here, what we are dealing with is a compilation
4 of information from public news sources of firearms
5 that were used, the number of shots that were fired,
6 the capacity of the magazines, and other information
7 about the incidents collected from public sources, so
8 that it is easily reviewed and investigated by anybody
9 who would be interested in checking its validity.

10 THE COURT: And did any of the experts in this
11 case do that, look at the Mother Jones data, but also
12 go back and look at the public press reports that
13 underlie it?

14 MR. FADER: No. Yes, there are some instances
15 in which they went and looked at press reports, but
16 there was no systematic review of that information to
17 identify whether every single entry was correctly
18 reported from any news source.

19 But it is publicly-available information that
20 has been subject to scrutiny, and it's available to be
21 subject to scrutiny, which again distinguishes it from
22 the kinds of information relied on by experts the
23 courts have found not to be fair game, because it's
24 not accessible. It's not subject to review. It's not
25 subject to testing. This is a much different type of

1 information.

2 THE COURT: Okay.

3 MR. FADER: Of course, these mass public
4 shootings are very public events. So it's not hard to
5 go back and try to find a news article to see if the
6 information in it is incorrect in some respect.

7 THE COURT: There is also a National Rifle
8 Association database that's relied on?

9 MR. FADER: And that's not a database as such as
10 much as a collection of stories that Lucy Allen had
11 relied on.

12 So the Mother Jones database, they have made an
13 effort based on an understanding, based on a
14 definition of mass public shooting to identify each
15 and every shooting that falls within that definition
16 and put information in that database. So it's an
17 attempt at a comprehensive database of those
18 incidents.

19 The National Rifle Association stories are
20 different. Those are collections of stories that are
21 reported by the National Rifle Association to
22 highlight self-defense incidents.

23 Ms. Allen is clear that it is not a
24 comprehensive database. It is not a systematically
25 created database. It's a collection of stories, but

1 it is not the most comprehensive collection of
2 information about those incidents that she was able to
3 find, and no more comprehensive study has been
4 identified.

5 So plaintiffs cited, I don't remember the name
6 of the case, but they cited a case to say anecdotal
7 evidence is not preferred. Well, what the case
8 actually says is when you have a comprehensive
9 systematic study that reaches one conclusion,
10 anecdotal evidence that contradicts it is not the best
11 evidence.

12 Here, there is no comprehensive
13 scientifically-assembled study. What we have, the
14 most comprehensive study that she was able to find,
15 and that anybody has identified, is this database, or
16 is not the database, excuse me, but is a collection of
17 stories that has been analyzed for two different
18 periods and has found, out of over 600 incidents, only
19 one in which more than ten shots were fired in
20 self-defense.

21 THE COURT: Thank you.

22 MR. FADER: Moreover, the testimony of law
23 enforcement officers is that assault weapons and
24 large-capacity magazines are dangerous and unusual
25 firearms from some of Maryland's leading law

1 enforcement officers, and that the bans will advance
2 Maryland's interest in public safety by reducing the
3 availability of those firearms and magazines for use
4 by criminals, reducing the threat to innocent
5 civilians from unintentional misuse, and helping to
6 protect law enforcement officers.

7 I do want to say just a word about the
8 plaintiffs' claim that the Court cannot even consider
9 those sources of information, because they claim they
10 were not before the General Assembly at the time that
11 it enacted this law. The plaintiffs' argument is
12 wrong in two ways.

13 First, there is no such limitation on the
14 Court's consideration of evidence. Second, some of
15 the evidence actually was before the General Assembly.
16 The Fourth Circuit has been clear that there is no
17 requirement that evidence be before the General
18 Assembly to be considered by the Court.

19 In Woollard, the Fourth Circuit relied on the
20 evidentiary basis found in testimonial evidence of law
21 enforcement officers to support a law against the
22 Second Amendment challenge.

23 In United States versus Carter, the Fourth
24 Circuit emphasized that the government could meet its
25 intermediate scrutiny burden by resorting to a wide

1 range of sources, such as legislative text and
2 history, empirical evidence, case law and common
3 sense, as circumstances and context require. The
4 defendants here rely on all of those sources.

5 The plaintiffs claim that that is in conflict
6 with the Supreme Court decision in Turner
7 Broadcasting, but they simply misread that case. In
8 Turner Broadcasting, the Court stated that legislators
9 are not required to make an administrative record to
10 accommodate court review, and if they are not required
11 to make that record, then the courts can't be limited
12 to only looking at what is in a record.

13 More importantly, the Turner Broadcasting court
14 said that on remand, the court below could consider
15 introduction of additional evidence as to the harm
16 that the broadcasters in that case would incur.

17 The plaintiffs read into that sentence a
18 limitation saying that only the broadcasters could
19 introduce that evidence in opposing the government,
20 but for two reasons, they misread that.

21 First, the sentence doesn't say that. More
22 importantly, in that case the broadcasters and the
23 federal government were on the same side. The law
24 that was at issue was to protect broadcasters by
25 requiring cable companies to carry their signals. It

1 was the government's burden to introduce evidence
2 about the harm on broadcasters; and, therefore, it was
3 the government that would have to be introducing that
4 additional evidence on remand.

5 So there is simply no support for the
6 plaintiffs' notion in that case or either of the cases
7 they cited for the first time in their reply brief,
8 which simply don't stand for the propositions for
9 which they have cited them.

10 The bottom line is that as the Fourth Circuit
11 has said, it is the legislature's job and not the
12 province of the court to weigh conflicting evidence
13 and make policy judgments regarding the dangers that
14 firearms pose to public safety.

15 This Court's responsibility is to determine
16 whether there is substantial evidence to justify the
17 General Assembly's predictive judgment, whether there
18 is a reasonable fit between the law and the
19 government's important interests.

20 There are two other claims that I would like to
21 just address briefly, Your Honor.

22 THE COURT: Yes.

23 MR. FADER: One is a claim under the Equal
24 Protection Clause. As to both of these remaining
25 claims, there is a motion to dismiss pending, as well

1 as a motion for summary judgment.

2 The Equal Protection Clause keeps governmental
3 decision-makers from treating --

4 THE COURT: Let me just stop you there. Just on
5 a procedural basis, is there any reason to address the
6 motion to dismiss if it is all disposed with in the
7 summary judgment motion?

8 MR. FADER: I think that it can be dismissed on
9 either grounds, Your Honor. I think that there are
10 clear legal reasons that could be the basis for
11 dismissing on the motion to dismiss or for summary
12 judgment, but we are certainly treating them as
13 combined at this point.

14 THE COURT: Okay.

15 MR. FADER: Under Fourth Circuit jurisprudence,
16 and I'm talking specifically about Morrison versus
17 Garraghty, 239 F.3d, at 654, a plaintiff must first
18 demonstrate that he has been treated differently from
19 others with whom he is similarly situated in order to
20 make an equal protection claims.

21 In this case, the equal protection claims arise
22 from the plaintiffs' claim that exceptions in the law
23 applicable to retired law enforcement officers violate
24 their equal protection rights, but the plaintiffs are
25 not similarly situated to those retired law

1 enforcement officers.

2 The plaintiffs initially challenged two
3 exceptions with respect to assault weapons; one, an
4 exception for the transfer of firearms actually
5 obtained for a retired law enforcement officer in the
6 line of duty when he wasn't active duty.

7 The plaintiffs seem to have dropped any argument
8 with respect to that exception and have dropped any
9 claim that they are similarly situated, since those
10 law enforcement officers obviously would have had to
11 receive extensive training on those particular
12 firearms.

13 But they seem to be maintaining their claim that
14 the provision allowing an exception for transfer to a
15 retiring law enforcement officer at the time of
16 retirement is a violation of the Equal Protection
17 Clause. But there again, the class of plaintiffs who
18 are not retired law enforcement officers are not
19 similarly situated to retired law enforcement
20 officers, who, in connection with their law
21 enforcement responsibilities, have had extensive
22 training not only on how to use the firearm, but how
23 to act in circumstances calling for the use of deadly
24 force, how to minimize other casualties on the
25 emotional, mental and psychological preparation needed

1 for the possibility of deadly force shooting
2 situations, which simply makes them not similarly
3 situated.

4 Moreover, as far as possible rationales on a law
5 that would be addressed under the rational basis test,
6 the General Assembly could certainly have rationally
7 concluded that retired law enforcement officers did
8 not present the same risks of having these instruments
9 fall into the hands of criminals, or used for ill
10 purposes, as if they were proliferating in the hands
11 of others.

12 The last claim in this case, Your Honor, is a
13 void for vagueness claim. Here again, simple legal
14 principles are dispositive.

15 The Fourth Circuit has held that facial
16 vagueness challenges to criminal statutes are allowed
17 only when the statute implicates First Amendment
18 rights. The plaintiffs have not disagreed with that
19 legal standard in the Fourth Circuit.

20 This case does not implicate First Amendment
21 rights. The plaintiffs have only brought a facial
22 challenge to the law, and, therefore, that facial
23 challenge must fail. This is a pre-enforcement facial
24 challenge to the law that cannot survive under that
25 standard.

1 The Supreme Court also in the Village of Hoffman
2 case said vagueness challenges to statutes which do
3 not involve First Amendment freedoms must be examined
4 in light of the facts of the case at hand. One whose
5 conduct the statute clearly applies may not
6 successfully challenge it for vagueness. Even --

7 THE COURT: That opinion by the Supreme Court,
8 do you think that's consistent with what the Fourth
9 Circuit has said?

10 It seems to me the Fourth Circuit was a bit more
11 categorical than the Supreme Court was in the Village
12 case, and looking at the other courts that have
13 addressed this, most of them have addressed the
14 merits, I think.

15 MR. FADER: Certainly some of the other courts
16 have addressed the merits; although, I don't know that
17 any of those were in situations in which there was not
18 an as applied challenge as well.

19 I think in the Village of Hoffman, that
20 statement is less categorical, but it applies to it as
21 an applied challenge.

22 It says vagueness challenges that don't involve
23 First Amendment freedoms must be examined in light of
24 the facts of the case at hand, indicating that there
25 must be facts that have been put forward with respect

1 to a particular plaintiff saying this is something I
2 want to be able to use, or this is conduct I want to
3 be able to engage in that is prohibited.

4 Here, the declarations that have been submitted
5 by the plaintiffs indicate that they know exactly what
6 is covered by this law. They want to purchase or sell
7 AR-15s and AK-47s, and they are upset that this law
8 prohibits them from doing so. There is no specific
9 factual scenario that would allow for an as-applied
10 challenge here.

11 And to the extent that the plaintiffs have
12 identified individual firearms or decisions by the
13 Maryland State Police that they consider incorrect, or
14 that they believe were made inappropriately, those are
15 not an appropriate basis for a facial challenge to a
16 law.

17 They have raised individual issues that could be
18 raised in state courts if there were to be a criminal
19 prosecution brought with respect to this, but that's
20 not the basis for a facial challenge to the law.

21 THE COURT: Now when the plaintiffs brought the
22 McCullen case to our attention, they also included
23 something I think described as newly discovered
24 evidence, but they included a bulletin from July of
25 2014 issued by the Maryland State Police, I think

1 going to the issue of a copy, what is a copy. If you
2 would like to address that.

3 MR. FADER: Certainly. The first point
4 addressing that, Your Honor, would be, again, that is
5 with respect to a particular firearm that they have
6 identified. It is not even a firearm that any of the
7 plaintiffs have said that they want to acquire, but
8 aren't because of this law.

9 So it's not -- that kind of focus on individual
10 firearms is not appropriate in considering a facial
11 challenge where there is a clearly defined core of
12 prohibited conduct as established by the plaintiffs'
13 own allegation. So a one-off situation doesn't make a
14 law facially unconstitutional.

15 With respect to the firearm at issue, what it
16 appears to be is that the plaintiffs disagree with the
17 State Police's preliminary determination as to whether
18 that particular firearm satisfied the test of having
19 completely interchangeable internal components.

20 There is a manual that comes with the firearm
21 that says that all of the major subassemblies of the
22 firearm are completely interchangeable with an AR-15,
23 and the plaintiffs have identified a part that they
24 believe is not fully interchangeable with an AR-15.
25 Under the Maryland State Police's policy, they will go

1 back and review that, and if they agree with it, then
2 they may change their view.

3 But this is a circumstance dealing with an
4 individual firearm, and the fact that there may be
5 further review, or even if there was an incorrect
6 decision as to that particular firearm does not call
7 into question the facial validity of the law itself.

8 Thank you.

9 THE COURT: Thank you. Thank you Mr. Fader.

10 Mr. Sweeney.

11 MR. SWEENEY: May it please the Court.

12 THE COURT: Good morning.

13 MR. SWEENEY: I am John Parker Sweeney, and I
14 represent citizens of Maryland and citizen groups that
15 are challenging the bans in SB281 on popular firearms
16 and magazines.

17 We are grateful for the opportunity to appear
18 before Your Honor today. At the outset, we want to
19 thank the Court for the opportunity to develop a
20 factual record.

21 I must commend Mr. Fader and Mr. Friedman for
22 their professionalism and civility that allowed us to
23 go through expedited discovery, including 40
24 depositions over the holidays, through a terrible
25 winter weather-wise to get here, and I am equally

1 proud to say that we have teed up these motions
2 without once requiring the Court to intervene and
3 resolve any disputes between us.

4 THE COURT: Well, I will echo your thanks to
5 counsel on both sides. I would certainly agree from
6 what I have seen everyone has handled this very
7 professionally. These are important arguments, and I
8 appreciate how you dealt with it.

9 MR. SWEENEY: This is the finest of litigating
10 in Maryland. That's why I enjoy it so much.

11 What distinguishes this case from every other
12 case relied upon by Mr. Fader, starting with the
13 Heller II decision, and the more recent district court
14 cases, is that we have developed a full record,
15 including depositions of key witnesses. The other
16 cases were largely resolved on summary judgment based
17 on declarations and expert reports, but without the
18 benefit of cross-examination through deposition.

19 Depositions in this case have demonstrated that
20 the defendants' experts' opinions offered by the
21 defendants to support the law in question are not
22 reliable, and should be excluded.

23 Let me start first by addressing Mr. Koper, who
24 Your Honor asked about during Mr. Fader's examination.
25 Mr. Koper is the principal author of two very

1 significant, indeed, critical studies in this area.

2 When the federal government banned assault
3 weapons and magazines with the capacity greater than
4 ten in 1994, that was for a ten-year period, and the
5 law required a study of its efficacy be done. Mr.
6 Koper, Dr. Koper, excuse me, was charged by the
7 government, and under contract to the Department of
8 Justice, prepared those studies.

9 He prepared a 1997 interim study, as required
10 under the Act, and he repaired a 2004 updated study,
11 as required under the Act, and these studies were
12 considered by Congress when Congress allowed the law
13 to expire in 2004.

14 One of the things that we were able to do that
15 no one else has done is depose Dr. Koper. I was,
16 frankly, more than a little surprised to find out that
17 he had never been deposed before.

18 And so what did we learn at Dr. Koper's
19 deposition? First we asked him about the effect of
20 the federal bans.

21 He said in his report, "There has been no
22 discernible reduction in the lethality and
23 injuriousness of gun violence." I asked him if that
24 report was correct, and he said yes. This is at page
25 94 of his deposition.

1 I went on to say is that still your view today
2 based upon your study and analysis of the impact of
3 the federal ban on assault weapons and large-capacity
4 magazines?

5 Answer, yes. Based on the data that I analyzed,
6 it's still my view of it.

7 I asked all right. Are you aware of anyone
8 else's data with respect to studying the impact of the
9 federal ban on assault weapons and large-capacity
10 magazines that reached a conclusion different from the
11 conclusion that you stated here?

12 Answer, no.

13 I went on on page 96 to say isn't it true that
14 as you sit here today, you cannot conclude with a
15 reasonable degree of scientific probability that the
16 federal ban on assault weapons and large-capacity
17 magazines reduce crimes related to guns?

18 Answer, correct.

19 Question, and it didn't reduce the number of --

20 THE COURT: But let me stop you for a minute.
21 The reducing crimes related to guns isn't really the
22 area of my focus in this case, is it?

23 Again, we are obviously not talking about a ban
24 on handguns or many other kinds of guns that are used
25 in the course of committing crimes.

1 MR. SWEENEY: I went on to ask, Your Honor, and
2 it didn't reduce the number of deaths or injuries
3 caused by guns either, correct?

4 Answer, correct.

5 THE COURT: Yes.

6 MR. SWEENEY: I further went on to ask him about
7 the effect of state bans rather than the federal ban.
8 On page 84 of his deposition I said you address, on
9 note 95, I believe state bans on assault weapons in
10 which you say, "A few studies suggest that state-level
11 assault weapon bans have not reduced crime." Am I
12 reading that correct?

13 Answer, yes.

14 Question, and is that still your view today?

15 Answer, I've not seen any further studies of
16 this yet, but yes, I mean, essentially that's the
17 conclusion.

18 I asked him about his study with respect to the
19 use of the banned firearms and assaults on law
20 enforcement officers.

21 On page 128, I asked would you agree with me
22 that law enforcement officers are far more likely to
23 be killed by motor vehicles in the line of duty than
24 assault rifles?

25 Answer, yes.

1 Question, vastly more likely to be killed by
2 handguns than by assault rifles?

3 Answer, yes.

4 Possibly even more like likely to be killed by
5 shotguns than by assault rifles, probably more likely?

6 Answer, probably.

7 I then asked him about mass shootings, page 131.

8 And if you assume four or more, referring to
9 individuals shot in one incident, can you state to a
10 reasonable degree of scientific probability based upon
11 the evidence available to you that banning assault
12 rifles will reduce the number of incidents of mass
13 shootings?

14 Answer, I can't say that based -- I mean I can't
15 make a firm projection of that based on any particular
16 available data. There might be data to suggest that
17 there could be some reduction in that, but it's hard
18 to really clearly project what that would be or how
19 difficult it might be to detect statistically.

20 THE COURT: Let me ask you, Mr. Sweeney, again,
21 the context in which I am evaluating these experts'
22 testimony or deciding whether to exclude it, it seems
23 to me is somewhat different from the traditional case,
24 medical malpractice, product liability, something
25 where it is required for an expert opining on

1 causation to reach an opinion, as you suggest,
2 something more likely than not, probable, scientific
3 probability.

4 It doesn't seem to me that is the precise
5 context here when what we are trying to evaluate is
6 whether there is a reasonable fit, that the
7 legislature's predictive judgment is supportable. It
8 seems to me like a different kind of analysis.

9 MR. SWEENEY: If the opinions advanced by the
10 State to support the constitutionality of the law that
11 restricts fundamental rights of American citizens
12 cannot be based upon the same evidence that meets Rule
13 702 and other federal cases, I don't think Your Honor
14 should affirm the statute.

15 THE COURT: That was not the thrust of my
16 question. I think Rule 702 needs to be --

17 What satisfies Rule 702 can vary depending on
18 the context of the case and the purpose for which an
19 opinion is being offered. So I'm perhaps not making
20 myself clear.

21 MR. SWEENEY: One of the issues in the Turner
22 Broadcasting case was whether or not the Congress had
23 before it evidence of the harm that it sought to
24 correct. One of the things that the Supreme Court
25 said in that case was, on remand, there has to be

1 evidence to support that.

2 Causation is not irrelevant. If the firearms in
3 question and the large-capacity magazines that are
4 being banned have not been shown, as Mr. Fader
5 asserts, to be disproportionately involved in mass
6 shootings, or the murders of law enforcement officers,
7 or indeed, crime in general involving firearms, then
8 there is no causation to underlie the infringement on
9 constitutional rights, which all the courts, as Your
10 Honor pointed out, have either assumed or found occurs
11 with these sorts of prohibitions. We are the first
12 ones to actually probe the evidence relied on by the
13 defendants.

14 Let me conclude with a portion here of Dr.
15 Koper's testimony with respect to what he could
16 predict from bans similar to the ones that are before
17 Your Honor in this case.

18 On page 84 I asked, you would not expect a ban
19 on assault weapons or large-capacity magazines to
20 actually reduce the number of firearms-related assault
21 or robberies, correct?

22 Answer, correct.

23 Question, and you would not expect a ban on
24 assault weapons or large-capacity magazines to reduce
25 firearm-related home invasions, correct?

1 Answer, no. Correct, I mean.

2 Question, and you wouldn't expect a ban on
3 assault weapons or large-capacity magazines to reduce
4 the number of firearm assaults on police officers,
5 correct?

6 Answer, correct. That's fair enough.

7 A careful reading of his deposition shows that
8 he can't really support the efficacy of the bans in
9 question here.

10 Mr. Fader pointed out a number of critical,
11 let's call them material facts underlying his motion.
12 We proffered at the temporary restraining order
13 hearing to Your Honor that we would develop evidence
14 to support the critical elements of our challenge. We
15 proffered that we would show that the banned firearms
16 are in common use. Even using defendants' five
17 million nationwide and 92,000 in Maryland, we have
18 demonstrated that these are common.

19 THE COURT: Let me ask you the same question
20 that I asked Mr. Fader. What is the state of the
21 record that they are commonly used for self-defense?

22 MR. SWEENEY: We have shown that the banned
23 firearms are chosen for self-defense.

24 Professor Webster, the only expert to testify
25 before the Maryland General Assembly, readily

1 acknowledged that the banned firearms are sometimes
2 used for self-defense.

3 We produced --

4 THE COURT: Do you have the cite to that for
5 Professor Webster?

6 MR. SWEENEY: I do. It's page 115 of his
7 deposition, Your Honor.

8 THE COURT: Of his deposition. Thank you.

9 MR. SWEENEY: Yes. We produced a survey result
10 conducted by the plaintiff, National Shooting Sports
11 Foundation, of more than 22,000 owners of modern
12 sporting rifles, who gave as the number one and two
13 purposes for owning those firearms target shooting and
14 home defense.

15 THE COURT: Do you have evidence of their use
16 for self-defense? I understand the choice issue. I
17 understand people wanting them for that purpose, but
18 actually using them in self-defense?

19 MR. SWEENEY: Yes. And may I say, Your Honor,
20 that the requirement of common use is not supported in
21 the text of Heller, and is a red herring.

22 Nothing in Heller requires handguns to have been
23 used for self-defense in the District of Columbia.
24 Indeed, they could not have been, because they had
25 long been banned.

1 Moreover, operable long guns were banned in the
2 homes of D.C. citizens, a prohibition which was
3 separately overturned in the District of Columbia.

4 There was no evidence before the Court in the
5 District of Columbia that either handguns or long guns
6 had ever been used in the defense of homes in the
7 District of Columbia. It is not use that is the
8 linchpin here. The linchpin is found in the text of
9 Heller, which talks about the nature of arms that are
10 protected by the Second Amendment.

11 The issue here is whether the firearms and
12 magazines banned here are typically possessed by
13 responsible law-abiding citizens for lawful purposes,
14 typically possessed.

15 Remember, the text of the Second Amendment is
16 keep and bear arms. The operative verb is kept,
17 commonly kept for lawful purposes, commonly possessed,
18 and this is particularly true when we are talking
19 about defense of the home.

20 Heller went on to say the Second Amendment
21 extends to all instruments that constitute bearable
22 arms, even those that were not in existence at the
23 time of the founding.

24 Mr. Fader conceded that simply because we are
25 not talking about a blunderbuss, we don't lose the

1 protection of the Second Amendment.

2 But they went on to say, in reading their prior
3 decision in Miller, which was the only previous
4 Supreme court decision that determined what arms were
5 or were not subject to the Second Amendment, we read
6 Miller to say only that the Second Amendment does not
7 protect those weapons not typically possessed by
8 law-abiding citizens for lawful purposes, such as
9 short barrel shotguns.

10 They went on to talk about the traditional
11 militia was formed from a pool of men bringing arms in
12 common use at the time for lawful purposes, like
13 self-defense.

14 Imagine, if you will, a hypothetical militia
15 muster in Towson, Maryland today, Your Honor. Will
16 you not see assembled on the town green men bearing
17 the banned firearms that contain the banned magazines?

18 Of course, you will. It's ridiculous to suggest
19 that that would not be the case.

20 THE COURT: But if it were a random sample of
21 the population, what percentage of those people
22 showing up for the Towson militia would have the
23 banned guns?

24 MR. SWEENEY: Well, considering the numbers that
25 we have, and if only armed citizens who chose to keep

1 arms at home were the ones who responded to the
2 militia, I would say a number substantially higher
3 than the one percent that Mr. Fader has already
4 conceded. We don't have that evidence.

5 The Second Amendment under Heller protects the
6 arms that the people choose to keep in their homes in
7 case they need them for the lawful purposes of
8 self-defense, hunting, and marksmanship proficiency,
9 which even Mr. Fader has conceded is covered by the
10 Second Amendment.

11 There is no need to quibble about whether
12 competitive marksman is covered because proficiency
13 marksmanship is clearly covered by the Second
14 Amendment.

15 Every federal court that has considered this
16 issue has analyzed these laws under the Second
17 Amendment. Not a single court has accepted Mr.
18 Fader's construction of commonly used and required
19 evidence of frequent use.

20 I am grateful to say that we do not have to
21 frequently use arms in the defense of our homes in
22 Maryland, and there would be no point in requiring
23 that as a precondition for the protection of arms
24 under the Second Amendment.

25 THE COURT: Do you think, if we are at the

1 second prong where, as we discussed, courts have gone,
2 that the frequency of a particular use, of a
3 particular type of firearm does not bear on the Second
4 Amendment analysis at all, that it is not relevant to
5 deciding whether this is the kind of very substantial
6 and severe burden that was involved in Heller, all
7 guns, all handguns?

8 MR. SWEENEY: No, it is not relevant, Your
9 Honor.

10 THE COURT: Why not?

11 MR. SWEENEY: Because the prohibition on popular
12 firearms and magazines, that is, commonly owned for
13 lawful purposes by the people, that prohibition is off
14 the table under Heller. Before we get to the second
15 prong of your analysis, I would like to address that
16 issue briefly.

17 In Heller, there was no discussion by the Court
18 that Mr. Fader would have you follow of it's okay to
19 balance the interests here between whether or not the
20 people really need these firearms for self-defense,
21 and the government disputes that, or whether they are
22 protected by the Second Amendment, because Heller made
23 clear that a complete ban of firearms would be off the
24 table as a policy choice.

25 And yes, they did say that under any of the

1 heightened scrutiny analyses used by the Court in the
2 context of other fundamental rights, a prohibition on
3 handguns would fail. So too would the prohibition on
4 operable long guns be equally found to be
5 unconstitutional in that case.

6 But the Court didn't stop there. It went on to
7 say we know of no other enumerated constitutional
8 right whose core protection has been subjected to a
9 freestanding interest balancing approach.

10 The very enumeration of the right takes out of
11 the hands of government, even the third branch, the
12 power to decide on a case-by-case basis whether the
13 right is really worth insisting on. A constitutional
14 guarantee subject to future judges' assessment of its
15 usefulness is no constitutional guarantee at all.

16 Constitutional rights are enshrined with the
17 scope they were understood to have when the people
18 adopted them, whether or not future legislatures or
19 even future judges think the scope too broad.

20 The Second Amendment is no different than like
21 the first. It is the very product of an interest
22 balancing by the people, which Justice Breyer would
23 now conduct for them anew. And whatever else it
24 leaves to future evaluations, it surely elevates above
25 all other interests the right of law-abiding,

1 responsible citizens to use arms in defense of hearth
2 and home.

3 Mr. Fader invites the Court to apply the
4 balancing test offered by Justice Breyer in dissent
5 and rejected by the majority in Heller.

6 THE COURT: How exactly do you think he is
7 inviting me to do that at the first prong? I mean I
8 haven't heard the words interest balancing, and I
9 thought what Mr. Fader said was I have to, as I do,
10 follow the Fourth Circuit, and if get to the second
11 prong, I apply an intermediate scrutiny test.

12 MR. SWEENEY: Well, the Fourth Circuit precedent
13 does not require any interest balancing in this case.

14 THE COURT: I'm agreeing with you.

15 MR. SWEENEY: The Fourth Circuit precedent in
16 fact has never considered a complete prohibition on
17 firearms that have been commonly kept for lawful
18 purposes in the home. That has never been before the
19 Fourth Circuit. Any of its case law is not binding in
20 that regard.

21 What do we have in the Fourth Circuit?

22 The Masciandaro case said we observe that any
23 law regulating the content of speech is subject to
24 strict scrutiny. We assume that any law that would
25 burden the fundamental core right of self-defense in

1 the home by a law-abiding citizen would be subject to
2 strict scrutiny.

3 Now, that sounds like a pretty strong statement.
4 That sounds like the Fourth Circuit would be saying if
5 we had to decide it, we would use strict scrutiny.

6 The Court went on in the Carter case to say as
7 we have noted, application of strict scrutiny is
8 important to protect the core right of self-defense
9 identified in Heller.

10 In Woollard, the Fourth Circuit panel that
11 reversed Judge Legg said we reject the view that would
12 place the right to arm one's self in public on equal
13 footing with the right to arm one's self at home,
14 necessitating that we apply strict scrutiny.

15 Plaintiffs' position is that a complete
16 prohibition of arms that are commonly kept for lawful
17 purpose in the home is off the table as a policy
18 choice. There's no balancing.

19 But if Your Honor is to look at the Fourth
20 Circuit cases, the teaching of the Fourth Circuit is
21 not what Mr. Fader suggests. The teaching of the
22 Fourth Circuit is clear. On this record, the only
23 level of constitutional scrutiny, if in fact the ban
24 is not impermissible per se under Heller, the only
25 permissible level of strict scrutiny, strict scrutiny

1 requires something the defendants have not even
2 pretended to show, narrow tailoring in the choice of
3 the least restrictive alternative.

4 Not only is the evidence disputed that the bans
5 would even be effective, there is no evidence
6 whatsoever that alternatives were considered.

7 Let me pause here and go to the question of
8 intermediate scrutiny, because I see that it is on
9 Your Honor's mind.

10 Mr. Fader used language to suggest that oh, the
11 courts are all over the place. There are lots of
12 different formulations of intermediate scrutiny.
13 What's a court to do? The Fourth Circuit cases are
14 very helpful on what intermediate scrutiny means in
15 this context.

16 First, let's talk about, however, the only
17 Circuit Court that has decided one of these banned
18 cases, Heller II, which Mr. Fader referred to a number
19 of times during the temporary restraining hearing and
20 has been remarkably quiet on.

21 That case applied intermediate scrutiny and it
22 said the District must establish a tight fit between
23 the registration requirements and an important or
24 substantial government interest, a fit that employs
25 not necessarily the least restrictive means, but a

1 means narrowly tailored to achieve the desired
2 objective.

3 The cases cited by Mr. Fader in his brief on
4 time, place, and manner restrictions similarly use the
5 narrowly tailored to serve a significant government
6 interest formulation.

7 But let's not stop there. Let's look at the
8 Fourth Circuit Second Amendment cases relied on by Mr.
9 Fader. What did Chester cite to, the first case to be
10 considered?

11 It cited, in applying intermediate scrutiny, the
12 Board of Trustees v. Fox, and that case said what our
13 decisions require is a fit between the legislature's
14 ends and the means chosen to accomplish those ends, a
15 fit that is not necessarily perfect, but reasonable,
16 that represents not necessarily the single best
17 disposition, but one whose scope is in proportion to
18 the interest served, that employs not necessarily the
19 least restrictive means, but as we have put it in the
20 other context discussed above, a means narrowly
21 tailored to achieve the desired objective.

22 So too Chester looked to Marzzarella, the Third
23 Circuit case involving handguns that did not have
24 serial numbers on them, that also said the regulation
25 need not be the least restrictive means, but may not

1 burden more speech than is reasonably necessary in
2 applying the standard of intermediate scrutiny.

3 Masciandaro itself cited Chester, and it also
4 cited Ward v. Rock Against Racism, the Supreme Court
5 case that talked about regulations that are narrowly
6 tailored to pass intermediate scrutiny, as well as
7 Board of Trustees of State University, also referring
8 to we uphold such restrictions so long as they are
9 narrowly tailored to serve the significant government
10 interest.

11 Woollard also cited Masciandaro. Carter cited
12 Chester and Marzzarella and Masciandaro.

13 The Fourth Circuit cases relied upon by Mr.
14 Fader, while perhaps not in the text saying narrowly
15 tailored, all cited cases, includes Supreme Court
16 cases, that talk about narrow tailoring.

17 THE COURT: Uh-huh.

18 MR. SWEENEY: Other district court cases
19 considering bans on firearms and magazines have also
20 cited case law that requires narrow tailoring under
21 intermediate scrutiny.

22 We saw in the New York State Rifle Association
23 case, they relied upon Kachalsky, a Second Circuit
24 case, and Masciandaro itself that they cited there.

25 In Shew, they cited Mazzarella.

1 In the Fiat case out of California, they cited
2 Chovan and Chester and Board of Trustees v. Fox,
3 already cited to Your Honor.

4 Narrow tailoring is a theme throughout the cases
5 relied upon by the Fourth Circuit and the District
6 Court cases relied upon by Mr. Fader, and what is
7 absent in this case is any effort by the State
8 whatsoever to show narrowly tailored. There is no
9 evidence, nor even argument that alternatives that
10 would be less restrictive than a complete prohibition
11 have been considered and rejected, and wouldn't work
12 because ineffective, nor could there be.

13 Before these bans took effect last fall, there
14 were two regulations in effect governing the firearms
15 and magazines in question. For sometime now Maryland
16 has put a cap of 20 rounds on the capacity of
17 magazines.

18 For sometime now, Maryland has required, under
19 its 77R regulation, that the firearms that are now
20 banned only be purchased after application and
21 background check, the so-called 77R process, which is
22 the only restriction on the purchase of handguns.

23 Now, Mr. Fader was unable to come up with any
24 evidence to support a problem preexisting the ban in
25 the State of Maryland to justify a complete

1 prohibition. There was no evidence, and our brief is
2 replete with the statements of law enforcement
3 officers admitting that the firearms are not
4 disproportionately used in crime in Maryland; and,
5 praise the Lord, we have not had mass shootings, and
6 we have not had assaults on law enforcement officers
7 with the firearms in question.

8 There is no evidence that the state of
9 regulation in Maryland, prior to the effective date of
10 these bans on October 1, 2013, was such as to require
11 these bans, or that the prior regulations long in
12 effect were not less restrictive alternatives.

13 Less restrictive alternatives are required by
14 the McCullen court. They are required by Standard
15 Broadcasting. That is what must be shown, and that's
16 what has not been shown in this case.

17 The legislature had before it precious little
18 evidence. What it did have was Dr. Webster's
19 statement focusing primarily upon the handgun
20 regulation, with one paragraph about the ban on the
21 firearms and magazines that was based solely upon Dr.
22 Koper's 1997 report.

23 It also had the testimony of Martin O'Malley,
24 and when we asked the defendants to produce all the
25 documents that supported that testimony, the answer

1 was there are none.

2 It had the testimony of Chief Johnson, and let
3 me pause there for a moment, Your Honor.

4 We were not provided with the testimony, the
5 oral testimony of Chief Johnson in advance of his
6 deposition. It was not disclosed to us as a document
7 that the plaintiffs would rely upon. It was not
8 provided to us in a copy that the plaintiffs
9 represented was the official Bill file.

10 We went down to Annapolis and we copied the Bill
11 file ourselves. It was not in the Bill file there.
12 It was not even mentioned or relied upon in the
13 opening brief of the defendants. They raise it for
14 the first time in their reply, and we were able to
15 obtain it. It was never provided to Your Honor in its
16 entirety, but there's a critical statement in there.

17 Chief Johnson is talking about why a ban on
18 large-capacity magazines might prevent mass shooters
19 from being able to reload and continue shooting. He
20 said you might be able to change a magazine in two
21 seconds if you're on a range in a calm environment.
22 But if you are not thinking clearly, it's going to
23 take longer than two seconds, if you can reload at
24 all.

25 Now if that doesn't apply to a home owner facing

1 in the middle of the night a sudden break-in, an
2 intruder.

3 The need for home defense only arises in the
4 most dire, uncertain and surprising context, and to
5 expect a home owner to have to change out magazines
6 every ten rounds under the circumstances of a
7 frightened response, to unknown and unnumbered number
8 of intruders coming into the home, is too much.

9 THE COURT: Again, I'll come back to the
10 question. I think I remember from the papers, there
11 was one instance cited, not in Maryland, but somewhere
12 else in the country, that might indicate a firing of
13 more than ten rounds in self-defense.

14 There are, on the other hand, certainly many
15 more, unfortunately, than one example of mass
16 shootings where more than ten rounds have been fired.
17 Am I wrong about that?

18 MR. SWEENEY: One of the things that Dr. Koper
19 readily admitted is the number of these incidents is
20 quite small, and one must be very careful about
21 drawing any conclusions from them.

22 There was the unfortunate incidence of Elliot
23 Rodger on the Santa Barbara campus in California, in
24 which the troubled young man stabbed three of his
25 roommates to death, got in a high-powered BMW, sped

1 around the campus striking pedestrians and bicyclists,
2 and shot three more people with two handguns and 51
3 ten-round capacity magazines. None of the firearms
4 that are subject to the ban here were involved in that
5 horrible assault.

6 Professor Webster was asked about it. He didn't
7 mention bans like this being able to make a difference
8 in those things. He talked about the need for greater
9 surveillance and vigilance with respect to mental
10 illness, and let me pause for a moment there, if I
11 may, and talk about that.

12 Maryland had a task force on mental illness and
13 firearms ongoing in 2013. Dr. Webster was on it.

14 Captain McCauley, now retired from the Maryland
15 State Police, was its co-chair. The task force came
16 out with a number of recommendations. Dr. Webster
17 didn't mention them to the General Assembly when he
18 supported SB281.

19 In December we learned, in Dr. Webster's
20 deposition of 2013, Michael Bloomberg donated \$250,000
21 to Dr. Webster's gun control center at the Johns
22 Hopkins Bloomberg School of Public Health that already
23 bears Mr. Bloomberg's name because of the generous
24 donations he has provided in the past.

25 Dr. Webster convened a symposium in January of

1 2013 in response, and he invited Mr. Bloomberg to
2 speak, along with Governor O'Malley. They suggested
3 at the outset of this symposium that, among other
4 reforms, that there should be a ban on military-style
5 assault weapons and large-capacity magazines.

6 And lo and behold, not a month later, Mr.
7 O'Malley, Governor O'Malley was before the General
8 legislature asking for that, and Professor Webster was
9 supporting it, without any discussion of the sorts of
10 recommendation that Dr. Webster had been working on
11 with Captain McCauley and many others on a blue ribbon
12 panel to control the kinds of unfortunate incidents
13 that we saw with Elliot Roger.

14 The bans in this case have not been shown to be
15 effective when they were employed on the federal
16 level. They have not been shown to be effective when
17 they have been employed in other states. The bans in
18 this case will impermissibly intrude upon the
19 constitutional right of Marylanders to keep in their
20 homes popular firearms that they commonly choose to
21 use for lawful purposes, including self-defense.

22 The government does not have the right under the
23 Second Amendment to tell the citizens that they cannot
24 choose popular firearms. These are popular firearms.
25 They are protected. Any such ban is a policy choice

1 that's off the table.

2 Thank you, Your Honor.

3 THE COURT: Thank you. I'm going to take about
4 a five-minute break, and then I will be happy to hear
5 whatever rebuttal either side would like to make.

6 (A recess was taken.)

7 THE COURT: Mr. Fader. Let me just clarify one
8 thing at the beginning. You're not challenging the
9 plaintiffs' standing in this case, are you?

10 MR. FADER: There was a challenge in the motion
11 to dismiss to the standing of some of the business
12 plaintiffs. But in light of where we are, and the
13 fact that there are plaintiffs who do have standing,
14 we are not challenging that.

15 THE COURT: Okay. Thank you.

16 MR. FADER: Your Honor, there are a few points
17 that I want to address. But I think preliminarily,
18 there was a colloquy early on when Mr. Sweeney was
19 presenting about the evidence, and the types of
20 evidence that are cognizable in a case of this nature,
21 and as Your Honor pointed out, this is different from
22 the context of a medical malpractice case when
23 causation is the issue, and there are well-defined
24 evidentiary standards that must be met for proof of
25 causation to be made before a jury.

1 Here, the Court is not looking at whether the
2 plaintiffs can satisfy a test for factors for tort
3 liability. The question is whether there was
4 substantial evidence to support the General Assembly's
5 predictive judgment that this would advance Maryland's
6 purposes in public safety.

7 Necessarily, the types of evidence that the
8 Court can consider are the types of evidence that the
9 General Assembly could consider. In examining what
10 would be substantial evidence before the General
11 Assembly, it does not make any sense, and no court has
12 ever held, that the General Assembly, when a law gets
13 challenged, all of a sudden has to be held to the
14 standard of what would be admissible in court.

15 The General Assembly is allowed to look at the
16 types of evidence that legislatures are able to
17 consider, and that's the type of evidence that, when a
18 court is considering whether the government has met
19 its burden, the Fourth Circuit has said that common
20 sense is a factor that the Court can consider in
21 looking at whether the government has satisfied its
22 burden under intermediate scrutiny.

23 A decision that we cited in briefing on the
24 motion to exclude, a very recent decision by the
25 District of Columbia District Court in the Heller III

1 case, looking at other elements of the District of
2 Columbia's law post-Heller took I think the most
3 thorough examination of this issue that has been taken
4 in the context of these Second Amendment challenges in
5 identifying the types of evidence that a court can
6 consider and found clearly, certainty is not required.

7 There is no requirement for scientific certainty
8 because you are dealing with the prerogatives of a
9 General Assembly as constrained by the constitutional
10 restraints of the Second Amendment, of course; but
11 it's the kind of evidence that can be considered by a
12 General Assembly that is appropriate to consider in
13 this context as well.

14 With respect to Professor Koper, Your Honor,
15 plaintiffs I think have built their case with respect
16 to Professor Koper around selective out-of-context
17 quotations, and ignoring Professor Koper's testimony
18 explaining what he meant, and ignoring the caveats
19 that he used when he first made those statements, and
20 quoting them without reference to any of those
21 caveats.

22 First of all, with respect to the federal ban,
23 Professor Koper is the only scholar to have done a
24 thorough investigation of the federal ban, and he did
25 not find it to be completely ineffective, as Mr.

1 Sweeney's presentation would indicate.

2 In fact, Professor Koper, although limited to
3 certain types of evidence that he had before him, has
4 described ways in which the federal ban did appear to
5 be effective.

6 In particular, although by the time he did his
7 report in 2004, there had not been systematic evidence
8 at that point of a reduction in large-capacity
9 magazines, Professor Koper both explained why that was
10 the case, and explained subsequent evidence coming
11 from studies of use of large-capacity magazines in
12 Virginia, indicating a very significant drop in the
13 criminal use of large-capacity magazines during the
14 period of the ban and a pretty significant rise
15 afterward, indicating that it did in fact have that
16 effect on recovery of magazines used in crimes.

17 But maybe more importantly are some of the
18 things that Professor Koper mentioned about the
19 federal ban itself and some of its limitations that
20 would cause a reasonable person looking at it to
21 understand that only over a long period of time would
22 a ban of that nature be expected to be effective.

23 One of the most significant problems with the
24 federal ban was the fact that it was not a ban on the
25 transfer of those firearms and magazines that it

1 covered. It was a ban only on the transfer of
2 firearms and magazines that were first produced after
3 the date of the ban.

4 So there was actually free transfer of firearms
5 and magazines during most of the period of the federal
6 ban, and with respect to large-capacity magazines,
7 there were even millions of those imported from abroad
8 into this country, as long as they were manufactured
9 before the date the ban took effect, meaning, as
10 Professor Koper explained, and plaintiffs ignore, you
11 can't necessarily --

12 Availability is the key. If you continue to
13 have these firearms and magazines available, readily
14 available for transfer, why is it that you would
15 expect to see a significant decline in their use if
16 they keep being injected into the system?

17 Maryland's ban takes a different approach. It
18 bans the transfer of these firearms and magazines
19 going forward. That's a significant departure, and
20 based on that significant limitation, which meant that
21 expectations of some as far as the results of the
22 federal ban weren't necessarily realized, although
23 there was progress during that time, but Maryland's
24 ban has taken a different approach.

25 The evidence is that criminals obtain their

1 firearms primarily through straw purchases, purchases
2 on the secondary market, and theft from law-abiding
3 individuals, meaning that if you are going to reduce
4 the availability of these firearms for criminal uses
5 and uses by people who may be mentally ill that have
6 been involved in some of these mass public shootings,
7 you need to reduce their availability generally.

8 That is something that in some ways the federal
9 ban wasn't able to accomplish because it continued to
10 allow transfers, but that Maryland's ban has
11 addressed, and which is one of the bases in which
12 Professor Koper said that he does expect it to be
13 likely that Maryland's ban over the long term will
14 promote Maryland's interest in public safety in
15 reducing the negative effects of handgun violence.

16 With respect to state bans, Professor Koper, a
17 footnote in Professor Koper's 1997 report, I'm sorry,
18 2004 report, identified that there had been two
19 studies of a limited nature looking at the wrong
20 outcome determination with respect to efficacy of
21 existing state bans on large-capacity magazines and
22 assault weapons, and he identified why no value should
23 be placed, why less value should be placed on those
24 studies, because they looked at the wrong outcome.
25 They looked at whether this reduced crime generally,

1 the straw man that the plaintiffs have erected saying
2 this ban doesn't reduce crime generally.

3 That's not the target. The idea is there are
4 particularly dangerous firearms and magazines, and if
5 criminals are forced to substitute other firearms that
6 are less dangerous and other magazines that have
7 lesser capacity, that the result will be fewer shots,
8 fewer injuries, and, therefore, reducing the negative
9 effects of handgun violence.

10 So the plaintiffs have a strongly misleading
11 focus on quotes pulled out of context from Dr. Koper
12 that he has explained in his declarations in this
13 case.

14 THE COURT: My recollection even of his
15 deposition surrounding some of those quotes is that he
16 would say yes, I agree, subject to qualification.

17 MR. FADER: In fact, on that point of the State
18 bans, and a part conveniently omitted from the
19 citation to the declaration from the plaintiffs, he
20 said subject to the same qualifications I used in the
21 report.

22 They ignored the qualifications in the report.
23 They ignored the qualifications that he made in his
24 declaration and pretended they weren't there, and
25 that's true with respect to pretty much every citation

1 they have from Professor Koper's testimony. Professor
2 Koper explained why, in his testimony about a specific
3 level of scientific probability, he couldn't provide
4 one.

5 Well, there's no requirement that the General
6 Assembly have evidence that something that it is going
7 to implement will work to a degree of scientific
8 certainty. It's what support there is for the
9 predictive judgment that the General Assembly had
10 made.

11 Professor Koper explains why evidence from the
12 federal ban does not necessarily apply to a different
13 ban that Maryland is implementing now, especially with
14 improvements that Maryland may have made.

15 The plaintiffs are correct that the Heller
16 decision had no discussion of balancing, and balancing
17 is not what the State is asking this Court to do.

18 The Supreme Court in Heller, at page 634,
19 specifically discussed the balancing inquiry that
20 Justice Breyer was recommending, and the Supreme Court
21 specifically said that Justice Breyer's
22 interest-balancing test was not any of the traditional
23 forms of scrutiny that that Supreme Court had implied.

24 Intermediate scrutiny is not a form of interest
25 balancing. It does not ask this Court to weigh the

1 evidence on one side or the other and come out with
2 your own conclusion as to what the best policy would
3 be. That's not what intermediate scrutiny does. It's
4 to look at whether there is a reasonable fit between
5 the law and the government's interest.

6 And yes, that reasonable fit inquiry has been
7 determined to look at whether the law is tailored to
8 the interest, is narrowly tailored, not in the sense
9 of a strict scrutiny standard of whether it is the
10 narrowest of all possible applications, but whether
11 there is a reasonable fit, whether it is reasonably
12 tailored.

13 Here, the General Assembly took a reasonable
14 tailored approach to this. They didn't ban all
15 semiautomatic weapons. They didn't ban all weapons
16 that had been used in crime. This is focused on
17 particular firearms that have been manufactured, sold,
18 identified as particularly useful in military-style
19 assaults and have been found to be disproportionately
20 used in mass public shootings and the murder of law
21 enforcement officers. It is not a balancing, and it
22 is a tailored law.

23 The plaintiffs also I think make a mistake in
24 attempting to find support from Heller with respect to
25 the issue of whether these firearms are popular, and

1 they are quoting from provisions in Heller which talk
2 about how the handgun is overwhelmingly chosen as a
3 class of weapons for lawful defense of the home. The
4 plaintiffs read that as basically saying anything
5 that's popular gets protection absolutely and cannot
6 be banned.

7 That's manifestly misreading Heller, which was
8 focused on a particular class of weapons most used by
9 Americans for self-defense, a firearm that now, after
10 having a few years of sales that have been much
11 greater than any years before, may have at most
12 reached the level of being less than three percent of
13 the gun stock of the country, simply doesn't qualify
14 on the same plane as the entire class of weapons
15 overwhelmingly chosen by Americans for self-defense.

16 To the extent that there was discussion about
17 the intermediate scrutiny standard and different
18 articulations of it, I would submit that those are
19 different articulation of the standard and not
20 fundamental differences in the test being applied.

21 In fact, in each of the cases, including the
22 D.C. Circuit's decision in Heller II, and the other
23 cases in New York, Connecticut and Colorado, the
24 courts reached the same result, which is that these
25 laws satisfy intermediate scrutiny. There is a

1 minimal, if any, burden on the Second Amendment right,
2 and that the government's evidence, substantially
3 similar to the evidence in this case, is sufficient to
4 meet that burden.

5 A word with respect to Chief Johnson's
6 testimony, Your Honor. The testimony of Chief Johnson
7 before the General Assembly was not anything, first of
8 all, that was in the custody or control of the
9 defendants, and moreover, not anything that the
10 defendants had intended to use until the plaintiffs
11 made I think a legally inaccurate argument that the
12 Court's focus needed to be on evidence that was before
13 the General Assembly.

14 But more importantly, it's in the public record.
15 It's available for Your Honor to have taken judicial
16 notice of it, whether it was cited by any party. It
17 also duplicates the testimony that he had in this case
18 on the same issues, and plaintiffs had a full
19 opportunity to examine him with respect to that when
20 they deposed him in this case.

21 Notably absent from the plaintiffs' presentation
22 was any discussion really of the testimony that the
23 law enforcement officers, the chief law enforcement
24 officers of Maryland's largest law enforcement
25 agencies have given in this case, which in and of

1 itself provides more than sufficient justification for
2 the predictive judgment to the General Assembly
3 discussing the particular dangers that these firearms
4 present to law enforcement in the context of mass
5 shootings and these active shooter events, that even
6 though we are fortunate enough to not have had one in
7 Maryland, that we are as much at risk as any state in
8 the country, except that our General Assembly is
9 trying to enact laws to protect against that.

10 The simple fact that, as Mr. Sweeney said,
11 praise the Lord, it hasn't happened here does not mean
12 that the General Assembly is left to simply hope that
13 it doesn't happen, without taking action, when there
14 is substantial evidence to support the predictive
15 judgment that it made.

16 For those reasons, Your Honor, unless Your Honor
17 has questions, the defendants would ask that the Court
18 grant their motion for summary judgment and dismiss
19 the lawsuit.

20 THE COURT: Thank you, Mr. Fader. I appreciate
21 it.

22 Mr. Sweeney, would you like a rebuttal?

23 MR. SWEENEY: Briefly, Your Honor, yes.

24 I must say that rebuttal generated a flurry of
25 notes for me from my team. I will do my best to give

1 them justice.

2 First, with respect to what Dr. Koper said about
3 the efficacy of the federal ban in his official report
4 to the Department of Justice and the United States
5 Congress in 2004, on page two, one, there has not been
6 a clear decline in the use of assault rifles.

7 Two, the ban has not yet reduced the use of
8 large-capacity magazines in crime.

9 Even if you are looking for a narrow purpose,
10 not the prevention of crimes, not the prevention of
11 assaults on law enforcement officers, not the
12 prevention of mass shootings, but simply less frequent
13 use of the banned firearms and magazines, that did not
14 occur in the ten years of the federal ban, according
15 to the official report on its effectiveness.

16 THE COURT: Mr. Fader suggested that the federal
17 ban did not prohibit transfers of the existing
18 weapons?

19 MR. SWEENEY: Well, Your Honor, the Maryland ban
20 is far more vulnerable to substitution than the
21 federal ban was.

22 Imagine, if you will, the difference between
23 having a ban that covers all of the United States and
24 a ban in Maryland that does not extend to
25 Pennsylvania, Delaware or Virginia, three contiguous

1 states, in which the magazines in question can readily
2 be purchased, brought into the state, and lawfully
3 possessed by Marylanders. That was not an incident
4 with the federal ban. The Maryland ban is far more
5 vulnerable to substitution of other firearms.

6 So true with respect to semiautomatic rifles
7 covered by the Maryland ban. The heavy-barrel AR-15,
8 for instance, which is exempted from the ban by
9 statute, can be readily created out of any AR-15 by
10 simply substituting in a heavy barrel.

11 And what's the purpose of the heavy barrel?
12 Well, it's heavier. It keeps the gun from floating up
13 during frequent fire, and it keeps the barrel from
14 overheating during many rounds being exchanged. That
15 makes it very useful for competitive marksmanship.

16 Now if any AR-15 can be readily converted to
17 make it legal under Maryland's law, how could it be
18 any more vulnerable than the federal law was -- any
19 less vulnerable than the federal law was?

20 Let me address for a moment the Rule 702 issue,
21 Your Honor, because frankly, it troubles me.

22 While the test of substantial evidence to
23 support, and we maintain there is substantial evidence
24 before the legislature, because how could the
25 legislature have draw inferences from evidence which

1 was not before it?

2 But let's set aside whether it's the
3 substantiality of evidence before the legislature or
4 that which was added after the fact. That evidence
5 itself must pass Rule 702, or what is Rule 702 for?

6 I have seen no case --

7 THE COURT: I think Rule 702 primarily applies
8 to the admissibility of evidence in a court
9 proceeding. It's not ordinarily something that the
10 legislature has to deal with.

11 MR. SWEENEY: And this is a court proceeding.

12 THE COURT: But when it's in front of a
13 legislature, it is a legislative proceeding.

14 MR. SWEENEY: And when it comes to court, there
15 must be substantial evidence.

16 THE COURT: Right.

17 MR. SWEENEY: The substantiality of evidence
18 must be evidence which is admissible, and the
19 admissibility of evidence is ruled by, among other
20 things, Rule 702.

21 Mr. Fader's position is that the rights of
22 Marylanders can turn on junk science, and that's
23 perfectly fine, and that this Court has nothing to say
24 in that, that you have no role whatsoever in
25 determining the admissibility of that evidence,

1 whether it's reliable, whether it's credible, and
2 whether the experts are even basing their opinions on
3 expertise.

4 THE COURT: Well, I don't agree with your
5 characterization of Mr. Fader's argument, but I
6 understand your point and your reasons for challenging
7 Dr. Koper's opinions.

8 MR. SWEENEY: Dr. Koper's opinions are simply
9 not based on sufficient data. They would not pass
10 muster under Rule 702.

11 Mr. Fader suggested there was a pipeline of
12 manufactured firearms that had been manufactured prior
13 to the effective date of the federal ban that affected
14 its efficacy. There is no evidence that there was a
15 ten-year pipeline of supply. In other words, whatever
16 pipeline there was, it certainly was not shown to have
17 lasted the full extent of the ten-year ban, and that
18 was certainly not addressed.

19 Even if you consider the evidence before the
20 legislature, there is no substantial tailoring here.
21 They didn't try to make this law as narrow as
22 necessary to intrude the least on Second Amendment
23 rights. No effort was done by the General Assembly.
24 There is no evidence of that. No effort was even done
25 by Mr. Fader.

1 He comes in and he says oh, well, we didn't ban
2 all semiautomatic rifles, only some, only the most
3 popular semiautomatic rifles.

4 We have in the record evidence from the Maryland
5 State Police that the AR-15 is the most popular
6 centerfire semiautomatic rifle in the United States,
7 followed only by the AK-47, both of them banned.

8 They cannot pretend that they have left unbanned
9 large swaths of semiautomatic rifles. Even if there
10 was support for their subclass argument, their
11 subclass argument fails.

12 They draw their subclass argument from Heller
13 and they make it in three different contexts.

14 First they say because this isn't the ban of a
15 complete class of firearms, it isn't protected by the
16 Second Amendment. It doesn't even involve the Second
17 Amendment.

18 Then they say well, there's no burden on Second
19 Amendment rights, because we didn't ban a complete
20 class of firearms.

21 The weight they try to put on the word class in
22 Heller will not be borne by the language there.

23 Judge Scalia said the handgun ban amounts to a
24 prohibition of an entire class of arms that is
25 overwhelmingly chosen by American society for that

1 lawful purpose.

2 In 1994, in the Staples case, cited and relied
3 upon by the defendants in their opening brief, the
4 Supreme Court had occasion to distinguish between
5 automatic and semiautomatic rifles. The context of
6 that case is critical, and even more important is the
7 language used by the court there.

8 It is also important to understand that the
9 author of that opinion was Judge Thomas, who joined in
10 Scalia's opinion in Heller, Justice Scalia, who
11 authored Heller, Justice Kennedy, who joined in
12 Justice Scalia's opinion, as well as Justice Ginsburg,
13 who joined in the Staples majority opinion.

14 Now, what did that case involve? It was a
15 violation of the same act that had been involved in
16 the Miller case about what arms are prohibited, and
17 what arms are covered by the Second Amendment.

18 Now, there wasn't a Second Amendment discussion
19 back in 1994, but what there was was a detailed
20 discussion about the critical distinction between
21 automatic and semiautomatic fire. In fact, that's the
22 point for which Mr. Fader relies on that case in his
23 opening brief; but what he didn't read carefully
24 enough was what did that case really involve?

25 It was the prosecution of an individual who was

1 in possession of an AR-15 that had been converted to
2 make it capable of automatic fire, and the government
3 said you're guilty. You're guilty under Miller.

4 This is a firearm that had to have been
5 registered with the ATF.

6 By the way, I can purchase an M16 today, pay the
7 tax stamp with the IRS -- the ATF, and I can come home
8 with it and use it in Maryland. It's not banned by
9 the law, a fully automatic M16, but that's beside the
10 point.

11 What this case said was the government's
12 position was that an AR-15, a semiautomatic firearm,
13 is so dangerous that the person who owns it should
14 expect that it might fall under the Act and require
15 registration.

16 The individual said I didn't know it was capable
17 of automatic fire. I never used it for automatic
18 fire. I had no idea.

19 He was convicted, and the Supreme Court rejected
20 that, and they went through great detail about the
21 difference between automatic fire and semiautomatic
22 fire. They said that the AR-15s capable of being
23 converted to fully automatic fire are a class of
24 weapons, a class of weapons, not just semiautomatic
25 rifles being a class of weapons, not AR-15

1 semiautomatic rifles being a class of weapons.

2 But AR-15 semiautomatic rifles capable of being
3 readily converted into automatic fire were referred to
4 by the Supreme Court in the Staples case not once as a
5 class, not twice as a class, three times as a class.

6 I doubt that Justice Scalia, writing in the
7 Heller case in 2008, was unmindful of the Staples
8 case, which he cited in his Heller case, or the fact
9 that they relied upon the word class to describe a
10 narrow category of only some semiautomatic rifles. It
11 simply doesn't bear the weight that defendants would
12 try to put on it.

13 So what we come down to in this case is is there
14 evidence substantial or otherwise to support the Act?
15 Where is the narrow tailoring? Why ten rounds? Why
16 not 15?

17 Fifteen was the number involved in Colorado.
18 Seven was used in New York, and that was rejected out
19 of hand by the court. Seven, on a case relied on by
20 Mr. Fader, was found to be constitutionally
21 impermissible. The Colorado court said 15.

22 Where is the attempt to narrowly tailor? Where
23 did ten come from? Where is the support for it?

24 The Washington Post study that they rely on to
25 suggest that well, maybe there was an effect after all

1 with respect to the federal ban is another example of
2 unreliable data collected by the media, untested,
3 unreported in any peer review journal.

4 The people of Maryland deserve better, and we
5 are relying on Your Honor to be the gatekeeper.

6 Thank you very much for your time and for your
7 patience, Your Honor.

8 THE COURT: Thank you, Mr. Sweeney.

9 As I said at the beginning, I do appreciate the
10 very careful, thorough briefing and argument from both
11 sides, and that you obviously have been able to work
12 together well. These are important issues, and I will
13 get a written decision out for you as soon as
14 possible. Thank you all very much.

15 (The proceedings concluded.)
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REPORTER'S CERTIFICATE

I hereby certify that the foregoing transcript in the matter of Stephen V. Kolbe, et al., Plaintiffs vs. Martin J. O'Malley, Defendants, et al., Civil Action No. CCB-13-2841, before the Honorable Catherine C. Blake, United States District Judge, on July 22, 2014 is true and accurate.

Gail A. Simpkins
Official Court Reporter

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