

# 14-36-cv(L)

**14-37-cv(XAP)**

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IN THE

## United States Court of Appeals

FOR THE SECOND CIRCUIT



WILLIAM NOJAY, THOMAS GALVIN, ROGER HORVATH, BATAVIA MARINE & SPORTING SUPPLY, NEW YORK STATE RIFLE AND PISTOL ASSOCIATION, INC., WESTCHESTER COUNTY FIREARMS OWNERS ASSOCIATION, INC., SPORTSMEN'S ASSOCIATION FOR FIREARMS EDUCATION, INC., NEW YORK STATE AMATEUR TRAPSHOOTING ASSOCIATION, INC., BEDELL CUSTOM, BEIKIRCH AMMUNITION CORPORATION, BLUELINE TACTICAL & POLICE SUPPLY, LLC,

*Plaintiffs-Appellants-Cross-Appellees,*

v.

ANDREW M. CUOMO, GOVERNOR OF THE STATE OF NEW YORK,  
ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL OF THE STATE OF NEW YORK,  
JOSEPH A. D'AMICO, SUPERINTENDENT OF THE NEW YORK STATE POLICE,

*Defendants-Appellees-Cross-Appellants,*

and

FRANK A. SEDITA, III, DISTRICT ATTORNEY FOR ERIE COUNTY, GERALD J. GILL,  
CHIEF OF POLICE FOR THE TOWN OF LANCASTER, NEW YORK, LAWRENCE FRIEDMAN,

*Defendants-Appellees.*

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*On Appeal from the United States District Court  
for the Western District of New York (Buffalo)*

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### **BRIEF FOR *AMICUS CURIAE* NATIONAL RIFLE ASSOCIATION**

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## **CORPORATE DISCLOSURE STATEMENT**

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

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## IDENTITY AND INTERESTS OF AMICUS<sup>1</sup>

*Amicus Curiae* National Rifle Association, Inc. (the “NRA” or “*Amicus*”) was founded in 1871 by Col. William C. Church and Gen. George Wingate to promote rifle marksmanship skills in the United States.<sup>2</sup> Over the past 150 years, its membership has grown to include over four million members nationwide. The NRA has remained true to its founding principles still working tirelessly today to advocate for safe firearm shooting, quality marksmanship, thorough training, and sound education.

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

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

<sup>2</sup> All Parties have consented to the filing of this Brief.

The NRA's *Amicus* brief will assist the Court in determining the proper level of constitutional scrutiny to apply and the appropriate weight to give to the expert evidence offered by Defendant-Appellees, which is a critical, and possibly determinative, issue in this case.

## INTRODUCTION

The New York Secure Ammunition and Firearms Enforcement Act of 2013 (the "SAFE Act") was signed into law by Gov. Cuomo on January 15, 2013. Among other things, the SAFE Act banned the purchase, transfer, or receipt within the state of New York of so-called "assault weapons," defined as semi-automatic rifles with a detachable box magazine and at least one specified "feature," and the purchase, transfer, receipt or possession of so-called "large-capacity" magazines, defined as detachable box magazines capable of holding more than ten rounds of ammunition.

The provisions of the SAFE Act challenged by Plaintiff-Appellants infringe upon the "core" Second Amendment right of self-defense. Moreover, these provisions of the SAFE Act intrude into the home, where they prohibit the possession of commonly owned firearms. This is precisely the type of restriction the Supreme Court struck in *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008), without resort to any interest-balancing test. Legal scholars have observed that courts have adopted the very interest-balancing test rejected by the Supreme

Court in *Heller*. As one author (a former staff attorney for the Brady Center to Prevent Gun Violence) phrased it, courts “have effectively embraced the sort of interest-balancing approach that Justice Scalia condemned, adopting an intermediate scrutiny test and applying it in a way that is highly deferential to legislative determinations and that leads to all but the most drastic restrictions on guns being upheld.”<sup>3</sup> Allen Rostron, *Justice Breyer’s Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 705-06 (2012).

The NRA recognizes that this Court has applied traditional, First Amendment tests to challenges under the Second Amendment.<sup>4</sup> See *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 n.9 (2nd Cir. 2012). Both Second Circuit case law, and that of other Circuits that have spoken on the issue, make clear that

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<sup>3</sup> This phenomenon has precedent in modern jurisprudence. After the United States Supreme Court’s seminal decision in *Roe v. Wade*, 410 U.S. 113 (1973), state legislatures and lower courts throughout the country made every effort to deny, ignore, limit, misapply and restrict the rights the Court had acknowledged for the first time. This led to years of frustration and litigation, culminating in several later decisions where the Supreme Court overturned restriction after restriction, explaining every time that its holding in *Roe* was not being given the credence it required by the legislatures or lower courts. See *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); and *Stenberg v. Carhart*, 530 U.S. 914 (2000).

<sup>4</sup> The appropriate analysis in this case is that which was used in *Heller*. Because the law effects a complete ban on the possession of commonly owned firearms, it is *per se* unconstitutional without resort to any interest balancing. Because this argument is set forth in Plaintiff-Appellents’ brief, *Amicus* will confine its argument only to the appropriate level of scrutiny, should the Court continue to apply interest balancing tests derived from First Amendment jurisprudence.

strict scrutiny is the only appropriate standard of review, if any balancing test is applied.

The court below erred, both in applying an intermediate scrutiny test and in crediting Defendant-Appellees' social science. In attempting to meet their burden to establish the constitutionality of the SAFE Act, Defendant-Appellees have offered declarations from social scientists that they claim support the position that the SAFE Act will have an impact on the criminal use, and consequences thereof, of the banned firearms and magazines. This Court must weigh for itself such evidence because its review on summary judgment is de novo and such expert evidence must meet the standards of Federal Rule of Evidence 702. This Court should reject their opinions as to the efficacy of bans on so-called “assault weapons” and “large capacity magazines,” because their own evidence establishes that such laws are ineffective.

The only conclusion that is supported by the evidence is that the challenged laws are unconstitutional.

## **ARGUMENT**

### **I. Strict Scrutiny Is the Only Balancing Test That Can Apply.**

This Court has twice before resolved challenges under the Second Amendment that involved laws that prevented individuals from possessing

firearms to some degree.<sup>5</sup> *Kachalsky, supra; United States v. DeCastro*, 682 F.3d 160 (2nd Cir. 2012). In *DeCastro*, this Court declined to review under heightened scrutiny the federal prohibition on “transferring into one’s state of residence firearms acquired outside the state.” *DeCastro*, 682 F.3d at 168. The Court did not find any impediment to acquiring a firearm because that law merely required a prospective purchaser to comply with state laws regarding eligibility to own firearms by effecting a transfer through a licensed firearm dealer within one’s home state. *Id.* The challenged statute did not prevent anyone from acquiring or possessing a firearm; it only regulated the manner in which one must complete a purchase of an out-of-state firearm. Thus, the Court concluded that there were “ample alternative means” of acquiring the desired firearm – whether by purchasing it in state or having it lawfully transferred – such that the Second Amendment was not offended.

In *Kachalsky*, this Court was confronted with a much more intrusive burden on the Second Amendment rights of law-abiding citizens. This Court was called upon to review the requirement that an applicant for a carry permit demonstrate

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<sup>5</sup> In *Kwong v. Bloomberg*, 723 F.3d 160 (2nd Cir. 2013), this Court resolved a challenge to New York’s handgun licensing scheme. As this Court stated, there was “no evidence” that the fee had prevented any plaintiff from actually acquiring a firearm. *Id.* at 167. The Court did not resolve whether intermediate scrutiny or rational-basis review should be employed, because it determined that the challenged law would satisfy intermediate scrutiny. *Id.* at 168. The holding was not based on any analysis of Second Amendment law or on a balancing of interests; rather, this Court held that the fee in question was not impermissible because it was designed to recoup the costs of the licensing program and did not exceed the actual cost of the license. *Id.* at 168-69.

“proper cause” to obtain the permit. 701 F.3d at 83. This Court held that the law did impose more than an inconsequential burden on Second Amendment rights because it prevented citizens from possessing firearms outside the home and heightened scrutiny was necessary. *Id.* at 94-97. In so doing, this Court recognized that the “critical difference” was that “New York’s licensing scheme affects the ability to carry handguns only in public, while the District of Columbia ban [in *Heller*] applied in the home ‘where the need for defense of self, family, and property is most acute.’” *Id.* at 94 (quoting *Heller*, 554 U.S. at 628)(emphasis in original).

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

This is in keeping with the jurisprudence of the Fourth Circuit, which has been even more explicit in its affirmation that strict scrutiny is appropriate to

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

Although Chester asserts his right to possess a firearm in his home for the purpose of self-defense, we believe his claim is not within the core right identified in *Heller* – the right of a *law-abiding*, responsible citizen to possess and carry a weapon for self-defense – by virtue of Chester’s criminal history as a domestic violence misdemeanant. Accordingly, we conclude that intermediate scrutiny is more appropriate than strict scrutiny for Chester and similarly situated persons.

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

More recently, the Fourth Circuit has opined that a ban on possession of firearms in the home was subject to strict scrutiny: “As we observe that any law regulating the content of speech is subject to strict scrutiny, . . . we assume that any

law that would burden the ‘fundamental,’ core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny.” *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011)(emphasis added); *see also United States v. Carter*, 669 F.3d 411, 416 (4th Cir. 2012)(“[W]e have noted that the application of strict scrutiny is important to protect the core right of self-defense identified in *Heller* . . .”).

Recently, the Fourth Circuit in *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013), drew precisely the same distinction as this Court in *Kachalsky*. In *Woollard*, the Fourth Circuit considered a challenge under the Second Amendment to Maryland’s requirement that a citizen have a good and substantial reason before he or she could receive a concealed carry weapon permit. The court held that intermediate scrutiny applied to bearing arms outside the home and rejected the argument that strict scrutiny applied because that would “place the right to arm oneself in public on equal footing with the right to arm oneself at home, necessitating that we apply strict scrutiny . . . .” *Id.* at 878; *see also Heller v. District of Columbia*, 670 F.3d 1244, 1258 (D.C. Cir. 2011)(*Heller II*)(using what it called intermediate scrutiny to analyze prohibitions on “assault weapons” and “large capacity magazines” where the prohibition extended to the home, but requiring defendants to establish “a fit that employs . . . a means narrowly tailored to achieve the desired objective”).

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

Applying strict rather than intermediate scrutiny to the SAFE Act would be more in line with the Supreme Court’s holding in *Heller* as well. That case is most often remembered, and cited, for the fact that it held the Second Amendment to be an individual right and that it held a complete ban on the possession of handguns violated the Second Amendment. What is often glossed over is the fact that the

Supreme Court also held that a ban on commonly owned long guns, such as those prohibited by the SAFE Act, was unconstitutional when it struck down the D.C. requirement that any firearm stored within a home be rendered inoperable. *Heller*, 554 U.S. at 636. To be sure, the SAFE Act does not ban the possession of all long guns. Such a law would be manifestly unconstitutional under the rationale employed in *Heller*. But, because the SAFE Act does ban the possession of many such commonly owned firearms, its provisions fall within the ambit of *Heller*'s mandate, and must be subjected to at least strict scrutiny.

There exists a defined road map for Second Amendment jurisprudence established by this Court and the Fourth Circuit. Laws, such as the SAFE Act, that ban the possession of commonly owned firearms used for lawful purposes by law-abiding, responsible citizens must, at the very minimum, be subjected to strict scrutiny.

## **II. The Social Science Relied Upon By Defendant-Appellees Does Not Support Their Positions.**

The social science present by Defendant-Appellees in this does not support the opinions relied upon by the lower court. Defendant-Appellees, and the lower court, drew heavily upon the opinions of Dr. Christopher Koper and Lucy Allen. The lower court in this case did not have the benefit of deposition testimony of these two experts. Because they have been deposed subsequently in other similar

litigation, revealing the lack of foundation for their opinions, this Court should disregard their opinions here.

**A. Dr. Christopher Koper**

There is currently ongoing litigation in Maryland regarding the constitutionality of that State's ban on so-called "assault weapons" and "large capacity magazines." *See Kolbe v. O'Malley*, No. 1:13-cv-02841-CCB (D. Md. 2014). Defendants in that case also relied upon the work of Dr. Koper and Ms. Allen. In that case, however, these experts were subjected to cross-examination at deposition.

The lower court here relied upon Dr. Koper's opinions to support a number of contentions. First, the court cited Dr. Koper for the notion that "[s]tudies and data support New York's view that assault weapons are often used to devastating effect in mass shootings." D. Ct. Op. at 29. In support of this point, the lower court referenced paragraphs 11-14 of Dr. Koper's declaration. Paragraph 11 is nothing more than a statement that Dr. Koper believes that "assault weapons" are frequently used in mass shootings, and paragraph 14 does not even mention mass shootings. *See R.* at A-289-90. A careful analysis of the basis for his opinions in paragraphs 12-13, however, reveals that they are not sufficient to support the lower court's conclusions.

First, Dr. Koper states that “[p]rior to the federal ban, assault weapons or other semiautomatics with [large capacity magazines] were involved in 6, or 40%, of 15 mass shooting incidents occurring between 1984 and 1993 in which six or more persons were killed or a total of 12 or more were wounded.” R. at A-289. This statement does not provide the foundation the lower court believed for three reasons. First, it conflates evidence on “assault weapons” and “large capacity magazines.” As Dr. Koper noted in his deposition testimony, however, he was not sure how many of those six incidents involved “assault rifles” versus “assault pistols” or other firearms with large capacity magazines. Dep. of Christopher Koper, Addendum (“Add.”) at p. 12. Dr. Koper could only state that “at least three of those . . . appeared to have involved an assault rifle.” *Id.* He also could not state with any certainty that the “assault rifles” were actually used in the crimes, except in one incident. *Id.* at pp. 12-13 (stating, in response to the question of whether the firearms were possessed or used, “[t]hey were possessed. I believe they were the weapons used. The way I write about the Patrick Purdy incident in particular used the AK-47. I believe – well, but the other ones you have to look into more depth into the cases”). Thus, Dr. Koper had specific knowledge in only one instance that a firearm banned by the laws challenged by Plaintiff-Appellants was actually used in a mass shooting.

That Dr. Koper could testify with specificity to only one incident involving a banned firearm is in line with his study, reported in his 2004 published work, in which he found that in only one of twenty-eight mass murder events he and his team studied was an “assault weapon” used. R. at A-464 n.12. Moreover, this single incident was perpetrated with an assault pistol, not a rifle. Dep. of Christopher Koper, Add. at p. 11 (“Q: All right. So the one report of an assault weapon used in the 1992/1994 period for mass murder of four or more persons was in fact an assault pistol; correct? A: It would seem so.”).

Dr. Koper’s opinion with respect to mass shootings is also flawed because it includes assault pistols in its definition of “assault weapons.” R. at A-285 ¶ 5; Dep. of Christopher Koper, Add. at p. 9 (“Generally speaking I did not always break out assault rifles and assault pistols.”). Thus, the relevance of his opinion is seriously called into question. By conflating assault pistols with assault rifles, Dr. Koper has obscured the actual data in an attempt to mislead the Court. Without knowing how the incidents break down, there is no way to know if Dr. Koper’s data supports a conclusion as to assault rifles, assault pistols, or neither.

The third flaw with relying on Dr. Koper’s opinions regarding mass shootings to justify the SAFE Act is that they are based on extremely few incidents. As Dr. Koper noted in his declaration, he reported the analysis of only fifteen incidents over a decade, of which only six involved “assault weapons or

other semiautomatics with [large capacity magazines].” R. at 289 ¶ 12. Thus, Dr. Koper’s declaration that these firearms have a “disproportionate involvement” in mass shootings is based on their being used on average less than once per year, at most. Common sense dictates that such rare use of commonly possessed firearms could not amount to “disproportionate involvement.” As Dr. Koper himself admitted at his deposition, “one has to be cautious” when extrapolating conclusions from such a small set of data. Dep. of Christopher Koper, Add. at p. 10.

Paragraph thirteen of Dr. Koper’s declaration is equally flawed. Dr. Koper reports that “a media investigation and compilation of 62 lone-shooter, public mass shooting incidents that involved the death of four or more people, over the period 1982-2012, reports that more than half of these mass shooters possessed assault weapons or both.” R. at A-289 ¶ 13. Clearly, this opinion shares the issue of confounding the possession of assault rifles with the possession of large capacity magazines and/or assault pistols. It also suffers from the fatal flaw of relying on data reported by an online magazine that has never been peer-reviewed, as Dr. Koper acknowledged at his deposition. Dep. of Christopher Koper, Add. at p. 17 (“Q: And the *Mother Jones* data hasn’t been published in any peer review journal; correct? A: Correct.”).

Thus, all of the parts of Dr. Koper's declaration related to mass shootings relied upon by the district court are not supported by sufficient, reliable evidence. This Court should not base its ruling on so flimsy a foundation.

The lower court also relied upon Dr. Koper to support the statement that "New York presents evidence that its regulations will be effective." D. Ct. Op. at 32. The lower court specifically cited Dr. Koper's statement that the SAFE Act is "likely to advance New York's interests in protecting its populace from the dangers of [] shootings." *Id.* (quoting R. at A-306 ¶ 65). This statement is demonstrably false and has been directly contradicted by Dr. Koper in both his published work and at deposition.

The quotation adopted by the lower court was based on Dr. Koper's statement in his declaration that "[i]n sum, it is my considered opinion that New York's bans on assault weapons and large-capacity magazines, particularly its [large capacity magazine] ban, have the potential to prevent and limit shootings in the State . . . ." R. at A-306 ¶ 65. Dr. Koper stated in his 2004 published work, however, that "there is not a clear rationale for expecting the [federal] ban to reduce assaults and robberies with guns." R. at A-530. Dr. Koper confirmed this was an accurate statement of his beliefs at his deposition. Dep. of Christopher Koper, Add. at p. 2. Dr. Koper admitted that he "cannot conclude to a reasonable degree of probability that the federal ban on assault weapons and large capacity

magazines reduced crimes related to guns.” Dep. of Christopher Koper, Add. at pp. 2, 8. Thus Dr. Koper has admitted that laws such as the SAFE Act do not “have the potential to prevent and limit shootings.” R. at A-306 65. His contrary statement in his declaration should be disregarded as unsupported by his own research.

The lower court also relied on Dr. Koper’s conclusion that “‘criminal use of assault weapons declined after the federal assault weapon ban was enacted in 1994, independent of trends in gun crime.’” D. Ct. Op. at 32 (quoting R. at A-306 ¶ 65). This claim is, at best, misleading, based on Dr. Koper’s previous work and his sworn statements during his deposition. He confirmed the ban “didn’t reduce the number of deaths or injuries caused by guns either . . . .” Dep. of Christopher Koper, Add. at p 8. He also admitted that he is not aware of any expert who has studied the impact of the federal ban and has come to a different conclusion. *Id.* at p. 7. Even Dr. Koper's published work belies his opinion here, admitting that “there has not been a clear decline in the use of [Assault Rifles]” in crime as a result of the federal assault weapon ban. CHRISTOPHER KOPER, UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE at 2 (July 2004). Similarly, he admitted the federal ban did not cause a decline in the criminal use of magazines with more than ten rounds. *Id.* As Dr. Koper admitted at his deposition, “[t]here has been no discernible reduction in the

lethality and injuriousness of gun violence” as a result of the federal ban. Dep. of Christopher Koper, Add. at p. 6.

Thus, Dr. Koper's deposition testimony and published work contradict his opinion here, relied upon by the lower court, that the federal ban had an effect on firearms violence.

The lower court also relied upon Dr. Koper to support its conclusion that the magazine ban is constitutional. D. Ct. Op. at 33. The court specifically stated that “the link between the SAFE Act’s restrictions on large-capacity magazines and the state’s interest in public safety is arguably even stronger” than it was for the firearm ban. *Id.* This conclusion, based on the work of Dr. Koper, is betrayed by the work of Dr. Koper himself. In his 2004 work, Dr. Koper found that the federal law did not reduce the criminal use of banned magazines. R. at A-453 (“[T]he ban has not yet reduced the use of [large capacity magazines] in crime . . . .”); *see also* Dep. of Christopher Koper, Add. at p. 5 (stating that when he conducted his 2004 study, there was “not clearly a reduction yet in the use of guns with large capacity magazines”). Thus, Dr. Koper’s own evidence demonstrates that banning magazines above a certain capacity does not have a “link” to furthering New York’s interest in public safety, because it will not actually reduce the criminal misuse of these magazines.

The most direct statement provided by Dr. Koper on the potential impact a law such as the SAFE Act could have was set forth in his 2004 published work, where he noted, “a few studies suggest that state-level [assault weapons] bans have not reduced crime.” R. at A-530 n.95. Dr. Koper confirmed that this was true at his deposition:

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

A: Yes.

Q: And is that still your view today?

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

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

Finally, Dr. Koper’s work is fatally flawed because he was unable to state his opinions to a reasonable degree of scientific probability. The term “reasonable degree of scientific certainty” simply means that a conclusion is more likely than not to be true – a low threshold. *See Burke v. Town of Walpole*, 405 F.3d 66, 91

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

Dr. Koper could not testify to a reasonable degree of scientific certainty that the firearm bans challenged in Maryland, which are substantially similar to those at issue in this case, would reduce the number of crimes perpetrated with the banned magazines and firearms. He also could not state that they would reduce the number of shots fired in crimes, would reduce the number of gunshot victims in crimes, would reduce the number of wounds per gunshot victim, would reduce the lethality

of gunshot injuries, or would reduce the societal costs of gunshot violence. Dep. of Christopher Koper, Add. at p. 14-15.

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

### **B. Lucy Allen**

The lower court referenced Ms. Allen’s work on two separate occasions. First, the court relied upon Ms. Allen’s work to support its conclusion that “more people die when a shooter has a large-capacity magazine,” and that large capacity magazines are over-represented in mass shootings. D. Ct. Op. at 33-34. Second, the lower court noted that Defendant-Appellees relied upon Ms. Allen to support their argument that the seven-round loading limit was constitutional. *Id.* at 36. Ms. Allen’s testimony at her deposition in the Maryland case (in which she offered opinions that are substantially identical to those in this case) undermine her opinions offered in this case. Neither the lower court’s nor the Defendant-Appellees’ reliance on Ms. Allen is warranted and this Court should not follow suit.

With respect to her opinions related to mass shootings, Ms. Allen relied upon data from *Mother Jones* magazine and the Citizens Crime Commission in

reaching her conclusions regarding the use of the banned magazines in mass shootings. R. at A-617 ¶ 17. She simply accepted this data without conducting any independent research to verify whether it was true. In fact, she testified that she did not even know if anyone had verified the data in a rigorous manner. Dep. of Lucy Allen, Add. at p. 24 (stating that she does not know if anyone has “ever gone through the process of reviewing the analysis” as one would to prepare for peer review). Without any research into the reliability of the data that she did not collect, her opinions are based on nothing more than a magazine article.

Moreover, the statements in Ms. Allen’s declaration and the lower court’s interpretation of them, are simply wrong, based upon Ms. Allen’s sworn testimony. The lower court stated “more troubling, [large capacity magazine use] is on the rise. In the past year, guns with large-capacity magazines were used in at least five of the six mass shootings,” D. Ct. Op. at 33, based on Ms. Allen’s declaration. Ms. Allen offered her declaration in this case on June 21, 2013. R. at A-619. Ms. Allen was deposed on January 24, 2014, in the Maryland case. Dep. of Lucy Allen, Add. at p. 19. Ms. Allen was asked about her opinions related to the criminal use of banned magazines in mass shootings and admitted that there was evidence of their use in only 5 of 12 mass shootings in the past two years:

Q: And so if there were five with large capacity divided by 12, that – I have about 42 percent, does that sound about right to you of the total population of which we know large-capacity magazines were used, right?

A: Yes, which is reported.

*Id.* at pp. 25-26. The lower court's conclusion that criminal use of large-capacity magazines in mass shootings was on the rise was based on its understanding that "they were used in more than half of the mass shootings since 1982." D. Ct. Op. at 33. This conclusion is not supported by the evidence.

The lower court also relied upon Ms. Allen's opinion for its conclusion that "the number of fatalities or injuries per mass shooting more than doubles when a shooter uses a large-capacity magazine." D. Ct. Op. at 33-34. At her deposition, Ms. Allen was asked if she had controlled for any variables such as the intent of the shooter when analyzing the data on mass shootings. Dep. of Lucy Allen, Add. at p. 27. By not controlling for the intent of the criminal, Ms. Allen could not rule out factors other than the presence of a large capacity magazine as being the controlling variable for the number of people wounded or injured:

Q: In your report on the data with respect to the number of fatalities or injuries in mass shootings involved in large-capacity magazines, are there other factors that may come into play in determining the number of fatalities or injuries other than solely the capacity of the magazine involved?

A: Sure, there may be other factors that come into play.

Q: And in your study and analysis, did you attempt to control for any of those other factors that might come into play?

A: I have not looked at other factors that might come into play. I have reported the average number of fatalities or injuries in the mass shootings for those with a large-capacity magazine and those that did not have a large – reported large-capacity magazine.

*Id.* Thus, Ms. Allen's raw data and basic arithmetic are not reliable in illustrating whether magazine capacity is a relevant variable in the number of people wounded or killed in a mass shooting because she did not eliminate the influence of other admitted factors.

With respect to the seven-round loading limit, Ms. Allen purportedly analyzed stories she found on the NRA's website to determine the frequency with which firearms are used in self-defense and the average number of shots fired. D. Ct. Op. at 36 (quoting R. at A-614-15 ¶¶ 12-15). Ms. Allen admitted at her deposition in the Maryland case that she simply coded stories and conducted her analysis based on this data without reviewing it for accuracy. *See* Dep. of Lucy Allen, Add. at p. 20. She did not speak to anyone at the NRA regarding how stories are collected, the reasons that some stories are published and others are not, and how the information is maintained. *Id.* at p. 21 (“Q: Have you ever spoken to anyone at the NRA about how and why they collect and maintain this information? A: I have not personally.”).

Had she conducted research into the source upon which she relied, “The Armed Citizen” reports, she would have learned that the stories reported by the NRA represent only a tiny fraction of the immense number of lawful defensive uses of firearms each year. The NRA receives stories sent in by its members to create a large pool of articles from which to choose to publish. Walter J. Howe, A

*History of "The Armed Citizen,"* in THE ARMED CITIZEN, NATIONAL RIFLE ASSOCIATION, at 2. Clearly, the self-selected stories that are sent to the NRA and are then distilled into those that represent stories it believes its members will be interested in reading, do not constitute a reliable sample from which to draw conclusions.

Even more troubling is the admission in Ms. Allen's declaration itself. Footnote 10, she admits that there was no data on the exact number of shots fired in all of the incidents she reviewed. Instead of omitting these data, she simply assumed that the number of shots fired in all such cases was the average of the number of shots fired in the cases in which the number was known. R. at A-615 n.10. There is no basis for doing this. Her method would only serve to skew the data toward the mean. Indeed, if for every event in which she assumed the number of shots fired there were actually 11 shots fired, all of her averages would be wrong. Moreover, without her providing any data on the number of incidents for which she made these assumptions, there is no way of telling how large an impact these assumptions had.

Finally, and most disturbingly, is Ms. Allen's admission that she did not inform the lower court here as to the lack of any peer review of a study upon which she relied. Ms. Allen stated that her analysis was consistent with that of Mr. Claude Werner, who also analyzed the NRA stories. R. at A-614 n.9. When questioned

about this at her deposition, she stated that she made no mention of Mr. Werner's study never being peer reviewed:

Q: Did you tell Judge Skretny (phonetic) that that analysis had never been subject to peer review?

A: I did not speak with the judge. The judge, as I understand it, read my report and reported analysis that was described in my report in the judge's decision.

Q: And the report that you gave Judge Skretny didn't say that the Werner study that you relied on had never been subject to peer review or published in a peer review journal, correct?

A: My report did not describe the analysis as being in a peer review journal.

Dep. of Lucy Allen, Add. at pp. 22-23. The Werner study was explicitly referenced by Ms. Allen in the part of her declaration cited by the lower court. Thus, it appears that the lower court was not aware of the unreliability of the evidence before it.<sup>6</sup> The lack of reliable factual foundation upon which she has formed her opinions should lead this Court to disregard all of Ms. Allen's opinions.

## CONCLUSION

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

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<sup>6</sup> The citation to this part of Ms. Allen's declaration came in the discussion of the 7-round limit that was declared unconstitutional. While *Amicus* believes the lower court was undoubtedly correct in this conclusion, it still illustrates that Ms. Allen's opinion was not scrutinized, as there was no mention of the defects in her method and data. *See* D. Ct. Op. at 35-36.

testimony of the experts offered by Defendant-Appellees and relied upon by the lower court reveal their opinions are not supported by reliable data and should be disregarded by this Court.

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### **CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitations of Fed. R. App. P. 28(e)(2)(a) because this brief contains 6,475 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(viii).

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

Dated: May 6, 2014

/s/ John Parker Sweeney  
John Parker Sweeney, Esq.  
*Attorney for Amicus Curiae*  
*National Rifle Association*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 6th day of May, 2014, this brief of *amicus curiae* National Rifle Association was served, via electronic delivery to all parties' counsel via CM/ECF system which will forward copies to Counsel of Record.

/s/ John Parker Sweeney  
John Parker Sweeney

# ADDENDUM

**In The Matter Of:**

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

---

*Christopher S. Koper, Ph.D.*

*Vol. 1*

*February 3, 2014*

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

4 A Yes.

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

9 A That's a partial statement of it.

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

12 A Yes.

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

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

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

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

7 A Correct.

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

11 A No. Correct, I mean.

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

16 A Correct. That's fair enough.

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

1 A Yes.

2 Q And is that still your view today?

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

6 Q All right.

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

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

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

16 A Okay.

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

19 A No. I've not read this.

20 Q And has anyone mentioned this to you?

21 A Defense counsel did mention the existence

1 matters as much or more than statistical significance.

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

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

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

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

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

10 A Yes.

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

14 A Yes.

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

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

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

6 A No.

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

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

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

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

8 A Correct.

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

11 A Correct.

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

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

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

18 Q I'm sorry. Page two.

19 A Page two. Got you.

20 Q Paragraph five.

21 A Uh-huh.

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

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

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

17 A Yeah.

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

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

1 Guns that one could look at on that issue.

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

5 A Uh-huh.

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

9 A Yes.

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

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

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

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

1 in your 2004 report on page 15?

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

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

7 A It would seem so.

8 Q Okay.

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

18 Q Can you --

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

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

1 other semi-automatics with large capacity magazines?

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

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

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

10 Q All right.

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

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

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

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

1 murderer?

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

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

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

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

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

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

3 BY MR. SWEENEY:

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

9 A Yes. Okay.

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

14 MR. FADER: Objection.

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

19 BY MR. SWEENEY:

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

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

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

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

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

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

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

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

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

11 A Yes.

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

14 A Correct.

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

17 A Those and other guns.

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

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

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

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

9 A Correct.

10 Q And --

11 A To my knowledge.

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

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

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

21 A No. Actually their data make it seem that

**In The Matter Of:**

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

---

*Lucy Allen*

*Vol. 1*

*January 24, 2014*

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
(Northern Division)

SHAWN J. TARDY, et al.

Plaintiffs

Case No.

vs.

1:13-cv-02841-CCB

MARTIN J. O'MALLEY, et al.

Defendants

\_\_\_\_\_ /

The deposition of LUCY ALLEN was taken on Friday, January 24, 2014, commencing at 1:13 p.m., at the offices of NERA Economic Consulting, 1166 Avenue of The Americas, New York, New York, before Karen E. Rigoni, Notary Public.

REPORTED BY: KAREN E. RIGONI, CSR, RPR

1 rounds of ammunition fired by individuals using  
2 a gun in self-defense, what did you do?

3 A. The specific analysis that's described  
4 and the findings that are described in my report  
5 come from a coding, a quantification of all the  
6 stories that were contained in a -- the NRA  
7 maintains a database of stories of people  
8 defending themselves. And so we looked through  
9 all of those stories in a recent time period and  
10 in addition looked for new stories describing  
11 the same event and counted up how many rounds  
12 were reported to have been fired by the  
13 individuals defending themselves.

14 Q. Of all the sources of information in  
15 the world on this subject, why did you choose  
16 the NRA stories?

17 A. They had a large database of stories of  
18 people defending themselves. We looked for  
19 other sources of information for people  
20 defending themselves and this was the most  
21 comprehensive source that we found.

22 Q. Are you familiar with the work of  
23 Dr. Kleck, K-l-e-c-k?

24 A. Yes.

25 Q. And he has gone directly to certain

1 kind of a phenomenon would work.

2 Q. You've studied --

3 A. Because I think that the stories, for  
4 one, are updated as they happen. So if you get  
5 to September and you're already at a hundred, do  
6 you then stop? I don't -- I don't see that. It  
7 would be interesting in one way to look -- if  
8 your theory is that somehow they don't want to  
9 go over a hundred, which I would not understand  
10 to be the case, I think there would be ways to  
11 test that. I don't see that.

12 Q. Have you ever spoken to anyone at the  
13 NRA about how and why they collect and maintain  
14 this information?

15 A. I have not personally. It's possible  
16 that someone on my team has done that. I don't  
17 recall. We typically try to -- I often try to  
18 contact people and find out about the data and  
19 make sure that I'm understanding it.

20 MR. SWEENEY: May I request the production of  
21 any documents related to this project that  
22 reflects that there's been any communication by  
23 the NRA?

24 MR. FRIEDMAN: (Indicating.)

25 MR. SWEENEY: Thank you.

1 A. I don't know if the -- if it has been  
2 published in a peer review journal or discussed  
3 in a peer review journal. I have seen the study  
4 discussed a few times. I don't know.

5 Q. Have you ever seen it discussed and  
6 published anywhere but on the internet?

7 A. Well, it was discussed in my report in  
8 the New York case, and the judge in the New York  
9 case cited my report including some statistics  
10 that I -- I don't know if the judge was citing  
11 the analysis that we conducted which was  
12 consistent with the analysis that Mr. Werner  
13 discussed. I don't recall. It may have been  
14 discussed by the judge in the New York case.

15 Q. Did you tell Judge Skretny (phonetic)  
16 that that analysis had never been subject to  
17 peer review?

18 A. I did not speak with the judge. The  
19 judge, as I understand it, read my report and  
20 reported analysis that was described in my  
21 report in the judge's decision.

22 Q. And the report that you gave  
23 Judge Skretny didn't say that the Werner study  
24 that you relied on had never been subject to  
25 peer review or published in a peer review

1 journal, correct?

2 A. My report did not describe the analysis  
3 as being in a peer review journal. I think it  
4 was --

5 Q. So if we -- on Page 3 of the -- of  
6 WeTheArmed article, there are some internet  
7 comments about Mr. Werner's study, and we don't  
8 know who they're from, but it says, for  
9 instance, I am concerned that the sample size is  
10 so small that a general conclusion cannot be  
11 supported. Do you disagree with that comment?

12 MR. FRIEDMAN: Objection.

13 THE WITNESS: Is the question whether the --  
14 that that person Goatroper is concerned? I  
15 don't know whether that individual is concerned.

16 MR. SWEENEY: No, that wasn't my question.  
17 Please read my question.

18 (Whereupon, the record was read  
19 as requested.)

20 THE WITNESS: Do you want me to answer again  
21 whether I think -- whether I agree whether that  
22 person is concerned? I don't know whether the  
23 person is concerned.

24 BY MR. SWEENEY:

25 Q. That's not my question. My question is

1 any peer reviewed --

2 Q. Or that any peer review journal has  
3 ever gone through the process of reviewing the  
4 analysis done and the study made and approving  
5 it from a peer review point of view, that hasn't  
6 been done to your knowledge, correct?

7 A. I don't know if anyone has done that or  
8 not.

9 Q. And is the same true with respect to  
10 the Citizens Crime Commission study as well?

11 A. I don't know.

12 Q. And the same with respect to the mayor  
13 study that you referred to, as far as you know,  
14 that hasn't gone through a peer review process  
15 for an academic journal?

16 A. I don't know. I don't believe it has.

17 Q. All right. On Page 8, the carryover  
18 paragraph, last full sentence, you state: "We  
19 updated the data on shots fired for mass  
20 shootings in 2013 where available." What does  
21 that mean? What did you do?

22 A. When -- I have to see if this said the  
23 same thing. So Mother Jones -- we did an  
24 analysis for New York, for the same data for  
25 New York, and at that point, Mother Jones had no

1 there that says: There were six additional mass  
2 shootings in which magazine capacity was  
3 unknown. So for that period, the total --

4 A. It should be five, that footnote.

5 Q. Should be five?

6 A. Yeah, footnote eight should say there  
7 were five additional.

8 Q. All right.

9 A. That's a typo.

10 Q. So then there would have been a total  
11 of seven mass shootings in those two years that  
12 you studied, correct? Five in the footnote plus  
13 the seven in the text.

14 A. Right. So there were --

15 Q. I count that --

16 A. So the past two years, there were --  
17 there were seven with no magazine capacity, plus  
18 another five with unknown, so that would be 12.

19 Q. For a total of 12.

20 A. 12.

21 Q. And so if there were five with large  
22 capacity divided by 12, that's -- I have about  
23 42 percent, does that sound about right to you,  
24 of the total population of which we know  
25 large-capacity magazines were used, right?

1 A. Yeah, which is reported, right.

2 Q. Now, Paragraph 15 you talk about -- the  
3 data indicates that it is common for offenders  
4 to fire more than ten rounds when using a gun  
5 with a large-capacity magazine in mass  
6 shootings. What do you mean by common?

7 A. Well, you know, as you've said, it's --  
8 if you take only the ones where it's known, it's  
9 a -- it's the majority. And if you take -- if  
10 you assume that all the unknown ones were --  
11 that the ones where you don't know, you assume  
12 they all weren't large capacity, at a minimum,  
13 it's almost, you know, 40 to 50 percent.

14 Q. You go on to state: The average number  
15 of shots fired was 75 in mass shootings that  
16 involved use of large-capacity magazine guns,  
17 correct?

18 A. Correct.

19 Q. What was the average number of shots  
20 fired in all mass shootings?

21 A. In this data?

22 Q. Yes.

23 A. I don't know. I did know what the  
24 number was when a large -- that didn't involve  
25 the use of a large-capacity magazine. Let's

1 law-abiding citizens or anything. I am  
2 reporting on the use of large capacity magazines  
3 and the number of casualties in mass shootings.

4 Q. In your report on the data with respect  
5 to number of fatalities or injuries in mass  
6 shootings involved in large-capacity magazines,  
7 are there other factors that may come into play  
8 in determining the number of fatalities or  
9 injuries other than solely the capacity of the  
10 magazine involved?

11 A. Sure, there may be other factors that  
12 come into play.

13 Q. And in your study and analysis, did you  
14 attempt to control for any of those other  
15 factors that might come into play?

16 A. I have not looked at other factors that  
17 may come into play. I have reported the average  
18 number of fatalities or injuries in the mass  
19 shootings for those with a large-capacity  
20 magazine and those that did not have a large --  
21 reported large-capacity magazine.

22 Q. You would agree with me that a firearm  
23 with a large-capacity magazine even loaded with  
24 bullets is not sufficient in and of itself to  
25 kill or injure anyone?