IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CALEB BARNETT, *et al.*, *Plaintiffs*, v. KWAME RAOUL, *et al.*, *Defendants*.	Case No. 3:23-cv-209-SPM ** designated Lead Case
DANE HARRELL, *et al.*, *Plaintiffs*, v. KWAME RAOUL, *et al.*, *Defendants*.	Case No. 3:23-cv-141-SPM
JEREMY W. LANGLEY, *et al.*, *Plaintiffs*, v. BRENDEN KELLY, *et al.*, *Defendants*.	Case No. 3:23-cv-192-SPM
FEDERAL FIREARMS LICENSEES OF ILLINOIS, *et al.*, *Plaintiffs*, v. JAY ROBERT "JB" PRITZKER, *et al.*, *Defendants*.	Case No. 3:23-cv-215-SPM

PLAINTIFFS' OPPOSITION TO STATE DEFENDANTS' MOTION TO PRECLUDE CONSIDERATION OF WILLIAM ENGLISH AND NSSF SURVEYS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

Defendants' motion to "preclude consideration of" various materials Plaintiffs have provided is unknown to the law of evidence and built on fundamental error. Defendants do not dispute that the reports prepared by Professor William English and the National Shooting Sports Foundation ("NSSF") concern only legislative facts. And they admit that this means they are not governed by the Federal Rules of Evidence ("FRE"). Yet Defendants nonetheless attempt to superimpose threshold FRE-like admissibility standards on what this Court may consider when engaging in legislative factfinding. That effort is foreclosed by decades of precedent and the Federal Rules themselves, both of which make clear that the Rules apply only to evidence relating to adjudicative facts, not legislative facts. And in all events, Defendants' objections to the surveys would not begin to justify refusing to consider them at all, as their accusations of bias and impropriety are baseless, and their methodological critiques reflect fundamental misunderstandings both of how the surveys were conducted and of elementary principles of statistical analysis. For any and all these reasons, their novel motion should be denied.

ARGUMENT

Defendants' motion is premised on a basic category error. Defendants insist that the reports Professor William English and Mr. Salam Fatohi prepared for general consumption must meet the expert-qualification requirements of Rule 702 in this case. That argument fails as a matter of law. It also gets Defendants nowhere, as their attacks are wholly unfounded and, in many instances, flatly contradicted by the reports themselves, the testimony regarding them, or both. In all events, even if Defendants' arguments had merit (which they do not), they speak only to the weight of the evidence, not to this Court's ability to consider it.

I. Legislative Facts Like Those In The English And NSSF Surveys Are Not Subject to Defendants' Pseudo-FRE Analysis.

The law of evidence distinguishes between two kinds of facts: adjudicative facts and legislative facts. Adjudicative facts are "facts concerning the conduct of parties in a particular case," *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012), "as distinguished from general facts which help the tribunal decide questions of law and policy and discretion," *Langevin v. Chenango Ct., Inc.*, 447 F.2d 296, 300 (2d Cir. 1971). The Federal Rules of Evidence are all about how the former (adjudicative) type of facts can, should, or must be admitted into evidence. Legislative facts, by contrast, are "proposition[s] about the state of the world." *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014). They do not "vary from locality to locality, or from person to person." *United States v. Turner*, 47 F.4th 509, 525 (7th Cir. 2022). Hence "[t]he constitutionality of statutes is typically determined by reference to general considerations … and other 'legislative facts,'" not adjudicative facts. *Metzl v. Leininger*, 57 F.3d 618, 622 (7th Cir. 1995); *see, e.g.*, *Moore*, 702 F.3d at 942 ("Only adjudicative facts are determined in trials, and only legislative facts are relevant to the constitutionality of the Illinois gun law."). Unlike adjudicative facts, moreover, legislative facts are not ordinarily "presented through testimony and other formal evidence subject to rules of evidence developed largely for the control of lay juries." *Metzl*, 57 F.3d at 622. Rather, they "more often are facts reported in books and other documents not prepared specially for litigation or refined in its fires." *Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1182 (7th Cir. 1990); *see also Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1162-63 n.24 (D.C. Cir. 1979) ("The Advisory Committee … embraced the general rule [in 1972] that legislative facts need not be developed through evidentiary hearings.").

Defendants do not dispute that each of the three reports they challenge concerns only legislative facts. Nor could they. The use and prevalence of certain types of firearms "are not

unique to a particular case"; those facts "appl[y] broadly to the state of the world"; and they "do[] not require making a finding specific to" these (or any particular) plaintiffs or defendants. *United States v. Turner*, 47 F.4th 509, 525 (7th Cir. 2022). What is more, those facts are of a type that courts routinely treat as properly susceptible to legislative factfinding. *See, e.g.*, *Unger v. Young*, 134 S.Ct. 20, 22 n.* (2013) (Alito, J., dissenting from the denial of certiorari) (acknowledging that "the data in the social science studies [considered by a court in a previous case] constituted legislative facts"); *Lockhart v. McCree*, 476 U.S. 162, 168 n.3 (1986) (declining to accept that "social science studies" are proper subject of "lower courts' 'factual' findings" to which "the clearly erroneous standard of Rule 52(a) applies," because they constitute "'legislative' facts").

Accordingly, federal courts have for years considered materials like those at issue here in adjudicating Second Amendment challenges. Indeed, federal courts have routinely considered *these exact materials* in Second Amendment cases, particularly post-*Bruen*—as Defendants themselves acknowledge, *see* Mot.19 (admitting that courts routinely "giv[e] English's study serious, sometimes determinative, treatment"). *See, e.g.*, *Del. State Sportsmen's Ass'n, Inc. v. Del. Dep't of Safety & Homeland Sec.*, 664 F.Supp.3d 584, 594-96 (D. Del. 2023) (relying on the English and NSSF reports in concluding that "the banned assault long guns are indeed 'in common use' for several lawful purposes, including self-defense," "and therefore [are] 'presumptively protect[ed]' by the Second Amendment"); *Duncan v. Bonta*, 695 F.Supp.3d 1206, 1216-17 & nn.27, 30-31 (S.D. Cal. 2023) (same for English's study); *Bianchi v. Brown*, 111 F.4th 438, 518-19 & nn.55-56, 58, 61 (4th Cir. 2024) (Richardson, J., dissenting) (same for both).

Defendants admit that "the Rules of Evidence may not apply here to the extent the Court is evaluating NSSF's study for the purpose of legislative factfinding," Mot.15—which is the only purpose for which this Court has been asked to evaluate the report, or any other. But they

nevertheless insist that the Court should not consider any of the three reports *at all* unless they satisfy the "reliability" standards for the admission of expert testimony under Rule 702. Mot.5. That flies in the face of the Seventh Circuit's repeated admonitions that legislative facts "lie outside the domain of rules of evidence." *Wiesmueller v. Kosobucki*, 547 F.3d 740, 742 (7th Cir. 2008); *see also, e.g.*, *Hart v. Sheahan*, 396 F.3d 887, 894-95 (7th Cir. 2005) ("[O]nly proof of adjudicative facts is governed by the rules of evidence."). As the advisory committee explained long ago, when it comes to "judicial access to legislative facts," a "judge is unrestricted in his investigation and conclusion." Fed. R. Evid. 201 advisory committee's note on 1973 proposed rule ("FRE 201 note"); *cf. United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002) ("[T]he Advisory Committee Notes provide a reliable source of insight into the meaning of a rule[.]"). To be sure, parties may offer argument as to why a judge should give weight to or rely on various information relating to legislative facts (or not). But a judge ultimately "may consult the sources of pertinent data to which [the parties] refer, or he may refuse to do so…. [T]he parties do no more than to assist; they control no part of the process." FRE 201 Note. Simply put, there is not "any limitation in the form of indisputability, any formal requirements of notice," or "any requirement of formal findings" when it comes to legislative factfinding of the sort at issue here. *Id.*

That dooms Defendants' effort to force this Court to subject the reports at issue here to some sort of threshold pseudo-admissibility analysis. Indeed, Defendants cite no authority in support of their effort to do so. They just invoke cases dealing with the admission of *expert* testimony, *see Zenith Electronics Corp. v. WH-TV Broadcasting Corp.*, 395 F.3d 416 (7th Cir. 2005), and treatises providing general guidance on legislative factfinding, *see McCormick on Evidence* §331; 21B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* §5103.2 (2d ed. 2024 update). But those cases are irrelevant, and the treatises ultimately

undermine their cause. Not only do they emphasize that legislative facts are often "generalized, opinion-like, and 'not susceptible to exacting proof,'" *Fed. Prac. & Proc.* §5103.2; *McCormick on Evidence* §331 (noting that "legislative facts" need "not" be "indisputable"), but one of the treatises expressly rejects the notion that "courts should judicially notice 'legislative facts' only if they are 'reasonably reliable,'" deeming that Rule-702-like standard "much too high" of a burden in this context, *Fed. Prac. & Proc.* §5103.2. Defendants simply ignore all of this.

Worse still, Defendants invoke a *rejected* amendment to the Federal Rules of Evidence. *See* Mot.3 (citing *The Evidence Project: Proposed Revisions to the Federal Rules of Evidence with Supporting Commentary*, 171 F.R.D. 330 (1997)). But "failed … proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior [rule].'" *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). If anything, that rejection evinces an affirmative desire *not* to impose any restrictions on what legislative facts a court may consider. *See Arizona v. United States*, 567 U.S. 387, 405 (2012).

In short, Defendants' motion fails at the starting gate, as there is simply no authority for invoking the Federal Rules of Evidence to try to preclude a court from considering information that bears upon legislative factfinding and the constitutionality of statutes. Defendants are certainly free to press whatever arguments they may wish to make about the persuasive value of the relevant surveys in their post-trial briefing. But they cannot preempt that exercise by forcing this Court to subject the reports to some pseudo-admissibility test of their own making.

II. The English And NSSF Reports Satisfy Any Reliability Test That Might Apply.

Even if the English and NSSF reports were subject to the kind of Federal Rules-adjacent analysis Defendants propose, none of their complaints would justify refusing to consider them. Each report is reliable, based on sound methodology, and compiled by a qualified author. And

even if the Court had doubts about any of that, Defendants' arguments would at best go to weight, not to whether the Court can consider the reports at all.

A. Professor English's 2021 National Firearms Survey

Plaintiffs have offered Professor William English's paper—*William English, PhD, 2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* ("English Survey") (May 13, 2022), https://rb.gy/ybwrx4—as support for legislative facts concerning the prevalence of various types of arms relevant to this case. While Defendants do not dispute the relevance of the English survey, they take issue with how it was conducted, invoking their own hired academic's critiques to accuse Professor English of everything from shoddy methodology to unethical conduct. *See* Dkt.190-1 (Klarevas Rep.). Soup to nuts, those arguments fail, and in all events go only to weight.

At the outset, Defendants again err by trying to subject the English survey to Rule 702's gatekeeping requirements for expert testimony. Professor English is not an expert witness, and his survey article is not an expert report. Plaintiffs have merely provided *his article* for the Court to consider in conducting its analysis of legislative facts. Consideration of that kind of academic literature is routine, in Second Amendment cases and elsewhere. *See, e.g., N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 29-30, 36 (2022); *District of Columbia v. Heller*, 554 U.S. 570, 577, 587 (2008). And Plaintiffs are aware of no other case in which a court has subjected such papers to the strictures of Rule 702's standards for expert testimony. *Cf. de Fontbrune v. Wofsy*, 838 F.3d 992, 999 (9th Cir. 2016) ("scholarly articles" do not constitute the kind of evidence that converts a Rule 12(b)(6) motion into a motion for summary judgment). Because Professor English has not been offered as an expert witness, Rule 702 is entirely beside the point.

At any rate, Defendants' attacks on Professor English's survey are baseless. Defendants

first claim that the survey "runs afoul of the standards of practice of the American Association for Public Opinion Research (AAPOR)" because it does not disclose all of his funding sources. Mot.6. But Defendants never explain why AAPOR standards should be the litmus test for survey reliability. No federal court in the Seventh Circuit has ever cited the AAPOR standards in this or any other like context. And the AAPOR does not set ethical standards for all academics in all fields, everywhere. The standard practice among academics in Professor English's field is to disclose funding sources "at the journal submission stage," not the working paper stage. Ex.A, William English, *A Response to Critics of the 2021 National Firearms Survey* ("English Response") 24-25 (Working Paper, 2024). In all events, this quibble is a moot point anyway, as there has been considerable public reporting on Professor English's research and funding sources. *See, e.g.*, Mike McIntire & Jodi Kantor, *The Gun Lobby's Hidden Hand in the 2nd Amendment Battle*, N.Y. Times (Jun. 18, 2024), https://tinyurl.com/ymf8k3z3. Defendants are certainly free to ask this Court to take that information into consideration in determining how much weight to give the survey, but it hardly precludes the Court from considering it at all. Defendants' contrary argument is particularly rich given that their own criticisms of Professor English's survey come almost exclusively from an academic that *they hired* to critique it.

Defendants also half-heartedly suggest that the English survey "may" run afoul of AAPOR standards in two other ways—namely, Professor English purportedly did not "release[] the weighted results of his survey" and purportedly "misrepresent[ed] the true purpose of [the] survey" to participants. Mot.7-8. The first claim is inexplicable. The English survey not only details its methodology at length, *see* English Survey 4-7, but includes the weights used in processing the final data, *see id.* Appendix B. Defendants implicitly recognize as much, as their motion goes on to attack the very methodology that they profess not to know. *See* Mot.8-11.

What is more, Professor English has made *all of the survey data publicly available*—a fact Professor English specifically noted in responding to the unfounded accusations about supposed "selection gimmicks" that Defendants reprise here. English Response 20.

Defendants' suggestion that Professor English misled survey participants fares no better. They accuse him of trying to "lure gun owners into taking the survey" by describing it as about "outdoor recreational activities." Mot.8. But Defendants cannot seriously mean to suggest that people with strong views about firearms are more likely to be interested in a survey about "outdoor recreational activities" than a survey about "firearms." Indeed, Professor English explained that he used the "ideologically neutral" phrase "outdoor recreational activities" to help guard *against* producing a disproportionate number of firearm owners. *See* English Response 25 ("Had the intro to the survey advertised it as something that would be of interest to firearms owners or enthusiasts, this would have generated a methodological concern that there could be some selection/response bias, as those without such interests might not proceed to take the survey."). That approach is entirely consistent with best practices in survey and clinical research, as it is widely recognized that "incomplete disclosure may be appropriate to promote scientific validity by enabling investigators to obtain unbiased data about attitudes and behavior in circumstances where truthful disclosure is considered likely to produce biased responses by participants." University of California, Los Angeles, Research Administration Human Research Protection Program, *Guidance and Procedure: Deception or Incomplete Disclosure* (July 7, 2020), https://tinyurl.com/3d3dbn59; *see also, e.g.*, American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct* §8.07.

Turning to Defendants' accusations of "methodological errors," they begin by complaining about a question that has no bearing on this case: Plaintiffs are not relying on any

data from Professor English's study about respondents' views on whether "'assault weapon' bans will make states that pass them less attractive destinations." *Contra* Mot.8. Defendants next fault Professor English for excluding from his conclusions about firearm ownership the less than 0.3% of respondents who reported owning "more than a hundred AR-15s." Mot.9. But Defendants and their expert appear to misunderstand Professor English's methodology. While they seem to think that the survey excluded these respondents only when estimating how many firearms the average person owns, Mot.9, it also excluded them when estimating how many firearms are owned *at all*. And rightly so, as including, e.g., one respondent's implausible claim to own more than one million AR-style rifles would have misleadingly "ma[de] [such rifles] appear even more common" than the bulk of responses indicated they are. English Response 21. It is thus *Defendants* that commit "severe methodological errors," Mot. 8, by claiming that the survey data supports the conclusion that these outliers, whose reported firearm ownership was not counted *at all*, somehow "account for ownership of 37.1% of all AR-15-style rifles," Mot.9. In reality, Professor English rendered his survey results *more* accurate by "ensur[ing] that average estimates [we]re not skewed by a small number of large outliers." English Survey 20; *see also, e.g.*, Vic Barnett & Toby Lewis, *Outliers in Statistical Data* 24 (1978) (discussing proper treatment of outlier responses); Vic Barnett, *Principles and methods for handling outliers in data sets* in Statistical Methods and the Improvement of Data Quality 133-66 (1983) (same).[1]

As for Professor English's findings about magazines, Defendants complain that the survey asked only "[t]hose who owned large capacity magazines" how many magazines they

[1] Defendants make the same mistake as to magazines, seemingly assuming that Professor English *included* outliers when estimating how many magazines are owned, but then excluded them when estimating how many magazines the average person owns. In fact, they were excluded from both metrics. *See* English Survey 23-24.

owned that held 10 rounds or fewer. Mot.9. This, they believe, caused Professor English to "overrepresent large capacity magazines as a percentage of all magazines owned." Mot.9. One glaring problem: Professor English did not say anything at all about what percentage of magazines in the country hold more than 10 rounds. He used the survey to estimate only the *number* of such magazines, a metric for which the number of magazines below that capacity is irrelevant. And he explicitly acknowledged that "we do not know how many magazines up to 10 rounds are owned by the 52% of gun owners who" do not own 10+ round magazines, *because that is not a question that they were asked*. English Survey 25. It is hardly a methodological flaw to forthrightly acknowledge what a survey and its findings do and do not address. And while Defendants critique Professor English's analysis of the usefulness of higher capacity magazines for self-defense, *see* Mot.10, they take no issue with his findings that over 500 respondents expressed that they found them useful, or with the credibility of the responses those participants provided, *see* English Survey 27-33. Defendants instead just take issue with the prospect that law-abiding citizens might find a higher capacity magazine useful for self-defense even if they do not ultimately end up firing more than 10 rounds at an assailant. *See* Mot.10.

Finally, Defendants claim that Professor English's methodology must have been unsound because it "apparently shows the highest rate of large capacity magazine ownership is in the District of Columbia—where possession of such magazines has been strictly prohibited for more than a decade." Mot.10. Once again, Defendants failed to carefully read the survey, which explains that respondents were asked about whether they "have *ever* owned magazines that hold over 10 rounds," not whether they presently do. English Survey 27 (emphasis added). It is hardly surprising that D.C., a jurisdiction known for its "highly transient" population, might have a high volume of residents who have lived in a jurisdiction with different laws. English Response 24.

In all events, even if any of Defendants' complaints had any merit, they would not justify refusing to consider the English survey at all. Indeed, some of their complaints do not even speak to the survey's accuracy. And all of them go, at best, to the weight the Court should afford various findings and conclusions it reached. *Cf. Stollings v. Ryobi Techs., Inc.*, 725 F.3d 753, 766 (7th Cir. 2013) (explaining this liberal standard in the expert-witness context). At most, Defendants have illustrated that there is scholarly disagreement about the extent and nature of firearm ownership in America. That would certainly justify submitting competing surveys or other data of their own—which Defendants conspicuously declined to do.[2] But it does not begin to justify refusing to consider the most comprehensive study that *has* been submitted on that score.

B. The NSSF Firearm Production Report

Defendants next target the NSSF Report on Firearm Production in the United States. That report, prepared by Salam Fatohi and NSSF's research department, compiled various statistics about firearm manufacturing in the United States, including the total number of firearms produced annually and the number of modern sporting rifles ("MSRs") produced annually in particular. *See* NSSF, *Firearm Production in the United States* 2, 7 (2023), https://tinyurl.com/bdhvzjea ("Firearm Production Report"); *see also* **Pltfs' Proposed Findings of Fact ¶¶79-81** (defining MSRs). To prepare the report, NSSF's research wing first evaluated the Annual Firearms Manufacturing and Exportation Report ("AFMER") data produced yearly by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") and independently determined which firms manufacture MSRs. Dkt.232-14 (Fatohi Dep.) at 47:9-21. If it could

[2] Defendants do reference a forthcoming article written by various anti-firearm-activist-academics that seeks to critique Professor English's survey (and that Defendant's curiously ask this Court to countenance without reference to any of their FRE-like standards). *See* Mot.10-11. But not even that article proposes an alternative number or data on common use. *See generally* Mot.Ex.2. And it has already been debunked. *See generally* English Response.

not confirm that a company produced only MSRs—such that all of their production data could be included in the count—it then directly contacted those firms to inquire about the number of MSRs they produced that year. *Id.*; *see also id.* at 107:13-108:10. NSSF also insured the accuracy of the count of MSRs in circulation in the U.S. by utilizing (1) AFMER data to subtract the number of MSRs exported out and (2) United States International Trade Commission data to add the number of MSRs imported in. *See id.* at 100:9-13; 155:1-15. This simple, intuitive approach allows NSSF to calculate a reliable lower bound for the number of MSRs manufactured in the United States each year.

At the outset, Defendants' challenge once again fails because they are impermissibly trying to subject these legislative facts to Federal Rule of Evidence 702. *See* pp.2-5, *supra*. But even setting that aside, much of their attack on this survey echoes their challenges to the English survey. They again point to a supposed ethical violation, claiming that NSSF is too biased to be trusted because it is "a trade organization for the firearm industry" and "a plaintiff in this litigation." Mot.11. But they do not identify any way in which that purported bias manifested itself in the NSSF report's results. Instead, Defendants just levy wholly unfounded allegations, e.g., that the report's author may have encouraged manufacturers to inflate their numbers. *See* Mot.13-14. But Defendants offer zero facts to substantiate their remarkable accusations, and their apparent belief that those who work in the firearm industry must be up to no good does not make it so. Nor, if such bias existed, would that justify refusing to consider the survey; "it is well-established" that "bias is not a proper basis to bar" consideration of evidence. *Cage v. City of Chicago*, 979 F.Supp.2d 787, 827 (N.D. Ill. 2013) (bias "goes to weight").

At any rate, a litany of evidence in this case refutes Defendants' accusations. For one thing, the evidence (which Defendants themselves elicited) clearly shows that NSSF regularly

compiles and reports this data (as it does each year in the normal course of business) *for the benefit of its members*, who want accurate data that they can use to make wise business decisions. *See, e.g.*, Dkt.232-14 (Fatohi Dep.) at 93:21-94:6 ("Q. Who is the audience of … the 2023 firearm production report? A.… [O]ur members…. It's a benefit to our members to have accurate … data here in a summarized fashion instead of them having to go look for stuff and having them do it themselves.… [T]he driving factor is to get accurate data to our members."); *id.* at 103:2-3 ("our members want truthful, accurate data"); *id.* at 124:15-18 (NSSF makes "prompt[]" adjustments when corrections are submitted to the ATF); *see also, e.g.*, Dkt.232-15 (Curcuruto Dep.) at 23:14-18 (Mr. Fatohi's predecessor noting that NSSF members benefit from accurate data for awareness of "current market" conditions to inform "better business decisions"); *id.* at 46:19-24 ("We wanted to provide [members] something that was useful to them that … if they spent money and made a decision on it, that we'd be confident that, you know, they can rely on this data to make those decisions."). And the proof is in the pudding. The results of NSSF's efforts mirror data reported by other outlets, *see, e.g.*, Emily Guskin et al., *Why do Americans own AR-15s?*, Washington Post/Ipsos (Mar. 27, 2023), https://tinyurl.com/3ddz8pj2 (20% of sampled gun owners own an AR-style rifle), including some that one of Defendants' experts described as "credible," Dkt.190-1 (Klarevas Rep.) at 19 ("[T]he *Washington Post* and Ipsos are considered to be organizations that conduct credible public opinion polls."). Indeed, NSSF's results are not far off from the findings of *Defendants' own expert*. *See id.* at 20 (estimating "the number of Americans who own AR-15-platform firearms" at "14.1 million" to "18.2 million adults").

Defendants next attack the qualifications of the report's author, Salam Fatohi, claiming that his "knowledge of statistics and survey methodologies was gleaned from online courses

offered by the social media company LinkedIn." Mot.11. Again, Mr. Fatohi is not an expert witness, so he is not subject to Rule 702. But Defendants' inflammatory accusations are once again unfounded. Mr. Fatohi has a Bachelor of Science in Business Administration from Wayne State University, and during his education there, he took "statistics classes" and "survey methodology courses." Dkt.232-14 (Fatohi Dep.) at 16:13-18, 21:8-12, 251:15-252:3. Mr. Fatohi testified during his deposition (as NSSF's 30(b)(6) designee) that *that* is where he learned the statistical techniques used in the surveys. While Defendants are correct that he has taken *continuing education courses* "exclusively through LinkedIn Learning," *id.* at 18:23-19:3, their claim that he has no statistics training outside that context is baseless. In addition to his training, Mr. Fatohi has worked for years as NSSF's Director of Research, and he has still more experience in providing research services even before that. *See id.* at 24:4-25:1. This work experience further buttresses his qualifications to perform elementary statistical analyses.

Defendants close with another hodgepodge of methodological quibbles, but these are baseless too. Defendants baldly claim that Mr. Fatohi compiled the report by "consulting the [MSR] manufacturer's website and making his best guess." Mot.12. This grossly misrepresents the record. Mr. Fatohi did not say that he looks at websites and guesses. He said that he consults manufacturer websites to determine whether they produce rifles other than MSRs. *Id.* (Fatohi Dep.) at 108:1-10. If they do not, then he does not have to "do the additional investigation of proportions of production," *id.*; he can simply take the manufacturer's total reported firearms production from publicly available AFMER data and treat it as the number of MSRs produced. *Id.* at 107:10-21.[3] That makes sense: If all the rifles a manufacturer makes are MSRs, then its

[3] *See also* Dkt.232-15 (Curcuruto Dep.) at 53:15-20 (Mr. Fatohi's predecessor: "I wasn't guessing"; "if I had a question, … I would call for more information. Or if I couldn't find more information, … I would more than likely just leave them off of that report for a given year.").

total rifle production (which AFMER reports) *will equal its total MSR production*. Defendants' accusations of "guesswork," Mot.12, 14-15, are foreclosed by Mr. Fatohi's actual testimony.

Defendants also ignore Mr. Fatohi's testimony that he has adopted numerous best practices to ensure the soundness of the report. For example, Mr. Fatohi excluded manufacturer data from companies that did not respond to NSSF inquiries regarding the number or proportion of MSRs they produced that year. Dkt.232-14 (Fatohi Dep.) at 102:3-5; 136:17-137:2. And he and other members of NSSF's staff performed "a general logic check" on industry-provided numbers to the extent staff suspected they might not "make sense" for one reason or another, in which case, NSSF went "through the steps to verify" the information provided, *id.* at 102:18-23, and excluded anything that might raise a red flag, *id.* at 188:21-189:10 (explaining process for "highlighted" problems and exclusion if "we can't get clarity"). *See also id.* at 104:17-105:21 (describing check on ATF AFMER data to ensure "accurate" counting). Perhaps Defendants ignore this testimony because it confirms that NSSF's count is actually "an *understatement* of what is likely the real number." Dkt.232-14 (Fatohi Dep.) at 205:19-20 (emphasis added); *see also, e.g.*, *id.* at 125:1-24 (NSSF makes "adjustments" only to avoid double-counting and "to be as conservative as possible and accurate"); *id.* at 133:3-7 (NSSF will omit even "big number[s]" if "major manufacturers" do not sufficiently clarify "ambiguit[ies]" regarding how much of their rifle production are MSRs); *id.* at 136:20-137:10 (providing examples of reported production numbers excluded from count).

Defendants' claims that Mr. Fatohi relied on some kind of "secret data," Mot.15, are equally baseless. During discovery, Plaintiffs disclosed the underlying data supporting NSSF's reporting. *See, e.g.*, Dkt.232-14 (Fatohi Dep.) at 89:22-90:4 (detailing production of "a number

of documents … Files, Excel files, different graphs, charts," that went into the reporting).[4] Defendants took no steps during discovery to compel any other allegedly "secret" data. To the extent they are complaining about minor redactions in the disclosed documentation, Defendants have only themselves to blame. At the parties' June 7 meet and confer, counsel for Plaintiffs explained the nature of the redactions and offered to provide all unredacted data for *in camera* review. But Defendants declined that offer. Defendants' refusal to access data that was offered to them obviously does not render the data "secret." And their refusal to provide their own expert Professor Klarevas with access to all the data Plaintiffs provided demonstrates only that Defendants, not Mr. Fatohi, NSSF, or any of the Plaintiffs, are the source of any purported impediment to his ability to analyze or replicate it. To state the obvious, that litigation tactic does not support exclusion of probative evidence.

Finally, Defendants claim that the data underlying the report is "inherently unreliable" because of how it was gathered. Mot.13. Notably, they cite nothing whatsoever to support the claim that Mr. Fatohi's data-collection methodology is outside the norm. *See* Mot.13. That is not surprising; evidence produced both during and before trial demonstrates that Mr. Fatohi's methodology is sound. *See* Dkt.236 (9/17/2024 Trial Tr., Ronkanien) at 316:6-18; *see also id.* at 323:11-327:22 (detailing review of publicly available AFMER data and concluding that one could cross-reference the count from "MSR exclusive manufacturers," with the overall AFMER count reported to get a conservative estimate of MSR production for sale); Dkt.232-12

[4] *Accord* Ex.B, NSSF's Answers To State Defendants' Second Set of Interrogatories ¶¶17-18; *see also* Mot.Ex.3 at 235-37 (NSSF_002351, master Excel Spreadsheet housing all underlying AFMER data for the NSSF MSR chart in question); Mot.Ex.3 at 223-234, (NSSF_002324-002335, underlying document tracking all corrections and adjustments made public by ATF to AFMER production, as well as NSSF's treatment of those ATF adjustments of the data); Ex.C, NSSF_002359 (data on MSR imports and exports used for adjusting yearly MSR totals).

(Ronkainen Dep.) at 132:23-134:22, 136:10-137:3 (same). More important, though, Defendants' complaint again cannot justify refusing to consider the Firearm Production Report in its entirety. It is simply an (off-base) attack on "the soundness of the factual underpinnings of [NSSF's] analysis"—a classic example of the kind of attack that is for the factfinder to consider and weigh when assessing the evidence. *Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000).

Defendants conclude their attack on the Firearm Production Report by confirming what was already obvious: Their motion seeks to end-run Seventh Circuit precedent limiting the Federal Rules of Evidence to adjudicative facts. *See* Mot.15-16. But their motion just underscores the wisdom of that long line of precedent, as it would require a mini-trial for each and every legislative fact a court might consider, ballooning the time and resources required to resolve even the simplest of cases. The Court should not countenance that novel approach.

C. The NSSF Detachable Magazine Report

Finally, Defendants take aim at the NSSF Detachable Magazine Report. *See* Mot.16-20. But their arguments miss the mark. The Detachable Magazine Report seeks to "[e]stimate the number of detachable firearm magazines" sold over the last several decades. NSSF, *Detachable Magazine Report*, at 3 (1990-2021), https://tinyurl.com/2452umcy ("Magazine Report"). The analysis captures not only detachable magazines that come "in the box" with a new firearm, but also detachable magazines purchased as standalone products.

The process involved simple, reliable statistical methods. NSSF used government reports on firearm manufacturing (*viz.* AFMER data) and began by removing from AFMER's total count of firearms those manufacturers that do not produce firearms that accept detachable magazines. *See id.* at 1. From there, NSSF identified the top 15 pistol manufacturers (representing about 80% of pistols produced) and the top 15 rifle manufacturers (representing about 60% of rifles

produced) by volume in the 2021 AFMER data. *See id.* NSSF then directly surveyed those manufacturers and conducted independent research to determine how many magazines are typically provided "in the box" with each new firearm sold. *See id.* NSSF then multiplied the number of manufactured firearms by the corresponding number of detachable magazines that come "in the box." *See id.* So, for instance, if Manufacturer *X* included two detachable magazines with each new firearm, then NSSF multiplied by two the AFMER-reported number of Manufacturer *X*'s firearms. *See* Dkt.232-14 (Fatohi Dep.) at 252:12-253:564-65, 256:21-23. If NSSF could not determine how many magazines were provided with a firearm, it used the conservative estimate of 1. Magazine Report at 2; *see also* Dkt.232-14 (Fatohi Dep.) at 252:22-253:5. The magazine averages for pistols (2.1 magazines) and rifles (1.8)—derived from the top 15 pistol and rifle manufacturers—were applied to the respective remaining manufacturers' AFMER data. Magazine Report at 2; *see also* Dkt.232-14 (Fatohi Dep.) at 253:16-254:5. Finally, to capture the (many millions of) magazines sold as standalone products, NSSF surveyed major manufacturers. *See* Magazine Report at 1; Dkt.232-14 (Fatohi Dep.) at 257:3-17; 264:7-13.

In addition to once again improperly relying on the standards for adjudicative facts outlined in the Federal Rules of Evidence, *see* pp.2-5, *supra*, Defendants recycle many of their earlier attacks, claiming that NSSF is biased, that Mr. Fatohi is unqualified, and that the survey is based on "secret" data. Mot.20. These arguments continue to fail for the same reasons they failed above, *see* pp.11-17, *supra*, including that Plaintiffs disclosed the allegedly "secret" data.[5]

The few arguments Defendants offer specific to this report fare no better. Defendants claim the survey was created for litigation purposes to "fill a gap in industry knowledge" in the

[5] *See* Ex.B ¶15; Mot.Ex.3 at 316-17 (excerpts of NSSF_002323, housing master Excel Spreadsheet with underlying data for the Magazine Report); Mot.Ex.3 at 318-25 (NSSF_002312-2319, Magazine Report survey questions).

wake of another case. Mot.16 (quotation marks omitted). Even if that were correct, that is hardly evidence of bias. Listening to judges and attempting to resolve concerns they identify is a salutary practice, not a reason to distrust survey reporting. Indeed, Defendants do not explain how litigants are supposed to address open questions if the very fact that they are trying to do so makes them too "biased" to be trusted. Anyway, Mr. Fatohi made clear that his work on this report predated the current litigation. Dkt.232-14 (Fatohi Dep.) at 232:4-11. And he repeatedly stressed that his goal in producing this research has been to obtain an accurate measure, not to influence judicial outcomes. *Id.* at 232:4-24, 233:7-16. So, Defendants' charge that the report was produced mid-litigation for the purpose of advancing a trial objective is simply not correct.

Defendants next object to Mr. Fatohi's reliance on AFMER data as "a starting point" in conducting his analysis of the number of detachable magazines accompanying manufactured firearms. Mot.16. This practice was plainly reasonable. Firearms that accept detachable magazines almost always arrive with at least one such magazine in the box. *See* Dkt.232-14 (Fatohi Dep.) at 253:1-3; *see, e.g.*, Dkt.234 (9/16/2024 Trial Tr., Pulaski) at 79:20-22 (noting that Glock 19 comes standard with 15-round magazine); Dkt.241 (9/19/2024 Trial Tr., Dempsey) at 612:25-613:11 ("SIG Sauer AR-15" came standard with "30-round magazine"). ATF metrics of the number of firearms produced establish a reliable lower bound for the number of magazines produced, once one controls for how many of those firearms accept detachable magazines.

Defendants also try to cast Mr. Fatohi's interpolation methodology—which was used in conjunction with the survey of manufacturers to capture the consumer side of the detachable magazine market—as some foreign practice bordering on data falsification. *See* Mot.17-18 (describing interpolation as "ma[king] it up"). But interpolation is a well-established statistical method that is accepted by every serious statistician. *See, e.g.*, Richard L. Burden & J. Douglas

Faires, *Numerical Analysis* 105-72 (9th ed. 2011) (chapters on "Interpolation and Polynomial Approximation"). There is nothing suspicious or "made up" about it. And Defendants' critique rings especially hollow considering that Mr. Fatohi's estimates are consistent with government reporting on the consistently linear increase in firearms sales over the past 25 years—as evidenced by FBI NICS background check statistics—which can be used as a proxy for firearm (and, therefore, magazine) ownership rates during the same period. *See* FBI, *NICS Data Repository* (2022), https://tinyurl.com/3dnuzad9. Defendants' effort to cast it as an untrustworthy methodology that "comes from a social media company," Mot.20, reveals only their own unfamiliarity with basic concepts of statistics.

Finally, Defendants complain that the interpolation method attributed significant sales of so-called "large capacity magazines" to a time when federal law prohibited selling them to ordinary consumers. Mot.18. But the federal law Defendants reference was limited in scope. *See* 18 U.S.C. §922(w)(1)-(2). And in all events, it was in effect for only ten years, covering just 51 million of the predicted magazines. *See* Mot.Ex.3 at 317. That accounts for only about 5% of the total sales the analysis estimated, the overwhelming majority of which took place after the federal ban expired. *See* Magazine Report at 2. Excluding the data for those years would thus make exactly zero difference in answering the question to which the report is directed: whether large capacity magazines are in common use.[6]

CONCLUSION

For the forgoing reasons, the Court should deny Defendants' motion.

[6] Notably, even the Oregon court Defendants cite did not treat those alleged defects as a basis to refuse to consider the survey at all. The judge simply took them into consideration in deciding how much weight to give it. *Or. Firearms Fed'n v. Kotek*, 682 F.Supp.3d 874, 895 (D. Or. 2023).

Date: October 21, 2024,

Respectfully submitted,

Paul D. Clement*
Erin E. Murphy*
Matthew D. Rowen*
Nicholas A. Aquart *
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900

* *pro hac vice*

s/ *Andrew A. Lothson (with permission)*
Andrew A. Lothson (*pro hac vice*)
Swanson, Martin & Bell, LLP
330 N. Wabash
Suite 3300
Chicago, IL 60611
alothson@smbtrials.com

Gary C. Pinter
Swanson, Martin & Bell, LLP
103 W. Vandalia Street
Suite 215
Edwardsville, IL 62025
(618) 655-3131
gpinter@smbtrials.com

Counsel for Plaintiffs Caleb Barnett, Brian Norman, Hood's Guns & More, Pro Gun and Indoor Range, and National Shooting Sports Foundation, Inc.

David H. Thompson*
Peter A. Patterson*
William V. Bergstrom*
COOPER & KIRK, PLLC
1523 New Hampshire Ave. NW
Washington, D.C. 20036
Tel: (202) 220-9600
Fax: (202) 220-9601
dthompson@cooperkirk.com

* *pro hac vice*

s/ David G. Sigale (with permission)
David G. Sigale (Atty. ID # 6238103)
LAW FIRM OF DAVID G. SIGALE, P.C.
55 West 22nd Street, Suite 230
Lombard, IL 60148
630.452.4547
dsigale@sigalelaw.com

Counsel for Plaintiffs Dane Harrel, C4 Gun Store, LLC, Marengo Guns, Inc., Illinois State Rifle Association, Firearms Policy Coalition, Inc., and Second Amendment Foundation

Mark L. Shaw, Esq.
Jennifer Craigmile Neubauer, Esq.
Michael A. Danforth, Esq.

s/ Sean A. Brady
Sean A. Brady, Esq.*
C.D. Michel, Esq.*

SHAW LAW LTD.
33 North County Street, Suite 300
Waukegan, Illinois 60085
(T): (847) 244-4696
(F): (847) 244-4673
(E-1): mlshaw@shawlawltd.com
(E-2): jcneubauer@shawlawltd.com
(E-3): michael@danforthlawgroup.com

Konstadinos T. Moros, Esq.*
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802

* *pro hac vice*

Counsel for Plaintiffs Federal Firearms Licensees of Illinois, Guns Save Life, Gun Owners of America, Gun Owners Foundation, Piasa Armory, Jasmine Young, and Chris Moore

CERTIFICATE OF SERVICE

The undersigned attorney certifies that a copy of the foregoing was served upon counsel of record for the Defendants by e-mail on October 21, 2024.

s/ Sean A Brady
Sean A Brady