IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

STEPHEN V. KOLBE, et al.

PLAINTIFFS

VS. CIVIL NO. CCB-13-2841

MARTIN J. O'MALLEY, et al.

DEFENDANTS

Baltimore, Maryland

July 22, 2014

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

A P P E A R A N C E S

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P R O C E E D I N G S

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

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

MR. FADER: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay. Thank you.

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

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

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

handgun wear and carry law is obviously untenable.

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

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

MR. FADER: It certainly is, Your Honor.

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

Do you want to respond to that.

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

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

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

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

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

In fact, courts articulate an intermediate

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

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

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

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

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

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

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

There were not concealed carry laws at that

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

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

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

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

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

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

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

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

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

It also raises questions about when you would

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Sure.

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

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

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

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

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

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

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

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

all magazines, and there is no firearm --

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

THE COURT: Okay.

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

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

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

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

move into the means and scrutiny?

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

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

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

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

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

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

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

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

The intermediate scrutiny test, as identified by

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

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

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

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

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

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

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

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

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

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

filed.

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

MR. FADER: Yes.

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

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

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

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

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

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

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

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

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

information.

THE COURT: Okay.

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

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

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

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

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

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

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

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

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

THE COURT: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Yes.

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

as a motion for summary judgment.

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

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

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

THE COURT: Okay.

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

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

enforcement officers.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you.

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

Mr. Sweeney.

MR. SWEENEY: May it please the Court.

THE COURT: Good morning.

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

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

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

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

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

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

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

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

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

significant, indeed, critical studies in this area.

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

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

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

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

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

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

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

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

Answer, no.

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

Answer, correct.

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

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

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

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

Answer, correct.

THE COURT: Yes.

MR. SWEENEY: I further went on to ask him about the effect of state bans rather than the federal ban. On page 84 of his deposition I said you address, on note 95, 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?

Answer, yes.

Question, and is that still your view today?

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

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

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

Answer, yes.

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

Answer, yes.

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

Answer, probably.

I then asked him about mass shootings, page 131.

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

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

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

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

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

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

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

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

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

evidence to support that.

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

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

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

Answer, correct.

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

Answer, no. Correct, I mean.

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

Answer, correct. That's fair enough.

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

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

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

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

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

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

We produced --

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

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

THE COURT: Of his deposition. Thank you.

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

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

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

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

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

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

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

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

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

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

protection of the Second Amendment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Why not?

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

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

And yes, they did say that under any of the

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

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

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

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

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

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

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

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

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

THE COURT: I'm agreeing with you.

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

What do we have in the Fourth Circuit?

The Masciandaro case said 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.

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

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

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

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

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

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

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

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

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

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

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

means narrowly tailored to achieve the desired objective.

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

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

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

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

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

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

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

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

THE COURT: Uh-huh.

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

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

In Shew, they cited Mazzarella.

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

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

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

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

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

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

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

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

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

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

was there are none.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dr. Webster convened a symposium in January of

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

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

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

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

that's off the table.

Thank you, Your Honor.

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

(A recess was taken.)

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

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

THE COURT: Okay. Thank you.

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

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

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

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

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

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

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

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

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

Sweeney's presentation would indicate.

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

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

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

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

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

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

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

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

The evidence is that criminals obtain their

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Sweeney, would you like a rebuttal?

MR. SWEENEY: Briefly, Your Honor, yes.

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

them justice.

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

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

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

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

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

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

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

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

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

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

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

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

was not before it?

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

I have seen no case --

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

MR. SWEENEY: And this is a court proceeding.

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

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

THE COURT: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

lawful purpose.

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

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

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

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

It was the prosecution of an individual who was

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

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

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

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

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

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

semiautomatic rifles being a class of weapons.

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

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

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

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

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

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

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

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

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

THE COURT: Thank you, Mr. Sweeney.

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

(The proceedings concluded.)

REPORTER'S CERTIFICATE

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

Gail A. Simpkins

Official Court Reporter

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