

DECEMBER 9, 2014

APPEARANCE BEFORE THE UNITED STATES COURT OF APPEAL

SECOND CIRCUIT

JUNE SHEW, ET AL.

V.

DANNEL P. MALLOY, ET AL.

1 **JUDGE CABRANES:** Mr. Thompson, go ahead.

2 **ATTORNEY THOMPSON:** Good afternoon. May it please
3 the Court, David Thompson on behalf of the Appellants in
4 both the New York and the Connecticut cases.

5 In *Heller*, the Supreme Court laid out a clear test
6 for possession of firearms in the home. The Court made
7 clear that states and localities cannot ban possession
8 of a firearm in the home if that firearm is typically
9 possessed by law-abiding citizens for lawful purposes.
10 And here we have a ban on the affected firearms and
11 magazines. It extends to the home. And so the only
12 question is whether these firearms are typically
13 possessed by law-abiding citizens for lawful purposes.
14 And the State bears the burden on that question because
15 the Supreme Court was clear in *Heller* that the Second
16 Amendment, *prima facie*, extends to all bearable arms,
17 and the evidence, even if we have the burden, is
18 overwhelming on this.

19 With respect to commonality of the banned firearms,
20 they are the most popular rifles in America. There are
21 8 million of them in circulation. They are owned by 4.8
22 million people, 92 percent of whom are not current law
23 enforcement officials. Judge Skretny found they were
24 popular, and the Supreme Court in *Staples* said they
25 have, quote, Traditionally have been widely accepted as

1 lawful possessions. And we know that they are owned for
2 lawful purposes, both from the survey data which show
3 that the No. 1 reason for owning them is target
4 practice, and the No. 2 reason the Court -- according to
5 the survey data is self-defense. We know this from the
6 ATF, which in 1989 in its report, which the defendants
7 have cited, recognize that many individuals purchased
8 these firearms for self-defense.

9 Now, with respect to magazines, these two are
10 extremely common. There are 75 --

11 **JUDGE DRONEY:** Just go back to the guns -- the
12 assault weapons for a second.

13 **ATTORNEY THOMPSON:** Yes.

14 **JUDGE DRONEY:** Then why did the Court specifically
15 say that M16s could be banned?

16 **ATTORNEY THOMPSON:** Well, M16s are different, the
17 Court has said, than the AR15 which in *Staples* had
18 said was --

19 **JUDGE DRONEY:** But the only difference is that it
20 has a fully automatic feature. Right?

21 **ATTORNEY THOMPSON:** And burst. There is also a
22 burst capability where you can fire three bullets at the
23 same time. But yes, that is --

24 **JUDGE DRONEY:** And there's plenty of evidence in the
25 record that says that putting it on fully automatic is

1 not as useful as the semiautomatic approach.

2 **ATTORNEY THOMPSON:** It would depend on what the
3 purpose were. If you were trying to have sort of cover,
4 you know -- there are certain combat purposes and
5 instances where you would want a fully automatic
6 feature. But yes, in many instances they are made --
7 the manual says the most effective way to use the weapon
8 is in semiautomatic mode. That's right.

9 **JUDGE DRONEY:** So how are we to take that language
10 in *Heller* that says M16s can be banned, and say but
11 AR15s with large magazines should not be?

12 **ATTORNEY THOMPSON:** Well, in *Heller*, *Heller* gives us
13 the test, Your Honor. It says are they typically
14 possessed? Are they commonly possessed? And when
15 you're talking about the most common and popular rifle
16 in the United States, with 8 million of them in
17 circulation, then it necessarily follows that --

18 **JUDGE DRONEY:** Was that the reason why the Court
19 said M16s can be banned, because they're not -- not many
20 people have them? Or --

21 **ATTORNEY THOMPSON:** Yes.

22 **JUDGE DRONEY:** -- because they're dangerous and
23 unusual and typically used in military situations? What
24 was the reason for the Court saying you can ban M16s?

25 **ATTORNEY THOMPSON:** Right. The test for dangerous

1 and unusualness is whether it's typically possessed by
2 law-abiding citizens. And machine guns in this country
3 are not typically possessed. There was a period of
4 approximately 10 years where people could go out and buy
5 machine guns without --

6 **JUDGE DRONEY:** Why don't we figure out what's
7 "typically possessed."

8 **ATTORNEY THOMPSON:** Well, Your Honor, when -- I
9 would say that when you're --

10 **JUDGE DRONEY:** You're giving me a number bandied
11 around of 2 percent? It's just 2 percent that we're --

12 **ATTORNEY THOMPSON:** Right. Well, there are four
13 problems with the 2 percent number, Your Honor. First
14 of all, we shouldn't be talking about percentages.
15 Everyone in America could own one, but if they owned
16 more of something else, then, you know, the percentage
17 would be lower.

18 No. 2, it's the -- there is a denominator problem
19 because that 2 percent says, well, there's 8 million,
20 but there's 310 million out -- firearms in the United
21 States. But that's a non-perishable stock. You should
22 be looking at, well, what's the functioning firearms?
23 And currently, about 7 to 8 percent --

24 **JUDGE LOHIER:** How long have these firearms been the
25 best-selling firearms in the country?

1 **ATTORNEY THOMPSON:** Your Honor, there have been -- I
2 don't know how long, but certainly since the 1990s.

3 **JUDGE LOHIER:** Since the 1990s. Before that it
4 would have really been almost seldom, really rarely
5 sold. Let's just say that.

6 **ATTORNEY THOMPSON:** Okay. I don't agree, but go
7 ahead.

8 **JUDGE LOHIER:** Then what would be typical if it's a
9 physicality analysis?

10 **ATTORNEY THOMPSON:** It would depend on how many;
11 what was the absolute number that had been sold during
12 that 20- or 25-year period. If it's 8 million, you
13 know, then that's not unusual. I mean there are --
14 2 percent of the market is Volkswagens, 1.4 percent is
15 Priuses. No one would say a Prius or a Volkswagen is
16 highly unusual. And that was the test in *Heller*:
17 Highly unusual. And when you have 8 million of
18 something, it is not highly unusual.

19 If I may switch to the magazines --

20 **JUDGE DRONEY:** -- whether you choose to or not.
21 Because the Court ban *in Heller* also talks about the
22 handgun being very appropriate for the type of
23 protection the Second Amendment countenances, which is
24 protection in the home; it's easier to use; it's not
25 heavy; you can use the phone while you're doing it. All

1 those things that the Court mentioned in *Heller*. Are
2 these -- are the AR15s and the other assault weapons --
3 is there a statistical basis to believe that they're
4 used for protection in the home or are they typically
5 used for sporting purposes?

6 **ATTORNEY THOMPSON:** But we have the survey data,
7 Your Honor, which shows that that's the No. 2 reason why
8 people have them. We have the ATF --

9 **JUDGE DRONEY:** No. 2?

10 **ATTORNEY THOMPSON:** Yes. The second --

11 **JUDGE DRONEY:** What's the first reason?

12 **ATTORNEY THOMPSON:** Sporting.

13 **JUDGE DRONEY:** Yes.

14 **ATTORNEY THOMPSON:** And we also have the ATF data
15 saying that many individuals -- in 1989, the ATF said
16 many individuals buy these for self-defense. We also
17 have Judge Skretny saying there is no and cannot be any
18 dispute that these features that are banned make them
19 easier to use. They have less recoil. They are more
20 accurate. And the other thing is they have less
21 penetrating firepower. One of the things that the State
22 completely and utterly ignored was what were the less
23 restrictive alternatives and what will happen if people
24 substitute, let's say, a traditional hunting rifle for
25 home defense in lieu of an AR15? And a traditional

1 hunting rifle, the record shows -- and there is no
2 dispute about this -- has far more penetration through
3 walls and apartments and homes, collateral damage.
4 There is not one scintilla of evidence in --

5 **JUDGE DRONEY:** Wait a minute. So there are a number
6 of police chiefs, the Hartford police chief, there's
7 Lucy Allen, there are other affidavits in the record
8 that indicate that the semiautomatic rifles are far more
9 able to penetrate walls, particularly in an apartment --

10 **ATTORNEY THOMPSON:** I don't recall, Your Honor, Lucy
11 Allen speaking that. I thought she was an economist.
12 But in any event, there is a .223 caliber and the
13 firepower of a rifle, of a traditional three-ought-six
14 bullet just goes through the wall, it's much more --

15 **JUDGE DRONEY:** It's not Lucy Allen, it's Two -- it's
16 ADA and Kathy Weiss.

17 **ATTORNEY THOMPSON:** Okay. Thank you, Your Honor.
18 But the reality is, the states have not engaged in any
19 analysis of what will happen on substitution. And if I
20 may, one of the things they say in their briefs is that
21 there should be substantial deference given to what the
22 legislature is fine. And there are some problems with
23 that. No. 1, they need to have, quote, substantial
24 evidence -- that's what Turner I and Turner II says --
25 substantial evidence that it will, in fact, advance and

1 alleviate the harm in a material way. And here if we
2 look at what their hand-picked expert says, Mr. Koper,
3 he said there is little evidence -- "little," not
4 "substantial" evidence -- little evidence that --
5 whether an assault weapon ban at the state level will
6 actually work. He also said that it is, quote, Unknown.
7 He said it is unknown whether there will be any
8 incremental benefit whatsoever to a ban on assault
9 weapons as compared to the magazines that are banned.
10 So when their own expert says "I don't know, it's
11 unknown" as to whether there will be any incremental
12 benefit to the assault weapons --

13 **JUDGE DRONEY:** But it seems to be generally agreed
14 that in the recent shootings, the mass shootings, that
15 there's a combination of an assault weapon and a
16 large-capacity magazine. There's evidence in the
17 record, Judge Skretny found it, over 50 percent of
18 recent mass shootings used a combination of the two.
19 Isn't that relevant to whether there -- the combination
20 is important to consider?

21 **ATTORNEY THOMPSON:** Well, Your Honor, if you ban one
22 and not the other, you won't have the combination
23 anymore, okay? So that would be the first point I would
24 make. And it's interesting, that 50 percent number
25 comes from the "Mother Jones" analysis. No. 1, "Mother

1 Jones," oftentimes they don't purport to claim that they
2 know what was used. They just know what firearms were
3 found there. They don't know what was used.

4 No. 2, there were two instances out of 62 where only
5 one of the banned firearms was used --

6 **JUDGE DRONEY:** Roper -- Roper made the same
7 conclusion, Dr. Roper: I also found that assault
8 weapons and other firearms with large-capacity magazines
9 are used in a higher share of mass public shootings and
10 killings of law enforcement officers.

11 **ATTORNEY THOMPSON:** And, Your Honor, if I may, just
12 I was going to say about the "Mother Jones" piece that
13 there are two instances in which you only had a firearm
14 with a banned feature; so-called assault weapon without
15 the large-capacity magazine. In both instances there
16 was less fatality and less injury. Less fatality, less
17 injury. And it makes sense, because when we talk about
18 these banned features, what are we talking about? We're
19 talking about a thumbhole stock. That is a hole in the
20 back of a stock. The notion that that somehow turns
21 this, you know, what the Supreme Court said has
22 traditionally been widely accepted as a lawful
23 possession into some sort of weapon of war is
24 ridiculous. And that's why in *Staples* the Supreme Court
25 said no, that's not right.

1 If I may also state, fully apart from the failure to
2 have substantial evidence on these points with respect
3 to the assault weapons that they banned, there's also a
4 lack of substantial evidence on the magazines
5 themselves. For their argument to be right, they have
6 to have evidence that criminals will not use these
7 magazines if they are banned. We have empirical
8 experience on that in this country. For 10 years these
9 magazines were banned throughout the United States, any
10 sale of them; and their own expert admits there was no
11 diminution whatsoever in the extent to which criminals
12 engaged in gun violence and, No. 2, used the magazines.
13 And it's little surprise because they are so common;
14 there's 75 million of them. And here it will be even
15 less --

16 **JUDGE LOHIER:** But that assault weapons ban, was
17 that 10 rounds or was that -- what was it?

18 **ATTORNEY THOMPSON:** I believe it was 10 rounds, Your
19 Honor. Yes.

20 **JUDGE LOHIER:** And some -- is there any experience
21 in this country with -- I think your answer would be no,
22 but I want to make sure I'm right -- with, say, a
23 7-round limit?

24 **ATTORNEY THOMPSON:** No, Your Honor. And there is
25 certainly no experience in this country with a gun

1 regulation which allows criminals to have the magazine
2 and ask them to voluntarily not put in the last three
3 bullets and not use them when they're going on their
4 shooting spree. This is -- you know, Judge Skretny said
5 it just stretches credibility too far to suggest --

6 **JUDGE DRONEY:** We're not talking about the 10 and 7;
7 we're talking about the --

8 **ATTORNEY THOMPSON:** Okay.

9 **JUDGE DRONEY:** -- 30 rounds in a magazine proper.
10 Right?

11 **ATTORNEY THOMPSON:** Yes. And the --

12 **JUDGE DRONEY:** And you're saying don't bother to
13 outlaw them because there are so many around that they
14 would be available to criminals anyway, so our best
15 defense is to let the law-abiding citizens have
16 large-capacity magazines, too. Is that what you're
17 saying?

18 **ATTORNEY THOMPSON:** Well that's the '94 -- that's
19 the experience, in part, of what the '94 law says. I
20 mean the '94 experience, their own expert, Professor
21 Koper, said there was no diminution in fatalities, no
22 diminution --

23 **JUDGE DRONEY:** -- from Connecticut did say that the
24 early prohibition in Connecticut of that had an effect,
25 is used. Isn't that right?

1 **ATTORNEY THOMPSON:** Well --

2 **JUDGE DRONEY:** There is expert evidence in the
3 record of that.

4 **ATTORNEY THOMPSON:** Your Honor, I'm not familiar
5 with that. You may be right. But I would say also, to
6 go back to the fact that *Heller* is very clear that when
7 you're talking about banning these things in the
8 public -- in the home, which *Kachalsky* said is the
9 zenith, that is the zenith, whether we're talking lives
10 or *Griswold*. And they have less restrictive alternatives
11 that they can and had to consider: *Turner I* and
12 *Turner II*, and *Rock versus Ward* -- *Ward versus Rock*
13 *Against Racism* all said that they cannot burden more of
14 the right than is necessary. And one thing they could
15 have done is look at carriage rules if they decided that
16 -- another thing they could have looked at is mental
17 health. And there are extensive regulations about
18 mental health, but there's not a single finding to defer
19 to that the mental health rules and the storage rules
20 will not solve the problem of mass shootings. They
21 don't have any consideration or any evidence of that now
22 that they've put forward.

23 If I may, there's also in the briefs a suggestion
24 that these weapons are used disproportionately. That's
25 wrong on the law and the facts. On the law it's wrong

1 because this was the centerpiece of the District of
2 Columbia's defense in *Heller*. They said, look, the
3 handguns are only 33 percent of the gun stock, but
4 they're used in 87 percent of the violent gun crimes.
5 These are disproportionate. They should be outlawed.
6 And the Supreme Court said no.

7 In addition, it's wrong on the facts because
8 Professor Koper -- and this is at Joint Appendix of New
9 York 464 -- said that in looking prior to 1994, only
10 2 percent of the firearms used in crime were the banned
11 weapons. And it's true they have an 8 percent number,
12 but that comes from tracing data. And Professor
13 Koper -- again, their expert, not ours -- said that
14 tracing data, No. 1, it's not -- it's a -- it is not a
15 random sample, it's only 1 percent of the guns that are
16 used in crimes other than homicides, 17 percent of the
17 homicide guns. And that it ended over -- represents an
18 over-sample, the assault weapons. That's at New York
19 48990. And I see that -- I'd like to go to my rebuttal.

20 **ATTORNEY UNDERWOOD:** Barbara Underwood for New York.

21 The New York law does not ban handguns as the law in
22 *Heller* did. It doesn't ban semiautomatic weapons. It
23 bans or restricts certain features that promote the
24 rapid firing of a large number of rounds; that is, that
25 means with a capacity of more than 10 rounds, and for

1 semiautomatics with detachable magazines, various
2 features that are used and needed to control the recoil
3 and the overheating that go along with fast firing of a
4 large number of rounds; that's the extra grip and the
5 barrel shroud and the muzzle brake, and so forth.

6 Under New York law, a person can have as many
7 features -- of those features as they want if they fix a
8 magazine to their semiautomatic rifle or pistol. It's a
9 combination of detachable magazine and those features,
10 that the State has identified as creating the particular
11 problem here. And the ability to fire a large number of
12 rounds quickly without reloading, which is what this
13 restricts, is not essential to the core Second Amendment
14 right bar in self-defense; and yet it is an important
15 cause of injury and death to law enforcement officers
16 and to the victims of mass shootings in schools,
17 shopping malls, movie theaters, and workplaces.

18 Restricting those features -- not guns, but
19 features -- may not implicate the Second Amendment right
20 at all because they aren't central to that self-defense
21 right, and they are characteristic of military weapons
22 or especially dangerous weapons, or it may impose such
23 an insubstantial burden on the Second Amendment right as
24 not to require heightened scrutiny under *Decastro*. But
25 given the legal uncertainties in this area, it seems

1 prudent to analyze the statute under heightened
2 scrutiny, assuming, without deciding, that that is
3 required. And for that purpose the appropriate level of
4 scrutiny is intermediate for three reasons: A law
5 imposes a burden and not a ban on weapons; it is not a
6 severe burden; and it's consistent with the decisions of
7 every other Circuit Court that has attempted to define
8 the appropriate level of scrutiny.

9 On the first point, that it imposes a burden rather
10 than a ban, which this Court said was important in
11 *Kwong* --

12 **JUDGE LOHIER:** So you would agree -- well, maybe
13 not. But what's your position with respect to how
14 typical one common use is assault weapons bursts --

15 **ATTORNEY UNDERWOOD:** Well, I think there is an
16 argument which we've made in our brief that they aren't
17 sufficiently used to be protected by the Second
18 Amendment, and that they are closer to the military
19 weapons that *Heller* reserved than to the commonly used
20 weapons. But I don't think it's -- as I say, I don't
21 think it's prudent to rest the decision in this case on
22 that ground, although we would be happy to go back to
23 the alternative ruling.

24 I do think the law is -- should be regarded as very
25 similar to time, place, and manner regulation in *First*

1 Amendment law. Just as the First Amendment permits the
2 state to regulate the volume of speech, the noise level,
3 so, too, the Second Amendment permits the state to
4 regulate the volume of gunfire, the number of rounds
5 that can be fired without pause. And that's all this
6 is: The number of rounds that can be fired without a
7 pause to reload. In fact, Plaintiffs in their second
8 brief at page 22, observed that the effect of the
9 magazine ban is to outlaw, they say, firearms capable of
10 firing more than 10 rounds without reloading. I would
11 just say --

12 **JUDGE DRONEY:** Can I ask you about the loading
13 provision that Judge Skretny said --

14 **ATTORNEY UNDERWOOD:** Yes.

15 **JUDGE DRONEY:** -- was unconstitutional?

16 **ATTORNEY UNDERWOOD:** Yes.

17 **JUDGE DRONEY:** And that is, doesn't it make sense,
18 though, if you have a 10-round capacity in a magazine,
19 but you say that you can only put in 7 rounds, then he
20 may be right that, well, the only people that would not
21 put the full 10 rounds in are law-abiding citizens.
22 That if you can still buy a 10-round magazine, a
23 criminal is always going to put in the 10 rounds. So
24 does it make any sense to have the 7-round loading limit
25 as Judge Skretny thought it did not?

1 **ATTORNEY UNDERWOOD:** It does. Even on the predicate
2 that the only people who will comply with it are
3 law-abiding people, it's harder to enforce for that
4 reason because it's not -- it's hard to enforce because
5 it's not addressed to manufacturers, it's addressed to
6 the user and -- and because you can only expect
7 compliance from law-abiding citizens. But if
8 law-abiding citizens keep their magazines loaded in 7
9 rather than 10, to that extent it will protect
10 bystanders from the event -- from those last three
11 bullets in the event -- several things could happen.
12 Somebody who wasn't the law-abiding person could
13 obtain -- a child, another member of the household. A
14 thief could obtain that gun. Someone -- or the normally
15 law-abiding citizen could have a moment of rage and --

16 **JUDGE DRONEY:** Where did it come from? Where did
17 the number 7 --

18 **ATTORNEY UNDERWOOD:** The number 7, to the best of
19 my -- I'm advised that the determination --

20 **JUDGE DRONEY:** You're advised.

21 **ATTORNEY UNDERWOOD:** That the legislature was making
22 a compromise between people who wanted 10 and people who
23 wanted 5; both of those numbers were out there. And
24 originally it was going to be a 7-capacity limit; that
25 was going to be magazines that only had a 7 capacity.

1 Picked the number 7 as adequate to provide for
2 self-defense and sporting and so forth, but not so large
3 as to be -- as to cause the additional harms from mass
4 shootings and law enforcement confrontations --

5 **JUDGE DRONEY:** Was the idea to force manufacturers
6 to make a magazine that could only --

7 **ATTORNEY UNDERWOOD:** That was -- well, I don't know
8 if was to force. The thought was that that would
9 happen. But then when -- when it became -- when it was
10 said that it wouldn't happen and the law was amended to
11 make the capacity limit 10 because there already existed
12 10-round-capacity magazines, and to achieve the 7
13 compromise number through a load limit, recognizing that
14 it would have a lesser effectiveness than the 10 limit,
15 but where it operated it would save -- it maybe would
16 eliminate the consequences of those last three -- of
17 those last three bullets. To be sure, the most
18 important feature of this whole structure is the
19 10-round-capacity limit on magazines --

20 **JUDGE DRONEY:** Isn't it true, though, that with
21 semiautomatic handguns before these recent bans, that
22 many of the typical handguns purchased for home
23 protection, semiautomatic pistols, had magazines which
24 had greater capacity than 10 rounds? Not all, but many.
25 Right?

1 **ATTORNEY UNDERWOOD:** I don't know the answer to
2 that. I'm --

3 **JUDGE DRONEY:** Well, in the record it says that,
4 doesn't it?

5 **ATTORNEY UNDERWOOD:** Pardon me?

6 **JUDGE DRONEY:** In the record it says that. Right?

7 **ATTORNEY UNDERWOOD:** I believe so. I'm not
8 confident about that answer. But the notion here that
9 the target of this -- sorry about the word -- but the
10 target of this legislation is the rapid fire, the
11 semiautomatic fire of large numbers -- you can pick the
12 number; you can pick 10, some states have picked 15, you
13 could pick 7 or 5 -- the rapid firing of large number of
14 bullets without pause that allows either the person who
15 has gone a little bit berserk, to stop and think, or the
16 victims to hide, or law enforcement to intervene, that
17 pause to reload provides an important opportunity to
18 save lives. And yet there is no evidence in the record
19 that it is -- that that large firing capacity is
20 necessary for self-defense. I don't think there's a
21 factual dispute about how often a large number of
22 bullets rapidly fired would be necessary for
23 self-defense. The dispute between the parties on that
24 point is not factual, but legal. I think they agree
25 that defensive use seldom if ever requires more than

1 brandishing or a few shots. They just claim that it's
2 conceivable that more would be needed and they're
3 entitled to arm themselves for maximum effectiveness
4 against a rare and even speculative event. That's in
5 their respon -- their second brief on page 26. But that
6 can't be right because that would mean the Second
7 Amendment guarantees the right to the most powerful
8 firearms that exist, and that can't be the law.

9 The burden -- I guess my time is up, I think. I'll
10 make one more point. The burden on the right of armed
11 self-defense doesn't become more severe because many
12 people want to have these features on their weapons.
13 The Second Amendment is not a popularity contest or a
14 consumer preference contest. *Heller's* emphasis on the
15 handgun as the quintessential self-defense weapon was a
16 way of explaining why the breadth of that ban was
17 unacceptable. It did not establish a rule saying that
18 you take a vote, and popularity answers the question
19 whether reasonable regulation is permissible or not.

20 **JUDGE DRONEY:** Let me ask you, I'm sorry, one
21 question before you sit down. It may be too onerous,
22 but one of the arguments that's made by your adversary
23 is that all this evidence that we've got in this
24 multivolume appendix was not before the legislature, or
25 much of it was not before the legislature when it made

1 its decision; the various decisions, various limits.
2 Now, what's your response to that when they say that
3 that -- we should consider that in determining if we --

4 **ATTORNEY UNDERWOOD:** But I think that's wrong for
5 two reasons. One, this legislation was part of an
6 ongoing effort over years to deal with the problem of
7 mass shooting, of what are being called assault weapons.
8 The legislature that passed this law had been
9 considering the problem, had a previous law that
10 existed, was patterning its laws after the federal law
11 or deciding where the federal law or the prior state law
12 had gaps in it. And much of this evidence was either
13 before Congress or before the New York legislature on a
14 prior occasion. This is not a -- they didn't just step
15 in when this law was passed and decide what to do on a
16 clean slate. They were dealing with an area in which
17 they had already been acting with ample evidence before
18 them. That's one point.

19 Beyond that, of course, this Court and other courts
20 have made clear that in deciding the reasonableness of a
21 law that a legislature is not an administrative agency
22 whose judgment is to be assessed on the basis of the
23 administrative record before it if, in fact, its
24 judgment was reasonable and is supported by evidence.
25 The role of the Court is just to make sure of that, to

1 make sure that it isn't going off the rails. But
2 evidence that is publicly available on the public record
3 is -- has routinely been used by this Court and other
4 courts to assess those questions about legislative
5 facts.

6 **JUDGE CABRANES:** Mr. Thompson. Oh, where do you --
7 let's see. That's fine. That's fine. That's the
8 arrangement you've worked. Thank you.

9 **ATTORNEY MURPHY-OSBORNE:** Good afternoon. May it
10 please the Court, my name is Maura Murphy-Osborne. I'm
11 an Assistant Attorney General for the State of
12 Connecticut, and with me at counsel table is Michael
13 Skold, also an Attorney General -- Assistant Attorney
14 General to the State of Connecticut. We represent the
15 defendants in the *Shew vs Malloy* matter.

16 Your Honor, the Connecticut Act that's at issue in
17 this litigation will have a meaningful impact in
18 reducing the lethality and the injuriousness of gun
19 crime incidents in Connecticut when they do occur, and
20 this Court should uphold the Act in its entirety.

21 The Act is consistent with this Court's precedents
22 in the area of firearms regulations; in particular,
23 *Kachalsky*, *Decastro*, and *Kwong*, and it is also
24 consistent with United States Supreme Court precedent of
25 *Heller* and *McDonald*.

1 This Court has appropriately found in other cases
2 that in this area of firearms regulations the
3 determination and the legislative choices of the
4 legislatures -- the legislature, such as those that are
5 contained in this Act, are entitled to deference by this
6 Court.

7 Your Honor, Plaintiffs -- we heard Plaintiffs'
8 counsel claim that the state failed to give any
9 consideration or analysis about whether or not this law
10 would have a meaningful impact on gun violence, and that
11 claim is simply wrong. The Act will have a meaningful
12 impact on gun crime in Connecticut. The Act will reduce
13 the lethality and the injuriousness of gun crime
14 incidents when they do occur. By one estimate of an
15 expert, an assault weapon ban like the one contained in
16 the Connecticut Act will help to reduce gunshot
17 victimization by up to 5 percent. A 5 percent
18 reduction --

19 **JUDGE DRONEY:** Koper was also an expert in your
20 case; is that correct?

21 **ATTORNEY MURPHY-OSBORNE:** In our case he was our
22 expert. We submitted an affidavit from him. He's
23 really the only person that has thoroughly examined the
24 federal assault weapon ban that was in -- that banned
25 both assault weapons, large-capacity magazines --

1 **JUDGE DRONEY:** So your adversary I think rightly
2 points out that his affidavits -- that's plural -- are
3 somewhat equivocal with respect to the impact of an
4 assault weapon ban. Don't you agree?

5 **ATTORNEY MURPHY-OSBORNE:** No, I don't agree. And
6 what Plaintiffs have done repeatedly throughout this
7 litigation is to cherry-pick and distort Dr. Koper's
8 findings. So it's important to understand Dr. Koper's
9 role in studying this issue. He's really the only
10 expert that has thoroughly examined it. He was
11 charged -- as part of the enactment of the federal ban
12 he was charged with studying the effects of the federal
13 ban. So he prepared a report in 1997, just three years
14 after the ban was in effect; and it's that 1997 report
15 where he did equivocate about the effectiveness of the
16 federal ban that Plaintiffs rely on extensively.
17 Dr. Koper in our case and in another publication he did
18 in --

19 **JUDGE DRONEY:** Distanced himself from or explained
20 those prior --

21 **ATTORNEY MURPHY-OSBORNE:** He did that and he also
22 noted that he -- that he had additional evidence to look
23 at. So really his 1997 report that you'll see
24 Plaintiffs rely upon extensively was pretty much
25 superseded by both his 2004 report and then,

1 subsequently, his -- in our case he was able to look at
2 information like the "Mother Jones" data compilation
3 about mass killings, in particular; he examined that and
4 studied it. He was also able to look at a study done by
5 The Washington Post regarding the large
6 capacity-magazine ban and he concluded looking at that
7 data that the Act, like Connecticut's Act, will have a
8 meaningful impact on gun violence incidence.

9 Even a small reduction in gunshot victimization will
10 yield substantial and quantifiable societal benefits.
11 By one estimate, even just a 1 percent decrease in
12 gunshot victimization would yield something around
13 \$19 million a year. And if you factor in less tangible
14 societal benefits, some estimates are that the savings
15 to society would be \$1 million per shooting or
16 approximately \$750 million annually saved.

17 A ban on large-capacity magazines such as that
18 contained in the Connecticut Act will be especially
19 useful in combating the lethality and the injuriousness
20 of gunshot victimization. Unlike what Plaintiffs just
21 claimed, that there was no evidence that bans on
22 large-capacity magazines have an impact, that's
23 completely wrong. Bans on large-capacity magazines have
24 been shown to reduce the presence of those magazines in
25 the civilian gun market over time. The Washington Post

1 study that I referenced a moment ago showed that as a
2 result -- toward the end of the federal ban period, this
3 10-year period, results were really starting to show,
4 and that there was a 44 percent decrease in the use of
5 large-capacity magazines in one geographic area towards
6 the end of that 10-year period.

7 **JUDGE DRONEY:** What do you say about the gist of the
8 question I asked your adversary? Before these bans went
9 into effect on large-capacity magazines, that I don't
10 know if it's most, but certainly many of the
11 semiautomatic pistols that were sold and that were used
12 for home protection, which is discussed so much in
13 *Heller*, had more than a 10-round capacity in their
14 clips, isn't it true that most of the handguns that were
15 sold before the ban on large-capacity magazines exceeded
16 a 10-round clip?

17 **ATTORNEY MURPHY-OSBORNE:** Many did, Your Honor, but
18 I think you need to be careful at looking at Plaintiffs'
19 evidence in that regard because they do make those
20 claims of somewhere -- even just looking at handguns,
21 they do make those claims that something like, you know,
22 30 or 40 percent of semiautomatic pistols would hold
23 more than a 10-round magazine. But if you look closely
24 at their data, that's often a snapshot and it's often a
25 snapshot of a more modern recent time, and it doesn't

1 show you any percentages about gun ownership generally
2 or pistol ownership generally. There's something
3 estimated to be around 310 million firearms in
4 possession in the United States, so their data about how
5 many semiautomatic pistols or AR15s that were produced
6 in, say, 2011 doesn't really give you an accurate
7 picture. But moreover, we don't -- we don't think that
8 even -- even as counsel for New York, the Assistant
9 General of New York mentioned, it's not really -- the
10 Second Amendment isn't driven by a consumer choice
11 issue; that that doesn't mean that there's an
12 encroachment on anybody's --

13 **JUDGE DRONEY:** Oh, but there's certainly language
14 about in common use and protection of the home in
15 *Heller*.

16 **ATTORNEY MURPHY-OSBORNE:** The right that the Court
17 found in *Heller* was a right of law-abiding citizens to
18 engage in self-defense, but with arms in the -- to
19 protect their hearth and home. So there's no
20 discussion --

21 **JUDGE DRONEY:** And a handgun is the most appropriate
22 way to do that, the Court said. Right?

23 **ATTORNEY MURPHY-OSBORNE:** Yes.

24 **JUDGE DRONEY:** It's the easiest and best way to do
25 that.

1 **ATTORNEY MURPHY-OSBORNE:** It did. It found that the
2 handgun was the quintessential self-defense weapon. But
3 this Act doesn't prohibit handguns in any way. This Act
4 is about a very small set -- subset of semiautomatic
5 handguns. So many handguns aren't even semiautomatic.
6 Some are revolvers. And --

7 **JUDGE DRONEY:** But far fewer revolvers are sold
8 today than they were 20 years ago. The evidence is
9 that, too. Right?

10 **ATTORNEY MURPHY-OSBORNE:** That's true. And that's
11 one of the concerns in the state interest is the growing
12 militarization of our civilian gun market. So while gun
13 manufacturers and a small segment of gun owners, maybe
14 1 percent of -- probably less than 1 percent because
15 most people who own something like an AR15, the
16 Plaintiffs' own evidence shows they tend to own more
17 than one. So even if AR15s and the like are just
18 1 percent of the 310 million guns in civilian
19 circulation, that's not even 1 percent of the people.
20 So just because a small -- this small number of people
21 wants to have these very militaristic weapons --

22 **JUDGE DRONEY:** He said a number of 4.2 million
23 people.

24 **ATTORNEY MURPHY-OSBORNE:** I believe the numbers --
25 the numbers the Plaintiffs rely on vary somewhat.

1 They're more -- first was that 3.97 million AR15s are
2 estimated to be in ownership. Their more recent numbers
3 are something like 4.7 million AR15s. But even when you
4 compare that to 310 million firearms generally, that's
5 still not a large percent and it certainly --

6 **JUDGE DRONEY:** But didn't the District Court find
7 that they were in common use?

8 **ATTORNEY MURPHY-OSBORNE:** The District Court did
9 find that, and then just engaged in the two-step
10 intermediate scrutiny analysis and upheld the law.

11 **JUDGE DRONEY:** As to magazines as well. Right?

12 **ATTORNEY MURPHY-OSBORNE:** Yes.

13 I see my time is nearly ended, so I would just
14 respectfully request that -- and submit to this Court
15 that the Act will advance Connecticut's interest in
16 reducing the number of deaths and injuries caused in gun
17 crime incidents. And particularly in the most horrific
18 types of gun crime incidents, mass public shootings,
19 which I didn't have an opportunity to discuss with you,
20 but the evidence is substantial and overwhelming that on
21 estimate somewhere in the range of 10 fewer people are
22 killed in these mass public shooting incidents when more
23 conventional weapons are used. And so -- in other
24 words, 10 more people are killed or injured when these
25 assault weapons or large-capacity magazines are used;

1 and that's obviously a very important state interest.
2 The Act leaves citizens free to select many firearms for
3 adequate and effective self-defense in the home, which
4 is the right found in *Heller*.

5 So the State of Connecticut respectfully submits to
6 this Court that the Act should be upheld in its entirety
7 and that the decision of the Trial Court should be
8 affirmed. Thank you.

9 **ATTORNEY THOMPSON:** Thank you, Your Honor.

10 So I'd like to begin by analyzing the question of
11 whether we've been distorting or cherry-picking
12 Professor Koper's statement. Let's start with his
13 supplemental declaration in this case. The last thing
14 he had to say --

15 **JUDGE DRONEY:** Where is that?

16 **ATTORNEY THOMPSON:** That is at Joint Appendix New
17 York 2236, and Joint Appendix Connecticut 1412.

18 He said, quote, There is little evidence -- little
19 evidence -- on how state assault weapons bans affect the
20 availability and use of assault weapons, close quote.

21 In 2004, he said, quote, It is unknown -- unknown --
22 whether further restrictions on outward features of
23 semiautomatic weapons, such as banning weapons having
24 any military features, will produce measurable benefits
25 beyond those restricting magazine capacity. That's at

1 New York 572 and Connecticut 1685.

2 That statement highlights something that is critical
3 for this Court. If the Court takes nothing from my
4 argument away from this, I would hope it would be that
5 there are two laws at stake here. There are two bans.
6 They need to be analyzed separately. The state wants to
7 sort of blur this distinction and make it sound like
8 it's one law. There are two bans, and the Court needs
9 to look at each.

10 Also, Professor Koper said -- and this is New York
11 JA545, 2004, said, quote --

12 **JUDGE DRONEY:** What's the number again?

13 **ATTORNEY THOMPSON:** JA545 of New York.

14 He said, quote, If anything, therefore, gun attacks
15 appear to have been more lethal and injurious since the
16 ban, close quote.

17 **JUDGE DRONEY:** On the original -- the most recent
18 affidavit you provided he did say: One should not
19 conclude, however, that such bans will have no effect on
20 public safety. As discussed above, if allowed to
21 operate over the long run, such bans can potentially
22 reduce number of lethality of gunshot victimizations, et
23 cetera.

24 He did -- he still makes same conclusion, though.
25 Right?

1 **ATTORNEY THOMPSON:** Well, it's not the same
2 conclusion, and he admits he has little evidence for it.
3 I mean he reaches this conclusion, but under Turner I
4 and II he has to have substantial evidence. He can't
5 just come in as a paid expert and opine on this. He has
6 to have substantial evidence. And he said, "I have
7 little evidence," or it's "unknown"; not that "I have
8 substantial evidence."

9 **JUDGE CABRANES:** Where does "substantial evidence"
10 come from?

11 **ATTORNEY THOMPSON:** That comes from the Turner --

12 **JUDGE CABRANES:** Administrative --

13 **ATTORNEY THOMPSON:** Turner I and Turner II. And
14 *Kachalsky* on four occasions cites to Turner I as the
15 standard. So this Court has embraced that.

16 In addition, there was a question about whether
17 *Heller* really just deals with handguns; whether, you
18 know, handguns are the best for self-defense. Nothing
19 in *Heller* suggests that it's confined, in fact, to
20 handguns. They said the Second Amendment, *prima facie*,
21 extends to all -- all -- bearable arms, close quote.
22 And Justice Stevens in *McDonald* said in his dissent:
23 The gravamen of the complaint is that the Plaintiffs
24 want to have a handgun or a gun of their own choosing.
25 He was very explicit that it was not confined -- that

1 *Heller* was not confined to handguns.

2 In addition, there's a question about will lethality
3 and injuriousness decline. You know, as we've pointed
4 out, Professor Koper himself said after the '94 ban,
5 10-year ban, it didn't. And that was a national ban.
6 This is one state. There are 44 states that don't have
7 this ban. There's 75 million of them in circulation.
8 They do not have any evidence to suggest that criminals
9 will not go out and find these magazines in one of the
10 other 44 states. And they don't have any evidence as to
11 if the criminals are thwarted somehow, what will they
12 use instead? And they haven't given any consideration
13 to what the defensive gun use implications are. They're
14 looking at this from the side -- from the perspective of
15 how are criminals going to misuse this, whereas *Heller*
16 teaches that's the wrong question. That was what the
17 District said. The right question is how are
18 law-abiding, responsible citizens going to use these
19 firearms and these magazines.

20 **JUDGE CABRANES:** Thank you very much. We'll reserve
21 decision. Excellent arguments and excellent briefs.
22 Oh, we have another one surfacing? Pardon me.

23 **ATTORNEY THOMPSON:** There's a cross-appeal, so I
24 believe --

25 **JUDGE CABRANES:** Whatever you want.

1 **ATTORNEY THOMPSON:** Defense has a cross-appeal.

2 **JUDGE CABRANES:** I'm easy.

3 **ATTORNEY UNDERWOOD:** Okay. I just -- just a few
4 points. I wanted to make the point that while Professor
5 Koper may have expressed some uncertainty about
6 features, he did not express any uncertainty about
7 large-capacity magazines. The problem with the data
8 about large-capacity magazines is that in New York,
9 until recently there was a huge grandfathering of
10 large-capacity magazines. This was an attempt to solve
11 that problem. As I said before, this legislation builds
12 on prior legislation that --

13 **JUDGE DRONEY:** May I ask you about your
14 cross-appeal, though?

15 **ATTORNEY UNDERWOOD:** Yes. Please.

16 **JUDGE DRONEY:** This issue of "muzzle breaks," the
17 misspelling of "brakes." Is there another -- is there
18 another use of b-r-e-a-k-s that would --

19 **ATTORNEY UNDERWOOD:** Not only is there not --

20 **JUDGE DRONEY:** Let me just finish my question.

21 **ATTORNEY UNDERWOOD:** I'm sorry.

22 **JUDGE DRONEY:** That would cause confusion? Because
23 it seems to be admitted that it should have been
24 "brakes," like on a car. Right? But it was misspelled
25 in the legislation. But is there a likelihood of

1 confusion if people won't know what you're talking
2 about?

3 **ATTORNEY UNDERWOOD:** There is not -- Plaintiffs have
4 never suggested that there is, and a little Googling
5 will show you that this misspelling is actually fairly
6 common, too. There is no other thing called a "muzzle
7 brake" with the other spelling. This misspelling is
8 fairly common as a misspelling of the thing that is a
9 brake on the muzzle that is designed to limit recoil.
10 Plaintiffs have never suggested that there was any
11 confusion, they've just identified the misspelling. And
12 a common one at that.

13 On the effectiveness, potential effectiveness of the
14 load limit of the 7 -- gun load limit, obviously there's
15 no data because it hasn't been tried; there's simply
16 reason and sense, and the legislature is allowed to do
17 that. That is, if the evidence supports limiting the
18 number of bullets that are available, the number of
19 rounds that are available to be used, if that is a
20 reasonable judgment and if a limitation to 10 is a
21 reasonable judgment or a limitation to 7 is one, then
22 achieving it by this particular mechanism it is also --

23 **JUDGE CABRANES:** They can presumably act on the
24 basis of intuition. Right?

25 **ATTORNEY UNDERWOOD:** No. They --

1 **JUDGE CABRANES:** This is not unheard of.

2 **ATTORNEY UNDERWOOD:** That's correct. But I think
3 the point is that this isn't intuition about the whole
4 area. There is evidence about the effect of limiting
5 the -- the beneficial effect on victims of the mass
6 shootings and law enforcement confrontations, of
7 limiting the number of rounds available, and the lack of
8 detriment to -- or there's no evidence showing that
9 there's -- there's generally conceded that it's not
10 important at these high numbers for armed self-defense.
11 And so then you get to the question of what number. And
12 there isn't evidence that you can possibly have
13 controlled studies about 10 versus 9 versus 8 versus
14 7 --

15 **JUDGE LOHIER:** Well, there's some manufacturer post
16 hoc evidence about Lucy Allen that 7 seems to be a cliff
17 effect in terms of what's actually --

18 **ATTORNEY UNDERWOOD:** There is, and that's why the
19 legislature was initially going for 7; and then finding
20 it impractical, they went for 10, which is a preexisting
21 magazine that is already marketed, with the 7-load limit
22 for law-abiding citizens who keep their guns loaded.
23 And those guns might be used by somebody other than the
24 law-abiding citizen who uses them. It can't be the law
25 that because some people will evade the law, that proves

1 that the law will have no effect and --

2 **JUDGE CABRANES:** Your time is up.

3 **ATTORNEY UNDERWOOD:** Thank you.

4 **JUDGE CABRANES:** Our little crib sheet doesn't quite
5 explain how all of this was worked out amongst you, but
6 whatever you want.

7 How about you? What do you have to say to that?

8 **ATTORNEY THOMPSON:** I have nothing further, Your
9 Honor.

10 **JUDGE CABRANES:** Thank you very much.

11 Now we'll reserve decision, and now I'll tell you
12 how good your arguments were, even after the postscript.
13 Thank you very much.

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