NO. 14-1945

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Stephen V. Kolbe; Andrew C. Truner; Wink's Sporting Goods, Inc.; Atlantic Guns, Inc.; Associated Gun Clubs of Baltimore Inc.; Maryland Shall Issue, Inc.; Maryland State Rifle and Pistol Association, Inc.; National Shooting Sports Foundation, Inc.; Maryland Licensed Firearms Dealers Association, Inc.,

Plaintiffs-Appellants,

vs.

Martin J. O'Malley, in his official capacity as Governor of the State of Maryland; Douglas F. Gansler, in his official capacity as Attorney General of the State of Maryland; Marcus L. Brown, in his official capacity as Secretary of the Department of State Police and Superintendent of the Maryland State Police; Maryland State Police,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF OF *AMICI CURIAE* THE STATE OF WEST VIRGINIA AND 20 OTHER STATES SUPPORTING PLAINTIFFS-APPELLANTS

OFFICE OF THE ATTORNEY GENERAL
State Capitol Building 1, Room 26-E
Charleston, WV 25305
Telephone: (304) 558-2021
Email: Elbert.Lin@wvago.gov

PATRICK MORRISEY
ATTORNEY GENERAL
Elbert Lin
Solicitor General
Julie Marie Blake
Assistant Attorney General

Counsel for Amicus Curiae *the State of West Virginia*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page**

STATUTES/RULES

IDENTITY OF *AMICI*

The States of West Virginia, Alabama, Alaska, Arizona, Florida, Idaho, Kansas, Louisiana, Michigan, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Wyoming, and the Commonwealth of Kentucky file this brief under Rule 29(a) of the Federal Rules of Appellate Procedure.[1] The *amici* have a significant interest in the protection of the fundamental constitutional rights of their citizens. These rights include the right to keep and bear arms protected by the Second Amendment of the United States Constitution. Maryland's Firearm Safety Act of 2013 burdens this right by imposing a ban on the possession of commonly used weapons that extends to the home. Md. Code Ann. Crim. L. §§ 4-301–4-306; Md. Code Ann. Pub. Saf. § 5-101. A decision that such a law passes constitutional muster would undermine the core right protected by the Second Amendment.

[1] A State may "file an amicus-curiae brief without the consent of the parties or leave of court." Fed. R. App. P. 29(a).

SUMMARY OF ARGUMENT

The State of Maryland has enacted a law that severely restricts the ability of anyone in that State to possess or transfer a number of commonly owned firearms. The ban includes some of the most widely owned rifles in the United States, including the AR-15. The law also bans the manufacture, sale, purchase, receipt, or transfer of detachable magazines that hold more than ten rounds—the standard magazines on most modern handguns.

This law violates the right to keep and bear arms protected by the Second Amendment of the United States Constitution. The Second Amendment protects an individual's right to weapons typically possessed by law-abiding citizens for lawful purposes. The core interest protected by this right is the use of such weapons for self-defense.

Maryland's outright ban of some of the most popular rifles in the United States and the most common magazines in the most common handguns violates this protection and should be subject to strict scrutiny. Md. Code Ann. Crim. L. §§ 4-301–4-306; Md. Code Ann. Pub. Saf. § 5-101. The banned weapons are typically possessed for lawful purposes and therefore fall within the protection of the Second Amendment. Strict scrutiny is appropriate because the Maryland law extends to possession of those weapons by a law-abiding citizen for self-defense in the home and because the law bans an entire class of weapons, which is the

equivalent of a content-based ban on a category of speech in the First Amendment context.

But even under intermediate scrutiny, the challenged law cannot pass constitutional muster for at least two reasons. *First*, the law is similar to the one the Supreme Court in *Heller* found to be invalid under any standard of scrutiny. *Second*, Maryland has failed to establish an adequate evidentiary link between the law and its interest in public safety and law enforcement. The State relies only on speculative assertions, which this Court has made clear do not satisfy either strict or intermediate scrutiny.

The District Court also erred when it applied a lesser standard of admissibility to expert opinion offered in court in support of Maryland's law. The Federal Rules of Evidence, as well as decisions of the Supreme Court and this Court, establish a uniform standard that applies to all expert opinion introduced in federal courts. Expert opinion that is first introduced in court, even when offered in defense of legislation, must always satisfy the same standard under Federal Rule of Evidence 702.

ARGUMENT

I. THE BANNED WEAPONS FALL WITHIN THE PROTECTION OF THE SECOND AMENDMENT.

The Second Amendment of the United States Constitution "guarantees"—against both the Federal Government and the States—"the individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). In full, the Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The Supreme Court has concluded that there is "no doubt, on the basis of both [the] text and history, that the Second Amendment confer[s] an individual right to keep and bear arms." *Heller*, 554 U.S. at 595. Indeed, "individual self-defense is 'the *central component*' of the Second Amendment right." *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010). And because it is a right "fundamental to *our* scheme of ordered liberty," it applies not just to the Federal Government but also to the States through the Due Process Clause of the Fourteenth Amendment. *Id.* at 767 (emphasis in original).

Following the Supreme Court, this Court and other federal appeals courts have recognized that the Second Amendment's protection extends to weapons "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554

U.S. at 625; *United States v. Chester*, 628 F.3d 673, 676 (4th Cir. 2010).[2] Nearly eighty years ago, the Supreme Court first held that the Second Amendment protects weapons "in common use at the time." *United States v. Miller*, 307 U.S. 174, 179 (1939). That limitation, the Court has more recently explained, means that the Amendment does not reach "dangerous and unusual weapons," *Heller*, 554 U.S. at 627 (internal quotations omitted), or "weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns," *id.* at 625. The "core lawful purpose" is "self-defense." *Id.* at 630.

The weapons banned by the Maryland law fall within the protection of the Second Amendment because they are typically possessed for lawful purposes, including the core protected purpose of self-defense. For example, the Supreme Court observed in *Staples v. United States* that semi-automatic rifles like the AR-15 "traditionally have been widely accepted as lawful possessions." 511 U.S. 600, 612 (1994). The defendant in *Staples* had been in possession of an AR-15, and the Federal Government had argued that his mere possession was enough to alert him to the likelihood of regulation. *Id.* at 603–04. The Supreme Court rejected the

[2] *See also United States v. Marzzarella*, 614 F.3d 85, 90 (3d. Cir. 2010) (noting that the Second Amendment extends to weapons "typically possessed by law-abiding citizens for lawful purposes"); *Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244, 1260 (D.C. Cir. 2011) ("[W]e must also ask whether the prohibited weapons are 'typically possessed by law-abiding citizens for lawful purposes'; if not, then they are not the sorts of 'Arms' protected by the Second Amendment.") (quoting *Heller*, 551 U.S. at 625) (citation omitted).

argument, explaining that not all guns have a "quasi-suspect character." *Id.* at 612. While the ownership of "machineguns, sawed-off shotguns, and artillery pieces" could be said to put gun owners "on notice of the likelihood of regulation," the Court held that "guns falling outside these categories traditionally have been widely accepted as lawful possessions." *Id.* at 611–12.

The D.C. Circuit has also acknowledged the prevalence of semi-automatic rifles and magazines with a capacity of ten or more rounds. In 2011, in *Heller II*, the D.C. Circuit observed that over 1.6 million AR-15s had been produced since 1986 and that "in 2007 this one popular model accounted for 5.5 percent of all firearms, and 14.4 percent of all rifles, produced in the U.S. for the domestic market." 670 F.3d at 1261. "As for magazines, fully 18 percent of all firearms owned by civilians in 1994 were equipped with magazines holding ten or more rounds, and approximately 4.7 million more such magazines were imported into the United States between 1995 and 2000." *Id.* On that basis, the D.C. Circuit found it "clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in 'common use' as the plaintiffs contend." *Id.*

Despite admitting that its law could ban as many as 9 million semi-automatic rifles in the State (constituting 3 percent of the total gun stock), Maryland argued in the district court that the banned weapons are not in common

lawful use because there is no evidence of actual discharge by a Maryland resident in self-defense. Doc. 44-1 at 25–29. But this argument misunderstands the meaning of "common use" as that term applies in the Second Amendment context. As noted above, the Supreme Court has explained that the Second Amendment's application to weapons "in common use" means that the Amendment protects those weapons "typically *possessed* by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625 (emphasis added). The question is merely whether the weapons at issue are commonly possessed for lawful purposes such as self-defense. Thus, the Supreme Court in *Heller* did not examine the frequency with which handguns were actually discharged or even brandished for the purpose of self-defense. *Id.* at 628–29. Instead, "it [was] enough to note . . . that the American people have considered the handgun to be the quintessential self-defense weapon." *Id.* at 629.

II. STRICT SCRUTINY APPLIES TO THE MARYLAND LAW BECAUSE THE ACT BURDENS THE CORE RIGHT OF LAW-ABIDING CITIZENS TO SELF-DEFENSE IN THE HOME AND BECAUSE IT BANS A CLASS OF WEAPONS.

A. Under this Court's precedent, the Maryland law must be subject to strict scrutiny because its restrictions extend to possession of a protected weapon by a law-abiding citizen for self-defense in the home. Rational-basis review, this Court has acknowledged, is never appropriate where a law burdens conduct protected by the Second Amendment. *Chester*, 628 F.3d at 682. And although this Court has

applied intermediate scrutiny in some Second Amendment appeals, it has "assume[d] that any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny." *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011). Cases applying intermediate scrutiny have involved a person who was not "a *law-abiding, responsible* citizen," *Chester*, 628 F.3d at 683 (emphasis in original), or involved a challenge to a law as applied to gun possession "outside the home," *Masciandaro*, 638 F.3d at 470; *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) ("In *Masciandaro*, we announced that intermediate scrutiny applies 'to laws that burden [any] right to keep and bear arms outside the home.'"). Unlike those cases, this appeal is a facial challenge to a law that burdens the core right to self-defense by a law-abiding citizen in the home. In this context, this Court has "f[ound] the application of strict scrutiny important." *Masciandaro*, 638 F.3d at 471.

Contrary to the District Court's suggestion, the Maryland law imposes precisely the sort of "severe burden on the core Second Amendment right of armed self-defense [that] should require strong justification." *Chester*, 628 F.3d at 682 (internal quotations omitted); Doc. 81 at 28. While this Court has noted that some laws may inflict "less severe burdens on the right" and "be more easily justified," that is only the case if the laws at issue "merely regulate rather than restrict . . . and . . . do not implicate the central self-defense concern of the Second Amendment."

Id. The law at issue in this appeal is quite different. It outright restricts the ability of Maryland residents to possess an entire class of weapons for any purpose—including for the core purpose of self-defense in their homes.

The District Court suggests that the ban is not "severe" enough for strict scrutiny because the law does not prohibit possession of *all* firearms. Doc. 81 at 26 (explaining that the law does not entirely "prevent an individual from keeping a suitable weapon for protection in the home"). But that is at odds with the Supreme Court's reasoning in *Heller*, which rejected the notion that all firearms are fungible and equivalent. Specifically, the Supreme Court found it "no answer to say, as petitioners d[id], that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.* long guns) is allowed." *Heller*, 554 U.S. at 629.

The application of strict scrutiny to the law at issue is also supported by this Court's endorsement of "looking to the First Amendment as a guide in developing a standard of review for the Second Amendment." *Chester*, 628 F.3d at 682. As this Court has recognized, "[i]n the analogous First Amendment context, the level of scrutiny . . . appl[ied] depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right." *Id.* at 682. Here, Maryland's law imposes a ban on an entire class of firearms, which "is equivalent to a ban on a category of speech." *Heller II*, 670 F.3d at 1285 (Kavanaugh, J.,

dissenting). Because such a blatantly content-based ban on speech would be subject to strict scrutiny, *id.*, so too should strict scrutiny apply to this categorical restriction based on the type of firearm.

In fact, the analogy to the First Amendment further shows why the District Court was wrong to reject strict scrutiny on the ground that Maryland residents can still possess *some* types of weapons for self-defense in the home. The District Court's reasoning suggests that it viewed the Maryland law as equivalent to a time, place, or manner restriction in the First Amendment context. Such content-neutral laws are subject only to intermediate scrutiny because they "leave open ample alternative channels for the communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). But the comparison is inapt. The law in question does not simply limit certain uses of firearms at certain times in certain places. *See Marzzarella*, 614 F.3d at 97 (applying intermediate scrutiny where a law "regulat[ed] the *manner* in which persons may lawfully exercise their Second Amendment rights" like a "time, place, and manner" regulation of speech) (emphasis added). Instead, it outright bans weapons of a particular type and thus is more like a law that prohibits speech of a particular content, regardless of time, place, or manner. And as noted above, "any law regulating the content of speech is subject to strict scrutiny." *Masciandaro*, 638 F.3d at 470.

B. The application of strict scrutiny in this appeal is, moreover, consistent with the Second Amendment decisions of nearly every other circuit. The Ninth Circuit, for example, has applied a standard more rigorous even than strict scrutiny. In *Peruta v. County of San Diego*, the court held that an almost-total restriction on the right to bear arms outside the home—banning "the open or concealed carriage of a gun, loaded or not"—was *per se* invalid. 742 F.3d 1144, 1170 (9th Cir. 2014). The court reasoned that such a law destroyed the Second Amendment right to carry a gun outside the home and that heightened scrutiny was therefore "unnecessary." *Id.* at 1168. Instead, any law that "destroy[s] the right altogether" is *per se* invalid. *Id.*

The Seventh Circuit has also required a "more rigorous showing" than intermediate scrutiny in the Second Amendment context. *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011). Confronted with a statute that prohibited law-abiding citizens from practicing at a firing range to maintain proficiency, the court required close scrutiny, "if not quite 'strict scrutiny.'" *Id.* Concluding that "an important corollary to the meaningful exercise of the core right to possess firearms for self-defense," the Seventh Circuit required proof of "a close fit between the range ban and the actual public interests it serves, and also that the public's interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights." *Id.* at 708–09.

Several circuits have applied intermediate scrutiny in Second Amendment appeals, but most involved laws and circumstances very different from those here. Unlike in this case, those appeals did not implicate the core right of a *law-abiding* person to possess certain *classes* of weapons in the home for self-defense. For instance, the Third Circuit applied intermediate scrutiny to a law that prohibited the "possession of a handgun with an obliterated serial number," reasoning that the law "was neither designed to nor ha[d] the effect of prohibiting the possession of any class of firearms." *Marzzarella*, 614 F.3d at 87, 97. The Tenth Circuit likewise applied intermediate scrutiny to a statute that "prohibit[ed] the possession of firearms by narrow classes of persons who, based on their past behavior, are more likely to engage in domestic violence." *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010). And the Seventh Circuit applied intermediate scrutiny to a statute prohibiting a felon from possessing a firearm. *United States v. Williams*, 616 F.3d 685, 691–92 (7th Cir. 2010).

To be sure, the D.C. Circuit has applied intermediate scrutiny to a ban similar to the ban at issue in this appeal. *Heller II*, 670 F.3d at 1262. As Judge Kavanaugh explained in dissent, however, the D.C. Circuit's decision is an outlier: "No court of appeals decision since [the Supreme Court's decision in] *Heller* has applied intermediate scrutiny to a ban on a class of arms that have not traditionally been banned and are in common use." *Id.* at 1285 (Kavanaugh, J., dissenting).

The D.C. Circuit committed the same error made by the District Court here. Observing that the ban in question did not prohibit the possession of *all* firearms, the court compared the law to a "time, place, and manner" restriction in the First Amendment context. *See id.* at 1262 (majority op.) ("[T]he prohibition of semi-automatic rifles and large-capacity magazines does not effectively disarm individuals."). But as explained above, and as noted by Judge Kavanaugh in dissent, that comparison is inapt. An outright ban on firearms of a particular type is more appropriately compared to a law that prohibits speech of a particular content, and should therefore be subject to strict scrutiny. *Id.* at 1285 (Kavanaugh, J., dissenting) ("A ban on a class of arms is not an 'incidental' regulation. It is equivalent to a ban on a category of speech.").

III. MARYLAND'S BAN FAILS BOTH STRICT AND INTERMEDIATE SCRUTINY.

Although strict scrutiny should apply, Maryland's ban on semi-automatic rifles and standard capacity magazines fails both strict and intermediate scrutiny. *First*, because it categorically bans home ownership of commonly owned weapons, Maryland's law resembles the law struck down in *Heller*, which was invalid "[u]nder any of the standards of scrutiny" the Supreme Court "ha[s] applied to enumerated constitutional rights." 554 U.S. at 628. *Second*, even on its own

merits, the Maryland law fails to satisfy the specific requirements of either strict or intermediate scrutiny.

A. In *Heller*, the Supreme Court concluded that the District of Columbia's total ban on possession of a class of guns in the home—specifically, handguns—was invalid under *any* standard of scrutiny that applies to enumerated rights. The District had produced empirical evidence that "[h]andguns are involved in a majority of firearm deaths and injuries in the United States" and "appear to be a very popular weapon among criminals." *Id.* at 697–98 (Breyer, J., dissenting). The parties and their *amici* had also submitted numerous studies intended to address "the District's *predictive judgment* that a ban on handguns will help solve . . . crime and accident problems." *Id.* at 699. Without discussion of any of this evidence, the Supreme Court concluded that the District's ban "failed under any of the standards that we have applied to enumerated constitutional rights." *Id.* at 628 (majority op.). In reaching that conclusion, the Supreme Court relied solely on the fact that the "ban amount[ed] to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for th[e] lawful purpose" of self-defense and that "[t]he prohibition extends . . . to the home." *Id.*

The Maryland law fails to satisfy either strict or immediate scrutiny for similar reasons. The law bans an entire class of weapons in common use, and the

ban extends to the home. Under *Heller*, the evidence that Maryland did or did not produce in support of the law is entirely irrelevant.[3]

B. The Maryland law furthermore fails both strict and intermediate scrutiny because it does not satisfy the requirements of either test. To begin with, the law fails strict scrutiny because it does not use the least restrictive means of achieving its purpose. Under strict scrutiny, "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). Here, Maryland has a number of alternatives less restrictive than an outright ban that it could use to promote public safety and reduce crime.

In addition, Maryland has not satisfied its burden of showing a sufficient "link" between the ban and an appropriate government interest. To survive strict scrutiny, a law "must be narrowly tailored to satisfy a compelling Government interest." *Id.* Intermediate scrutiny requires a lesser showing that a law is "reasonably adapted to a substantial government interest." *Woollard v. Gallagher*,

[3] It is arguable that, under the Supreme Court's approach in *Heller*, the traditional levels of scrutiny should not be applied at all. The *Heller* Court focused on "text, history, and tradition" to determine whether the laws at issue could withstand constitutional scrutiny, *Heller II*, 670 F.3d at 1276 (Kavanaugh, J., dissenting), and omitted any discussion of how the laws at issue advance any government interest, *see Heller*, 554 U.S. at 628–35. Because this Court has chosen to apply tiers of scrutiny in Second Amendment cases, however, *amici* urge the Court to apply strict scrutiny here as the standard closest approximately *Heller*'s analysis, and in any event, to find that the challenged law fails both strict and intermediate scrutiny.

712 F.3d at 876 (quoting *Masciandaro*, 638 F.3d at 471). Neither burden may be met by mere speculation. Evidence must show that the law is premised on "reasonable inferences based on substantial evidence." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (internal quotations omitted). As this Court has put it, there must be "an established link" between the government interest and the policy adopted. *United States v. Mahin*, 668 F.3d 119, 128 (4th Cir. 2012). Merely offering "plausible *reasons* why" a firearms regulation "is substantially related to an important government goal" is not enough; there must be "sufficient *evidence* to establish a substantial relationship" between the policy and the government goal. *Chester*, 628 F.3d at 683 (emphasis in original).

Although Maryland undoubtedly has a substantial interest in public safety and crime prevention, the policy adopted by Maryland is not sufficiently linked to those goals to satisfy even intermediate scrutiny. The data in a study offered by Maryland itself refutes such a link. The study finds that a similar federal ban in effect from 1994 to 2004 produced "no discernible reduction in the lethality and injuriousness of gun violence." Doc. 44-7 at 163. And, if anything, Maryland's ban will likely be even less effective than the federal ban because a resident of Maryland could simply cross state lines to acquire the banned weapons.

Absent any reliable evidence that its ban on semi-automatic rifles and standard capacity magazines promotes public safety and law enforcement,

Maryland's defense of the law is little more than an assertion that the ban "has the potential to prevent and limit shooting injuries in the state over the long-run." Doc. 44-7 at 23. But that is the type of naked speculation against which this Court has specifically warned. Without more, Maryland's ban simply does not pass constitutional muster.

IV. THE DISTRICT COURT ERRED WHEN IT APPLIED A LESSER STANDARD TO EXPERT EVIDENCE OFFERED IN COURT IN SUPPORT OF AN ACT OF A LEGISLATURE.

At a minimum, the District Court failed to properly apply Federal Rule of Evidence 702 to the expert evidence proffered by Maryland. Rule 702 permits the introduction of expert opinions in court only if that testimony is "based on sufficient facts or data" and "the product of reliable principles and methods." Fed. R. Evid. 702 (b)–(c); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999). The District Court concluded that Dr. Koper's opinion was subject to a less rigorous standard than expert opinions introduced in other cases, however, because legislatures are entitled to leeway when relying on evidence in enacting laws. Doc. 81 at 8 ("[A]lthough a reasonable degree of certainty is required for the admission of expert testimony to prove causation in medical malpractice cases . . . applying such a standard here would misapprehend the court's inquiry.") The problem with that reasoning is that Dr. Koper's opinion was first introduced *in court* and not before the legislature when the law was enacted. Whatever might be

said about the deference due to evidence in the legislative record, it is not relevant to Dr. Koper's testimony. Expert opinion that is first introduced in court, even when offered in defense of legislation, must always satisfy the same standard under Rule 702.

The application of a less rigorous standard to expert opinion offered in a constitutional challenge to an act of a legislature is contrary to the plain language of the Federal Rules of Evidence. Rule 702 allows the admission of expert testimony only if the testimony satisfies a four part test concerning the relevance and reliability of expert testimony. Nothing in the rules suggests different standards in different kinds of litigation. To the contrary, the rules always apply "to proceedings in United States courts," Fed. R. Evid. 101(a), including all "civil cases and proceedings," Fed. R. Evid. 1101(b).

Moreover, the Supreme Court has emphasized that Rule 702 establishes a uniform standard in the context of different kinds of expert testimony. In *Kumho Tire*, the Supreme Court explained that a district court's gatekeeping obligation to exclude insufficiently reliable testimony applies "to all expert testimony." 526 U.S. at 147. In reaching that conclusion, the Supreme Court refused to make a distinction that the language of the Rule did not provide. *Id.* (noting that the language of Rule 702 "makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized knowledge"). Following the

Supreme Court, this Court has similarly explained that "the obligation of a district court to determine whether expert testimony is reliable and relevant prior to admission applies to all expert testimony." *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 262 (4th Cir. 1999).

Contrary to the District Court's assertion, the "flexible" nature of the Rule 702 inquiry does not support the application of a lower standard. Doc. 81 at 8. "[T]he test of reliability is 'flexible'" under Rule 702, but the Supreme Court has been clear that this flexibility applies to "*how* to determine reliability," not the level of reliability that is required. *Kumho Tire Co.*, 526 U.S. at 141–42. The District Court thus erred when it applied a lesser standard to Maryland's proffered evidence.

CONCLUSION

The District Court's judgment should be reversed.

Respectfully submitted,

PATRICK MORRISEY
ATTORNEY GENERAL

/s/ Elbert Lin
Elbert Lin
Solicitor General
Counsel of Record
Julie Marie Blake

Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
OF WEST VIRGINIA
State Capitol Building 1, Room 26-E
Charleston, WV 25305
Telephone: (304) 558-2021
Email: Elbert.Lin@wvago.gov

November 12, 2014

COUNSEL FOR ADDITIONAL AMICI

Luther Strange
Attorney General
State of Alabama
501 Washington Ave.
Montgomery, AL 36130
(334) 242-2848

Michael C. Geraghty
Attorney General
State of Alaska
P.O. Box 110300
Juneau, AK 99811
(907) 465-3600

Thomas C. Horne
Attorney General
State of Arizona
1275 West Washington Street
Phoenix, AZ 85007
(602) 542-8986

Pam Bondi
Attorney General
State of Florida
The Capitol, PL-01
Tallahassee, FL 32399
(850) 414-3688

Lawrence G. Wasden
Attorney General
State of Idaho
P.O. Box 83720
Boise, ID 83720
(208) 334-2400

Derek Schmidt
Attorney General
State of Kansas
120 SW 10th Ave, 2nd Floor
Topeka, KS 66612
(785) 296-2215

Jack Conway
Attorney General
Commonwealth of Kentucky
700 Capital Avenue, Suite 118
Frankfort, KY 40601
(502) 696-5650

James D. "Buddy" Caldwell
Attorney General
State of Louisiana
P.O. Box 94095
Baton Rouge, LA 70804
(225) 326-6000

Bill Schuette
Attorney General
State of Michigan
P.O. Box. 30212
Lansing, MI 48909
(517) 373-1110

Chris Koster
Attorney General
State of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101
(573) 751-3321

Timothy C. Fox
Attorney General
State of Montana
P.O. Box. 201401
Helena, MT 59620
(404) 444-2026

John Bruning
Attorney General
State of Nebraska
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682

Gary King
Attorney General
State of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504
(505) 827-6000

Wayne Stenehjem
Attorney General
State of North Dakota
600 E. Boulevard Avenue
Bismarck, ND 58505
(701) 328-2210

E. Scott Pruitt
Attorney Geneal
State of Oklahoma
313 N.E. 21st Street
Oklahoma City, OK 73105
(405) 521-3921

Alan Wilson
Attorney General
State of South Carolina
P.O. Box. 11548
Columbia, SC 29211
(803) 734-3970

Martin J. Jackley
Attorney General
State of South Dakota
1302 E. Highway 14, Suite 1
Pierre, SD 57501
(605) 773-3215

Greg Abbott
Atorney General
State of Texas
P.O. Box 12548
Austin, TX 78711
(512) 463-2100

Sean Reyes
Attorney General
State of Utah
State Capitol, Rm. 230
Salt Lake City, UT 84114
(801) 538-9600

Peter K. Michael
Attorney General
State of Wyoming
123 State Capitol
Cheyenne, WY 82002
(307) 777-7841

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,673 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Date: November 12, 2014 /s/ Elbert Lin

Elbert Lin
Office of the West Virginia Attorney General
State Capitol Building 1, Room E-26
Charleston, WV 25305
Telephone: (304) 558-2021
Fax: (304) 558-0140
E-mail: elbert.lin@wvago.gov

Counsel for *Amicus Curiae* State of West Virginia

CERTIFICATE OF SERVICE

I certify that on November 12, 2014, the foregoing document was served on the counsel of record for all parties through the CM/ECF system. Eight paper copies of this brief will be sent to the Clerk of Court via Federal Express.

/s/ Elbert Lin
Elbert Lin

November 12, 2014
Date

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPEARANCE OF COUNSEL FORM

BAR ADMISSION & ECF REGISTRATION: If you have not been admitted to practice before the Fourth Circuit, you must complete and return an Application for Admission before filing this form. If you were admitted to practice under a different name than you are now using, you must include your former name when completing this form so that we can locate you on the attorney roll. Electronic filing by counsel is required in all Fourth Circuit cases. If you have not registered as a Fourth Circuit ECF Filer, please complete the required steps at Register for eFiling.

THE CLERK WILL ENTER MY APPEARANCE IN APPEAL NO. 14-1945 as

☐ Retained ☐ Court-appointed(CJA) ☐ Court-assigned(non-CJA) ☐ Federal Defender ☐ Pro Bono ☑ Government

COUNSEL FOR: State of West Virginia

_____ as the
(party name)

☐ appellant(s) ☐ appellee(s) ☐ petitioner(s) ☐ respondent(s) ☑ amicus curiae ☐ intervenor(s)

/s/ Elbert Lin
(signature)

Elbert Lin
Name (printed or typed)

304-558-2021
Voice Phone

WV Office of the Attorney General
Firm Name (if applicable)

304-558-0140
Fax Number

State Capitol Bldg. 1, Room 26-E

Charleston, WV 25305
Address

Elbert.Lin@wvago.gov
E-mail address (print or type)

CERTIFICATE OF SERVICE

I certify that on 11/12/2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Elbert Lin
Signature

11/12/2014
Date

05/07/2014
SCC