No. 14-1945

In the
United States Court of Appeals for the Fourth Circuit

STEPHEN KOLBE, *ET AL.*,
Plaintiffs-Appellants,
v.
MARTIN O'MALLEY, *ET AL.*,
Defendants-Appellees.

On Appeal from the
United States District Court for
the District of Maryland

Brief *Amicus Curiae* of Gun Owners of America, Inc., Gun Owners Foundation, U.S. Justice Foundation, The Lincoln Institute for Research and Education, The Abraham Lincoln Foundation for Public Policy Research, Inc., Conservative Legal Defense and Education Fund, and Institute on the Constitution in Support of Plaintiffs-Appellants and Reversal

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November 12, 2014

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Robert J. Olson Date: November 12, 2014

Counsel for: Gun Owners of America, et al.

CERTIFICATE OF SERVICE

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I certify that on November 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:

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(signature)

November 12, 2014
(date)

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INTEREST OF *AMICI CURIAE*

Gun Owners of America, Inc., Gun Owners Foundation, U.S. Justice Foundation, The Lincoln Institute for Research and Education, The Abraham Lincoln Foundation for Public Policy Research, Inc., and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code, and each is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law, with particular interest in constitutional provisions recognizing individual rights to firearm ownership and use.[1] Institute on the Constitution is an educational organization.

Several of these *amici* have filed *amicus curiae* briefs in other firearms-related and Second Amendment cases, including the following:

- U.S. v. Emerson, U.S.C.A. Fifth Cir., No. 99-10331 (Dec. 20, 1999)

[1] *Amici* requested and received the consent of the parties to the filing of this brief *amicus curiae*, pursuant to Rule 29(a), Federal Rules of Appellate Procedure. No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

- State of Wyoming v. U.S., District Court, Wyoming, No. 2:06-cv-00111-ABJ (Aug. 18, 2006)
- U.S. v. Stanko, U.S.C.A. Eighth Cir., No. 06-3157 (Nov. 2, 2006);
- Watson v. U.S., On Writ of Certiorari, U.S. Supreme Court, No. 06-571 (May 4, 2007);
- State of Wyoming v. U.S., U.S.C.A. Tenth Cir., No. 07-8046 (Aug. 21, 2007);
- D.C. v. Heller, On Writ of Certiorari, U.S. Supreme Court, No. 07-290 (Feb. 11, 2008);
- U.S. v. Hayes, On Writ of Certiorari, U.S. Supreme Court, No. 07-608 (Sept. 26, 2008);
- Akins v. U.S., U.S.C.A. Eleventh Cir., No. 08-15640-FF (Nov. 26, 2008);
- McDonald v. Chicago, On Petition for Writ of Certiorari, U.S. Supreme Court, No. 08-1521 (July 6, 2009);
- McDonald v. Chicago, On Writ of Certiorari, U.S. Supreme Court No. 08-1521 (Nov. 23, 2009);
- U.S. v. Skoien, U.S.C.A. Seventh Cir., No. 08-3770 (Apr. 2, 2010);
- Heller v. D.C., U.S.C.A. D.C. Cir., No. 10-7036 (July 30, 2010);
- Nordyke v. King, U.S.C.A. Ninth Cir., No. 07-15763 (Aug. 18, 2010);

- Skoien v. U.S., On Petition for Writ of Certiorari, U.S. Supreme Court, No. 10-7005 (Nov. 15, 2010);
- Smith v. Commonwealth of Virginia, Supreme Court of Virginia, No. 102398 (May 24, 2011);
- MSSA v. Holder, U.S.C.A. Ninth Cir., No. 10-36094 (June 13, 2011);
- Woollard v. Gallagher, U.S.C.A. Fourth Cir., No. 12-1437 (Aug. 6, 2012);
- Abramski v. U.S., On Petition for Writ of Certiorari, U.S. Supreme Court, No. 12-1493 (July 25, 2013);
- Rosemond v. U.S., On Writ of Certiorari, U.S. Supreme Court, No. 12-895 (Aug. 9, 2013);
- Woollard v. Gallagher, On Petition for Writ of Certiorari, U.S. Supreme Court, No. 13-42 (Aug. 12, 2013);
- NRA v. BATFE, On Petition for Writ of Certiorari, U.S. Supreme Court, No. 13-137 (Aug. 30, 2013);
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- U.S. v. Castleman, On Writ of Certiorari, U.S. Supreme Court, No. 12-1371 (Dec. 23, 2013);
- Drake v. Jerejian, On Petition for Writ of Certiorari, U.S. Supreme Court, No. 13-827 (Feb. 12, 2014);
- Shew v. Malloy, U.S.C.A. Second Cir., No. 14-319 (May 23, 2014);

- Johnson v. U.S., On Writ of Certiorari, U.S. Supreme Court, No. 13-7120 (July 3, 2014);
- Jackson v. City & County of San Francisco, U.S.C.A. Ninth Cir., No. 12-17803 (July 3, 2014); and
- Heller v. D.C., U.S.C.A. D.C. Cir., No. 14-7071 (September 9, 2014).

ARGUMENT

Chief Judge Catherine C. Blake of the U.S. District Court for the District of Maryland engaged in a form of analysis of the Second Amendment that may be without antecedent in the history of the Republic. After **assuming** "the Firearm Safety Act **infringes** on the Second Amendment," she then ruled that its **infringement** upon the right to keep and bear arms **could be justified** as a means to better ensure Maryland's public safety ends. *See* Kolbe v. O'Malley, 2014 U.S. Dist. LEXIS 110976, p. *45. In doing so, the Chief Judge rendered a opinion which deliberately violated the Constitutional text which guarantees that the rights it protects **"shall not be infringed**." Although some federal courts have permitted trampling of the Second Amendment's text, those courts have been careful to avoid direct conflict with the Second Amendment text.[2] Chief

[2] For example, San Francisco ordinances that "**limit but do not destroy** Second Amendment rights…." Jackson v. San Francisco, 746 F.3d 953, 957 (9th Cir. 2014).

Judge Blake, however, brazenly has ruled that Maryland may "infringe" a right that the Constitution plainly states "shall not be infringed." Such a ruling cannot stand.

I. THE COURT'S OPINION BELOW CONFLICTS WITH DISTRICT OF COLUMBIA v. HELLER.

At issue in this case is whether the Maryland Firearms Safety Act of 2013 (the "Act") ban on certain semi-automatic rifles (termed "assault weapons" or "assault long guns" ("ALG") in the Act) and standard capacity magazines (termed "large-capacity magazines" ("LCMs") in the Act) violates the Second Amendment.[3] According to District of Columbia v. Heller, 554 U.S. 570 (2008), a firearm (including a magazine) is protected by the Second Amendment if that firearm is in "common use" for lawful purposes.[4] *See id.* at 627. If it is, then the matter is resolved, and no further questions need be asked. *See id.* at 625. The right of the People to possession of such firearms is secured against

[3] Despite the obvious effort of the Maryland legislature to taint the firearms in question for political reasons by using loaded terminology, this brief uses the Act's terminology for ease of understanding.

[4] Of course, Heller also established that the Second Amendment protects an individual right to keep and bear arms, regardless of whether that individual serves in a state controlled militia. *See, e.g., id.* at 581.

any and all infringements, without regard to any countervailing policy claim proffered by the government. *Id.* at 627-28. The district court below failed to comply with this Heller directive in two fundamental ways.

A. Second Amendment Rights Are Not Subject To Judicial Interest Balancing.

The district court below erroneously assumed that Heller conferred upon her, as a federal district judge, the power to rule that the Act's ban on assault weapons and large capacity magazines was constitutional **even if the Act** "**infringes** on the Second Amendment." Kolbe v. O'Malley, 2014 U.S. Dist. LEXIS 110976, p. *45 (emphasis added). Ignoring the Second Amendment's admonition that the people's right "shall not be **infringed**" (emphasis added), the court below claimed that Heller empowered judges to subject such infringements to "means-ends scrutiny … to determine the law's constitutionality." *Id.* The foremost support that the court below could muster for that proposition was footnote 27 in the Heller majority opinion.[5] That footnote, the court vouched,

[5] In pertinent part, the footnote reads "Justice Breyer correctly notes that this law, like almost all laws, would pass rational-basis scrutiny…. But rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws…. In those cases, 'rational basis' is not just the standard of scrutiny, but the very substance of the constitutional guarantee…. If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment

established that "[t]he Supreme Court **held** …that a heightened level of scrutiny applies to regulations found to burden the Second Amendment right." Kolbe at *45 (emphasis added). As remarkable as it is for the district court to have located Heller's holding in a footnote,[6] the finding is even more remarkable because that very footnote repudiates the court's proposition that the Second Amendment right is subject to extra-textual scrutiny, such as that unsuccessfully proposed by Justice Breyer's Heller dissent, and applied by the court below. *See* Heller at 687-705 (Breyer, J., dissenting) and Kolbe at *45-*68.

Anticipating that judges would be tempted to engage in judicial "interest balancing" despite the Second Amendment's plain, unambiguous text stating that "the right of the people to keep and bear arms shall not be infringed," Justice Scalia set out this marker against what the district court did in the text of the majority opinion in Heller:

> A constitutional guarantee subject to **future judges' assessments of its usefulness** is no constitutional guarantee at all. Constitutional

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would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." 554 U.S. at 629 n.27.

[6] Webster defines footnote as a "note of reference, explanation or comment" or an "utterance … that is subordinated or added to a larger statement." Synonyms are "commentary" or "afterthought." Third New International Dictionary, Merriam-Webster, p. 885 (1962).

> rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even **future judges** think that scope too broad. [*Id.* at 634-35 (emphasis added).]

B. The Court Below Failed to Consider the Evidence that the Banned Firearms Are in Common Use for Lawful Purposes.

After a confusing review of the trial record in search for answers to the question whether the banned "assault" weapons were in common use, the court below expressed "serious[] doubts that the banned assault long guns are commonly possessed for lawful purposes … and [was] inclined to find the weapons fall outside Second Amendment protection as dangerous and unusual." Kolbe at *42. However, instead of resolving those doubts by specified findings of fact, the district court decided "not [to] resolve whether the banned assault weapons and LCMs are useful or commonly used for lawful purposes," but to perform the means/end balancing test on the "assum[ption]" that the firearms in question were in common use. *See id.* at *45. However, a closer look at the district court's entire opinion reveals that the court failed to base its decision on any such assumption, but rather heavily weighed her doubts and reservations about the usage of the banned firearms, tipping the balancing of interests in the government's favor, and erasing plaintiffs' right to keep and bear arms.

After reviewing the evidence put on by the plaintiffs (*id.* at 29-34) and the evidence put on by defendants (*id.* at 34-42), the district court essentially rejected all of the plaintiffs' evidence, accepted all of the defendants' evidence, and adopted the position that ALGs and LCMs are not in common use. *Id.* at 42-45. None of the reasons undergirding its decision that ALGs and LCMs are not in common use can survive review.

1. The Court's Decision Departs from Reality.

"[B]ased on the absolute number of … weapons owned by the public … no more than 3% of the current civilian gun stock," the district court asserted that ALGs and LCMs are not in common use. *Id.* at 42-43. If that logic were applied to automobiles, the judge presumably would conclude that Honda Accords are not in common use because they represent a similarly small

percentage of total automobiles on the road today.[7] Yet the ubiquitous Honda Accord is seventh on a list of the best-selling cars of all time.[8]

Many modern "assault rifles" share the same type of popularity. Indeed, even the anti-gun Violence Policy Center claims that "[s]elling militarized firearms to civilians … has been at the point of the industry's civilian design and marketing strategy since the 1980s."[9] Indeed, "[f]rom 2007 to 2011 … domestic consumer long gun sales grew at a compound annual rate of 3 percent [while] modern sporting rifle sales grew at a 27 percent rate."[10] Far from being

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[7] There are approximately 253 million vehicles registered in the United States. http://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/national_transportation_statistics/html/table_01_11.html. Approximately 9 million Honda Accords have been sold in the United States since they were first imported. http://www.hondanews.com/channels/167/releases/4bf47761-5c31-1349-c2d1-43004c34bfab. Many Accords are no longer on the road, but even if they were, their total represents **only 3.6 percent** of total currently registered vehicles in the United States.

[8] E. Marquis, "History's 10 Best Selling Cars Of All Time," AOL Autos, Sept. 17, 2013, http://autos.aol.com/gallery/historys-10-bestselling-cars-of-all-time/#!_slide=1002352.

[9] "The Militarization of the U.S. Civilian Firearms Market," Violence Policy Center, June 2011, http://www.vpc.org/studies/militarization.pdf.

[10] J. Peters, "How Many Assault Weapons Are There in America? How Much Would It Cost the Government To Buy Them Back?" Slate.com, Dec. 20, 2012, http://www.slate.com/blogs/crime/2012/12/20/assault_rifle_stats_how_many_assault_rifles_are_there_in_america.html.

uncommon or rare, so-called assault rifles are among the most popular and widely owned and used rifles in the United States today. Any finding to the contrary is insupportable.

Additionally, the district court obfuscated the distinction between ALGs and LCMs. The Act restricts possession of **ALGs and LCMs separately**. In addressing whether each of those **separate items** is in common use, the plaintiffs put on evidence of the widespread ownership of first ALGs and then evidence of the widespread ownership of LCMs. *See id.* at 29-32. Afterwards, the court failed to distinguish between the two, using only the term "assault weapons" — **all references to LCMs disappear**. *See, e.g.*, 34-45. While the court holds that "the court is not persuaded that assault weapons are commonly possessed" (*id.* at 42), the court actually makes no finding whatsoever about LCMs, and the court's implication that it does is without support. Plaintiffs' evidence as to the widespread possession and use of LCMs stands unrefuted. *Id.* at 42-43.

2. The Court's Decision Defies Logic.

The court below distorts the Heller opinion as a predicate to its claim that ALGs and LCMs are used disproportionately **for criminal purposes**. *Id.* at 43. In Heller, the Supreme Court asked whether a firearm is commonly used **for**

lawful purposes. Thus, the district court inverted the approach of the Supreme Court, which never focused on whether particular firearms are ever used for **unlawful purposes**. Instead, she followed the lead of Justice Breyer who, writing in dissent in Heller, thought it important that "[g]uns are used … to commit crimes…. The Second Amendment plainly does not protect the right to use a gun to rob a bank…." Heller at 636. However, the Heller majority ignored this line of argument. The district court below focuses on a few illegal uses of ALGs and LCMs, as a strategy to ignore their overwhelming lawful uses, in an attempt to escape the Heller rule.

Additionally, the district court here committed a logical fallacy. The supposed degree of unlawful use of ALGs and LCMs has no bearing on the amount of lawful use. Indeed, even if some crimes are committed with ALGs and LCMs, that may merely demonstrate that they are much more widely owned and used than the district court acknowledges. Correlation does not establish causation, and cannot lay the predicate for banning classes of weapons that are clearly in common use for lawful purposes.

3. The Court's Decision is Crabbed.

The district court faulted plaintiffs for failing to show that ALGs and LCMs are commonly used "for self-defense in the home…." *Id.* at 43. Failing that test, the court apparently concluded that ALGs and LCMs are commonly used for **no** lawful purpose — as if self-defense in the home were the only possible lawful purpose. But Heller stated that "[t]he traditional militia was formed from a pool of men bringing arms 'in common use at the time' for lawful purposes **like self-defense**." *Id.* at 624 (emphasis added). Even though by its own language the court below admitted there are other "lawful **purposes**" (*id.* at 29) (emphasis added), the court ignored all other possible lawful uses for ALGs and LCMs, such as "competitive marksmanship," target shooting, hunting, and the like.

The court went so far as to claim that "there has been no indication from the Supreme Court that competitive marksmanship in itself is a purpose protected by the Second Amendment." *Id.* at 34. This statement reveals a visceral anti-gun view.[11] The Supreme Court in Heller placed no limit on, nor purported to

[11] Since Heller was decided, most lower federal courts have been loathe to give its teachings any faithful application, instead reading the Supreme Court's opinion as narrowly as possible in the course of circumventing its holdings. For example, most federal courts hold that Heller stands only for the proposition that

give an exhaustive list of, "lawful purposes,"[12] stating only that self-defense is "such" a lawful purpose. *Id.* at 577. In the absence of any evidence to the contrary, the words "lawful purpose" as used in Heller must be given their ordinary meaning.[13] Because the word "purpose" is modified only by the word "lawful," any purpose which is lawful qualifies under Heller.

Indeed, the only reason the Heller Court discussed self-defense in the home specifically is because **that was the activity affected by the District's**

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self-defense in the home is the core of the Second Amendment, while all other activities (even such as bearing arms outside the home) are far less important, deserving of much less protection, and therefore warranting only a mild form of intermediate scrutiny. *See id.* at 45-47; *see, e.g.*, Woollard v. Gallagher, 712 F.3d 865, 875-76 (4th Cir. 2013) ("the Amendment must have *some* application … outside-the-home [but] 'as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense'"). The district court's opinion is a prime example of this trend. The court, in its zeal to uphold Maryland's statutes, tries to confine Heller to its specific facts, so it may ignore its holding. *See, e.g., id.* at 34 n.22. In short, most lower courts have taken the Justice Breyer approach, even though it was thoroughly rebuffed by the Heller majority. *See* A. Rostron, "Justice Breyer's Triumph in the Third Battle Over the Second Amendment," 80 G.W. LAW REV. 703 (2012).

[12] In fact, not all legitimate uses of firearms under the Second Amendment are deemed lawful by those in government. The colonists who took up arms against the British clearly were not engaging in any "lawful purpose" as viewed by King George III. *See* Heller at 598.

[13] *See*, *e.g.*, A. Scalia & B. Garner, Reading Law, p. 69.

regulations. It is not up to the district court below to pick and choose which lawful purposes it finds acceptable and which it does not. *See* Heller at 628-29.

4. The Court's Decision Reflects An Ignorance of Firearms.

The court found that "assault weapons are military-style weapons designed for offensive use…." *Id.* at 43. In doing so, the district court asked and answered the wrong question. Just because a firearm is useful for one purpose does not make it useless for another purpose. While a baseball player might use a bat for offense and a glove for defense, in a gunfight there is no difference in tools employed. The only difference between the offender and the defender is intent. The offender tries to inflict harm, while the defender tries to stop harm from being inflicted.

5. The Court's Decision Painted a False Picture of Firearm Usage.

The court recounted defendants' assertions that fewer than 1 percent of Marylanders own assault weapons, and Marylanders infrequently if ever use LCMs. *Id.* at 36-37. Of course, it is no surprise that Maryland falls below the national average for ownership and use of ALGs and LCMs. So-called "assault weapons" and so-called "high capacity" magazines have been heavily regulated in Maryland since well before the passage of the 2013 Act.

As far back as 1991, Maryland has required a background check for transfers of assault weapons, requiring them to be registered with the state, and requiring a seven-day waiting period before they can be transferred.[14] Then, in 1994, Maryland banned so-called "assault pistols."[15] Also in 1994, Maryland restricted magazines with a capacity of over 20 rounds.[16] Finally, since 1996, Maryland has limited purchases of many firearms, including assault weapons, to one per month.[17]

With all of these heavy burdens historically placed on the ownership of ALGs and LCMs, it was inevitable that such weapons and magazines currently are not more widely owned and used in Maryland. Using the result of past restrictions in order to justify further restrictions is nothing more than bootstrapping. Had Marylanders been given the opportunity to purchase the firearms they preferred, they no doubt would possess significantly greater

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[14] Md. Ann. Code art. 27, § 442 (1991).

[15] Md. Ann. Code art. 27, § 36H-1 (1994); Md. Ann. Code art. 27, § 36H-3 (1994).

[16] Md. Ann. Code art. 27, § 36H-5 (1994).

[17] Md. Ann. Code art. 27, § 442A (1996); Md. Ann. Code art. 27, § 441 (1996).

numbers of ALGs and LCMs than they currently do. That is exactly why the Maryland legislature enacted this law.

6. The Court's Decision is Fanciful.

The court claimed that "the penetrating capabilities of bullets[18] fired from assault weapons pose a **higher risk** than that posed by other firearms." *Id.* at 61 (emphasis added). This statement is deceptively false.

The firearms that have been arbitrarily classed by Maryland as "assault long guns" do not fire any specific or unique caliber. Some fire relatively small rifle rounds (*e.g.,* the AR-15), some fire large rifle rounds (*e.g.,* the Barrett .50 cal), some fire shotgun shells (*e.g.,* the LAW 12, SPAS 12, and Striker 12), and some fire pistol rounds (*e.g.,* UZI 9mm). *See* Md. Code Ann., Crim. Law § 4-301(b). Even AR-15 style "assault rifles" — the ubiquitous "assault weapon" — come in a dozen or more different calibers, such as .223/5.56, 7.62x39, 300BO, 5.45x39, 6.8SPC, 6.5 Grendel, 22LR, 9mm, .450 Bushmaster, .458 SOCOM —

[18] Firearm magazines hold cartridges, which are made up of a casing, gunpowder, a primer, and a projectile. A "bullet" is the colloquial term for the projectile that is fired out of the barrel. Bullets come in all sorts of sizes and shapes. A particular combination of size, shape, and weight of casing and projectile (bullet) is known as a "caliber," such as the common handgun calibers 9mm or 45ACP.

and the list goes on and on. No caliber or type of bullets is unique to assault weapons.

The quintessential version of what gun opponents label an "assault long gun," the AR-15 semi-automatic rifle, fires a .223 caliber bullet.[19] However, even that caliber is not unique to the AR-15. Various bolt action rifles[20] also fire the .223 bullet, as do some "over-under" combination shotgun/rifle,[21] lever-action rifles,[22] and single-shot rifles.[23] These countless other types of firearms fire the same .223 projectile, yet none of them are considered "assault long guns." Plaintiffs explained, but the district court did not address, that "[t]here is nothing ballistically special or different about a .223/5.56mm bullet whether fired from an AR-15 or some other rifle of the same caliber." *Id.* at 33. Therefore,

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[19] *See, e.g.*, http://www.rockriverarms.com/index.cfm?fuseaction=category.display&category_ID=213

[20] *See, e.g.*, http://www.mossberg.com/rifle-calibers/556mmnato-223-rem.

[21] *See, e.g.*, http://www.budsgunshop.com/catalog/product_info.php/manufacturers_id/3/products_id/14175.

[22] *See, e.g.*, http://www.browning.com/products/catalog/firearms/detail.asp?fid=003B&cid=034&tid=018

[23] *See, e.g.*, http://www.hr1871.com/firearms/rifles/hunter.asp.

there is simply no linkage whatsoever between assault rifles and any particular caliber.

Although there are no calibers that are common to "assault long guns," the majority of the weapons banned by the Act tend to be rifles that fire **intermediate** calibers of cartridges, for hitting **intermediate** targets at **intermediate** ranges. The most common so-called assault rifles, the AR-15 and the AK-47, fire bullets weighing typically between 55 and 123 grains. These calibers of intermediate power — unsurprisingly — have intermediate penetrating capabilities as compared to other rifles, such as high-powered hunting and precision rifles.[24]

Contrary to the district court's assertion that bullets fired from assault weapons have peculiar penetrative properties, the intermediate sized and powered bullets fired out of typical so-called assault rifles are not known for having any special penetration qualities whatsoever. However, this did not deter the court

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[24] *See, e.g.*, penetration comparisons between the .223 bullet out of an AR-15 as compared to the penetration of the 30-06 — a higher powered round not found in assault rifles, as demonstrated on the Internet. For example, the .223 bullet in one video fired out of an AR-15 (assault rifle) did not even penetrate a 6x6" pressure treated piece of wood, while a 30-06 bullet fired out of a bolt action rifle (not an assault rifle) created a large hole through the board. https://www.youtube.com/watch?v=OtP88D6r9bg.

from concluding that "rounds shot from [assault] weapons have the capability — **more so than rounds shot from many other types of guns** — to penetrate the soft body armor worn by law enforcement officers, as well as many kinds of bullet-resistant glass used by law enforcement." *Id.* at 58 (emphasis added). On the contrary, as plaintiffs pointed out, "'soft body armor … is rated only to stop handgun rounds. It is not rated to stop most center-fire rifle rounds.'" *Id.* at 34. The court stresses that bullets from assault rifles go through soft body armor — while wholly ignoring unchallenged record evidence that so too do the bullets fired from just about every centerfire rifle![25] Returning to the automobile analogy, it is as if the court has asserted that Honda Accords are particularly high-powered cars because they are capable of driving 60 miles per hour, while ignoring that just about every other car on the road can also attain 60 miles per hour, and some several multiples of that.

7. The Court Opinion Mischaracterizes "Assault" Weapons.

The district court stated that "assault weapons are designed to … fire many rounds … from a **greater distance** and with **greater accuracy** than many other types of guns…." *Id.* at 57 (emphasis added). This statement is demonstrably

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[25] *See* NIJ Specifications for Level IIIA soft body armor, https://www.officerstore.com/images/nijspec2.htm.

false. As explained above, the majority of the weapons classed "assault long guns" by the Act are known for their intermediate characteristics. They are not particularly useful at long distances, nor are they particularly accurate compared to other more precision-type rifles such as bolt-action rifles, as discussed below.

Assault rifles are not considered long distance rifles. For example, a typical .223 bullet fired from the AR-15 will drop about 64 inches at 500 yards,[26] similar to the 30-06 bullet's (not found in assault rifles) drop of 55 inches at the same distance.[27] A 7.62x39 bullet fired from an AK–47, however, has already dropped 123 inches at that distance.[28] However, beyond 500 yards, the lightweight and moderately powered .223 and 7.62x39 bullets fall off sharply, the .223 falling 692 inches at 1,000 yards, and the 7.62x39 falling a whopping 1004 inches at 1,000 yards, compared to only 376 inches of bullet drop for the 30-06 at 1,000 yards. Additionally, the relatively light .223 bullet is more easily affected by wind and blown off course. This severe drop makes precision shooting at long distances more difficult.

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[26] http://gundata.org/blog/post/223-ballistics-chart/

[27] http://gundata.org/blog/post/30-06-ballistics-chart/

[28] http://gundata.org/blog/post/7.62x39mm-ballistics-chart/

In terms of energy, at the muzzle the .223 has 1281 foot pounds of energy, and the 7.62x39 bullet has 1507 foot pounds, while the 30-06 has about **twice** that, 2872 foot pounds. But at 1,000 yards, the .223 has lost almost all of its energy, retaining only 75 foot pounds of energy. The 7.62x39 has lost all but 156 foot pounds, while the 30-06 retains **several times** that — 531 foot pounds. In short, the .223 and 7.62x39 bullets, like the bullets from many assault rifles, are not known for their usefulness in long-distance shooting, due both to bullet drop and loss of energy.

8. Summary.

In sum, the "assault long guns" banned by the Act hold no mystical properties. Generally, there is nothing special about them in terms of power, penetration, accuracy, or distance. For the most part, they are compromise weapons, often sacrificing the range and knockdown power of larger calibers (such as the 30-06) in favor of the lighter weight and other benefits.

Rifles such as the AR-15 and AK-47 are not horrible and terrifying instruments, except perhaps to one suffering from hoplophobia.[29] If anything,

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[29] "Hoplophobia" is the fear of firearms. *See* McGraw-Hill Concise Dictionary of Modern Medicine, The McGraw-Hill Companies, Inc. (2002). "Coined in 1966 by the late Col. Jeff Cooper, it comes from the Greek word hoplites, or weapon. Hoplophobia is a morbid fear of weapons, and a lot of

the majority of ALGs are the Honda Accord of firearms — of intermediate size, weight, and power, resulting in a tool that is exceedingly useful for both the young and old, the small and large. They are highly favored by civilians for a host of lawful purposes, including use in defending themselves and their homes and, by doing so, in securing the Second Amendment's goal of a "free state."

II. THE MARYLAND STATUTE UNCONSTITUTIONALLY DISCRIMINATES IN FAVOR OF SPECIAL SUBSETS OF STATE CITIZENRY.

The Maryland Firearm Safety Act of 2013 exempts from its ban on the transfers of "assault long guns" those transfers from a law enforcement agency to a retired officer as long as the weapon (i) is sold or transferred upon retirement or (ii) "was purchased or obtained by the person for official use with the law enforcement agency before retirement." Maryland Code Ann. § 4-302(7). The Act also exempts retired law enforcement officers from the ban on LCMs. *Id.* § 4-305(a)(2) and (b).

In the district court below, the plaintiffs/appellants argued that, "by treating retired law enforcement officers differently than other individuals," the Act "violates the Equal Protection Clause of the Fourteenth Amendment…." *See*

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people have it." A. Korwin, "Can 'Hoplophobia' Be Cured?" American Handgunner, http://americanhandgunner.com/can-hoplophobia-be-cured/

Kolbe at *67. The district court rejected this argument on the sole ground that the plaintiffs/appellants were not "similarly situated" to retired law enforcement officers. Rather, the court found that such officers were "differently situated by virtue of their experiences ensuring public safety and their extensive training on the use of firearms." *Id.* at *68. Therefore, the court ruled that it "cannot conclude that the State of Maryland is treating differently persons **who are in all relevant respects alike**, [therefore] the plaintiffs' equal protection challenge must fail." *Id.* at *73 (emphasis added). The district court's ruling is erroneous.

The court mistakenly assumed that the benchmark by which it was to measure whether the plaintiffs/appellants and retired law enforcement officers were "similarly situated" was the training and use of firearms by government officials to protect the public safety, and the assumed lack thereof by plaintiffs. *See id.* at *68-*73. However, comparative experience and training in matters of public safety are not relevant to the question whether a person has a constitutionally protected right to keep and bear arms. To the contrary, the Second Amendment right of defense of self, of one's family and of one's home does not in way depend upon evidence that the claimant has any formal training

or experience in the handling of firearms, including any experience with the use of such firearms to keep the public peace.

Rather, as Heller recognizes, the Second Amendment right to keep and bear arms encompasses "the **inherent** right of self-defense." District of Columbia v. Heller, 554 U.S. 570, 628 (2008) (emphasis added). Because the right to keep and bear arms is a "***pre-existing* right**,"[30] the Supreme Court in Heller ruled that the Second Amendment secures that right to "individuals, according to 'libertarian political principles,' not as members of a fighting force." *Id.* at 593. Thus, the right to keep and bear arms is a right that belongs to "the People," that is, to "all members of the political community, not an unspecified subset." *Id.* at 580. In affirming this bedrock political principle as the underpinning of the Second Amendment, the Heller Court rejected the notion that the right was a collective one protected only to the extent that it was necessary to support a government-organized militia. *Id.* at 595-96, 599-60. To the contrary, Heller ruled that the Second Amendment guarantee, including the individual's right to self-defense, was necessary "to secure a free state," as

[30] *Id.* at 592 (emphasis added).

expressly guaranteed by the Second Amendment, since the people would be "better able to resist tyranny." *Id.* at 597-98.

In short, the right to keep and bear arms as a right secured by the Second Amendment "belongs to all Americans." *Id.* at 581. Whether a Maryland citizen is trained to arms, and whether that citizen is experienced in keeping the peace, then, are wholly irrelevant to whether a citizen is entitled to the right to keep and bear arms. Thus, regardless of such training and experience, retired police officers and plaintiff citizens truly are "similarly situated," and equally entitled to the protection of the Second Amendment. As this Court previously has observed, "the core right identified in *Heller* [is] the right of a *law-abiding* responsible citizen to possess and carry a weapon for self-defense." United States v. Chester, 628 F.3d 673, 683 (4th Cir. 2010).

Not only does the Act violate this Second Amendment principle of equality by exempting retired law enforcement officers, but also it compromises that right through the creation of a number of additional exempt categories of Maryland citizens. Principal among these exempt categories is the one enjoyed by "personnel of the United States government or a unit of that government, members of the armed forces of the United States or of the National Guard, law

enforcement personnel of the State or a local unit in the State, or a railroad police officer authorized under Title 3 of the Public Safety Article or 49 U.S.C. § 28101." *See* § 4-302(1). To be sure, this exemption applies only "if [one is] acting within the scope of official business,"[31] but that qualifier in no way lessens the Second Amendment breach; rather it exacerbates it. Exempting military and police forces, allowing them to have free choice of weapons and magazines, while denying that choice to the people, creates an imbalance of power that threatens the people's access to constitutionally protected arms "necessary to oppose an oppressive military force if the constitutional order broke down." *See* Heller at 599.

Even more constitutionally suspect is the Act's broad exemption favoring "**organizations** that are required or authorized by federal law governing their specific business or activity to maintain assault weapons and applicable ammunition and detachable magazines." *See* § 4-302(4) (emphasis added). Such

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[31] The term is not defined, much less limited, by any provision of the Act. *See* § 4-301 and 2. It appears, therefore, that the term — like the ubiquitous phrase, "within the scope of employment" — would extend to personal activities, such as possessing a weapon in one's home, if incident to being "on call" 24/7 (*see* Javier v. City of Milwaukee, 670 F.3d 823, 830-31 (7th Cir. 2012)), and not some use that would be considered strictly personal. *See also* Millbrook v. United States, 569 U.S. ___, 133 S.Ct. 1441, 1446 (2013).

special privileges serve as a subterfuge to channel arms to those interests that favor the current regime, akin to arbitrary English gun laws favoring "a very small proportion of the people." *See* W. Rawle, A View of the Constitution of the United States, at 125-26, reprinted in The Founders' Constitution, item 9, p. 214 (Kurland, P. & Lerner, R., eds., Univ. Chi. Press: 1987)

Finally, the Act grandfathers certain "assault pistols" and "assault long gun or copycat[s]," exempting (i) persons who lawfully possessed and registered an assault pistol before June 1, 1994, and persons who lawfully possessed and registered an assault long gun or copycat weapon before October 1, 2013. *See* § 4-303(b). In neither case may anyone "sell, offer to sell, transfer, purchase, or receive" such a pistol or long gun or copycat. *See* § 4-303(a). However, in both cases the possessor may transfer the weapon "by inheritance," so long as the person inheriting the weapon is not "otherwise disqualified from possessing a regulated firearm." *See* § 4-302(5).

These provisions create a permanent favored class of citizens based solely upon the date of purchase of the banned weapons. Establishing such a class smacks of the protection extended by the 1689 English Bill of Rights, which extended protection of any to "the subjects which are protestants … arms for

their defence suitable to their conditions." *See* Bill of Rights (Dec. 16, 1689), reprinted in Sources of Our Liberties 245, 246 (R. Perry & J. Cooper, eds., rev. ed., ABA Found.: 1978). While the English version of the right to keep and bear arms continued to permit discretionary deprivations for political or safety reasons,[32] the Second Amendment secures, without exception, "the People's" right to keep and bear arms. Indeed, as an inherent, pre-existing right — neither "granted by the Constitution, [nor] in any manner dependent upon that instrument for its existence, [T]he [S]econd [A]mendment declares that it shall not be infringed." Heller at 592. To deny to some Americans the right to keep and bear arms while securing that right to other Americans, however attenuated, is not only un-American, but unconstitutional.

CONCLUSION

The opinion below demonstrates how difficult it can be for a federal judge, apparently unfamiliar with firearms, and who lives under the protection of others who carry arms, to understand either how firearms like ALGs work or why citizens would want to own them. However, it is of critical importance that

[32] *See* Sources at 231.

judicial decisions are not reached on deeply flawed factual records, such as that developed below.

A recent poll demonstrated that fully 63 percent of Americans believe that firearms in the home keep them more safe.[33] While a state legislator or a federal judge may feel a particular weapon has attributes that justifies its use being limited to government officials such as the guards who protect him, the people, wherever allowed by law, continue to vote with their pocketbook to purchase so-called assault weapons for a multitude of lawful uses, including self-defense. In keeping and bearing arms, they are exercising the inherent right granted them by their Creator,[34] as recognized in and protected by the Second Amendment. Despite the view of the district judge to the contrary, the Constitution permits no infringement of that inherent right.

Therefore, the decision of the District Court should be reversed.

Respectfully submitted,

/s/Robert J. Olson

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[33] J. McCarthy, "More Than Six in 10 Americans Say Guns Make Homes Safer," Gallup Polls, Nov. 7, 2014, http://www.gallup.com/poll/179213/six-americans-say-guns-homes-safer.aspx.

[34] *See, e.g.,* Exodus 22:2-3 and Luke 11:21; Declaration of Independence.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* complies with the word limitation set forth by Rule 29(d), because this brief contains 6,401 words, excluding the parts of the brief exempted by Rule 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 this brief has been prepared in a proportionally spaced typeface using WordPerfect version 13.0.0.568 in 14-point CG Times.

/s/Robert J. Olson

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Dated: November 12, 2014

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.*, in Support of Plaintiff-Appellants and Reversal, was made, this 12th day of November, by the Court's Case Management/Electronic Case Files system upon the attorneys for the parties.

/s/Robert J. Olson

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