No. 14-1945

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STEPHEN V. KOLBE, *et al.*,
Plaintiffs-Appellants,
and
SHAWN J. TARDY; MATTHEW GODWIN,
Plaintiffs,
v.
MARTIN J. O'MALLEY, Governor, in his official capacity
as Governor of the State of Maryland, *et al.*,
Defendants-Appellees

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

BRIEF *AMICUS CURIAE* OF THE LAW ENFORCEMENT LEGAL DEFENSE FUND, LAW ENFORCEMENT ACTION NETWORK, LAW ENFORCEMENT ALLIANCE OF AMERICA, INTERNATIONAL LAW ENFORCEMENT EDUCATORS AND TRAINERS ASSOCIATION, AND WESTERN STATES SHERIFFS' ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLANTS AND IN SUPPORT OF REVERSAL

Dan M. Peterson
Dan M. Peterson PLLC
3925 Chain Bridge Road, Suite 403
Fairfax, Virginia 22030
Telephone: (703) 352-7276
dan@danpetersonlaw.com

Counsel for Amici Curiae

November 12, 2014

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 14-1945 Caption: Stephen V. Kolbe, et al. v. Martin J. O'Malley, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Law Enforcement Legal Defense Fund
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

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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/ Dan M. Peterson Date: November 12, 2014

Counsel for: Law Enforcement Legal Def. Fund

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Pursuant to FRAP 26.1 and Local Rule 26.1,

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Counsel for: Law Enforcement Action Network

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Law Enforcement Alliance of America
(name of party/amicus)

who is amicus, makes the following disclosure:
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Signature: /s/ Dan M. Peterson Date: November 12, 2014

Counsel for: Law Enforcement Alliance of Am.

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Pursuant to FRAP 26.1 and Local Rule 26.1,

International Law Enforcement Educators and Trainers Association
(name of party/amicus)

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Counsel for: ILEETA

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Western States Sheriffs' Association
(name of party/amicus)

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Law Enforcement Legal Defense Fund

Law Enforcement Legal Defense Fund ("LELDF") is a 501(c)(3) non-profit organization, headquartered in Alexandria, Virginia, that provides legal assistance to law enforcement officers. LELDF has aided nearly one hundred officers, many of whom have been acquitted, mostly in cases where officers have faced legal action for otherwise authorized and legal activity in the line of duty. While LELDF supports measures that will further legitimate public safety interests and protection of law enforcement officers, it does not support provisions which do not advance those interests, and which because of vagueness may subject police officers to risk of lawsuits for false arrest and similar causes of action.

Law Enforcement Action Network

Law Enforcement Action Network ("LEAN") is a sister organization of LELDF, headquartered in Alexandria, Virginia, which has received 501(c)(4) status. LEAN promotes policies that protect law enforcement officers' personal and professional safety. LEAN seeks to provide insight to the Court about the negative ground level impact the challenged provisions will have on police officers and citizens.

Law Enforcement Alliance of America, Inc.

Law Enforcement Alliance of America, Inc. ("LEAA") is a non-profit, non-partisan advocacy and public education organization founded in 1992 and made up of thousands of law enforcement professionals, crime victims, and concerned citizens. LEAA represents its members' interests by assisting law enforcement professionals and seeking criminal justice reforms that target violent criminals, rather than vague regulatory laws that create confusion in law enforcement and unexpected criminal liability for otherwise law abiding citizens. LEAA has been an *amicus curiae* in numerous other federal and state appellate cases, and on the prevailing side in two United States Supreme Court cases.

International Law Enforcement Educators and Trainers Association

International Law Enforcement Educators and Trainers Association ("ILEETA"), is a professional association of 4,000 persons committed to the reduction of law enforcement risk and to saving lives of police officers and the general citizenry through the provision of training enhancements for criminal justice practitioners. ILEETA has joined this brief because the Maryland statutes will not reduce the risk to law enforcement or promote a public safety interest, and because it is impossible for police officers to enforce laws that provide no readily ascertainable standard for what does or does not constitute an "assault weapon."

Western States Sheriffs' Association

The Western States Sheriffs' Association ("WSSA") was established in 1993, and now consists of hundreds of members from 15 member states throughout the Western United States (Arizona, California, Colorado, Idaho, Montana, North Dakota, New Mexico, Nevada, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming). The mission of WSSA is to assist Sheriffs and their offices with federal and state legislative issues, address policy and procedural matters, develop guidelines to promote uniformity in matters that are important to Sheriffs of the Western United States, and to work together to keep the office of Sheriff strong. WSSA supports the positions taken by the Maryland Sheriffs Association, the Maryland Troopers Association and the Maryland State Police Alumni Association, as described below, in opposition to the statutes at issue in this appeal.

Amici believe that the perspective of front line law enforcement personnel and law enforcement organizations should be of assistance to this court in evaluating whether any interest in public safety is actually served by Maryland's bans on certain firearms and magazines, and whether those bans provide sufficient guidance for law enforcement officers to enforce them in a fair and uniform manner.

STATEMENT PURSUANT TO RULE 29(c)

No party's counsel authored this brief in whole or in part. No party or party's counsel, and no person other than *amici*, their members, or their counsel, contributed money that was intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

INTRODUCTION

Maryland has banned, with limited exceptions, the possession, sale, transfer, purchase, and receipt of a large number of commonly possessed firearms that it styles as "assault weapons." Maryland Code Ann., Crim. Law, § 4-303(a); Maryland Code Ann., Pub. Safety, § 5-101(r)(2). It has also generally banned the manufacture, sale, purchase, receipt, or transfer of detachable magazines having a capacity of more than 10 rounds. Maryland Code Ann., Crim. Law, § 4-305(b).

Amici support the position of Appellants that these statutes, as enacted or amended by the Maryland Firearm Safety Act of 2013 (the "Act"), violate the Second Amendment to the United States Constitution and are void for vagueness. Rather than repeating the arguments of Appellants, *Amici* first address from a law enforcement perspective why these provisions of the Act will not promote the important interests in public safety and officer safety. In the second part of this

brief, *Amici* describe the very real, major, practical uncertainties—even impossibilities—that front line law enforcement, as well as citizens, prosecutors, and courts, will encounter in attempting to enforce or comply with these vague statutes.

ARGUMENT

I. THE BANS ON PROHIBITED FIREARMS AND MAGAZINES WILL NOT PROMOTE PUBLIC SAFETY.

As set forth in Appellants' Opening Brief at 22-29, the challenged provisions of the Act should be held to directly violate the Second Amendment under the Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). If some form of heightened scrutiny is applied instead, the state must show that these bans are narrowly tailored to advance either a "compelling" state interest, or an "important" or "substantial" interest. Appellants' Opening Brief at 29-36. The District Court took the position that the interest in "providing for public safety and preventing crime" would be advanced by these bans. JA 184.

From a law enforcement perspective, prohibition of the widely possessed firearms that Maryland arbitrarily defines as "assault weapons," and the ban on standard magazines capable of holding more than ten rounds, will not promote public safety or prevent crime. There are several reasons for this.

First, there is nothing special about the semi-automatic rifles that Maryland has seen fit to include under the rubric "assault weapons." The semi-automatic rifles listed in § 5-101(r)(2) have been arbitrarily selected from a larger pool of semi-automatic rifles, tens of millions of which have been produced for over a century. JA 2254-59. The most popular among them are chambered for cartridges which are on the low to medium side of the power spectrum for centerfire rifle cartridges.[1] Like any other semi-automatic, they fire one bullet per trigger pull. There is nothing especially powerful or dangerous about the particular firearms banned by Maryland.[2]

Second, the use of these firearms in crime is extremely rare. Although the

[1] AR-15 style rifles most commonly fire the .223 or 5.56x45 cartridge, which is toward the low end of the power spectrum for centerfire rifles. JA 2262. The AK style rifles most often are chambered for 7.62x39 cartridges, which are somewhat more powerful than the .223, but still in the intermediate range for centerfire rifle cartridges. *Id.* Both cartridges have roughly half (or less) of the power of the .30-06 cartridge that was used by Americans in rifles in World War I and World War II, and which is also a common deer hunting cartridge. *Id.*

[2] Semiautomatic rifles that are functional equivalents of the banned "assault weapons" are not included in § 5-101(r)(2). For example, the standard Ruger Mini-14 is not banned, even though it fires the same .223 cartridge most frequently used in AR platform rifles. JA 2271. The M1 Garand rifle, the standard American battle rifle of World War II, which fires the more powerful .30-06 cartridge, is expressly exempted by § 5-101(r)(2)(xxxvii). *See* JA 2258, 2262, 2271. The M1 carbine, which uses a detachable magazine and fires .30 caliber rifle cartridges of intermediate power, also does not appear on the list. JA 2262, 2272. One suspects that the reason is that all of these typically have traditional wooden stocks, and thus do not readily fit the image of "dangerous" assault weapons that ought to be banned.

FBI does not break down its Uniform Crime Report ("UCR") data by "assault weapons,"[3] the percentage of firearms in circulation that Maryland considers "assault pistols," or that are shotguns that Maryland bans, is minimal. Nearly all are rifles, including the very numerous AR and AK platform rifles discussed in the District Court opinion and in Appellants' Opening Brief. Consequently, for all practical purposes, "assault weapons" as Maryland defines them are a subset of the category "rifles" in FBI UCR reporting.

For the year 2013, the number of murders in the United States was 12,253, and the number of those murders committed with rifles of all kinds was 285, or *2.3%* percent. (The percentage committed with firearms defined as "assault weapons" by Maryland will be even lower.). For the same period, the number of homicides committed with rifles is about one-fifth of those committed with knives or cutting instruments (1,490), substantially fewer than the number committed with blunt objects (428), and fewer than half of those committed with hands, fists, feet, and the like (687). FBI UCR (2013) (Table 8, Murder Victims by Weapon, 2009-

[3] There is no current federal definition of "assault weapon," because "assault weapons" are not prohibited at the federal level. The small handful of states which have "assault weapon" restrictions use differing definitions. The semi-automatic firearms that Maryland calls "assault weapons" are perfectly legal to buy, transfer, and possess in most states.

2013).[4] The data are comparable for the four prior years included in Table 8. In other words, rifles of any kind, including the rifles that Maryland has banned, are at the *bottom* of the list when looking at implements (including fists and feet) used to commit violent crimes such as homicide.

Of the 379 murders that took place in Maryland in 2013, the total committed with rifles of all kinds was: zero. FBI UCR (2013) (Table 20, Murder by State, Types of Weapons).[5] In 2012, out of 365 Maryland murders only 5 were committed with rifles. FBI UCR (2012) (Table 20, Murder by State, Types of Weapons).[6] That is 1.37 percent. There were 398 murders in 2011, with only 2 being committed with rifles. FBI UCR (2011) (Table 20, Murder by State, Types of Weapons).[7] Similarly, in 2010, of the 424 murders in Maryland, in only 3 were rifles of any kind used. FBI UCR (2010) (Table 20, Murder by State, Types of Weapons).[8] If one seriously wants to address violent crime, imposing a ban on

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4 http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_8_murder_victims_by_weapon_2009-2013.xls

5 http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/tables/table-20/table_20_murder_by_state_types_of_weapons_2013.xls

6 http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/20tabledatadecpdf

7 http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-20

8 http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-

firearms that are almost never used in crime in the state is not a productive law enforcement strategy.

Third, there is no credible evidence that "assault weapons" are disproportionately used in killings of police officers. The District Court relied on assertions by the Violence Policy Center, an advocacy group, that "assault weapons" were responsible for 19.4 percent of the deaths of officers killed in action in the years 1998-2001. JA 178. That is simply untrue. The VPC claimed that out of a total of 211 law enforcement officers killed in the line of duty over those four years, 41 were slain by "assault weapons." JA 1504. It provides a list of years, states, manufacturers, and models of the weapons allegedly used. JA 1513-14.

But there are two problems with this "data." The first problem is that the source of this information is never identified. Although the VPC document makes reference to an FBI report,[9] that report does not contain a description of the firearms used in the 41 cases. For only 15 of the cases, the VPC listed citations to newspaper articles to attempt to identify the weapon used. In addition to seriously distorting the numbers (essentially tripling them), newspaper reports are unlikely to accurately identify "assault weapons" in any reliable way.

The second problem is that most of the 41 killings that allegedly took place

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2010/tables/10tbl20.xls

[9] *Law Enforcement Officers Killed and Assaulted, 2001.*

using assault weapons did not, in fact, use assault weapons. The federal definition that was in effect at the time listed specific models made by specific manufacturers, and that definition was quoted in the VPC report. JA 1508-09, n. 5.[10] But the VPC report included firearms, such as the Ruger Mini-14, which the VPC itself admitted (JA 1509) were not on the federal list (and are not on the current Maryland list). The VPC report also included, for example, SKS models, which in standard configuration have a fixed magazine capacity of ten, do not accept a detachable magazine, and were not on the federal list of "assault weapons."[11] In short, this "study" employed its own *ad hoc* definition of "assault weapon," which apparently consisted of any semi-automatic that the authors objected to, and then claimed that a high number of law enforcement officers were killed by "assault weapons."

In fact, handguns and other weapons, not "assault weapons" or rifles of any kind, are overwhelmingly used in instances where officers are tragically killed while performing their duties.[12] In 2012, the most recent year for which data is

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[10] The federal law, enacted in 1994, defined "semiautomatic assault weapon" to include a list of nine specific firearms, or "copies or duplicates of the firearms in any caliber." 18 U.S.C. §921(a)(30)(A). That law expired in 2004. *See* Pub.L. 103-322, Title XI, §110105(2), 108 Stat. 2000 (September 13, 1994).

[11] VPC's apparent justification was that they hoped that legislation to be introduced in Congress would classify the SKS as an "assault weapon." JA 1513 n.11.

[12] The State of Maryland itself has asserted that the principal danger to law enforcement officers is posed by handguns, not rifles. In *Woollard v. Gallagher*, 712 F.3d 865, 877 (4th Cir. 2013), this Court quoted from evidence offered by

available, 48 officers were feloniously killed in the line of duty across the United States. Only seven were killed with rifles of any kind, and it is not known how many of these seven might be considered "assault weapons." *See* FBI UCR (2012) (Table 27, Law Enforcement Officers Feloniously Killed, Type of Weapon, 2003–2012).[13]

As groups representing or consisting of law enforcement officers, the safety of officers performing their duties is of paramount concern to *Amici*. But attempts to ban so-called "assault rifles" will not achieve that goal.

Law enforcement officers at all levels also know that such bans will not reduce violent crime. That consensus was confirmed by a recent, large scale, national survey of law enforcement personnel.

The national law enforcement organization PoliceOne conducted its Gun Policy & Law Enforcement survey between March 4 and March 13, 2013, receiving 15,595 responses from verified police professionals across all ranks and department

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Maryland in that case to show that "handguns have persisted as 'the largest threat to the lives of Maryland's law enforcement officers.'" That evidence recounted that "of the 158 Maryland law enforcement officers who have died in the line of duty from non-vehicular, non-natural causes, 132—or 83.5%—died as the result of intentional gunfire, *usually from a handgun.*" *Id.* (emphasis added).

[13] http://www.fbi.gov/about-us/cjis/ucr/leoka/2012/tables/table_27_leos_fk_type_of_weapon_2003-2012.xls

sizes.[14] Respondents were asked: "What effect do you think a federal ban on manufacture and sale of some semi-automatic firearms, termed by some as 'assault weapons,' would have on reducing violent crime?" PoliceOne Survey, Question 5. The results were overwhelming: only 1.6% (227) thought such a ban would have a significant effect, 6.0% (885) thought it would have a "moderate" effect, 71% (10,397) thought the effect would be "none," 20.5% (3,004) believed the effect would be *negative* in reducing crime, and .9% (129) were unsure.

Regarding magazines, respondents were asked, "Do you think a federal ban on manufacture and sale of ammunition magazines that hold more than ten rounds would reduce violent crime?" PoliceOne Survey, Question 6. The results were just as conclusive: 95.7% (14,013) of the respondents said "no," only 2.7% (391) said "yes," and 1.6% (238) were unsure. This extraordinary consensus by police professionals that such bans will not reduce violent crime is in stark contrast to the isolated opinions of some individual Maryland officials relied on by the state.

Indeed, there was heavy law enforcement opposition to the Act in Maryland.

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[14] PoliceOne, *Gun Policy & Law Enforcement Survey* (2013) (reported at http://ddq74coujkv1i.cloudfront.net/p1_gunsurveysummary_2013.pdf ("PoliceOne Survey"). A description of the study is at http://www.policeone.com/police/products/_press-releases/6188461-policeone-com-releases-survey-of-15-000-law-enforcement-professionals-about-u-s-gun-control-policies/.

The Maryland Troopers Association and the Maryland State Police Alumni Association actively opposed the Act when it was pending in the Maryland General Assembly. Ex. 35 to Plaintiff's Cross Motion for Summary Judgment, Dkt. 55-35. The Maryland Sheriffs Association voted to oppose it, and the President and Immediate Past President of that association testified against it while it was pending. Ex. 49 to Plaintiffs' Reply, Dkt. 69-5.

Capt. Jack McCauley, the former Commander of the Maryland State Police Licensing Division and a retired Captain of the Maryland State Police, also condemned the futility of the Act. JA 2278-81. The Licensing Division is the Division responsible for conducting the background checks for regulated firearms and for making the determinations of whether particular firearms are "copies" of any of the enumerated long guns in Maryland Code Ann., Pub. Safety, § 5-101. Capt. McCauley, who is uniquely in a position to know, testified under oath that "the banned firearms are almost never used in crimes. At most, they are used in 5% of firearm-related crimes in Maryland." JA 2280. He also confirmed that:

> The banned firearms are also not used disproportionately in attacks on law enforcement officers. In fact, the majority of officers who are assault[ed] with firearms are attacked with handguns.

Id. He stated unequivocally: "To my knowledge, no Maryland law enforcement officer has been shot with a banned firearm." *Id.*

Where "assault weapon" and magazine bans have recently been imposed in a small number of other states, sometimes after little or no debate, the reaction of rank and file law enforcement officers, as well as elected law enforcement officials, has been heavily negative, chiefly on grounds that such bans are ineffective in reducing crime. After no debate at all, the New York state legislature in 2013 banned "assault weapons" and imposed a ten round magazine limit on civilians, though not on law enforcement. *See* NY SAFE Act, S. 2230, 2013 Reg. Sess. (N.Y. 2013), amended by S. 2607D, 2013 Reg. Sess. (N.Y. 2013). The Albany Police Officers Union wrote an open letter to the Governor and key legislators stating that it "condemns and opposes" the new law, that the law "violates fundamental constitutional rights," and that it "will not deter criminals or mentally ill individuals from plotting and carrying out bloodshed and violence."[15] They forcefully urged that the Act "will not improve public safety. Criminals and the mentally ill will not abide by it…." *Id.*[16]

The New York State Sheriffs' Association and a number of individual

[15] Available at http://www.nysrpa.org/files/SAFE/AlbanyPoliceUnionLetter.pdf

[16] The New York State Troopers Police Benevolent Association stated in a public release that "our membership holds widely shared concerns" regarding the new law. "Additionally, we believe that actual enforcement of these new regulations will significantly increase the hazards of an already dangerous job." http://www.syracuse.com/news/index.ssf/2013/04/nys_troopers_have_widely_share.html

sheriffs not only opposed the Act publicly, they submitted a brief in opposition to the Act in federal district court and on appeal. *New York State Rifle and Pistol Association v. Cuomo*, 1:13-cv-00291 (W.D.N.Y) (Dkt. No. 47-1); *Nojay v. Cuomo*, 14-36-CV(L) (2d. Cir.) (Dkt. No. 93).

In Colorado, a ban on magazines over fifteen rounds was also passed in 2013. Fifty-four out of sixty-two elected sheriffs initially joined as plaintiffs in a lawsuit to have the ban declared unconstitutional. *Cooke v. Hickenlooper*, Civil Action No. 13-CV-1300-MSK-MJW (D. Colo) (Dkt. No. 1).

In sum, front line police officers, sheriffs, and other law enforcement officers at every level across the country, recognize that banning commonly possessed firearms used by citizens for lawful purposes will accomplish nothing in reducing crime or protecting law enforcement officers, but will only serve to empower criminals against the citizenry, and infringe on the Second Amendment rights of millions of honest individuals.

II. THE BAN ON "COPIES" IS SO VAGUE THAT IT IS NEARLY IMPOSSIBLE TO DETERMINE WHAT FIREARMS ARE PROHIBITED

A. A critical reason that vague laws must be held unconstitutional is that they cannot be applied by law enforcement in a uniform manner.

As the courts have frequently stated, a statute is unconstitutionally vague if it fails "to provide the kind of notice that will enable ordinary people to understand

what conduct it prohibits…." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion).

Less frequently emphasized, but at least as important, is the principle that a statute must be sufficiently definite for law enforcement personnel, prosecutors, and courts to apply it in a fair and uniform manner. As the Supreme Court has explained, the void-for-vagueness doctrine "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and *in a manner that does not encourage arbitrary and discriminatory enforcement.*" *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (emphasis added). The Supreme Court emphasized that "[a]lthough the doctrine focuses both on actual notice to citizens and arbitrary enforcement," the Court has:

> recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine — *the requirement that a legislature establish minimal guidelines to govern law enforcement.*" *Smith* [*v. Goguen*, 415 U.S. 566 (1974)] at 574. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.*, at 575.

Kolender, 461 U.S. at 357-58 (emphasis added).

More recently, the Court has held that, "even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly

vague because it fails to establish standards *for the police and public* that are sufficient to guard against the arbitrary deprivation of liberty interests." *Chicago v. Morales*, 527 U.S. 41, 52 (1999) (emphasis added).

This Court has also recognized the importance of clear standards to guide law enforcement: "A statute is impermissibly vague if it either (1) 'fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits' or (2) 'authorizes or even encourages arbitrary and discriminatory enforcement.'" *United States v. Shrader*, 675 F.3d 300, 310 (4th Cir. 2012) (quoting *Hill v. Colorado*, 530 U.S. 703, 732 (2000)).

Statutes that affect fundamental constitutional rights are scrutinized especially closely for vagueness:

> [P]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.

Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 499 (1982). The right to keep and bear arms is an enumerated, fundamental right. *McDonald v. City of Chicago*, 130 S.Ct. 3020, 3036-37, 3042, 3050 (2010).

Thus, in addition to providing notice to persons who must conform their conduct to a statutory proscription, it is essential that the legislature "establish

minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 358. Front line law enforcement personnel cannot correctly and uniformly enforce a statute when no one—not themselves, the public, prosecutors, juries, or judges—knows what it means. As shown below, the Maryland "assault weapon" proscriptions place law enforcement in that very quandary.

B. The Act does not provide ascertainable standards to guide law enforcement personnel regarding what is a "copy" of a banned firearm.

As the Supreme Court has stated, "What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is." *United States v. Williams*, 553 U.S. 285, 306 (2008). Here, the legislature has provided no guidance whatsoever as to what a "copy" of a banned firearm means. Yet, as shown below, determinations as to whether particular firearms are "copies" will constitute the overwhelming majority of the enforcement decisions.

The Act bans "any of the following specific assault weapons *or their copies*, regardless of which company produced and manufactured that assault weapon…." (emphasis added). Maryland Code Ann., Pub. Safety, § 5-101(r)(2). There follows a highly idiosyncratic list of 45 rifles, carbines, and shotguns, sometimes designated

only by model number ("AK-47 in all forms"); sometimes only by manufacturer and action type, no matter what types or models the manufacturer makes now or might make in the future ("Bushmaster semi-auto rifle"); sometimes by specific manufacturer and model ("FN LAR and FN FAL assault rifle"); sometimes by whether an otherwise non-prohibited rifle has a particular accessory, such as a folding stock ("Ruger mini-14 folding stock model (.223 caliber)"); sometimes by listing a caliber designation, and sometimes not ("UZI 9mm carbine or rifle").

The determination as to whether a particular firearm is a "copy" of another is not a peripheral issue in this case, but a vital, central issue. Many of the prohibited firearms are old, are no longer made or imported, or were manufactured in relatively small numbers. The most numerous kinds of firearms that the Act apparently intends to ban will therefore be *copies* (or alleged copies) of models listed in § 5-101(r)(2). Two examples will make this clear.

There has been much discussion in this case of "AR-15s," "AR-15 types," or "AR-15 platform" rifles and carbines. How does the Act address these rifles?

There is only one explicit designation in § 5-101(r)(2) using the term "AR-15." Subparagraph (xv) bans the "Colt AR-15, CAR-15, and all imitations except Colt AR-15 Sporter H-BAR rifle."[17] Maryland Code Ann., Pub. Safety, § 5-

[17] It is unclear why the "Colt AR-15 Sporter H-BAR rifle" would be considered an

101(r)(2)(xv). However, Colt itself has had only a small share of the civilian market for AR-15 platform rifles in recent years. According to ATF's Annual Firearms Manufacturers and Export Reports,[18] Colt manufactured 16,419 rifles of all kinds in 2011, 11,175 rifles in 2010, 46,483 in 2009, 20,896 in 2008, and 11,138 rifles in 2007.

As one of the experts in this case testified, approximately 4,796,400 AR-platform rifles were produced for sale in the commercial marketplace between 1990 and 2012 by approximately 37 manufacturers, including Smith & Wesson, Colt, Remington, Sig Sauer and Sturm, Ruger. JA 1877. Approximately 3,415,000 AR- and AK-platform rifles were imported into the United States for sale in the commercial marketplace during that same time period, and in 2012 nearly one million of these rifles were either manufactured in the U.S. or imported to the U.S. for sale. *Id.*

"imitation" in the first place, when it is made by the same manufacturer. Also, as noted in the Declaration of Jim Supica, an actual firearms expert, there have been eight semi-auto Colt models with "Sporter" and "H-BAR" in the model name, four models with some variation of "AR-15" and "H-BAR" in the name, and one named "Colt AR-15 A2 H-BAR Sporter." He was unable to find any model named "AR-15 Sporter H-BAR." JA 2270. Model names are important, because the Act bans (or excepts) particular models by name, while often leaving other, similar models off the list.

[18] The ATF manufacturing reports for 1998 through 2011 are available at https://www.atf.gov/statistics/index.html

Thus, it is apparent that in recent years the overwhelming majority—in fact, nearly all—of AR-platform rifles are not made by Colt, but by other domestic companies, or are imported. So, ascertaining what is a "copy" or "imitation" becomes of critical importance.[19]

One way would be to define "copy" by the markings stamped by the manufacturer or importer on the receiver of the firearm that is a copy. Federal law requires manufacturers and importers stamp or engrave on the firearm's receiver a serial number, the model (if any), the caliber or gauge, the manufacturer's name and the name of the foreign manufacturer (when applicable), certain information about where the firearm manufacturer's and/or importer's business is located, and the country of origin. *See* 27 C.F.R. 478.92(a)(1)(ii). But the Act does not define "copies" by reference to specific manufacturers and models that have been examined and found to be copies of the Colt AR-15.

"AR-15" is a registered trademark owned by Colt.[20] Consequently, no firearms other than those manufactured by Colt will have "AR-15" stamped on their receivers, but as required by federal firearms law, will have a *different*

[19] Note that § 5-101(r)(2) bans "copies" of the listed firearms, including "copies" of "imitations" of Colt AR-15s. *See* § 5-101(r)(2)(xv). Banning "copies" of "imitations" compounds the vagueness of this statute, and does so for the largest group of firearms at issue.

[20] There are actually three registrations of AR-15 trademarks for Colt. They can be verified at http://www.uspto.gov/trademarks/index.jsp.

manufacturer's and model name stamped on it. So, without a statewide list of copies, one cannot tell by the markings on the firearm whether it is a copy of an "AR-15"; indeed, the manufacturer's markings will indicate to the purchaser and to law enforcement that it is a different model.

For the other major platform, loosely referred to as "AKs," the Act bans "AK-47 in all forms," and "Avtomat Kalashnikov semiautomatic rifle in any format." The AK-47 is a Russian rifle.[21] As Mr. Supica notes, the production of true AK-47s ceased in in 1959. JA 2258. However, millions of semi-automatic rifles loosely (or closely) based on the original design by Mikhail Kalashnikov have been made in or imported into this country. JA 1877. They will rarely, if ever, be designated as "AK-47" because they will have been made by other manufacturers, often in other countries, with different model designations. For example, Century Arms manufactures in this country a series of firearms which, to the eye, seem to be built on an AK platform, but will not be so marked (the rifle model is called the

[21] True AK-47s are fully automatic select fire; that is, by moving a selector lever, they can be operated either in semi-automatic mode (one shot per trigger pull) or as a fully automatic firearm (rounds keep firing until trigger is released or ammunition is used up). JA 2258. In the United States, true AK-47s are therefore classed as machine guns, heavily regulated under the National Firearms Act, and subject to national registration. It has been illegal to manufacture or import fully automatic weapons such as true AK-47s for the civilian market in this country since 1986. *See* 18 U.S.C. § 922(o).

"C39 Centurion"; there are also pistol variants).[22] According to a standard reference work, "the term 'Avtomat Kalashnikov' is not engraved on any firearm ever manufactured." 2 S. Halbrook, *Firearms Law Deskbook* 172 (2014-15 ed.).

Firearms have dozens or even hundreds of parts. Must every part in a firearm not listed in (r)(2) be identical and interchangeable for the unlisted firearm to be a "copy" of one that is listed? The Act does not say. Guidance from the Maryland government has been vague and contradictory. The Attorney General opined that:

> it is our opinion that the reference to "copies" in PS §5-101(p)(2) [the predecessor to (r)(2)] does not extend the regulated firearms law to weapons that bear a *mere cosmetic similarity* to a listed weapon. Rather, in order for a firearm to be considered a copy of a listed assault weapon, and therefore governed by the regulated firearms law, there must be a *similarity between the internal components and function of the firearm in question* and those of one of the listed weapons. *A determination as to whether a particular firearm bears such similarity is a factual question entrusted in the first instance to the Department of State Police.* (emphasis added).

95 Op. Att'y Gen. 101. JA 685-86. This clarification clarifies little—what degree of "similarity" turns possession or transfer of an otherwise legal firearm into a crime?

However, the Maryland State Police have taken a view that is different from the Attorney General. While agreeing that cosmetic similarity is not sufficient to

[22] http://www.centuryarms.com/Consumer/August2013Consumer/files/assets/basic-html/page5.html

make a particular firearm a "copy" of one that is on the list, the Maryland State Police have stated in a letter to all regulated firearms dealers that, to be a "copy," a firearm must have "*completely interchangeable internal components* necessary for the full operation and function of any one of the specifically enumerated" firearms listed in the statute. JA 2414.

Note what this requires of law enforcement officers. To determine whether a particular firearm should be seized, and an individual arrested, the officer will have to disassemble the firearm and compare each individual part to a known exemplar of a prohibited firearm. This is clearly an impossibility. So on which side of the equation is the law enforcement officer to err? If he or she arrests someone on the chance that the firearm might later, after disassembly and examination, prove to be a "copy," and it turns out not to be a "copy," the officer risks a lawsuit for false arrest or similar theories. On the other hand, is he or she simply to turn a blind eye, and overlook possible criminal violations, because the test is an impossible one for an officer on the street to meet?

There has been additional conflicting "guidance." For decades, the Colt AR-15 used a direct gas impingement system as part of the mechanism used to cycle the action and reload the firearm. Other manufacturers developed a piston operating system, instead of the gas operating system, for firearms that were otherwise similar

to the Colt. These are completely different systems, which emphatically do not have interchangeable parts. JA 2269. Yet the Maryland State Police now take the position that "AR-15 regardless of its operating system, is an AR-15 and any copy of an AR-15, whether it be a copy of an AR-15 with a piston operating system or a copy of the AR-15 with a gas operating system is a regulated firearm…." JA 2269.[23]

The Maryland ban is simply unworkable, relying as it does on tests regarding internal components that neither law enforcement personnel, citizens, prosecutors nor judges will be able to put into practice. Determination of what is a "copy" of a prohibited firearms is properly a *legislative determination*, not a *law enforcement* determination. The constitutional flaw in a vague criminal statute is that it "necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat." *Chicago v. Morales*, 527 U.S. 41, 60 (1999). That flaw pervades Maryland Code Ann., Crim. Law, § 4-301-305 and Maryland Code Ann., Pub. Safety, § 5-101(r)(2).

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[23] This odd position may have been prompted by the recent introduction by Colt in 2012 of a piston driven system.
See http://bulletin.accurateshooter.com/2012/04/colt-releases-new-gas-piston-ar-platform-rifle-le6940p/ But the models introduced by other manufacturers *before* 2012 are certainly not "copies" of the *later* Colt system. Do the parts interchange? The average citizen and the average law enforcement officer have not the slightest way of knowing.

Law enforcement officers are not experts on the literally thousands of models of firearms in existence. They are not experts on the internal mechanical workings of semi-automatic firearms. In such technical matters, where the risk of inconsistent determinations is omnipresent, officers need specificity as much as the public and the courts do.

In *Harrott v. County of Kings*, 108 Cal.Rptr.2d 445, 25 P.3d 649, 25 Cal.4th 1138 (Cal. 2001), the California Supreme Court quoted a letter from Senator Don Rogers to the governor requesting the governor's signature on Senate Bill No. 2444, the bill which required the Attorney General to produce an "Identification Guide" for so-called "assault weapons." Letter to Governor Deukmejian Re: Sen. Bill No. 2444 (1989-1990 Reg. Sess.) Aug. 23, 1990. In that letter, Sen. Rogers stated:

> [A] great many law enforcement officers who deal directly with the public are not experts in specific firearms identification . . . . [¶] There are numerous makes and models of civilian military-looking semi-automatic firearms which are not listed by California as "assault weapons" but which are very similar in external appearance. This situation sets the stage for honest law-enforcement mistakes resulting in unjustified confiscations of non-assault weapon firearms. Such mistakes, although innocently made, could easily result in unnecessary, time-consuming, and costly legal, actions both for law enforcement and for the lawful firearms owners affected.

Harrott, 108 Cal.Rptr.2d at 452, n.4.

Senator Rogers thus saw it as necessary to "assur[e] that law enforcement officers are assisted in the proper performance of their duties through having at their disposal a reliable means of accurately identifying each listed 'assault weapon.'" *Id.* Without the "Identification Guide," it was too likely that law enforcement officers would interpret and apply the law in an arbitrary and discriminatory manner because each officer's understanding of what constitutes an "assault weapon" could too easily differ from the next officer's understanding.

The California Supreme Court agreed, stating that "[n]ot only would ordinary citizens find it difficult, without the benefit of the Identification Guide, to determine whether a semiautomatic firearm should be considered an assault weapon, ordinary law enforcement officers in the field would have similar difficulty." *Id.*

California now has a 96 page Identification Guide to assist law enforcement in identifying which particular firearms are prohibited and which are not. *See* http://oag.ca.gov/sites/all/files/agweb/pdfs/firearms/forms/awguide.pdf. Maryland has nothing, and with its conflicting interpretations has muddied the waters of an already hopelessly vague statute.

From the standpoint of law enforcement, the Maryland "assault weapons" scheme does not advance any interest in public safety. It is a solution in search of a

problem, because violent crime and attacks on law enforcement officers are almost entirely carried out using handguns or other weapons, not the numerous rifles based on popular platforms that are principally affected by the ban. Under Maryland's approach, neither citizens nor law enforcement are able to determine whether a given firearm is a banned "copy." Manufacturer and model designations will confuse rather than resolve the issue without a detailed statewide guide. Matching the internal operating parts of the potential "copy" with those of an outlawed firearm to see if they are interchangeable is a task that will be impossible for the average citizen and ordinary law enforcement officer to perform. Not only do these statutes violate the Second Amendment; they are unconstitutionally vague as well.

CONCLUSION

For the reasons stated above, the decision of the District Court should be reversed.

Respectfully submitted,

/s/ Dan M. Peterson
Dan M. Peterson
Dan M. Peterson PLLC
3925 Chain Bridge Road, Suite 403
Fairfax, Virginia 22030
Telephone: (703) 352-7276
dan@danpetersonlaw.com

November 12, 2014

Counsel for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

I hereby certify that the attached Brief of Appellant complies with Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure. According to the word count feature of the word-processing system used to prepare the brief, it contains 6,361 words, exclusive of those matters that may be omitted under Rule 32(a)(7)(B)(iii).

I further certify that the attached brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6). It was prepared in a proportionately spaced typeface using 14-point Times New Roman font in Microsoft Word.

/s/ Dan M. Peterson
Dan M. Peterson

Counsel for *Amici Curiae*

Date: November 12, 2014

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I hereby certify that on November 12, 2014, electronic PDFs of the foregoing Brief of Appellant and of the Joint Appendix were uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

/s/ Dan M. Peterson
Dan M. Peterson

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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

/s/ Dan M. Peterson
(signature)

Dan M. Peterson
Name (printed or typed)

703-352-7276
Voice Phone

Dan M. Peterson PLLC
Firm Name (if applicable)

703-359-0938
Fax Number

3925 Chain Bridge Road, Suite 403

Fairfax, VA 22030
Address

dan@danpetersonlaw.com
E-mail address (print or type)

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