No. 14-1945

In The
United States Court of Appeals
For the Fourth Circuit

STEPHEN V. KOLBE, et al.,

Plaintiffs-Appellants,

v.

MARTIN J. O'MALLEY, et al.,

Defendants-Appellees.

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

AMICUS CURIAE BRIEF FOR NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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INTEREST OF AMICUS CURIAE

The National Rifle Association of America, Inc. ("NRA") is America's foremost and oldest defender of Second Amendment rights. Founded in 1871, the NRA has approximately five million members and is America's leading provider of firearms marksmanship and safety training for civilians. The NRA has a strong interest in this case, because the law at issue here violates the Second Amendment rights of its many members residing in Maryland by prohibiting them from defending themselves in their homes with popular semiautomatic firearms and standard-capacity ammunition magazines.

The parties have consented to the filing of this brief. A party's counsel has not authored this brief in whole or in part, a party or a party's counsel has not contributed money that was intended to fund preparing or submitting this brief, and no person other than the amicus curiae, its members, or its counsel has contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION

The State of Maryland has second-guessed the judgment of millions of law-abiding citizens across the United States by deeming certain popular semiautomatic firearms and standard-capacity ammunition magazines to be too dangerous for civilian use and banning them. But the Second Amendment forbids Maryland from making this policy choice. The firearms and ammunition

magazines that Maryland bans are "arms protected by the Second Amendment." *District of Columbia v. Heller*, 554 U.S. 570, 623 (2008). And such arms *cannot be banned*: when the Second Amendment "right *applies* to" certain types of firearms, "citizens *must* be permitted to use [them] for the core lawful purpose of self-defense." *McDonald v. City of Chicago*, 561 U.S. 742, 767-68 (2010) (emphases added) (quotation marks omitted).

In reaching a contrary conclusion and holding that Maryland has the power to ban constitutionally protected arms, the district court followed *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) ("*Heller II*"), a decision in which a divided panel of the D.C. Circuit rejected a Second Amendment challenge to a District of Columbia ban similar to Maryland's. *Heller II* and the decision below, however, are irreconcilable with *Heller*'s teaching that law-abiding, responsible citizens are entitled to acquire, possess, and use the arms protected by the Second Amendment to defend themselves and their families in their homes.

ARGUMENT

I. MARYLAND'S BAN ON POPULAR SEMIAUTOMATIC FIREARMS AND STANDARD-CAPACITY AMMUNITION MAGAZINES VIOLATES THE SECOND AMENDMENT.

1. Despite the Second Amendment's specific protection of "the right of the people to keep and bear Arms," U.S. CONST. amend. II, the State of Maryland bans some of this Nation's most popular arms through its ban on certain

semiautomatic firearms (inaccurately labeled "assault weapons") and standard-capacity magazines capable of holding more than ten rounds of ammunition. *See* MD. CODE, CRIM. LAW §§ 4-303(a), 4-305(b). The banned firearms include America's "most popular semi-automatic rifle," the AR-15. *Heller II*, 670 F.3d at 1287 (Kavanaugh, J., dissenting). *See* MD. CODE, CRIM. LAW § 4-301(d); MD. CODE, PUB. SAFETY § 5-101(r)(2)(xv). Indeed, the State has admitted that the banned AR-15 is the "most popular type of centerfire semiautomatic rifle in the United States." Defs.' Mem. in Supp. of Mot. for Summ. J. at 8, JA2744. Between 1990 and 2012, American manufacturers produced nearly 5 million AR-platform rifles for the domestic market. *See* JA1877. When imported AR- and AK-platform rifles are added in, the total number increases to over 8 million. *See id*. A survey of firearms retailers found that over 20% of *all* firearms sold in 2012 were "modern sporting rifles" such as the AR-15s, making them second in popularity only to semiautomatic handguns among all firearms. JA1979.

The banned magazines are standard equipment on many of this Nation's most popular firearms. *See* JA2096. Americans own approximately 75 million magazines capable of holding more than ten rounds of ammunition, a number that amounts to nearly half of all magazines owned in this country. *See* JA1880.

Maryland's ban on some of this Nation's most popular semiautomatic firearms and standard-capacity ammunition magazines infringes the Second

Amendment rights of the people of the State. "Any Second Amendment analysis must now begin with the Supreme Court's recent seminal decision in *Heller*," *United States v. Carter*, 669 F.3d 411, 414 (4th Cir. 2012), and *Heller* demonstrates that Maryland's ban is flatly unconstitutional.

First, *Heller* establishes that the semiautomatic firearms and ammunition magazines that Maryland bans are *protected by the Second Amendment*. The Second Amendment, *Heller* explains, "extends, prima facie, to *all* instruments that constitute bearable arms." *Heller*, 554 U.S. at 582 (emphasis added). The government thus bears the burden to show that any bearable arms that it seeks to ban are unprotected. To do so it must show that such arms are "not typically possessed by law-abiding citizens for lawful purposes," but rather are "highly unusual in society at large." *Id.* at 625, 627.

Heller's standard for identifying protected arms is based on historical practices and "the historical understanding of the scope of the right." *Id.* at 625. On the one hand, "[t]he traditional militia" that the Second Amendment was designed to protect "was formed from a pool of men bringing arms in common use at the time for lawful purposes like self-defense." *Id.* at 624 (quotation marks omitted). On the other hand, the right to bear arms coexisted with a "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.' " *Id.* at 627.

As explained above, the banned semiautomatic firearms and banned ammunition magazines are far from unusual. Millions of Americans own millions of them, and they are among the most popular firearms and magazines in the country. It follows that the banned items are protected by the Second Amendment.

Second, *Heller* establishes that arms protected by the Second Amendment *cannot be banned*. The text of the Second Amendment provides that "the right of the people to keep and bear *Arms*, shall not be infringed." U.S. CONST. amend. II (emphasis added). It follows that there are certain "instruments that constitute bearable arms," *Heller*, 554 U.S. at 582, that law-abiding, responsible, adult citizens have an inviolable right to acquire, possess, and use.

Heller confirms this implication of the constitutional text. There, the Supreme Court held that the Second Amendment "*elevates above all other interests* the right of law-abiding, responsible citizens to use *arms* in defense of hearth and home." *Id*. at 635 (emphases added). Thus, all that needs to be done to resolve a challenge to a flat ban of certain weapons is to determine whether they are "arms" protected by the Second Amendment. Any further evaluation of allegedly competing public-policy considerations is foreclosed by the constitutional text. That text is the "very *product* of an interest-balancing by the people," and "[t]he very enumeration of the right [to keep and bear arms] takes out of the hands of government . . . the power to decide on a case-by-case basis

whether the right is *really worth* insisting upon." *Id*. at 634, 635 (emphases in original).

Consistent with this reasoning, the Supreme Court's decisions addressing restrictions on certain types of firearms have turned on whether the firearms in question were constitutionally protected. In *Heller*, of course, the Supreme Court found that handguns are "arms" protected the Second Amendment, and thus struck down the District of Columbia's "absolute prohibition of handguns held and used for self-defense in the home" as a "policy choice[ ]" that the Second Amendment takes "off the table." *Id.* at 636. In *United States v. Miller*, 307 U.S. 174 (1939), by contrast, the Court found that "the type of weapon at issue [a short-barreled shotgun] was not eligible for Second Amendment protection," *Heller*, 554 U.S. at 622 (emphasis omitted), and thus affirmed an indictment for transporting such a weapon in interstate commerce without registering it with the federal government.

McDonald confirms this understanding of the Court's precedents. There, the Court explained that, "in *Heller*, . . . we found that [the Second Amendment] right *applies* to handguns . . . . Thus, we concluded, citizens *must* be permitted to use handguns for the core lawful purpose of self-defense." *McDonald*, 561 U.S. at 767-68 (brackets and quotation marks omitted).

In sum, Supreme Court authority establishes that Maryland's ban is unconstitutional. Because the Second Amendment right *applies* to the popular

semiautomatic firearms and standard-capacity ammunition magazines that Maryland bans, law-abiding citizens *must* be permitted to acquire and use them.

2. This Circuit has applied a "two-step" framework when analyzing Second Amendment claims concerning the carrying of firearms outside the home and the possession of firearms by individuals who are not law-abiding, responsible citizens. Even if that framework applied to a ban on law-abiding, responsible citizens acquiring and using protected firearms for self-defense in the home, it would reinforce the conclusion that Maryland's ban is flatly unconstitutional.

At the first step, because there "exists a clearly-defined fundamental right to possess firearms for self-defense within the home," *United States v. Masciandaro*, 638 F.3d 458, 467 (4th Cir. 2011), Maryland's ban on protected arms "imposes a burden on conduct falling within the scope of the Second Amendment's guarantee," *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010).

At the second step, because a flat ban on protected arms necessarily would fail "any of the standards of scrutiny . . . applied to enumerated constitutional rights," *Heller*, 554 U.S. at 628, there is neither need nor warrant to engage in a tiers-of-scrutiny analysis when confronted with one. Indeed, a flat ban on protected arms is "entirely inconsistent with the protections afforded by an enumerated right," making application of means-ends scrutiny "an exercise in futility." *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 n.9 (2d Cir. 2012).

Other circuits that apply the same two-step framework as this Court recognize that certain laws are so antithetical to the Second Amendment that they are "categorically unconstitutional." *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011). The Seventh Circuit, for example, held that the State of Illinois's "flat ban on carrying ready-to-use guns outside the home" was flatly unconstitutional. *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012). The Ninth Circuit likewise found that "applying heightened scrutiny was unnecessary" to strike down San Diego's limitation of concealed-carry permits to citizens who demonstrate "a unique risk of harm." *Peruta v. County of San Diego*, 742 F.3d 1144, 1168, 1169 (9th Cir. 2014). While this Court's decisions affirming restrictions on carrying firearms outside the home ultimately are in tension with these decisions, the source of that tension is not in the recognition that some laws are wholly inconsistent with the Second Amendment, but rather in this Court's insistence that the Second Amendment "core" protection is limited to the home. *See Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013); *Masciandaro*, 638 F.3d at 470-71. That distinction is not implicated here, as Maryland's ban extends into the home.

II. THIS COURT SHOULD NOT FOLLOW THE D.C. CIRCUIT'S FLAWED DECISION UPHOLDING A BAN SIMILAR TO MARYLAND'S.

Several district courts, including the district court in this case, have ignored *Heller*'s teaching by sustaining bans on popular semiautomatic firearms and

standard-capacity ammunition magazines despite holding or assuming that the banned items are constitutionally protected. *See* JA179; *see also, e.g.*, *Friedman v. City of Highland Park*, 2014 WL 4684944, at *8 (N.D. Ill. Sept. 18, 2014); *Colorado Outfitters Ass'n v. Hickenlooper*, 2014 WL 3058518, at *14 (D. Colo. June 26, 2014); *Shew v. Malloy*, 994 F. Supp. 2d 234, 245-246 (D. Conn. 2014); *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 990 F. Supp. 2d 349, 365 (W.D.N.Y. 2013). These district courts have instead followed the example of *Heller II*, in which a divided panel of the D.C. Circuit rejected a Second Amendment challenge to the District of Columbia's ban on popular semiautomatic rifles such as the AR-15 and ammunition magazines capable of holding more than ten rounds of ammunition, despite assuming that the banned items are constitutionally protected. *See Heller II*, 670 F.3d at 1261. The district court in this case, for example, cited *Heller II* twelve times in its opinion rejecting plaintiffs' constitutional challenge.

By holding that protected arms can be banned, *Heller II* departs sharply from *Heller*. Indeed, the *Heller II* majority was able to reach the result that it did only by committing several errors in its constitutional analysis that this Court must avoid if it is to remain true to *Heller*. Each of these errors was repeated by the district court in this case.

First, *Heller II* improperly cited First Amendment doctrine to reason that even a wholesale ban on protected arms potentially may be justified under a levels-of-scrutiny analysis. *See id.* at 1262. *Heller*, to be sure, frequently draws on First Amendment doctrines and concepts while interpreting the Second Amendment. For example, in determining that the Second Amendment protects an individual right, the Court emphasized that the Second Amendment, like the First, "use[s] the phrase 'right of the people.' " *Heller*, 554 U.S. at 579. In rejecting as "bordering on the frivolous" the argument "that only those arms in existence in the 18th century are protected by the Second Amendment," the Court reasoned that "[j]ust as the First Amendment protects modern forms of communications, . . . the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id*. at 582. And in acknowledging that the Second Amendment is subject to historically grounded limitations, the Court indicated that in this regard it "is no different" than the First. *See id*. at 595, 635.

By drawing frequent parallels between the Second Amendment and the First Amendment, *Heller* makes clear that the two Amendments are due equal respect and that the Second is not be treated as "second-class" or "singled out for special—and specially unfavorable—treatment." *McDonald*, 561 U.S. at 778-79, 780 (opinion of Alito, J.). But it does not follow that the Court meant to incorporate

the full panoply of First Amendment scrutiny analysis into the Second Amendment context. To the contrary, the Court struck down the District of Columbia's handgun ban *without* applying any particular level of scrutiny, and in so doing it emphasized that the Second Amendment "surely elevates *above all other interests* the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635. *Heller* thus indicates that *no* interest can be so compelling, and *no* law sufficiently tailored to any such interest, to justify a wholesale ban on protected arms in the home. As explained above, this conclusion is consistent with the two-step framework that this Court has adopted for Second Amendment claims, because any law banning protected arms in the home necessarily would fail any level of heightened scrutiny.

By establishing that a law banning protected arms in the home is categorically unconstitutional, *Heller* arguably departs from First Amendment precedent holding that even a content-based restriction of speech—i.e., a law that strikes at the heart of the right to free speech—may be justified if the government can satisfy strict scrutiny. But such a result is a virtue, not a vice, for it prevents the drawing of any inference "that States may [ban protected arms] whenever they believe there is a compelling justification for doing so." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 125 (1991) (Kennedy, J.,

concurring in judgment). Levels of scrutiny analysis originally "derives from . . . equal protection jurisprudence," and

> [a]lthough the notion that protected speech may be restricted on the basis of content if the restriction survives what has sometimes been termed the most exacting scrutiny may seem familiar, the Court appears to have adopted this formulation in First Amendment cases by accident rather than as the result of a considered judgment.

Id. at 124, 125 (citation and quotation marks omitted). *Heller* demonstrates that the Court is not prepared to make such an "ill advised" decision in the Second Amendment context. *Id.* at 124. Indeed, during oral argument Chief Justice Roberts questioned why the Court would need to "articulate some very intricate standard" to decide the flat ban on protected arms at issue in that case, emphasizing that "these standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up." Tr. of Oral Arg. at 44, *Heller*, No. 07-290 (S. Ct. Aug. 12, 2008).

Second, even if a levels-of-scrutiny analysis were applicable, *Heller II* drew the wrong lessons from First Amendment doctrine to hold that intermediate scrutiny, rather than strict scrutiny, applies to a ban on popular semiautomatic firearms and standard-capacity ammunition magazines. As an initial matter, *Heller II*'s reliance on *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), as a touchstone for intermediate scrutiny analysis is a clear red flag, because the "*Heller* majority flatly *rejected* [the] *Turner Broadcasting*-based approach" that

"Justice Breyer's *dissent* explicitly advocated." *Heller II*, 670 F.3d at 1280 (Kavanaugh, J., dissenting) (emphases added). *Heller* thus establishes that "First Amendment cases applying intermediate scrutiny" such as *Turner* do not provide the proper mode of analysis for reviewing a flat ban on protected arms. 554 U.S. at 704 (Breyer, J., dissenting).

Furthermore, a ban on protected arms strikes at the very heart of a fundamental, enumerated constitutional right. To avoid treating the Second Amendment as a "second-class" right, such a ban at a minimum must be reviewed under strict scrutiny. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (applying strict scrutiny to law targeting practices of particular religion); *Brown v. Entertainment Merch. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (applying strict scrutiny to law targeting content of protected speech). This Court accordingly has recognized that "application of strict scrutiny" is "important to protect the core right of the self-defense of a law-abiding citizen in his home." *Masciandaro*, 638 F.3d at 471. *See also id*. at 470 ("[W]e assume that any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny."); *Woollard*, 712 F.3d at 878 ("The Appellees would have us place the right to arm oneself in public on equal footing with the right to arm oneself at home,

necessitating that we apply strict scrutiny in our review of the good-and-substantial-reason requirement.").

Heller II nevertheless held that intermediate scrutiny applies "because it thought the ban was similar to a regulation of the manner in which speech takes place, a type of regulation subject to intermediate scrutiny under the time, place, and manner doctrine of the First Amendment." 670 F.3d at 1262 (quotation marks and ellipsis omitted). But a wholesale ban is the antithesis of a time, place, and manner restriction: it prohibits use of banned arms at *any* time, in *any* place, and in *any* manner. Genuine time, place, and manner restrictions must "leave open ample alternative channels for communication of *the information*" in question. *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (emphasis added). "Additional restrictions *such as an absolute prohibition on a particular type of expression*" trigger strict scrutiny. *United States v. Grace*, 461 U.S. 171, 177 (1983) (emphasis added).

First Amendment time, place, and manner doctrine thus militates *against* applying intermediate scrutiny to a ban on protected arms, and the same is true of First Amendment case law applying intermediate scrutiny to other types of laws restricting speech. Laws restricting commercial speech, for example, are subject to intermediate scrutiny, but this is because the Court has deemed such speech to occupy a "subordinate position in the scale of First Amendment values." *Ohralik*

v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978). Similarly, laws restricting "expressive conduct within the outer perimeters of the First Amendment" likewise are subject to intermediate scrutiny. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991). The possession of protected arms in the home, by contrast, occupies a preeminent position in the scale of Second Amendment values and lies at the core of the Second Amendment right, and a ban on such arms must at a minimum be subject to strict scrutiny.

Third, in deciding to apply intermediate scrutiny, *Heller II* erroneously focused on the fact that the District of Columbia's ban "left a person free to possess any otherwise lawful firearm." 670 F.3d at 1262 (quotation marks omitted). But "restating the Second Amendment right in terms of what IS LEFT after the regulation rather than what EXISTED historically, as a means of lowering the level of scrutiny, is exactly backward from *Heller*'s reasoning." *National Rifle Ass'n of America, Inc. v. BATFE*, 714 F.3d 334, 345 (5th Cir. 2013) (Jones, J., dissenting from denial of rehearing en banc). Indeed, *Heller* establishes that a ban on certain protected arms cannot be justified by the availability of other protected arms that are not banned. "It is no answer," *Heller* held, "to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed." *Id.* at 629. As the D.C. Circuit decision affirmed by *Heller* put it, the District of Columbia's attempt to justify its handgun

ban on the grounds that " 'residents still have access to hundreds more' " types of firearm was "frivolous." *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007).

Fourth, the *Heller II* court exceeded its authority by questioning whether citizens really *need* the banned firearms and magazines, reasoning that the availability of substitutes meant that citizens retained the "ability to defend themselves." *Heller II*, 670 F.3d at 1262. The Second Amendment reserves to law-abiding citizens, not courts or legislatures, the right to decide which protected arms are best suited for their defense. Thus, while *Heller* identified several "reasons that a citizen may prefer a handgun for home defense," the Court held that "*[w]hatever the reason*, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Id*. at 629 (emphasis added).

McDonald underscores this point. In dissent, Justice Breyer argued against incorporation of the Second Amendment because, in his view, "determining the constitutionality of a particular state gun law requires finding answers to complex empirically based questions of a kind that legislatures are better able than courts to make," such as, "What sort of guns are necessary for self-defense? Handguns? Rifles? Semiautomatic weapons? When is a gun semi-automatic?" *McDonald*, 561 U.S. at 922-923 (Breyer, J., dissenting). Justice Alito's controlling opinion

squarely rejected this argument: "Justice BREYER is incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions . . . . [W]hile his opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion." *Id*. at 790-91. When determining whether a particular weapon may be banned, it is the choices made by the American people that matter, not judges' or legislators' assessments of those choices.

At any rate, just as there are reasons why citizens may prefer handguns for home defense, there also are reasons why citizens may prefer the popular semiautomatic firearms and standard-capacity ammunition magazines that the District of Columbia and Maryland have banned. For example, many citizens prefer semiautomatic AR-type rifles for home defense because of their desirable combination of enhanced accuracy, reduced recoil, user-friendly ergonomics, and an intermediate round that balances effective stopping power with a relatively low risk of over-penetrating walls and other structures. *See* JA2086-88; JA2097-2102; JA2129-31; JA2262-63; FRANK MINITER, THE FUTURE OF THE GUN 35 (2014) ("ARs are popular with civilians and law enforcement around the world because they're accurate, light, portable, and modular. . . . It's also easy to shoot and has little recoil, making it popular with women. The AR-15 is so user-friendly that a group called 'Disabled Americans for Firearms Rights' . . . says the AR-15 makes it possible for people who can't handle a bolt-action or other rifle type to shoot and

protect themselves. Also, its .223 caliber makes it safer to use as a home-defense gun because this lighter caliber is less likely to travel through walls.").

The reason why millions of citizens prefer standard-capacity ammunition magazines capable of holding more than ten rounds is obvious: the desire not to become a crime victim by running out of ammunition before being able to repel a violent attack. The Second Amendment is designed for the worst-case scenario in which citizens are left with no choice but to use force to protect themselves and their families from an immediate threat of violence from sources such as criminal attack, civil unrest, or a tyrannical government. *See, e.g.*, *Heller*, 554 U.S. at 594 (The right to arms "was by the time of the founding understood to be an individual right protecting against both public and private violence."); *Silveira v. Lockyer*, 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc) ("The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed . . . ."); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *140 (1765) ("[T]o vindicate these rights [to the free enjoyment of personal security, of personal liberty, and of personal property], when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next to the right of petitioning the king and parliament for redress of grievances; and lastly to the right of having and using

arms for self-preservation and defence."). The fact that the police often fire more than ten rounds to defend themselves shows that a law-abiding citizen reasonably may prepare to do so as well, particularly in a worst-case type scenario. *See Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022 (2014) (holding that police officers acted reasonably "in firing a total of 15 shots" because threat persisted during the time in which the shots were fired); NEW YORK CITY POLICE DEPARTMENT, ANNUAL FIREARMS DISCHARGE REPORT 2011 23 (2012), http://goo.gl/pz8UHo (In 2011, New York City police officers fired more than ten rounds in 29% of incidents in which they fired their weapons to defend themselves and others.). And it makes perfect sense that a citizen preparing for such a scenario should be entitled to acquire the arms commonly possessed in the society at large, *because those are the arms the citizen may potentially expect to face*.

Fifth, *Heller II* placed undue weight on criminal misuse of the banned firearms and magazines. *See Heller II*, 670 F.3d at 1262-64. *Heller* demonstrates that the focus of Second Amendment analysis should be the choices made by law-abiding citizens, not the choices made by criminals. Indeed, if a ban on handguns would fail "any of the standards of scrutiny . . . applied to enumerated constitutional rights," including intermediate scrutiny, *Heller*, 554 U.S. 628, the same necessarily must be true of a ban on other protected arms, because the vast majority of gun violence in this country is committed using handguns. The *Heller*

Court struck down the District of Columbia's handgun ban in full "aware[ness] of the problem of handgun violence in this country." *Id.* at 636. Indeed, Justice Breyer's dissent supported the assertion that handguns "are by far the firearm of choice" for many crimes with a litany of statistics, including that "[f]rom 1993 to 1997, 81% of firearm-homicide victims were killed by handgun," and that "roughly the same rate" obtained from 1993 to 2001, *id.* at 693-99, 711. The District of Columbia likewise emphasized the vastly disproportionate use of handguns in crime: "Although only a third of the Nation's firearms are handguns, they are responsible for far more killings, woundings, and crimes than all other types of firearms combined." Brief for Petitioners at 51, *Heller*, No. 07-290 (S. Ct. Jan. 4, 2008).

The State of Maryland also is aware that handguns are the weapon of choice for the vast majority of violent criminals. Indeed, that proposition was a central feature of the State's defense of its public-carry licensing regime before this Court:

> The State's evidence reflects that, although there has been "a significant improvement over past violent crime, homicide, and robbery totals," Maryland had the "eighth highest violent crime rate," "the third highest homicide rate," and "the second highest robbery rate of any state in 2009." J.A. 116. Over the course of that year, "**97.4% of all homicides by firearm were committed with handguns**," and **handguns were "the weapon of choice" for robberies and carjackings**. *Id.* at 116–17; *see also id.* at 110 (explaining that "**[h]andguns are the weapon of choice for criminal activity in Baltimore** because they are small, relatively lightweight, easy to carry and conceal, easy to load and fire, deadly at short range, and ideal for surprise attacks"). Furthermore, **handguns have persisted as "the largest threat to the lives of**

> **Maryland's law enforcement officers**." *Id.* at 117 (recounting 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").

Woollard, 712 F.3d at 877 (emphases added).

Compared to handguns, a minuscule proportion of crimes involve the popular semiautomatic firearms and standard-capacity ammunition magazines that Maryland bans. Compelling evidence of this is provided by the final report analyzing the similar and now-expired 1994 federal ban that the State's witness Christopher Koper prepared for the Department of Justice. Professor Koper noted that "a compilation of 38 sources indicated" that the banned semiautomatic firearms "accounted for 2% of crime guns on average" before the federal ban, and that this 2% consisted largely of banned handguns, not the banned long guns that are the focus of Plaintiffs' complaint in this case. JA423. Criminals used magazines capable of holding more than 10 rounds of ammunition a bit more often—"roughly 14% to 26% of most gun crimes prior to the ban." JA426. But it was "not clear how often the ability to fire more than 10 shots without reloading . . . affects the outcomes of gun attacks," with data "suggest[ing] that relatively few attacks involve more than 10 shots fired" and "available studies . . . show[ing] that assailants fire less than four shots on average." JA427, 498.

In sum, if criminal misuse of handguns could not save the District of Columbia's handgun ban, less frequent criminal misuse cannot save bans of other protected arms.

Sixth, *Heller II* improperly conflated semiautomatic *civilian* firearms with fully automatic *military* firearms, reasoning that "it is difficult to draw meaningful distinctions between the AR-15 and the M-16." 670 F.3d at 1263. But there is at least one dispositive difference between the civilian AR-15 and the military M-16: The AR-15, like all other semiautomatic firearms, fires only one round with each pull of the trigger, while the M-16 has a selector switch that allows the user to fire in fully automatic mode.

The D.C. Circuit acknowledged this distinction but failed to appreciate its significance. As an initial matter, the court argued that semiautomatics "fire almost as rapidly as automatics," *id*., but it based this assertion entirely on the inaccurate, unsworn legislative testimony of a Brady Center lobbyist. The lobbyist claimed that a semiautomatic firearm fired *30 rounds in five seconds*, but an Army manual states the maximum effective rates of semiautomatic fire for various M4- and M16-series firearms to be between 45 and 65 rounds per minute—roughly *5 rounds in five seconds*. *See* JA2407. Furthermore, the lobbyist's testimony "indicate[d] that semi-automatics actually fire two-and-a-half times slower than automatics." *Heller II*, 670 F.3d at 1289 (Kavanaugh, J., dissenting).

But more importantly, *Heller II*'s reasoning *fails to distinguish the banned semiautomatic firearms from other semiautomatic firearms that are not banned.* Whatever the relative firing rate of semiautomatics and automatics, all semiautomatics fire at the same rate—one round with each pull of the trigger. This is fatal to *Heller II*'s reasoning, for the Supreme Court has held that unlike fully automatic "machineguns," semiautomatic firearms—and specifically the semiautomatic AR-15 rifle—"traditionally have been widely accepted as lawful possessions." *Staples v. United States*, 511 U.S. 600, 611-12 (1994). Semiautomatic firearms are not "highly unusual in society at large," *Heller*, 554 U.S. at 627, and they cannot be banned.

Anti-gun publicists promoting "assault weapons" bans have sought to exploit "the public's confusion over fully automatic machine guns versus semi-automatic assault weapons" to "increase the chance of public support for restrictions on these weapons." JOSH SUGARMANN, ASSAULT WEAPONS AND ACCESSORIES IN AMERICA, Conclusion (Violence Policy Center 1988), *available at* http://goo.gl/72b7mq. Indeed, there is no legitimate class of firearms known as "semiautomatic assault weapons." "Prior to 1989, the term 'assault weapon' did not exist in the lexicon of firearms. It is a political term, developed by anti-gun publicists . . . ." *Stenberg v. Carhart*, 530 U.S. 914, 1001 n.16 (2000) (Thomas, J., dissenting). Even the ATF has acknowledged "it is somewhat of a misnomer to

refer to [semiautomatic] weapons as 'assault rifles' " because "[t]rue assault rifles are selective fire weapons *that will fire in a fully automatic mode*." JA734-35 (emphasis added). As this history demonstrates, the phrase "semiautomatic assault weapons" is "political language" that "is designed to make lies sound truthful and . . . give an appearance of solidity to pure wind," George Orwell, *Politics and the English Language* (1946), *available at* http://goo.gl/xFhzqZ, and it should have no place in this Court's constitutional analysis.

Seventh, *Heller II*'s reasoning relies on a fundamental tension that undermines the court's analysis. As explained above, the court decided to apply intermediate scrutiny because it concluded that the availability of non-banned substitute firearms and magazines meant that the District of Columbia's ban would not "substantially affect [individuals'] ability to defend themselves." *Heller II*, 670 F.3d at 1262. But the court did not extend this reasoning to its intermediate scrutiny analysis. Instead, the court reasoned that there was a "reasonable 'fit' " between the ban and "important interests in protecting police officers and controlling crime" because of the enhanced "firepower" the banned firearms and magazines purportedly would offer criminals. *Id.* at 1262-63. There is a fundamental disconnect between the two parts of this analysis. If the availability of substitutes means that banning certain arms does not substantially affect law-abiding citizens' ability to defend themselves, the availability of the same

substitutes means that the ban does not substantially affect criminals' ability to commit crimes. And if the banned arms offer enhanced firepower to criminals, the banned arms offer the same enhanced firepower to law-abiding citizens. At best, then, bans like the District of Columbia's and Maryland's affect law-abiding citizens and criminals in the same way. And just as "the tie goes to free expression" in the First Amendment context, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 819 (2000), the tie must go to the possession of protected arms in the Second Amendment context.

To make matters worse, bans like the District of Columbia's and Maryland's actually have a disproportionately negative effect on *law-abiding citizens*. Because criminals by definition are less likely to obey a ban on any particular type of firearm, to the extent that a firearm offers its user an advantage in a confrontation, that advantage will go to the criminal who ignores the law when making his weapon choice. As the influential Italian criminologist Cesare Beccaria put it long ago, laws forbidding "wear[ing] arms . . . disarm[ ] those only who are not disposed to commit the crime which the laws mean to prevent," which "makes the situation of the assaulted worse, and of the assailants better, and rather encourages than prevents murder." Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right To Bear Arms*, 49 LAW & CONTEMP. PROBS. 151, 153-54 (1986).

Furthermore, criminals retain the upper hand even if they do forego the use of banned arms, because it is criminals, not their targeted victims, that choose the time and place of a confrontation. Criminals thus have a much greater capacity than law-abiding citizens to ensure that they enter a confrontation with substitute measures such as multiple firearms or multiple 10-round magazines.

Eighth, and finally, *Heller II* failed to adequately account for the lack of evidence that a State or municipal ban on popular semiautomatic firearms and standard-capacity ammunition magazines will actually work. As explained above, violent criminals are unlikely to care whether any particular firearm or magazine they want to use is banned. Indeed, "most of the methods through which criminals acquire guns and virtually everything they ever do with those guns are already against the law." JAMES D. WRIGHT & PETER H. ROSSI, ARMED & CONSIDERED DANGEROUS xxxv (2d ed. 2008). In order for a ban to work, then, it must at a minimum make it more difficult for criminals to obtain the banned items.

The problem for advocates of bans like the District of Columbia's and Maryland's is the lack of any evidence that such bans force criminals to use different firearms and magazines. Even under intermediate scrutiny, the government bears the burden to demonstrate that its law was "designed to address a real harm" and that it "will alleviate [that harm] in a material way." *Turner*, 520 U.S. at 195. In determining whether the government has carried this burden,

Turner instructs courts to "accord substantial deference to the predictive judgments" of the legislature. *Id*. But judicial deference does not mean judicial abdication. To the contrary, the Court must ensure that the legislature "grounded" its judgment on "reasonable factual findings supported by evidence that is substantial for a legislative determination." *Id*. at 224. Thus, the government must identify evidence substantial to support a determination that its ban will advance public safety in a material way.

The available evidence indicates that a State or municipal ban on popular semiautomatic firearms and standard-capacity ammunition magazines *will not* decrease criminal misuse of the banned items. Indeed, Professor Koper concluded that the 10-year *national* ban *did not* result in "a clear decline in the use of" banned semiautomatic rifles (as opposed to banned semiautomatic handguns) and "*fail[ed]* to reduce" criminal use of banned magazines. JA410 (emphasis added). While bans like Maryland's may be stricter than the federal ban in certain respects, they are almost certain to be less effective because they *do not apply in the vast majority of states that lack similar bans*. Professor Koper highlighted this issue in his 2004 report, explaining:

> **[T]here is little evidence on how state AW bans affect the availability and use of AWs** (the impact of these laws is likely undermined to some degree by the influx of AWs from other states, a problem that was probably more pronounced prior to the federal ban when the state laws were most relevant).

JA489 (emphasis added). This problem has become "more pronounced" once again now that the federal ban has expired. Given this state of the evidence, it is sheer speculation whether or not a ban like Maryland's actually will reduce criminal use of the banned firearms or magazines. And as this Court has emphasized, even under intermediate scrutiny "mere anecdote and supposition" do not suffice to justify an intrusion upon the right to keep and bear arms. *Carter*, 669 F.3d at 418 (quotation marks omitted).

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below and hold that Maryland's ban on popular semiautomatic firearms and standard-capacity ammunition magazines violates the Second Amendment.

Dated: November 12, 2014

Respectfully submitted,

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This brief complies with the type-volume limitations of Fed R. App. P. 29(d) because this brief contains 6,594 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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