

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 OF THE CONGRESS OF RACIAL EQUALITY,
NATIONAL CENTER FOR PUBLIC POLICY RESEARCH, PROJECT 21,
PINK PISTOLS, WOMEN AGAINST GUN CONTROL, AND THE
DISABLED SPORTSMEN OF NORTH AMERICA IN SUPPORT OF
APPELLANTS**

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Pursuant to FRAP 26.1 and Local Rule 26.1,

Congress of Racial Equality, The National Center for Public Policy Research, Project 21, Pink Pistols,
(name of party/amicus)

Women Against Gun Control; and the Disabled Sportsmen of North America,

who is _____ amici _____, makes the following disclosure:
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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:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
If yes, identify all such owners:

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
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
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/ Brian S. Koukoutchos

Date: November 12, 2014

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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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INTEREST OF AMICI CURIAE

Amici are organizations comprising segments of the Maryland population that are disproportionately the targets of armed criminal violence and that vigorously support the right to bear arms.¹ CORE, The Congress of Racial Equality, has been one of America's leading African-American civil rights organizations since its founding in 1942. Pink Pistols is a national society that honors gender and sexual diversity and advocates the responsible use of firearms for self-defense. Its creed is: "Without self-defense, there are no gay rights." Women Against Gun Control has been a leading national advocacy group for Second Amendment rights for more than two decades. Its motto is: "The Second Amendment *is* the Equal Rights Amendment." The National Center for Public Policy Research, founded in 1982, is a research foundation that supports a strong national defense and is dedicated to the proposition that the principles of free markets, individual liberty and personal responsibility provide the greatest hope for meeting the challenges facing America in the 21st century. Project 21 is an initiative created by The National Center for Public Policy Research to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility have not always been echoed by the nation's civil rights establish-

¹ This brief was not authored in whole or in part by a party's counsel, nor has a party or a party's counsel contributed money to fund its submission. No one other than amici, their members and their counsel funded this submission. The parties have graciously consented to the filing of this amicus brief.

ment. Amicus Disabled Sportsmen of North America is a non-profit enterprise that serves the interests of disabled Americans in pursuing the shooting sports and the responsible use of firearms for self-defense. Many of America's disabled citizens who engage in shooting sports were disabled while in military service.

ARGUMENT

I. THE SUPREME COURT HAS STRESSED THE IMPORTANCE OF THE SECOND AMENDMENT RIGHT TO MINORITY GROUPS DISPROPORTIONATELY SUBJECT TO ARMED CRIMINAL VIOLENCE.

Amici are a coalition of groups representing those who are far more likely than average to become victims of firearms violence, including African-Americans, women, individuals with disabilities, and members of the Lesbian-Gay-Bisexual-Transgender (LGBT) community. Amici wish to dispel the misleading and insulting caricature that supporters of Second Amendment rights are either tobacco-chewing, gap-toothed, camouflage-wearing rednecks or militia posers who are morbidly fascinated with firepower. The Supreme Court held in *McDonald v. City of Chicago* that the 14th Amendment recognized in 1868 the need for then-recently emancipated black citizens in the South to bear arms for self-defense against the Klan and others who lynched African-Americans on the basis of twisted notions about white-male supremacy. 130 S. Ct. 3020, 3038-41, 3049 (2010).

A century and a half later, black Americans still bear the brunt of the nation's plague of assault by illegal firearms and it is still the case that African Amer-

icans have a particularly acute need for armed self-defense. Nearly half of all hate crimes are racially motivated, and more than half of the known perpetrators are white.² “Homicide is the leading cause of death for young black men,” and “while the rest of the country may be largely shielded from the horrors of gun violence, approximately 47% of victims of the 165,000 homicides from 2000 to 2010 were black”—which means that African Americans are 5.9 times as likely as the rest of America to be victims of homicide.³ As illustrated by Maryland’s ill-considered and ineffectual ban on certain firearms, “many of the solutions” proposed for firearms violence “ignore the real gun and violence problem in America—not the one that occasionally shatters lives in white suburban America, but violence that brings daily Sandy Hooks to the doorsteps of black Americans.”⁴

Sexual minorities—whether gay, lesbian, bisexual, or transgender—are likewise especially subject to violence (often by gangs) based on discriminatory animus, as Congress recognized when it enacted the Matthew Shepard/James Byrd, Jr. Hate Crimes Prevention Act of 2009, which expanded the scope of the federal statute to include violence driven by the perpetrator’s animus toward the victim’s actual or perceived sexual orientation or gender identity. *See* 18 U.S.C. § 249(a)(2). The FBI reports that approximately one-fifth of all hate crimes are mo-

² *See* FBI, *Hate Crime Statistics 2012*, <http://goo.gl/UddcNx>.

³ Dustin Siggins, *Don’t Ignore Gun Violence Among Black Americans*, USA TODAY, Dec. 14, 2013, <http://goo.gl/CXVgOa>.

⁴ *Id.*

tivated by such bias, which makes this category of hate crime second only to crimes based on race.⁵ Women, too, fall victim to higher rates of violence because of their vulnerability to male predators, whether in the form of domestic violence by husbands and boyfriends or street violence by common muggers and rapists. ***Today, blacks, women, the disabled, and the LGBT community are the face of the Second Amendment right to bear arms in self-defense.***

Members of these groups need the most effective firearms they can obtain, especially when, as is particularly true with racial minorities and members of the LGBT community, they are attacked by gangs bent on venting hatred. In all situations where isolated black, female, gay, or disabled victims face multiple predators, every single shot counts, and Maryland's restriction on magazines holding more than ten rounds (pejoratively labeled "Large Capacity Magazines" or "LCMs," as if they were horrific paramilitary anomalies, rather than the standard-issue magazines for the semiautomatic firearms with which they are sold) dangerously impairs—as a practical matter—those citizens' ability to defend themselves and infringes—as a constitutional matter—their Second Amendment right to keep and bear arms in self-defense. These are, of course, the very same magazines that Maryland and its municipalities issue to their own law enforcement officers. Thus Maryland takes the position that highly trained, able-bodied cops with flak vests,

⁵ See FBI, *2012 Hate Crime Statistics, Incidents and Offenses*, <http://goo.gl/kHlsaM>.

12-gauge shotguns, AR-15 rifles, and SWAT teams for backup need LCMs for their handguns, but law-abiding citizens—who lack all those police resources—do not. The irony is rich, the reasoning is absurd, and the result is tragic.

In *District of Columbia v. Heller*, the Supreme Court recognized a Second Amendment “right to keep and bear” firearms that are “ ‘in common use at the time’ for lawful purposes like self-defense.” 554 U.S. 570, 622, 624 (2008). It is beyond cavil that the magazines banned from sale or transfer in Maryland are not only “in common use” for “lawful purposes like self-defense,” *id.* at 624, but are also essential for fending off multiple assailants. A lone woman accosted late at night in her office building’s parking garage by a dozen thugs bent on robbery (or worse) has a very unpleasant choice to make if she carries—in accord with the law challenged here—only a six-shot revolver or a semiautomatic pistol with a ten-round magazine. This is not a game of Russian roulette that any American citizen should be forced to play.

And the plight of a disabled person trying to climb into his wheelchair to move across his bedroom to obtain a spare ammunition magazine, or desperately fumbling to reload a low-capacity handgun magazine in the middle of the night while an armed criminal crashes through his window, is too horrific to contemplate. *Cf.* Oral argument in *Heller*, No. 07-290, E.R. III 205-06 (ridiculing efforts of District of Columbia’s counsel to characterize opening a trigger lock when

awakened in terror in the middle of the night as a quick and easy task) (remarks of Roberts, C.J., and Scalia, J.). Yet these are the scenarios that the challenged statute unnecessarily foists upon Maryland's citizens. Moreover, the law puts law-abiding Maryland citizens in these precarious situations while arming its own law enforcement officers with the very firearms that it denies to its citizens: semiautomatic pistols holding up to 22 rounds and semiautomatic AR-15 patrol carbines holding 30 rounds.⁶ Apparently, in Maryland sauce for the goose is not sauce for the gander.

II. MARYLAND TACITLY—BUT UNAVOIDABLY—CONCEDES THAT THE CHALLENGED LAW DEPRIVES LAW-ABIDING CITIZENS OF THEIR RIGHT TO KEEP AND BEAR ARMS THAT ARE “IN COMMON USE” FOR “LAWFUL PURPOSES LIKE SELF-DEFENSE” BY ARMING ITS POLICE WITH THE SAME MAGAZINES AND SEMIAUTOMATIC FIREARMS THAT THE STATE DENIES ITS CITIZENS.

It is misleading to describe magazines that hold more than ten rounds as “unusual,” *see Heller*, 554 U.S. at 627: these are the *standard-capacity* magazines with which commonly used firearms are sold. Indeed, the unusual gun is the semiautomatic firearm whose magazine holds only ten or fewer rounds.⁷ Insofar as

⁶ *See* Part II, *infra*.

⁷ Magazines holding more than ten rounds have been a familiar feature since before the 14th amendment was adopted. The Jennings rifle of 1849 had a 20-round magazine, the Volcanic rifle of the 1850s held 30 rounds, both the 1873 Winchester and the 1860 Henry had 16-round magazines, the 1898 Mauser accepted a box magazine of 20 rounds, and the 1903 Springfield rifle accepted a box magazine of 25 rounds. *See* MILITARY SMALL ARMS 146-47, 149 (Graham Smith ed., 1994); GUN: A VISUAL HISTORY 170-71, 174-75, 196-97 (Chris Stone ed.,

firearms equipped with magazines of more than ten rounds are “in common use” for “lawful purposes”—particularly the paramount “lawful purpose [of] self-defense”—the Second Amendment guarantees the right of law-abiding, responsible citizens to acquire, possess, and use them. *Heller*, 554 U.S. at 624.

The court below accepted that American civilians own at least 8 million semiautomatic rifles that Maryland now classifies as “Assault Weapons.” *See Kolbe v. O’Malley*, 2014 WL 4243633 at *11 (D. Md. Aug. 22, 2014). The semiautomatic AR-15 alone accounts for at least five million of those lawfully owned firearms, and the AR-15 and its clones account for 60% of all civilian rifles sold each year in the United States.⁸ There are 200 manufacturers of AR-type rifles.⁹ That undoubtedly qualifies the AR-15 as being “in common use” and “typically possessed by law-abiding citizens for lawful purposes.” *Heller*, 554 U.S. at 624,

2012).

As for semiautomatic handguns: the 1896 Mauser C/96 could accept a detachable 20-round box magazine, the widely used German Luger (1902 or 1908 models) could accept a detachable 32-round drum magazine, and the 1935 Browning High-Power pistol came standard with a 13-round magazine. *See GUN: A VISUAL HISTORY*, *supra*, at 68-69, 81; WILL FOWLER & PATRICK SWEENEY, *WORLD ENCYCLOPEDIA OF RIFLES AND MACHINE GUNS* 138, 141 (2012); K.D. KIRKLAND, *AMERICA’S PREMIER GUNMAKERS: BROWNING* 31 (2013); *MILITARY SMALL ARMS*, *supra*, at 89, 96-97.

⁸ *See* Dan Haar, *America’s Rifle: Rise of the AR-15*, *HARTFORD COURANT*, Mar. 9, 2013, <http://goo.gl/tltueo> (last visited Mar. 14, 2014); *see also* GUNS & AMMO, *BOOK OF THE AR-15* 4 (Eric R. Poole ed., 2013).

⁹ David M. Fortier, *AR Trends: What Is Hot and What Is Not*, *SHOTGUN NEWS* (Mar. 20, 2014).

625.¹⁰ Hundreds of companies manufacture semiautomatic AR-15s for civilian use,¹¹ and the popularity of the weapon has spawned an entire industry devoted to customizing it.¹² The versatile AR-15 is widely used for hunting—the .223 Remington cartridge that it fires was developed from a *hunting* cartridge, not a military round¹³—and it also dominates target shooting competition: “If you are not

¹⁰ The court below reasoned that the AR-15 and rifles like it are insufficiently “in common use” to fall within the Second Amendment’s scope, *see* 2014 WL 4243633, at *10-12, ostensibly because the eight million such rifles are dwarfed by the total number of privately-owned firearms, which is estimated to be between 262 million and 310 million. *See* Edward W. “Ned” Hill, et al., *How Many Guns Are in the United States? Americans Own Between 262 Million and 310 Million Firearms*, Cleveland State Univ., (2013), <http://goo.gl/uUob1G> (last visited Nov. 11, 2014).

The district court must be employing a very queer definition of the word “common.” In this context, common means “of frequent or usual occurrence; not extraordinary.” WEBSTER’S NEW 20TH CENTURY DICTIONARY 365 (2d ed. 1975). That definition fits the AR-15 to a T. The position of the court below is tantamount to saying that cars made by Volvo, Audi, and BMW cannot be considered to be “in common use” in America because they have, respectively, merely 0.5%, 0.9%, and 1.7% of the automobile market. *See Market Data Center, Auto Sales (% Market Share YTD 2012)*, WALL STREET JOURNAL, <http://goo.gl/giM6S4> (last visited Mar. 14, 2014). The district court’s reasoning makes no sense.

¹¹ *See* note 9, *supra*; *see generally* GUN DIGEST 2013 268-69, 455-63, 497-99 (Jerry Lee ed., 67th ed. 2012) (listing many manufacturers of civilian semiautomatic AR-15-type rifles).

¹² *See, e.g.*, GUNS & AMMO, BOOK OF THE AR-15, *supra* note 8, at i-ii, 9, 24-27, 30-32, 34, 35, 48-52, 63, 70, 75-76, 88, 90-92, 94, 95, 123, 135, 137, 160-61; *see also* CHRISTOPHER R. BARTOCCI, BLACK RIFLE II: THE M16 INTO THE 21ST CENTURY i-ii, xxv (2004).

¹³ *See* GARY PAUL JOHNSTON & THOMAS B. NELSON, THE WORLD’S ASSAULT RIFLES 19-20, 23, 1036 (2010).

shooting an AR-15, you are not in the game.”¹⁴ Both hunting and target shooting are “lawful purposes” for possessing a semiautomatic rifle like the AR-15.

The proposition that semiautomatic rifles and standard-capacity magazines are in common use for defensive purposes is underscored by the firearms practices of Maryland’s own law enforcement agencies, which universally employ “assault weapons” with standard-issue “large capacity magazines.” For example, the Maryland State Police recently transitioned from the Beretta PX4 semiautomatic handgun (with its 14-round magazine) to the Glock 22, another semiautomatic handgun with standard magazines—excuse us, with “LCMs”—that hold 15, 17, or even 22 rounds.¹⁵ Similarly, the standard sidearm of the Baltimore County Police is the FNS-40 semiautomatic handgun with its 14-round magazine.¹⁶ The same holds true for the semiautomatic rifles that Maryland issues to its police and which are commonly mounted to the dashboard of the police cruiser or carried in the trunk. The semiautomatic AR-15 that is demonized by both the Maryland legislature and

¹⁴ See Glenn M. Gilbert, *The Making of a Match Rifle*, in BLACK RIFLES 38, 40; see also *id.* at 43 (“The AR-15 has come a long way. Long derided as a plastic toy, it is now the benchmark in accuracy among semiauto rifles.”); AMERICAN RIFLEMAN: ARMALITE 50 YEARS 76 (Dec. 2004) (“Even a casual observer of these highpower service rifle matches would recognize one thing quickly—the dominance of the AR-style rifle on the firing line.”).

¹⁵ See *Maryland State Police Switch from Berettas to Glocks*, WBALTV (June 6, 2012, 8:38 AM), <http://goo.gl/OSefuz> (last visited Mar. 14, 2014). See also *22 Round .40 Glock Factory Magazine*, GLOCKMEISTER, <http://goo.gl/5rIj> (last visited Mar. 14, 2014).

¹⁶ See <http://goo.gl/xP458i> (last visited Nov. 11, 2014).

the district court below is the most widely issued police patrol rifle in America.¹⁷

At least 16 police departments in Maryland use Colt AR-15s with their standard 30-round magazines,¹⁸ but other manufacturers have also responded to the demands of Maryland law enforcement agencies for more firepower. For example, Maryland's National Capital Park Police are armed with the M4 Patrolman's Carbine, a shorter, handier version of the AR-15.¹⁹

Thus Maryland tacitly—but unavoidably—concedes that its statute deprives law-abiding citizens of their right to keep and bear arms that are “in common use” for “lawful purposes like self-defense” by arming its own police with the very same magazines and semiautomatic firearms that the state denies its citizens.

Such firepower is essential in encounters with armed criminals. The FBI recently made a major change in its firearms training protocol based on its discovery that 75% of FBI agent shoot-outs involved criminals who were within nine feet of the agent.²⁰ This tracks the experience of police officers nationwide: 65% of law enforcement officers who have been murdered in the line of duty were killed by

¹⁷ Michael Remez, *A Civilian Version of an M-16: Bushmaster Rifle a Common Choice*, HARTFORD COURANT, Oct. 25, 2002, <http://goo.gl/VZssPH> (last visited Mar. 14, 2014); BARTOCCI, *BLACK RIFLE II*, *supra* note 12, at 126.

¹⁸ See <http://goo.gl/HkwCIY> (last visited Nov. 11, 2014).

¹⁹ See *Bushmaster Supplies Md. Park Police with Carbines*, POLICE MAGAZINE (Sept. 9, 2011), <http://goo.gl/1oXSqT> (last visited Nov. 11, 2014).

²⁰ See Brian McCombie, *An Inside Look at FBI Handgun Training*, GUNS & AMMO HANDGUNS (June 20, 2013), <http://goo.gl/igCdVC> (last visited Mar. 14, 2014).

assailants who were within ten feet of them.²¹ Yet even at close range, highly trained police officers miss their target far more often than they hit it. Examples from two of the nation's elite municipal police forces, charged with maintaining law and order in densely populated cities with high crime rates, illustrate this truth. A study of the Metro-Dade police in Florida revealed that officers who fired at suspects, even at these close ranges, missed 85% of the time.²² New York City's police did only slightly better: its officers missed 83% of the time when the assailant was nine to twenty-one feet away, and when the assailant was within six feet the police still missed 62% of the time.²³ When suddenly placed in a life-or-death situation, adrenaline floods the bloodstream: when our ancestors were hunter-gatherers on the veldt in Africa, this hormone-fueled "flight or fight" reaction enabled the large muscle groups in the arms and legs to power our ancestors to flee on foot or climb a tree to escape danger. But in the 21st century, that same adrenaline rush drastically impairs the fine motor control necessary to accurately fire a handgun²⁴—and that is why even the most highly trained police officers usually miss when firing their pistols at criminals who are little more than an arms-length away. Given how hard it is even for trained professionals to shoot accurately at close

²¹ *Id.* (considering data from 2002 through 2011).

²² *Id.* (considering one decade's worth of data).

²³ *Id.*

²⁴ *See generally* LT. COL. DAVE GROSSMAN, ON COMBAT: THE PSYCHOLOGY AND PHYSIOLOGY OF DEADLY CONFLICT IN WAR AND IN PEACE (3d ed. 2012).

range, maximum firepower—in the form of a standard-issue magazine—is a necessity, not some gimmick desired only by a half-wit besotted by Hollywood action movies.

It is little wonder that police officers—even with their body armor, backup pistols, shotguns, AR-15 patrol rifles, and all their training—deem LCMs in their handguns essential to protect themselves from armed criminals. The universal use of semiautomatic pistols with standard-capacity magazines by a million American law enforcement officers is sufficient by itself to confirm that pistols with such magazines are “in common use” for “lawful purposes like self-defense.” *Heller*, 554 U.S. at 624.²⁵

If Maryland were correct that semiautomatic firearms with standard-issue magazines are in fact murderous “assault weapons” useful only for mass slaughter of the innocent, then “such killing machines have no place in the hands of domestic

²⁵ The nation’s nearly one million law enforcement agents at the federal, state and local levels are armed with semiautomatic handguns with magazines holding more than 10 and as many as 20 rounds of ammunition. See BUREAU OF JUSTICE STATISTICS: CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008 (July 2011), available at <http://goo.gl/fBZJjf> (last visited Mar. 14, 2014); MASSAD AYOUB, THE COMPLETE BOOK OF HANDGUNS 50 (2013) (discussing police transition from revolvers to semiautomatics with large magazines); *id.* at 87 (“Known as the Glock 22, this pistol is believed to be in use by more American police departments than any other.”); *id.* at 90 (“The most popular police handgun in America, the Glock is also hugely popular for action pistol competition and home and personal defense.”).

law enforcement.”²⁶ But in truth, the standard magazines that the State has banned are essential tools for self-defense, which Maryland implicitly—but inevitably—concedes by arming its police with semiautomatic handguns that hold 15, 17, or 22 rounds and semiautomatic patrol rifles that hold 30 rounds.²⁷

Moreover, if *police officers* need that much firepower to defend themselves against armed criminals, *a fortiori* law-abiding citizens need the same firepower, if not more.²⁸ The police have many self-defense advantages: (1) they wear bullet-proof vests; (2) they carry at least two extra magazines; (3) they usually have a back-up handgun hidden away; (4) they have additional firepower in their patrol cars, such as a 12-gauge shotgun or a patrol rifle (and the latter is usually the semiautomatic AR-15 that Maryland now slanders and outlaws as a sociopath’s “assault weapon”); (5) they have tasers, police batons and pepper spray; (6) they have a partner in the car who is similarly armed to the teeth; and (7) back-up police reinforcements, including paramilitary SWAT teams, are only a radio call away. Civilians do not have those resources, so their need for standard pistol magazines that hold as many rounds as possible is both acute and undeniable.

It is no answer to say that because the police are so well-armed, citizens need not be. Not only is that proposition wrong as a matter of law—because the

²⁶ See David B. Kopel, “Assault Weapons,” in GUNS: WHO SHOULD HAVE THEM 176, 202 (David B. Kopel ed., 1995).

²⁷ See *supra* notes 15-17.

²⁸ Kopel, in GUNS: WHO SHOULD HAVE THEM, *supra* note 26, at 202.

Second Amendment's right to bear arms is conferred on private citizens—it is also tragically false as a matter of fact. No citizen enjoys a constitutional right to police protection from assailants²⁹ and the police are, unfortunately, usually not around when a citizen is being assaulted.³⁰

III. MARYLAND'S INFRINGEMENT OF SECOND AMENDMENT RIGHTS CANNOT BE JUSTIFIED BY THE SUPPOSED THREAT THAT TRAINED, LICENSED, AND ARMED CITIZENS POSE TO PUBLIC SAFETY.

Although “the Supreme Court made clear in *Heller* that it wasn't going to make the right to bear arms depend on casualty counts,” *Moore v. Madigan*, 702 F.3d 933, 939 (7th Cir. 2012), Maryland nevertheless attempts to justify the challenged statute on the supposition that armed, law-abiding citizens pose a threat to public safety. But the State cannot justify denying civilians the semiautomatic firearms and standard magazines that are issued to the police on grounds that civilians, unlike trained law enforcement officers, cannot be trusted to use their defensive firearms responsibly. The fact is that armed civilians—even though they outnumber police by several orders of magnitude—make far fewer mistakes with their firearms. Each year there are approximately 30 instances in which an armed civil-

²⁹ See, e.g., *Town of Castle Rock, Colorado v. Gonzales*, 545 U.S. 748, 757-67 (2005); *DeShaney v. Winnebago Cnty. Dep't of Social Servs.*, 489 U.S. 189, 197 (1989); *Warren v. District of Columbia*, 444 A.2d 1, 3 (D.C. Cir. 1981).

³⁰ Consider the crime statistics for 2012: in that year the police were unable to protect the public from 14,827 murders, 84,376 rapes, 354,520 robberies and 760,739 aggravated assaults. *Crime in the United States, Violent Crime, 2012*, FBI, <http://goo.gl/JL6cKj> (browse by violent crime category) (last visited Mar. 14, 2014).

ian mistakenly shoots and kills an innocent individual who was not actually a murderer, mugger, or similar threat—but “[o]ver the same period the police erroneously kill *five to eleven times* more innocent people.”³¹ Indeed, armed civilians are an asset to public safety: “Regardless of which counts of homicides by police are used, the results indicate that civilians legally kill far more felons than police officers do.”³²

The undeniable reality is that civilians are often left to defend themselves, and the Second Amendment guarantees that they may do so with firearms that are “in common use” and “typically possessed by law-abiding citizens for lawful purposes.” *Heller*, 554 U.S. at 624, 625. Semiautomatic pistols and rifles with large magazines are among “the most preferred firearm[s] in the nation to ‘keep’ and use for protection of one’s home and family.” *Id.* at 628-29. Maryland’s restriction on magazine capacity—an essential feature of defensive gun use—is just as unconstitutional as the D.C. handgun ban struck down in *Heller* or the D.C. requirement that handguns be disabled by a trigger lock, which was also categorically struck down in *Heller*. In this case, as in *Heller*, the state has outlawed a class of arms “overwhelmingly chosen by American society for [the] lawful purpose [of self-

³¹ JOYCE LEE MALCOLM, *GUNS & VIOLENCE: THE ENGLISH EXPERIENCE* 239 & n.71 (2002) (emphasis added).

³² See Gary Kleck, *Keeping, Carrying, and Shooting Guns for Self-Protection*, in DON B. KATES, JR. AND GARY KLECK, *THE GREAT AMERICAN GUN DEBATE: ESSAYS ON FIREARMS AND VIOLENCE* 199 (1997).

defense],” *id.* at 628, and therefore the result here should be the same as in *Heller*: the Act should be struck down.

IV. MARYLAND’S OWN EXPERT WITNESS HAS CONFIRMED THAT MARYLAND’S ASSAULT WEAPONS STATUTE WILL NOT REDUCE FIREARMS HOMICIDES AND HAVE LITTLE, IF ANY, EFFECT ON FIREARMS VIOLENCE.

Even if mere intermediate scrutiny is applied, the fit between the Maryland gun ban and the State’s goal must nevertheless survive “skeptical scrutiny,” *United States v. Virginia*, 518 U.S. 515, 531 (1996). Maryland “must demonstrate an ‘exceedingly persuasive justification’ ” for the challenged law and show that its ban is “substantially related” to the State’s objective. *Id.* at 531, 533. This Maryland cannot do because of the “relative rarity of events” where homicides involve weapons that Maryland now classifies as AWs or LCMs. Declaration of Christopher S. Koper, Doc. 44-7 ¶ 11 (hereinafter Koper Decl. 2014). Maryland’s own expert, Professor Christopher Koper, testified that, at best, the effects of Maryland’s statute on crime “are likely to be relatively small.” *Id.* ¶ 12. *See also id.* ¶ 12 n.6 (only a “small portion of gun murders [are] committed with assault rifles” or “LCMs”); ¶ 23 (AWs and LCMs “are used in a small share of gun crimes overall”). Due to the “rarity” of homicides with these banned weapons, “there is insufficient evidence to draw definite conclusions with respect to any specific range of probability that Maryland’s ban will accomplish” any of its purported goals. *Id.* ¶ 11; *see also id.* ¶ 85 (same). Remarkably, Professor Koper conceded that, even an-

alyzing the most recent data, he and his research team “found no difference in the average number of fatalities” in mass shootings, regardless whether so-called “Assault Weapons” were possessed or not. *Id.* ¶ 26.

The fundamental problem is substitution: a criminal denied access to one firearm will simply use a different one. Or, in Professor Koper’s words, “the ban did not appear to have a measurable effect on overall gun crime in terms of crimes committed (due to criminals’ ability to substitute other guns in their crimes).” Koper Decl. 2014 ¶ 67. Consequently, even if the expired federal ban prevented the use of “assault weapons” in a few crimes, the fact remains “that many of these crimes still were committed with other guns that the perpetrator substituted for the banned assault weapon.” *Id.* ¶¶ 58-59. The number of crimes for which criminals will even have to seek out a substitute firearm is small indeed: according to Professor Koper, the use of “assault weapons” is exceedingly rare, accounting for a mere two percent of guns used in crime (“according to a compilation of 38 sources”).³³ To put that diminutive number in context, consider the FBI’s report that there were 55,168 murders committed with firearms of any kind from 2007 through 2012.³⁴

³³ Christopher S. Koper, *America’s Experience with the Federal Assault Weapons Ban, 1994-2004*, in REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS 162 (Daniel W. Webster & Jon S. Vernick eds., 2013) (hereinafter “Koper Essay 2013”).

³⁴ See *Crime in the United States 2012: Expanded Homicide Data Table 8, Murder Victims*, FBI, <http://goo.gl/itKFjl> (last visited Mar. 14, 2014); *Crime in the*

Applying Professor Koper's two percent figure, just 1,103 of those murders were committed with a so-called "assault weapon." And to put that number in perspective, consider the fact that, in the same period of time, there were *six times as many murders committed with bare hands (6,019)* (whether by punching, strangling, or being pushed out of a window), and nearly *ten times as many murders committed with knives (10,556)*.³⁵ "Assault weapon" crimes are so rare that the FBI does not even give them their own category in its annual crime statistics. Until Maryland bans knives (which will never happen) or outlaws hands (an impossibility) its "assault weapons" ban will have only a negligible, barely discernible impact on the number of homicides.³⁶

United States 2012: Expanded Homicide Data Table 8, Murder Victims by Age, FBI, <http://goo.gl/df1mNW> (last visited Mar. 14, 2014).

³⁵ *Id.* The FBI has distinct statistical categories of murders by such means as "Poison," "Explosives," and "Asphyxiation," but none for "assault weapons." Nor do the FBI reports identify which, if any, of the firearms murders were committed with handguns, rifles or shotguns that had magazines holding more than ten rounds of ammunition. See *Crime in the United States 2012: Expanded Homicide Data Table 8*, *supra* note 34.

³⁶ A fundamental problem Professor Koper's analysis and conclusions is that he relies heavily on a compilation of homicides prepared not by criminologists, but by journalists at a popular online magazine known as "Mother Jones." See Koper Decl. 2014 ¶¶ 17 & n.8, 25-28. Professor Koper palms in a footnote the revelation *that he has never verified or even questioned the data* contained in the "Mother Jones" article. Koper Decl. 2014 ¶ 28 n.16.

Professor Koper's analysis is further undermined by his stunning admission that, in collecting his data, he made no distinction between homicides wrought by the "Assault Weapons" banned by Maryland and "gun attacks with semiautomatics" that are not banned anywhere. Koper Decl. 2014 ¶ 9. This admission permeates Professor Koper's affidavit and pollutes his data set. See ¶¶ 13 & n.7, 15, 17,

V. THE SAD TRUTH IS THAT THE STATUTE CHALLENGED HERE WOULD NOT HAVE PREVENTED THE ATROCITY THAT SPAWNED IT—THE MASSACRE AT THE NEWTOWN ELEMENTARY SCHOOL.

The district court below began its memorandum decision with a moving description of the horrors that occurred at the Sandy Hook Elementary School in Newtown, Connecticut on December 12, 2012. *See* 2014 WL 4243633 at *1.

Well aware that all the research has demonstrated that AW and LCM bans do not reduce firearms homicides, defenders of such bans shift to arguing that such bans may at least reduce the carnage from mass killings such as those at Newtown, Aurora and Columbine. This is a false hope.

Although Professor Koper has speculated that some stories in the news media may suggest that the now-expired federal ban might eventually have had some “modest[]” effect on mass killings and other gun crime had it been reenacted by Congress, Koper Essay 2013 at 158, 164-65, 170, Professor Koper himself concluded that the studies he reviewed show “no discernible reduction in the lethality or injuriousness of gun violence during the post-ban years,” *id.* at 165, and that “it

18, 24, 39, 41, 43, 46, 83. Thus his homicide data include crimes in which the perpetrator did not use an AW or an LCM, but simply a “semiautomatic” firearm of some sort—and “semiautomatic” includes the entire universe of 20th and 21st century firearms other than revolvers and bolt-action or lever-action rifles. The consequent over-counting of supposed “AW” homicides is staggering and it irretrievably corrupts Professor Koper’s conclusions and renders them unreliable.

was impossible to make definitive assessments of the ban's impact on gun violence," *id.* at 166.

The problem is that mass killers can easily substitute other equally or more deadly weapons if legislation such as the Maryland Act renders certain firearms unavailable. Mass killings in schools are not a new phenomenon, and their history reveals myriad means of skirting any ban by employing different weapons. For example, the first school massacre was recorded in Pennsylvania in 1764 when a teacher and ten of her students were scalped or shot dead by killers armed with knives and flintlock muskets.³⁷ In 1891 a man used a shotgun on children on a playground at a parochial school in New York.³⁸ And the worst school massacre in American history took place in Bath, Michigan, in 1927, when a madman killed 45 students and teachers with bombs he planted in the local school.³⁹ None of these massacres required an "assault weapon" or a "large capacity magazine."

Moving to the present day, nothing in the Maryland Act would have changed the outcome in recent mass killings. The Act does not ban the double-barreled and pump shotguns, or the Hi-Point 9mm carbine (with a mere ten-round magazine)

³⁷ DAVID DIXON, *NEVER COME TO PEACE AGAIN: PONTIAC'S UPRISING AND THE FATE OF THE BRITISH EMPIRE IN NORTH AMERICA* 236 (2005).

³⁸ Rossella Lorenzi, *Mass Shootings Have Long History*, (Dec. 20, 2012), <http://goo.gl/A1ELHZ> (last visited Nov. 11, 2014).

³⁹ Justin Peters, *"We Still Look at Ourselves as Survivors": More than Eighty Years Later, Remembering the Deadliest School Massacre in American History*, SLATE, Dec. 18, 2012, <http://goo.gl/2XKu5> (last visited Nov. 11, 2014).

that Dylan Klebold and Eric Harris used at Columbine High School.⁴⁰ Ironically, the Act specifically exempts from its ban most versions of the Ruger Mini-14 rifle, which fires precisely the same cartridge, from the same 30-round magazine, with precisely the same force, and at precisely the same semiautomatic pace, as all of the variations on the AR-15 that the Act does ban. *See* MD. CODE, PUB. SAFETY § 5-101(r)(2)(xxxiii) (banning only the “folding stock model” of the Ruger Mini-14). The only difference is that the other Ruger models, such as its popular Ranch Rifle, have solid wooden stocks like a traditional hunting rifle, rather than a pistol grip and an adjustable folding stock, and therefore may appear less menacing to those who know nothing about firearms. But those differences do not make Ruger’s Mini-14 Ranch Rifle any less dangerous: that was the weapon that fascist Anders Behring used to massacre 69 teenagers at a Norwegian summer camp in July of 2011.⁴¹

The Maryland Act does not regulate the purchase of the Mini-14, which was used by the criminals during the infamous Miami shootout in 1986 that caused the law-enforcement firearms revolution, in which police and the FBI concluded that they were outgunned and had to replace their revolvers with semiautomatic hand-

⁴⁰ *How They Were Equipped That Day*, Jefferson County, Colorado, Sheriff, CNN.COM, <http://goo.gl/vvJuQz> (last visited Nov. 11, 2014).

⁴¹ *See* Julia Gronnevet, *Norway Killer Got on Ferry in Uniform*, ASSOC. PRESS, May 4, 2012, <http://goo.gl/Wh5wVX> (last visited Mar. 14, 2014).

guns with magazines holding twelve, fifteen or even seventeen rounds.⁴² Former FBI agent John Hanlon, who was shot four times by the criminal wielding the Ruger Mini-14 on that day in Miami, has denounced “assault weapons” bans like Maryland’s, which are based on features such as folding stocks or pistol grips, as “a joke.”⁴³ “I don’t think it would have changed a damn thing,” Hanlon has said; “I don’t see what makes that gun less dangerous” when it has a traditional fixed stock.⁴⁴ Agent Edmund Morales, another FBI agent who survived the Miami shootout, said that AW bans focus on “irrelevant” features and that the host of other semiautomatic rifles that are not banned are “equally dangerous.” For example, the Maryland ban ignores AR-10s, rifles that fire 7.62mm caliber bullets that are far more deadly than the little 5.56mm rounds fired by the banned AR-15.⁴⁵ The point is not that the Maryland ban is constitutionally infirm because it is severely underinclusive—rather, the point is that the ban is utterly irrational.

Finally, the Court must confront the stubborn fact that nothing that this Act does would have changed anything at Newtown. Limiting detachable magazines

⁴² See PAUL M. BARRETT, *GLOCK: THE RISE OF AMERICA’S GUN* 1-5 (2012).

⁴³ *Gun Control: Gun Ban Would Protect More than 2,200 Firearms*, ABC7 (Feb. 16, 2013, 8:38 AM), <http://goo.gl/7QYeEV>.

⁴⁴ *Id.* The folding stock reduces the rifle’s length by a mere 2.75 inches.

⁴⁵ *Id.* The Act likewise expressly exempts from its ban the semiautomatic Ruger Mini-30, which fires the Russian Kalashnikov 7.62x39mm cartridge used in the fully automatic versions of the AK-47 assault rifle. See JOHNSTON & NELSON, *THE WORLD’S ASSAULT RIFLES*, *supra* note 13, at 1004.

to ten rounds would have made no difference: Adam Lanza used 30-round magazines, but he changed many of them out before they were exhausted and he could just as easily have changed out 10-round magazines after firing every last round in them.⁴⁶ Or instead of reloading his AR-15, he could have employed either of the two semiautomatic pistols that he was carrying, or even the shotgun that he also took to the school but left in his car.⁴⁷ For that matter, Lanza or some other lunatic could avoid Maryland's new ban on AR-15 rifles by using the Colt AR-15 Sporter H-BAR rifle, which is specifically exempted from the Act's ban⁴⁸ but differs from other AR-15 models only in that it has a heavier barrel that enhances long-distance marksmanship—whether at a shooting range or next to a school playground. Deranged spree killers arm themselves with multiple guns—this was true at Columbine high school, at the movie theater in Aurora, and at Sandy Hook elementary school.

Nor did the rate of fire of Adam Lanza's AR-15 make a difference, because it was the same as every other semiautomatic rifle—one pull of the trigger and the gun fires one bullet. Indeed, even if *all* semiautomatic rifles were outlawed, Lanza

⁴⁶ N.R. Kleinfield et al., *Newtown Killer's Obsessions*, in *Chilling Detail*, N.Y. TIMES, Mar. 28, 2013, at A1.

⁴⁷ *Id.*, see Kopel, in GUNS: WHO SHOULD HAVE THEM, *supra* note 26, at 164, for an explanation of the massive killing power that can be unleashed in three seconds by a regular shotgun statutorily classified as “recreational” and therefore not subject to any “assault weapons” ban.

⁴⁸ See MD. CODE, PUB. SAFETY § 5-101(r)(2)(xv).

could still have used a 150-year-old lever-action rifle such as the Volcanic, the Henry, or the Winchester—cowboy guns familiar to us from a thousand movies and TV Westerns. Lanza fired 154 shots in about five minutes, or 30 shots per minute.⁴⁹ That same rate of fire can be achieved with a Winchester lever-action carbine from 1866,⁵⁰ a Volcanic lever-action rifle from the 1850s (which had a 30-round magazine),⁵¹ or a World War I bolt-action British SMLE rifle, which can fire up to 37 aimed shots per minute with its ten-round magazine—precisely the size that the Act permits.⁵²

Finally, Lanza could have accomplished his grim atrocities without any rifle at all, but with a mere revolver that could rapidly be reloaded with the use of such common and inexpensive devices as speed-loaders, moon clips, or Quickstrips.⁵³

⁴⁹ See Mary Ellen Clark & Noreen O'Donnell, *Newtown School Gunman Fired 154 Rounds in Less than Five Minutes*, REUTERS U.S. EDITION, Mar. 28, 2013, <http://goo.gl/PXN0bw>.

⁵⁰ See GUN: A VISUAL HISTORY, *supra* note 7, at 174; MILITARY SMALL ARMS, *supra* note 7, at 147.

⁵¹ See MILITARY SMALL ARMS, *supra* note 7, at 146.

⁵² See FOWLER & SWEENEY, WORLD ENCYCLOPEDIA OF RIFLES AND MACHINE GUNS, *supra* note 7, at 40. Adam Lanza apparently also possessed some type of “Enfield bolt-action rifle” at his home. See Clark & O'Donnell, *supra* note 49.

⁵³ See Joseph von Benedikt, *Double Down: Get Your DA Revolver Skills Up to Snuff with These Pro Tips*, in GUNS & AMMO, HANDGUNS 62-63 (Aug./Sept. 2013). Further evidence of the rapid reload ability of revolvers comes from the Scottish government's PUBLIC INQUIRY INTO THE SHOOTINGS AT DUNBLANE PRIMARY SCHOOL ON 13 MARCH 1996, led by Lord Cullen. See <http://goo.gl/a1ovvm>. On that day, a madman named Thomas Hamilton walked into a primary school in Scotland and, within four minutes, shot 30 teachers and children with a 9mm

Thus firearms technology that is more than a century old would have wrought the same destruction at Newtown as the modern semiautomatic rifle that Lanza used. The monstrosity at Newtown was not the weapon, but the depraved individual who wielded it.

CONCLUSION

This case should be decided by the principles for evaluating categorical bans on particular firearms that were laid down by the Supreme Court in *Heller*. Insofar as the weapons categorically banned by the Maryland Act are “arms ‘in common use at the time’ for lawful purposes like self-defense,” *Heller*, 554 U.S. at 624, or are weapons “typically possessed by law-abiding citizens for lawful purposes,” *id.*

Browning semiautomatic pistol before killing himself with a single shot from one of the two .357 magnum Smith & Wesson revolvers that he was carrying. *See id.* ¶ 1.3, 6.10(i). Hamilton shot all of his victims with the 9mm Browning semiautomatic that he kept reloading with 20-round magazines (he fired 105 rounds in total). *Id.* ¶ 3.39. However, the Public Inquiry by Lord Cullen concluded that Hamilton could easily have inflicted the same bloodshed in the same amount of time with either of his revolvers: “[W]ith a revolver it is possible to maintain a speed of firing which approaches that of the self-loading pistol. Further, as I stated earlier, the use of a speedloader in conjunction with a revolver which had a cylinder which could be swung out would enable a whole set of cartridges to be removed and replaced very quickly.” *Id.* ¶ 9.51. The Inquiry further noted that use of a shotgun would have been far more deadly, on the basis of evidence showing that one could, within the same span of time, discharge and reload a double-barreled shotgun 105 times—the same number of shots that Hamilton had fired—but with much more destruction from the approximately 1,000 projectiles that would saturate the room if one were using buckshot. *Id.* ¶ 9.53. As a result of the Dunblane massacre, the British government outlawed virtually all private ownership of handguns—an option that the Second Amendment forbids in this country.

at 625, they are within the scope of the Second Amendment. The grief of the parents of the Newtown victims and all the other people whose lives have been sun-dered by mass killings cannot be overstated nor can it be assuaged. But the individuals represented by Amici here contend with armed assault on a daily basis and are constitutionally entitled to arm themselves so that they do not become victims too.

Dated: November 12, 2014

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Dated: November 12, 2014

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