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

## BRIEF OF THE BRADY CENTER TO PREVENT GUN VIOLENCE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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January 7, 2015

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Stephen Kiehl Date: January 7, 2015

Counsel for: Brady Center to Prevent Gun Violence

## CERTIFICATE OF SERVICE

**********

I certify that on January 7, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Stephen Kiehl (signature) January 7, 2015 (date)

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## STATEMENT OF INTEREST

The Brady Center to Prevent Gun Violence is the nation's largest non-partisan, non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. In support of that mission, the Brady Center files this brief as *amicus curiae* in support of Appellees.[1]

The Brady Center has a substantial interest in ensuring that the Second Amendment is not interpreted or applied in a way that would jeopardize the public's interest in protecting families and communities from the effects of gun violence. Through its Legal Action Project, the Brady Center has filed *amicus* briefs in numerous cases involving firearms regulations, including *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *United States v. Hayes*, 555 U.S. 415, 427 (2009), and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

## INTRODUCTION

On December 14, 2012, Adam Lanza killed his mother in her home with a Savage Mark II rifle before taking four semi-automatic firearms capable of accepting high-capacity magazines (a Bushmaster XM15-ES2 rifle, a Glock 20SF

[1] Pursuant to Fed. R. App. P. 29(c)(5), the Brady Center states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief. Pursuant to Fed. R. App. P. 29(a), the Brady Center states that all parties have consented to the filing of this brief.

semi-automatic pistol, a Sig Sauer P226 semi-automatic pistol, and an Izhmash Saiga-12 semi-automatic shotgun) to Sandy Hook Elementary School in Newtown, Connecticut.[2] Upon his arrival at the school, Lanza used the Bushmaster rifle (an AR-15) to blast through the glass panel next to the schoolhouse's locked doors.[3] He then gunned down twenty first-grade students (twelve girls and eight boys) and six adults—all within ten minutes.[4] Lanza fired approximately 150 rounds, striking all but two of the victims more than once.[5] He thus converted "a place where children were supposed to be safe into a national symbol of heartbreak and horror."[6] Police rushed to the scene, but by the time they arrived, eighteen of the twenty children and all six adults were dead.[7]

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[2] Stephen J. Sedensky III, *Report of the State's Attorney for the Judicial District of Danbury on the Shootings at Sandy Hook Elementary School and 36 Yogananda Street, Newtown, Connecticut on December 14, 2012*, Connecticut Division of Criminal Justice (Nov. 25, 2013), http://www.ct.gov/csao/lib/csao/Sandy_Hook_Final_Report.pdf, at 2, 9.

[3] *Id.* at 9.

[4] *Id.* at 2, 5, 10.

[5] *See id.* at 17-22; Bill Hutchinson, *Sandy Hook Elementary School Massacre Death Certificates Released*, N.Y. Daily News (June 18, 2013), http://www.nydailynews.com/news/crime/sandy-hook-elementary-school-massacre-death-certificates-released-article-1.1376084.

[6] James Barron, *Children Were All Shot Multiple Times With a Semiautomatic, Officials Say*, N.Y. Times (Dec. 15, 2012),
(continued…)

The Sandy Hook mass shooting is only one recent example of the dangers that assault weapons and high-capacity magazines pose to public safety. To illustrate:

- **Columbine High School**: On April 20, 1999, senior high school students Dylan Klebold and Eric Harris, armed with Intratec TEC-DC9 assault pistols, a Hi-Point 9mm Carbine, a Savage 67H pump-action shotgun, and a Savage 311-D 12-gauge shotgun, went on a 49-minute rampage at Columbine High School, killing 13 and wounding 23 of their classmates and teachers.[8]
- **Virginia Tech**: On April 16, 2007, student Seung-Hui Cho shot and killed 32 people and wounded 17 others before taking his own life in the deadliest mass shooting in U.S. history.[9] Cho used two semi-automatic pistols: a Glock 19,

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http://www.nytimes.com/2012/12/16/nyregion/gunman-kills-20-children-at-school-in-connecticut-28-dead-in-all.html?pagewanted=all.

[7] *See* Sedensky, *supra* note 2, at 10.

[8] *See* Violence Policy Center, *Where'd They Get Their Guns?* (2001), https://www.vpc.org/studies/wgun990420.htm.

[9] *See* Virginia Tech Review Panel, *Mass Shootings at Virginia Tech, April 16, 2007* (Aug. 2007), http://web.archive.org/web/20131015095917/http://www.governor.virginia.gov/TempContent/techPanelReport-docs/FullReport.pdf, at 1.

which comes standard with a high-capacity magazine and was initially developed for the Austrian military; and a Walther P22.[10]

- **Aurora Movie Theater**: On July 20, 2012, James Holmes opened fire in a movie theater in Aurora, Colorado during a midnight showing of *The Dark Knight Rises*, killing 12 people and injuring 58.[11] Holmes carried out most of the shooting with a Smith & Wesson M&P15 (an AR-15); he also used a Remington 870 12-gauge shotgun and a Glock .40 semi-automatic pistol.[12] Holmes equipped his rifle with a 100-round drum magazine, which gave him the potential ability to shoot 50 or 60 rounds within one minute.[13]

* * *

Tragic events like these formed the backdrop for the Maryland Legislature's enactment of the Firearm Safety Act of 2013. The Maryland Act prohibits the possession, sale, transfer, purchase, or receipt of certain types of semi-automatic

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[10] *See id.* at 71; *see also* Glock USA, *Glock Timeline 1982*, http://us.glock.com/heritage/timeline.

[11] *See* CNN Library, *Colorado Theater Shooting Fast Facts*, CNN (July 13, 2014), http://www.cnn.com/2013/07/19/us/colorado-theater-shooting-fast-facts/.

[12] *See* James Dao, *Aurora Gunman's Arsenal: Shotgun, Semiautomatic Rifle and, at the End, a Pistol*, N.Y. Times (July 23, 2012), http://www.nytimes.com/2012/07/24/us/aurora-gunmans-lethal-arsenal.html?_r=0.

[13] *See* Dan Frosch & Kirk Johnson, *Gunman Kills 12 in Colorado, Reviving Gun Debate*, N.Y. Times (July 20, 2012), http://www.nytimes.com/2012/07/21/us/shooting-at-colorado-theater-showing-batman-movie.html.

rifles and shotguns possessing a set of distinct characteristics, along with detachable magazines with capacities of more than ten rounds of ammunition. *See* Md. Code Ann., Crim. Law §§ 4-301–05. The weapons and magazines prohibited by the Act share two key features: (1) they are especially useful in the commission of violent crime and mass murder because they are designed to fire the most bullets at the most people in the shortest amount of time; and (2) they are especially ill-suited for what the Supreme Court has called the "core protection" of the Second Amendment, the "defense of hearth and home." *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008).

## ARGUMENT

As a threshold matter, the Maryland Act does not burden Appellants' rights under the Second Amendment. The Amendment does not protect dangerous, military-style assault weapons and high-capacity magazines, like those subject to the Act, that are not commonly used by law-abiding, responsible citizens for lawful purposes, the "central component" of which is self-defense in the home. Still, even assuming that the Act burdens conduct protected by the Second Amendment, the appropriate standard of review is intermediate scrutiny. Under that test, the Act is constitutional because it is reasonably adapted to the important governmental objective of promoting public safety.

## I. Second Amendment Claims Are Evaluated Under a Two-Part Test

In *United States v. Chester*, this Court concluded that "a two-part approach to Second Amendment claims seems appropriate under *Heller*." 628 F.3d 673, 680 (4th Cir. 2010). Under this approach:

> The first question is whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification. If it was not, then the challenged law is valid. If the challenged regulation burdens conduct that was within the scope of the Second Amendment as historically understood, then we move to the second step of applying an appropriate form of means-end scrutiny.

*Id.* (citations and internal quotation marks omitted).

The two-part *Chester* inquiry comports with the text and spirit of *Heller*, where the Supreme Court examined District of Columbia statutes that banned the possession of handguns in the home. 554 U.S. at 628. Finding that self-defense was "the central component" of the Second Amendment right and that the D.C. regulation burdened that right, *id.* at 599, 628, the Court held that the regulation was unconstitutional under any level of scrutiny it could apply. *Id.* at 628–29. Since *Heller*, numerous appellate courts have endorsed the two-step process of first deciding whether the statute implicates the Second Amendment's protections and, if so, determining whether the statutory restriction is justified under the appropriate

level of scrutiny. *See Woollard v. Gallagher*, 712 F.3d 865, 874–75 (4th Cir. 2013) (collecting circuit decisions and noting appellate consensus).

## II. Part One of the Test: The Weapons Regulated by the Act Are Not Protected by the Second Amendment

The Supreme Court has made clear that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited" in scope and does not amount to "a right to keep and carry *any weapon whatsoever* in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626 (emphasis added). The Court further observed in *Heller* that "nothing in our opinion should be taken to cast doubt on" the constitutionality of "presumptively lawful regulatory measures," including "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27 & n.26. To this illustrative and non-exhaustive list, the Court added "another important limitation on the right to keep and carry arms"—namely, the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id.* at 627 (citations omitted). Because the Maryland Act accords with this "historical tradition," it is a "presumptively lawful regulatory measure" that does not burden conduct protected by the Second Amendment.

At bottom, *Heller* stands for the proposition that the Second Amendment protects the right to possess a firearm only if: (A) it is commonly used "at the time"; (B) for lawful self-defense in the home; and (C) it is not dangerous and unusual. *See id.* at 627-29. The regulated firearms must meet each of these criteria to qualify for constitutional protection. Here, the firearms regulated by the Maryland Act do not meet any of these criteria.

### A. Assault Weapons and High-Capacity Magazines Are Not Commonly Used

In *Heller*, the Supreme Court observed that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes … ." 554 U.S. at 625. It noted that, historically, "the sorts of weapons protected were those 'in common use at the time.'" *Id.* at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)). The Court proceeded to hold that the Second Amendment could not tolerate a total ban on possession of handguns in the home because handguns are "overwhelmingly chosen by American society" for self-defense. *Id.* at 628. Handguns are essentially in a class by themselves. As the Court explained, "the American people have considered the handgun to be the quintessential self-defense weapon," and "handguns are the most popular weapon chosen by Americans for self-defense in the home … ." *Id.* at 629.

In sharp contrast, the military-style assault weapons that are the focus of Appellants' Second Amendment challenge are neither the "quintessential self-defense weapon," nor "the most popular weapon chosen by Americans for self-defense in the home." Under any reasonable interpretation of the phrase, the weapons regulated by the Act are not in "common use."

**First,** there is no empirical evidence that the restricted assault weapons and high-capacity magazines are in "common use" in Maryland or in the United States. Based on the numbers that Appellants themselves relied on at trial, assault weapons comprise no more than 3% of the current civilian gun stock in the U.S. *Kolbe v. O'Malley*, No. 13-cv-2841, 2014 WL 4243633, at *11 (D. Md. Aug. 22, 2014). Such usage does not remotely approach the level of handgun use deemed so crucial in *Heller*.

Moreover, ownership of assault weapons is highly concentrated in less than 1% of the U.S. population. *Kolbe*, 2014 WL 4243633, at *11; *see also id.* at *9 ("Using NSSF's figure that the average assault weapons owner has 3.1 such weapons, this means less than 1% of Americans own an assault weapon."); National Shooting Sports Foundation, *Modern Sporting Rifle Comprehensive Consumer Report 2013* (2013) (indicating that the average owner of modern

sporting rifles had 2.6 such weapons in 2010 and 3.1 such weapons in 2013).[14] According to recent reports, although the number of U.S. households with firearms has declined, current owners are stockpiling more firearms. *See* Allison Brennan, *Analysis: Fewer U.S. Gun Owners Own More Guns*, CNN (July 31, 2012), http://www.cnn.com/2012/07/31/politics/gun-ownership-declining/index.html?iref=allsearch.

**Second,** even if Appellants could show that semi-automatic rifles and shotguns are commonly owned, the Act does not prohibit all such weapons. Rather, the Act targets only a defined list of specific firearms and other "copycat" assault weapons that possess certain secondary characteristics, such as a folding stock or a shotgun with a revolving cylinder. *See* Md. Code Ann., Crim. Law § 4-301. Appellants point to no evidence that weapons with the particular secondary characteristics identified in the Act are commonly used. According to the National Shooting Sports Foundation, 60% of "modern sporting rifles" (semi-automatic rifles) have a collapsible or folding stock, and 64% of semi-automatic rifles have a permanent or non-permanent flash-hider. *See* National Shooting

[14] The regulated firearms may be in "common use" by one group: they are "preferred by criminals over law abiding citizens eight to one." *See* Brady Center to Prevent Gun Violence, *Assault Weapons: Mass Produced Mayhem* (Oct. 2008), at 10.

Sports Foundation, *Modern Sporting Rifle Comprehensive Consumer Report 2010: Ownership, Usage and Attitudes Towards Modern Sporting Rifles* (2010), http://nssf.org/share/PDF/MSRConsumerReport2010.pdf, at 7–8. If assault weapons comprise only 3% of American firearms, it follows that a significantly lower number of those are among the assault weapons prohibited under the Act.

**Third,** Appellants cannot show that the prohibited assault weapons and high-capacity magazines were in common use during a relevant historical timeframe. The Supreme Court in *Heller* emphasized that the Second Amendment protects the sorts of weapons "in common use at the time," but it did not elaborate on what the relevant timeframe should be. 554 U.S. at 627; *see also Miller*, 307 U.S. at 179 (introducing the phrase, "common use at the time").

It would be unreasonable to look only to the day on which the statute was enacted or, as Appellants seem to prefer, the present time. Suppose, for example, that a new, unregulated, and highly lethal weapon were developed before a statute was enacted. When first offered for sale, the weapon would not be protected because it would not be in common use. Yet, under Appellants' theory, if sales of the weapon grew explosively over the next year, prior to any legislation, then the weapon would, within that short timeframe, become constitutionally protected, even though a ban would have been permissible had the legislature acted a few

months earlier. Such an approach would allow the gun industry to determine what firearms are constitutionally protected simply by flooding the market—even if that market is predominantly criminal. That makes little sense. If "common use at the time" is a relevant criterion, then "the time" must be understood to cover, at the least, a historically representative period of time during which the weapons exhibiting the particular characteristics were available and widely used for purposes of self-defense. There is no evidence that the assault weapons at issue have been in common use for a representative time period.[15]

### B. Assault Weapons and High-Capacity Magazines Are Not Commonly Used for Self-Defense in the Home

Even if Appellants could demonstrate that the weapons regulated by the Act were in "common use at the time," that showing alone would not be sufficient to bring the weapons within the scope of the Second Amendment's protection. Such common use must have been for a lawful purpose. The principal "lawful purpose" identified by the Supreme Court in *Heller* is self-defense within the home. *See*

[15] Although sales of semi-automatic rifles may have increased in recent years, partly due to the expiration of the federal assault weapons ban in 2004, these weapons were not historically popular—and certainly not historically popular for lawful self-defense in the home. *See* Christopher Koper, *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994–2003, Report to the National Institute of Justice*, U.S. Dep't of Justice (June 2004), at 10 ("Around 1990, there were an estimated 1 million privately owned AWs in the U.S. (about 0.5% of the estimated civilian gun stock)").

*Woollard*, 712 F.3d at 874 ("*Heller* … was principally concerned with the 'core protection' of the Second Amendment: 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" (quoting *Heller*, 554 U.S. at 634–35)); *see also McDonald*, 561 U.S. at 780 (reiterating that the "central holding in *Heller*" is that "the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home").

Given the Second Amendment's limited scope, a critical question in determining whether the Act oversteps constitutional bounds is whether it impairs the ability of citizens to arm themselves for self-defense in their homes. That purpose was at the heart of *Heller*, which invalidated a D.C. statute that required handguns to be disabled inside the home. According to the Supreme Court, that requirement "makes it impossible for citizens to use [the firearm] for the core lawful purpose of self-defense and is hence unconstitutional." 554 U.S. at 630.

It follows that if the regulated characteristics meaningfully affect the weapons' utility for self-defense, then the challenged statute is more likely to burden conduct protected by the Second Amendment. But if regulating the weapons' secondary characteristics does not undermine their utility for self-defense, then the statute does not implicate the Second Amendment. "[I]t … would make little sense to categorically protect a class of weapons bearing a

certain characteristic wholly unrelated to their utility. *Heller* distinguished handguns from other classes of firearms, such as long guns, by looking to their functionality." *United States v. Marzzarella*, 614 F.3d 85, 94 (3d Cir. 2010); *see also Heller*, 554 U.S. at 629 (discussing handguns' ease in storage, access, and use in case of confrontation).

Here, the Act's focus on secondary characteristics of certain assault weapons and high-capacity magazines will not have a meaningful impact on the self-defense right at the core of the Second Amendment. For example, law enforcement officials with first-hand experience responding to home invasions have confirmed that the "typical self-defense scenario in a home does not require more ammunition than is available in a standard 6-shot revolver or 6–10 round semiautomatic pistol." *See* Brady Center, *Assault Weapons: Mass Produced Mayhem*, *supra* note 14, at 16 (citing statement of former Baltimore County Police Department Colonel Leonard J. Supenski); *see also Kolbe*, 2014 WL 4243633, at *10 (citing expert testimony of Lucy Allen, who analyzed the NRA Institute for Legislative Action's reports on self-defense incidents occurring between January 2011 and December 2013 and determined that, on average, only 2.1 bullets were fired per incident); *id.* (citing expert testimony of Professor Daniel W. Webster, who stated that he was aware of

no study or data suggesting that assault weapons' features and high-capacity magazines are necessary for personal defense).[16]

Indeed, despite the alleged popularity of assault weapons, the District Court found that Appellants had "fail[ed] to identify a single incident in which a Marylander defended herself using an assault weapon. With the exception of one [irrelevant] incident … Maryland law enforcement officials are unaware of any Marylander using an assault weapon, or needing to fire more than ten rounds, to protect himself." *Kolbe*, 2014 WL 4243633, at *10.

### C. Assault Weapons and High-Capacity Magazines Are Dangerous and Unusual.

Under *Heller*, a prohibition on the possession or sale of "dangerous and unusual weapons" does not burden conduct falling within the scope of the Second Amendment's protection. *See* 554 U.S. at 571; *Marzzarella*, 614 F.3d at 91 ("By equating the list of presumptively lawful regulations with restrictions on dangerous and unusual weapons, we believe the [*Heller*] Court intended to treat them

[16] *See also* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. Crim. L. & Criminology 150, 185 (1995) (stating that revolvers and semi-automatic pistols are together used almost 80% of the time in incidents of self-defense with a gun); *Hightower v. City of Boston*, 693 F.3d 61, 71 (1st Cir. 2012) (observing that large-capacity weapons, unlike handguns, are not "weapons of the type characteristically used to protect the home").

equivalently—as exceptions to the Second Amendment guarantee."); *see also* *Chester*, 628 F.3d at 679 ("[A] citizen's right to carry or keep sawed-off shotguns, for instance, would not come within the ambit of the Second Amendment.").

**1. Historical Evidence**

Since its adoption, the Second Amendment's guarantee has never extended to weapons that terrify the population, *see* 4 William Blackstone, *Commentaries* *148 (1769) ("The offense of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land"), or to weapons that are suited for violent crime and that imperil public safety, *see English v. State*, 35 Tex. 473, 476 (1871) ("No kind of travesty, however subtle or ingenious, could so misconstrue this provision of the constitution of the United States, as to make it cover and protect that pernicious vice [pistols], from which so many murders, assassinations, and deadly assaults have sprung … .").

The historical record shows that founding-era arms regulations were routinely enacted to protect the public. *See* Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 502–13 (2004); *see also* Adam Winkler, *Gunfight: The Battle over the Right to Bear Arms in America* 113–18 (2011). Laws regulating the storage and

transport of gun powder, for example, were "crafted to meet the needs of public safety" and "also provided a check on the creation of a private arsenal." *See* Cornell & DeDino, Fordham L. Rev. at 512. Subsequent 19th-century restrictions on certain types of arms reflect the historical understanding that the state has the power to regulate firearms for the sake of public safety. *See id.* at 512-16. These early laws

> demonstrate the ample power of the state to regulate and restrict firearm usage and ownership to achieve the goal of creating a well regulated society. A wide range of gun regulations, including … prohibitions on certain classes of weapons have deep roots in American history stretching back before the American Revolution and extending forward in time long after the Second Amendment was adopted.

*See id.* at 516; *see also Day v. State*, 37 Tenn. 496, 500 (1857) ("So, it will be seen, that the Legislature intended to abolish these most dangerous weapons [i.e., concealed knives] entirely from use, as unfit to be worn and used in a christian and civilized community for any purpose, so far as severe penalties could accomplish that object. They were induced to do this on account of the savage character of the instrument and for the saving of blood."). The Maryland Act comports with the strong American tradition of categorically restricting "dangerous and unusual" firearms on public-safety grounds. Accordingly, the Act passes constitutional

muster as a "presumptively lawful regulatory measure[]" under *Heller*. *See* 554 U.S. at 626-27 & n.26.[17]

**2. Contemporary Evidence**

Contemporary evidence confirms that the arms regulated by the Act are too "dangerous and unusual" to fall within the ambit of the Second Amendment's protection. As the District Court found, the regulated weapons are "designed to cause extensive damage and can fire many rounds in quick succession, from a greater distance and with greater accuracy than many other types of guns—including, in some respects, their automatic counterparts." *Kolbe*, 2014 WL 4243633 at *16. Fully automatic weapons have historically been banned from the civilian stock. *See* 18 U.S.C. § 922(o). But the only difference between semi-automatic weapons and those that are fully automatic is that the former will fire with each pull of the trigger, while the latter will fire continuously as its trigger is held down.[18] *See* Violence Policy Center, *Understanding the Smith & Wesson*

[17] "*Heller* demonstrates that a regulation can be deemed 'longstanding' even if it cannot boast a precise founding-era analogue. After all, *Heller* considered firearm possession bans on felons and the mentally ill to be longstanding, yet the current versions of these bans are of mid–20th century vintage." *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 196 (5th Cir. 2012) (citations omitted).

[18] For example, an AR-15 is virtually identical to an M-16, except that the M-16 is fully-automatic. *See* Violence Policy Center, *Understanding the Smith & Wesson*
(continued…)

*M&P15*, *supra* note 18, at 6. Even this distinction, however, is inconsequential: firearms experts have found that fire from semi-automatic weapons is actually more accurate than fire from automatic weapons. *Id*. at 5; *see also Kolbe*, 2014 WL 4243633, at *16.

The District Court also determined that high-capacity magazines "serve an obvious military function by allowing the shooter to fire many rounds without having to pause to reload." *Kolbe*, 2014 WL 4243633, at *10. This leads to mass casualties, "while depriving victims and law enforcement of an opportunity to escape or overwhelm an assailant as he reloads his weapon." *Id.* at *11; *see also id.* at *17 (finding that high-capacity magazines are "disproportionately used in the killing of law enforcement officers" and "contribute to more fatalities per incident than in non-[high-capacity magazine] cases").

Furthermore, certain features prohibited by the Act do not relate to the utility of the weapons for self-defense (or even for sporting purposes), but rather to their utility for mass murder. The Act prohibits certain semi-automatic rifles that have

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*M&P15 Semiautomatic Assault Rifle Used in the Aurora, Colorado Mass Murder* (July 2012), http://www.vpc.org/studies/M&P15.pdf, at 5–6; *see also Staples v. United States*, 511 U.S. 600, 603 (1994) (finding the AR-15 is "the civilian version of the military's M-16 rifle"); *Kolbe*, 2014 WL 4243633, at *15-16. Similarly, the regulated Ruger Mini-14 is a scaled down version of the M14, an automatic rifle used by the Navy SEALs. *See* Violence Policy Center, *The Ruger Mini-14, The "Poor Man's Assault Rifle,"* (July 2011), https://www.vpc.org/fact_sht/RugerBackgrounderJuly2011.pdf, at 2.

any two of the following: a folding stock, a grenade or flare launcher, or a flash suppressor. *See* Md. Code Ann., Crim. Law § 4-301(e)(1)(i). While the danger of a rifle equipped with a grenade or a flare launcher is obvious, a folding stock, too, threatens public safety: it "allow[s] the firearm to be fired from the folded position, yet it cannot be fired nearly as accurately as with an open stock." U.S. Dep't of Treasury, *Studying the Sporting Suitability of Modified Semiautomatic Assault Rifles* (Apr. 1998), https://www.atf.gov/files/firearms/industry/april-1998-sporting-suitability-of-modified-semiautomatic-assault-rifles.pdf ("*Sporting Suitability Study*"). Consequently, folding stocks increase the risk of injury to innocent bystanders. They also enable the weapon to be easily concealed and transported. *See N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 990 F. Supp. 2d 349, 370 (W.D.N.Y. 2013) (noting that "[f]olding and telescoping stocks aid concealability and portability").

By the same token, the function of a flash suppressor is to

> disperse[] the muzzle flash when the firearm is fired to help conceal the shooter's position, especially at night … [and] assist in controlling the "muzzle climb" of the rifle, particularly when fired as a fully automatic weapon.

*See Sporting Suitability Study*, *supra*, at Exhibit 5. According to ATF, "[f]rom the standpoint of a traditional sporting firearm, there is no particular benefit in suppressing muzzle flash." *Id.* Its utility is for violence, not sport.

Moreover, statistical research on mass shootings reflects a significantly higher rate of injury and death from military-style assault weapons and high-capacity magazines as compared to other firearms:

- For mass shootings from January 2009 to January 2013, the use of assault weapons or high-capacity magazines resulted in more than double the number of people shot and over 50 percent more people killed. *See* Christopher Koper, *America's Experience with the Federal Assault Weapons Ban, 1994–2004*, in *Reducing Gun Violence in America* 157, 167 (Daniel W. Webster and Jon S. Vernick eds., 2013).
- For mass shootings from 1984 to 2012, more rounds fired per minute correlated to higher numbers of people hit and killed. *See* Kevin Ashton, *The Physics of Mass Killing* (Jan. 24, 2013), http://kevinjashton.com/2013/01/24/the-physics-of-mass-killing/.
- Recent mass shootings not involving assault weapons or high-capacity magazines resulted in an average of 7 people shot and 5.4 deaths, whereas shootings involving assault weapons or high-capacity magazines resulted in an average of 15.6 people shot (123% more) and 8.4 deaths (54% more). *See* Mayors Against Illegal Guns, *Mass Shootings Since January 20, 2009* (Feb. 2013),

http://www.washingtonpost.com/blogs/wonkblog/files/2013/02/mass_shootings_2009-13_-_jan_29_12pm1.pdf, at 1.

- In 62 mass shootings in the United States over the past 30 years, 33 involved assault weapons, high-capacity magazines, or both. *See* Mark Follman et al., *More Than Half of Mass Shooters Used Assault Weapons and High-Capacity Magazines*, Mother Jones (Feb. 27, 2013), http://www.motherjones.com/politics/2013/02/assault-weapons-high-capacity-magazines-mass-shootings-feinstein; *see also Kolbe*, 2014 WL 4243633 at *17.

These data demonstrate the dangerous and unusual character of the regulated weapons.

## III. Part Two of the Test: Even Assuming That the Maryland Act Implicates the Second Amendment, the Act Is Constitutional.

In *McDonald*, the Supreme Court noted that the Second Amendment's guarantee "*limits* (but by no means eliminates) [the States'] ability to devise solutions to social problems that suit local needs and values." *McDonald*, 561 U.S. at 785. The Court readily acknowledged that "state and local experimentation with reasonable firearms regulations will continue under the Second Amendment." *Id.* (alteration omitted). Here, the State of Maryland has engaged in exactly the sort of

local experimentation envisioned in *McDonald*. Even if this Court were to conclude that the Act restricts rights protected by the Second Amendment, it does so only marginally, and the restriction is far outweighed by Maryland's important governmental interest in ensuring the safety and security of its citizens.

### A. Intermediate, Not Strict, Scrutiny Is the Appropriate Standard of Review.

If this Court concludes that the challenged regulation burdens conduct protected by the Second Amendment, it must then determine and apply the appropriate form of means-ends scrutiny. *See Chester*, 628 F.3d at 680; *Woollard*, 712 F.3d at 875. Although Appellants urge this Court to apply strict scrutiny to Maryland's legislation, neither this Court nor any other court has ever suggested that such a standard should apply to a reasonable, limited regulation like the Act.

This Court has already rejected the notion that every regulation impinging upon the Second Amendment's guarantee must trigger strict scrutiny. *See Chester*, 628 F.3d at 683 (applying intermediate, not strict, scrutiny to ban on firearm possession by domestic violence misdemeanants); *Woollard*, 712 F.3d at 878 (rejecting argument that strict scrutiny should apply to Maryland's handgun permitting requirements as "foreclosed by [Fourth Circuit] precedent," and applying intermediate scrutiny). Instead, the proper level of scrutiny "depends on the nature of the conduct being regulated and the degree to which the challenged

law burdens the right." *See Chester*, 628 F.3d at 682. While a "severe burden on the core Second Amendment right of armed self-defense" could trigger strict scrutiny, "less severe burdens on the right" and "laws that do not implicate the central self-defense concern of the Second Amendment[] may be more easily justified" under intermediate scrutiny. *Id.* (citation and internal quotation marks omitted).[19]

Appellants argue that the Act burdens the "core" of their Second Amendment rights, defined in *Heller* as "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 634–35. Yet, the Act does not implicate the right of self-defense in the home; it places no limitations whatsoever on the ability of individuals to use "the quintessential self-defense weapon," the handgun, for purposes of defending their homes. *Heller*, 554 U.S. at 629. Rather, the Act regulates weapons that are *not* commonly used for lawful

[19] First Amendment jurisprudence supports a similar adjustment of the level of scrutiny, depending on the extent to which the challenged regulation implicates the Second Amendment's core concern. *See Chester*, 628 F.3d at 682 ("In the analogous First Amendment context, the level of scrutiny we apply depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right."); Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 697–98 (2007) ("It simply is not true that every right deemed 'fundamental' triggers strict scrutiny," for "[e]ven among those incorporated rights that do prompt strict scrutiny, such as the freedom of speech and of religion, strict scrutiny is only occasionally applied.").

home defense. Because the Act does not strike squarely at the core of the Second Amendment, intermediate scrutiny—not strict scrutiny—is appropriate.

### B. The Act Is Constitutional Because It Is Substantially Related to the Important Governmental Objective of Protecting Communities from Gun Violence.

To pass muster under intermediate scrutiny, there must be a "reasonable fit" between the challenged regulation and a "substantial" or "important" government objective. *See Chester*, 628 F.3d at 683; *see also United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011) (stating that intermediate scrutiny requires the government to demonstrate that the regulation is "reasonably adapted to a substantial governmental interest"). That standard is easily met here, as the Act furthers the substantial government interest of promoting public safety.

When it enacted the Firearm Safety Act of 2013, the Maryland Legislature considered substantial evidence regarding the lethality of assault weapons and their lack of utility as a common method of self-defense. It heard testimony that "[a]ssault weapons and other firearms with large capacity ammunition feeding devices are commonly used in mass shootings and the greater the ammunition capacity of the firearm used in a mass shooting, the more victims were injured or

killed by gunfire."[20] It received evidence that the drastic increase in the number of assault weapons available since the federal assault weapons ban expired in 2004 presented significant dangers to communities and risks to law enforcement personnel.[21] Furthermore, the Legislature considered evidence that the assault weapons prohibited by the Act are not likely to be useful for the purpose of self-defense in the home, nor are they commonly used for that purpose.[22] Such empirical evidence demonstrates the reasonableness of the "fit" between the Act and Maryland's important interest in protecting its citizens from the violent effects of certain assault weapons and high-capacity magazines.

### C. Other Courts Have Upheld Similar Statutes

Numerous courts have upheld nearly identical prohibitions of assault weapons and high-capacity magazines against Second Amendment challenge. For example, the D.C. Circuit examined the District of Columbia's ban on certain

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[20] *See* Daniel W. Webster, Director of the Johns Hopkins Center for Gun Policy and Research, *Testimony in Support of HB 294–Firearm Safety Act of 2013 Before the Maryland House Judiciary Committee* (2013), http://mgaleg.maryland.gov/2013RS/ag_letters/sb0281.pdf, at 26.

[21] *See* Douglas F. Gansler, Attorney General of Maryland, *Letter Regarding Senate Bill 281, The "Firearm Safety Act of 2013,"* (Apr. 30, 2013), http://mgaleg.maryland.gov/2013RS/ag_letters/sb0281.pdf, at 5 (citing the testimony of Baltimore County Police Chief Jim Johnson).

[22] *See* Webster, *supra* note 20.

semi-automatic rifles and high-capacity magazines. *See Heller v. District of Columbia ("Heller II")*, 670 F.3d 1244, 1249 (D.C. Cir. 2011). The court in *Heller II* determined that the regulation did not burden the "core" right to defend oneself in one's home because the prohibition did nothing to "prevent a person from keeping a suitable and commonly used weapon for protection in the home or for hunting, whether a handgun or a non-automatic long gun." *Id.* at 1262; *see also id.* ("[T]he prohibition of semi-automatic rifles and large-capacity magazines does not effectively disarm individuals or substantially affect their ability to defend themselves.").

Applying intermediate scrutiny, the D.C. Circuit held that the regulation passed muster because the District had demonstrated a "substantial relationship between" the regulation and "the objectives of protecting police officers and controlling crime." *Id.* at 1264. Like the record here, the record in *Heller II* demonstrated that the prohibited assault weapons and LCMs were designed to enable "shoot[ing] multiple human targets very rapidly," posed a "danger to innocent people," were "preferred by criminals," and "place[d] law enforcement officers at particular risk." *Id.* at 1263-64 (citations omitted).

Similarly, in a recent case from Illinois, the court examined a city ordinance prohibiting the possession, sale, or manufacture of certain types of assault weapons

and large-capacity magazines. *Friedman v. City of Highland Park*, No. 1:13-cv-9073, 2014 WL 4684944, at *1 (N.D. Ill. Sept. 18, 2014). The court applied intermediate, rather than strict, scrutiny because the plaintiffs challenging the ordinance had failed to demonstrate a "severe burden on the right to armed self-defense." *Id.* at *9. There, as here, the plaintiffs failed to submit evidence "that a prohibition on the banned weapons and magazines limits, in any meaningful way, Highland Park residents' ability to defend themselves." And, like Appellants here, the plaintiffs in *Friedman* failed to proffer a "single instance of an Assault Weapon used in self-defense." *Id.*; *see also id.* (adding that the ordinance "allows residents … to keep an exceedingly large number of types of weapons," including handguns, and "an unlimited number of magazines, holding 10 rounds or less, for self-defense").

Applying intermediate scrutiny, the *Friedman* court found an adequate means-ends fit. *Id.* It relied on record evidence that the prohibited assault weapons and LCMs had an "offensive," "military heritage that makes them particularly effective for combat situations" and for "quickly acquiring multiple targets and firing at those targets without a frequent need to reload." *Id.* at *9-*10. The court did not believe it necessary to explain why there was a "close fit" between a prohibition on such weaponry and the "objective of providing for the

protection and safety of [Highland Park's] inhabitants." *See id.* at *10. Here, too, the means-ends fit between the Maryland Act and the important interest of public safety is obvious.

Finally, in *New York State Rifle & Pistol Association v. Cuomo*, the court examined a New York law that resembles the Maryland Act in prohibiting (i) assault weapons with certain secondary characteristics and (ii) high-capacity magazines. 990 F. Supp. 2d 349, 357 (W.D.N.Y. 2013). The court reasoned that intermediate scrutiny was proper because, "unlike the [D.C.] handgun ban, the [law at bar] applies only to a subset of firearms with characteristics New York State has determined to be particularly dangerous and unnecessary for self-defense; it does not totally disarm New York's citizens; and it does not meaningfully jeopardize their right to self-defense." *Id.* at 367. The court concluded that the law was substantially related to the state's interest in public safety because the "banned features are unusually dangerous, commonly associated with military combat situations, and are commonly found on weapons used in mass shootings." *Id.* at 368. Notably, the court rejected the argument that New York's failure to outlaw "numerous legal substitutes offering the same firepower" undermined the reasonableness of the fit between the law and its objective:

> [T]o survive intermediate scrutiny, the fit between the governmental objective and the challenged regulation

> need only be substantial, not perfect. And while these are legitimate considerations, it is the legislature's job, not this Court's, to weigh conflicting evidence and make policy judgments. New York, citing the undisputed potential for mass casualty that assault weapons present, is empowered to take action to reduce the quantity of such weapons in its state.

*Id.* at 370 (citations, alterations, internal quotation marks omitted). The court added: "It is well-settled that 'a statute is not invalid under the Constitution because it might have gone farther than it did, that a legislature need not strike at all evils at the same time, and that reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'" *Id.* (quoting *Nat'l Rifle Ass'n*, 700 F.3d at 211 (quoting *Buckley v. Valeo*, 424 U.S. 1, 105 (1976))). As the court did in *Cuomo*, this Court should heed the principle articulated in *Buckley* and decline Appellants' invitation to strike down the Maryland Act on the specious ground that the Act is inadequately burdensome.

The Act, and the purpose it is intended to serve, reflect the considered judgment of the Maryland Legislature; that judgment is due at least some deference.[23]

[23] *See also Shew v. Malloy*, 994 F. Supp. 2d 234, 249 (D. Conn. 2014) (upholding ban on specified assault weapons and LCMs under intermediate scrutiny because they "increase a firearm's 'lethalness'" and because the ban is "substantially related to the important governmental interest in crime control and safety"); *Colorado Outfitters Ass'n v. Hickenlooper*, No. 13-cv-01300, 2014 WL 3058518, at *14-*19 (D. Colo. June 26, 2014) (upholding ban on LCMs with more than fifteen rounds under intermediate scrutiny because (i) although the ban "touches the *core*" of the right to use firearms for home self-defense, it does not severely limit "a person's ability" to use firearms for that purpose, and (ii) the ban is "substantially related" to the state's interest in reducing the "number and magnitude of injuries" caused by the prohibited LCMs); *Fyock v. City of Sunnyvale*, No. 13-cv-5807, 2014 WL 984162, at *6-*8 (N.D. Cal. Mar. 5, 2014) (upholding ban on LCMs under intermediate scrutiny because (i) although "close" to the "core" right of home self-defense, the law created only a "minor burden" on that right given the number of alternatives, and (ii) means-ends fit was adequate); *San Francisco Veteran Police Officers Ass'n v. City & Cnty. of San Francisco*, 18 F. Supp. 3d 997, 1003 (N.D. Cal. 2014) (upholding ban on LCMs under intermediate scrutiny because (i) the ban "merely burdens" but does not "destroy" the right to self-defense, and (ii) means-ends fit was adequate); *cf. Kampfer v. Cuomo*, 993 F. Supp. 2d 188, 195-96 (N.D.N.Y. 2014) (upholding New York regulation that expanded class of prohibited assault weapons, and declining to apply any "heightened scrutiny" because the Act "does not impose a substantial burden on [plaintiff's] exercise of his Second Amendment rights," but rather leaves "ample firearms … available to carry out the '*central component*' of the Second Amendment right: self-defense" (citation omitted)).

## CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,930 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: January 7, 2015

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I certify that on January 7, 2015, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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