

No. 17-127

**In the
Supreme Court of the United States**

Stephen V. Kolbe, *et al.*,
Petitioners,

v.

Lawrence J. Hogan, Jr., Governor, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United
States Court of Appeals for the Fourth Circuit

**BRIEF OF *AMICI CURIAE* LAW ENFORCEMENT
GROUPS AND STATE AND LOCAL FIREARMS
RIGHTS GROUPS IN SUPPORT OF PETITIONERS
(*AMICI* LISTED ON INSIDE COVER)**

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The following law enforcement groups and state and local firearms rights groups are *amici curiae* in this case: Western States Sheriffs' Association, California State Sheriffs' Association, International Law Enforcement Educators and Trainers Association, Law Enforcement Legal Defense Fund, Law Enforcement Action Network, Law Enforcement Alliance of America, International Association of Law Enforcement Firearms Instructors, Association of New Jersey Rifle & Pistol Clubs, Bridgeville Rifle & Pistol Club, California Rifle & Pistol Association, Inc., CRPA Foundation, Connecticut Citizens Defense League, Delaware State Sportsmen's Association, Gun Owners' Action League Massachusetts, Gun Owners of California, Gun Owners of Vermont, Hawaii Rifle Association, Idaho State Rifle & Pistol Association, Illinois State Rifle Association, League of Kentucky Sportsmen, Louisiana Shooting Association, Michigan Rifle & Pistol Association, Missourians for Personal Safety, Missouri Sport Shooting Association, Montana Rifle & Pistol Association, North Carolina Rifle & Pistol Association, Nevada Firearms Coalition, New Mexico Shooting Sports Association, New York State Rifle & Pistol Association, Texas State Rifle Association, Vermont Federation of Sportsmen's Clubs, Vermont State Rifle & Pistol Association, Virginia Shooting Sports Association, and Western Missouri Shooters Alliance.

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INTEREST OF *AMICI CURIAE*¹

The Western States Sheriffs' Association was established in 1993, and consists of more than three hundred members from fifteen member states throughout the Western United States. Its mission is to assist sheriffs and their offices with federal and state legislative issues, address policy and procedural matters, and work together to keep the office of sheriff strong.

The California State Sheriffs' Association is a nonprofit professional organization that represents each of the fifty-eight California sheriffs. It was formed to allow the sharing of information and resources between sheriffs and departmental personnel, in order to improve law enforcement throughout the state.

The International Law Enforcement Educators and Trainers Association is a professional association of 4,000 persons committed to the reduction of law enforcement risk and to saving lives of police officers and the general citizenry through the provision of training enhancements for criminal justice practitioners.

¹No party's counsel authored this brief in whole or in part. No party or party's counsel, and no person other than *amici*, their members, or their counsel contributed money that was intended to fund preparation or submission of this brief. Counsel of record for all parties received timely notice of intent to file this brief under Rule 37.2(a) and consent was granted by all parties.

The Law Enforcement Legal Defense Fund is a non-profit organization headquartered in Alexandria, Virginia, that provides legal assistance to law enforcement officers. It has aided nearly one hundred officers, many of whom have been acquitted, mostly in cases where officers have faced legal action for otherwise authorized and legal activity in the line of duty.

Law Enforcement Action Network is a sister organization of the Law Enforcement Legal Defense Fund. It promotes policies that protect law enforcement officers' personal and professional safety, including weaponry issues.

The Law Enforcement Alliance of America, Inc. is a non-profit, non-partisan advocacy and public education organization founded in 1992 and made up of thousands of law enforcement professionals, crime victims, and concerned citizens. LEAA represents its members' interests by assisting law enforcement professionals and seeking criminal justice reforms that target violent criminals rather than otherwise law-abiding citizens.

The International Association of Law Enforcement Firearms Instructors is a non-profit association formed in 1981 whose 3,000-plus members come from local, state and federal law enforcement agencies nationwide. It conducts 20-25 police firearms training events annually, and publishes authoritative training standards and guidelines.

The following are state and local groups that promote the shooting sports, provide firearms safety

training, enhance marksmanship, educate the public about firearms, and raise awareness about and defend the rights protected by the Second Amendment:

Association of New Jersey Rifle & Pistol Clubs, Bridgeville Rifle & Pistol Club, California Rifle & Pistol Association, Inc., CRPA Foundation, Connecticut Citizens Defense League, Delaware State Sportsmen's Association, Gun Owners' Action League Massachusetts, Gun Owners of California, Gun Owners of Vermont, Hawaii Rifle Association, Idaho State Rifle & Pistol Association, Illinois State Rifle Association, League of Kentucky Sportsmen, Louisiana Shooting Association, Michigan Rifle & Pistol Association, Missourians for Personal Safety, Missouri Sport Shooting Association, Montana Rifle & Pistol Association, Nevada Firearms Coalition, New Mexico Shooting Sports Association, New York State Rifle & Pistol Association, North Carolina Rifle & Pistol Association, Texas State Rifle Association, Vermont Federation of Sportsmen's Clubs, Vermont State Rifle & Pistol Association, Virginia Shooting Sports Association and Western Missouri Shooters Alliance.

INTRODUCTION

As described by the Petition in this case, the decision by the *en banc* Fourth Circuit puts the circuits in at least a three-way state of conflict, and is also deeply in conflict with this Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008). *Amici* will not repeat that analysis, but instead will show how the *en banc* opinion is dependent on a fundamental mischaracterization of the banned firearms. That

opinion equates the banned semiautomatic firearms with machine guns, implies that the ammunition used is exceptionally lethal, and attempts to blame those firearms for mass shootings and killings of law enforcement officers. The truth is that, in their function and power, these firearms are just a subset of ordinary semiautomatic rifles, which have been commonly and legally possessed by law-abiding citizens for more than a century.

SUMMARY OF ARGUMENT

This Court held in *District of Columbia v. Heller* that the kinds of arms protected by the Second Amendment include those that are typically possessed by law-abiding citizens for lawful purposes. The Fourth Circuit's *en banc* opinion substitutes a radically different constitutional test and holds, contrary to *Heller*, that any firearms that are "like M-16s" are unprotected by the Second Amendment. That test has no limit on its generality, and could be extended to virtually all firearms. Any test, such as the Fourth Circuit's, that divests firearms of constitutional protection because of similarity to small arms that have been useful in warfare is also untenable, because the overlap between military and civilian firearms is and always has been enormous.

Not only was an erroneous test applied by the *en banc* Fourth Circuit, the key findings necessary to reach the result that opinion did are demonstrably incorrect. The essential finding that the semiautomatic rifles banned by Maryland are "exceptionally lethal weapons of war" is provably wrong. The difference

between fully automatic firearms (machine guns) and semiautomatic firearms (which shoot only one shot per trigger pull, just like all other commonly possessed firearms) is a major functional difference that has been recognized by this Court and by federal firearms legislation. The semiautomatic rifles banned by Maryland are not the main military rifle of any country on earth; the standard rifles employed by the world's militaries are all machine guns.

The claims that semiautomatic rifles are virtually indistinguishable from machine guns because semiautomatics can allegedly fire up to 500 rounds per minute are false and unsupported by any credible source. The true effective rate, according to the U.S. Army, is about 45 rounds per minute. Furthermore, the popular AR-15 platform semiautomatic firearms banned by Maryland typically use a cartridge firing a .223 caliber bullet. Claims by the *en banc* opinion notwithstanding, there is nothing unusual or especially lethal about that cartridge, which is actually in the lower to intermediate range of power for centerfire rifle cartridges.

Instead, the firearms banned by Maryland are suitable for use by law enforcement agencies and by citizens seeking to defend hearth and home. These rifles are rarely used in crime, and are not used disproportionately in mass shootings, as the Fourth Circuit held. They are also not used disproportionately in killings of law enforcement officers. Those murders are overwhelmingly committed by criminals using handguns.

ARGUMENT

I. THE FOURTH CIRCUIT'S *EN BANC* OPINION APPLIED A CONSTITUTIONAL TEST THAT IS THE REVERSE OF THIS COURT'S HOLDING IN *HELLER*.

Heller straightforwardly held that the kinds of arms protected by the Second Amendment are those typically possessed by law-abiding citizens for lawful purposes. The opinion stated that:

The traditional militia was formed from a pool of men bringing arms “in common use at the time” for lawful purposes like self-defense. “In the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same.” [citations omitted] Indeed, that is precisely the way in which the Second Amendment’s operative clause furthers the purpose announced in its preface. We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.

Heller, 554 U.S. at 624-25. In other words, at the time of adoption of the Second Amendment, there was no distinction between weapons typically possessed by law-abiding citizens for lawful purposes, and military weapons.

The Court of Appeals based its holding on a misinterpretation of *Heller* in which words are

wrenched out of context, and then distorted to mean something entirely different from what this Court stated. In a passage refuting what the Court anticipated to be an objection to its main holding (that the arms protected by the Second Amendment are those typically possessed by law-abiding citizens for lawful purposes) this Court observed:

It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment’s ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty.

The Fourth Circuit concluded that the firearms and magazines banned by Maryland are “like’ M-16 rifles” and contended that “we have no power to extend Second Amendment protection to the weapons of war that the *Heller* decision explicitly excluded....” App.12.

But what kinds of firearms are “like” M-16s? A standard dictionary defines the expression “the like” to mean “others of the same kind.” *Webster’s New World College Dictionary* 831 (4th ed. 2006). The *en banc* opinion did not try to determine if the firearms banned by Maryland are “of the same kind” as M-16s, but instead sought to blur the major distinction between them: that M-16s are machine guns, and the rifles banned by Maryland are semiautomatic, a kind of rifle

that has been commonly possessed by citizens for lawful purposes for well over a century. As will be shown below, that distinction is of fundamental importance.

A test focusing on whether certain firearms are “like” military weapons has no limiting principle. An M-16 fires a projectile from a barrel by the action of an explosive. Does that mean that all civilian arms are without Second Amendment protection because they, too, fire a projectile in that manner? Military rifles all fire metallic cartridges (consisting of case, powder, primer, and bullet). But so do all modern rifles manufactured since shortly after the Civil War to the present that are typically possessed by law-abiding citizens for lawful purposes. Does that make them “like M-16s?” M-16s have a shoulder stock, a sighting mechanism, and a trigger and trigger guard. Are all other firearms with those features “like M-16s?” The “test” applied by the Fourth Circuit does not articulate any definite standard, but is wholly subjective.

Withdrawing Second Amendment protection from a class of firearms simply because such firearms are useful in warfare is also untenable, because the overlap between military small arms and arms typically possessed by civilians for lawful purposes is, and always has been, enormous. JA 2260. At the time of the American Revolution, down to the Civil War, U.S. military forces were armed with muzzle loading muskets or rifles, and those were the kinds of long guns (in addition to shotguns) typically possessed by civilians. Revolvers were developed for both the civilian and military markets in the mid-nineteenth

century, were widely used by both sides in the Civil War, and were the standard sidearm for the Army until 1911. Lever action repeating rifles saw significant use in the Civil War, and lever action rifles were thereafter widely owned by civilians in the United States. Single shot rifles utilizing metallic cartridges were standard U.S. military issue for several decades after the Civil War. Bolt action rifles were the basic military rifle for most countries from the latter part of the nineteenth century through World War II (except for the United States, which used bolt action rifles in World War I and World War II, but which during World War II relied principally on the semiautomatic Garand M1 and the semiautomatic M-1 carbine, neither of which is banned by Maryland). The United States military has used semiautomatic pistols as the standard military sidearm since 1911, and literally scores of millions of handguns that are either identical or functionally identical to those military semiautomatics are lawfully possessed by citizens. See Expert Report of Jim Supica, JA 2250-60, for discussion of the historical development of these firearms.

Does that mean that muzzle loading muskets and rifles, revolvers, lever action rifles, single shot rifles, bolt action rifles, semiautomatic handguns, and semiautomatic rifles—that is, *virtually all modern firearms* and some not so modern—fall outside the scope of the Second Amendment’s protection? That is where the logic of the *en banc* opinion’s analysis—that “weapons of war” can be banned—would lead.

That, of course, is the reverse of the standard applied in *Heller*, that firearms typically possessed by law-abiding citizens for lawful purposes are protected by the Second Amendment. *See also Caetano v. Massachusetts*, ___U.S.___, 136 S. Ct. 1027, 1028 (relying on *Heller* for the proposition that “the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding,” and for rejecting the proposition that “that *only* those weapons useful in warfare are protected.”) (emphasis added).

II. THE SEMIAUTOMATIC RIFLES BANNED BY MARYLAND ARE NOT “WEAPONS OF WAR” AND ARE NOT “EXCEPTIONALLY LETHAL.”

In trying to overcome the fact that the banned firearms are widely possessed and are functionally different from fully automatic firearms, the *en banc* opinion contends that “the State proffered extensive uncontroverted evidence demonstrating that the assault weapons outlawed by the FSA are exceptionally lethal weapons of war.” That statement is incorrect in three ways: 1) the banned rifles are not weapons of war; 2) they are not exceptionally lethal, but are instead are in the low to intermediate range of rifle power; and 3) evidence was proffered by plaintiffs refuting these assertions, but was simply ignored by the *en banc* majority opinion.

A. The difference between fully automatic rifles and semiautomatic rifles is fundamental.

The reason why “assault weapons,” as Maryland defines them, are no more dangerous or lethal than

other ordinary semiautomatic rifles² is that they *are* no different.

As the panel opinion accurately notes:

To fire a semi-automatic rifle, the shooter must pull the trigger each time he wishes to discharge a round of ammunition. In other words, a semi-automatic rifle fires “only one round with a single trigger pull.... To fire a subsequent round, the trigger must be released and pulled again.” J.A. 2254. By contrast, an automatic rifle, like an M-16, will continuously discharge rounds “for as long as the trigger [is depressed or] until the magazine is empty.” *Id.* at 2254-55.

App. 118 n.1; *see also* 26 U.S.C. § 5845(b) (definition of machine gun). The semiautomatics banned by Maryland are not “fully automatic”; that is, they are not machine guns. Instead, like all firearms that are not machine guns—including semiautomatic rifles, semiautomatic pistols, revolvers, semiautomatic shotguns, pump action shotguns, bolt-action rifles, slide action rifles, and lever action rifles—the operator pulls the trigger once, and the gun fires once.

In *Staples v. United States*, 511 U.S. 600, 603 (1994), the Supreme Court recognized the

² In terms of numbers of firearms in circulation, those defined as “assault weapons” by Maryland are overwhelmingly rifles. Only two very rare shotguns are so classified. The handguns so defined are also uncommon, and form only a minute percentage of handguns in use by civilians and law enforcement.

fundamental distinction between machine guns and semiautomatics:

The AR-15 is the civilian version of the military's M-16 rifle, and is, unless modified, a semiautomatic weapon. The M-16, in contrast, is a selective fire rifle that allows the operator, by rotating a selector switch, to choose semiautomatic or automatic fire.³

As the *Staples* court observed, machine guns are heavily regulated and must be registered with the federal government under pain of severe penalties. *Id.* at 602-03.⁴ However, “guns generally can be owned in perfect innocence.” *Id.* at 611. Unlike machine guns and a few other items regulated by the National Firearms Act, AR-15s are among those firearms that “traditionally have been widely accepted as lawful possessions” *Id.* at 612.

³ The M-16 has largely been replaced in the U.S. military by the M4 carbine, a shorter version of the M-16. For a period of time, certain models of the M-16 and M4 carbine could switch between semiautomatic fire and a three round burst mode, and would not continue to fire with one trigger pull until the magazine was empty. However, they were still classified as machine guns. The M4A1 carbine that is now issued to the Army infantry does not have the three round burst feature and is selective fire between semiautomatic and fully automatic.

⁴ Even though machine guns have historically been considered in a different class from semiautomatic rifles, it is not illegal under federal law for citizens to possess them. They simply must be registered. Only a handful of states generally ban machine guns. Maryland allows machine guns, but requires that they be registered. Md. Code Ann., Crim. Law § 4-403(c)(1).

B. The rifles banned by Maryland are in fact not “weapons of war.”

It is an easily provable and irrefutable fact that the rifles banned by Maryland are not “weapons of war.” That is because no known national military force uses semiautomatic only rifles as its main military rifle; all self-loading rifles are either automatic or select-fire (that is, they can be switched between automatic and semiautomatic). EDWARD C. EZELL, *SMALL ARMS OF THE WORLD: A BASIC MANUAL OF SMALL ARMS* 6-843 (12th ed. 1990) (containing descriptions by country); *see also* “Assault and Battle Rifles” at <http://www.military-today.com/firearms.htm> (listing all military assault and battle rifles produced in the world, by country; all have automatic capability as indicated by the “cyclic rate” listing for fully automatic fire). None are solely semiautomatic.⁵ In short, the rifles banned by Maryland are not weapons of war at all.

C. The banned rifles are not “exceptionally lethal.”

The *en banc* opinion claims that the difference between fully automatic and semiautomatic versions of a firearm is “slight.” App. 20. It asserts that “[S]emiautomatic weapons can be fired at rates of 300 to 500 rounds per minute, making them virtually indistinguishable in practical effect from machine

⁵ The referenced webpage contains a short listing of semiautomatic rifles. However, these are all either obsolete or designed for the civilian market. None of them are the current assault rifle or battle rifle for any nation’s military.

guns.” App. 20-21. No one who is knowledgeable about firearms believes this. The only citation in the *en banc* opinion to support this contention is to a Congressional committee report, citing oral testimony to Congress in 1991 by a police union official in support of adopting a federal “assault weapon” ban.⁶ No citation to any source was given by the witness.

The contention in the *en banc* opinion that “the automatic firing of all the ammunition in a large-capacity thirty-round magazine takes about two seconds, whereas a semiautomatic rifle can empty the same magazine in as little as five seconds” is also unsupported and misleading. App. 20

No source is cited for this specific contention, but relying on *Heller v. District of Columbia*, 670 F.3d 1244, 1263 (D.C. Cir. 2011) (“*Heller II*”), Maryland urged in the proceedings below that “[a]utomatic firing of all the ammunition in a 30-round magazine takes 2 seconds, whereas a semiautomatic rifle can empty the same magazine in approximately 5 seconds.”

Where did this claim originate? In the district court proceedings from which the appeal in *Heller II* resulted, the District of Columbia placed no evidence in the record whatsoever. The *Heller II* court derived this finding from a District of Columbia Committee

⁶ Committee on the Judiciary, Report to Accompany H.R. 4926, Report 103-489, 103d Cong., Second Sess. (1994), *citing* Hearing on Semiautomatic Assault Weapons, House of Representatives, Committee on the Judiciary, Subcommittee on Crime and Criminal Justice, June 12, 1991 (Statement of Dewey R. Stokes, National President, Fraternal Order of Police).

Report, which contained the above unsworn assertion by an attorney and lobbyist, Brian J. Siebel, for the anti-Second Amendment Brady Center to Prevent Gun Violence. JA 1150. This statement was not footnoted.

However, the statement can be traced to another Brady Center publication, also authored by Mr. Siebel, called *Assault Weapons: "Mass Produced Mayhem"* (2008). JA 1534. That publication contained the same statement, and offered as its source a 1992 article by a staff attorney for the Legal Action Project at the Center to Prevent Handgun Violence. See Judith Bonderman, *In Search of Justice: Compensation for Victims of Assault Weapon Violence*, 20 Product Safety & Liability Rep. 662 (June 26, 1992). That article in turn cited a gun control advocacy piece by a police chief in San Jose, California. After some unknown model of an UZI was used in a crime, the author claimed that:

we tested it on our police firing range. Fully automatic, the weapon is illegal; it fired a 30 round clip in slightly less than two seconds. On semiautomatic, it fired the same clip in five seconds. These weapons are defined as rifles and purchased legally....

Joseph D. McNamara, *The Need for Gun Control: Developing a Rational, National Firearms Policy*, The Police Chief 26 (Mar. 1988).

So, the centerpiece of the assertion that semiautomatics shoot almost as fast as fully automatics is based on one anecdotal "test" conducted on one gun, with no information about the caliber, the

skill of the person firing semiautomatically, the reliability of the timing procedures, the specific model used for testing, who witnessed and verified this alleged test, or any other particulars to judge the accuracy of the test. Determinations by courts that affect the fundamental constitutional rights of citizens should not be based on uncritical acceptance of fifth hand, unverified, anecdotal reports.

Even if it is possible for a very highly-skilled individual to pull a trigger six times or more in a second, effective fire by the average person could not be delivered at anywhere near that rate. For example, the U.S. military does not consider the rate of fire in semiautomatic mode to be remotely comparable to fully automatic fire by M-16s or M4s. As stated in the U.S. Army training manual *Rifle Marksmanship*, the “Maximum Effective Rate of Fire (rounds per min)” in semiautomatic for the M4 and M16A2 rifles is 45 rounds per minute,⁷ not even close to the claimed 30 rounds in five seconds.

To support its finding that the AR-15 is “exceptionally lethal” the *en banc* opinion cites early reports from South Vietnamese Army tests that high velocity bullets from the selective-fire AR-15 (that is, what became the M-16) caused “[a]mputation of limbs, massive body wounds, and decapitations.” App. 20. That opinion omits the characterization in the cited source that those reports were “almost incredible.”

⁷ DEP’T OF THE ARMY, FM 3-22.9, RIFLE MARKSMANSHIP: M16-/M4-SERIES WEAPONS 2-1 (2008).

There is nothing special or magical about the .223 cartridge typically used in AR-15s. Centerfire rifle cartridges come in wide spectrum of sizes and calibers. The .223 is toward the smaller, less powerful end of the spectrum. The basic measure of a cartridge's power is muzzle energy, which is based on the mass and velocity of the projectile. Though amounts and types of powder, and the weight of the projectile, vary, a .223 (5.56x45 mm) cartridge, which is typically used in an AR-15, generates about 1180-1380 foot-pounds of muzzle energy. The predecessor American military rifle cartridges (.308 Winchester and 30-.06 Springfield) are roughly twice as powerful as the .223 cartridge, generating about 2,200-2,700 and 2700-3,000 foot-pounds of muzzle energy, respectively. JA 2261-62.

Both the .308 and the 30-.06 are popular deer and big game cartridges. In some states, it is illegal to hunt deer with the .223 cartridge typically used in the AR-15, because it is considered too *underpowered* to result in clean, humane kills. *See, e.g.*, 2 Code of Colo. Reg. 406-2:203(A)(1); 4 Va. Admin. Code 15-270-10; Wash. Admin. Code 220-414-020(1)(c).

III. THE FIREARMS BANNED BY MARYLAND ARE SUITABLE FOR HOME DEFENSE AND LAW ENFORCEMENT PURPOSES.

AR-15 platform rifles are preferred by law enforcement for several important reasons, and the reasons many civilians prefer them for home defense are similar. *See generally* JA 2176-83. A training course in the Patrol Rifle (AR-15) for Massachusetts

Municipal Police points out advantages of that rifle in a number of common circumstances. The materials for the course state that:

The [AR-15] rifle is a superior tool. It allows the officer to either stand off from the threat or, if the situation requires, advance to the threat with the confidence that the tool in their hands can deal with almost any perceived threat.

Massachusetts Municipal Police Training Committee, Basic Firearms Instructor Course: Patrol Rifle 3 (2007).

After noting that the AR-15 platform has sufficient power and “a larger magazine capacity than our service pistol or shotgun,” the course manual states that “The longer sight radius makes it potentially a more accurate weapon which lowers the liability to the department.” *Id.* The .223 (5.56 mm) round for which most AR platform rifles are chambered also is adequate but not too powerful for home defense, and additional rounds may sometimes be needed by civilians as well. The longer sight radius and increased accuracy provide the same benefit to civilians as to law enforcement.

AR-15 platform firearms are generally lighter in weight and shorter than traditional wood-stocked hunting rifles or most shotguns. That makes them more maneuverable and easier to handle, for both law enforcement officers and civilian home defense, inside rooms and hallways. JA 2182.

The .223 round for which most AR-15 platform rifles are chambered is on the low to intermediate side of the power range for rifle cartridges. Thus, recoil is less than with more powerful rifle cartridges. JA 2263. If the firearm is equipped with a flash suppressor, temporary blindness in dark conditions will be reduced and safety increased. JA 2264.

Because of the relatively light projectile fired in most AR-15s, there is less risk of overpenetration of walls than with heavier bullets, thus minimizing risk to bystanders. JA 2263. This is an important consideration in law enforcement work, and to citizens acting in defense of their homes where there may be other family members present.

For these reasons, large numbers of law enforcement officers purchase AR-15 platform or AK pattern rifles for their own private ownership at home. According to a large scale survey conducted by the National Shooting Sports Foundation (“NSSF”), 11% of private owners of modern sporting rifles or MSRs (a category that includes AR-15 and AK pattern rifles) had a law enforcement background. NSSF, MODERN SPORTING RIFLE (MSR) COMPREHENSIVE CONSUMER REPORT 12 (2013). Of these, half were active law enforcement officers, and half were retired. *Id.* For respondents with a military or law enforcement background, “home defense” was the second most important reason (8.35 on a scale of 10) for owning an MSR, just slightly lower than “recreational target shooting” (8.86). *Id.* (unpaginated cross-tabulation tables).

Despite the claims that the banned firearms are “extremely lethal weapons of war” with a “capability for lethality – more wounds, more serious, in more victims – far beyond that of other firearms in general, including other semiautomatic guns,” App. 22, the truth is more mundane: the banned firearms are just a subset of ordinary semiautomatic rifles, and are owned and used by many millions of law-abiding citizens and thousands of law enforcement agencies and officers for lawful purposes.

IV. THE BANNED FIREARMS ARE RARELY USED IN CRIME AND ARE NOT USED DISPROPORTIONATELY IN MASS SHOOTINGS.

According to the Federal Bureau of Investigation, the annual average number of homicides committed in the United States during the years 2011 through 2015 was 12,732. Only 285, or 2.2%, were committed with rifles of all types.⁸ Thus, though commonly and legally possessed in the many millions, rifles defined as “assault weapons” by Maryland are probably used to commit fewer than 1% of the homicides in this country. By contrast, far more homicides were committed during this period with “blunt objects” such as clubs and hammers (467, or 3.7%) than with all rifles. *Id.* Twice as many were committed with

⁸ Uniform Crime Reports, Murder Victims by Weapon, 2011-2015, available at https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/expanded_homicide_data_table_8_murder_victims_by_weapon_2011-2015.xls.

“personal weapons” such as hands, fists, and feet (690, or 5.4%), and more than five times as many using “knives or cutting instruments” (1590, or 12.5%) than with all rifles. *Id.*

In Maryland, the percentage of murders with rifles is even fewer. Of 372 Maryland homicides in 2015, only three (.81%) were committed with a rifle of any kind. Sixteen murders were committed with hands, fists, and feet, more than five times the rate for rifles. More than fourteen times as many homicides (44) were committed with cutting instruments than with all rifles in Maryland that year.⁹

Nor are the banned rifles used disproportionately in mass shootings. The *en banc* opinion claims, without citation, that “One study of sixty-two mass shootings between 1982 and 2012, for example, found that the perpetrators were armed with assault rifles in 21% of the massacres and with large-capacity magazines in 50% or more....” App. 24. The opinion fails to mention that this “study” consisted of an ongoing “investigation” by Mother Jones magazine. 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>.

⁹ Uniform Crime Reports, Table 20, Murder by State, Types of Weapons, 2015, available at <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-20>.

Although the Mother Jones “investigation” frequently uses the terms “mass shootings” and “mass public shootings” interchangeably, the distinction is highly important. A recent report by the Congressional Research Service defines “mass shooting” as a “multiple homicide incident in which four or more victims are murdered with firearms—not including the offender(s)—within one event, and in one or more locations in close geographical proximity.” William J. Krouse and Daniel J. Richardson, Congressional Research Service, *Mass Murder with Firearms: Incidents and Victims 1999-2013* 13 (Jul. 30, 2015) (“CRS Report”).

A “mass public shooting,” by contrast, is defined by the CRS Report as “a multiple homicide incident in which four or more victims are murdered with firearms—not including the offender(s)—within one event, and at least some of the murders occurred in a public location or locations in close geographical proximity (e.g., a workplace, school, restaurant, or other public settings), and the murders are not attributable to any other underlying criminal activity or commonplace circumstance....” CRS Report 16. They are quite rare. During the period 1999-2013, mass public shootings constituted a small subset (about 4.4 incidents per year) of the average of approximately 21 mass shootings per year. CRS Report 16.

“Assault weapons,” even though they are possessed in the millions, are infrequently used in mass shootings. The CRS Report states that in only 31 out of 317 mass shootings were firearms that “could” be characterized as “assault weapons” carried or used.

That is 9.7%, or fewer than one in ten mass shootings, even if the report’s apparently broad assumptions about what constitutes an “assault weapon” are accepted.¹⁰ CRS Report 16, 29.

The Mother Jones investigation, performed by an agenda-driven advocacy publication, is nearly useless as valid criminological or social science research. It uses a definition of “assault weapon” that has never been enacted into law by any jurisdiction. It does not disclose the research credentials (apparently none) of the persons conducting it. Furthermore, it related only to mass public shootings, not “mass shootings,” as the *en banc* opinion states. The criteria for inclusion of an event as a mass public shooting were apparently quite subjective and *ad hoc*.¹¹

¹⁰ The report does not define “assault weapon.” However, the authors cast the net widely, including instances where the offenders used firearms “that *could* be characterized as ‘assault weapons’ in that they *carried* rifles or pistols *capable* of accepting detachable magazines that *might have* previously fallen under the 10-year, now-expired federal assault weapons ban....” *Id.* at 16. (emphasis added).

¹¹ “Mass shootings,” including “mass public shootings,” are generally distinguished from “spree” killings, in which a perpetrator kills a number of people over a period of time in various locations. CRS Report 6. Mother Jones admits this (<http://www.motherjones.com/mojo/2012/08/what-is-a-mass-shooting>) but then includes five incidents which it classifies as spree killings. It also excludes an unknown number of shootings involving “armed robbery, gang violence, or domestic violence in a home....” *Id.*

Furthermore, the conclusions are seriously distorted by a neat trick: the Mother Jones investigation claims that out of the 62 incidents, there were “33 cases involving assault weapons *or high-capacity magazines* (or both).” (emphasis added). As shown by the record in this case, there are over 75 million standard magazines with a capacity of over 10 rounds of ammunition in the United States, nearly half of all magazines. JA 1880. The majority of semiautomatic handguns and semiautomatic rifles are sold with standard magazines holding more than 10 rounds of ammunition. JA 2122. By artificially characterizing standard magazines provided by the manufacturer as “high capacity,” it is a certainty that a substantial number of public mass shootings will involve “high capacity” magazines. If one lowered the definition of “high capacity” to more than 7 rounds, or 5 rounds, the number of “high capacity” magazines involved would increase even more.

The number of these 62 carefully cherry-picked shootings that actually involved so-called “assault weapons” was not 33, but only 14.¹² Furthermore, the Mother Jones “investigation” lists all firearms that were “possessed” by the shooter, and does not indicate which ones were actually used (most had multiple firearms). More shooters possessed revolvers (18 incidents), despite their declining popularity, and

¹² Spreadsheet at <http://www.motherjones.com/politics/2013/02/assault-weapons-high-capacity-magazines-mass-shootings-feinstein>.

shotguns (also 18 incidents) than possessed “assault weapons.”

V. THE FIREARMS BANNED BY MARYLAND ARE NOT USED DISPROPORTIONATELY IN SHOOTINGS OF LAW ENFORCEMENT OFFICERS.

Without citing a source, the *en banc* opinion argues that “Another study determined that assault weapons, including long guns and handguns, were used in 16% of the murders of on-duty law enforcement officers in 1994, and that large-capacity magazines were used in 31% to 41% of those murders.” App. 25. Whether data from 1994 is of much relevance, what this highlights is that the vast majority of law enforcement officers who are slain on duty are killed with ordinary handguns. More current data show this to be true.

Nationwide, for the 10 year period 2006-2015, of the 491 law enforcement officers feloniously killed in the line of duty, 454 were slain with a firearm of some type. *See* FBI UCR (2015) (Table 28, Law Enforcement Officers Feloniously Killed, Type of Weapon, 2005–2015). Of those killed with firearms, 330 (73%) were killed with handguns, far more than all rifles (19%), shotguns, and other firearms combined over that ten year period. The rifles which Maryland calls “assault weapons” would constitute only a fraction of the rifles used against law enforcement officers. *See also* *Woollard v. Gallagher*, 712 F.3d 865, 877 (4th Cir. 2013) (quoting evidence offered by Maryland in that

case to show that “handguns have persisted as ‘the largest threat to the lives of Maryland’s law enforcement officers’”).

In the years 1990-2012, well over eight million AR and AK platform rifles were manufactured in the United States or imported from abroad. JA 1877. That is, on average, about 300,000 to 350,000 per year over that 23 year period. Generally speaking, the numbers have been increasing each year, with approximately one million of these rifles manufactured or imported into the U.S. in 2012. *Id.*

So, if “assault weapons” have multiplied by the millions, has the number of law enforcement officers killed by rifles jumped radically over the past decade or so? It has not. For the five year period 2006-2010, the total number of law enforcement officers killed with rifles of any kind was 52. For the five year period 2011-2015, the number was 36. FBI UCR (2015), Table 28 (Law Enforcement Officers Feloniously Killed, Type of Weapon, 2006–2015). Thus, while the number of so-called “assault weapons” was increasing rapidly, the number of law enforcement officers killed by rifles was decreasing. While any law enforcement deaths are deeply regrettable, a ban on a subset of rifles is not an effectual means for protecting officers.

CONCLUSION

The Petition for Certiorari should be granted.

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Respectfully submitted,

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