No. 14–1945

In the United States Court of Appeals for the Fourth Circuit

STEPHEN V. KOLBE, *et al.*,
Plaintiffs-Appellants,

v.

LAWRENCE J. HOGAN, JR., GOVERNOR, *et al.*,
Defendants-Appellees.

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

UNOPPOSED MOTION BY EVERYTOWN FOR GUN SAFETY FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLEES AND REHEARING *EN BANC*

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February 25, 2016

Everytown for Gun Safety seeks leave under Federal Rule of Appellate Procedure 29 to file the attached *amicus curiae* brief. All parties consent to the brief's filing, and no counsel for any party authored it in whole or part. Apart from *amicus curiae*, no person contributed money intended to fund its preparation and submission.

This case presents a constitutional challenge to Maryland's prohibitions on military-style rifles and high-capacity magazines, an issue of exceptional importance. The panel's decision, if upheld, threatens to impede state legislators' ability to adopt laws they deem necessary to protect their constituents from gun violence.

Everytown is the nation's largest gun-violence-prevention organization, with over three million supporters. Everytown has a large number of supporters who live and work in the states that make up the Fourth Circuit, and who believe in common-sense gun laws. The mayors of Baltimore, Maryland; Norfolk, Richmond, and Virginia Beach, Virginia; and Charlotte and Raleigh, North Carolina are all members of Everytown's Mayors Against Illegal Guns coalition. Everytown has drawn on its research on historical firearms laws to file briefs in several recent Second Amendment cases. *See, e.g.*, *Wrenn v. District of Columbia*, No. 15–7057 (D.C. Cir.); *Peruta v. San Diego*, No. 10–56971 (9th Cir.); *Silvester v. Harris*, No. 14–16840 (9th Cir.). As in those cases, Everytown seeks to assist this Court by providing relevant, previously overlooked history. Everytown's brief also explains why Maryland's law does not burden the Second Amendment right—an issue largely unaddressed by both the panel majority and by Maryland's petition for rehearing *en banc*.

Dated: February 25, 2016

Respectfully submitted,

/s/ Deepak Gupta

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CERTIFICATE OF SERVICE

I certify that on February 25, 2016, the foregoing motion was served on all parties or their counsel of record through the CM/ECF system.

/s/ Deepak Gupta
Deepak Gupta

February 25, 2016

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

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 14-1945 Caption: Kolbe, et al. v. Hogan, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Everytown for Gun Safety
(name of party/amicus)

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

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

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent 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/ Deepak Gupta Date: February 25, 2016

Counsel for: Everytown for Gun Safety

CERTIFICATE OF SERVICE

****

I certify that on February 25, 2016 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/ Deepak Gupta
(signature)

February 25, 2016
(date)

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

> "This is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights. . . . If ever there was an occasion for restraint, this would seem to be it." – *United States v. Masciandaro*, 638 F.3d 458, 475–76 (4th Cir. 2011) (Wilkinson, J.).

Where Judge Wilkinson counseled restraint, the panel took the opposite path: By a bare majority, it produced an extreme, unprecedented opinion that gravely imperils legislators' ability to adopt laws they deem necessary to protect their constituents. As the nation's largest gun-violence-prevention organization, amicus Everytown for Gun Safety urges this Court to grant rehearing *en banc* and correct the panel's serious errors.

The panel's embrace of strict scrutiny—in conflict with the law of every other circuit—alone makes this case worthy of *en banc* review. Worse, the panel reached that outlier result even though the plaintiffs failed to show that the Constitution confers *any* right to possess military-style assault weapons and high-capacity magazines like those that Maryland's elected representatives have regulated. The panel opinion fashions a dangerous and illogical rule under which these weapons are effectively immune from regulation because they are deemed in "common use"—a rule that cannot be reconciled with either *District of Columbia v. Heller* or the circuits that have addressed the issue. And worse still, despite its obligation to consider history at the threshold, the panel overlooked a century's worth of semiautomatic-weapon regulations that even the National Rifle Association endorsed.

ARGUMENT

1. The panel's insistence on strict scrutiny—in square conflict with every other circuit to address a firearms law—flows from two fundamental flaws in the panel's analysis of the Second Amendment's scope.

a. ***Common Use.*** The panel erred first by embracing an illogical theory of "common use" that cannot be reconciled with *Heller* or the uniform precedent of the circuits. The Second Amendment does not guarantee "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. 570, 626 (2008). In particular, it does not protect the highly dangerous "weapons that are most useful in military service—M–16 rifles and the like—[which] may be banned." *Id.* at 627. Yet the panel somehow held it "beyond dispute" that the Constitution guarantees access to weapons that are, in the judgment of Maryland legislators as well as Congress, "virtually indistinguishable in practical effect" from those *Heller* found unprotected by the Second Amendment. Op. 21; H.R. Rep. 103-489 at 18 (1994). It based this erroneous conclusion on the idea that the assault weapons that Maryland restricts are "commonly possessed by law-abiding citizens for self-defense and other lawful purposes," whereas the M–16 is not commonly used because the federal government effectively prohibited it in 1986. Op. 38.

But "relying on how common a weapon is at the time of litigation [is] circular." Op. 72 (King, J. dissenting) (quoting *Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015)). As Judge Easterbrook pointed out in upholding a similar law, "it

would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn't commonly owned. A law's existence can't be the source of its own constitutional validity." *Id.* If the panel's decision were allowed to stand, it would not only open up a stark conflict with the Seventh Circuit but would establish this absurdity as the law of this Circuit.

What's more, the panel's