No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Maryland has banned arms that are in common use for self-defense, including the most popular semiautomatic rifles and detachable ammunition magazines exceeding ten rounds. The United States Court of Appeals for the Fourth Circuit upheld the ban, claiming to discern in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the command to exclude these arms from Second Amendment protection by applying a test without any limiting standards: whether the banned arms are "'like' 'M-16 rifles' – 'weapons that are most useful in military service.'" App.12.

"This Court has held that: 'the Second Amendment extends, prima facie, to all instruments that constitute bearable arms,'" *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1027 (2016) (per curiam) (quoting *Heller*, 554 U.S. at 582); the Second Amendment protects arms "in common use," arms that are "typically possessed by law-abiding citizens for lawful purposes," *Heller*, 554 U.S at 624-25; and a ban is "off the table" because the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635-36.

The question presented is whether *Heller* excludes the most popular semiautomatic rifles and magazines from Second Amendment protection and whether they may be banned even though they are typically possessed for lawful purposes, including self-defense in the home.

PARTIES TO THE PROCEEDINGS

Petitioners Stephen V. Kolbe; Andrew C. Turner; Wink's Sporting Goods, Inc.; Atlantic Guns, Inc.; Associated Gun Clubs of Baltimore, Inc.; Maryland Shall Issue, Inc.; Maryland State Rifle and Pistol Association, Inc.; National Shooting Sports Foundation, Inc.; and Maryland Licensed Firearms Dealers Association, Inc. were plaintiffs-appellants below.

Respondents Governor Lawrence J. Hogan, Jr.; Attorney General Brian E. Frosh; Superintendent of the Maryland State Police William Pallozzi; and Maryland State Police were defendants-appellees below. Under Federal Rule of Appellate Procedure 43(b)(2), Governor Hogan was substituted for the previous Governor, Martin O'Malley; Attorney General Frosh was substituted for the previous Attorney General, Douglas Gansler; and Superintendent Pallozzi was substituted for the previous Superintendent, Marcus Brown.

CORPORATE DISCLOSURE STATEMENT

Wink's Sporting Goods, Inc.; Atlantic Guns, Inc.; Associated Gun Clubs of Baltimore, Inc.; Maryland Shall Issue, Inc.; Maryland State Rifle and Pistol Association, Inc.; National Shooting Sports Foundation, Inc.; and Maryland Licensed Firearms Dealers Association, Inc. are not publicly held entities. None of these entities has a parent corporation, and no publicly held company owns 10% or more of any of these entities' stock.

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The district court's opinion is reported at 42 F. Supp. 3d 768 (D. Md. 2014). App.195-260. The Fourth Circuit's panel opinion is reported at 813 F.3d 160 (4th Cir. 2016). App.110-194. The Fourth Circuit's order granting rehearing en banc is reported at 636 Fed. App'x 880 (4th Cir. 2016). App.261-264. The Fourth Circuit's en banc opinion is reported at 849 F.3d 114 (4th Cir. 2017). App.1-109.

JURISDICTION

The Fourth Circuit issued its en banc judgment on February 21, 2017. Chief Justice Roberts granted an extension of time to file this Petition to and including July 21, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "All persons born or naturalized in the United States, and subject

to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Sections 4-301, 4-302, 4-303, and 4-305 of the Criminal Law Article and Section 5-101 of the Public Safety Article of the Maryland Code are reprinted at App.265-280.

INTRODUCTION

Maryland has banned the most popular semi-automatic rifles and magazines – arms that are indisputably in common use for self-defense – from the homes of its law-abiding citizens. According to the Fourth Circuit, it was "compelled by *Heller* to recognize that those weapons and magazines are not constitutionally protected," App.49, and, therefore, to hold that these common, popular firearms fall outside the Second Amendment and can be banned from the home because they are "'like' 'M-16 rifles' and 'most useful in military service.'" App.61. The Fourth Circuit's decision misinterprets and conflicts with *Heller* and its progeny, as well as with the decisions of other Courts of Appeals, on a central question addressed in *Heller*: What arms are protected by the core right of the

Second Amendment – the right of law-abiding citizens to keep arms in common use for self-defense in the home.

Heller struck down a prohibition on the firearms most commonly chosen for self-defense – handguns – even though handguns are arguably more "dangerous" than other firearms, and even though firearms other than handguns remained available for use in self-defense. This Court recognized and protected the principle at the heart of the interests enshrined by the Second Amendment: The individual – and not the government – retains the right to choose from among common arms those that they believe will best protect their person, family, and home. *Id*. at 629 ("Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.").

In *Heller*, this Court established the straightforward "in common use" test for addressing a ban on arms. Simply put, the government cannot prohibit arms that are "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 625, 627. Despite this Court's clear mandate that the government cannot prohibit law-abiding citizens from possessing arms in common use for self-defense in their homes, Courts of Appeals have misunderstood *Heller*. Their disparate opinions have created a clear conflict with this Court's decisions and among themselves, spawning multiple, inconsistent "tests" to determine the constitutionality of such bans. *Compare Friedman v. City of Highland Park*, 784 F.3d 406, 410

(7th Cir. 2015), *with New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 254-55 (2d Cir. 2015).

Now, the Fourth Circuit has held that the Second Amendment does not even apply to the same popular semiautomatic rifles and magazines involved in these prior cases and possessed by millions of law-abiding citizens for lawful purposes. The Fourth Circuit ignored *Heller*'s in-depth examination of the Second Amendment's text, history, and tradition as well as this Court's Second Amendment precedent, and rejected this Court's "in common use" test, focusing instead on one part of one sentence in *Heller* to truncate the core right recognized there. The Fourth Circuit misunderstood *Heller* in concluding both that the "in common use" test does not apply to these popular arms and that the Second Amendment does not extend to arms in common use if believed by a court to be "like M-16s."

The Fourth Circuit's "like M-16s" test cannot be reconciled with *Heller* and its progeny, or with the decisions of other Courts of Appeals, and is a giant leap down a slippery slope headed toward denying all semiautomatic firearms and magazines Second Amendment protection. The Fourth Circuit declined to provide any direction to lower courts as to how to apply its novel test, but a literal application of it would result in the handguns at issue in *Heller*, along with their standard capacity magazines, being unprotected because they are common military sidearms. The Fourth Circuit's application of its test demonstrates this. It defies common sense that ammunition

magazines – of any capacity, let alone those sold as standard equipment with most civilian pistols – are "like M-16s," yet that is the Fourth Circuit's opinion. The only thing that is certain about the Fourth Circuit's test is that its application will be utterly unpredictable, threatening to undermine this Court's holdings.

This case is most similar to *Caetano*, where this Court summarily reversed a state appellate court's fundamental misunderstanding of the *Heller* test for protected arms, 136 S. Ct. at 1027-28, the only instance in which this Court has reviewed a Second Amendment case post-*McDonald v. City of Chicago*, 561 U.S. 742 (2010). Review by this Court is necessary to protect the core individual right of self-defense recognized by this Court in *Heller*, and affirmed in *McDonald* and *Caetano*, against specially unfavorable treatment that will inevitably lead to the evisceration of the right.

STATEMENT OF THE CASE

I. The Parties

Petitioner Stephen Kolbe is a law-abiding citizen, small business owner, husband, and the father of two young children in Baltimore County (Towson), Maryland. App.122. He seeks effective and safe firearms and magazines of his choice to protect himself and his family in their home. App.122. Petitioner Kolbe wishes to purchase one of the popular but now-banned semiautomatic rifles as well as standard capacity

magazines, but fears a credible threat of criminal prosecution. App.122.

Petitioner Andrew Turner is a law-abiding citizen and retired Master-At-Arms of the United States Navy who resides in Prince George's County (Hyattsville), Maryland. App.122. He suffers from partial paralysis of his dominant hand, which was caused by an injury to his right arm he received while on active duty in the Navy. App.122. He requires common semiautomatic firearms and standard capacity magazines exceeding ten rounds to ensure his ability to defend himself in his home. App.122-123.

Petitioner Atlantic Guns, Inc., is a family-owned firearms store founded in 1950 by the current owner's father, with two locations in Montgomery County, Maryland. App.123. Petitioner Wink's Sporting Goods is a family-owned outdoor sporting goods store with its principal place of business in the small community of Princess Anne, on Maryland's Eastern Shore. App.123. Atlantic Guns and Wink's are licensed firearms dealers that buy, sell, receive, and transfer firearms and magazines. App.123. Prior to the implementation of the ban, Atlantic Guns and Wink's sold popular semiautomatic rifles and standard capacity magazines now banned by Maryland. App.123. These businesses have been severely impacted by the ban because they cannot provide customers the arms the customers want. Their customers have been denied their right to choose popular semiautomatic rifles and standard capacity magazines for lawful purposes, including self-defense in the home. App.123.

Petitioner National Shooting Sports Foundation, Inc., is an industry trade association representing the interests of its members, including manufacturers, distributors, and retailers in Maryland and elsewhere who wish to engage in lawful commerce of the banned firearms and magazines in Maryland. Petitioner Maryland Licensed Firearms Dealers Association, Inc., is an industry trade association of licensed firearms dealers in Maryland. Like Petitioners Atlantic Guns and Wink's, the members of these associations have been adversely impacted by Maryland's ban. Petitioners Associated Gun Clubs of Baltimore, Inc.; Maryland Shall Issue, Inc.; and Maryland State Rifle and Pistol Association, Inc. are associations representing the interests of law-abiding, responsible Maryland citizens like Petitioners Kolbe and Turner who want to possess for self-defense and other lawful purposes the popular semiautomatic rifles and standard capacity magazines now banned by Maryland. App.123.

Respondents are the individuals responsible for implementing and enforcing the challenged Maryland bans, sued in their official capacities, as well as the Maryland law enforcement agency responsible for enforcing the bans. App.18.

II. Arms Banned by Maryland

Maryland bans almost all semiautomatic rifles as a class, which it calls "assault weapons," Md. Code Ann. Crim. L. § 4-301(d), a term that it defines to include

"assault long guns" and "copycat weapons." *Id.* § 4-301(d). Maryland also bans detachable magazines with capacities exceeding ten rounds. *Id.* § 4-305.

The firearms and magazines banned by Maryland are in common use, arms that are typically possessed by law-abiding citizens for lawful purposes. Two popular models of these semiautomatic rifles – the AR-15 and AK-47 – accounted for approximately twenty percent of firearm sales in 2012, and sales of these two models were more than double sales of the Ford F-150 truck, the best-selling vehicle in the United States. App.86 (Traxler, J., dissenting). There are at least eight million AR-15 and AK-47 style firearms in the United States as of 2012. App.86 (Traxler, J., dissenting). Law-abiding citizens may possess them "in at least 44 states." App.87 (Traxler, J., dissenting). Law-abiding citizens choose the banned firearms for many reasons, including because these firearms are equipped with features (such as telescoping stocks, pistol grips, and barrel shrouds) that promote accuracy, safe handling, and adaptability and that enhance the ability of citizens to defend themselves. App.98-99 (Traxler, J., dissenting).

Magazines with a standard capacity between ten and twenty rounds of ammunition have been sold in the civilian market for over a hundred years. App.29. There are over seventy-five million standard magazines with a capacity of over ten rounds in the United States as of 2012. App.29. These magazines have proved so popular that they are the standard capacity

magazines provided with the majority of semiautomatic handguns and rifles sold today. App.29.

One of the primary reasons cited by purchasers for owning the banned firearms is for self-defense. App.30. This is in accord with a 1989 report published by the Bureau of Alcohol, Tobacco, and Firearms that described semiautomatic rifles, including those banned by Maryland, as suitable for self-defense. App.89 (Traxler, J., dissenting). Even Respondents' expert witness, Dr. Daniel Webster (Director of the Johns Hopkins Center for Gun Policy and Research), the only expert to testify before the Maryland legislature in support of the ban, admitted that he assumed the banned firearms are used for self-defense. App.89 (Traxler, J., dissenting). Similarly, law-abiding citizens choose the banned magazines for self-defense because their "ability to reload a firearm quickly during a home invasion" is compromised by stress, fear, and many other factors. App.106 (Traxler, J., dissenting).

Judge Traxler's dissent succinctly outlined the record evidence demonstrating why citizens might choose the banned firearms and magazines over handguns for self-defense:

> The record contains evidence, which on summary judgment was to be viewed in the light most favorable to the plaintiffs, suggesting that "handguns are inherently less accurate than long guns" as they "are more difficult to steady" and "absorb less of the recoil[,] . . . [thus] reducing accuracy." This can be an important consideration for a typical

> homeowner, who "under the extreme duress of an armed and advancing attacker is likely to fire at, but miss, his or her target." "Nervousness and anxiety, lighting conditions, the presence of physical obstacles . . . , and the mechanics of retreat are all factors which contribute to [the] likelihood" that the homeowner will shoot at but miss a home invader. These factors could also affect an individual's ability to reload a firearm quickly during a home invasion. Similarly, a citizen's ability to defend himself and his home is enhanced with [a large capacity magazine].

App.106 (Traxler, J., dissenting) (record citations omitted).

III. Proceedings Below

The district court granted Respondents' Motion for Summary Judgment and denied Petitioners' Cross-Motion for Summary Judgment. App.197. The court found that Maryland bans "a class of weapons that the plaintiffs desire to use for self-defense in the home," App.232 (emphasis omitted). The court assumed those banned arms were protected by the Second Amendment, but nevertheless applied intermediate scrutiny because Maryland permits the acquisition of other firearms for self-defense and upheld the challenged bans because it believed prohibiting these protected arms reasonably fit Maryland's interest in public safety. App.231. Jurisdiction in the district court was proper under 28 U.S.C. §§ 1331 and 1343(3). Relief

was sought under 28 U.S.C. §§ 2201 and 2202 and 42 U.S.C. §§ 1983 and 1988.

A divided panel of the Fourth Circuit reversed because "[t]he statute prohibits all forms of possession of any weapon listed . . . – a law-abiding citizen cannot keep any of these weapons in the home for any reason, including the defense of self and family." App.127. The panel held that the "conduct being regulated . . . includes an individual's possession of a firearm in the home for self-defense," and the panel held that such possession is protected under the Second Amendment because *Heller* already had conducted the necessary text, history, and tradition analysis of the right to possess a firearm in the home for self-defense. App.127.

The panel next applied this Court's "in common use" test and had "little difficulty" in holding that the prohibited firearms and magazines are "in common use," App.130, relying upon the evidence produced by Petitioners in this case, as well as the decisions of other Courts of Appeals on these issues. App.130-131. The panel further found that self-defense in the home is among the lawful purposes for which law-abiding citizens typically possess the banned semiautomatic rifles and standard capacity magazines. App.131.

The panel then selected strict scrutiny as the appropriate standard of review because Maryland "imposes a complete ban on the possession by law-abiding citizens of AR-15 style rifles – the most popular class of centerfire semiautomatic rifles in the United

States," App.144, and that ban reaches into the home "where the protection afforded by the Second Amendment is at its greatest." App.101. It held that "the challenged provisions of [Maryland law] substantially burden" the fundamental right of possessing a firearm in the home for self-defense because the prohibitions "reach[] every instance where an AR-15 platform semi-automatic rifle or [banned magazine] might be preferable to handguns or bolt-action rifles." App.144. The panel rejected the district court's conclusion that the availability of other firearms mitigated the burden associated with the bans, because this Court had already found that argument to be without merit in *Heller*, where the government had offered to allow possession of operable long guns in lieu of handguns. App.145. The panel then remanded the case for the district court to determine whether Respondents could meet their burden under strict scrutiny. App.153.

On rehearing en banc, a divided Fourth Circuit affirmed the district court. The majority declined to follow the "in common use" test "because *Heller* also presents us with a dispositive and relatively easy inquiry: Are the banned assault weapons and large-capacity magazines 'like' 'M-16 rifles,' i.e., 'weapons that are most useful in military service,' and thus outside the ambit of the Second Amendment?" App.45-46. The majority read *Heller* to draw a bright line between "weapons that are most useful in military service and those that are not." App.47-48. The majority concluded: "Because the banned assault weapons

and large-capacity magazines are 'like' 'M-16 rifles' – 'weapons that are most useful in military service' – they are among those arms that the Second Amendment does not shield." App.44.

The majority also concluded, in the alternative, that it would apply intermediate scrutiny even if the banned firearms and magazines were protected by the Second Amendment because the availability of other firearms for self-defense mitigates any burden on Petitioner's Second Amendment rights. App.56. Applying intermediate scrutiny, the majority upheld the ban as a reasonable fit with Maryland's asserted interest in public safety by "reducing the availability of such weapons and magazines overall." App.55.

Judge Traxler (joined by Judges Niemeyer, Shedd, and Agee) dissented because under *Heller*'s "in common use" test there should be no dispute that the banned firearms and magazines are protected by the Second Amendment, as had been found or assumed by every court to have considered similar bans. App.83-84 (Traxler, J., dissenting). The dissent criticized the majority for rejecting the "in common use" test because the majority disliked the outcome of that test's application. App.90 n.3 (Traxler, J., dissenting).

The dissent observed that the novel "like M-16s" test adopted by the majority was inconsistent with both *Heller* and *Caetano*, and "[u]nder this approach, it is irrelevant that a firearm may have been commonly possessed and widely accepted as a legitimate firearm for law-abiding citizens for hundreds of years; such a

weapon could be removed from the scope of the Second Amendment so long as any court says it is 'like' an M-16 or, even easier, just calls it a 'weapon of war.'" App.92 (Traxler, J., dissenting). The dissent concluded that the majority's "'most useful in military service' rubric would remove nearly *all* firearms from Second Amendment protection as nearly all firearms can be useful in military service." App.94 (Traxler, J., dissenting) (emphasis in original).

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit's "like M-16s" test is an outlier permitting infringement of the core Second Amendment right.

In deciding "that the Second Amendment does not even *apply* to modern semiautomatic rifles or magazines holding more than ten rounds[,] the [Fourth Circuit] stands alone from all other courts to have considered this issue." App.83-84 (Traxler, J. dissenting) (emphasis in original). "Millions of Americans keep semiautomatic rifles and use them for lawful, non-criminal activities, including as a means to defend their homes." App.89 (Traxler, J., dissenting). The Fourth Circuit nevertheless held "that the Government can take semiautomatic rifles away from law-abiding American citizens," and "can tell you that you cannot use them to defend yourself and your family in your home." App.82 (Traxler, J., dissenting). "In concluding the Second Amendment does not even apply, the majority has gone to greater lengths than any

other court to eviscerate the constitutionally guaranteed right to keep and bear arms." App.82-83 (Traxler, J., dissenting). The risk of permanent harm to the core right is both obvious and immediate.

Heller recounted the history and scope of the Second Amendment in painstaking detail, and held, on the basis of this analysis, that the Second Amendment guarantees an individual right to keep arms for lawful purposes, especially the core right of self-defense in the home. *Heller*, 554 U.S. at 635. *Heller* defined the scope of the Second Amendment's coverage of specific arms: "[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding," *id.* at 582; the only exception being arms not "in common use," arms that are not "typically possessed by law-abiding citizens." *Id.* at 625, 627 (applying the "in common use" test derived from *United States v. Miller*, 307 U.S. 174 (1939)); *accord McDonald*, 561 U.S. at 791; *Caetano*, 136 S. Ct. at 1027-28.

In *Caetano*, this Court summarily vacated and remanded the decision of the Supreme Judicial Court of Massachusetts upholding a ban on stun guns, which that court had held to be outside the protections of the Second Amendment. 136 S. Ct. at 1027-28. This Court confirmed that "*Heller* rejected the proposition 'that *only* those weapons useful in warfare are protected.'" *Id.* at 1028 (*quoting Heller*, 554 U.S. at 624-25) (emphasis added). Usefulness in warfare, while neither a necessary nor sufficient including factor after *Heller*, nevertheless remains a factor in determining what

arms are included in the Second Amendment's protections. The Fourth Circuit erred in holding that "usefulness in warfare" is a sufficient excluding factor under *Heller*.

Because the Fourth Circuit en banc majority misunderstood *Heller* and *Caetano*, it found the questions attendant to the "in common use" test set forth in *Heller* too difficult, echoing the criticism articulated by Justice Breyer's dissent. App.45-46. Rejecting this Court's "in common use" test, the Fourth Circuit seized upon this Court's reference in *Heller* to weapons " 'like' 'M-16 rifles' i.e., 'weapons that are most useful in military service.' " App.46. That language from *Heller*, however, referred back to the discussion of fully automatic machineguns like the M-16 mentioned just four paragraphs previously, *see Heller*, 554 U.S. at 624-25, not to semiautomatic civilian rifles like the popular AR-15 that *Heller* did not discuss.

Put more succinctly, semiautomatic rifles are not "like" fully automatic rifles. This seems especially likely because this Court previously had held that AR-15s are not "like" M-16s because, unlike the fully automatic M-16, semiautomatic rifles such as the AR-15 had been understood to be lawful civilian firearms. *Staples v. United States*, 511 U.S. 600, 612 (1994). The limitation of AR-15 rifles to semiautomatic fire is the critical distinction that makes them the "civilian version of the military's M-16." *Id.* at 603. In placing the full weight of its opinion on a misreading of this aside in *Heller* – weight that language was never intended to bear – the Fourth Circuit has

injected a new layer of ambiguity into the lower courts' Second Amendment jurisprudence, creating even more unresolved questions regarding the scope of the core right.

Moreover, applying the Fourth Circuit's test to the facts of *Heller* and *Miller* would produce results opposite those reached by this Court. The rationale of *Miller*, as construed in *Heller*, was that the sawed-off shotguns at issue were outside the Second Amendment because they were not typically possessed for lawful purposes and, therefore, not part of ordinary military equipment that would be brought by law-abiding citizens to a militia muster. Yet, the Fourth Circuit's test, which focuses on military use, but as an excluding factor, may have found sawed-off shotguns protected precisely because they are not "useful in military service." Conversely, *Heller*'s handguns and their standard capacity magazines would lose protection because they are used as military sidearms. There is something fundamentally wrong with the Fourth Circuit's "like M-16s" test if it produces outcomes contrary to this Court's holdings. That the military might find a commonly owned firearm potentially useful cannot exclude that otherwise protected firearm from the Second Amendment; if so, the government could simply purchase the Second Amendment out of existence.

Rather than providing a "dispositive and relatively easy inquiry," as the Fourth Circuit hoped, App.46, this test will prove to be anything but easy. Nowhere did the en banc majority set forth any standards to be considered when applying this novel test. It failed to

identify any factors for courts to use in determining if a firearm is "like" an M-16 rifle. The Fourth Circuit's test does not even consider *Staples*' bright line inquiry: whether a firearm is semiautomatic or fully automatic. There are no limits to what a court could determine to be unprotected under the "'like' 'M-16 rifles' – 'weapons that are most useful in military service'" test.

Is the iconic Colt Army Model 1860 revolver unprotected by the Second Amendment because it was used by United States Army cavalry during the Civil War? What about the more modern Colt 1911 pistol – the standard sidearm of the United States armed forces from World War I until the mid-1980s? Are Beretta M9 pistols that replaced the Colt 1911 as standard issue military sidearms unprotected? Are bolt-action rifles used for big game hunting unprotected because they are used by military snipers worldwide? The language the Fourth Circuit chose to fashion into a test was never intended for this purpose and fails to deliver "dispositive and relatively easy" answers. App.46.

The Fourth Circuit's analysis of the ban at issue consisted only of its statement that "the banned assault weapons are designed to kill or disable the enemy on the battlefield," App.48 (internal quotations omitted), and a list of various features found on some firearms that it believes are related to combat functionality based solely on a nearly 25-year-old committee report from the debate on the now-repealed federal "assault weapons" ban. App.54. Because Petitioners' evidence refuted that report by demonstrating that

those same features are beneficial to self-defense, enhance safety, and are not necessarily combat-related, and because the Maryland legislature never made any findings that the banned firearms and magazines are most useful in warfare, it is unclear what facts are relevant to the application of the Fourth Circuit's test other than a court's personal opinion. *See* App.98-99 (Traxler, J., dissenting). The Fourth Circuit favored Respondents' speculative, anecdotal, and unscientific expert testimony, which was never considered by the Maryland legislature and materially disputed by Petitioners' evidence, because doing so yielded the desired result. *See* App.90 n.3 (Traxler, J., dissenting); *see also Duncan v. Becerra*, ___ F. Supp. 3d ___, No. 3:17-cv-1017-BEN, 2017 WL 2813727, at *10-*19 (S.D. Cal. June 29, 2017) (rejecting as inadequate California's evidence, largely identical to Respondents' disputed evidence here, to support a similar state-wide magazine ban).

At no point in its analysis did the Fourth Circuit actually consider what arms the military uses – the obvious standard by which it could have given its test at least some structure. The Fourth Circuit's failure to address this question is not surprising, given the lack of evidence that any of the banned semiautomatic firearms are actually used by any military force, contrasting with evidence that firearms actually used by the United States Army in wartime combat, such as the M1 Garand rifle, are expressly permitted in Maryland. *See* App.100 n.8 (Traxler, J., dissenting).

The Fourth Circuit's novel test collapses into the question of whether a judge believes the military could use a firearm – even in the absence of any evidence that any military actually uses the firearm – because it has features the military might want. If so, that firearm is unprotected by the Second Amendment. This is nothing more than a freestanding test that subjects Second Amendment rights to the preferences of particular judges, unbound by any limiting standards.

The Fourth Circuit's application of its test to the banned magazines illustrates this point by readily excluding all magazines with a capacity exceeding ten rounds from the Second Amendment as "like M-16s." This underscores both the test's subjectivity and its propensity to exclude otherwise protected arms from the Second Amendment. App.100. (Traxler, J., dissenting) Why are magazines with a capacity of ten rounds not most useful in military service as a matter of law, but those with eleven are? If magazines of at least some capacity are protected by the Second Amendment (as even the Fourth Circuit implicitly concedes), then what are the limiting principles for determining the number of rounds protected by the Second Amendment versus the number excluded because of purported military utility? In contrast, the "in common use" test is easy to apply in this context. As the D.C. Circuit found, "[t]here may well be some capacity above which magazines are not in common use but . . . that capacity surely is not ten." *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) ("*Heller II*").

The Fourth Circuit's test is directly contrary to this Court's opinions in *Miller* and *Heller* and is a "judge-empowering 'interest-balancing inquiry.'" *Heller*, 554 U.S. at 634. Just like the lower court's decision in *Caetano*, the Fourth Circuit's decision has created a conflict as to the scope of the Second Amendment itself, and, like *Caetano*, this decision cannot stand.

II. This Court's review is necessary to protect the core right of self-defense from evisceration.

By excluding from the Second Amendment the most popular semiautomatic rifles and magazines sold in America, the Fourth Circuit's decision elevated the legislative majority's preferences above the individual right to choose how to defend oneself in one's home. This Court cannot ignore such a direct assault on a fundamental right. "The idea of the Constitution was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. This is why fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605-06 (2015) (internal quotation marks and citations omitted). "This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity." *Id.* at 2605. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or

(yes) even future judges think that scope too broad." *Heller*, 554 U.S. at 634-35.

While *Heller* did not "clarify the entire field" of Second Amendment jurisprudence, 554 U.S. at 635, it confirmed that the Second Amendment protects at least an individual right to self-defense, set out a straightforward test for determining what arms are protected by that core right, and held that a ban of those arms was unconstitutional. In *McDonald*, this Court affirmed that the rights protected by the Second Amendment are fundamental and incorporated them into the Fourteenth Amendment, prohibiting infringement by the states. 561 U.S. at 767-68.

The lower courts have failed to achieve coherence in their Second Amendment jurisprudence and have diverged from this Court's teachings regarding fundamental rights. Only one consistent theme has emerged from the decisions issued by the various lower courts that have considered Second Amendment challenges: deference to the will of legislative majorities – even when the analysis required to uphold challenged laws singles out this right for specially unfavorable treatment and squarely conflicts with this Court's decisions. *See*, *e.g.*, *Massachusetts v. Caetano*, 470 Mass. 774 (2015), *rev'd Caetano*, 136 S. Ct. 1027.

The Fourth Circuit in particular has made clear its policy of deference to the legislature. Judge Wilkinson's concurring opinion below acknowledges as much: "I am unable to draw from the profound ambiguities of the Second Amendment an invitation to courts to

preempt this most volatile of political subjects and arrogate to themselves decisions that have been historically assigned to other, more democratic, actors." App.78 (Wilkinson, J., concurring). Judge Wilkinson previously cautioned that courts should "await direction from the [Supreme] Court itself" before extending "*Heller* beyond its undisputed core holding." *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011).

In *Obergefell*, however, this Court explained that, "when the rights of persons are violated, the Constitution requires redress by the courts, notwithstanding the more general value of democratic decisionmaking." 135 S. Ct. at 2605 (internal quotation marks and citation omitted). The most basic principle of federal jurisdiction is that "[t]he Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter. An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act." *Id.* That should hold especially true here because the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635.

The lower courts – especially the Fourth Circuit – are calling out for this Court's guidance to assuage their fear of applying the Second Amendment with the same vigor with which they apply other constitutional provisions. The Fourth Circuit, overly concerned with the negative consequences of criminal misuse of

firearms, has all but declared it will not protect the fundamental, individual right at issue. The Fourth Circuit's acknowledgement of this can be seen in Judge King's dissent from the panel opinion below, quoting from a prior Fourth Circuit opinion: 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." App.187 (King, J., dissenting from the panel opinion) (*quoting Masciandaro*, 638 F.3d at 475). This self-limiting perspective focuses only on the (rare) potential criminal misuse of the banned arms, not their typical, lawful use by law-abiding citizens, which this Court found controlling in striking down handgun bans in both *Heller* and *McDonald*.

Despite widespread criminal misuse of handguns, this Court did not hesitate to confirm that those firearms are protected by the Second Amendment because they are typically possessed by law-abiding citizens for lawful purposes, including self-defense:

> We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. . . . But the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition on handguns held and used for self-defense in the home.

Heller, 554 U.S. at 636.

This Court further admonished: "The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications." *McDonald*, 561 U.S. at 783; *see*, *e.g.*, *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) ("The exclusionary rule generates 'substantial social costs,' *United States v. Leon*, 468 U.S. 897, 907, 104 S. Ct. 3405 (1984), which sometimes include setting the guilty free and the dangerous at large."). As this Court's decisions make clear, there may be some "social costs" associated with insisting upon the enforcement of enumerated constitutional rights, but "[l]ike the First, [the Second Amendment] is the very *product* of an interest balancing by the people." *Heller*, 554 U.S. at 635 (emphasis in original).

The Second Amendment must be applied with the same vigor as other constitutional amendments that protect the rights of citizens. *See McDonald*, 561 U.S. at 780 (refusing to treat the Second Amendment "as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees"). "The very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634 (emphasis in original). Only this Court can ensure that the Fourth Circuit's novel test will not make "the Second Amendment extinct." *Id.* at 636.

III. The Fourth Circuit's "like M-16s" test continues the lower courts' divergence from *Heller* and further fragments the Courts of Appeals into three irreconcilable paths.

The Fourth Circuit's erroneous conclusion that its holding was "compelled by *Heller*," App.49, is reason alone for this Court's review. From time to time, Courts of Appeals have determined that they are compelled to arrive at a certain outcome because of their erroneous interpretation of this Court's decisions. This Court has been quick to correct those outliers, as it should be here.

In *Celotex Corp. v. Catrett*, this Court granted certiorari to resolve a conflict among the Courts of Appeals where the court below mistakenly believed that its decision was required by its incorrect interpretation of this Court's precedent. 447 U.S. 317 (1986). There, the Court of Appeals had erred in holding that *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), required a plaintiff to produce affirmative evidence proving the absence of a dispute as to all material facts to obtain summary judgment. *Celotex Corp.*, 447 U.S. at 325. In correcting the Court of Appeals' misinterpretation of *Adickes*, this Court noted that *Adickes* had held that additions to Federal Rule Civil Procedure 56(e) were not intended to either reduce or increase the burden on a movant under that rule. *Id.* "Yet that is exactly the result which the reasoning of the Court of Appeals would produce." *Id.*

The Fourth Circuit's decision here rejected the "in common use" test set forth by this Court and discussed at length in *Heller*, relying instead upon an isolated part of a single sentence it took out of context to craft a novel test for whether the Second Amendment applies to particular firearms. A plain reading of *Heller* demonstrates the Fourth Circuit's error. This Court made clear that the Second Amendment applies "prima facie, to all instruments that constitute bearable arms," *Heller*, 554 U.S. at 582, and reiterated the test in *Miller* that the only "bearable arms" to which the Second Amendment does not apply are those that are not "typically possessed by law-abiding citizens." *Id.* at 625. Based on this clear language, most Courts of Appeals have utilized the "in common use" test for whether a firearm is protected by the Second Amendment, evaluating whether they are "typically possessed by law-abiding citizens for lawful purposes." *Heller II*, 670 F.3d at 1261 (firearms and magazines); *Cuomo*, 804 F.3d at 255 (firearms and magazines); *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015) (magazines); *see also* App.87 (Judge Traxler, in dissent, explaining that "courts have had little difficulty in concluding that semiautomatic rifles such as the AR-15 are in common use by law-abiding citizens"). The Fourth Circuit, both in rejecting and concocting a substitute for the "in common use" test and in applying intermediate scrutiny in its alternate decision, in effect conceded that the banned arms are in common use.

"'*Heller* asks whether the law bans types of firearms commonly used for a lawful purpose. . . .

Under [Supreme Court] precedents, *that is all that is needed* for citizens to have a right under the Second Amendment to keep such weapons.'" *Duncan*, 2017 WL 2813727 at *6-*7 (*quoting Friedman*, 136 S. Ct. at 449 (Thomas, J., dissenting from denial of certiorari)) (emphasis in *Duncan*). Sawed off shotguns and hand grenades can be banned because they are not typically possessed by law-abiding citizens for lawful purposes. This may also prove true for fully automatic machineguns, like M-16 rifles, as this Court explained in *Heller*, 554 U.S. at 627. Conversely, handguns, shotguns, semiautomatic rifles, and standard capacity magazines cannot be banned because they are typically possessed by law-abiding citizens for lawful purposes. It is the purpose for which the arms are typically possessed by law-abiding citizens that defines their protection. Concepts and measures of numerosity or commonality help inform that analysis, but do not replace it. *See Duncan*, 2017 WL 2813727 at *6-*7; *see also Caetano*, 136 S. Ct. at 1032 (Alito, J., concurring) ("the pertinent Second Amendment inquiry is whether stun guns are commonly possessed by law-abiding citizens for lawful purposes").

As described above, the Fourth Circuit misinterpreted this Court's reconciliation of its holding with the Second Amendment's prefatory clause to find an alternative test for determining whether an arm is protected. The Fourth Circuit's application of its novel "like M-16s" test to exclude common arms from the Second Amendment conflicts not only with *Heller* but

also with the other Courts of Appeals, further dividing them into at least three disparate factions.

The District of Columbia, Second, and Ninth Circuits also have addressed bans similar to those at issue in this case. In each of those cases, the Courts of Appeals applied the "in common use" test to hold or assume that the banned firearms and magazines were protected by the Second Amendment. *Heller II*, 670 F.3d at 1261 (firearms and magazines); *Cuomo*, 804 F.3d at 255 (firearms and magazines); *Fyock*, 779 F.3d at 998 (magazines). Even prior to the Fourth Circuit's decision below, however, the Seventh Circuit had split from the District of Columbia, Second, and Ninth Circuits in declining to apply the "in common use" test. *See Friedman*, 784 F.3d 406 (rejecting the "in common use" test).

The Fourth Circuit, however, forged its own path, rejecting both of these approaches and their results. The Fourth Circuit's test conflicts with both other approaches but is diametrically opposed to the Seventh Circuit's approach that looks to "some reasonable relationship to the preservation or efficiency of a well regulated militia," *Friedman*, 784 F.3d at 410 (internal quotation marks omitted), and produces irreconcilable outcomes. If a firearm is "most useful in warfare," it must bear "some reasonable relationship to the preservation or efficiency of a well regulated militia." Such a firearm would be unprotected under the Fourth Circuit's test but protected under the Seventh Circuit's. The opinion below further fragments the

Courts of Appeals' Second Amendment jurisprudence and forecloses any hope of coherence.

Further demonstrating the lower courts' confusion over the incoherent state of Second Amendment jurisprudence is the dilemma faced in *Duncan*. 2017 WL 2813727. There, the court acknowledged *Heller* and *Miller*, but confessed that it was hamstrung in applying them because the Courts of Appeals had adopted a complex test that "appear[s] to be at odds with the simple test used by the Supreme Court in *Heller*." *Id.* at *6 (describing the controlling standard as a "tripartite binary test with a sliding scale and a reasonable fit" that is unintelligible to the ordinary citizen). Nevertheless, the court entered a preliminary injunction because "the State's criminalization of possession of 'large capacity magazines' likely places an unconstitutional burden on the citizen plaintiffs." *Id.* at *4.

The *Duncan* court found its path through the maze of conflicting Second Amendment jurisprudence because it closely followed this Court's Second Amendment precedent, a path less travelled by other courts. The disparate tests applied by the lower courts produce a patchwork of holdings where the same arms are protected under the federal constitution in some parts of the country yet are unprotected in others. *Compare Kolbe* (holding magazines with a capacity greater than ten rounds and common semiautomatic rifles are not protected in Maryland), *with Duncan* (holding magazines with a capacity greater than ten rounds are protected in California) *and Cuomo*

(assuming magazines with a capacity greater than ten rounds and common semiautomatic rifles are protected in New York and Connecticut). Similarly, a ban on protected arms is permissible in one city but not others in the same state. *Compare Fyock* (denying preliminary injunction of a City of Sunnyvale, California, ban on magazines with a capacity greater than ten rounds), *with Duncan* (entering preliminary injunction of a California state-wide ban on magazines with a capacity greater than ten rounds).

The Courts of Appeals' Second Amendment jurisprudence is "an overly complex analysis that people of ordinary intelligence cannot be expected to understand." *Duncan*, 2017 WL 2813727 at *6. As a result, the core right of the Second Amendment comes closer to evisceration with each subsequent lower court opinion upholding bans on protected arms, especially now that the Fourth Circuit has held that the Second Amendment does not even apply. Only this Court's intervention can counter this threat to the core right.

IV. The Fourth Circuit's alternate decision applying intermediate scrutiny solidifies the Courts of Appeals' conflict with *Heller* and this Court's fundamental rights jurisprudence.

The Fourth Circuit erred thrice-over in its alternative rationale for upholding Maryland's ban. First, it rejected *Heller*'s text, history, and tradition approach. Second, even though the ban restricts the

core right of self-defense in the home, the Fourth Circuit selected and applied only intermediate scrutiny because Maryland permits its citizens to possess other firearms. Third, in its application of intermediate scrutiny, the Fourth Circuit improperly accepted the illegitimate purpose of limiting protected arms in the hands of law-abiding citizens as an important government interest justifying the challenged infringement.

First, this Court made clear in *Heller* that the Second Amendment, like all constitutional rights, was "enshrined with the scope [it was] understood to have when the people adopted [it.]" 554 U.S. at 634-35. Whether or not a statute violates the Second Amendment necessarily involves a consideration of the relevant "text, history, and tradition." *See Heller II*, 670 at 1271, 1282-84 (Kavanaugh, J., dissenting) (explaining why none of the interest balancing tests applied in First Amendment cases are appropriate). Even where this Court acknowledged that there could be limitations on Second Amendment rights, it grounded those limitations in text, history, and tradition – not the interest balancing tests favored by the lower courts. *Heller*, 554 U.S. at 635.

Notwithstanding this Court's direction, the Courts of Appeals, including the Fourth Circuit, have not followed *Heller*'s text, history, and tradition analysis, reverting instead to the more familiar interest balancing tests applied in the First Amendment context. Some of the lower courts have borrowed from First Amendment jurisprudence a two-step approach that

involves determining whether the Second Amendment applies and then selecting the appropriate level of scrutiny to apply.

The lower courts applying the "two-step" First Amendment analysis to Second Amendment challenges have overlooked one critical point: that analysis cannot apply in the context of a ban on protected arms. The question of whether such a prohibition is constitutional was already answered by this Court's text, history, and tradition analysis of the individual right in *Heller*, when it held that banning protected arms was "a policy choice that is off the table." 554 U.S. at 636. "Few other questions of original meaning have been as thoroughly explored." *McDonald*, 561 U.S. at 788. It may be that the two-step analysis is appropriate for Second Amendment questions involving other forms of firearms regulation, but it does not fit a ban of protected arms from the homes of law-abiding citizens.

Second, except for the now-vacated panel opinion below, App.148, Courts of Appeals, including the Fourth Circuit in its alternate decision, have selected and applied only intermediate scrutiny, and all have upheld government bans on common firearms. In each case, the court accepted the availability of other protected firearms to mitigate the severity of the burden, *e.g.*, App.50-51, which this Court rejected in *Heller*, 554 U.S. at 629 ("It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed.").

In the First Amendment context, from which the lower courts derived this two-step approach, this Court does not tolerate application of intermediate scrutiny to core First Amendment rights. When restrictions burden core First Amendment rights, this Court requires that they receive strict scrutiny. *See*, *e.g.*, *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226-27 (2015) (reversing the Ninth Circuit judgment applying intermediate scrutiny and applying strict scrutiny to content-based restrictions). Only where a law impacts just the periphery of a First Amendment right may intermediate scrutiny be appropriate. *E.g.*, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (applying intermediate scrutiny to a content-neutral time, place, or manner restriction); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980) (applying intermediate scrutiny to commercial speech restrictions). The Fourth Circuit's application of intermediate scrutiny to laws burdening the core right of self-defense in the home turns the Second Amendment into a "second-class" right, an outcome that this Court rejected in *McDonald*, 561 U.S. at 780 (*see also Heller*, 554 U.S. at 634 (holding Second Amendment is a right "*really worth* insisting upon") (emphasis in original)), and cannot be reconciled with this Court's holdings in the context of other fundamental rights.

Finally, the Fourth Circuit's acceptance of Maryland's inappropriate justification for the bans conflicts with this Court's holdings. In *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (plurality),

Justice Kennedy's controlling opinion made clear that a challenged law may not be upheld under intermediate scrutiny if it targets protected conduct in an effort to cure undesirable side effects. *Id.* at 445; *see also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564-65 (2001) (holding unconstitutional Massachusetts' tobacco advertising prohibitions that were designed to reduce underage smoking); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986) (upholding a zoning law regulating the location of adult theaters because it was directed at the side-effects of such establishments, not "as a pretext for suppressing expression") (internal quotation marks omitted); *cf. Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1292-93 (9th Cir. 2015) ("If speech provokes wrongful acts on the part of hecklers, the government must deal with those wrongful acts directly; it may not avoid doing so by suppressing the speech."). Rather, the challenged law can survive only if its "purpose and effect" are to reduce the secondary effects and not the exercise of constitutional rights. *City of Los Angeles*, 535 U.S. at 445.

Here, Respondents directly target possession by law-abiding citizens in hopes that reducing the availability of the banned arms "overall" (to law-abiding citizens) will reduce their availability to criminals as well. App.27, 55. The target of the challenged laws, then, is not the rare criminal misuse of these arms, but possession of them by law-abiding citizens, the core conduct protected by the Second

Amendment. Respondents' rationale, upheld by the Fourth Circuit, fails the *City of Los Angeles* test.

Even under intermediate scrutiny, the challenged laws fail because they are directed at constitutionally protected conduct. As Petitioners have demonstrated, there simply is no tailoring. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014) (requiring narrow tailoring under intermediate scrutiny). The Fourth Circuit's alternate analysis cannot save its erroneous decision supporting Maryland's ban. Instead it both hardens and deepens the lower courts' conflict with *Heller* and reinforces the need for this Court's review.

CONCLUSION

This Court announced an important principle of constitutional law in *Heller*: The government may not prohibit law-abiding citizens from possessing arms that are typically kept for lawful purposes. Purporting to be compelled by *Heller*, the Fourth Circuit has turned *Heller* on its head by excluding from the Second Amendment all arms a court determines are "like M-16s." Only this Court has the power to correct this outlier and prevent its evisceration of the core right protected by the Second Amendment.

July 21, 2017

Respectfully submitted,

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-1945

STEPHEN V. KOLBE; ANDREW C. TURNER; WINK'S SPORTING GOODS, INCORPORATED; ATLANTIC GUNS, INCORPORATED; ASSOCIATED GUN CLUBS OF BALTIMORE, INCORPORATED; MARYLAND SHALL ISSUE, INCORPORATED; MARYLAND STATE RIFLE AND PISTOL ASSOCIATION, INCORPORATED; NATIONAL SHOOTING SPORTS FOUNDATION, INCORPORATED; MARYLAND LICENSED FIREARMS DEALERS ASSOCIATION, INCORPORATED,

Plaintiffs-Appellants,

and

SHAWN J. TARDY; MATTHEW GODWIN,

Plaintiffs,

v.

LAWRENCE J. HOGAN, Jr., in his official capacity as Governor of the State of Maryland; BRIAN E. FROSH, in his official capacity as Attorney General of the State of Maryland; COLONEL WILLIAM M. PALLOZZI, in his official capacity as Secretary of the Department of State Police and Superintendent of the Maryland State Police; MARYLAND STATE POLICE,

Defendants-Appellees.

STATE OF WEST VIRGINIA; STATE OF ALABAMA; STATE OF ALASKA; STATE OF ARIZONA; STATE OF FLORIDA; STATE OF IDAHO; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MICHIGAN; STATE OF MISSOURI; STATE OF MONTANA; STATE OF NEBRASKA; STATE OF NEW MEXICO; STATE OF NORTH DAKOTA; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF TEXAS; STATE OF UTAH; STATE OF WYOMING; COMMONWEALTH OF KENTUCKY; TRADITIONALIST YOUTH NETWORK, LLC; NATIONAL RIFLE ASSOCIATION OF AMERICA; CRPA FOUNDATION; GUN OWNERS OF CALIFORNIA; COLORADO STATE SHOOTING ASSOCIATION; IDAHO STATE RIFLE & PISTOL ASSOCIATION; ILLINOIS STATE RIFLE ASSOCIATION; KANSAS STATE RIFLE ASSOCIATION; LEAGUE OF KENTUCKY SPORTSMEN, INC.; NEVADA FIREARMS COALITION; ASSOCIATION OF NEW JERSEY RIFLE & PISTOL CLUBS; NEW MEXICO SHOOTING SPORTS ASSOCIATION; NEW YORK RIFLE & PISTOL ASSOCIATION; TEXAS STATE RIFLE ASSOCIATION; VERMONT FEDERATION OF SPORTSMAN'S CLUBS; VERMONT RIFLE & PISTOL ASSOCIATION; GUN OWNERS OF AMERICA, INC.; GUN OWNERS FOUNDATION; U.S. JUSTICE FOUNDATION; THE LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION; THE ABRAHAM LINCOLN FOUNDATION FOR PUBLIC POLICY RESEARCH, INC.; CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND; INSTITUTE ON THE CONSTITUTION; CONGRESS OF RACIAL EQUALITY; NATIONAL CENTER FOR PUBLIC POLICY RESEARCH; PROJECT 21; PINK PISTOLS; WOMEN AGAINST GUN CONTROL; THE

DISABLED SPORTSMEN OF NORTH AMERICA; LAW ENFORCEMENT LEGAL DEFENSE FUND; LAW ENFORCEMENT ACTION NETWORK; LAW ENFORCEMENT ALLIANCE OF AMERICA; INTERNATIONAL LAW ENFORCEMENT EDUCATORS AND TRAINERS ASSOCIATION; WESTERN STATES SHERIFFS' ASSOCIATION,

Amici Supporting Appellants,

LAW CENTER TO PREVENT GUN VIOLENCE; MARYLANDERS TO PREVENT GUN VIOLENCE, INCORPORATED; BRADY CENTER TO PREVENT GUN VIOLENCE; STATE OF NEW YORK; STATE OF CALIFORNIA; STATE OF CONNECTICUT; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF IOWA; STATE OF MASSACHUSETTS; STATE OF OREGON; DISTRICT OF COLUMBIA,

Amici Supporting Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Catherine C. Blake, District Judge. (1:13-cv-02841-CCB)

Argued: May 11, 2016 Decided: February 21, 2017

Before GREGORY, Chief Judge, and WILKINSON, NIEMEYER, MOTZ, TRAXLER, KING, SHEDD, AGEE, KEENAN, WYNN, DIAZ, FLOYD, THACKER, and HARRIS, Circuit Judges.

Affirmed by published opinion. Judge King wrote the opinion for the en banc majority, in which Chief Judge Gregory and Judges Wilkinson, Motz, Keenan, Wynn, Floyd, Thacker, and Harris joined in full; Judge Diaz joined in part as to the Second Amendment claims and joined as to the Fourteenth Amendment equal protection and due process claims; and Judges Niemeyer, Shedd, and Agee joined as to the Fourteenth Amendment claims only. Judge Wilkinson wrote a concurring opinion, in which Judge Wynn joined. Judge Diaz wrote an opinion concurring in part and concurring in the judgment as to the Second Amendment claims. Judge Traxler wrote a dissenting opinion as to the Second Amendment claims, in which Judges Niemeyer, Shedd, and Agee joined. Judge Traxler also wrote an opinion dissenting as to the Fourteenth Amendment equal protection claim and concurring in the judgment as to the Fourteenth Amendment due process claim.

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KING, Circuit Judge:

On the morning of December 14, 2012, in Newtown, Connecticut, a gunman used an AR-15-type Bushmaster rifle and detachable thirty-round magazines to murder twenty first-graders and six adults in the Sandy Hook Elementary School. Two additional adults were injured by gunfire, and just twelve children in the two targeted classrooms were not shot. Nine terrified children ran from one of the classrooms

when the gunman paused to reload, while two youngsters successfully hid in a restroom. Another child was the other classroom's sole survivor. In all, the gunman fired at least 155 rounds of ammunition within five minutes, shooting each of his victims multiple times.

Both before and after Newtown, similar military-style rifles and detachable magazines have been used to perpetrate mass shootings in places whose names have become synonymous with the slaughters that occurred there – like Aurora, Colorado (twelve killed and at least fifty-eight wounded in July 2012 in a movie theater), and San Bernardino, California (fourteen killed and more than twenty wounded in December 2015 at a holiday party). In the early morning hours of June 12, 2016, a gunman killed forty-nine and injured fifty-three at the Pulse nightclub in Orlando, Florida, making it the site of this country's deadliest mass shooting yet. According to news reports, the Orlando gunman used a Sig Sauer MCX, a semiautomatic rifle that was developed at the request of our Army's special forces and is known in some military circles as the "Black Mamba." Other massacres have been carried out with handguns equipped with magazines holding more than ten rounds, including those at Virginia Tech (thirty-two killed and at least seventeen wounded in April 2007) and Fort Hood, Texas (thirteen killed and more than thirty wounded in November 2009), as well as in Binghamton, New York (thirteen killed and four wounded in April 2009 at an immigration center), and Tucson, Arizona (six killed and thirteen wounded in

January 2011 at a congresswoman's constituent meeting in a grocery store parking lot).

In response to Newtown and other mass shootings, the duly elected members of the General Assembly of Maryland saw fit to enact the State's Firearm Safety Act of 2013 (the "FSA"), which bans the AR-15 and other military-style rifles and shotguns (referred to as "assault weapons") and detachable large-capacity magazines. The plaintiffs in these proceedings contest the constitutionality of the FSA with a pair of Second Amendment claims – one aimed at the assault weapons ban, the other at the prohibition against large-capacity magazines – plus Fourteenth Amendment equal protection and due process claims.

On cross-motions for summary judgment, a distinguished judge in the District of Maryland ruled in August 2014 that the FSA is constitutional and thus awarded judgment to the defendants. *See Kolbe v. O'Malley*, 42 F. Supp. 3d 768 (D. Md. 2014) (the "Opinion"). Addressing the plaintiffs' Second Amendment claims under the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), the district court expressed grave doubt that the banned assault weapons and large-capacity magazines are constitutionally protected arms. Nevertheless, the court ultimately assumed that the FSA implicates the Second Amendment and subjected it to the "intermediate scrutiny" standard of review. In the wake of *Heller*, four of our sister courts of appeals have also rejected Second Amendment challenges to bans on assault weapons

and large-capacity magazines, including two (the Second and District of Columbia Circuits) that utilized an analysis similar to the district court's.

In early February of 2016, a divided three-judge panel of this Court vacated the Opinion's Second Amendment rulings and remanded to the district court, directing the application of the more restrictive standard of "strict scrutiny" to the FSA. *See Kolbe v. Hogan*, 813 F.3d 160 (4th Cir. 2016). Pursuant to its reading of *Heller*, the panel majority determined that the banned assault weapons and large-capacity magazines are indeed protected by the Second Amendment, and that the FSA substantially burdens the core Second Amendment right to use arms for self-defense in the home. We thereby became the first and only court of appeals to rule that a ban on assault weapons or large-capacity magazines deserves strict scrutiny. Meanwhile, the panel affirmed the district court's denial of the plaintiffs' Fourteenth Amendment claims. On March 4, 2016, the panel's decision was vacated in its entirety by our Court's grant of rehearing en banc in this case. We heard argument en banc on May 11, 2016, and the appeal is now ripe for disposition.

As explained below, we are satisfied to affirm the district court's judgment, in large part adopting the Opinion's cogent reasoning as to why the FSA contravenes neither the Second Amendment nor the Fourteenth. We diverge from the district court on one notable point: We conclude – contrary to the now-vacated decision of our prior panel – that the banned assault weapons and large-capacity magazines are *not*

protected by the Second Amendment. That is, we are convinced that the banned assault weapons and large-capacity magazines are among those arms that are "like" "M-16 rifles" – "weapons that are most useful in military service" – which the *Heller* Court singled out as being beyond the Second Amendment's reach. *See* 554 U.S. at 627 (rejecting the notion that the Second Amendment safeguards "M-16 rifles and the like"). Put simply, we have no power to extend Second Amendment protection to the weapons of war that the *Heller* decision explicitly excluded from such coverage. Nevertheless, we also find it prudent to rule that – even if the banned assault weapons and large-capacity magazines are somehow entitled to Second Amendment protection – the district court properly subjected the FSA to intermediate scrutiny and correctly upheld it as constitutional under that standard of review.

I.

A.

The General Assembly of Maryland passed the FSA on April 4, 2013, the Governor signed it into law that May 16, and it became effective several months later on October 1. The FSA provides that a person may neither "transport an assault weapon into the State" nor "possess, sell, offer to sell, transfer, purchase, or receive an assault weapon." *See* Md. Code Ann., Crim. Law § 4-303(a). The banned assault weapons include "assault long gun[s]" and "copycat weapon[s]." *Id.* § 4-301(d).

The FSA defines an assault long gun as a rifle or shotgun "listed under § 5-101(r)(2) of the Public Safety Article," including the "Colt AR-15," "Bushmaster semi-auto rifle," and "AK-47 in all forms." *See* Md. Code Ann., Crim. Law § 4-301(b); Md. Code Ann., Pub. Safety § 5-101(r)(2). The list of prohibited rifles and shotguns consists of "specific assault weapons *or their copies*, regardless of which company produced and manufactured that assault weapon." *See* Md. Code Ann., Pub. Safety § 5-101(r)(2) (emphasis added).[1]

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[1] The rifles and shotguns specifically identified as banned in section 5-101(r)(2) – mostly semiautomatic rifles – are as follows:

> (i) American Arms Spectre da Semiautomatic carbine; (ii) AK-47 in all forms; (iii) Algimec AGM-1 type semi-auto; (iv) AR 100 type semi-auto; (v) AR 180 type semi-auto; (vi) Argentine L.S.R. semi-auto; (vii) Australian Automatic Arms SAR type semi-auto; (viii) Auto-Ordnance Thompson M1 and 1927 semi-automatics; (ix) Barrett light .50 cal. semi-auto; (x) Beretta AR70 type semi-auto; (xi) Bushmaster semi-auto rifle; (xii) Calico models M-100 and M-900; (xiii) CIS SR 88 type semi-auto; (xiv) Claridge HI TEC C-9 carbines; (xv) Colt AR-15, CAR-15, and all imitations except Colt AR-15 Sporter H-BAR rifle; (xvi) Daewoo MAX 1 and MAX 2, aka AR 100, 110C, K-1, and K-2; (xvii) Dragunov Chinese made semi-auto; (xviii) Famas semi-auto (.223 caliber); (xix) Feather AT-9 semi-auto; (xx) FN LAR and FN FAL assault rifle; (xxi) FNC semi-auto type carbine; (xxii) F.I.E./Franchi LAW 12 and SPAS 12 assault shotgun; (xxiii) Steyr-AUG-SA semi-auto; (xxiv) Galil models AR and ARM semi-auto; (xxv) Heckler and Koch HK-91 A3, HK-93 A2, HK-94 A2 and A3; (xxvi) Holmes model 88 shotgun; (xxvii) Avtomat Kalashnikov semi-automatic rifle in any format; (xxviii) Manchester Arms "Commando" MK-45, MK-9; (xxix) Mandell TAC-1 semi-auto carbine; (xxx) Mossberg model 500 Bullpup

The FSA provides a separate definition for a copycat weapon that is premised on a weapon's characteristics, rather than being identified by a list of specific firearms. In relevant part, a copycat weapon means:

> (i) a semiautomatic centerfire rifle that can accept a detachable magazine and has any two of the following:
>
> 1. a folding stock;
>
> 2. a grenade launcher or flare launcher; or
>
> 3. a flash suppressor;
>
> (ii) a semiautomatic centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds;
>
> (iii) a semiautomatic centerfire rifle that has an overall length of less than 29 inches;

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assault shotgun; (xxxi) Sterling Mark 6; (xxxii) P.A.W.S. carbine; (xxxiii) Ruger mini-14 folding stock model (.223 caliber); (xxxiv) SIG 550/551 assault rifle (.223 caliber); (xxxv) SKS with detachable magazine; (xxxvi) AP-74 Commando type semi-auto; (xxxvii) Springfield Armory BM-59, SAR-48, G3, SAR-3, M-21 sniper rifle, M1A, excluding the M1 Garand; (xxxviii) Street sweeper assault type shotgun; (xxxix) Striker 12 assault shotgun in all formats; (xl) Unique F11 semi-auto type; (xli) Daewoo USAS 12 semi-auto shotgun; (xlii) UZI 9mm carbine or rifle; (xliii) Valmet M-76 and M-78 semi-auto; (xliv) Weaver Arms "Nighthawk" semi-auto carbine; or (xlv) Wilkinson Arms 9mm semi-auto "Terry."

See Md. Code Ann., Pub. Safety § 5-101(r)(2).

* * *

(v) a semiautomatic shotgun that has a folding stock; or

(vi) a shotgun with a revolving cylinder.

See Md. Code Ann., Crim. Law § 4-301(e)(1). The FSA excludes assault long guns – those enumerated in section 5-101(r)(2) of the Public Safety Article and their copies – from the definition of a copycat weapon. *See* Md. Code Ann., Crim. Law § 4-301(e)(2).[2]

In banning large-capacity magazines along with assault weapons, the FSA provides that "[a] person may not manufacture, sell, offer for sale, purchase, receive, or transfer a detachable magazine that has a capacity of more than 10 rounds of ammunition for a firearm." *See* Md. Code Ann., Crim. Law § 4-305(b). A detachable magazine is defined as "an ammunition feeding device that can be removed readily from a firearm without requiring disassembly of the firearm action or without the use of a tool, including a bullet or cartridge." *Id.* § 4-301(f).

A person who violates the FSA is subject to criminal prosecution and imprisonment for up to three years plus a fine not exceeding $5,000. *See* Md. Code Ann., Crim. Law § 4-306(a). A longer prison term is

[2] Although the FSA also identifies "assault pistol[s]" as assault weapons, *see* Md. Code Ann., Crim. Law § 4-301(c), (d)(2), the plaintiffs have not challenged the FSA's prohibition against assault pistols. Thus, our discussion of the banned assault weapons is limited to assault long guns and those copycat weapons that are rifles and shotguns.

mandatory if a person uses an assault weapon or large-capacity magazine in the commission of a felony or crime of violence, i.e., five to twenty years for a first violation, and ten to twenty years for each subsequent violation. *See id.* § 4-306(b).

Under the FSA's exceptions, "[a] licensed firearms dealer may continue to possess, sell, offer for sale, or transfer an assault long gun or a copycat weapon that the licensed firearms dealer lawfully possessed on or before October 1, 2013," and "[a] person who lawfully possessed, has a purchase order for, or completed an application to purchase an assault long gun or a copycat weapon before October 1, 2013, may . . . possess and transport the assault long gun or copycat weapon." *See* Md. Code Ann., Crim. Law § 4-303(b)(2), (3)(i). The FSA does not ban the possession of a large-capacity magazine. Further, the FSA explicitly allows the receipt and possession of an assault weapon or large-capacity magazine by a retired Maryland law enforcement officer if the assault weapon or large-capacity magazine "is sold or transferred to the person by the law enforcement agency on retirement" or "was purchased or obtained by the person for official use with the law enforcement agency before retirement." *Id.* § 4-302(7).

B.

On September 26, 2013, the plaintiffs filed their initial Complaint in the District of Maryland. The following day, they requested a temporary restraining order from the district court, seeking to bar the

defendants from enforcing the challenged provisions of the FSA once it took effect on October 1, 2013. The court conducted a hearing on October 1 and denied the requested temporary restraining order from the bench. Thereafter, the parties agreed that the court should proceed to resolve the merits of the litigation on cross-motions for summary judgment.

The operative Third Amended Complaint, filed on November 22, 2013, asks for declaratory and injunctive relief. It alleges the FSA is facially unconstitutional in four respects: (1) the assault weapons ban contravenes the Second Amendment; (2) the prohibition against large-capacity magazines also violates the Second Amendment; (3) the provision allowing receipt and possession of assault weapons and large-capacity magazines by retired Maryland law enforcement officers contravenes the Equal Protection Clause of the Fourteenth Amendment; and (4) the provision outlawing "copies" of the rifles and shotguns enumerated in section 5-101(r)(2) of the Public Safety Article violates the Fourteenth Amendment's Due Process Clause by being too vague to provide adequate notice of the conduct proscribed.

The plaintiffs include Stephen V. Kolbe and Andrew Turner, two Maryland residents who have asserted that they would purchase assault weapons and large-capacity magazines but for the FSA. Other plaintiffs are firearms dealers in Maryland and firearms-related associations: Wink's Sporting Goods, Incorporated; Atlantic Guns, Incorporated; Associated Gun Clubs of Baltimore, Incorporated; Maryland Shall

Issue, Incorporated; Maryland State Rifle and Pistol Association, Incorporated; National Shooting Sports Foundation, Incorporated; and Maryland Licensed Firearms Dealers Association, Incorporated. *See Kolbe v. O'Malley*, 42 F. Supp. 3d 768, 774 n.3 (D. Md. 2014) (concluding that "a credible threat of prosecution under the [FSA]" confers standing on individual plaintiffs Kolbe and Turner, and thus "jurisdiction is secure . . . whether or not the additional plaintiffs have standing" (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977))).

The plaintiffs' claims are made against four defendants in their official capacities: Lawrence J. Hogan, Jr., Governor of the State of Maryland, as successor to Martin J. O'Malley; Brian E. Frosh, the State's Attorney General, as successor to Douglas F. Gansler; Colonel William M. Pallozzi, Secretary of the Department of State Police and Superintendent of the Maryland State Police, as successor to Colonel Marcus L. Brown; and the Maryland State Police. We hereafter refer to the defendants collectively as the "State."

C.

1.

In support of its motion for summary judgment, the State proffered extensive uncontroverted evidence demonstrating that the assault weapons outlawed by the FSA are exceptionally lethal weapons of war.[3] A

[3] By the Opinion of August 22, 2014, explaining its award of summary judgment to the State, the district court also denied the

prime example of the State's evidence is that the most popular of the prohibited assault weapons – the AR-15 – is simply the semiautomatic version of the M16 rifle used by our military and others around the world. *Accord Staples v. United States*, 511 U.S. 600, 603 (1994) (observing that "[t]he AR-15 is the civilian version of the military's M-16 rifle, and is, unless modified, a semiautomatic weapon").

The State's evidence imparts that the AR-15 was developed after World War II for the U.S. military. It was designed as a selective-fire rifle – one that can be fired in either automatic mode (firing continuously as long as the trigger is depressed) or semiautomatic mode (firing one round of ammunition for each pull of the trigger and, after each round is fired, automatically loading the next). In combat-style testing conducted in 1959, it was "discovered that a 7- or even 5-man squad armed with AR-15s could do as well or better in hit-and-kill potential . . . than the traditional 11-man squad armed with M14 rifles," which were the heavier selective-fire rifles then used by soldiers in the Army. *See* J.A. 930.[4] Subsequent field testing in Vietnam, in

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plaintiffs' motion to exclude certain of the State's expert and fact evidence. *See Kolbe*, 42 F. Supp. 3d at 775, 777-82. In this appeal, the plaintiffs challenge the court's evidentiary rulings. Because the court did not abuse its discretion in making the evidentiary rulings, we affirm those rulings and rely on evidence that the court properly declined to exclude. *See Humphreys & Partners Architects, L.P. v. Lessard Design, Inc.*, 790 F.3d 532, 538 (4th Cir. 2015).

[4] Citations herein to "J.A. __" refer to the contents of the Joint Appendix filed by the parties in this appeal.

1962, revealed the AR-15 "to be a very lethal combat weapon" that was "well-liked . . . for its size and light recoil." *Id.* at 968. Reports from that testing indicated that "the very high-velocity AR-15 projectiles" had caused "[a]mputations of limbs, massive body wounds, and decapitations." *Id.*

Within the next few years, the Department of Defense purchased more than 100,000 AR-15 rifles for the Army and the Air Force, and the military changed the name "AR-15" to "M16." By that time, the former Soviet Union was already producing the AK-47, a selective-fire rifle which, like the AR-15/M16, was developed for offensive use and has been adopted by militaries around the world. Various firearms companies have since manufactured civilian versions of the AR-15 and AK-47 that are semiautomatic but otherwise retain the military features and capabilities of the fully automatic M16 and AK-47. Several other FSA-banned assault weapons are – like the AR-15 and semiautomatic AK-47 – semiautomatic versions of machineguns initially designed for military use. *See, e.g.*, J.A. 1257 (UZI and Galil rifles); *id.* at 1260 (Fabrique National ("FN") assault rifles); *id.* at 1261 (Steyr AUG rifles).

The difference between the fully automatic and semiautomatic versions of those firearms is slight. That is, 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. *See, e.g.*, J.A. 1120 ("[S]emiautomatic weapons can be fired at

rates of 300 to 500 rounds per minute, making them virtually indistinguishable in practical effect from machineguns."). Moreover, soldiers and police officers are often advised to choose and use semiautomatic fire, because it is more accurate and lethal than automatic fire in many combat and law enforcement situations.

The AR-15, semiautomatic AK-47, and other assault weapons banned by the FSA have a number of features designed to achieve their principal purpose – "killing or disabling the enemy" on the battlefield. *See* J.A. 735. For example, some of the banned assault weapons incorporate flash suppressors, which are designed to help conceal a shooter's position by dispersing muzzle flash. Others possess barrel shrouds, which enable "spray-firing" by cooling the barrel and providing the shooter a "convenient grip." *Id.* at 1121. Additional military features include folding and telescoping stocks, pistol grips, grenade launchers, night sights, and the ability to accept bayonets and large-capacity magazines.

Several manufacturers of the banned assault weapons, in advertising them to the civilian market, tout their products' battlefield prowess. Colt's Manufacturing Company boasts that its AR-15 rifles are manufactured "based on the same military standards and specifications as the United States issue Colt M16 rifle and M4 carbine." *See* J.A. 1693. Bushmaster describes its Adaptive Combat Rifle as "the ultimate military combat weapons system" that is "[b]uilt specifically for law enforcement and tactical markets." *Id.* at 1697.

In short, like their fully automatic counterparts, the banned assault weapons "are firearms designed for the battlefield, for the soldier to be able to shoot a large number of rounds across a battlefield at a high rate of speed." *See* J.A. 206. Their design results in "a capability for lethality – more wounds, more serious, in more victims – far beyond that of other firearms in general, including other semiautomatic guns." *Id.* at 1121-22.

Correspondingly, the large-capacity magazines prohibited by the FSA allow a shooter to fire more than ten rounds without having to pause to reload, and thus "are particularly designed and most suitable for military and law enforcement applications." *See* J.A. 891. Such magazines are "designed to enhance" a shooter's "capacity to shoot multiple human targets very rapidly." *Id.* at 1151. Large-capacity magazines are a feature common, but not unique, to the banned assault weapons, many of which are capable of accepting magazines of thirty, fifty, or even 100 rounds.

With limited exceptions, M16s and other machineguns have been banned nationwide since 1986. *See* 18 U.S.C. § 922(o)(1) (rendering it "unlawful for any person to transfer or possess a machinegun"); 26 U.S.C. § 5845(b) (defining a "machinegun" as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger"). By that time, the private ownership of machineguns was substantially circumscribed as a result of heavy taxes and strict regulations imposed almost fifty years earlier by the National Firearms Act of

1934. *See United States v. Miller*, 307 U.S. 174 (1939) (outlining 1934 Act's requirements for transferring and registering firearms, including short-barreled shotguns and machineguns, and rejecting Second Amendment challenge thereto). There have also been various state and local prohibitions against the receipt, possession, and transfer of machineguns.

In 1994, Congress enacted a ban on certain semi-automatic military-style weapons and magazines capable of holding more than ten rounds. The federal ban applied only to assault weapons and magazines manufactured after September 13, 1994, however, and it expired a decade later on September 13, 2004. Just months before Congress passed the 1994 federal assault weapons ban, Maryland had enacted a state law prohibiting assault pistols and the transfer of magazines with a capacity in excess of twenty rounds. The same state law regulated what the FSA now identifies as assault long guns by requiring that purchasers first complete an application and undergo a background check. Maryland replaced that law with the FSA in 2013, spurred by Newtown and other mass shootings.[5]

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[5] Dr. Christopher Koper, a social scientist who has studied the effects of the 1994 federal assault weapons ban, explained in these proceedings that the federal ban had several features that may have limited its efficacy and that are not present in Maryland's FSA. One such feature was the federal ban's broader "grandfather" clause, rendering its prohibitions applicable solely to assault weapons and large-capacity magazines manufactured after the ban's effective date of September 13, 1994. In contrast, the FSA grandfathers only assault weapons owned prior to its effective date, and "does not allow the further sale, transfer, or

The State has calculated that – accepting the plaintiffs' estimate that there were at least 8 million FSA-banned assault weapons in circulation in the United States by 2013 – those weapons comprised less than 3% of the more than 300 million firearms in this country. Moreover, premised on the plaintiffs' evidence that owners of the banned assault weapons possessed an average of 3.1 of them in 2013, the State has reckoned that less than 1% of Americans owned such a weapon that year.

At the same time, according to the State's evidence, the FSA-banned assault weapons have been used disproportionately to their ownership in mass shootings and the murders of law enforcement officers. Even more frequently, such incidents have involved large-capacity magazines. 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 (as it was unknown to the researchers whether large-capacity magazines were

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receipt of those firearms." *See* J.A. 362. With respect to large-capacity magazines, or "LCMs," the FSA does not bar their transport into Maryland, but "is still more stringent than the federal ban, which not only allowed the possession of any existing LCMs, but also: (i) the importation for sale of large stocks of LCMs from other countries; and (ii) the ongoing sale, transfer, and receipt of both existing stocks of LCMs and the newly-imported LCMs." *Id.* at 363. The federal assault weapons ban, in Koper's words, "did not even preclude individuals from going to the gun store around the corner to purchase a [large-capacity magazine]." *Id.*

involved in many of the cases). 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. The banned assault weapons have also been used in other crimes, including the infamous "D.C. Sniper" shootings in 2002, in which an AR-15-type Bushmaster rifle was used to kill and critically injure more than a dozen randomly selected victims, including several in Maryland.[6]

The State has emphasized that, when the banned assault weapons and large-capacity magazines are used, more shots are fired and more fatalities and injuries result than when shooters use other firearms and magazines. The banned assault weapons further pose a heightened risk to civilians in that "rounds from assault weapons have the ability to easily penetrate most materials used in standard home construction, car doors, and similar materials." *See* J.A. 279. Criminals armed with the banned assault weapons possess a "military-style advantage" in firefights with law enforcement officers, as such weapons "allow criminals to effectively engage law enforcement officers from great distances" and "their rounds easily pass through the

[6] Tragic events involving assault weapons continue to occur. On July 7, 2016, a shooter armed with a semiautomatic assault rifle killed five law enforcement officers and injured nine others, plus two civilians, in Dallas, Texas. Just ten days later, on July 17, 2016, another shooter armed with a semiautomatic assault rifle shot six police officers in Baton Rouge, Louisiana, killing three of them.

soft body armor worn by most law enforcement officers." *See id.* at 227, 265.

For their part, large-capacity magazines enable shooters to inflict mass casualties while depriving victims and law enforcement officers of opportunities to escape or overwhelm the shooters while they reload their weapons. Even in the hands of law-abiding citizens, large-capacity magazines are particularly dangerous. The State's evidence demonstrates that, when inadequately trained civilians fire weapons equipped with large-capacity magazines, they tend to fire more rounds than necessary and thus endanger more bystanders.

The State has also underscored the lack of evidence that the banned assault weapons and large-capacity magazines are well-suited to self-defense. Neither the plaintiffs nor Maryland law enforcement officials could identify a single incident in which a Marylander has used a military-style rifle or shotgun, or needed to fire more than ten rounds, to protect herself. Although self-defense is a conceivable use of the banned assault weapons, the State's evidence reflects – consistent with the Supreme Court's *Heller* decision – that most individuals choose to keep other firearms for that purpose. *See District of Columbia v. Heller*, 554 U.S. 570, 628 (2008) (emphasizing that handguns are "overwhelmingly chosen by American society for [self-defense]"). Moreover, the State's evidence substantiates "that it is rare for a person, when using a firearm in self-defense, to fire more than ten rounds." *See* J.A. 649. Studies of "armed citizen" stories collected by the

National Rifle Association, covering 1997-2001 and 2011-2013, found that the average number of shots fired in self-defense was 2.2 and 2.1, respectively. *Id.* at 650.

In support of the FSA, the State garnered evidence showing that the prohibitions against assault weapons and large-capacity magazines will promote public safety by reducing the availability of those armaments to mass shooters and other criminals, by diminishing their especial threat to law enforcement officers, and by hindering their unintentional misuse by civilians. The State does not expect the FSA to eradicate all gun crimes and accidents, but rather to curtail those that result in more shots fired and more deaths and injuries because they are committed with military-style firearms and magazines.

The State's evidence indicates that the FSA will reduce the availability of the banned assault weapons and large-capacity magazines to criminals by "reducing their availability overall." *See* J.A. 228. That is because criminals usually obtain their firearms through straw purchases, by buying them on the secondary market, or by stealing them from law-abiding persons, and most criminals "are simply not dedicated enough to a particular type of firearm or magazine to go to great lengths to acquire something that is not readily available." *Id.* at 232.

The State has also pointed to an important lesson learned from Newtown (where nine children were able to run from a targeted classroom while the gunman

paused to change out a large-capacity thirty-round magazine), Tucson (where the shooter was finally tackled and restrained by bystanders while reloading his firearm), and Aurora (where a 100-round drum magazine was emptied without any significant break in the firing). That is, reducing the number of rounds that can be fired without reloading increases the odds that lives will be spared in a mass shooting. For example, a shooter's use of ten-round magazines – rather than those that hold thirty, fifty, or 100 rounds – would for every 100 rounds fired afford

> six to nine more chances for bystanders or law enforcement to intervene during a pause in firing, six to nine more chances for something to go wrong with a magazine during a change, six to nine more chances for the shooter to have problems quickly changing a magazine under intense pressure, and six to nine more chances for potential victims to find safety during a pause in firing.

See J.A. 266. Thus, the State has justified the FSA on the ground that limiting a shooter to a ten-round magazine could "mean the difference between life and death for many people." *Id.*

2.

For their part, the plaintiffs have purported to dispute the State's evidence equating the FSA-banned assault weapons with the M16, but have not produced evidence actually demonstrating that the banned assault weapons are less dangerous than or materially

distinguishable from military arms. Otherwise, the plaintiffs have emphasized the popularity of the banned assault weapons, particularly the AR-15, semiautomatic AK-47, and their copies. Those weapons are often referred to by the plaintiffs, and in their evidence, as "modern sporting rifles."

As previously mentioned, the plaintiffs have asserted that there were at least 8 million FSA-banned assault weapons in circulation in the United States by 2013. Rifles based on the AR-15 and AK-47 accounted for approximately 20% of firearm sales in the United States in 2012, and the banned assault weapons comprised between 18% and 30% of all regulated firearm transfers in Maryland in 2013. The plaintiffs' evidence reflects that, since it was first marketed to the public in 1963, "[t]he AR-15 has become the most popular civilian rifle design in America, and is made in many variations by many companies." *See* J.A. 2259.

The plaintiffs have also focused on the popularity of large-capacity magazines, tendering evidence that in the United States between 1990 and 2012, magazines capable of holding more than ten rounds numbered around 75 million, or 46% of all magazines owned. Most pistols are manufactured with magazines holding ten to seventeen rounds, and many popular rifles are manufactured with magazines holding twenty or thirty rounds. Firearms capable of firing more than ten rounds without reloading may have existed since the late sixteenth century, and magazines with a capacity of between ten and twenty rounds have been on the civilian market for more than a hundred years.

Individual plaintiffs Kolbe and Turner have averred that they wish to own banned assault weapons and large-capacity magazines for self-defense. The plaintiffs have more generally asserted that many owners of assault weapons cite home protection as a reason for keeping those weapons, along with other lawful purposes such as hunting and competitive marksmanship.[7] The plaintiffs regard large-capacity magazines as especially useful for self-defense, because it is difficult for a civilian to change a magazine while under the stress of defending herself and her family from an unexpected attack. Moreover, a civilian firing rounds in self-defense will frequently miss her assailant, rendering it "of paramount importance that [she] have quick and ready access to ammunition in quantities sufficient to provide a meaningful opportunity to defend herself and/or her loved ones." *See* J.A. 2123.

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[7] Prior to the en banc argument, we allowed the plaintiffs to file a supplemental appendix containing two reports published in 2015 by the National Shooting Sports Foundation (the "NSSF"), including a "Firearms Retailer Survey Report" outlining the results of an online survey of more than 500 firearms retailers across the country. Relevant to the issue of self-defense, one survey question asked: "Of your annual firearm sales [for each year from 2011 to 2014], please report the percentages you think were sold primarily for hunting, target-shooting and personal-protection purposes." *See* J.A. 3063. The respondents indicated that they "think" between 28.1% and 30.5% of "AR-style/modern sporting rifles" were sold primarily for personal protection. *Id.* The NSSF report, however, does not reveal why the respondents "think" that.

To refute the theory that the FSA will effectuate Maryland's goal of protecting its citizens and law enforcement officers, the plaintiffs have pointed to a variety of evidence. For example, the FSA does not disallow the Colt AR-15 Sporter H-BAR rifle, which the plaintiffs' evidence suggests "could be made into a compact lightweight short-barrel AR pattern rifle identical to the restricted models" while remaining "exempted from the restrictions of the law." *See* J.A. 2270-71. The plaintiffs' evidence also indicates that rounds from firearms not prohibited by the FSA are capable of penetrating building materials and soft body armor; that "[t]he banned firearms are almost never used in crimes"; that, "in 2012, there was a greater probability that a person in the United States would be killed by someone strangling them than by an assault rifle in a mass shooting"; and that "[m]ore officers are killed in car accidents than with the banned firearms." *See id.* at 2160, 2280-81, 2371-97. Additionally, the plaintiffs have emphasized that, because the FSA does not prohibit the possession of large-capacity magazines, a criminal can legally purchase those magazines in another state and return with them to Maryland.[8]

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[8] Further attacking Maryland's justification for the FSA, the plaintiffs have endeavored to show that the 1994 federal ban on assault weapons and large-capacity magazines was ineffective, and thus that the FSA will be a failure, too. In so doing, the plaintiffs rely on snippets from the studies of the State's expert, Dr. Koper. *See supra* note 5. Dr. Koper ultimately concluded, however, that – despite features of the federal ban that may have limited its efficacy (including its grandfather clause for assault weapons and large-capacity magazines manufactured prior to its effective date) – the federal ban had some success and could have had more

II.

On appeal, the plaintiffs contend that the district court erred in ruling in favor of the State on the parties' cross-motions for summary judgment. More specifically, the plaintiffs seek reversal of the adverse summary judgment award and entry of judgment in their favor. We review de novo the district court's summary judgment decision. *See Libertarian Party of Va. v. Judd*, 718 F.3d 308, 312 (4th Cir. 2013). With respect to each side's motion, "we are required to view the facts and all justifiable inferences arising therefrom in the light most favorable to the nonmoving party, in order to determine whether 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* at 312-13 (quoting Fed. R. Civ. P. 56(a)).

III.

We begin with the plaintiffs' claims that the FSA's assault weapons ban and its prohibition against large-capacity magazines contravene the Second Amendment. According to the plaintiffs, they are entitled to summary judgment on the simple premise that the banned assault weapons and large-capacity magazines are protected by the Second Amendment and, thus, the

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had it remained in effect. Additionally, Dr. Koper opined that Maryland's stricter FSA has "the potential to prevent and limit shooting injuries in the state over the long-run" and thereby "advance Maryland's interest in reducing the harms caused by gun violence." *See* J.A. 364.

FSA is unconstitutional per se. We conclude, to the contrary, that the banned assault weapons and large-capacity magazines are *not* constitutionally protected arms. Even assuming the Second Amendment reaches those weapons and magazines, however, the FSA is subject to – and readily survives – the intermediate scrutiny standard of review. Consequently, as to the Second Amendment claims, we must affirm the district court's award of summary judgment to the State.

A.

The Second Amendment provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." *See* U.S. Const. amend. II. In *District of Columbia v. Heller*, the Supreme Court recognized that the Second Amendment is divided into a prefatory clause ("A well regulated Militia, being necessary to the security of a free State, . . . ") and an operative clause (" . . . the right of the people to keep and bear Arms, shall not be infringed."). *See* 554 U.S. 570, 577 (2008). The *Heller* majority rejected the proposition that, because of its prefatory clause, the Second Amendment "protects only the right to possess and carry a firearm in connection with militia service." *Id.* Rather, the Court determined that, by its operative clause, the Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation." *Id.* at 592. The Court also explained that the operative clause "fits perfectly" with the prefatory clause, in that creating the individual right to

keep and bear arms served to preserve the militia that consisted of self-armed citizens at the time of the Second Amendment's ratification. *Id.* at 598.

The Second Amendment's "core protection," the *Heller* Court announced, is "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *See* 554 U.S. at 634-35. Concomitantly, the Court emphasized that "the right secured by the Second Amendment is not unlimited," in that it is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. The Court cautioned, for example, that it was not "cast[ing] doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or 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.*

Of utmost significance here, the *Heller* Court recognized that "another important limitation on the right to keep and carry arms" is that the right "extends only to certain types of weapons." *See* 554 U.S. at 623, 627 (discussing *United States v. Miller*, 307 U.S. 174 (1939)). The Court explained that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes," including "short-barreled shotguns" and "machineguns." *Id.* at 624-25. The Court elsewhere described "the sorts of weapons protected" as being "those in common use at the time," and observed that such "limitation is fairly supported by the historical tradition of

prohibiting the carrying of dangerous and unusual weapons." *Id.* at 627 (internal quotation marks omitted) (citing, inter alia, 4 Blackstone 148-49 (1769)).[9]

Continuing on, the *Heller* Court specified that "weapons that are most useful in military service – M-16 rifles and the like – may be banned" without infringement upon the Second Amendment right. *See* 554 U.S. at 627. The Court recognized that the lack of constitutional protection for today's military weapons might inspire the argument that "the Second Amendment right is completely detached from the prefatory clause." *Id.* The Court explained, however, that the fit between the prefatory and operative clauses is properly measured "at the time of the Second Amendment's ratification," when "the conception of the militia . . . 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." *Id.* The fit is not measured today, when a militia may "require sophisticated arms that are highly unusual in society at large," including arms that "could be useful against modern-day bombers and tanks." *Id.* It was therefore immaterial to the Court's interpretation of the Second Amendment that "modern developments have limited the degree of fit between the prefatory clause and the protected right." *Id.* at 627-28. And thus, there was

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[9] Although the *Heller* Court invoked Blackstone for the proposition that "dangerous and unusual" weapons have historically been prohibited, Blackstone referred to the crime of carrying "dangerous *or* unusual weapons." *See* 4 Blackstone 148-49 (1769) (emphasis added).

simply no inconsistency between the Court's interpretation of the Second Amendment and its pronouncement that some of today's weapons lack constitutional protection precisely because they "are most useful in military service."

Deciding the particular Second Amendment issues before it, the *Heller* Court deemed the District of Columbia's prohibition against the possession of handguns in the home to be unconstitutional. *See* 554 U.S. at 628-29. Without identifying and utilizing a particular standard for its review, the Court concluded that, "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to keep and use for protection of one's home and family would fail constitutional muster." *Id.* (footnote and internal quotation marks omitted).

The *Heller* Court clearly was concerned that the District of Columbia's ban extended "to the home, where the need for defense of self, family, and property is most acute." *See* 554 U.S. at 628. Significantly, however, the Court also was troubled by the particular type of weapon prohibited – handguns. Indeed, the Court repeatedly made comments underscoring the status of handguns as "the most preferred firearm in the nation to keep and use for protection of one's home and family," including the following:

- "The handgun ban amounts to a prohibition of an entire class of arms that is overwhelmingly chosen by American society for [the] lawful purpose [of self-defense]";
- "It is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed. It is enough to note . . . that the American people have considered the handgun to be the quintessential self-defense weapon"; and,
- "Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid."

See id. at 628-29 (internal quotation marks omitted).

As explained therein, the *Heller* decision was not intended "to clarify the entire field" of Second Amendment jurisprudence. *See* 554 U.S. at 635. Since then, the Supreme Court decided in *McDonald v. City of Chicago* "that the Second Amendment right is fully applicable to the States," but did not otherwise amplify *Heller*'s analysis. *See* 561 U.S. 742, 750 (2010). Just recently, in *Caetano v. Massachusetts*, the Court reiterated two points made by *Heller*: first, "that the Second Amendment 'extends . . . to . . . arms . . . that were not in existence at the time of the founding' "; and, second, that there is no merit to "the proposition 'that only those weapons useful in warfare are protected.' " *See*

Caetano, 136 S. Ct. 1027, 1028 (2016) (per curiam) (alterations in original) (quoting *Heller*, 554 U.S. at 582, 624-25) (remanding for further consideration of whether Second Amendment protects stun guns).

The lower courts have grappled with *Heller* in a variety of Second Amendment cases. Like most of our sister courts of appeals, we have concluded that "a two-part approach to Second Amendment claims seems appropriate under *Heller*." *See United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (citing *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010)); *see also N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015); *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs*, 788 F.3d 1318, 1322 (11th Cir. 2015); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011) ("*Heller II*"); *Ezell v. City of Chicago*, 651 F.3d 684, 703-04 (7th Cir. 2011); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010).

Pursuant to that two-part approach, we first ask "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *See Chester*, 628 F.3d at 680 (internal quotation marks omitted). If the answer is no, "then the challenged law is valid." *Id.* If, however, the challenged law imposes a burden on conduct protected by the Second Amendment, we next "apply[ ] an appropriate form of means-end scrutiny." *Id.* Because "*Heller*

left open the level of scrutiny applicable to review a law that burdens conduct protected under the Second Amendment, other than to indicate that rational-basis review would not apply in this context," we must "select between strict scrutiny and intermediate scrutiny." *Id.* at 682. In pinpointing the applicable standard of review, we may "look[ ] to the First Amendment as a guide." *Id.* With respect to a claim made pursuant to the First or the Second Amendment, "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." *Id.*

To satisfy strict scrutiny, the government must prove that the challenged law is "narrowly tailored to achieve a compelling governmental interest." *See Abrams v. Johnson*, 521 U.S. 74, 82 (1997). Strict scrutiny is thereby "the most demanding test known to constitutional law." *See City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). The less onerous standard of intermediate scrutiny requires the government to show that the challenged law "is reasonably adapted to a substantial governmental interest." *See United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011); *see also Chester*, 628 F.3d at 683 ("[T]he government must demonstrate under the intermediate scrutiny standard that there is a reasonable fit between the challenged regulation and a substantial governmental objective." (internal quotation marks omitted)). Intermediate scrutiny does not demand that the challenged law "be the least intrusive means of achieving the relevant government objective, or that there be no burden

whatsoever on the individual right in question." *See Masciandaro*, 638 F.3d at 474. In other words, there must be "a fit that is 'reasonable, not perfect.'" *See Woollard v. Gallagher*, 712 F.3d 865, 878 (4th Cir. 2013) (quoting *United States v. Carter*, 669 F.3d 411, 417 (4th Cir. 2012)).

Until this Second Amendment challenge to the FSA's bans on assault weapons and large-capacity magazines, we have not had occasion to identify the standard of review applicable to a law that bars law-abiding citizens from possessing arms in their homes. In *Masciandaro*, we "assume[d] that any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny." *See* 638 F.3d at 470. Thereafter, in *Woollard*, we noted that *Masciandaro* had "'assume[d]'" any inside-the-home regulation would be subject to strict scrutiny, and we described the plaintiff's related – and unsuccessful – contention that "the right to arm oneself in public [is] on equal footing with the right to arm oneself at home, necessitating that we apply strict scrutiny in our review of [an outside-the-home regulation]." *See Woollard*, 712 F.3d at 876, 878 (4th Cir. 2013) (quoting *Masciandaro*, 638 F.3d at 470). Notably, however, neither *Masciandaro* nor *Woollard* purported to, or had reason to, decide whether strict scrutiny always, or even ever, applies to laws burdening the right of self-defense in the home. *See also*, *e.g.*, *United States v. Hosford*, 843 F.3d 161, 168 (4th Cir. 2016) (declining to apply strict scrutiny to a firearms prohibition that "addresses only conduct

occurring outside the home," without deciding if or when strict scrutiny applies to a law reaching inside the home).

B.

Guided by our two-part approach to Second Amendment claims, but lacking precedent of this Court or the Supreme Court examining the constitutionality of a law substantively similar to the FSA, the district court began its analysis by questioning whether the banned assault weapons and large-capacity magazines are protected by the Second Amendment. Addressing assault weapons in particular, the Opinion disclosed the court's "inclin[ation] to find the weapons fall outside Second Amendment protection as dangerous and unusual," based on "serious[] doubts that [they] are commonly possessed for lawful purposes, particularly self-defense in the home." *See Kolbe v. O'Malley*, 42 F. Supp. 3d 768, 788 (D. Md. 2014). The Opinion further observed that, "[g]iven that assault rifles like the AR-15 are essentially the functional equivalent of M-16s – and arguably more effective – the [reasoning of *Heller* that M-16s could be banned as dangerous and unusual] would seem to apply here." *Id.* at 789 n.29 (citing *Heller*, 554 U.S. at 627).

Ultimately, however, the district court elected to assume that the banned assault weapons and large-capacity magazines are constitutionally protected, and thus that the FSA "places some burden on the Second Amendment right." *See Kolbe*, 42 F. Supp. 3d at 789.

The Opinion then identified intermediate scrutiny as the appropriate standard of review, because the FSA "does not seriously impact a person's ability to defend himself in the home." *Id.* at 790. In so ruling, the court recognized that the FSA "does not ban the quintessential weapon – the handgun – used for self-defense in the home" or "prevent an individual from keeping a suitable weapon for protection in the home." *Id.* at 790. Finally, applying the intermediate scrutiny standard, the Opinion recognized that the State of Maryland possesses an interest that is not just substantial – but compelling – "in providing for public safety and preventing crime." *Id.* at 792. A reasonable fit between that interest and the FSA was shown, according to the Opinion, by evidence of the heightened risks that the banned assault weapons and large-capacity magazines pose to civilians and law enforcement officers. *See id.* at 793-97. Accordingly, the district court concluded that the FSA "does not violate the Second Amendment." *Id.* at 797.

In its analysis, the district court relied in part on the 2011 decision of the District of Columbia Circuit in *Heller II*. The *Heller II* court assumed that the District's prohibitions against military-style assault rifles and large-capacity magazines impinge upon the Second Amendment right and then upheld the bans under the intermediate scrutiny standard. *See* 670 F.3d at 1261-64. After the district court issued its Opinion, statewide bans on the AR-15 and semiautomatic AK-47, other assault weapons, and large-capacity magazines in New York and Connecticut were similarly

sustained by the Second Circuit's 2015 decision in *N.Y. State Rifle & Pistol Ass'n*. There, the court of appeals proceeded "on the assumption that [the challenged] laws ban weapons protected by the Second Amendment"; determined "that intermediate, rather than strict, scrutiny is appropriate"; and concluded "that New York and Connecticut have adequately established a substantial relationship between the prohibition of both semiautomatic assault weapons and large-capacity magazines and the important – indeed, compelling – state interest in controlling crime." *See N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 257, 260, 264. The Supreme Court recently denied the Connecticut plaintiffs' petition for a writ of certiorari in that matter. *See Shew v. Malloy*, 136 S. Ct. 2486 (2016).

In the time period between *Heller II* and *N.Y. State Rifle & Pistol Ass'n*, two other courts of appeals refused to enjoin or strike down bans on assault weapons or large-capacity magazines. Affirming the denial of a preliminary injunction in *Fyock v. City of Sunnyvale*, the Ninth Circuit concluded that the district court neither "clearly err[ed] in finding, based on the record before it, that a regulation restricting possession of [large-capacity magazines] burdens conduct falling within the scope of the Second Amendment," nor "abused its discretion by applying intermediate scrutiny or by finding that [the regulation] survived intermediate scrutiny." *See* 779 F.3d 991, 998-99 (9th Cir. 2015). Thereafter, in *Friedman v. City of Highland Park*, the Seventh Circuit upheld prohibitions against assault weapons and large-capacity magazines, albeit

without applying either intermediate or strict scrutiny. Under *Friedman*'s reasoning, "instead of trying to decide what 'level' of scrutiny applies, and how it works," it is more suitable "to ask whether a regulation bans weapons that were common at the time of ratification or those that have some reasonable relationship to the preservation or efficiency of a well regulated militia, and whether law-abiding citizens retain adequate means of self-defense." *See* 784 F.3d 406, 410 (7th Cir.) (internal quotation marks omitted), *cert. denied*, 136 S. Ct. 447 (2015).

C.

We could resolve the Second Amendment aspects of this appeal by adopting the district court's sound analysis and thereby follow the lead of our distinguished colleagues on the Second and District of Columbia Circuits. That is, we could simply assume that the assault weapons and large-capacity magazines outlawed in Maryland are protected by the Second Amendment and then deem the FSA constitutional under the intermediate scrutiny standard of review. It is more appropriate, however, in light of the dissent's view that such constitutional protection exists, that we first acknowledge what the Supreme Court's *Heller* decision makes clear: Because the banned assault weapons and large-capacity magazines are "like" "M-16 rifles" – "weapons that are most useful in military service" – they are among those arms that the Second Amendment does not shield. *See Heller*, 554 U.S. at 627

(recognizing that "M-16 rifles and the like" are not constitutionally protected).

1.

On the issue of whether the banned assault weapons and large-capacity magazines are protected by the Second Amendment, the *Heller* decision raises various questions. Those include: How many assault weapons and large-capacity magazines must there be to consider them "in common use at the time"? In resolving that issue, should we focus on how many assault weapons and large-capacity magazines are owned; or on how many owners there are; or on how many of the weapons and magazines are merely in circulation? Do we count the weapons and magazines in Maryland only, or in all of the United States? Is being "in common use at the time" coextensive with being "typically possessed by law-abiding citizens for lawful purposes"? Must the assault weapons and large-capacity magazines be possessed for any "lawful purpose[]" or, more particularly and importantly, the "protection of one's home and family"? Is not being "in common use at the time" the same as being "dangerous and unusual"? Is the standard "dangerous *and* unusual," or is it actually "dangerous *or* unusual"? *See Heller*, 554 U.S. at 625, 627, 629; *see also N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 254-57; *Friedman*, 784 F.3d at 408-10; *Fyock*, 779 F.3d at 997-98; *Heller II*, 670 F.3d at 1260-61.

Thankfully, however, we need not answer all those difficult questions today, because *Heller* also presents

us with a dispositive and relatively easy inquiry: Are the banned assault weapons and large-capacity magazines "like" "M-16 rifles," i.e., "weapons that are most useful in military service," and thus outside the ambit of the Second Amendment? *See* 554 U.S. at 627. The answer to that dispositive and relatively easy inquiry is plainly in the affirmative.[10]

Simply put, AR-15-type rifles are "like" M16 rifles under any standard definition of that term. *See, e.g.*, *Webster's New International Dictionary* 1431 (2d ed.

[10] Our ruling on Second Amendment protection is in line with the State's argument that – because the banned assault weapons and large-capacity magazines are "like" "M-16 rifles" and "most useful in military service" – they are "dangerous and unusual weapons" that are beyond the Second Amendment's reach. *See Heller*, 554 U.S. at 627; *see also* Br. of Appellees at 2-4, 16-23; Defs.' Mem. in Supp. of Summ. J. at 3-10, 32-37, *Kolbe v. O'Malley*, No. 1:13-cv-02841 (D. Md. Feb. 14, 2014), ECF No. 44. We find it unnecessary under *Heller*, however, to include the term "dangerous and unusual weapons" in the relevant inquiry. That is because the *Heller* Court plainly pronounced that "weapons that are most useful in military service – M-16 rifles and the like – may be banned" without infringement upon the Second Amendment right. *See* 554 U.S. at 627. Meanwhile, although the *Heller* Court suggested that those particular weapons are "dangerous and unusual," the Court did not elaborate on what being "dangerous and unusual" entails. *Id.* In these circumstances, we deem it prudent and appropriate to simply rely on the Court's clear pronouncement that there is no constitutional protection for weapons that are "like" "M-16 rifles" and "most useful in military service," without needlessly endeavoring to define the parameters of "dangerous and unusual weapons." Questions about that term and the phrases "in common use at the time" and "typically possessed by law-abiding citizens for lawful purposes" are best left for cases involving other sorts of weapons, such as the stun guns at issue in *Caetano*.

1948) (defining "like" as "[h]aving the same, or nearly the same, appearance, qualities, or characteristics; similar"); *The New Oxford American Dictionary* 982 (2d ed. 2005) (defining "like" as "having the same characteristics or qualities as; similar to"). Although an M16 rifle is capable of fully automatic fire and the AR-15 is limited to semiautomatic fire, their rates of fire (two seconds and as little as five seconds, respectively, to empty a thirty-round magazine) are nearly identical. Moreover, in many situations, the semiautomatic fire of an AR-15 is more accurate and lethal than the automatic fire of an M16. Otherwise, the AR-15 shares the military features – the very qualities and characteristics – that make the M16 a devastating and lethal weapon of war.

In any event, we need not rely solely on dictionary definitions, because *Heller* itself expounds on what it means to be "like" the M16. As the plaintiffs would have it, *Heller* drew a "bright line" between fully automatic and semiautomatic firearms, and thus the AR-15 cannot be considered "like" the M16 for purposes of the Second Amendment. That contention is baseless, however, because *Heller* did not restrict the meaning of "M-16 rifles and the like" to only fully automatic weapons. Rather, *Heller* described "M-16 rifles and the like" more broadly, specifically identifying them as being those "weapons that are most useful in military service." Therefore, we identify the line that *Heller* drew as not being between fully automatic and semiautomatic firearms, but between weapons that

are most useful in military service and those that are not.[11]

Whatever their other potential uses – including self-defense – the AR-15, other assault weapons, and large-capacity magazines prohibited by the FSA are unquestionably most useful in military service. That is, the banned assault weapons are designed to "kill[] or disabl[e] the enemy" on the battlefield. *See* J.A. 735. The very features that qualify a firearm as a banned assault weapon – such as flash suppressors, barrel shrouds, folding and telescoping stocks, pistol grips, grenade launchers, night sights, and the ability to accept bayonets and large-capacity magazines – "serve specific, combat-functional ends." *See id.* at 1120. And, "[t]he net effect of these military combat features is a capability for lethality – more wounds, more serious, in more victims – far beyond that of other firearms in

[11] As further support for the Supreme Court's purported line between fully automatic and semiautomatic firearms, the plaintiffs rely on *Staples v. United States*, 511 U.S. 600 (1994). There, the Court invalidated Staples's conviction for failing to register a machinegun, because the government had not been required to prove that Staples knew his AR-15 had been modified to be capable of fully automatic fire. In explaining its decision, the Court noted that AR-15s "traditionally have been widely accepted as lawful possessions" in this country. *See Staples*, 511 U.S. at 612. That statement might be pertinent to this dispute if the State were arguing that the FSA is a "longstanding prohibition[]" against assault weapons and thus presumptively valid. *See Heller*, 554 U.S. at 626 (cautioning that "nothing in our opinion should be taken to cast doubt on [certain] longstanding prohibitions"). But the issue actually before us is one that the *Staples* Court did not address: Whether, because of its likeness to the M16 rifle, the AR-15 lacks Second Amendment protection.

general, including other semiautomatic guns." *Id.* at 1121-22.

Likewise, the banned large-capacity magazines "are particularly designed and most suitable for military and law enforcement applications." *See* J.A. 891 (noting that large-capacity magazines are meant to "provide[] soldiers with a large ammunition supply and the ability to reload rapidly"). Large-capacity magazines enable a shooter to hit "multiple human targets very rapidly"; "contribute to the unique function of any assault weapon to deliver extraordinary firepower"; and are a "uniquely military feature[]" of both the banned assault weapons and other firearms to which they may be attached. *See id.* at 1151.

Because the banned assault weapons and large-capacity magazines are clearly most useful in military service, we are compelled by *Heller* to recognize that those weapons and magazines are not constitutionally protected. On that basis, we affirm the district court's award of summary judgment in favor of the State with respect to the plaintiffs' Second Amendment claims.[12]

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[12] In light of our ruling today, we need not reach the State's alternative contention that large-capacity magazines lack constitutional protection because they are not "arms" within the meaning of the Second Amendment. *See Heller*, 554 U.S. at 582 (observing that the Second Amendment extends to "bearable arms"); Br. of Appellees at 26 ("A large-capacity detachable magazine is not an 'arm'. . . . Indeed, large-capacity magazines are not even ammunition, but instead are devices used for feeding ammunition into firearms that can easily be switched out for other devices that are of lower capacity. . . .").

2.

In the alternative, assuming that the assault weapons and large-capacity magazines prohibited by the FSA are somehow entitled to Second Amendment protection, we conclude that the district court properly upheld the FSA as constitutional under the intermediate scrutiny standard of review.

a.

First of all, intermediate scrutiny is the appropriate standard because the FSA does not severely burden the core protection of the Second Amendment, i.e., the right of law-abiding, responsible citizens to use arms for self-defense in the home. *See N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 260 ("Heightened scrutiny need not . . . be akin to strict scrutiny when a law burdens the Second Amendment – particularly when that burden does not constrain the Amendment's core area of protection." (internal quotation marks omitted)); *Chester*, 628 F.3d at 682 ("A severe burden on the core Second Amendment right of armed self-defense should require strong justification. But less severe burdens on the right . . . may be more easily justified." (quoting *United States v. Skoien*, 587 F.3d 803, 813-14 (7th Cir. 2009), *rev'd en banc*, 614 F.3d 638 (7th Cir. 2010))).

The FSA bans only certain military-style weapons and detachable magazines, leaving citizens free to protect themselves with a plethora of other firearms and ammunition. Those include magazines holding ten or fewer rounds, nonautomatic and some semiautomatic

long guns, and – most importantly – handguns. The handgun, of course, is "the quintessential self-defense weapon." *See Heller*, 554 U.S. at 629. In contrast, there is scant evidence in the record before us that the FSA-banned assault weapons and large-capacity magazines are possessed, or even suitable, for self-protection. *See Kolbe*, 42 F. Supp. 3d at 791 (observing that, although the FSA prohibits "a class of weapons that the plaintiffs desire to use for self-defense in the home, there is no evidence demonstrating their removal will significantly impact the core protection of the Second Amendment" (emphasis and citation omitted)).

Notably, the plaintiffs invoke the district court's passing reference to "a class of weapons" in an effort to frame the AR-15 and other FSA-banned assault weapons as a "class" entitled to the same treatment afforded handguns in *Heller*. *See Heller*, 554 U.S. at 628 (deeming the District of Columbia's handgun ban to be unconstitutional because it prohibited "an entire class of arms that is overwhelmingly chosen by American society for [self-defense]" (internal quotation marks omitted)). The initial weakness in the plaintiffs' theory is that the banned assault weapons cannot fairly be said to be a "class" like that encompassing all handguns, in that the banned assault weapons are just some of the semiautomatic rifles and shotguns in existence. *Accord N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 260 (explaining that "New York and Connecticut have not banned an entire class of arms," but rather "only a limited subset of semiautomatic firearms, which contain one or more enumerated military-style features").

The more critical flaw in the plaintiffs' theory is that it ignores the status of handguns as not merely "an entire class of arms," but as "an entire class of arms *that is overwhelmingly chosen by American society for [self-defense]*." *See Heller*, 554 U.S. at 628 (emphasis added) (internal quotation marks omitted). As the Third Circuit recently explained, "*Heller* gives special consideration to the District of Columbia's categorical ban on handguns because they 'are the most popular weapon chosen by Americans for self-defense in the home.' This does not mean that a categorical ban on any particular type of bearable arm is unconstitutional." *See United States v. One (1) Palmetto State Armory PA-15 Machinegun Receiver/Frame, Unknown Caliber Serial No.: LW001804*, 822 F.3d 136, 144 (3d Cir. 2016) (quoting *Heller*, 554 U.S. at 629).

At bottom, the FSA's prohibitions against assault weapons and large-capacity magazines simply do "not effectively disarm individuals or substantially affect their ability to defend themselves." *See N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 260 (quoting *Heller II*, 670 F.3d at 1262). Nor can the FSA be compared to the handgun ban struck down as unconstitutional in *Heller*. Hence, assuming the Second Amendment protects the FSA-banned assault weapons and large-capacity magazines, the FSA is subject to the intermediate scrutiny standard of review.

b.

Turning to the application of intermediate scrutiny, the FSA survives such review because its prohibitions against assault weapons and large-capacity magazines are – as they must be – "reasonably adapted to a substantial governmental interest." *See Masciandaro*, 638 F.3d at 471. To be sure, Maryland's interest in the protection of its citizenry and the public safety is not only substantial, but compelling. *See id.* at 473 (noting that, "[a]lthough the government's interest need not be 'compelling' under intermediate scrutiny, cases have sometimes described the government's interest in public safety in that fashion" (citing cases)).

The plaintiffs have acknowledged that Maryland has a compelling interest in protecting the public, but argue that such purpose cannot be advanced by the FSA. In support, the plaintiffs have pointed to evidence that non-banned firearms have some of the same attributes as the FSA-banned assault weapons, including the capability to penetrate building materials and soft body armor; that the banned assault weapons are used in few crimes, especially compared to handguns; and that the FSA will not prevent criminals from obtaining the banned assault weapons and large-capacity magazines from other states.[13]

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[13] The plaintiffs also assert that the purported failure of the 1994 federal assault weapons ban demonstrates that the FSA cannot advance Maryland's interest in public safety. As previously explained, *see supra* note 8, the premise of the plaintiffs' assertion – that the federal ban was wholly ineffective – is not supported by

For its part, the State contends that there is a reasonable fit between the FSA and Maryland's interest in public safety. The State emphasizes the military-style features of the banned assault weapons and large-capacity magazines that render them particularly attractive to mass shooters and other criminals, including those targeting police. The same military-style features pose heightened risks to innocent civilians and law enforcement officers – certainly because of the capability to penetrate building materials and soft body armor, but also because of an amalgam of other capabilities that allow a shooter to cause mass devastation in a very short amount of time.

Upholding the prohibitions against assault weapons and large-capacity magazines in New York and Connecticut, the Second Circuit summarized that,

> [a]t least since the enactment of the federal assault-weapons ban, semiautomatic assault weapons have been understood to pose unusual risks. When used, these weapons tend to result in more numerous wounds, more serious wounds, and more victims. These weapons are disproportionately used in crime, and particularly in criminal mass shootings like the attack in Newtown. They are also disproportionately used to kill law enforcement officers.

See N.Y. State Rifle & Pistol Ass'n, 804 F.3d at 262 (footnotes omitted); *see also id.* at 263 ("The record

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the record. Moreover, the plaintiffs ignore differences between the federal ban and the FSA that strengthen the potential efficacy of the FSA's prohibitions.

evidence suggests that large-capacity magazines may present even greater dangers to crime and violence than assault weapons alone, in part because they are more prevalent and can be and are used in both assault weapons and non-assault weapons." (footnote, alteration, and internal quotation marks omitted)).

Although the plaintiffs fault the FSA for not targeting the firearms most used in crime and for not thereby promising to reduce gun crimes in Maryland overall, that is not the FSA's purpose. Rather, as the State has described it, the primary goal of the FSA "is to reduce the availability of assault long guns and large-capacity magazines so that when a criminal acts, he does so with a less dangerous weapon and less severe consequences." *See* Br. of Appellees 42. Another objective is to prevent the unintentional misuse of assault weapons and large-capacity magazines by otherwise law-abiding citizens. Maryland relied on evidence that, by reducing the availability of such weapons and magazines overall, the FSA will curtail their availability to criminals and lessen their use in mass shootings, other crimes, and firearms accidents.

The judgment made by the General Assembly of Maryland in enacting the FSA is precisely the type of judgment that legislatures are allowed to make without second-guessing by a court. That is, "[i]t is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments." *See Woollard*, 712 F.3d at 881 (quoting *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 99 (2d Cir. 2012)). And, "we must 'accord substantial deference to the predictive judgments of [the

legislature].'" *See Satellite Broad. & Commc'ns Ass'n v. FCC*, 275 F.3d 337, 356 (4th Cir. 2001) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994) ("*Turner I*")). Our obligation is simply "to assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence." *See Turner I*, 512 U.S. at 666; *accord Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) ("*Turner II*").[14]

Being satisfied that there is substantial evidence indicating that the FSA's prohibitions against assault weapons and large-capacity magazines will advance Maryland's goals, we conclude that the FSA survives intermediate scrutiny. Simply put, the State has shown all that is required: a reasonable, if not perfect, fit between the FSA and Maryland's interest in protecting public safety. That is our alternative basis for affirming the district court's award of summary judgment in favor of the State with respect to the plaintiffs' Second Amendment claims.

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[14] The plaintiffs contend that, under *Turner I*, *Turner II*, and subsequent decisions of the courts of appeals, the evidence on which the General Assembly of Maryland relied at the time of the FSA's enactment cannot be deemed "substantial" because the legislative record was too sparse and the State only later amassed evidence for this litigation. We disagree on the grounds that there was ample evidence in the legislative record, and that, in any event, it was appropriate for the State to supplement that evidence in these proceedings. *See, e.g.*, *Satellite Broad. & Commc'ns Ass'n*, 275 F.3d at 357 ("We may . . . look to evidence outside the legislative record in order to confirm the reasonableness of [the legislature's] predictions.").

D.

We are confident that our approach here is entirely faithful to the *Heller* decision and appropriately protective of the core Second Amendment right. In contrast, our dissenting colleagues would expand that constitutional protection to even exceptionally lethal weapons of war and then decree that strict scrutiny is applicable to any prohibition against the possession of those or other protected weapons in the home. At bottom, the dissent concludes that the so-called popularity of the banned assault weapons – which were owned by less than 1% of Americans as recently as 2013 – inhibits any efforts by the other 99% to stop those weapons from being used again and again to perpetrate mass slaughters. We simply cannot agree.

1.

To start with, the dissent would extend Second Amendment protection to each and every weapon deemed sufficiently popular – no matter how violent or dangerous that weapon is. *See post* at 89-107 (Traxler, J., dissenting). Therefore, it is somehow of immense significance to the dissent that, "in 2012, the number of AR- and AK- style weapons manufactured and imported into the United States was more than double the number of the most commonly sold vehicle in the U.S., the Ford F-150." *Id.* at 92 (internal quotation marks omitted). And, it is entirely an irrelevance if "some court concludes [an AR-15 or other banned

weapon] has militarily useful features or is too dangerous for civilians to possess." *Id.* at 102.

Under the dissent's popularity test, whether an arm is constitutionally protected depends not on the extent of its dangerousness, but on how widely it is circulated to law-abiding citizens by the time a bar on its private possession has been enacted and challenged. Consider, for example, short-barreled shotguns and machineguns. But for the statutes that have long circumscribed their possession, they too could be sufficiently popular to find safe haven in the Second Amendment. Consider further a state-of-the-art and extraordinarily lethal new weapon. That new weapon would need only be flooded on the market prior to any governmental prohibition in order to ensure it constitutional protection.

As the dissent points out, the same concerns about the popularity test were raised by Justice Breyer in his four-justice *Heller* dissent. *See post* at 91 (citing *Heller*, 554 U.S. at 720-21 (Breyer, J., dissenting)). In our dissenting colleagues' view, "the *Heller* majority was obviously unmoved by [Justice Breyer's dissent]," thus indicating that *Heller* adopted the popularity test. *Id.* Actually, however, Justice Breyer simply expressed that it was not "at all clear to [him] how the majority decides *which* loaded 'arms' a homeowner may keep," and then he explained why popularity is not a

standard that makes sense. *See Heller*, 554 U.S. at 720-21 (Breyer, J., dissenting).[15]

Meanwhile, the *Heller* majority said nothing to confirm that it was sponsoring the popularity test. Nevertheless, our dissenting colleagues also claim support for the popularity test from the recent two-justice concurring opinion in *Caetano*, which propounded that, under *Heller*, "the relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes." *See Caetano*, 136 S. Ct. at 1031 (Alito, J., concurring in the judgment). Of course, that reading of *Heller* failed to garner a Court majority in *Caetano*.

We reject the interpretation of *Heller* embraced by our dissenting colleagues because it is incompatible with *Heller*'s clear and dispositive pronouncement: There is no Second Amendment protection for "M-16 rifles and the like," i.e., "weapons that are most useful in military service." *See* 554 U.S. at 627. It would be incongruous to say that *Heller* makes an exception for such weapons if they are sufficiently popular. That is,

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[15] Justice Breyer's dissent explained that, under the popularity test, "the majority determines what regulations are permissible by looking to see what existing regulations permit," although "[t]here is no basis for believing that the Framers intended such circular reasoning." *See Heller*, 554 U.S. at 721 (Breyer, J., dissenting). The popularity test also has been characterized as "circular" by the Seventh Circuit, which concluded that "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." *See Friedman*, 784 F.3d at 409.

although we do not endeavor today to resolve the difficult questions raised by *Heller* concerning the interplay of "in common use at the time," "typically possessed by law-abiding citizens for lawful purposes," and "dangerous and unusual," *see id.* at 625, 627, we are entirely convinced that the correct answers to such inquiries cannot and do not culminate in the dissent's popularity test.[16]

In seeking to impugn our ruling on Second Amendment protection, the dissent accuses the en banc majority of a laundry list of misfeasance. That list includes improperly conjuring up "a heretofore unknown 'test' " of "whether the firearm in question is 'most useful in military service' "; flouting "basic fairness" by neither affording an opportunity to the parties (particularly the plaintiffs) "to squarely meet the issue" nor remanding for the district court to address the issue in the first instance; employing our own "military opinion" to conclude that the assault weapons and large-capacity magazines prohibited by Maryland's FSA are not constitutionally protected; and "abandon[ing] the

[16] We must also reject the dissent's theory that, consistent with the popularity test, the *Heller* Court could categorically exclude "weapons that are most useful in military service" from Second Amendment protection, because no such weapon is typically possessed by law-abiding citizens today. *See post* at 98-99. The dissent specifically identifies "Gatling guns, mortars, bazookas, etc." and asserts that "no one could claim these items were ever commonly possessed for Second Amendment purposes." *Id.* at 99. But the dissent's list of militarily useful weapons makes a critical omission: the very assault weapons and large-capacity magazines that the dissent insists satisfy the popularity test.

summary judgment standard and reach[ing] a conclusion based on facts viewed in the light most favorable to the State." *See post* at 96-97 & nn.4-5.

With all respect, those accusations are entirely unfounded. Although our ruling on Second Amendment protection may seem novel in some quarters, it is solidly predicated on the plain language of *Heller* and was raised and argued by the State in both the district court proceedings and this appeal. *See supra note* 10. Specifically, the State has consistently asserted that – because the banned assault weapons and large-capacity magazines are "like" "M-16 rifles" and "most useful in military service" – they are "dangerous and unusual weapons" beyond the reach of the Second Amendment. *See Heller*, 554 U.S. at 627; *see also* Br. of Appellees at 2-4, 16-23; Defs.' Mem. in Supp. of Summ. J. at 3-10, 32-37, *Kolbe v. O'Malley*, No. 1:13-cv-02841 (D. Md. Feb. 14, 2014), ECF No. 44. That very argument was acknowledged and discussed both in the district court's Opinion and in the dissent to our panel majority's now-vacated Second Amendment decision. *See Kolbe v. Hogan*, 813 F.3d 160, 194, 196 (4th Cir. 2016) (King, J., dissenting in part and concurring in the judgment in part) (expressing a strong inclination to "proclaim that the Second Amendment is not implicated by the FSA," in that there is no "reasonable basis for saying that, although the M16 is a dangerous and unusual weapon, the AR-15 and similar arms are not"); *id.* at 195 n.2 (recognizing that large-capacity magazines also "could be deemed dangerous and unusual, in view of evidence that, inter alia, they are particularly designed and

most suitable for military and law enforcement applications" (internal quotation marks omitted)); *Kolbe*, 42 F. Supp. 3d at 789 n.29 (observing that, "[g]iven that assault rifles like the AR-15 are essentially the functional equivalent of M-16s – and arguably more effective – the [reasoning of *Heller* that M-16s could be banned as dangerous and unusual] would seem to apply here" (citing *Heller*, 554 U.S. at 627)).

In our analysis, we simply de-emphasize the term "dangerous and unusual," more directly concluding under *Heller* that, because the banned assault weapons and large-capacity magazines are "like" "M-16 rifles" and "most useful in military service," they are beyond the reach of the Second Amendment. Consequently, the problem for the plaintiffs is not that they have been deprived of an ample opportunity to squarely meet the issue of whether the banned assault weapons and large-capacity magazines are most useful in military service. Instead, the plaintiffs' problem is that, despite full notice of the issue, they have not and apparently cannot forecast evidence adequately helpful to their cause. Meanwhile, the State's evidence readily establishes that the banned assault weapons and large-capacity magazines are most useful in military service, causing us to neither employ our own "military opinion" nor abandon the summary judgment standard to rule as we do.

Our distinguished dissenting colleagues just as ineffectively attack the merits of our ruling on Second Amendment protection, chiefly complaining that we do

not adopt the dissent's illogical popularity test. Elsewhere, the dissent strategically removes the word "most" from *Heller*'s enunciation of the "*most* useful in military service" inquiry. The dissent thereby incorrectly insists that we are foreclosing Second Amendment protection for weapons that may have some use in military service, including the stun guns at issue in *Caetano* and even the handguns at issue in *Heller*. The dissent goes so far as to claim that we "would remove nearly *all* firearms from Second Amendment protection as nearly all firearms can be useful in military service." *See post* at 100. At another point, the dissent acknowledges the critical distinction that the *Heller* Court drew between military weapons at the time of Second Amendment's ratification (arms entitled to constitutional protection because they were otherwise possessed at home by citizen militia members for self-defense) and the military weapons of today (sophisticated arms like the M16 that were developed for modern warfare and thus lack constitutional protection). But the dissent inconsistently reckons that we have placed a settler's musket outside the ambit of the Second Amendment.

Taking a last shot at our ruling on Second Amendment protection, the dissent endeavors to make the case for the plaintiffs that the FSA-banned assault weapons and large-capacity magazines are not, in fact, most useful in military service. In so doing, the dissent simply resorts to further obfuscation. For example, the dissent underscores that the AR-15 and other prohibited semiautomatic rifles are not themselves "in

regular use by any military force, including the United States Army, whose standard-issue weapon has been the fully automatic M16- and M4-series rifles." *See post* at 102; *see also id.* at 106 ("If these firearms were such devastating weapons of war, one would think that they would be standard issue for military forces across the globe."). The dissent characterizes the relevant inquiry as being whether a weapon's "*only* legitimate purpose is to lay waste to a battlefield full of combatants," *id.* at 102-03 (emphasis added), and then invokes evidence that there are citizens who possess and use the banned assault weapons for sporting purposes and self-defense, *id.* at 106-07. The dissent also treats rate of fire as the sole determinative factor and proffers its own evidence that an M16 in semiautomatic mode cannot fire as rapidly – at least not "effectively" – as the State's evidence reflects. *Id.* at 103-04; *see also id.* at 105 n.6 (noting that fully automatic and semiautomatic firearms do not "spray-fire" in precisely the same manner). Additionally, the dissent parses other individual features of the banned assault weapons, pointing out that some features are shared by non-banned firearms, do not on their own make weapons "more lethal or battle-ready," and can actually render firearms "easier and safer to operate." *Id.* at 104-06. The dissent even emphasizes evidence opining that "[t]he semiautomatic AR15 carbine is likely the most ergonomic, safe, readily available and effective firearm for civilian self-defense." *Id.* at 107 (alteration in original) (internal quotation marks omitted).

As the dissent would have it, we groundlessly deem the banned assault weapons to be military-style weapons of war when they are actually nothing of the sort, thereby welcoming prohibitions against a multitude of other firearms. On that score, however, the dissent is patently alarmist and wrong.

Our ruling on Second Amendment protection is limited and clear: Because the FSA-banned assault weapons and large-capacity magazines are like M16s, in that they are most useful in military service, they are not protected by the Second Amendment. The relevant question is not whether they are themselves M16s or other arms used by a military; or whether they are useful at all or only useful in military service; or whether they have this or that single feature in common with a non-banned firearm. Rather, the issue is whether the banned assault weapons and large-capacity magazines possess an amalgam of features that render those weapons and magazines like M16s and most useful in military service. The uncontroverted evidence here is that they do. *See, e.g.*, J.A. 735, 1121-22 (reflecting that the banned assault weapons are designed to "kill[ ] or disabl[e] the enemy" on the battlefield, and that "[t]he net effect of [their] military combat features is a capability for lethality – more wounds, more serious, in more victims – far beyond that of other firearms in general, including other semiautomatic guns"); *id.* at 891, 1151 (indicating that large-capacity magazines "are particularly designed and most suitable for military and law enforcement applications," as well as a "uniquely military feature[ ]" of

both the banned assault weapons and other firearms to which they may be attached). Nothing in our decision today affects or calls into question the Second Amendment protection of weapons that are *not* most useful in military service – including, of course, *Heller*'s handguns.

2.

Finally, unlike us, our esteemed dissenting colleagues would subject the FSA's prohibitions against assault weapons and large-capacity magazines to the ultra-demanding strict scrutiny standard. *See post* at 107-15. Indeed, the dissent would apply strict scrutiny to any ban on in-home possession of any weapon that satisfies the dissent's popularity test. Meanwhile, we conclude that no more than intermediate scrutiny applies here, in part because the FSA leaves citizens free to protect themselves with handguns and plenty of other firearms and ammunition, and thus does not severely burden the core Second Amendment right to use arms for self-defense in the home. We also take notice of the scant evidence in the record that the banned assault weapons and large-capacity magazines are possessed or suitable for self-protection.

The dissent has no good answer to our analysis. First, the dissent mischaracterizes our Court's recent decision in *United States v. Hosford*, 843 F.3d 161 (4th Cir. 2016), as holding "that strict scrutiny applies when a law restricting possession of a firearm applies to conduct inside of the home and touches on self-defense

concerns." *See post* at 110. The *Hosford* panel consisted of three judges in today's en banc majority. What *Hosford* actually decided is that strict scrutiny does not apply where – as there – a "prohibition does not touch on the Second Amendment's core protections," e.g., where the law "addresses only conduct occurring outside the home[] and does not touch on self-defense concerns." *See* 843 F.3d at 168. We did not determine in *Hosford* whether strict scrutiny always or ever applies to laws infringing on the Second Amendment right of self-defense in the home, and we had no reason to do so. In these circumstances, the *Hosford* decision is not pertinent, and the dissent is simply wrong in arguing otherwise.

The dissent also asserts that our "line of thought was expressly rejected by the Supreme Court in *Heller*" when it "dismissed the District of Columbia's reverse contention that its handgun ban [was constitutional] because long guns were still permitted for home defense." *See post* at 111 (emphasis omitted) (citing *Heller*, 554 U.S. at 629). The dissent's equation of this case and *Heller* is wholly untenable, however, because it depends on discounting the relevance of the handgun's status as "the quintessential self-defense weapon" – a status that was obviously and unquestionably important to the *Heller* Court. *See Heller*, 554 U.S. at 628-29. Nevertheless, the dissent next insists that, in rejecting its reading of *Heller*, we allow that "any state 'would be free to ban all weapons except handguns, because handguns are the most popular weapon chosen by Americans for self-defense in the home.'" *See post*

at 112 (emphasis omitted) (quoting *Caetano*, 136 S. Ct. at 1032 (Alito, J., concurring in the judgment)). In reality, without passing on the comparative burdensomeness of bans on any other types of arms, we merely say that a prohibition against assault weapons and large-capacity magazines is far less burdensome on the core Second Amendment right than a ban on handguns. According to the dissent, we thereby improperly discount evidence of the utility of assault weapons and large-capacity magazines for self-defense, but that assertion relies on the same and similar points that fail to make the case for the plaintiffs that such weapons and magazines are not, in fact, most useful in military service. *See id.* at 112-14 & n.9.

Ultimately, the dissent would leave it to individual citizens – and disempower legislators – to determine whether a weapon may be possessed for self-defense. *See post* at 114 ("As long as the weapon chosen is one commonly possessed by the American people for lawful purposes[,] . . . the state has very little say about whether its citizens should keep it in their homes for protection."). That is, under the dissent, any ban on the in-home possession of a sufficiently popular weapon would have to withstand strict scrutiny to be allowed to stand. The *Heller* Court did not, however, ordain such a trampling of the legislative prerogative to enact firearms regulations to protect all the people. Rather, as it is here, intermediate scrutiny can be the appropriate standard for assessing the constitutionality of a prohibition against the possession of a weapon in the home. And the FSA survives intermediate scrutiny,

assuming the assault weapons and large-capacity magazines that it prohibits are even entitled to Second Amendment protection.

IV.

We next address the plaintiffs' Fourteenth Amendment claims, which are pursued under the Equal Protection Clause (barring a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws"), as well as the Due Process Clause (prohibiting a state from "depriv[ing] any person of life, liberty, or property, without due process of law"). *See* U.S. Const. amend. XIV, § 1. We are satisfied to affirm the district court's award of summary judgment to the State with respect to those claims.

A.

The first of the plaintiffs' Fourteenth Amendment claims is that the FSA contravenes the Equal Protection Clause by allowing retired Maryland law enforcement officers to receive and possess assault weapons and large-capacity magazines. As previously explained, the relevant provision of the FSA allows the receipt and possession of an assault weapon or large-capacity magazine by a retired Maryland law enforcement officer if such weapon or magazine "is sold or transferred to the person by the law enforcement agency on retirement" or "was purchased or obtained by the person for official use with the law enforcement

agency before retirement." *See* Md. Code Ann., Crim. Law § 4-302(7).

The Supreme Court has recognized that equal protection "is essentially a direction that all persons similarly situated should be treated alike." *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Thus, a plaintiff challenging a state statute on an equal protection basis "must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *See Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001) (citing *City of Cleburne*, 473 U.S. at 439-40). If that initial showing has been made, "the court proceeds to determine whether the disparity in treatment can be justified under the requisite level of scrutiny." *Id.* At that step, a court generally presumes that the statute is valid and will reject the challenge "if the classification drawn by the statute is rationally related to a legitimate state interest." *See City of Cleburne*, 473 U.S. at 440.[17]

Applying the foregoing principles, we first assess whether the FSA treats similarly situated persons differently. *See Morrison*, 239 F.3d at 654. More specifically, we examine whether retired Maryland law

[17] In certain circumstances, the general presumption of statutory validity "gives way" and stricter judicial scrutiny of a challenged law is warranted. *See City of Cleburne*, 473 U.S. at 440-41 (observing that higher levels of scrutiny apply to suspect classifications). There is no contention that a heightened level of scrutiny applies to the equal protection challenge in this case.

enforcement officers are similarly situated to other members of the public with respect to the banned assault weapons and large-capacity magazines.

Maryland requires its law enforcement officers to maintain competence relating to firearms. For example, such officers are not entitled to use or carry firearms in their work until they have "successfully complete[d] the applicable firearms classroom instruction, training, and qualification." *See* Code of Maryland Regulations ("COMAR") 12.04.02.03(A); *see also* COMAR 12.04.02.06(B) (establishing minimum requirements for long gun instruction, training, and qualification). Thereafter, officers are obliged to complete annual classroom instruction and training for each firearm they are authorized to use or carry. *See* COMAR 12.04.02.08(A). The failure of an officer to complete his annual training will cause the seizure of his firearms by the Maryland Police Training Commission, or, if those firearms are personally owned by the officer, the loss of his authorization to use them on the job. *See* COMAR 12.04.02.08(E). Finally, officers are trained on the use of deadly force, plus the safe handling and storage of firearms at work and at home. *See* COMAR 12.04.02.10(C)-(D).

The record shows that Maryland law enforcement officers are also required to complete specialized training in order to use or carry assault weapons. Officers are trained on how and when to utilize assault weapons, and they are taught the techniques that minimize the risks of harm to innocent civilians. After receiving

assault weapons training, officers are required to periodically requalify to use or carry such weapons in the line of duty.

As for large-capacity magazines, Maryland law enforcement officers are taught to assess every shot from a firearm for effectiveness and to fully evaluate a hostile situation before firing multiple rounds. The record shows that, at least within four major police agencies – the Maryland State Police, the Baltimore County Police Department, the Baltimore Police Department, and the Prince George's County Police Department – the standard service weapons issued to law enforcement personnel come with large-capacity magazines. Consequently, officers who retire from those departments have been properly trained on the handling and use of such magazines.

Because of the extensive training that Maryland requires of its law enforcement officers, and in light of their experience in public safety, retired Maryland law enforcement officers are not similarly situated to the general public with respect to the assault weapons and large-capacity magazines banned by the FSA. That is, retired officers are better equipped to safely handle and store those weapons and magazines and to prevent them from falling into the wrong hands. Accordingly, we reject the plaintiffs' equal protection challenge for lack of an initial showing that the FSA treats similarly situated persons differently. *See Kolbe v. O'Malley*, 42 F. Supp. 3d 768, 799 (D. Md. 2014) ("The court cannot conclude that the State of Maryland is treating differently persons who are in all relevant respects alike,

and the plaintiffs' equal protection challenge must fail.").[18]

B.

The plaintiffs' second Fourteenth Amendment claim is that the FSA's ban on "copies" of the assault weapons identified in section 5-101(r)(2) of the Maryland Code's Public Safety Article is unconstitutionally vague on its face, in contravention of the Due Process Clause. In particular, they maintain that the statute fails to inform a reasonable person of what constitutes a "cop[y]" of a particular assault weapon. *See* Md. Code Ann., Pub. Safety § 5-101(r)(2) (defining a "[r]egulated firearm" as "a firearm that is any of the following specific assault weapons or their copies, regardless of which company produced and manufactured that assault weapon").

As the Supreme Court recently explained, the void-for-vagueness doctrine precludes the enforcement

[18] In pursuing their equal protection challenge, the plaintiffs rely primarily on *Silveira v. Lockyer*, wherein the Ninth Circuit concluded that a retired officer exception to an assault weapons ban contravened the Equal Protection Clause. *See* 312 F.3d 1052, 1089-92 (9th Cir. 2002). We agree with the district court, however, that the *Silveira* decision "is flawed," as it did not analyze whether there was differential treatment of similarly situated persons. *See Kolbe*, 42 F. Supp. 3d at 798 n.39. Otherwise, the plaintiffs insist that Maryland's retired law enforcement officers are similarly situated to the general public, in that some individual officers might not have been properly trained on assault weapons or large-capacity magazines. That contention lacks merit because we must look at retired officers as a broader class.

of a criminal statute "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *See Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015).[19] A criminal statute need not, however, "spell out every possible factual scenario with celestial precision." *See United States v. Hager*, 721 F.3d 167, 183 (4th Cir. 2013) (internal quotation marks omitted).

The term "copies," as used in section 5-101(r)(2), is not new to Maryland's firearms statutes. Indeed, Maryland has regulated the "possession, sale, offer for sale, transfer, purchase, receipt, or transport" of certain assault weapons and "their copies" for more than two decades. *See* 1994 Md. Laws, ch. 456. In May 2010, Maryland's Attorney General rendered an opinion explaining the term "copies" as used in section 5-101(r)(2). He therein observed that the ordinary meaning of the word copy is "a reproduction or imitation of an original." *See* J.A. 681. The Attorney General explained that, under Maryland law, "a copy of a designated assault weapon must be similar in its internal components and function to the designated weapon."

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[19] The Supreme Court's *Johnson* decision – which was rendered in June 2015, nearly a year after the district court's Opinion here – precludes the State's contention that we should uphold the FSA's ban on "copies" under *United States v. Salerno*, 481 U.S. 739, 745 (1987) (observing that "[a] facial challenge to a legislative Act" requires "the challenger [to] establish that no set of circumstances exists under which the Act would be valid"). In *Johnson*, the Court rejected the notion that "a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." *See* 135 S. Ct. at 2561.

Id. at 678. Thus, "[c]osmetic similarity to an enumerated assault weapon alone would not bring a weapon within the regulated firearms law." *Id.* Six months later, in November 2010, the Maryland State Police issued a bulletin explaining that it considers a firearm that is cosmetically similar to an assault weapon identified in section 5-101(r)(2) to be a copy only if it possesses "completely interchangeable internal components necessary for the full operation and function of any one of the specifically enumerated assault weapons." *Id.* at 676. The Attorney General's opinion, coupled with the State Police bulletin, provide guidance on the term "copies," and that guidance remained in force after the FSA was enacted in 2013.

The Court of Appeals of Maryland has recognized that "legislative acquiescence in the administrative construction [of a statute] gives rise to a strong presumption that the administrative interpretation is correct." *See Wash. Suburban Sanitary Comm'n v. C.I. Mitchell & Best Co.*, 495 A.2d 30, 37 (Md. 1985). Because the Attorney General's 2010 opinion and the subsequent bulletin of the State Police explain how to determine whether a particular firearm is a copy of an identified assault weapon, we cannot conclude that the term "copies" in section 5-101(r)(2) is unconstitutionally vague. *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 504 (1982) (explaining that a municipality may "adopt administrative regulations that will sufficiently narrow potentially vague or arbitrary interpretations of [an] ordinance").

In further support of their vagueness claim, the plaintiffs argue that the typical gun owner would not know whether the internal components of one firearm are interchangeable with the internal components of some other firearm. That contention misapprehends the vagueness inquiry, which focuses on the intractability of identifying the applicable legal standard, not on the difficulty of ascertaining the relevant facts in close cases. *See United States v. Williams*, 553 U.S. 285, 306 (2008) ("What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is."); *see also Johnson*, 135 S. Ct. at 2560 (emphasizing, in ruling that the residual clause of the Armed Career Criminal Act was unconstitutionally vague, the "pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider"). The legal standard for determining what qualifies as a copy of an identified assault weapon is sufficiently clear, and we thus reject the plaintiffs' contention that the FSA's ban on copies of assault weapons is unconstitutionally vague. *See Kolbe*, 42 F. Supp. 3d at 802 ("[T]he court cannot conclude that the [FSA] fails to provide sufficient notice of banned conduct.").[20]

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[20] In the summary judgment proceedings below, the plaintiffs also unsuccessfully sought to show that the FSA invites arbitrary enforcement. As the district court recognized in disposing of that contention, "[w]hen the terms of a regulation are clear and not subject to attack for vagueness, the plaintiff bears a high burden to show that the standards used by officials enforcing the statute

V.

Pursuant to the foregoing, we affirm the judgment of the district court.

AFFIRMED

WILKINSON, Circuit Judge, with whom WYNN, Circuit Judge, joins, concurring:

I am happy to concur in Judge King's fine opinion in this case.

No one really knows what the right answer is with respect to the regulation of firearms. It may be that relatively unrestricted access to guns will diminish the incidence of crime by providing a deterrent force against it. On the other hand, it may be that such access leads only to a proliferation of incidents in which the most deadly firearms are unleashed against the public.

The question before us, however, is not what the right answer is, but how we may best find it. The

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nevertheless give rise to a vagueness challenge." *See Kolbe*, 42 F. Supp. 3d at 802 (quoting *Wag More Dogs, L.L.C. v. Cozart*, 680 F.3d 359, 372 (4th Cir. 2012)). The court concluded that the plaintiffs failed to sustain that substantial burden, in that they have not identified any arrests or convictions resulting from a misunderstanding of the term "copies," as used in section 5-101(r)(2), nor have they identified any acquittals based on the alleged vagueness of that term. The plaintiffs did not endeavor on appeal to demonstrate that there has been arbitrary enforcement of the "copies" provision.

dissent aspires to subject a host of firearm regulations to "strict scrutiny," a term of art deployed here to empower the judiciary and leave Congress, the Executive, state legislatures, and everyone else on the sidelines. I am unable to draw from the profound ambiguities of the Second Amendment an invitation to courts to preempt this most volatile of political subjects and arrogate to themselves decisions that have been historically assigned to other, more democratic, actors. The fact that *Heller* exempted from legislative infringement handguns broadly utilized for self-defense in the home does not mean that it disabled legislatures from addressing the wholly separate subject of assault weapons suitable for use by military forces around the globe. *See District of Columbia v. Heller*, 544 U.S. 570, 626-28 (2008).

Disenfranchising the American people on this life and death subject would be the gravest and most serious of steps. It is their community, not ours. It is their safety, not ours. It is their lives, not ours. To say in the wake of so many mass shootings in so many localities across this country that the people themselves are now to be rendered newly powerless, that all they can do is stand by and watch as federal courts design their destiny – this would deliver a body blow to democracy as we have known it since the very founding of this nation.

In urging us to strike this legislation, appellants would impair the ability of government to act prophylactically. More and more under appellants' view, preventive statutory action is to be judicially forbidden

and we must bide our time until another tragedy is inflicted or irretrievable human damage has once more been done. Leaving the question of assault weapons bans to legislative competence preserves the latitude that representative governments enjoy in responding to changes in facts on the ground. Constitutionalizing this critical issue will place it in a freeze frame which only the Supreme Court itself could alter. The choice is ultimately one of flexibility versus rigidity, and beyond that, of whether conduct that has visited such communal bereavement across America will be left to the communal processes of democracy for resolution.

Providing for the safety of citizens within their borders has long been state government's most basic task. *See, e.g.*, *Boston Beer Co. v. Massachusetts*, 97 U.S. 25, 32 (1877). In establishing the "right of law-abiding, responsible citizens to use arms in defense of hearth and home," *Heller* did not abrogate that core responsibility. 554 U.S. at 635. Indeed, *Heller* stopped far short of the kind of absolute protection of assault weapons that appellants urge on us today. The dissent, by contrast, envisions the Second Amendment almost as an embodiment of unconditional liberty, thereby vaulting it to an unqualified status that the even more emphatic expressions in the First Amendment have not traditionally enjoyed. As Judge King has aptly noted, *Heller* was a cautiously written opinion, which reserved specific subjects upon which legislatures could still act. *See id.* at 626 (recognizing that the Second Amendment right is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for

whatever purpose"). Had *Heller* in fact failed to reserve those subjects, or had it been written more ambitiously, it is not clear that it could have garnered the critical five votes.

The weapons that Maryland sought to regulate here are emphatically not defensive in nature. Of course, no weapon is what we learned long ago in real property class to call a fixture. Weapons may remain at home for a while but their station is not permanent. They can always be taken out on the town. For what purpose? The Maryland legislature could readily conclude that assault weapons, unlike handguns, are efficient instruments of mass carnage, and in fact would serve as weapons of choice for those who in a commando spirit wish to charge into a public venue and open fire. Likewise, the legislature could validly determine that large detachable magazines with a capacity of more than ten rounds of ammunition in fact facilitate assaults by those who seek to eliminate the need to reload.

If this statute is struck down, it is difficult to see what class of non-automatic firearms could ever be regulated. If these weapons are outside the legislative compass, then virtually all weapons will be. It is altogether fair, of course, to argue that the assault weapons here should be less regulated, but that is for the people of Maryland (and the Virginias and the Carolinas) to decide.

Appellants claim, however, that these assault weapons cannot be banned because they are "in common use" and are "typically possessed by law-abiding citizens for lawful purposes." Appellants' Supp. Br. 20-23. This language was of course employed in *Heller*, 554 U.S. at 624-28, but it did not purport to make any inquiry into common usage and typical possession the exclusive province of the courts. The dissent's forays into the properties and usages of this or that firearm are the kind of empirical inquiries routinely reserved for legislative bodies which possess fact-finding capabilities far superior to the scantily supported views now regularly proffered from the bench. In fact, legislators are uniquely suited to discern popular habits and to understand regular usage within the populace. The term "common use" was never meant to deal to courts the sole and supreme hand in a political controversy where the combatants on both sides are robust, where they are energized, and where they are well stocked with arguments they can press before the public.

As *Heller* recognized, there is a balance to be struck here. While courts exist to protect individual rights, we are not the instruments of anyone's political agenda, we are not empowered to court mass consequences we cannot predict, and we are not impaneled to add indefinitely to the growing list of subjects on which the states of our Union and the citizens of our country no longer have any meaningful say.

With all respect for my good colleagues who see this important matter differently, I would uphold the Maryland law in its entirety.

DIAZ, Circuit Judge, concurring in part:

I am pleased to join the majority in affirming the district court's judgment. But like the district court, I think it unnecessary to decide whether the assault weapons and large-capacity magazines at issue here are protected by the Second Amendment. Rather, I am content to decide this case solely on the majority's alternative (and compelling) rationale – that even if Maryland's statute implicates the Second Amendment, it nonetheless passes constitutional muster.

TRAXLER, Circuit Judge, with whom NIEMEYER, SHEDD, and AGEE, Circuit Judges, join, dissenting:

Today the majority holds that the Government can take semiautomatic rifles away from law-abiding American citizens. In South Carolina, North Carolina, Virginia, West Virginia and Maryland, the Government can now tell you that you cannot hunt with these rifles. The Government can tell you that you cannot shoot at targets with them. And, most importantly, the Government can tell you that you cannot use them to defend yourself and your family in your home. In concluding that the Second Amendment does not even apply, the majority has gone to greater lengths than any

other court to eviscerate the constitutionally guaranteed right to keep and bear arms.

In addition, the majority holds that even if it is wrong when it says that the Second Amendment does not cover these commonplace rifles, Maryland can still lawfully forbid their purchase, even for self defense in one's home – the core Second Amendment right. My friends do not believe this ruling impairs the rights citizens have under the Constitution to any significant degree. In my view, the burden imposed by the Maryland law is considerable and requires the application of strict scrutiny, as is customary when core values guaranteed by the Constitution are substantially affected. I recognize that after such a judicial review, the result could be that the Maryland law is constitutional. I make no predictions on that issue. I simply say that we are obligated by Supreme Court precedent and our own to treat incursions into our Second Amendment rights the same as we would restrictions on any other right guaranteed us by our Constitution.

Therefore I respectfully dissent.

I. The Second Amendment Protects Semiautomatic Rifles and Large Capacity Magazines

A. Semiautomatic rifles are commonly possessed by law-abiding citizens.

The majority says first that the Second Amendment does not even *apply* to modern semiautomatic rifles or magazines holding more than ten rounds. In doing so, the majority stands alone from all the other

courts to have considered this issue. But the scope of the Second Amendment is broad with regard to the kinds of arms that fall within its protection, "extend[ing], prima facie, to all instruments that constitute bearable arms." *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008). Of course, like other constitutionally protected rights, "the right secured by the Second Amendment is not unlimited." *Id.* at 626. Of particular importance here are the historical limitations that apply to the *types* of arms a law-abiding citizen may bear. In that regard, the Second Amendment protects those weapons "typically possessed by law-abiding citizens for lawful purposes." *Id.* at 625. By contrast, "the carrying of 'dangerous and unusual weapons' " has been prohibited as a matter of "historical tradition." *Id.* at 627; *see Caetano v. Massachusetts*, 136 S. Ct. 1027, 1028 (2016) (per curiam). If a weapon is one "typically possessed by law-abiding citizens for lawful purposes," *Heller*, 554 U.S. at 625, then it cannot also be a "dangerous and unusual" weapon in a constitutional sense, *id.* at 627 (weapons "in common use at the time" did not include "dangerous and unusual weapons" (internal quotation marks omitted)). Indeed, *Heller* refers to "dangerous and unusual" conjunctively, so that even a "dangerous" weapon enjoys constitutional protection if it is widely held for lawful purposes. *See Caetano*, 136 S. Ct. at 1031 (explaining that the dangerous and unusual test "is a conjunctive test: A weapon may not be banned unless it is *both* dangerous *and* unusual") (Alito, J., concurring). The significance of this rule is that "the relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms

commonly used for lawful purposes." *Id.* Simply put, if the firearm in question is commonly possessed for lawful purposes, it falls within the protection of the Second Amendment. *See Heller*, 554 U.S. at 627.

My colleagues in the majority reject the foregoing "common use" analysis, characterizing it as a "popularity test" founded on "circular" reasoning such that "a state-of-the-art and extraordinarily lethal new weapon . . . would need only be flooded on the market prior to any governmental prohibition in order to ensure it constitutional protection." But the majority's beef is not with me – it is with the Supreme Court of the United States. Justice Breyer raised a quite similar objection to this "popularity test" in his *Heller* dissent:

> [I]f Congress and the States lift restrictions on the possession and use of machineguns, and people buy machineguns . . . the Court will have to reverse course and find that the Second Amendment does, in fact, protect the individual self-defense-related right to possess a machinegun. On the majority's reasoning, if tomorrow someone invents a particularly useful, highly dangerous self-defense weapon, Congress and the States had better ban it immediately, for once it becomes popular Congress will no longer possess the constitutional authority to do so. . . . There is no basis for believing that the Framers intended such circular reasoning.

554 U.S. at 720-21. Justice Breyer effectively raised my colleagues' precise criticism in his *Heller* dissent and the *Heller* majority was obviously unmoved by it.

And, indeed, following *Heller*, almost every federal court to have considered "whether a weapon is popular enough to be considered in common use has relied on statistical data of some form, creating a consensus that common use is an objective and largely statistical inquiry." *Hollis v. Lynch*, 827 F.3d 436, 449 (5th Cir. 2016) (internal quotation marks omitted). It is beyond any reasonable dispute from the record before us that a statistically significant number of American citizens possess semiautomatic rifles (and magazines holding more than 10 rounds) for lawful purposes. Between 1990 and 2012, more than 8 million AR- and AK- platform semiautomatic rifles alone were manufactured in or imported into the United States. In 2012, semiautomatic sporting rifles accounted for twenty percent of all retail firearms sales. In fact, in 2012, the number of AR- and AK- style weapons manufactured and imported into the United States was "more than double the number of the most commonly sold vehicle in the U.S., the Ford F-150." J.A. 1878. In terms of absolute numbers, these statistics lead to the unavoidable conclusion that popular semiautomatic rifles such as the AR-15 are commonly possessed by American citizens for lawful purposes within the meaning of *Heller*.

The number of jurisdictions where possession of semiautomatic rifles is lawful is also an appropriate consideration in determining common use for lawful purposes. *See Caetano*, 136 S. Ct. at 1032-33 (Alito, J., concurring) (explaining that the 200,000 tasers and stun guns in the United States are commonly possessed for lawful purposes and "widely owned and

accepted as a legitimate means of self-defense across the country" where 45 states permit their lawful possession). The semiautomatic rifle has been in existence since at least the turn of the Twentieth Century. Today, more than 100 years after these firearms came into use, individual citizens may possess semiautomatic rifles like the AR-15 semiautomatic in at least 44 states, which establishes that these weapons are widely accepted across the country as firearms that may be legitimately possessed for lawful purposes. *See* Robert J. Cottrol and George A. Mocsary, *Guns, Bird Feathers, and Overcriminalization: Why Courts Should Take the Second Amendment Seriously*, 14 Geo. J. L. & Pub. Pol'y 17, 36 (2016) (noting that "[s]even states, the District of Columbia, and a few localities regulate or ban so-called assault weapons"); *see id.* at 36 n.106 ("The states [banning or regulating "assault weapons"] are California, Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, and New York.").[1]

In view of the significant popularity of these firearms, courts have had little difficulty in concluding that semiautomatic rifles such as the AR-15 are in common use by law-abiding citizens. *See, e.g.*, *Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244, 1261 (D.C. Cir. 2011) ("We think it clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in 'common use,' as the plaintiffs contend. Approximately 1.6 million

[1] Although Hawaii is listed, it bans assault *pistols* only; semiautomatic rifles such as the AR-15 are still permitted in Hawaii. *See* Haw. Rev. Stat. §§ 134-1, 134-4, 134-8.

AR-15s alone have been manufactured since 1986, and in 2007 this one popular model accounted for 5.5 percent of all firearms, and 14.4 percent of all rifles, produced in the U.S. for the domestic market."); *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 255 (2d Cir. 2015) ("This much is clear: Americans own millions of the firearms that the challenged legislation prohibits. . . . Even accepting the most conservative estimates cited by the parties and by amici, the assault weapons and large-capacity magazines at issue are 'in common use' as that term was used in *Heller*."); *Colorado Outfitters Ass'n v. Hickenlooper*, 24 F. Supp. 3d 1050, 1068 (D. Colo. 2014) (concluding that statute "affects the use of firearms that are both widespread and commonly used for self-defense," in view of the fact that "lawfully owned semiautomatic firearms using a magazine with the capacity of greater than 15 rounds number in the tens of millions"), *vacated in part on other grounds*, 823 F.3d 537 (10th Cir. 2016).

The record also shows unequivocally that magazines with a capacity of greater than 10 rounds are commonly kept by American citizens, as there are more than 75 million such magazines owned by them in the United States. These magazines are so common that they are standard on many firearms: "[O]n a nationwide basis most pistols are manufactured with magazines holding ten to 17 rounds." J.A. 2122. Even more than 20 years ago, "fully 18 percent of all firearms owned by civilians . . . were equipped with magazines holding more than ten rounds." *Heller II*, 670 F.3d at 1261; *see Fyock v. City of Sunnyvale*, 779 F.3d 991, 998

(9th Cir. 2015) ("[W]e cannot say that the district court abused its discretion by inferring from the evidence of record that, at a minimum, [such] magazines are in common use.")[2]

Millions of Americans keep semiautomatic rifles and use them for lawful, non-criminal activities, including as a means to defend their homes. Plaintiffs Kolbe and Turner both seek to acquire and keep semiautomatic rifles, equipped with magazines able to hold more than 10 rounds, in their homes primarily for self-defense – a common and legitimate purpose for possessing these firearms. Plaintiffs' expert James Curcuruto presented survey evidence showing that self-defense was a primary reason for the purchase of weapons banned under the FSA, and a 1989 Report from the Bureau of Alcohol, Tobacco, and Firearms indicated that self-defense was a suitable purpose for semiautomatic rifles. The State's expert Daniel Webster even agreed that it is reasonable to assume that a purpose for keeping one of the prohibited weapons is "self-defense in the home." J.A. 2291.

Because the evidence before us clearly demonstrates that these popular weapons are commonly possessed for lawful purposes and are therefore not

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[2] Although the majority does not reach the issue of whether detachable magazines constitute bearable arms entitled to Second Amendment protection, such magazines quite clearly constitute arms for the reasons set forth in the now vacated panel opinion. *See Kolbe v. Hogan*, 813 F.3d 160, 175 (4th Cir. 2016).

dangerous and unusual, they are covered by the Second Amendment. The majority errs in holding otherwise.[3]

B. The Majority's Balancing Test is contrary to *Heller*.

Rather than apply the Supreme Court's common-use test to determine whether the Second Amendment applies to a particular type of weapon or magazine, the majority creates a heretofore unknown "test," which is whether the firearm in question is "most useful in military service."[4] Under this newly-birthed test, which

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[3] It is evident that my good friends in the majority simply do not like *Heller*'s determination that firearms commonly possessed for lawful purposes are covered by the Second Amendment. In the majority's view, *Heller*'s "commonly possessed" test produces unacceptable results in this case, providing Second Amendment coverage for semiautomatic rifles owned by less than 1% of the American public and thwarting "efforts by the other 99%" to ban them. Majority Op. at 60. This assertion rests on the false premise that every American who does not own a semiautomatic rifle wishes to ban them. That is quite a stretch. In fact, a recent Gallup poll shows that public support for a so-called assault weapons ban is at 36%. Thus, for what it is worth, substantially more Americans oppose a ban than favor it. *See* www.gallup.com/poll/196658/support-assault-weapons-ban-record-low.aspx (last visited Feb. 13, 2017).

[4] Since the majority has not previously articulated this novel interpretation of *Heller*, neither side in the district court focused its evidence or legal arguments on proving or disproving that semiautomatic rifles such as the AR-15 are "most useful" as military weapons or on the question of whether qualifying as "militarily useful" would remove the weapon from Second Amendment protection. And the district court likewise did not address these questions. If this is the new standard, then basic fairness requires that

seems to be a stand-alone inquiry, the Second Amendment does not apply if a court deems a weapon "most useful" in combat operations. And in the case before us today, the majority concludes that the Second Amendment does not apply at all because semiautomatic rifles, in the military opinion of the majority, are more useful as military weapons than as weapons for individual self-defense, hunting and target or sport shooting. *See* Majority Op. at 47 ("Whatever their other potential uses – including self-defense – the AR-15, other assault weapons, and large-capacity magazines prohibited by the FSA are unquestionably most useful in military service."). This analysis is clearly at odds with the Supreme Court's approach in *Heller* setting out how courts, including the majority, are to go about a Second Amendment inquiry.[5]

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the plaintiffs have an opportunity to squarely meet the issue. *See United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) ("Having established the appropriate standard of review, we think it best to remand this case to afford the government an opportunity to shoulder its burden and Chester an opportunity to respond. Both sides should have an opportunity to present their evidence and their arguments to the district court in the first instance.").

[5] In articulating and then applying its novel military usefulness test, not only has the majority failed to afford plaintiffs an opportunity to respond, but it has abandoned the summary judgment standard and reached a conclusion based on facts viewed in the light most favorable to the State, the proponent of the summary judgment motion, and not the plaintiffs as the non-movants. *See Woollard v. Gallagher*, 712 F.3d 865, 873 (4th Cir. 2013) (applying Fed. R. Civ. P. 56(a) in Second Amendment context and "viewing the facts and inferences reasonably drawn therefrom in the light most favorable to the nonmoving party").

First, the majority simply ignores "the pertinent Second Amendment inquiry" – "whether [the firearms at issue] are commonly possessed by law-abiding citizens for lawful purposes today." *Caetano*, 136 S. Ct. at 1032 (Alito, J., concurring) (emphasis omitted). But, this omission is understandable in light of the millions of law-abiding Americans who possess the semiautomatic rifles at issue, as explained previously. It is beyond debate.

Second, the majority makes no attempt to demonstrate that semiautomatic rifles have been historically prohibited as "dangerous and unusual" weapons. Instead, our court today has adopted an ad hoc analysis that excludes a weapon from Second Amendment protection if it appears to be "like" an M-16 or "most useful in military service." Under this approach, it is irrelevant that a firearm may have been commonly possessed and widely accepted as a legitimate firearm for law-abiding citizens for hundreds of years; such a weapon could be removed from the scope of the Second Amendment so long as a court says it is "like" an M-16 or, even easier, just calls it a "weapon of war." Indeed, Justice Alito pointed out in his *Caetano* concurrence that even a stun gun capable of only non-lethal force is suitable for military use. *See id.* Obviously, what the majority ignores from *Heller* is that "weapons that are most useful in military service – M-16 rifles and the like" – are not "typically possessed by law-abiding citizens" today. *Heller*, 554 U.S. at 625, 627. While the majority's quoted reference from *Heller* would exclude weapons "*most* useful in military service" such as

Gatling guns, mortars, bazookas, etc., no one could claim these items were ever commonly possessed for Second Amendment purposes. Indeed, such "M-16 rifles and the like" are outside the Second Amendment because they "are highly unusual in society at large." *Id.* at 627.

Third, *Heller* in no way suggests that the military usefulness of a weapon disqualifies it from Second Amendment protection. That is the majority's singular concoction. On the contrary, the Second Amendment has always been understood to cover weapons useful in military operations. Indeed, the Second Amendment at the Founding was grounded in the need to safeguard the commonly possessed weapons of citizens for military service. "[A]t the time of the Second Amendment's ratification," it was understood that "all citizens capable of military service . . . would bring the sorts of lawful weapons that they possessed at home to militia duty." *Heller*, 554 U.S. at 627. "'Ordinarily when called for militia service able-bodied men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.'" *Id.* at 624 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)) (alterations omitted). Under the majority's analysis, a settler's musket, the only weapon he would likely own and bring to militia service, would be most useful in military service – undoubtedly a weapon of war – and therefore not protected by the Second Amendment. This analysis turns *Heller* on its head. Indeed, the Court in *Heller* found it necessary to expressly reject the view that "*only* those weapons useful in warfare

are protected." *Id.* (emphasis added). Weapons useful in warfare are obviously protected by the Second Amendment; if this were not so, the Court would have had no reason to caution against the assumption that the Second Amendment protects only weapons useful in military operations.

Read in context, *Heller*'s reference to "weapons that are most useful in military service" clearly does not provide some alternative to the "in common use" query for determining whether the Second Amendment applies. If it were otherwise, the "most useful in military service" rubric would remove nearly *all* firearms from Second Amendment protection as nearly all firearms can be useful in military service. *Heller* settled "a decades-long debate between those who interpreted the text to guarantee a private, individual right to bear arms and those who generally read it to secure a collective right to bear arms in connection with service in the state militia." *Chester*, 628 F.3d at 674-75. *Heller* determined that the prefatory clause of the Second Amendment, which refers to the militia, does not limit the right to "keep and bear Arms" set forth in the operative clause, 554 U.S. at 578, and therefore that the Second Amendment "protects an individual right to possess a firearm unconnected with service in a militia," *id.* at 577. In addressing the criticism that the Court had simply read the prefatory clause out of the Second Amendment, the Court explained:

> 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. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. *But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right*.

Id. at 627-28 (emphasis added). Thus, because the Second Amendment "protects an individual right to possess a firearm unconnected with service in a militia," *id.* at 577, "whether a weapon has a nexus to military utility is not the test as to whether that weapon receives Second Amendment protection," *Hollis*, 827 F.3d at 446.

In sum, if a "weapon belongs to a class of arms commonly used for lawful purposes," *Caetano*, 136 S. Ct. at 1031 (Alito, J., concurring), then it comes within the ambit of the Second Amendment and our threshold inquiry is at an end. The fact that a weapon is designed "for the purpose of bodily assault" and "constructed to produce death or great bodily harm"

"cannot be used to identify arms that fall outside the Second Amendment." *Id.* (internal quotation marks omitted). That is, "the relative dangerousness of a weapon is irrelevant" where the weapon is "commonly used for lawful purposes." *Id.* Under *Heller*, therefore, even a weapon that some court concludes has militarily useful features or is too dangerous for civilians to possess is covered by the Second Amendment if it is "commonly used for lawful purposes."

C. It is anything but clear that semiautomatic sporting rifles are "weapons of war."

The majority concludes that the semiautomatic rifles banned by Maryland law are most useful in military service, even though they are not in regular use by any military force, including the United States Army, whose standard-issue weapon has been the fully automatic M16- and M4-series rifles. *See Hollis*, 827 F.3d at 440 n.2.

In its effort to show that semiautomatic rifles are devastating weapons of war whose only legitimate purpose is to lay waste to a battlefield full of combatants, the majority first states that the rates of fire between the fully automatic M16 service rifle and the semiautomatic AR-15 sporting rifle are "nearly identical." This claim seems counter-intuitive because semiautomatic firearms require that the shooter pull the trigger for each shot fired, while fully automatic weapons – otherwise known as "machine guns" – do not require a pull of the trigger for each shot and will discharge

every round in the magazine as long as the trigger is depressed. *See Staples v. United States*, 511 U.S. 600, 602 n. 1 (1994). The rate of fire of a semiautomatic firearm is determined simply by how fast the shooter can squeeze the trigger.

The majority's assertion might surprise the United States Army, which sets the maximum effective rates of M4- and M16-series rifles operating in *semi-automatic mode* at 45 to 65 rounds per minute – only about five rounds in five seconds (not 30 rounds as the majority believes). This is far slower than 150 to 200 rounds per minute that may effectively be fired by the same arms operating in fully automatic mode. *See* United States Dep't of Army, Field Manual 3-22.9, Rifle Marksmanship, M16-/M4-Series Weapons, Table 2-1 (2008). Some of the experts at the Bureau of Alcohol, Tobacco, Firearms and Explosives ("BATF") might be surprised as well, in light of the testimony submitted to Congress on behalf of BATF:

> The AK-47 is a select fire weapon capable of firing 600 rounds per minute on full automatic and 40 rounds per minute on semi-automatic. The AKS and AK-47 are similar in appearance. The AK-47 . . . [has] been manufactured as a machine gun. . . . The AKS is a semi-automatic that, except for its deadly military appearance, is no different from other semi-automatic rifles.

Hearings on S. 386 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 101st Cong. 28-29 (1989).

Of course, if the majority is correct that the semiautomatic AR-15's rate of fire makes it a weapon of war outside the scope of the Second Amendment, then all semiautomatic firearms – including the vast majority of semiautomatic handguns – enjoy no constitutional protection since the rate of fire for *any* semiautomatic firearm is determined by how fast the shooter can squeeze the trigger. Such a conclusion obviously flies in the face of *Heller*, which never mentions rate of fire as a relevant consideration. Likewise, the suggestion that the ability to accept large-capacity magazines facilitates a firearm's military usefulness applies to all semiautomatic weapons, including constitutionally-protected handguns, since any firearm that can hold a magazine can theoretically hold one of any size.

The majority also suggests that other features of semiautomatic rifles like the AR-15 make them devastating military weapons. But several of the features identified do not make the firearms more lethal or battle-ready, but easier to use. On the contrary, many of the "military-style" components "increase accuracy and improve ergonomics." J.A. 2100. A telescoping stock, for example, permits the operator to adjust the length of the stock according to his or her physical size so that the rifle can be held comfortably. J.A. 2182. Likewise, a pistol grip provides comfort, stability, and accuracy, *see* David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, 20 J. Contemp. L. 381, 396 (1994) ("By holding the pistol grip, the shooter keeps the barrel from rising after the first shot, and

thereby stays on target for a follow-up shot. The defensive application is obvious, as is the public safety advantage in preventing stray shots."), and barrel shrouds keep the operator from burning himself or herself upon contact with the barrel.[6] And although flash suppressors can indeed conceal a shooter's position – which is also an advantage for someone defending his or her home at night – they serve the primary function of preventing the shooter from being blinded in low-lighting conditions. *See Kopel*, at 397 ("Reduced flash decreases shooter's blindness – the momentary blindness caused by the sudden flash of light from the explosion of gunpowder. The flash reduction is especially important for shooting at dawn or at dusk."). None of these features convert a semiautomatic rifle into a weapon of war like a machinegun carried into battle by actual soldiers. It is unclear to me why features that make a firearm easier and safer to operate add to its battlefield prowess.[7]

In deciding that the banned semiautomatic rifles "are unquestionably most useful in military service,"

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[6] These features, the majority suggests, enable a shooter to "spray-fire" rounds everywhere. "Spray-firing" can only be accomplished with a fully automatic assault rifle like an M4 carbine; "[i]n semiautomatic mode it is possible to either aim fire or to point shoot, but it is not possible to spray fire in the manner as one would in fully automatic mode." J.A. 2128.

[7] Nor does it appear that an AR-15-style rifle fires rounds that create a *greater* risk to civilians than rounds fired by a standard hunting rifle. In fact, just the opposite is true. The AR-15's standard .223/5.56 mm ammunition is "quite anemic in penetration capability and pale[s] in destructive capacity when compared to common civilian hunting rifles. . . ." J.A. 2095.

the majority cavalierly dismisses "their other potential uses" without discussion. The irony is that millions of law-abiding Americans *actually use* these versatile guns, while there do not seem to be any military forces that routinely carry an AR-15 or other semiautomatic sporting rifles as an officially-issued service weapon – at least the majority has not identified any. If these firearms were such devastating weapons of war, one would think that they would be standard issue for military forces across the globe. Whatever the *potential* military usefulness of these weapons, millions of American citizens *actually* use them for sporting purposes and possess them to defend themselves, their families and their homes. Indeed, plaintiffs' evidence suggests that "[t]he semi-automatic AR15 carbine is likely the most ergonomic, safe, readily available and effective firearm for civilian self-defense." J.A. 2091.[8]

The semiautomatic firearms banned by Maryland are commonly "chosen by Americans for self-defense in the home" and are thus clearly protected by the Second Amendment – "[w]hatever the reason" for their popularity. *Heller*, 554 U.S. at 629. The real question is whether the district court applied the appropriate level of scrutiny in determining any limitations on

[8] The majority's utilization of the "military use" theory instead of the common use test produces ironic results. For example, the law my colleagues uphold today permits Maryland residents to possess the M1 Garand rifle, which was the standard-issue battle rifle for American troops in World War II and the Korean War. The result of the holding in this case is that it is legal in Maryland to possess a rifle that was actually used by our military on the battlefield, but illegal to possess a rifle never used by our military.

Second Amendment protection. As explained below and in the now-vacated panel opinion, *see Kolbe*, 813 F.3d at 179-84, it did not.

II. Strict Scrutiny Applies

To select the proper level of scrutiny, we consider "the nature of the conduct being regulated and the degree to which the challenged law burdens the right." *Chester*, 628 F.3d at 682. "A severe burden on the core Second Amendment right of armed self-defense should require strong justification." *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (internal quotation marks omitted). However, "laws that do not implicate the central self-defense concern of the Second Amendment[] may be more easily justified." *Id.* (internal quotation marks omitted); *see Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 195 (5th Cir. 2012) ("A less severe regulation – a regulation that does not encroach on the core of the Second Amendment – requires a less demanding means-ends showing.").

Maryland's ban on the AR-15 and other semiautomatic rifles forbids its law-abiding citizens from purchasing commonly possessed firearms for use in their homes for the protection of self and family. By reaching into private homes, where the protection afforded by the Second Amendment is at its greatest, Maryland's law clearly implicates the "core" of the Second Amendment: "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554

U.S. at 635. The Supreme Court in *Heller* made clear that the "inherent right of self-defense has been *central* to the Second Amendment," *id.* at 628 (emphasis added), and that this central component of the Second Amendment is at its strongest within "the home where the need for defense of self, family, and property is most acute," *id. See also Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) ("What we know from [*Heller* and *McDonald v. City of Chicago*] is that Second Amendment guarantees are at their zenith within the home."). At stake here is a "basic right," *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010), "that the Framers and ratifiers of the Fourteenth Amendment counted . . . among those fundamental rights necessary to our system of ordered liberty," *id.* at 778. "The [Supreme] Court [in *Heller*] went to great lengths to emphasize the special place that the home – an individual's private property – occupies in our society." *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1259 (11th Cir. 2012).

The majority is incredulous that we would apply strict scrutiny to a law prohibiting the possession of a commonly used firearm to protect family and home. But, of course we would apply strict scrutiny – we have no other alternative in these circumstances. Once it is determined that a given weapon is covered by the Second Amendment, then obviously the in-home possession of that weapon for self-defense is core Second Amendment conduct and strict scrutiny must apply to a law that prohibits it. This position is not remarkable

in the least, and I am not alone in this circuit in adhering to it. Indeed, a panel of this court recently made very clear in *United States v. Hosford* that strict scrutiny applies when a law restricting possession of a firearm applies to conduct inside of the home and touches on self-defense concerns. *See* 843 F.3d 161, 168 (4th Cir. 2016). In *Hosford*, which was decided after en banc argument in this case, the defendant raised a Second Amendment challenge to his conviction under a law that "impose[d] a licensing requirement on those who wish[ed] to profit by regularly selling firearms outside of their personal collection." *Id.* In explaining why the law at issue there should receive only intermediate scrutiny, the panel stated as follows:

> Here, even assuming that the prohibition implicates conduct protected by the Second Amendment, the prohibition does not touch on the Second Amendment's core protections. Individuals remain free to possess firearms for self-defense. Individuals also remain free to purchase or sell firearms owned for personal, self-defensive use. . . . [The law] serves, not as a prohibition, but as a condition or qualification. The law, therefore, regulates rather than restricts, addresses only conduct occurring outside the home, and does not touch on self-defense concerns. *It is thus subject to intermediate scrutiny*.

Id. (emphasis added). In this passage, the *Hosford* panel very ably shows why intermediate scrutiny is required there, but strict scrutiny is required here. Under the Maryland law we consider today, individuals

do not remain free to purchase or possess the banned firearms for self-defense inside of their homes. Thus, Maryland's law restricts rather than regulates; it addresses conduct occurring inside the home; and it directly touches self-defense concerns in the home. Maryland's law imposes dramatic limitations on the core protections guaranteed by the Second Amendment and, as implicitly admitted by the *Hosford* panel, requires the court to apply strict scrutiny.

My friends in the majority do not apply strict scrutiny because they do not believe that the Maryland law significantly burdens the "core lawful purpose" of the Second Amendment. Their reasoning? Maryland left handguns (and other weapons) for its residents to use to defend their homes, and this ought to be enough. This line of thought was *expressly rejected* by the Supreme Court in *Heller*, which dismissed the District of Columbia's reverse contention that its handgun ban did not unconstitutionally burden the right to self-defense because long guns were still permitted for home defense. *See Heller*, 554 U.S. at 629 ("It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed."); *accord Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007) (rejecting the District's argument that alternative weapons rendered handgun ban lawful, calling it "frivolous," and noting that "[i]t could be similarly contended that all firearms may be banned so long as sabers were permitted"). As long as the firearms chosen are those commonly possessed by the

American people for lawful purposes – and the rifles at issue here most certainly are – states cannot prohibit their residents from purchasing them for self-defense in the home unless that restriction can meet strict scrutiny review.

The majority, however, implies that this portion of *Heller* does not apply to a ban of commonly possessed firearms if handguns are still available to the homeowner because handguns are "the quintessential self-defense weapon." 554 U.S. at 629. If the majority were correct, then any state "would be free to ban *all* weapons *except* handguns, because handguns are the most popular weapon chosen by Americans for self-defense in the home." *Caetano*, 136 S. Ct. at 1032 (Alito, J., concurring) (internal quotation marks omitted). Under the majority's logic, a state could similarly ban all shotguns, even those commonly used in hunting, and not transgress the Second Amendment, so long as handguns remained lawful to possess. The fact that handguns are still available is irrelevant. If other firearms, though "less popular than handguns," are nonetheless "widely owned and accepted as a legitimate means of self-defense across the country," they cannot be banned simply because more popular handguns are not. *Id.* at 1033.

Finally, we are told that the ban on semiautomatic rifles is not burdensome because these weapons are not even well-suited for defense of hearth and home – handguns are better and that is all law-abiding

citizens need.[9] This is patently wrong. First, there are legitimate reasons for citizens to favor semiautomatic rifles over handguns in defending themselves and their families at home. The record contains evidence, which on summary judgment was to be viewed in the light most favorable to the plaintiffs, suggesting that "handguns are inherently less accurate than long guns" as they "are more difficult to steady" and "absorb less of the recoil[,] . . . [thus] reducing accuracy." J.A. 2131. This can be an important consideration for a typical homeowner, who "under the extreme duress of an armed and advancing attacker is likely to fire at, but miss, his or her target." J.A. 2123. "Nervousness and anxiety, lighting conditions, the presence of physical obstacles . . . , and the mechanics of retreat are all factors which contribute to [the] likelihood" that the homeowner will shoot at but miss a home invader. *Id.* These factors could also affect an individual's ability to reload a firearm quickly during a home invasion. Similarly, a citizen's ability to defend himself and his home is enhanced with an LCM.

Second, the means selected by citizens to defend themselves and their families at home is an intensely

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[9] If, as the majority says, there is "scant evidence" that the prohibited semiautomatic rifles are well-suited for home defense, then there is even less reason to believe that these weapons are best suited for combat operations. After all, it cannot be disputed that one reason non-criminal citizens actually keep these weapons at home is for self-defense. I have searched the record in vain for the statistics on how many standing armies issue AR-15s or semiautomatic-only-weapons to their troops. I do not believe there are any.

personal choice dependent upon circumstances unique to each individual. Not everyone who would bear arms in defense of his home is comfortable or confident using a handgun. As long as the weapon chosen is one commonly possessed by the American people for lawful purposes – and the rifles at issue here most certainly are – the state has very little say about whether its citizens should keep it in their homes for protection. "The question under *Heller* is not whether citizens have adequate alternatives available for self-defense. Rather, *Heller* asks whether the law bans types of firearms commonly used for a lawful purpose – regardless of whether alternatives exist." *Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from the denial of certiorari). "[T]he Second Amendment confers rights upon individual citizens – not state governments," and it clearly does not "delegate to States and localities the power to decide which firearms people may possess." *Id.* "The very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634.

Nevertheless, Maryland has taken the choice away from its residents and simply determined that, regardless of the circumstances in any case, its people, whether living in a 700 square-foot apartment or a 50-acre farm, may only protect their loved ones with one of the guns *the State* thinks they should use – perhaps a handgun, or a slow-to-load bolt-action hunting rifle or a shotgun with heavy recoil. "The right to

self-defense is largely meaningless if it does not include the right to choose the most effective means of defending oneself." *Friedman v. City of Highland Park*, 784 F.3d 406, 418 (7th Cir. 2015) (Manion, J., dissenting). Indeed, "the ultimate decision for what constitutes the most effective means of defending one's home, family, and property resides in individual citizens and not the government. . . . The extent of danger – real or imagined – that a citizen faces at home is a matter only that person can assess in full." *Id.* at 413.

For a law-abiding citizen who, for whatever reason, chooses to protect his home with a semi-automatic rifle instead of a semi-automatic handgun, Maryland's law clearly imposes a significant burden on the exercise of the right to arm oneself at home, and it should at least be subjected to strict scrutiny review before it is allowed to stand.

For the reasons I have set forth, I respectfully dissent.

TRAXLER, Circuit Judge, dissenting as to Part IV.A and concurring as to Part IV.B:

For the reasons set forth in the now-vacated panel opinion, I dissent from the majority's opinion on the equal protection claim. *See Kolbe v. Hogan*, 813 F.3d 160, 199-202 (4th Cir. 2016).

I concur in the result reached by the majority with respect to the vagueness challenge, for the reasons expressed in the now-vacated panel opinion. *See id.* at 190-92.

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-1945

STEPHEN V. KOLBE; ANDREW C. TURNER; WINK'S SPORTING GOODS, INCORPORATED; ATLANTIC GUNS, INCORPORATED; ASSOCIATED GUN CLUBS OF BALTIMORE, INCORPORATED; MARYLAND SHALL ISSUE, INCORPORATED; MARYLAND STATE RIFLE AND PISTOL ASSOCIATION, INCORPORATED; NATIONAL SHOOTING SPORTS FOUNDATION, INCORPORATED; MARYLAND LICENSED FIREARMS DEALERS ASSOCIATION, INCORPORATED,

Plaintiffs-Appellants,

and

SHAWN J. TARDY; MATTHEW GODWIN,

Plaintiffs,

v.

LAWRENCE J. HOGAN, Jr., in his official capacity as Governor of the State of Maryland; BRIAN E. FROSH, in his official capacity as Attorney General of the State of Maryland; COLONEL WILLIAM M. PALLOZZI, in his official capacity as Secretary of the Department of State Police and Superintendent of the Maryland State Police; MARYLAND STATE POLICE,

Defendants-Appellees.

STATE OF WEST VIRGINIA; STATE OF ALABAMA; STATE OF ALASKA; STATE OF ARIZONA; STATE OF FLORIDA; STATE OF IDAHO; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MICHIGAN; STATE OF MISSOURI; STATE OF MONTANA; STATE OF NEBRASKA; STATE OF NEW MEXICO; STATE OF NORTH DAKOTA; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF TEXAS; STATE OF UTAH; STATE OF WYOMING; COMMONWEALTH OF KENTUCKY; TRADITIONALIST YOUTH NETWORK, LLC; NATIONAL RIFLE ASSOCIATION OF AMERICA; CRPA FOUNDATION; GUN OWNERS OF CALIFORNIA; COLORADO STATE SHOOTING ASSOCIATION; IDAHO STATE RIFLE & PISTOL ASSOCIATION; ILLINOIS STATE RIFLE ASSOCIATION; KANSAS STATE RIFLE ASSOCIATION; LEAGUE OF KENTUCKY SPORTSMEN, INC.; NEVADA FIREARMS COALITION; ASSOCIATION OF NEW JERSEY RIFLE & PISTOL CLUBS; NEW MEXICO SHOOTING SPORTS ASSOCIATION; NEW YORK RIFLE & PISTOL ASSOCIATION; TEXAS STATE RIFLE ASSOCIATION; VERMONT FEDERATION OF SPORTSMAN'S CLUBS; VERMONT RIFLE & PISTOL ASSOCIATION; GUN OWNERS OF AMERICA, INC.; GUN OWNERS FOUNDATION; U.S. JUSTICE FOUNDATION; THE LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION; THE ABRAHAM LINCOLN FOUNDATION FOR PUBLIC POLICY RESEARCH, INC.; CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND; INSTITUTE ON THE CONSTITUTION; CONGRESS OF RACIAL EQUALITY; NATIONAL CENTER FOR PUBLIC POLICY RESEARCH; PROJECT 21; PINK PISTOLS; WOMEN AGAINST GUN CONTROL; THE

DISABLED SPORTSMEN OF NORTH AMERICA; LAW ENFORCEMENT LEGAL DEFENSE FUND; LAW ENFORCEMENT ACTION NETWORK; LAW ENFORCEMENT ALLIANCE OF AMERICA; INTERNATIONAL LAW ENFORCEMENT EDUCATORS AND TRAINERS ASSOCIATION; WESTERN STATES SHERIFFS' ASSOCIATION,

Amici Supporting Appellants,

LAW CENTER TO PREVENT GUN VIOLENCE; MARYLANDERS TO PREVENT GUN VIOLENCE, INCORPORATED; BRADY CENTER TO PREVENT GUN VIOLENCE; STATE OF NEW YORK; STATE OF CALIFORNIA; STATE OF CONNECTICUT; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF IOWA; STATE OF MASSACHUSETTS; STATE OF OREGON; DISTRICT OF COLUMBIA,

Amici Supporting Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Catherine C. Blake, District Judge. (1:13-cv-02841-CCB)

Argued: March 25, 2015 Decided: February 4, 2016

Before TRAXLER, Chief Judge, and KING and AGEE, Circuit Judges.

Affirmed in part, vacated in part, and remanded by published opinion. Chief Judge Traxler wrote the opinion for the court as to Parts I, II, III, V, and VI, in which

Judge Agee joined. Judge Agee wrote separately as to Part IV. Judge King wrote an opinion dissenting as to Part III and concurring in the judgment as to Parts IV and V. Chief Judge Traxler wrote a dissenting opinion as to Part IV.

ARGUED: John Parker Sweeney, BRADLEY ARANT BOULT CUMMINGS LLP, Washington, D.C., for Appellants. Matthew John Fader, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellees. **ON BRIEF:** T. Sky Woodward, James W. Porter, III, Marc A. Nardone, BRADLEY ARANT BOULT CUMMINGS LLP, Washington, D.C., for Appellants. Douglas F. Gansler, Attorney General of Maryland, Jennifer L. Katz, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellees. Kyle J. Bristow, BRISTOW LAW, PLLC, Clarkston, Michigan; Jason Van Dyke, THE VAN DYKE LAW FIRM, PLLC, Plano, Texas, for Amicus Traditionalist Youth Network, LLC. Patrick Morrisey, Attorney General, Elbert Lin, Solicitor General, Julie Marie Blake, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA, Charleston, West Virginia, for Amicus State of West Virginia; Luther Strange, Attorney General of Alabama, Montgomery, Alabama, for Amicus State of Alabama; Michael C. Geraghty, Attorney General of Alaska, Juneau, Alaska, for Amicus State of Alaska; Thomas C. Horne, Attorney General of Arizona, Phoenix, Arizona, for Amicus State of Arizona; Pam Bondi, Attorney General

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Peter A. Patterson, COOPER & KIRK, PLLC, Washington, D.C., for Amicus National Rifle Association of America, Inc. C.D. Michel, Clinton B. Monfort, Anna M. Barvir, MICHEL & ASSOCIATES, P.C., Long Beach, California, for Amici CRPA Foundation, Gun Owners of California, Colorado State Shooting Association, Idaho State Rifle & Pistol Association, Illinois State Rifle Association, Kansas State Rifle Association, League of Kentucky Sportsmen, Inc., Nevada Firearms Coalition, Association of New Jersey Rifle & Pistol Clubs, New Mexico Shooting Sports Association, New York State Rifle & Pistol Association, Texas State Rifle Association, Vermont Federation of Sportsmen's Clubs, and Vermont Rifle & Pistol Association. Michael Connelly, U.S. JUSTICE FOUNDATION, Ramona, California, for Amicus U.S. Justice Foundation; Robert J. Olson, Herbert W. Titus, William J. Olson, John S. Miles, Jeremiah L. Morgan, WILLIAM J. OLSON, P.C., Vienna, Virginia, for Amici Gun Owners of America, Inc., Gun Owners Foundation, U.S. Justice Foundation, The Lincoln Institute for Research and Education, The Abraham Lincoln Foundation for Public Policy Research, Inc., Conservative Legal Defense and Education Fund, and Institute on the Constitution. Brian S. Koukoutchos, Mandeville, Louisiana; James B. Astrachan, ASTRACHAN GUNST THOMAS, P.C., Baltimore, Maryland, for Amici Congress of Racial Equality, National Center for Public Policy Research, Project 21, Pink Pistols, Women Against Gun Control, and The Disabled Sportsmen of North America. Dan M. Peterson, DAN M. PETERSON, PLLC, Fairfax, Virginia, for Amici The Law Enforcement Legal Defense Fund, Law

Enforcement Action Network, Law Enforcement Alliance of America, International Law Enforcement Educators and Trainers Association, and Western States Sheriffs' Association. Jonathan K. Baum, Chicago, Illinois, Mark T. Ciani, KATTEN MUCHIN ROSENMAN LLP, New York, New York, for Amici Law Center to Prevent Gun Violence and Marylanders to Prevent Gun Violence, Inc. Jonathan E. Lowy, Kelly Sampson, BRADY CENTER TO PREVENT GUN VIOLENCE, Washington, D.C.; Elliott Schulder, Suzan F. Charlton, Amit R. Vora, Catlin Meade, Stephen Kiehl, COVINGTON & BURLING LLP, Washington, D.C., for Amicus Brady Center To Prevent Gun Violence. Barbara D. Underwood, Solicitor General, Anisha S. Dasgupta, Deputy Solicitor General, Claude S. Platton, Assistant Solicitor General, Eric T. Schneiderman, Attorney General of the State of New York, for Amicus State of New York; Kamala D. Harris, Attorney General of California, Sacramento, California, for Amicus State of California; George Jepsen, Attorney General of Connecticut, Hartford, Connecticut, for Amicus State of Connecticut; Russell A. Suzuki, Attorney General of Hawaii, Honolulu, Hawaii, for Amicus State of Hawaii; Lisa Madigan, Attorney General of Illinois, Chicago, Illinois, for Amicus State of Illinois; Thomas J. Miller, Attorney General of Iowa, Des Moines, Iowa, for Amicus State of Iowa; Martha Coakley, Attorney General of Massachusetts, Boston, Massachusetts, for Amicus Commonwealth of Massachusetts; Ellen F. Rosenblum, Attorney General of Oregon, Salem, Oregon, for Amicus State of Oregon; Karl A. Racine, Attorney General

of The District of Columbia, Washington, D.C., for Amicus The District of Columbia.

TRAXLER, Chief Judge, wrote the opinion for the court as to Parts I, II, and III, in which Judge AGEE joined.

In April 2013, Maryland passed the Firearm Safety Act ("FSA"), which, among other things, bans law-abiding citizens, with the exception of retired law enforcement officers, from possessing the vast majority of semi-automatic rifles commonly kept by several million American citizens for defending their families and homes and other lawful purposes. Plaintiffs raise a number of challenges to the FSA, contending that the "assault weapons" ban trenches upon the core Second Amendment right to keep firearms in defense of hearth and home, that the FSA's ban of certain larger-capacity detachable magazines ("LCMs") likewise violates the Second Amendment, that the exception to the ban for retired officers violates the Equal Protection Clause, and that the FSA is void for vagueness to the extent that it prohibits possession of "copies" of the specifically identified semi-automatic rifles banned by the FSA. The district court rejected Plaintiffs' Second Amendment challenges, concluding that the "assault weapons" and larger-capacity magazine bans passed constitutional muster under intermediate scrutiny review. The district court also denied Plaintiffs' equal protection and vagueness claims.

In our view, Maryland law implicates the core protection of the Second Amendment – "the right of

law-abiding responsible citizens to use arms in defense of hearth and home," *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), and we are compelled by *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), as well as our own precedent in the wake of these decisions, to conclude that the burden is substantial and strict scrutiny is the applicable standard of review for Plaintiffs' Second Amendment claim. Thus, the panel vacates the district court's denial of Plaintiffs' Second Amendment claims and remands for the district court to apply strict scrutiny. The panel affirms the district court's denial of Plaintiffs' Equal Protection challenge to the statutory exception allowing retired law enforcement officers to possess prohibited semi-automatic rifles. And, the panel affirms the district court's conclusion that the term "copies" as used by the FSA is not unconstitutionally vague.

I. Background

A.

The FSA substantially expanded Maryland's gun control laws. Prior to passage of the FSA, Maryland law permitted citizens in good standing to possess semi-automatic[1] rifles after passing an extensive

[1] 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

background check.[2] The FSA made it a crime after October 1, 2013, to "possess, sell, offer to sell, transfer, purchase, or receive" or to transport into Maryland any firearm designated as an "assault weapon." Md. Code, Crim. Law § 4-303(a). Under the FSA, the term "assault weapon" includes "assault long gun[s]," "assault pistol[s]," and "copycat weapon[s]." *Id.* at § 4-301(d). Plaintiffs' challenge in this appeal is limited to the ban on "assault long guns," *i.e.*, most semi-automatic rifles. An "assault long gun" is defined as any one of the more than 60 semi-automatic rifle or shotgun models specifically listed in section 5-101(r)(2) of the Maryland Public Safety Code, *see* Md. Code, Crim. Law § 4-301(b), "or their copies," Md. Code, Pub. Safety § 5-101(r)(2).[3] The

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empty." *Id.* at 2254-55. No party is challenging the ban on automatic weapons.

[2] Pre-ban Maryland law required a prospective purchaser of what is now defined as an "assault weapon" to provide information such as his "name, address, Social Security number, place and date of birth, height, weight, race, eye and hair color, signature, driver's or photographic identification, [and] occupation." 2003 Maryland Laws Ch. 5, § 2. This information is still required under current Maryland law for individuals wishing to purchase regulated firearms. *See* Md. Code, Pub. Safety § 5-118(b)(1).

[3] The term "assault pistol" is defined by reference to a list of 15 semi-automatic pistols, specified by make and model. *See* Md. Code, Crim. Law § 4-301(c). Handguns are categorized separately by the FSA, *see* Md. Code, Pub. Safety Code § 5-101(n)(1) (defining handgun as a "firearm with a barrel less than 16 inches in length"), although there certainly are semiautomatic handguns not listed as "assault pistols" under the FSA.

"Copycat weapons" are semi-automatic rifles and shotguns not specifically listed under section 5-102(r)(2) but similar in terms of style and features to the listed weapons. *See* Md. Code,

FSA does not define the term "copies." The list of prohibited weapons includes the semi-automatic rifle models most popular by far among American citizens, the AR-15 "and all imitations" and the semi-automatic AK-47 "in all forms." *Id.* at § 5-101(r)(2)(ii) and (xv).[4] Anyone who possesses a prohibited semi-automatic rifle or otherwise violates the FSA's restrictions on such rifles "is guilty of a misdemeanor" and is subject to a prison term of up to three years. Md. Code, Crim. Law § 4-306(a).

The FSA also imposed new limits on the acquisition of detachable magazines in Maryland. Prior to the FSA, Maryland law permitted the acquisition and transfer of detachable magazines with a capacity of up to 20 rounds. *See* 2002 Maryland Laws Ch. 26, § 2. The FSA now makes it illegal to "manufacture, sell, offer for sale, purchase, receive, or transfer a detachable

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Crim. Law § 4-301(e)(2) ("'Copycat weapon' does not include an assault long gun or an assault pistol.").

[4] Maryland's law does expressly permit its citizens to possess a couple of semi-automatic rifles. For example, it specifically exempts the WWII-era M1 Garand, *see* Md. Code, Pub. Safety § 5-101(r)(2)(xxxvii), and the AR-15 "H-BAR", *see* § 5-101(r)(2)(xv), a heavy barrel iteration of the AR-15, neither of which are popular home defense firearms. Citizens might also legally possess other semi-automatic rifles that are not listed under § 5-101(r)(2), presuming the citizen has sufficient expertise to determine that the firearm does not constitute a "copy" of one of the banned rifles or an "imitation" of the AR-15 pattern semi-automatic rifle. One semi-automatic rifle that apparently passes muster is the AR-10, *see* J.A. 210, a firearm that is ill-suited to home defense for some smaller individuals because of its heavy recoil which makes it difficult "to reobtain the target and to quickly and accurately fire subsequent shots if needed." J.A. 2267.

magazine that has a capacity of more than 10 rounds of ammunition for a firearm." Md. Code, Crim. Law § 4-305(b).[5] The FSA, however, does not expressly prohibit the transportation of magazines holding more than 10 rounds into Maryland from out of state, as it does the transportation of semi-automatic rifles. The same penalties that apply to a violation of the statutory prohibitions against semi-automatic rifles apply to a violation of the provisions regulating magazines holding more than 10 rounds. *See* Md. Code, Crim. Law § 4-306(a).

The FSA provides a few exceptions to the ban on possessing semi-automatic rifles or LCMs. For example, the statute contains a grandfather clause pursuant to which "[a] person who lawfully possessed" or "completed an application to purchase" a prohibited semi-automatic rifle "before October 1, 2013" may lawfully continue to "possess and transport" it. *See* Md. Code, Crim. Law § 4-303(b)(3)(i). And the FSA's prohibitions do not apply to several classes of individuals, such as active law enforcement officers and licensed firearms dealers under certain circumstances. *See* Md. Code, Crim. Law §§ 4-302(1), (3). Another exception allows retired state or local law enforcement agents to possess banned weapons and LCMs if the weapon or magazine was "sold or transferred to the [retired agent] by the law enforcement agency on retirement,"

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[5] The statute defines a "detachable magazine" as "an ammunition feeding device that can be removed readily from a firearm without requiring disassembly of the firearm action or without the use of a tool, including a bullet or cartridge." Md. Code, Crim. Law § 4-301(f).

or the retired agent "purchased or obtained" the weapon "for official use with the law enforcement agency before retirement." *See* Md. Code, Crim. Law §§ 4-302(7)(i), (ii).

B.

Plaintiff Stephen Kolbe is a life-long resident of Maryland who resides in Towson and owns a small business in Baltimore County. Kolbe owns "one full-size semiautomatic handgun" that is equipped with a standard detachable magazine that holds more than 10 rounds. J.A. 1851. Various personal experiences, including an incident in which an employee's ex-boyfriend threatened to come kill her at work but police did not respond for thirty minutes, and Kolbe's family's close proximity to "a high-traffic public highway," J.A. 1852, have caused Kolbe to conclude that he needs to keep firearms for the purpose of "self-defense in [his] home." J.A. 1851. But for the ban imposed by the FSA, Kolbe would purchase a semi-automatic rifle, which "possess[es] features which make[s] [it] ideal for self-defense in the home." J.A. 1851.

Plaintiff Andrew Turner is a Maryland resident who currently owns three semi-automatic rifles, now banned as assault weapons under the FSA, and a semi-automatic handgun, all of which come with standard detachable magazines holding more than 10 rounds. While on active duty in the United States Navy, Turner suffered an injury that makes it difficult for him to operate firearms and thus necessitates "access to

full-capacity magazines . . . to ensure," among other things, his ability to defend himself in his home. J.A. 1856. According to Turner, he would purchase additional semi-automatic rifles with detachable LCMs if Maryland law did not prohibit him from doing so. Turner's primary purpose for owning such firearms is self-defense in his home, but he also uses his currently owned semi-automatic rifles for target shooting and hunting.

Finally, Wink's Sporting Goods, Inc., and Atlantic Guns, Inc. – two businesses that operate in the firearms, hunting, and sport shooting industries – joined the individual plaintiffs in challenging the FSA. Likewise, several trade, hunting and gun-owners' rights organizations joined as plaintiffs on their own behalf and on behalf of their members.[6]

Just before the FSA took effect on October 1, 2013, Plaintiffs filed a Motion for a Temporary Restraining Order and sought declaratory and injunctive relief, arguing that the ban on possession of assault rifles and the 10-round limitation on detachable magazines abridges their rights under the Second Amendment; that the exemption for retired law enforcement officers under the FSA violates the Equal Protection Clause of the Fourteenth Amendment; and that the term "copies" as it is used in section 5-101(r)(2) of Maryland's Public

[6] These include Associated Gun Clubs of Baltimore, Inc.; Maryland Shall Issue, Inc.; Maryland State Rifle and Pistol Association, Inc.; National Shooting Sports Foundation, Inc.; and the Maryland Licensed Firearms Dealers Association, Inc.

Safety Code is unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment.

After the district court denied Plaintiffs' Motion for a Temporary Restraining Order, the parties filed cross motions for summary judgment on the merits. The district court determined that intermediate scrutiny applied to the Second Amendment claims. In granting summary judgment to the State, the district court concluded, under intermediate scrutiny, that Maryland's ban on "assault" rifles and LCMs met the applicable standards and was thus valid under the Second Amendment. *See Kolbe v. O'Malley*, 42 F. Supp. 3d 768, 797 (D. Md. 2014). The district court also granted summary judgment for the State on Plaintiffs' Equal Protection claim to the statutory exception for retired law enforcement officers, holding that retired officers "are differently situated" than ordinary citizens who wish to obtain assault rifles. *Id.* at 798. Finally, the district court granted summary judgment for the State on Plaintiffs' vagueness claim based on its conclusion that the ban on possessing assault rifles "or their copies" sets forth "an identifiable core of prohibited conduct." *Id.* at 802.

Plaintiffs appeal.

II. Standard of Review

As we noted above, the district court decided this case on cross-motions for summary judgment. "When faced with cross-motions for summary judgment, we consider each motion separately on its own merits to

determine whether either of the parties deserves judgment as a matter of law." *Bacon v. City of Richmond*, 475 F.3d 633, 337-38 (4th Cir. 2007) (internal quotation marks omitted). In doing so, we apply the ordinary *de novo* standard, while "resolving all doubts and inferences in favor of the non-moving party." *Id.*

Plaintiffs challenge each of the district court's rulings. We address these challenges seriatim.

III. Second Amendment

We turn first to Plaintiffs' Second Amendment challenge to the FSA's ban on semi-automatic rifles and LCMs. The Second Amendment, of course, provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In *United States v. Chester*, we fashioned a two-part approach to resolving Second Amendment challenges, *see* 628 F.3d 673, 680 (4th Cir. 2010), much like the approach adopted by several of our sister circuits in the wake of *Heller, see, e.g.*, *Fyock v. Sunnyvale*, 779 F.3d 991, 996 (9th Cir. 2015); *Ezell v. City of Chicago*, 651 F.3d 684, 701-03 (7th Cir. 2011); *Heller v. District of Columbia ("Heller II")*, 670 F.3d 1244, 1252 (D.C. Cir. 2011); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). First, we ask "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *Chester*, 628 F.3d at 680 (internal quotation marks omitted). The

answer to this question requires an "historical inquiry" into "whether the conduct at issue was understood to be within the scope of the right at the time of ratification." *Id.*; *see Heller*, 554 U.S. at 626-27. If the answer to this initial inquiry is no, "the challenged law is valid." *Chester*, 628 F.3d at 680. However, "[i]f 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.*

A. Does the FSA's Ban Implicate Second Amendment Rights?

We first address the threshold question of whether the bans imposed by the FSA burden conduct that falls within the scope of the Second Amendment. As is now well understood, *Heller* affirmed that the Second Amendment protects a preexisting "individual right to possess and carry weapons in case of confrontation." 554 U.S. at 592. "[D]eeply rooted in this Nation's history and tradition," *McDonald*, 561 U.S. at 768 (internal quotation marks omitted), this right is among the "fundamental rights necessary to our system of ordered liberty," *id.* at 778. The right to keep and bear arms historically has been understood to encompass "self-defense and hunting," *Heller*, 554 U.S. at 599, but *Heller* made clear "the *central component* of the Second Amendment right" is "individual self-defense," *McDonald*, 561 U.S. at 767. Moreover, the right to keep arms is at its greatest strength in "the home, where the need

for defense of self, family, and property is most acute." *Heller*, 554 U.S. at 628.

The FSA makes it unlawful for any citizen "to possess, . . . purchase, or receive" an "assault weapon." Md. Code, Crim. Law § 4-303(a).[7] The statute prohibits all forms of possession of any weapon listed in section 5-101(r)(2) – a law-abiding citizen cannot keep any of these weapons in the home for any reason, including the defense of self and family. Accordingly, the conduct being regulated by the FSA includes an individual's possession of a firearm in the home for self-defense.

The Supreme Court has already performed an historical analysis of our traditional understanding of a citizen's right to keep a weapon at home for self-defense, concluding that "the right of law-abiding, responsible citizens to use arms in defense of hearth and home" lies at the core of the Second Amendment. *Heller*, 554 U.S. at 635. Any prohibition or restriction imposed by the government on the exercise of this right in the home clearly implicates conduct protected by the Second Amendment.

The right to keep and bear arms, as a matter of history and tradition, "is not unlimited," of course, as even law-abiding citizens do not have "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. Of particular relevance to this appeal is the historical limitation upon *which* arms a citizen had the right to bear,

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[7] The same statutory prohibitions (except as to possession) apply to LCMs. *See* Md. Code, Crim. Law § 4-305(b).

as the Second Amendment protects only "the sorts of weapons . . . in *common use at the time.*" *Id.* at 627 (emphasis added) (internal quotation marks omitted). "[The Second Amendment] does not extend to all types of weapons, only to those typically possessed by law-abiding citizens for lawful purposes." *Marzzarella*, 614 F.3d at 90. This limitation reflects "the historical tradition of prohibiting the carrying of dangerous *and* unusual weapons." *Id.* (internal quotation marks omitted; emphasis added).

Moreover, when the regulated conduct relates to a particular class of weapons, we must address an additional issue before we can say with assurance that the Second Amendment applies and turn to the question of the appropriate level of scrutiny. That is, we must determine whether the particular class of weapons prohibited or regulated by the statute are themselves protected by the Second Amendment. *See Friedman v. City of Highland Park*, 784 F.3d 406, 414 (7th Cir. 2015) (Manion, J., dissenting) ("[W]here, as here, the activity is directly tied to specific classes of weapons, we are faced with an additional threshold matter: whether the classes of weapons regulated are commonly used by law-abiding citizens. If the weapons in question (assault rifles and high-capacity magazines) are not commonly used by law-abiding citizens, then our inquiry ends as there is no Second Amendment protection. . . .").

In *United States v. Miller*, 307 U.S. 174 (1939), the Court rejected a Second Amendment challenge to the defendants' convictions for unlawful possession of a

short-barreled shotgun because there was no "evidence tending to show" that such a weapon was related "to the preservation or efficiency of a well regulated militia" or was "part of the ordinary military equipment," *id.* at 178. Significantly, however, *Miller* noted that "ordinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *Id.* at 179; *see Heller*, 554 U.S. at 624-25 ("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." (internal quotation marks and alteration omitted)). Reading *Miller*'s passages together, the *Heller* Court clarified *Miller*'s holding and explained 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 625 (emphasis added). Accordingly, the Second Amendment extends only to those weapons "typically possessed by law-abiding citizens for lawful purposes," *id.*; *see Marzzarella*, 614 F.3d at 90 ("[The Second Amendment extends] . . . only to those [weapons] typically possessed by law-abiding citizens for lawful purposes."); *Heller II*, 670 F.3d at 1260 ("[W]e must also ask whether the prohibited weapons are typically possessed by law-abiding citizens for lawful purposes; if not, then they are not the sorts of Arms protected by the Second Amendment." (internal citation and quotation marks omitted));

United States v. Fincher, 538 F.3d 868, 873 (8th Cir. 2008) (explaining there is no protection for "weapons not typically possessed by law-abiding citizens for lawful purposes" (internal quotation marks omitted)). Thus, we must determine whether semi-automatic rifles and LCMs are commonly possessed by law-abiding citizens for lawful purposes. *See Fyock*, 779 F.3d at 998; *Heller II*, 670 F.3d at 1260-61.

Commonly Possessed

Like a number of courts that have previously considered this question, we have little difficulty in concluding that the banned semi-automatic rifles are *in common use* by law-abiding citizens. *See, e.g.*, *Heller II*, 670 F.3d at 1261 ("We think it clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in 'common use,' as the plaintiffs contend. Approximately 1.6 million AR-15s alone have been manufactured since 1986, and in 2007 this one popular model accounted for 5.5 percent of all firearms, and 14.4 percent of all rifles, produced in the U.S. for the domestic market."); *Colorado Outfitters Ass'n v. Hickenlooper*, 24 F. Supp. 3d 1050, 1068 (D. Colo. 2014) (concluding that statute "affects the use of firearms that are both widespread and commonly used for self-defense," in view of the fact that "lawfully owned semi-automatic firearms using a magazine with the capacity of greater than 15 rounds number in the tens of millions"); *Shew v. Malloy*, 994 F. Supp. 2d 234, 246 (D. Conn. 2014) (concluding that semi-automatic rifles such as the AR-15 as well as magazines with a

capacity greater than 10 rounds "are 'in common use' within the meaning of *Heller* and, presumably, used for lawful purposes"). We make the assessment based on the present-day use of these firearms nationwide. *See, e.g.*, *Heller II*, 670 F.3d at 1261 (looking to present-day use to assess common use); *United States v. Tagg*, 572 F.3d 1320, 1326 (11th Cir. 2009) (same); *United States v. Fincher*, 538 F.3d 868, 874 (8th Cir. 2008) (same).

We think it is beyond dispute from the record before us, which contains much of the same evidence cited in the aforementioned decisions, that law-abiding citizens commonly possess semi-automatic rifles such as the AR-15. Between 1990 and 2012, more than 8 million AR- and AK-platform semi-automatic rifles alone were manufactured in or imported into the United States. J.A. 1877. In 2012, semi-automatic sporting rifles accounted for twenty percent of all retail firearms sales. J.A. 1880. For perspective, we note that in 2012, the number of AR- and AK-style weapons manufactured and imported into the United States was more than double the number of Ford F-150 trucks sold, the most commonly sold vehicle in the United States. J.A. 1878.

Likewise, the record in this case shows unequivocally that LCMs are commonly kept by American citizens, as there are more than 75 million such magazines in circulation in the United States. In fact, these magazines are so common that they are standard. "[O]n a nationwide basis most pistols are manufactured with magazines holding ten to 17 rounds."

J.A. 2122. Even more than 20 years ago, "fully 18 percent of all firearms owned by civilians . . . were equipped with magazines holding more than ten rounds." *Heller II*, 670 F.3d at 1261. Virtually every federal court to have addressed this question has concluded that "magazines having a capacity to accept more than ten rounds are in common use." *Fyock v. City of Sunnyvale*, 25 F. Supp. 3d 1267, 1275 (N.D. Cal. 2014) (noting such magazines comprise "approximately 47 percent of all magazines owned" and number "in the tens-of-millions, even under the most conservative estimates" (internal quotation marks omitted)), *aff'd*, 779 F.3d 991, 998 (9th Cir. 2015) ("[W]e cannot say that the district court abused its discretion by inferring from the evidence of record that, at a minimum, magazines are in common use."). "There may well be some capacity above which magazines are not in common use but, if so, the record is devoid of evidence as to what that capacity is; in any event, that capacity surely is not ten." *Heller II*, 670 F.3d at 1261; *see also Shew*, 994 F. Supp. 2d at 245-46; *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 990 F. Supp. 2d 349, 365 (W.D.N.Y. 2013).

In addition, we reject the State's argument that the Second Amendment does not apply to detachable magazines because magazines are not firearms – that is, detachable magazines do not constitute "bearable" arms that are expressly protected by the Second Amendment. *See* U.S. Const. amend. II. By Maryland's logic, the government can circumvent *Heller*, which established that the State cannot ban handguns kept

in the home for self-defense, simply by prohibiting possession of individual components of a handgun, such as the firing pin. But of course, without the ability to actually fire a gun, citizens cannot effectively exercise the right to bear arms. *See Jackson v. City of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) ("The Second Amendment protects 'arms,' 'weapons,' and 'firearms'; it does not explicitly protect ammunition. Nevertheless, without bullets, the right to bear arms would be meaningless."). In our view, "the right to possess firearms for protection implies a corresponding right" to possess component parts necessary to make the firearms operable. *Id.* (internal quotation marks omitted); *see Ezell*, 651 F.3d at 704 ("The right to possess firearms for protection implies a corresponding right to . . . maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective.").

This reasoning applies to the magazines in question. To the extent that firearms equipped with detachable magazines are commonly possessed by law-abiding citizens for lawful purposes, there must also be an ancillary right to possess the magazines necessary to render those firearms operable. To the extent the State can regulate these magazines, it is *not* because the magazines are not bearable "arms" within the meaning of the Second Amendment.

Our conclusion that these magazines constitute "arms" also finds strong historical support. *Heller* looked to early definitions of "arms" to determine what weapons implicated the Second Amendment, and those

definitions were broad, including "weapons of offence, or armour of defence," or anything "that a man . . . takes into his hands, or useth in wrath to cast at or strike another." *Heller*, 554 U.S. at 581. Other dictionaries of the time say the same. *See, e.g.*, Nathan Bailey, *An Universal Etymological English Dictionary* 47 (1756) (defining "arm" as "to furnish with armour of defense, or weapons of offence"). Obviously, magazines and the rounds they contain are used to strike at another and inflict damage. Early American provisions protecting the right to "arms" were also crafted partly in response to British measures that, while not taking away guns entirely, drastically impaired their utility – suggesting "arms" should be read to protect all those items necessary to use the weapons effectively. *See* Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History*, 17 Stan. L. & Pol'y Rev. 571, 577 (2006) (describing British efforts to steal colonial Williamsburg's store of gunpowder, thereby rendering the firearms of citizens useless). In short, magazines and other forms of ammunition have long been recognized as arms.

Lawful Purposes

Plaintiffs Kolbe and Turner both seek to acquire and keep semi-automatic rifles, equipped with LCMs, in their homes primarily for self-defense. And, they proffered evidence suggesting that they are not alone in this regard. For example, Plaintiffs' expert James Curcuruto presented survey evidence showing that

self-defense was a primary reason for the purchase of weapons banned under the FSA, and a 1989 Report from the Bureau of Alcohol, Tobacco, and Firearms indicated that self-defense was a suitable purpose for semi-automatic rifles. The State's expert Daniel Webster even agreed that it is reasonable to assume that a purpose for keeping one of the prohibited weapons is self-defense in the home.

The State argues that even if ownership of the prohibited weapons and magazines is common, nothing in the record reflects that these weapons are commonly *used for self-defense.* More specifically, the State's position is premised on Plaintiffs' lack of evidence that the banned semi-automatic rifles have ever *actually* been used in self-defense in Maryland, as opposed to being possessed for self-defense.

The State's position flows from a hyper-technical, out-of-context parsing of the Supreme Court's statement in *Heller* "that the sorts of weapons protected were those in common *use* at the time." *Heller*, 554 U.S. at 627 (emphasis added; internal quotation marks omitted). The State misreads *Heller*, as Second Amendment rights do not depend on how often the semi-automatic rifles or regulated magazines are *actually* used to repel an intruder. The proper standard under *Heller* is whether the prohibited weapons and magazines are "typically *possessed* by law-abiding citizens for lawful purposes" as a matter of history and tradition, *id.* at 625 (emphasis added), not whether the magazines are often actually employed in self-defense incidents. Actual use in self-defense is a poor measure

of whether a particular firearm is "typically possessed by law-abiding citizens" for self-defense, as it is unlikely most people will ever need to actually discharge a firearm in self-defense. *See Fyock*, 25 F. Supp. 3d at 1276 ("The fact that few people will require a particular firearm to effectively defend themselves should be celebrated and not seen as a reason to except [that firearm] from Second Amendment protection. Evidence that such magazines are typically possessed by law-abiding citizens for lawful purposes is enough.").

More importantly, it is the government's burden to establish that a particular weapon or activity falls outside the scope of the Second Amendment right. *See Ezell*, 651 F.3d at 702-03 ("[I]f the government can establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment – 1791 or 1868 – then the analysis can stop there."). So far as we can tell, nothing in the record suggests any such tradition with respect to semi-automatic rifles or LCMs. In fact, the Supreme Court, in a pre-*Heller* decision, hinted at the opposite, stating that "certain categories of guns," such as "machineguns, sawed-off shotguns, and artillery pieces," have a "quasi-suspect character," but that "guns falling outside those categories traditionally have been widely accepted as lawful possessions." *Staples v. United States*, 511 U.S. 600, 611-12 (1994). *Heller* reiterated that "the Second Amendment does not protect those weapons *not typically possessed by law-abiding*

citizens for lawful purposes, such as short-barreled shotguns." 554 U.S. at 625 (emphasis added).

We find nothing in the record demonstrating that law-abiding citizens have been historically prohibited from possessing semi-automatic rifles and LCMs. *See Friedman*, 784 F.3d at 418 (Manion, J., dissenting) ("[O]utside of weapons deemed dangerous or unusual, there is no historical tradition supporting wholesale prohibitions of entire classes of weapons."). In fact, semi-automatic firearms have been in use by the civilian population for more than a century. "[I]nitially called 'self-loading' or 'auto-loading' firearms," J.A. 2254, semi-automatic weapons with detachable magazines started to see significant advancements in the late 1800s. In 1893, the "Brochardt semi-auto pistol" was developed for the civilian market. J.A. 2255. In 1905, Winchester produced a semi-automatic rifle, equipped with either a five-or ten-round detachable magazine. And, in 1963, Colt produced the SP-1 semi-automatic rifle with a 20-round detachable magazine, later known as the AR-15, a semi-automatic counterpart to the fully automatic M-16. There is no record evidence or historical documentation that these weapons were at all prohibited until relatively recently.

Dangerous and Unusual Weapons

Finally, the State argues that the banned semi-automatic rifles are "unusually dangerous" and therefore do not fall within the ambit of the Second Amendment. *Heller* makes clear that "dangerous and

unusual" weapons are not "weapons typically possessed by law-abiding citizens for lawful purposes" that have some degree of Second Amendment protection. But because all firearms are dangerous by definition, the State reasons that *Heller* must mean firearms that are "unusually dangerous" fall altogether outside of the scope of the Second Amendment. The State views the banned guns and LCMs as "unusually dangerous," rendering the Second Amendment inapplicable to the ban.

The State's novel "unusually dangerous" standard reads too much into *Heller*. As best we can tell, no statute or case has mentioned, much less adopted, the State's newly proffered standard.

In distinguishing between protected and unprotected weapons, *Heller* focused on whether the weapons were *typically* or *commonly* possessed, not whether they reached or exceeded some undefined level of dangerousness. Hand grenades, sawed-off shotguns and fully automatic "M-16 rifles and the like," *Heller*, 554 U.S. at 627, are unusual weapons that fall outside of the Second Amendment because they are not in common use or typically possessed by the citizenry, *see id.*; *Fincher*, 538 F.3d at 874 ("Machine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use.").

Nothing in *Heller* suggests that courts considering a Second Amendment challenge must decide whether

a weapon is "unusually dangerous." Moreover, the difficulties that would arise from the application of such a standard are fairly apparent. How is a court to determine which weapons are too dangerous to implicate the Second Amendment? The district court believed that semi-automatic rifles with LCMs are too dangerous based on evidence that they unleash greater destructive force than other firearms and appear to be disproportionately connected to mass shootings. But if the proper judicial standard is to go by total murders committed, then handguns should be considered far more dangerous than semi-automatic rifles. "[M]ost murders in America are committed with handguns. No other weapon is used nearly as often. During 2006, handguns were used in 60% of all murders while long guns . . . were used only in 7%." Carl T. Bogus, *Gun Control & America's Cities: Public Policy & Politics*, 1 Alb. Gov't L. Rev. 440, 447 (2008) (footnote omitted). And, the use of handguns in the number of overall homicides is out of proportion to the ownership of handguns. *See id.* at 447 ("[A]mong the 192 million guns in America only 35% are handguns . . . [H]andguns are used in 88% of all firearm murders." (footnote omitted)). Yet *Heller* has established that handguns are constitutionally protected and therefore cannot be too dangerous for Second Amendment purposes.

Furthermore, *Heller* refers to "dangerous" *and* "unusual" conjunctively, suggesting that even a dangerous weapon may enjoy constitutional protection if it

is widely employed for lawful purposes, i.e., not unusual. Founding era understandings of what it means for something to be "unusual" reflect that the firearm must be rare to be considered "unusual." *See* Samuel Johnson, *A Dictionary of the English Language* 717 (1768) (defining "unusual" as "not common: not frequent: rare"); Bailey, *supra*, at 641 (defining "unusualness" as "rareness, and uncommonness"); *accord Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1154 (9th Cir. 2014) (suggesting that laws applicable to "dangerous and unusual" weapons were "understood to cover carriage of uncommon, frightening weapons only"). Scholars often read "unusual" in the same way. *See, e.g.*, Jordan Pratt, *Uncommon Firearms as Obscenity*, 81 Tenn. L. Rev. 633, 637 (2014) (equating "dangerous and unusual" firearms with "uncommon" ones"); Dan Terzian, *The Right to Bear (Robotic) Arms*, 117 Penn St. L. Rev. 755, 767 (2013) ("Most likely, common use is the sole limiting principle."). If the firearm in question is commonly possessed for lawful purposes, it certainly isn't "rare" and thereby "unusual." *See, e.g.*, *Fyock*, 25 F. Supp. 3d at 1275 ("To measure whether a weapon is dangerous and unusual, the court looks at whether it is in common use. . . ."); *In re Wheeler*, 81 A.3d 728, 750 (N.J. App. Div. 2013) ("[T]he protection was not understood to extend to the keeping, carrying or using of weapons that were deemed dangerous or unusual, in the sense that they were not typically used by the law-abiding and responsible for lawful purposes."). Indeed, it was only a dissent in *Heller* that focused on dangerousness alone. *See Heller*, 554 U.S. at 711 (Breyer, J., dissenting). Thus, the State's "unusually dangerous"

argument is of no avail. Our good colleague in dissent would not reach this issue and therefore assumes for analytical purposes that semi-automatic rifles like the AR-15 are not "dangerous and unusual" but are commonly possessed by law-abiding citizens for lawful purposes.[8]

In sum, semi-automatic rifles and LCMs are commonly used for lawful purposes, and therefore come within the coverage of the Second Amendment.[9]

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[8] Although the dissent faults our conclusion that the AR-15 and other semi-automatic rifles prohibited by Maryland law are not so "dangerous and unusual" that they fall outside of the scope of the Second Amendment, the dissent does not rest on unusual dangerousness grounds.

[9] Plaintiffs go too far in arguing that once we determine that the prohibited firearms fall within the protective ambit of the Second Amendment, the Act is unconstitutional and our analysis is at an end. Although *Heller* indicated that the District of Columbia's ban on keeping operable handguns in the home would fail any level of constitutional scrutiny, *Heller* did not do away with means-end scrutiny for Second Amendment challenges. *Heller* simply found it unnecessary to decide the applicable level of scrutiny because a ban of handguns, the overwhelming choice of Americans for home defense, was clearly unconstitutional regardless of the standard applied. *See Heller II*, 670 F.3d at 1265 ("If the Supreme Court truly intended to rule out any form of heightened scrutiny for all Second Amendment cases, then it surely would have said at least something to that effect."). Accordingly, in most every post-*Heller* case implicating the Second Amendment, we have assumed that "an appropriate form of means-end scrutiny" will be applied once we determine that a challenged law implicates the Second Amendment. *See United States v. Pruess*, 703 F.3d 242, 245 (4th Cir. 2012); *United States v. Carpio-Leon*, 701 F.3d 974, 978 (4th Cir. 2012); *United States v. Carter* ("*Carter I*"), 669 F.3d 411, 416 (4th Cir. 2012); *United States v. Chapman*, 666 F.3d 220, 225 (4th Cir. 2012); *United States v. Staten*, 666 F.3d 154,

B. Appropriate Level of Scrutiny

Having determined that the Second Amendment covers the prohibited semi-automatic rifles, we next consider whether the district court erred in applying intermediate scrutiny.

We first consider which of the two relevant standards of scrutiny (strict or intermediate scrutiny) should apply.[10] The strict-scrutiny standard requires the government to prove its restriction is "narrowly tailored to achieve a compelling governmental interest." *Abrams v. Johnson*, 521 U.S. 74, 82 (1997); *see Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340 (2010) (explaining strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest" (internal quotation marks omitted)). To be narrowly tailored, the law must employ the least restrictive means to achieve the compelling government interest. *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). Conversely, intermediate scrutiny requires the government to

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158 (4th Cir. 2011); *Chester II*, 628 F.3d at 678. Unless the Supreme Court directs us to the contrary, we will apply "an appropriate means-end scrutiny" to determine whether firearm regulations can apply to acts coming under the protection of the Second Amendment.

[10] In a Second Amendment challenge, we will not conduct rational-basis review. *See Heller*, 554 U.S. at 628 n.27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.").

"demonstrate . . . that there is a reasonable fit between the challenged regulation and a substantial government objective." *Chester*, 628 F.3d at 683. For several reasons, we find that the Act's firearms and magazine bans require strict scrutiny.

In *Chester*, we adopted a First-Amendment-like approach to determining the appropriate level of scrutiny to apply to any given Second Amendment challenge. To select the proper level of scrutiny, we consider "the nature of the conduct being regulated and the degree to which the challenged law burdens the right." 628 F.3d at 682. "A less severe regulation – a regulation that does not encroach on the core of the Second Amendment – requires a less demanding means-ends showing." *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco & Firearms*, 700 F.3d 185, 195 (5th Cir. 2012); *see also United States v. Huitron-Guizar*, 678 F.3d 1164, 1166 (10th Cir. 2012) ("The right to bear arms, however venerable, is qualified by what one might call the 'who,' 'what,' 'where,' 'when,' and 'why.' ").

First, the FSA's ban on semi-automatic rifles and larger-capacity magazines burdens the availability and use of a class of arms for self-defense in the home, where the protection afforded by the Second Amendment is at its greatest. It implicates the "core" of the Second Amendment: "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 634, 635; *see Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) ("What we know from [*Heller* and *McDonald*] is that

Second Amendment guarantees are at their zenith within the home."). At stake here is a "basic right," *McDonald*, 561 U.S. at 767, "that the Framers and ratifiers of the Fourteenth Amendment counted . . . among those fundamental rights necessary to our system of ordered liberty," *id.* at 778. Indeed, "[t]he [Supreme] Court [in *Heller*] went to great lengths to emphasize the special place that the home – an individual's private property – occupies in our society." *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1259 (11th Cir. 2012).

Second, we conclude that the challenged provisions of the FSA substantially burden this fundamental right. The burden imposed in this case is not merely incidental. Maryland law imposes a complete ban on the possession by law-abiding citizens of AR-15 style rifles – the most popular class of centerfire semi-automatic rifles in the United States. As we explained in Section III.A., these weapons are *protected* under the Second Amendment. We therefore struggle to see how Maryland's law would not substantially burden the core Second Amendment right to defend oneself and one's family in the home with a firearm that is commonly possessed by law-abiding citizens for such lawful purposes. Moreover, the FSA also reaches *every* instance where an AR-15 platform semi-automatic rifle or LCM might be preferable to handguns or bolt-action rifles-for example hunting, recreational shooting, or competitive marksmanship events, all of which are lawful purposes protected by the Constitution. *See Friedman v. City of Highland Park*, 136 S. Ct. 447

(Mem.) (December 7, 2015) (Thomas, J., dissenting from the denial of cert.) ("[T]he ordinance criminalizes modern sporting rifles (e.g., AR-style semiautomatic rifles), which many Americans own for lawful purposes like self-defense, hunting, and target shooting."). Thus, the FSA completely prohibits, not just regulates, an entire category of weaponry.[11] As Judge Kavanaugh noted in dissent in *Heller II*, prohibiting this group of weapons might be "equivalent to a ban on a category of speech." 670 F.3d at 1285.

Contrary to the district court's conclusion, the fact that handguns, bolt-action and other manually-loaded long guns, and, as noted earlier, a few semi-automatic rifles are still available for self-defense does not mitigate this burden. *See, e.g.*, *Jackson v. City & Cnty. of*

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[11] Despite my good friend's contrary suggestion, in prohibiting the AR-15 platform or pattern rifles and its copies or imitations, Maryland law is prohibiting an entire class of semi-automatic rifles. Indeed, the district court recognized that the Maryland firearm law "remove[s] a *class* of weapons" that the plaintiffs want for home defense. J.A. 181 (emphasis added). Even the State's expert witness refers to the "AR-15 class" of firearms. J.A. 438, Modern sporting rifles using the AR-15 platform or pattern are produced by numerous manufacturers including Colt, Olympic Arms, DPMS, Eagle Arms, Bushmaster, SGW Enterprises, Essential Arms, and Sendra. Although the FSA specifically lists the "Colt AR-15" as a prohibited weapon, the AR-15 style semi-automatic rifles produced by other manufacturers would be prohibited as copies or imitations under Md. Code, Pub. Safety § 5-101(r)(2)(xv). *See Friedman v. City of Highland Park*, 136 S. Ct. 447 (Mem.) (December 7, 2015) (Thomas, J., dissenting from the denial of cert.) (describing similar "Assault Weapons" ordinance as "categorical[ly] ban[ning] . . . firearms that millions of Americans commonly own for lawful purposes"); *see also* J.A. 413.

San Fran., 135 S. Ct. 2799, 2801 (2015) (Thomas, J., dissenting from the denial of certiorari) ("[N]othing in our decision in *Heller* suggested that a law must rise to the level of the absolute prohibition at issue in that case to constitute a 'substantial burden' on the core of the Second Amendment right."). Indeed, the Supreme Court rejected essentially the same argument in *Heller* – that the District of Columbia's handgun ban did not unconstitutionally burden the right to self-defense because the law permitted the possession of long guns for home defense. *See Heller*, 554 U.S. at 629 ("It is no answer to say, as petitioners do, that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed."); *accord Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007) (rejecting the District's argument that alternative weapons rendered handgun ban lawful, calling it "frivolous," and noting that "[i]t could be similarly contended that all firearms may be banned so long as sabers were permitted"); *cf. Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975) ("[O]ne is not to have the exercise of liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."). A semi-automatic rifle may not be "the quintessential self-defense weapon," as *Heller* described the handgun, 554 U.S. at 629; nonetheless, as we explained previously, AR-15s and the like are commonly possessed by law-abiding citizens for self-defense and other lawful purposes and are protected under the Second Amendment.

There are legitimate reasons for citizens to favor a semi-automatic rifle over handguns in defending themselves and their families at home. The record contains evidence suggesting that "handguns are inherently less accurate than long guns" as they "are more difficult to steady" and "absorb less of the recoil . . . , reducing accuracy." J.A. 2131. This might be an important consideration for a typical homeowner, who "under the extreme duress of an armed and advancing attacker is likely to fire at, but miss, his or her target." J.A. 2123. "Nervousness and anxiety, lighting conditions, the presence of physical obstacles . . . and the mechanics of retreat are all factors which contribute to [the] likelihood" that the homeowner will shoot at but miss a home invader. J.A. 2123. These factors could also affect an individual's ability to reload a firearm quickly during a home invasion. Similarly, a citizen's ability to defend himself and his home is enhanced with an LCM.

In sum, for a law-abiding citizen who, for whatever reason, chooses to protect his home with a semi-automatic rifle instead of a semi-automatic handgun, or possesses an LCM for use in firearms kept in the home, the FSA significantly burdens the exercise of the right to arm oneself at home. "The right to self-defense is largely meaningless if it does not include the right to choose the most effective means of defending oneself." *Friedman*, 784 F.3d at 418 (Manion, J., dissenting); *see id.* at 413 ("[T]he ultimate decision for what constitutes the most effective means of defending one's home, family, and property resides in individual citizens and not the government. . . . The extent of danger

– real or imagined – that a citizen faces at home is a matter only that person can assess in full."). The FSA "restrict[s] the right [ ] of [Maryland's] citizens to select the means by which they defend their homes and families." *Id.* at 419.

As we have noted on previous occasions, "any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny. But, as we move outside the home, firearm rights have always been more limited." *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011). "[T]his longstanding out-of-the-home/in-the-home distinction bears directly on the level of scrutiny applicable," *id.*, with strict scrutiny applying to laws restricting the right to self-defense in the home, *see Woollard v. Gallagher*, 712 F.3d 865, 878 (4th Cir. 2013) (observing that restrictions on "the right to arm oneself at home" necessitates the application of strict scrutiny). Strict scrutiny, then, is the appropriate level of scrutiny to apply to the ban of semiautomatic rifles and magazines holding more than 10 rounds. *See Friedman*, 784 F.3d at 418 (Manion, J., dissenting); *cf. Heller II*, 670 F.3d at 1284 (Kavanaugh, J., dissenting) (reading *Heller* as departing from traditional scrutiny standards but stating that "[e]ven if it were appropriate to apply one of the levels of scrutiny after *Heller*, surely it would be strict scrutiny rather than . . . intermediate scrutiny").

We recognize that other courts have reached different outcomes when assessing similar bans, but we ultimately find those decisions unconvincing.

The Seventh Circuit, for instance, recently upheld a ban on "assault weapons" and LCMs by dispensing with levels of scrutiny entirely. *See Friedman*, 784 F.3d at 410. Instead, that court conjured its own test, asking "whether a regulation bans weapons that were common at the time of ratification or those that have some reasonable relationship to the preservation or efficiency of a well regulated militia, and whether law-abiding citizens retain adequate means of self-defense." *Id.* (internal quotation marks and citations omitted). The Seventh Circuit's approach cannot be reconciled with *Heller*, which looked to present-day use to assess whether handguns are in common use (and consequently protected). *See* 554 U.S. at 629; *see also id.* at 582 ("Some have made the argument, *bordering on the frivolous*, that only those arms in existence in the 18th century are protected by the Second Amendment." (emphasis added)). *Friedman*, on the other hand, ignores the Supreme Court's specification of present-day focus and asks instead whether certain features of the weapons in question were common at the time of the Founding, effectively elevating a *Heller* dissent to constitutional canon. *Compare Friedman*, 784 F.3d at 408-09 (suggesting that present day common use cannot be the relevant test because machine guns were in common use when they were federally banned in 1934 and are now uncommon *because* of the ban), *with Heller*, 554 U.S. at 720-21 (Breyer, J., dissenting) (same).

Friedman's problems stretch beyond its direct contradiction of *Heller.* For instance, the *Friedman* opinion

defines the scope of the Second Amendment right by reference to militias – but it then declares that states, "which are in charge of militias," should determine what weapons are rightfully held for militia – related purposes. *Friedman*, 784 F.3d at 410-11. That course effectively permits states to opt-out of the Second Amendment. *But see McDonald*, 561 U.S. at 750 ("[T]he Second Amendment right is fully applicable to states."). *Friedman* also concludes that the "dangerousness" of the regulated weapons should not be decisive, *Friedman*, 784 F.3d at 409, but nevertheless dismisses the self-defense-related benefits of those same weapons because they "can fire more shots, faster, and thus can be more dangerous in aggregate," *id.* at 411. And it recognizes that the restriction must be supported by some genuine state interest, but then finds such an interest in the fact that bans might "reduce[] the *perceived* risk from a mass shooting." *Id.* at 412 (emphasis added). In other words, under the Seventh Circuit's view, a significant restriction on a fundamental right might be justified by benefits that are quite literally imagined into existence. Needless to say, we see much to question in the Seventh Circuit's decision.

Two courts of appeal have applied the standard of intermediate scrutiny to restrictions like Maryland's. *See Fyock*, 779 F.3d at 999 (applying intermediate scrutiny to an LCM ban); *Heller II*, 670 F.3d at 1262 (applying intermediate scrutiny to a semi-automatic weapon and LCM ban). Both did so after rather conclusorily determining that the bans in those cases did not impose any significant burden on the Second

Amendment right. For its part, the D.C. Circuit was "reasonably certain" that the challenged laws didn't impose a substantial burden, *Heller II*, 670 F.3d at 1262, while the Ninth Circuit found that the district court did not "abuse [its] discretion" at the preliminary injunction stage in finding much the same, *Fyock*, 779 F.3d at 999.

For example, the D.C. Circuit in *Heller II*, with *de minimis* analysis, simply concluded that prohibitions of the arms in question would meet intermediate scrutiny because "the ban on certain semi-automatic rifles [does not] prevent a person from keeping a suitable and commonly used weapon for protection in the home or for hunting[.]" 670 F.3d at 332. As noted earlier, this genre of judicial conclusion seems plainly contrary to the Supreme Court's logic and statements in *Heller*: "It is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed." 554 U.S. at 629. Notwithstanding this guidance from the Supreme Court, the *Heller II* court went on to also summarily conclude that "the prohibition of semi-automatic rifles and large-capacity magazines does not effectively disarm individuals or substantially affect their ability to defend themselves." 670 F.3d at 1262. This holding seems to directly contradict the Supreme Court's statement in *Heller* that the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635. Thus, we find

Heller II and *Fyock* without persuasive reasoning and simply incorrect.

Whatever may be said about the bans at issue in *Fyock* and *Heller II*, it should be obvious by this point that we view Maryland's ban quite differently. A wholesale ban on an entire class of common firearms is much closer to the total handgun ban at issue in *Heller* than more incidental restrictions that might be properly subject to intermediate scrutiny. The law here "goes beyond mere regulation" and is instead "a total prohibition of possession of certain types of arms." *Arnold v. Cleveland*, 616 N.E.2d 163, 176 (Ohio 1993) (Hoffman, J., concurring in part and dissenting in part) (addressing assault-weapons ban); *see also Marzzarella*, 614 F.3d at 97 (stressing that the ban in *Heller* was subject to most scrutiny because "[i]t did not just regulate possession of handguns; it prohibited it"). In this way, Maryland's outright ban on LCMs and "assault weapons" is akin to a law that "foreclose[s] an entire medium of expression." *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994). Such laws receive exceptionally rigorous review in the analogous context of the First Amendment, *id.*, and we see no reason for a different method here.

Our distinguished dissenting colleague asserts that we have imprudently and unnecessarily broken with our sister courts of appeal and infers that we will bear some responsibility for future mass shootings. In our view, inferences of this nature have no place in judicial opinions and we will not respond beyond noting this. The meaning of the Constitution does not depend

on a popular vote of the circuits and it is neither improper nor imprudent for us to disagree with the other circuits addressing this issue. We are not a rubber stamp. We require strict scrutiny here not because it aligns with our personal policy preferences but because we believe it is compelled by the law set out in *Heller* and *Chester*.

Because the district court did not evaluate the challenged provisions of the FSA under the proper standard of strict scrutiny, and the State did not develop the evidence or arguments required to support the FSA under the proper standard, we vacate the district court's order as to Plaintiffs' Second Amendment challenge and remand for the court to apply strict scrutiny in the first instance. This is not a finding that Maryland's law is unconstitutional. It is simply a ruling that the test of its constitutionality is different from that used by the district court. The State should be afforded the opportunity to develop its case in light of this more demanding standard, and Plaintiffs should be permitted to do so as well. In doing so, the parties may look to "a wide range of sources, such as legislative text and history, empirical evidence, case law, and common sense, as circumstances and context require." *Carter I*, 669 F.3d at 418.[12]

[12] In light of our decision to remand the Second Amendment claim, we need not address Plaintiffs' arguments that the district court committed error by granting summary judgment to the State when there were several material facts in dispute, and, by the same token, denying summary judgment to Plaintiffs when

IV. Equal Protection

AGEE, Circuit Judge, wrote a separate opinion as to Part IV, in which Judge KING concurred in the judgment:

The Equal Protection Clause guarantees that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.[13] It does not follow, however, that all classifications are forbidden. Instead, the Equal Protection Clause is designed to "keep[] governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). In our view, the district court correctly determined that retired police officers are not similarly situated with the public at large for purposes of the Maryland Firearm Safety Act ("FSA"). Therefore, granting those officers certain rights under the FSA does not violate the Equal Protection Clause.

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the record contained various undisputed material facts that required entry of judgment as a matter of law in favor of Plaintiffs.

Plaintiffs also contest the district court's denial of their motion to exclude expert and fact testimony offered by the State. Having carefully considered these arguments, we conclude that the district court did not abuse its wide discretion in evidentiary matters by denying the motions and considering the testimony. *See United States v. Min*, 704 F.3d 314, 324-25 (4th Cir. 2013) (decisions under Rule of Evidence 701 reviewed for abuse of discretion); *United States v. Wilson*, 484 F.3d 267, 273 (4th Cir. 2007) (Rule of Evidence 702).

[13] This portion of the opinion omits internal marks, alterations, citations, emphasis, or footnotes from quotations unless otherwise noted.

A.

1.

To succeed on an equal-protection claim, "a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated." *Sandlands C & D LLC v. Cnty. of Horry*, 737 F.3d 45, 55 (4th Cir. 2013). "Generally, in determining whether persons are similarly situated for equal protection purposes, a court must examine *all* relevant factors." *United States v. Olvis*, 97 F.3d 739, 744 (4th Cir. 1996) (emphasis added). The court applies an appropriate level of constitutional scrutiny to the challenged governmental act only *after* the plaintiff makes this initial showing of similarity, along with a showing that the government acted purposefully or intentionally. *Sandlands C & D LLC*, 737 F.3d at 55.

The "similarly situated" standard requires a plaintiff to identify persons materially identical to him or her who has received different treatment. Different courts describe this requirement in different ways. The Seventh Circuit, for example, has said that the two compared groups must be "identical or directly comparable in all material respects." *LaBella Winnetka, Inc. v. Village of Winnetka*, 628 F.3d 937, 942 (7th Cir. 2010). The Eleventh Circuit indicates that different groups must be "prima facie identical" to provide the relevant comparison. *Grider v. City of Auburn, Ala.*, 618 F.3d 1240, 1264 (11th Cir. 2010). The First Circuit, meanwhile, takes a more colloquial approach, stressing that "apples should be compared to apples." *Barrington*

Cove Ltd. P'ship v. R.I. Hous. & Mortg. Fin. Corp., 246 F.3d 1, 8 (1st Cir. 2001). However the test is written, the basic point is the same: the "evidence must show an extremely high degree of similarity." *Willis v. Town of Marshall, N.C.*, 275 F. App'x 227, 233 (4th Cir. 2008); *see also LaBella*, 628 F.3d at 942 ("The similarly situated analysis is not a precise formula, but . . . what is clear is that similarly situated individuals must be very similar indeed.").

2.

A retired officer enjoys two privileges under the FSA that the public does not. First, he may possess an "assault weapon" as long as it was "sold or transferred to the [officer] by the law enforcement agency on retirement" or the officer "purchased or obtained" it "for official use with the law enforcement agency before retirement." Md. Code, Crim. Law § 4-302(7). Second, he is not subject to any of the restrictions on larger-capacity magazines. *Id.* § 4-305(a)(2).

Exceptions for retired law enforcement officers like these are common in firearms regulations. *See, e.g.*, Cal. Penal Code §§ 25450, 26015; D.C. Code § 7-2502.01(a)(2); N.Y. Penal Law § 265.20.e (McKinney 2015); *see also* Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, § 110102(a)(4)(C), 108 Stat. 1796, 1996 (1994) (repealed 2004). But according to Plaintiffs, the differentiation found in Maryland's law renders the entire FSA unconstitutional. *See* Opening Br. 44 n.8.

B.

Plaintiffs argue that, when it comes to owning semiautomatic weapons and larger-capacity magazines, retired law enforcement officers and the public at large are "similarly situated." In our view, that argument fails because retired law enforcement officers are different from the public in several fundamental respects. Three dissimilarities are particularly relevant.

1.

First, retired police officers possess a unique combination of training and experience related to firearms. *See Shew v. Malloy*, 994 F. Supp. 2d 234, 252 (D. Conn. 2014); *Pineiro v. Gemme*, 937 F. Supp. 2d 161, 176 (D. Mass. 2013). All Maryland police officers undergo comprehensive training and qualification on their firearms. *See* Code of Md. Admin. Regs. 12.04.02.03-.10. This training incorporates live-fire exercises and academic study. Moreover, it covers not just how to fire a weapon accurately, but also when a given firearm is appropriately used, how to minimize harm, and how to safely store the firearm – among many other subjects. After initial qualification, officers must then undergo additional training every year.

The officers do not just participate in some "general" form of firearms training. Rather, the officers that carry assault weapons on duty – and thus, those most likely to obtain those weapons upon retirement – must receive further training and certification tests that

pertain specifically to those weapons. An officer who wishes to carry an AR-15, for instance, must fire at least 350 rounds of ammunition with that weapon during initial training and qualification. *See id.* 12.04.02.06B(3)(c). The same officer must also spend at least 14 hours in the classroom discussing the appropriate use of such weapons. *See id.* 12.04.02.06B(2)(c). If an officer fails to meet any one of these requirements, he may not carry that weapon.

On a day-to-day basis, through their years of employment, police officers gain further practical experience with their weapons – experience that few, if any, private civilians can claim to possess in equal measure. For "[u]nlike most employees in the workforce, peace officers carry firearms because their occupation requires them on occasion to confront people who have no respect either for the officers or for the law." *Gonzalez v. City of Anaheim*, 747 F.3d 789, 799 (9th Cir. 2014) (Trott, J., dissenting in part and concurring in part); *see also United States v. Fernandez*, 121 F.3d 777, 780 (1st Cir. 1997) ("[L]aw enforcement officers usually carry weapons[.]"). Indeed, perhaps except for military personnel, police officers likely have more experience with a firearm than any other profession in America.

And retired police officers are eligible to possess prohibited firearms under the FSA only when those firearms come directly from their employer upon retirement. In other words, the FSA does not grant open permission to acquire prohibited firearms at will. The officers will therefore have special familiarity and training with the specific weapons they are permitted

to obtain. It is significant that the FSA exceptions for retired police officers contain this clear nexus to their professional law enforcement employment and training.

2.

Second, because they are granted a "special degree of trust," *O'Donnell v. Barry*, 148 F.3d 1126, 1135 (D.C. Cir. 1998), police officers are instilled with what might be called an unusual ethos of public service. "[Police forces] must demand a high level of discipline and duty of their members in order to function effectively for the good of all members of society." *Vorbeck v. Schnicker*, 660 F.2d 1260, 1263 (8th Cir. 1981). Officers swear to uphold the law and serve the public from the very start. Indeed, they most often take such an oath on their first day as an officer. Once employed, they agree to "serve mankind," and "to safeguard lives and property; to protect the innocent against deception; the weak against oppression or intimidation, and the peaceful against violence or disorder." John Kleinig, *The Ethics of Policing* 236 (1996) (quoting International Association of Chiefs of Police's Law Enforcement Code of Ethics); *see also Seegmiller v. Laverkin City*, 528 F.3d 762, 765 (10th Cir. 2008) (describing a law enforcement code of ethics); *Thaeter v. Palm Beach Cty. Sheriff's Office*, 449 F.3d 1342, 1345-46 (11th Cir. 2006) (same).

The officers' responsibilities go beyond mere pledges and oaths, as the law requires police officers to

meet the highest standards of conduct in acting to protect the public. For example, a police officer "owe[s] a fiduciary duty to the public to make governmental decisions in the public's best interests." *United States v. Woodard*, 459 F.3d 1078, 1086 (11th Cir. 2006). Likewise, "police have a duty to protect both the lives and the property of citizens." *United States v. Markland*, 635 F.2d 174, 176 (2d Cir. 1980). The law then grants officers the authority to arrest, detain, and use force to fulfill these essential responsibilities.

Given these publicly oriented responsibilities, law enforcement officers – retired and active alike – are "not to be equated with a private person engaged in routine public employment or other common occupations of the community." *Foley v. Connelie*, 435 U.S. 291, 298 (1978); *see also Peña v. Lindley*, No. 2:09-CV-01185-KJM-CKD, 2015 WL 854684, at *17 (E.D. Cal. Feb. 26, 2015) (holding that police officers' charge to protect the public differentiated them from the public); *Shew*, 994 F. Supp. 2d at 252 (same); *cf. Detroit Police Officers Ass'n v. City of Detroit*, 190 N.W.2d 97, 98 (Mich. 1971) ("The police force is a semi-military organization subject at all times to immediate mobilization, which distinguishes this type of employment from every other in the classified service."). Retired and active police officers are used to acting in the public interest in a way that does not apply to the public at large.

3.

Third, retired police officers face special threats that private citizens do not. Most obviously, "retired law enforcement officers often have to defend themselves . . . from criminals whom they have arrested." H.R. Rep. 108-560, at 4 (2004), *reprinted in* 2004 U.S.C.C.A.N. 805, 806; *see, e.g.*, Alison Gendar, *Ex-Con with Grudge Busted in Bashing*, N.Y. Daily News, July 1, 2007, at 13 ("Armed with a grudge and a set of brass knuckles, an ex-con pummeled a retired cop last week as payback for a minor arrest in 2002, authorities said."). This "greater risk of retaliatory violence," which continues "following retirement," makes law enforcement officers different even from other public employees. *In re Wheeler*, 81 A.3d 728, 763 (N.J. App. Div. 2013); *see also Nichols v. Brown*, No. CV 11-09916 SJO, 2013 WL 3368922, at *6 (C.D. Cal. July 3, 2013); *Mehl v. Blanas*, No. Civ. S 03-2682 MCE KHM, slip op. at 11 (E.D. Cal. Sept. 3, 2004) ("While an officer's duty to respond to the public's calls for help stops when he retires, the threat of danger from enemies he might have made during his service does not."); *cf. Williams v. Puerto Rico*, 910 F. Supp. 2d 386, 399 (D.P.R. 2012) (noting that current and former government officials have a greater need for firearms because "[t]he sensitive nature of many of their jobs . . . subjects them to additional risks of danger").

What's more, the same public spirit and sense of civic duty that motivated retired law enforcement officers when they were active might also lead them to

intervene more often in dangerous situations in retirement. Just recently, for example, a retired police officer was injured when he allegedly interrupted a robbery at his neighbor's house. *See* Matthew J. Coyne, *Charges for 2 in Ex-Cop's Shooting*, J. News (Westchester, N.Y.), July 15, 2015, at A1. Other examples are easy to find. *See, e.g.*, Kevin K. Ivesmillard, *Cops: Evidence Doesn't Support Teen Burglar's Account of How He Was Shot*, Daily Commercial (Leesburg, Fla.), Aug. 12, 2015, at A1 (describing a retired police officer's shooting of a burglar who allegedly attacked him); Andrew Dys, *Suspect Linked to Chester Councilman's Killing Pleads Guilty to Drug Charge*, Herald (Rock Hill, S.C.), Mar. 17, 2015, at 521 (describing how a retired police officer was allegedly shot after he followed gang members en route to a robbery).

* * * * * *

Thus, in light of their special training, their extensive experience, their commitment to public service, and their unique need for protection in the face of post-retirement violence, retired law enforcement officers are not similarly situated to other Maryland citizens. That should end the equal-protection analysis. *See Brown v. Montoya*, 662 F.3d 1152, 1173 (10th Cir. 2011) ("[T]o assert a viable equal protection claim, plaintiffs must first make a threshold showing that they were treated differently from others who were similarly situated to them.").

C.

Chief Judge Traxler, in dissent on this issue, concedes that retired police officers are not similarly situated, but nonetheless deems that fact irrelevant – positing that the differences between retired officers and private citizens are not sufficiently tied to the FSA's perceived objectives to be decisive. Plaintiffs never made this sort of argument; they argued instead that retired police and private citizens are equally well-trained and, consequently, similarly situated. The dissent also focuses on a characteristic that Plaintiffs never discuss: the "responsibility or authority . . . to protect" that a retired police officer can (or cannot) be said to possess. But even if Plaintiffs had pressed such a position, we should not embrace it.

1.

When passed, the FSA had a number of objectives. Among other things, it sought to "keep guns away from criminals" and lower the rate of gun deaths from incidents like "murders, suicides, and accidents," all while "protect[ing] legal gun ownership." *See* J.A. 1183-84. It did so by amending or repealing 31 separate sections of the Maryland Code covering matters as diverse as hunting areas, mental health, police training, and state record-keeping requirements. *See* 2013 Md. Laws Ch. 427. The sheer breadth of the legislation makes it obvious that the legislation was meant to balance many, sometimes-competing objectives.

The provisions permitting retired officers to obtain restricted firearms and magazines are directly related to these broad objectives. Police officers' experience and training makes it less likely that retired officers will harm others through the unskilled use of their firearms. *See Shew*, 994 F. Supp. 2d at 252; *Pineiro*, 937 F. Supp. 2d at 176. Given their years in public service, retired police officers would also be more likely use their firearms in ways consistent with the public's interests, not simply private ones. Retired police officers would further be expected to exercise special care to ensure that their firearms and magazines are not acquired for criminal purposes. And permitting retired police officers these particular firearms and magazines could deter the unique retaliatory violence that only those officers face. Thus, retired police officers have "distinguishing characteristics relevant to the interests" that Maryland intended to serve in enacting the FSA. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985).

2.

In finding to the contrary, the dissent defines the FSA's legislative objectives too narrowly. It assumes that the General Assembly intended the Act to eliminate all of the restricted weapons, such that most any exception to a wholesale ban would be inconsistent with that objective (regardless of the characteristics of those who stand to benefit). But the General Assembly's intent seems more nuanced than that: to limit the prevalence of purportedly dangerous firearms and

magazines except in those instances where (1) certain facts ameliorated the expected harms from the restricted items, or (2) other public interests justified the continuing risk.

This approach is entirely acceptable under the Equal Protection Clause. "[T]here is no mandate that a state must address its problems wholesale." *Helton v. Hunt*, 330 F.3d 242, 246 (4th Cir. 2003); *accord FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 316 (1993) ("[T]he legislature must be allowed leeway to approach a perceived problem incrementally."). "[S]tates are free to regulate by degree, one step at a time, addressing the phase of the problem which seems most acute to the legislative mind." *Helton*, 330 F.3d at 246; *accord Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 489 (1955) ("Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think."). The FSA is more appropriately characterized as such a step-by-step attempt.

The dissent also casts its lot with the Ninth Circuit, resting much of its analysis on an abrogated decision from that court, *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), *abrogated by District of Columbia v. Heller*, 554 U.S. 570 (2008). But *Silveira* never engaged with the question before us, namely, whether retired police officers are "similarly situated" to private citizens. Instead, the Ninth Circuit ignored that threshold issue and jumped straight to rational-basis review of a California statute that granted retired police the right to carry semi-automatic weapons despite a ban. *See*

Silveira, 312 F.3d at 1090-91. The Ninth Circuit then established the California statute's objectives by relying on legislative history and public statements specific to that statute, all of which indicated that the California law was intended to "eliminate the availability of the [restricted] weapons generally." *Id.* at 1091. In contrast, the record here contains no evidence that the Maryland General Assembly had any similarly prohibitionist intent.

Most fundamentally, *Silveira* appears to have been animated by a hostility toward so-called "assault weapons" in general. *Id.* (holding that there is no "legitimate state interest" in permitting retired police officers – and apparently anyone – to "possess and use" "military-style weapons" "for their personal pleasure"); *cf. Nordyke v. King*, 319 F.3d 1185, 1192 n.4 (9th Cir. 2003) (criticizing "the *Silveira* panel's unnecessary historical disquisition" in which it "took it upon itself" to advance a limited reading of the Second Amendment). *Silveira*'s equal-protection analysis should be put aside as a legally unsound and factually distinguishable discussion that lacks any persuasive authority.

D.

For all these reasons, we affirm the district court's decision on the equal-protection issue. Retired police officers and the public are not similarly situated, and dissimilar treatment of these dissimilar groups does not violate the Equal Protection Clause.

TRAXLER, Chief Judge, wrote the opinion for the court as to Parts V and VI, in which Judge AGEE joined:

V. Vagueness

Finally, Plaintiffs contend that the FSA is unconstitutionally vague on its face because it is not drafted with sufficient clarity to allow an ordinary citizen to understand when a firearm qualifies as a "copy" of a banned semi-automatic rifle. As previously explained, the FSA prohibits possession of "assault long guns," which are defined by reference to the list of specific "assault weapons or their copies" set forth in § 5-101(r)(2). The statute does not define the term "copies," and there is no state regulatory definition. The FSA has not been enforced against Plaintiffs, and they do not claim that they were forced to forego their Second Amendment rights because they were uncertain whether weapons they wished to acquire were prohibited. Nonetheless, Plaintiffs ask us to invalidate this portion of the FSA under the Due Process Clause.

"Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Sun*, 278 F.3d 302, 309 (4th Cir. 2002) (internal quotation marks omitted). "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what

conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see United States v. McLamb*, 985 F.2d 1284, 1291 (4th Cir. 1993). Our task is to determine "whether the government's policy is set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with." *Imaginary Images, Inc. v. Evans*, 612 F.3d 736, 749 (4th Cir. 2010) (internal quotation marks omitted). In order to succeed on a vagueness challenge, therefore, a litigant must "prove that the enactment is vague not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.7 (1982). Put another way, he must demonstrate that the "provision simply has no core." *Id.* (internal quotation marks omitted).

The State urges us to apply the rule set forth in *United States v. Salerno*, requiring Plaintiffs to establish that "no set of circumstances exists under which the Act would be valid." 481 U.S. 739, 745 (1987). We have noted previously that the continuing validity of the "no set of circumstances" formulation is unclear, *see United States v. Comstock*, 627 F.3d 513, 518 (4th Cir. 2010), and our concern was validated further in the Supreme Court's recent decision in *Johnson v. United States*, 135 S. Ct. 2551, 2561 (2015) ("[O]ur *holdings* squarely contradict the theory that a vague provision

is constitutional merely because there is some conduct that clearly falls within the provision's grasp."). Regardless, "at the very least, a facial challenge cannot succeed if a statute has a 'plainly legitimate sweep.'" *Comstock*, 627 F.3d at 518 (quoting *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202 (2008); *Martin v. Lloyd*, 700 F.3d 132, 135 (4th Cir. 2012) ("[A] facial challenge is ineffective if the statute has a plainly legitimate sweep." (internal quotation marks omitted)).

The phrase "assault weapons and their copies" has a plainly legitimate sweep and is not unconstitutionally vague. Although the Act does not specifically define "copy," the plain meaning of the word – "something that is or looks exactly or almost exactly like something else: a version of something that is identical or almost identical to the original" – is not beyond the grasp of an ordinary citizen. *Merriam-Webster online dictionary.* The word is a familiar one in Maryland state law, Md. Code Pub. Safety § 5-101(r)(2), and even federal law, 18 U.S.C. § 921(a)(30)(A)(i) (1994 & Supp. V 1999). When read together with the specific list of prohibited firearms, "copies" is sufficiently definite to give notice to an ordinary person of the conduct that would subject him to criminal sanctions – possession of any firearm that is identical or almost identical to any of the 60-plus semi-automatic rifles listed in the Act is prohibited. *Cf. United States v. Fontaine*, 697 F.3d 221, 226-27 (3d Cir. 2012) (finding that statute prohibiting possession of an imitation firearm during crime of violence was not unconstitutionally vague).

Additionally, in 2010, Maryland's Attorney General provided guidance on the meaning of "copy" under section 5-101(r)(2) of the Public Safety Code: "[A] copy of a designated assault weapon must be similar in its internal components and function to the designated weapon. Cosmetic similarity to an enumerated assault weapon alone would not bring a weapon within the regulated firearms law." 95 Op. Att'y Gen. 101. J.A. 678. Following the Attorney General's issuance of this opinion, the Maryland State Police issued a bulletin indicating that a firearm was subject to regulation under the Act if it was "cosmetically similar to a specifically enumerated assault weapon" and "has completely interchangeable internal components necessary for the full operation and function of any one of the specifically enumerated assault weapons." J.A. 676.

Plaintiffs argue that the typical gun owner would have no way of knowing whether the internal components of one firearm are interchangeable with the internal components of another. This argument has a commonsense appeal; nonetheless, Plaintiffs have not identified any firearm that they would not risk possessing because of any uncertainty over the meaning of "copies." Although it is possible to invent "scenarios in which a regulation might be subject to a successful vagueness challenge," *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 371 (4th Cir. 2012), "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications," *id.* (internal quotation marks

omitted). It is telling that the weapons that Plaintiffs, according to their own testimony, wish to acquire are all clearly prohibited by the FSA. Section 5-101(r)(2) is therefore "surely valid in the vast majority of its intended applications."

Finally, we note that this same list of "assault weapons or their copies" has been on the books in Maryland for more than 20 years. Although possession of these weapons was not banned prior to passage of the FSA, an individual could not acquire any of the specifically listed "assault weapons" or their "copies" without submitting to a background check. The failure to comply with the regulations was subject to criminal sanctions. Yet, Plaintiffs have not identified, and we are unaware of any instance, where the term "copy" created uncertainty or was challenged as too vague.

We reject Plaintiffs' vagueness argument. A statute need only have a "legitimate sweep," *Martin*, 700 F.3d at 135, that identifies a "core" of prohibited conduct, *Hoffman Estates*, 455 U.S. at 495 n.7. "A failure by a statute to define all of its terms does not necessarily render it impermissibly vague," *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 191 n.4 (4th Cir. 2013), and a "statute need not spell out every possible factual scenario with celestial precision to avoid being struck down on vagueness grounds," *United States v. Hager*, 721 F.3d 167, 183 (4th Cir. 2013). In short, "[v]agueness review is quite deferential." *United States v. Runyon*, 707 F.3d 475, 502 (4th Cir. 2013). The challenged provisions of the Act sufficiently demarcate a

core of prohibited conduct under the Act to survive that deferential test.

VI.

To sum up, the panel vacates the district court's summary judgment order on Plaintiffs' Second Amendment claims and remands for the district court to apply strict scrutiny. The panel affirms the district court's summary judgment order on Plaintiffs' Equal Protection claim with respect to the FSA's exception permitting retired law enforcement officers to possess semi-automatic rifles. Finally, the panel affirms the district court's conclusion that the FSA is not unconstitutionally vague.

AFFIRMED IN PART,
VACATED IN PART,
AND REMANDED

KING, Circuit Judge, wrote an opinion dissenting as to Part III and concurring in the judgment as to Parts IV and V:

There is sound reason to conclude that the Second Amendment affords no protection whatsoever to the assault rifles and shotguns, copycat weapons, and large-capacity detachable magazines that are banned by the State of Maryland. Assuming, however, that Maryland's Firearm Safety Act (the "FSA") burdens the Second Amendment right, it is, put most succinctly, subject to nothing more than intermediate scrutiny.

Indeed, no precedent of the Supreme Court or our own Court compels us to rule otherwise. And the suitability of intermediate scrutiny is confirmed by cogent decisions of other courts of appeals. I therefore dissent insofar as the panel majority – charting a course today that divides us from our sister circuits – vacates the district court's denial of the Plaintiffs' Second Amendment claims and remands for an application of strict scrutiny.

Although I am dissenting from the panel majority's reinstatement of the Second Amendment claims pressed by the Plaintiffs, I concur in the judgment to the extent that we affirm the district court's denial of the Plaintiffs' claims that the FSA violates the Equal Protection Clause of the Fourteenth Amendment and is unconstitutionally vague. I would, in sum, wholly affirm the judgment of the district court on the basis of its summary judgment decision, which I commend unreservedly. *See Kolbe v. O'Malley*, 42 F. Supp. 3d 768 (D. Md. 2014).[1]

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[1] In addition to a thoughtful and compelling analysis of the Second Amendment claims, the district court provided all the reasons needed to reject the equal protection and vagueness claims. *See Kolbe*, 42 F. Supp. 3d at 797-99 (concluding that the FSA does not violate the Equal Protection Clause by excepting retired law enforcement officers from the assault-weapon and large-capacity-magazine bans, in "that retired law enforcement officers are differently situated by virtue of their experiences ensuring public safety and their extensive training on the use of firearms"); *id.* at 799-803 (ruling that, because it imparts "sufficient notice of banned conduct," including "what constitutes a 'copy' of the banned assault long guns," the FSA is not unconstitutionally vague). As my good colleagues recognize, *see ante* at 46 n.12, the

I.

A.

Let's be real: The assault weapons banned by Maryland's FSA are exceptionally lethal weapons of war. In fact, the most popular of the prohibited semiautomatic rifles, the AR-15, functions almost identically to the military's fully automatic M16. Significantly, the Supreme Court in its seminal *Heller* decision singled out "M-16 rifles and the like," i.e., arms "that are most useful in military service," as being "dangerous and unusual weapons" not even protected by the Second Amendment. *See District of Columbia v. Heller*, 554 U.S. 570, 624-25, 627 (2008) (recognizing "that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns [and machineguns]"). Similar to the district court – and unlike the panel majority – I am far from convinced that the Second Amendment reaches the AR-15 and other assault weapons prohibited under Maryland law, given their military-style features, particular dangerousness, and questionable utility for self-defense. *See Kolbe*, 42 F. Supp. 3d at 788 ("Upon review of all the parties' evidence, the court seriously doubts that the banned assault long guns are commonly possessed for lawful purposes, particularly self-defense in the home, . . . and is inclined to find the weapons fall outside

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district court also properly denied the Plaintiffs' motion to exclude certain expert and fact evidence offered by the State.

Second Amendment protection as dangerous and unusual.").

That the banned assault weapons are not constitutionally protected finds considerable support in the record, which includes the following evidence:

- The AR-15 and other banned assault weapons, like their military counterparts, "are firearms designed for the battlefield, for the soldier to be able to shoot a large number of rounds across a battlefield at a high rate of speed." *See* J.A. 206. The military-style features of those weapons include folding or telescoping stocks, pistol grips, flash suppressors, grenade launchers, night sights, and the ability to accept detachable magazines and bayonets. Their design results in "a capability for lethality – more wounds, more serious, in more victims – far beyond that of other firearms in general, including other semiautomatic guns." *See id.* at 1121-22.
- The sole difference between the M16 and the AR-15 is that the M16 is capable of automatic fire while the AR-15 is semiautomatic. That difference is slight, in that automatic firing of all the ammunition in a thirty-round magazine takes two seconds, whereas a semiautomatic rifle can empty the same magazine in about five seconds. Moreover, soldiers and police officers are often advised to choose semiautomatic fire, because it is more accurate

and lethal than automatic fire in many combat and law enforcement situations.

- The banned assault rifles and shotguns constitute no more than 3% of the civilian gun stock, and ownership of such weapons is concentrated in less than 1% of the U.S. population. At the same time, assault weapons are used disproportionately to their ownership in mass shootings and the murders of police officers, and they cause more fatalities and injuries than other firearms.

- Maryland was inspired to enact the FSA by the December 14, 2012 mass shooting at Sandy Hook Elementary School in Newtown, Connecticut, where the gunman used an AR-15-style assault rifle to shoot his way into the locked building and then murder twenty first-graders and six educators in less than eleven minutes. That horrific event was preceded and has been followed by mass shootings across the nation.

- Criminals armed with the banned assault weapons possess a "military-style advantage" in firefights with law enforcement, as such weapons "allow criminals to effectively engage law enforcement officers from great distances (far beyond distances usually involved in civilian self-defense scenarios)," "are more effective than handguns against soft body armor," and "offer the capacity to fire dozens of

highly-lethal rounds without having to change magazines." *See* J.A. 265.

- The banned assault weapons also can be more dangerous to civilians than other firearms. For example, "rounds from assault weapons have the ability to easily penetrate most materials used in standard home construction, car doors, and similar materials," and, when they do so, are more effective than rounds fired from handguns. *See* J.A. 279. Additionally, untrained users of assault weapons tend to fire more rounds than necessary, increasing the risk to bystanders.
- Although self-defense is a conceivable use of the banned assault weapons, most people choose to keep other firearms for self-defense, and assault-weapon owners generally cite reasons other than self-defense for owning assault weapons. There is no known incident of anyone in Maryland using an assault weapon for self-defense.

In these circumstances, I am entirely unable to discern a reasonable basis for saying that, although the M16 is a dangerous and unusual weapon, the AR-15 and similar arms are not. As the panel majority would have it, since all firearms are dangerous, the dangerous-and-unusual standard is really only concerned with whether a given firearm is unusual, i.e., "not in common use or typically possessed by the citizenry." *See ante* at 29-30. Pursuant to the majority's

view, because M16s have long been outlawed while AR-15s have in some places been allowed, the AR-15 enjoys Second Amendment protection that the M16 is denied. *Accord Friedman v. City of Highland Park*, 784 F.3d 406, 416 (7th Cir. 2015) (Manion, J., dissenting) ("In the case of machine guns, nobody has argued, before or since, that ordinary citizens used these weapons for lawful purposes, and so they have been rightly deemed not to fall within the ambit of the Second Amendment. Had there been even a small amount of citizens who used them for lawful purposes, then the Second Amendment might have covered them.").

There are significant problems with the panel majority's conception of the dangerous-and-unusual standard. First of all, even accepting that an "unusual" weapon is one that is not commonly possessed, "what line separates 'common' from 'uncommon' ownership is something the [*Heller*] Court did not say." *See Friedman*, 784 F.3d at 409 (Easterbrook, J., writing for the court). Moreover,

> relying on how common a weapon is at the time of litigation would be circular. . . . Machine guns aren't commonly owned for lawful purposes today because they are illegal; semi-automatic weapons with large-capacity magazines are owned more commonly because, until recently (in some jurisdictions), they have been legal. Yet 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.; *see also* Br. of Appellees 17 ("Focusing . . . solely on the number or popularity of firearms owned would make the constitutionality of a ban dependent on the time at which it was enacted, with particularly dangerous weapons suddenly becoming entitled to constitutional protection upon reaching an imaginary constitutional numerosity threshold, but less dangerous firearms permitted to be forever restricted if banned early enough." (internal quotation marks omitted)). It follows that the term "unusual" most likely does not have the meaning accorded to it by my colleagues.

Another significant problem with the panel majority's conception of the dangerous-and-unusual standard is that it renders the word "dangerous" superfluous, on the premise that all firearms are dangerous. In the course of doing so, the majority rejects the State's contention that weapons lacking Second Amendment protection are "unusually dangerous" ones. More specifically, the majority asserts that the unusually dangerous benchmark finds no support in *Heller* and would be too difficult to apply. But the *Heller* Court surely had relative dangerousness in mind when it repudiated Second Amendment protection for short-barreled shotguns and "weapons that are most useful in military service – M-16 rifles and the like." *See Heller*, 554 U.S. at 624-25, 627 (internal quotation marks omitted). Furthermore, the unusually dangerous

benchmark is no more difficult to apply than, for example, the majority's dubious test of whether a weapon is "not in common use" and thus "unusual."

That is not to say that it is easy to answer the question of whether the assault weapons prohibited by Maryland's FSA are protected by the Second Amendment. Nor is it clear whether the Second Amendment protects the banned large-capacity detachable magazines, or "LCMs."[2]

The Supreme Court recently declined to expound on those issues when it denied certiorari in the Seventh Circuit's *Friedman* case. *See Friedman v. City of Highland Park*, 136 S. Ct. 447 (2015). Other of the federal courts of appeals have considered bans similar to Maryland's, discussed the complexity of the issue of Second Amendment coverage, and ultimately assumed

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[2] The State proffers two substantial grounds for ruling that LCMs are unprotected. First, LCMs could be deemed dangerous and unusual, in view of evidence that, inter alia, they "are particularly designed and most suitable for military and law enforcement applications." *See* J.A. 891; *see also*, *e.g.*, *Kolbe*, 42 F. Supp. 2d at 787-88 (addressing the State's evidence that LCMs "can allow a criminal to cause mass casualties, while depriving victims and law enforcement of an opportunity to escape or overwhelm an assailant as he reloads his weapon"). Second, it could be concluded that LCMs are not "arms" within the meaning of the Second Amendment and thus not eligible for its protection. *See Heller*, 554 U.S. at 582 (observing that the Second Amendment extends to "bearable arms"); Br. of Appellees 26 ("A large-capacity detachable magazine is not an 'arm'. . . . Indeed, large-capacity magazines are not even ammunition, but instead are devices used for feeding ammunition into firearms that can easily be switched out for other devices that are of lower capacity. . . .").

– but not decided – that constitutional protection may be afforded to assault weapons and LCMs. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 257 (2d Cir. 2015); *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) ("*Heller II*"). The district court likewise resolved to assume without deciding that the FSA "places some burden on the Second Amendment right." *See Kolbe*, 42 F. Supp. 3d at 789. Although I am strongly inclined to instead proclaim that the Second Amendment is not implicated by the FSA, I will, as explained below, refrain from doing so.

B.

We need not decide today whether the banned assault weapons and large-capacity detachable magazines are protected by the Second Amendment, because – following the lead of our colleagues on the Second and District of Columbia Circuits – we can assume they are so protected and yet rule that Maryland's FSA passes constitutional muster under the highest appropriate level of scrutiny: that is, the concept of intermediate scrutiny. *See N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 257-64; *Heller II*, 670 F.3d at 1261-64; *see also Kolbe*, 42 F. Supp. 3d at 789-97. Notably, not a single court of appeals has ever – until now – deemed strict scrutiny to be applicable to a firearms regulation along the lines of the FSA.[3] Indeed, in the

[3] In affirming the denial of a preliminary injunction in *Fyock v. City of Sunnyvale*, the Ninth Circuit concluded that the district court neither "clearly err[ed] in finding . . . that a regulation restricting possession of [LCMs] burdens conduct falling within the

wake of *Heller*, only the Sixth Circuit has applied strict scrutiny to any firearms regulation (there, a prohibition on the possession of firearms by a person who has been committed to a mental institution), and that decision was vacated by the court's grant of rehearing en banc. *See Tyler v. Hillsdale Cty. Sheriff's Dep't*, 775 F.3d 308 (6th Cir. 2014), *vacated*, No. 13-1876 (6th Cir. Apr. 21, 2015), ECF No. 50.

Employing no more than intermediate scrutiny in our constitutional analysis of the FSA is not only counselled by decisions of other courts of appeals, it is also entirely consistent with binding precedent. Puzzlingly, however, the panel majority deems itself "compelled by" the Supreme Court's decisions in *Heller* and *McDonald v. City of Chicago*, as well as our own post-*Heller* decisions, to apply strict scrutiny. *See ante* at 7. Of course, as our good Chief Judge previously explained, "*Heller* left open the level of scrutiny applicable to review a law that burdens conduct protected under the Second Amendment, other than to indicate

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scope of the Second Amendment," nor "abused its discretion by applying intermediate scrutiny or by finding that [the regulation] survived intermediate scrutiny." *See* 779 F.3d 991, 998 (9th Cir. 2015). Thereafter, in *Friedman*, the Seventh Circuit upheld the City of Highland Park's ban on assault weapons and LCMs, albeit without applying either intermediate or strict scrutiny. *See* 784 F.3d at 410 ("[I]nstead of trying to decide what level of scrutiny applies, and how it works, . . . we think it better to ask whether a regulation bans weapons that were common at the time of ratification or those that have some reasonable relationship to the preservation or efficiency of a well regulated militia, and whether law-abiding citizens retain adequate means of self-defense." (internal quotation marks omitted)).

that rational-basis review would not apply in this context." *See United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010); *see also N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 253 ("The [*Heller*] Court did imply that [Second Amendment] challenges are subject to one of 'the standards of scrutiny that we have applied to enumerated constitutional rights,' though it declined to say which. . . ." (quoting *Heller*, 554 U.S. at 628)). *McDonald* did not amplify *Heller*'s analysis, but instead illuminated only "that the Second Amendment right is fully applicable to the States." *See* 561 U.S. 742, 750 (2010). Consequently, neither *Heller* nor *McDonald* can be read to require or demand strict scrutiny in this case.

Furthermore, our post-*Heller* decisions – particularly *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011), and *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013) – do not compel an application of strict scrutiny to each and every restriction on the right of self-defense in the home. According to the panel majority, *Masciandaro* "noted" that "'any law that would burden the "fundamental," core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny,'" *ante* at 40 (quoting *Masciandaro*, 638 F.3d at 470), while *Woollard* "observ[ed]" that "restrictions on 'the right to arm oneself at home' necessitate[] the application of strict scrutiny," *id.* (quoting *Woollard*, 712 F.3d at 878). Actually, however, *Masciandaro* did not *note*, it merely "*assume[d]* that any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to

strict scrutiny." *See* 638 F.3d at 470 (emphasis added). And *Woollard* did not *observe*, it simply *described the plaintiffs' (rejected) contention* that "the right to arm oneself in public [is] on equal footing with the right to arm oneself at home, necessitating that we apply strict scrutiny in our review of [an outside-the-home regulation]." *See* 712 F.3d at 878; *see also id.* at 876 (reiterating that *Masciandaro* did nothing more than "'assume'" that an inside-the-home regulation would be subject to strict scrutiny (quoting *Masciandaro*, 638 F.3d at 470)). Neither *Masciandaro* nor *Woollard* purported to, or had reason to, decide whether strict scrutiny always, or even ever, applies to regulations burdening the right of self-defense in the home. Those decisions do not provide even a smattering of support for the majority's position on the level-of-scrutiny question.

We are thus left to conduct the analysis spelled out in our *Chester* decision for selecting between strict and intermediate scrutiny. Analogizing the Second Amendment to the First, *Chester* explained that "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." *See* 628 F.3d at 682. Here, too, I part ways with the panel majority. Although I assume that the FSA implicates the "core protection" of the Second Amendment – "the right of law-abiding, responsible citizens to use arms in defense of hearth and home," *see Heller*, 554 U.S. at 634-35 – I simply cannot agree that the FSA sufficiently burdens that right to elicit strict scrutiny.

Contrary to the panel majority, the FSA does not, in banning certain assault weapons and detachable magazines, prohibit "an entire category of weaponry." *See ante* at 36. Nor "might [the FSA] be 'equivalent to a ban on a category of speech.'" *See id.* at 37 (quoting *Heller II*, 670 F.3d at 1285 (Kavanaugh, J., dissenting)). To support its theory, the majority carves out the popular AR-15 and its copies as "an entire class of semi-automatic rifles." *See id.* at 36 n.11. But, of course, a ban on one type of semi-automatic rifle does not equate to a prohibition on "an entire category of weaponry" in the same sense that, using the *Heller* example, a blanket ban on all handguns does. That fact – that the FSA does "*not* ban 'an entire class of arms'" – renders "the restrictions substantially less burdensome." *See N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 260 (quoting *Heller*, 554 U.S. at 628).

Moreover, despite what the panel majority says, it does matter that the FSA leaves handguns, as well as nonautomatic and some semiautomatic long guns, available for self-defense in the home. According to the majority, *Heller* "rejected essentially the same argument" when it dismissed the contention "'that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed.'" *See ante* at 37-38 (quoting *Heller*, 554 U.S. at 629). The majority's equation of this case and *Heller* is wholly untenable, because it depends on discounting the relevance of the handgun's status as "the quintessential self-defense weapon" – a status that was obviously and unquestionably important to the Supreme

Court. *See Heller*, 554 U.S. at 628-29 (emphasizing that handguns are "overwhelmingly chosen by American society for [self-defense]"). To be sure, a ban on the possession of handguns is far more burdensome on the right of self-defense in the home than a prohibition on the possession of AR-15s and similar arms.

At bottom, I agree with the Second and District of Columbia Circuits "that 'the prohibition of semi-automatic rifles and large-capacity magazines does not effectively disarm individuals or substantially affect their ability to defend themselves.' The burden imposed by the challenged legislation is real, but it is not 'severe.'" *See N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 260 (quoting *Heller II*, 670 F.3d at 1262). Accordingly, I would apply intermediate scrutiny and, in an analysis like that of the district court, uphold Maryland's FSA as constitutional, in that it is reasonably adapted to a substantial government interest. *See Kolbe*, 42 F. Supp. 3d at 791-97 (concluding, inter alia, "that the ban on assault weapons is likely to further the government's interest in protecting public safety by removing weapons that cause greater harm when used – to both civilians and police – and create greater obstacles for law enforcement in stopping and detaining criminals who are using them"). Simply put, the State has shown all that should be required: a reasonable, if not perfect, fit between the FSA and Maryland's substantial interest in protecting the public safety and deterring criminal activity.

II.

To their credit, my colleagues declare their rejection of the Plaintiffs' contention that, "once we determine that the prohibited firearms fall within the protective ambit of the Second Amendment, the [FSA] is unconstitutional and our analysis is at an end." *See ante* at 32 n.9. I fear, however, that by liberally extending constitutional protection to unusually dangerous arms and then decreeing strict scrutiny applicable to every ban on law-abiding citizens' in-home possession of protected weapons, the panel majority has guaranteed the demise of the FSA and other sensible gun-control measures within this Circuit. After all, though strict scrutiny may not be "strict in theory, but fatal in fact," *see Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995), it is at least "the most demanding test known to constitutional law," *see City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

This grave matter calls to mind the thoughtful words of our esteemed colleague Judge Wilkinson, recognizing in *Masciandaro* the "serious business" of adjudicating the Second Amendment's breadth: "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." *See* 638 F.3d at 475. To put it mildly, it troubles me that, by imprudently and unnecessarily breaking from our sister courts of appeals and ordering strict scrutiny here, we are impeding Maryland's and others' reasonable efforts to prevent the next Newtown – or Virginia Tech, or Binghamton, or

Fort Hood, or Tucson, or Aurora, or Oak Creek, or San Bernardino. In my view, any burden imposed by the FSA on the Second Amendment is far from severe. On the other hand, the State's paramount interest in the protection of its citizenry and the public safety is profound indeed. Unfortunately, however, I find myself outvoted today.

In these circumstances, and because I strongly agree with the excellent decision of our distinguished district court colleague upholding the constitutionality of the FSA, I wholeheartedly dissent.

TRAXLER, Chief Judge, wrote a dissenting opinion as to Part IV:

Plaintiffs contend that the FSA violates the Equal Protection Clause by creating an exception for retired law enforcement officers allowing them to acquire and possess banned firearms and LCMs. Unlike other citizens, retired officers are permitted under the Act to receive these weapons upon retirement. *See* Md. Code, Crim. Law §§ 4-302(7)(i), 4-305(a)(2). Plaintiffs argue that Maryland arbitrarily and irrationally grants a privilege to retired law enforcement officers that it denies to them and other similarly situated citizens.

The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause "keeps governmental decisionmakers from treating differently

persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). The Clause, however, "does not take from the States all power of classification," *Personnel Adm'r v. Feeney*, 442 U.S. 256, 271 (1979); "[l]awmaking by its nature requires that legislatures classify, and classifications by their nature advantage some and disadvantage others." *Helton v. Hunt*, 330 F.3d 242, 245 (4th Cir. 2003). Since "classification is the very essence of the art of legislation," a challenged classification is "presumed to be constitutional under the equal protection clause." *Moss v. Clark*, 886 F.2d 686, 689 (4th Cir. 1989). To survive a constitutional challenge under the Equal Protection Clause, the classification in question "need only be rationally related to a legitimate state interest unless it violates a fundamental right or is drawn upon a suspect classification such as race, religion, or gender." *Giarratano v. Johnson*, 521 F.3d 298, 303 (4th Cir. 2008).

Plaintiffs do not suggest that we are presented with a suspect classification or a classification that impinges upon fundamental rights. Therefore, rational-basis scrutiny applies to determine whether the exception for retired law enforcement officers to possess prohibited semi-automatic rifles and magazines comports with Equal Protection.

An equal protection plaintiff first must "demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Morrison v. Garraghty*, 239

F.3d 648, 654 (4th Cir. 2001). To be "similarly situated" means to be "similar in all aspects *relevant to attaining the legitimate objectives of legislation*." *Van Der Linde Housing, Inc. v. Rivanna Solid Waste Auth.*, 507 F.3d 290, 293 (4th Cir. 2007) (emphasis added). "Once this showing is made, the court proceeds to determine whether the disparity in treatment can be justified under the requisite level of scrutiny." *Morrison*, 239 F.3d at 654; *see e.g.*, *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-40 (1985).

In rejecting the equal protection claim, the district court proceeded no further than the threshold question of whether retired law enforcement officers in Maryland are similarly situated to law-abiding citizens who wish to possess weapons prohibited by the FSA. The district court concluded that retired law enforcement officers as a class are not similarly situated to the citizenry at large because of their firearms training and experience. The district court noted that officers who carry firearms are required to receive continuing classroom instruction, complete firearms training and qualify periodically with their firearms; that officers are trained how to store firearms and ammunition safely in the home; and that law enforcement officers, by virtue of their duty and authority to protect public safety by use of force if need be, are more experienced in the handling of firearms. Additionally, those officers who use one of the prohibited weapons during the course of duty are required to have received specialized training and instruction on these weapons.

Plaintiffs respond that retired officers have varying levels of training on these weapons, noting that most officers in fact do not have specialized training on a prohibited weapon during their employment and the FSA does not *require* retired officers who obtain prohibited weapons under the exception to have specialized training. Plaintiffs suggest that the training and experience thus does not differentiate retired officers in Maryland from Plaintiffs or other individuals, some of whom are trained on the handling of semi-automatic rifles and some of whom are not. Maryland believes the *general* firearms training received by all law enforcement officers while on the job is sufficient to set them apart as a class from ordinary citizens.

Plaintiffs urge us to follow *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), *abrogated on other grounds, District of Columbia v. Heller*, 554 U.S. 570 (2008),* in which the Ninth Circuit invalidated a similar statutory provision under the Equal Protection Clause. I find this case instructive. In *Silveira*, the plaintiffs raised an equal protection challenge to a California statute banning "assault weapons" but "allowing the possession of assault weapons by retired peace officers who acquire them from their employers at the time of their retirement." *Id.* at 1059. California's law also contained an exception for active *off-duty* officers to use

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* *Silveira v. Lockyer* reaffirmed the Ninth's Circuit position at the time that the Second Amendment does not confer an individual right to bear arms. *See* 312 F.3d 1052, 1060-61 (9th Cir. 2002). The Supreme Court, of course, rejected this view in *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

assault weapons "only for law enforcement purposes." *Id.* at 1089 (internal quotation marks omitted). The court concluded that the exception for off-duty officers passed muster because it was rationally related to the statutory objective of preserving public safety:

> We presume that off-duty officers may find themselves compelled to perform law enforcement functions in various circumstances, and that in addition it may be necessary that they have their weapons readily available. Thus, the provision is designed to further the very objective of preserving the public safety that underlies the [statute].

Id. By contrast, the court "discern[ed] no legitimate state interest in permitting *retired* peace officers to possess and use [assault weapons] for their *personal* pleasure" while denying it to others. *Id.* at 1091 (emphasis added). The court explained that because the retired officer exception "does *not* require that the transfer [of the weapon to the officer upon retirement] be for law enforcement purposes, and the possession and use of the weapons is not so limited," the exception bears no rational relationship and in fact is "directly contrary to the act's basic purpose of eliminating the availability of . . . military-style weapons and thereby protecting the people of California from the scourge of gun violence." *Id.* at 1090.

The Ninth Circuit did not explicitly address the threshold question of whether the plaintiffs and retired law enforcement officers were similarly situated;

however, the court rejected the notion that retired officers should be allowed to possess assault weapons for non-law enforcement purposes simply because they "receive more extensive training regarding the use of firearms than do members of the public." *Id.* at 1091. As the Ninth Circuit explained, "[t]his justification . . . bears no reasonable relationship to the stated legislative purpose of banning the possession and use of assault weapons in California. . . . The object of the statute is not to ensure that assault weapons are owned by those most skilled in their use; rather, it is to eliminate the availability of the weapons generally." *Id.*

The district court is likely correct that law enforcement officers receive greater firearms training and have more experience in the handling of firearms than an ordinary citizen and, in that respect, are not "similarly situated" to individuals who are not permitted to possess firearms banned under the Act. But, in my view, these differences are not "relevant to attaining the legitimate objectives of legislation." *Van Der Linde Housing*, 507 F.3d at 293. Maryland's Act was passed as part of "a comprehensive effort to promote public safety and save lives." Brief of Appellees at 9. Like the Ninth Circuit in *Silveira*, I see the general firearms training a retired officer received while on active police duty as having only attenuated relevance to an overarching objective of the FSA – to preserve the safety of the public. A retired officer has no greater responsibility or authority than an ordinary citizen to protect the general public. I cannot discern how a retired officer's

ability to wield a semiautomatic weapon with great adeptness for his *personal* use would promote public safety through the elimination of semi-automatic rifles like the AR-15. *See Silveira*, 312 F.3d at 1091 ("The object of the statute is not to ensure that assault weapons are owned by those most skilled in their use; rather, it is to eliminate the availability of the weapons generally."). For purposes of this particular provision, I conclude that *retired* law enforcement officers who are no longer charged with protecting the public are similarly situated to Plaintiffs who also wish to possess the prohibited weapons for personal uses such as self-defense.

Therefore, the only remaining question is "whether the disparity in treatment can be justified under the requisite level of scrutiny." *Morrison*, 239 F.3d at 654. In this case, the requisite level of scrutiny is rational basis review. This is hardly an imposing barrier for a statute to surmount. Nonetheless, I think the best course, especially in light of our decision to remand the Second Amendment claim for the application of strict scrutiny review, is to remand the equal protection claim as well for reconsideration in light of this opinion. The parties on appeal focused their arguments on whether citizens like Plaintiffs and retired law enforcement officers are "similarly situated." I would remand and have the parties focus on whether the FSA's exception permitting retired law enforcement personnel to possess semi-automatic rifles and LCMs can be justified.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

STEPHEN V. KOLBE, et al.	*	
	*	Civil No.
v.	*	CCB-13-2841
MARTIN J. O'MALLEY, et al.	*	

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AMENDED MEMORANDUM

On May 16, 2013, in the wake of a number of mass shootings, the most recent of which claimed the lives of twenty children and six adult staff members at Sandy Hook Elementary School in Connecticut, the Governor of Maryland signed into law the Firearm Safety Act of 2013. The Act bans certain assault weapons and large-capacity magazines ("LCMs").

Plaintiffs Stephen V. Kolbe, Andrew C. Turner, Wink's Sporting Goods, Inc., Atlantic Guns, Inc., Associated Gun Clubs of Baltimore, Inc. ("AGC"), Maryland Shall Issue, Inc., Maryland State Rifle and Pistol Association, Inc., National Shooting Sports Foundation, Inc. ("NSSF"), and Maryland Licensed Firearms Dealers Association, Inc. ("MLFDA")[1] brought this action against defendants Martin J. O'Malley, Douglas F. Gansler, Marcus L. Brown, and Maryland State Police ("MSP"),[2] requesting a judgment declaring Maryland's

[1] The plaintiffs are various associations of gun owners and advocates, companies in the business of selling firearms and magazines, and individual gun-owning citizens of Maryland.

[2] All the defendants are sued in their official capacities.

gun control legislation unconstitutional.[3] Now pending before the court are the defendants' motion for summary judgment and the plaintiffs' cross-motion for summary judgment. Also pending are the plaintiffs' motion to exclude testimony, which the defendants have opposed, and a number of unopposed motions, including the defendants' motions for protective orders

[3] The defendants do not challenge the plaintiffs' standing to bring this lawsuit. Exercising its independent duty to ensure that jurisdiction is proper, the court is satisfied that individual plaintiffs Kolbe and Turner face a credible threat of prosecution under the Firearm Safety Act. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014). Kolbe currently owns a semi-automatic handgun that comes with detachable magazines holding more than ten rounds. (Kolbe Decl., ECF No. 55-2, ¶ 3.) Although he does not own a long gun banned by the Firearm Safety Act, he indicates that, but for the Act, he would purchase one along with detachable magazines holding more than ten rounds. (*Id.* ¶¶ 4-5.) Turner currently owns three long guns classified as assault weapons, all of which come with detachable magazines holding in excess of ten rounds. (Turner Decl., ECF No. 55-3, ¶ 3.) He claims that, but for the Act, he would purchase other banned firearms and large capacity magazines. (*Id.* ¶¶ 4-5.) *Cf. New York State Rifle and Pistol Ass'n, Inc. v. Cuomo (NYSRPA)*, ___ F. Supp. 2d ___, 2013 WL 6909955, at *5 (W.D.N.Y. Dec. 31, 2013) (concluding that individual plaintiffs had standing to challenge a New York gun control statute, as they owned rifles, pistols, and large capacity magazines regulated by the statute and desired to acquire weapons that the statute rendered illegal); *see also Ezell v. City of Chicago*, 651 F.3d 684, 695-96 (7th Cir. 2011) (deciding that plaintiffs, who wished to engage in range training, had standing to bring a Second Amendment challenge to a Chicago ordinance banning firing ranges, reasoning that the very existence of the ordinance implied a threat to prosecute). As Kolbe and Turner have standing, jurisdiction is secure, and the court may adjudicate this dispute whether or not the additional plaintiffs have standing. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977).

and John Cutonilli's motion for leave to file a brief as amicus curiae. The parties have fully briefed the issues, and oral argument was held on July 22, 2014. For the reasons stated below, I find the law constitutional, and accordingly will grant the defendants' motion for summary judgment and deny the plaintiffs' cross motion.[4] The plaintiffs' motion to exclude will be denied, the defendants' motions for protective orders will be granted, and Cutonilli's motion to file an amicus brief will be denied.[5]

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[4] The court will deny as moot the defendants' motion to dismiss the complaint and the defendants' motion to dismiss the third amended complaint.

[5] The court does not find Cutonilli's proffered amicus brief, which consists of his interpretation of the Second Amendment and relevant precedents, useful to the disposition of this case. *See Finkle v. Howard Cnty., Md.*, ___ F. Supp. 3d ___, 2014 WL 1396386, at *2 (D. Md. Apr. 10, 2014) (noting the trial court's discretion in deciding whether to grant leave to file as amicus curiae and that "a motion for leave to file an amicus curiae brief . . . should not be granted unless the court deems the proffered information timely and useful" (alteration in original) (citations and internal quotation marks omitted)). The court, however, has considered the amicus briefs proffered by Marylanders to Prevent Gun Violence and the Brady Center in support of the defendants. The court has also considered the amicus briefs of the Pink Pistols and the National Rifle Association ("NRA") in support of the plaintiffs.

BACKGROUND

The Firearm Safety Act of 2013 provides in general that, after October 1, 2013, a person may not possess, sell, offer to sell, transfer, purchase, or receive "assault pistols,"[6] "assault long guns,"[7] and "copycat

[6] The plaintiffs are not challenging the Act's ban on assault pistols.

[7] The Firearm Safety Act defines assault long guns by reference to § 5-101(r)(2) of the Public Safety Article. Md. Code Ann., Crim. Law § 4-301(b). Thus, the Act bans:

> a firearm that is any of the following specific assault weapons or their copies, regardless of which company produced and manufactured that assault weapon: (i) American Arms Spectre da Semi-automatic carbine; (ii) AK-47 in all forms; (iii) Algimec AGM-1 type semi-auto; (iv) AR 100 type semi-auto; (v) AR 180 type semi-auto; (vi) Argentine L.S.R. semi-auto; (vii) Australian Automatic Arms SAR type semi-auto; (viii) Auto-Ordnance Thompson M1 and 1927 semi-automatics; (ix) Barrett light .50 cal. semi-auto; (x) Beretta AR70 type semi-auto; (xi) Bushmaster semi-auto rifle; (xii) Calico models M-100 and M-900; (xiii) CIS SR 88 type semi-auto; (xiv) Claridge HI TEC C-9 carbines; (xv) Colt AR-15, CAR-15, and all imitations except Colt AR-15 Sporter H-BAR rifle; (xvi) Daewoo MAX 1 and MAX 2, aka AR 100, 110C, K-1, and K-2; (xvii) Dragunov Chinese made semi-auto; (xviii) Famas semi-auto (.223 caliber); (xix) Feather AT-9 semi-auto; (xx) FN LAR and FN FAL assault rifle; (xxi) FNC semi-auto type carbine; (xxii) F.I.E./Franchi LAW 12 and SPAS 12 assault shotgun; (xxiii) Steyr-AUG-SA semi-auto; (xxiv) Galil models AR and ARM semi-auto; (xxv) Heckler and Koch HK-91 A3, HK-93 A2, HK-94 A2 and A3; (xxvi) Holmes model 88 shotgun; (xxvii) Avtomat Kalashnikov semi-automatic rifle in any format; (xxviii) Manchester Arms "Commando" MK-45, MK-9; (xxix) Mandell TAC-1 semi-auto carbine; (xxx) Mossberg model 500 Bullpup assault shotgun; (xxxi) Sterling Mark 6; (xxxii) P.A.W.S.

weapons" (together, "assault weapons").[8] Md. Code Ann., Crim. Law ("CR") §§ 4-301(d), 4-303(a)(2). In addition, the Act states that a person "may not manufacture, sell, offer for sale, purchase, receive, or transfer a detachable magazine that has a capacity of more than 10 rounds of ammunition for a firearm."[9] *Id.* § 4-305(b). A person who violates the Act "is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 3 years or a fine not exceeding $5,000 or both," although different penalties are provided for a person who uses an assault weapon or LCM in the

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> carbine; (xxxiii) Ruger mini-14 folding stock model (.223 caliber); (xxxiv) SIG 550/551 assault rifle (.223 caliber); (xxxv) SKS with detachable magazine; (xxxvi) AP-74 Commando type semi-auto; (xxxvii) Springfield Armory BM-59, SAR-48, G3, SAR-3, M-21 sniper rifle, M1A, excluding the M1 Garand; (xxxviii) Street sweeper assault type shotgun; (xxxix) Striker 12 assault shotgun in all formats; (xl) Unique F11 semi-auto type; (xli) Daewoo USAS 12 semi-auto shotgun; (xlii) UZI 9mm carbine or rifle; (xliii) Valmet M-76 and M-78 semi-auto; (xliv) Weaver Arms "Nighthawk" semi-auto carbine; or (xlv) Wilkinson Arms 9mm semi-auto "Terry".

Md. Code Ann., Pub. Safety ("PS") § 5-101(r)(2). According to the plaintiffs, the most widely owned firearms of those banned by the Act are the AR-15, the AK-47, and their copies.

[8] Individuals who lawfully possessed assault long guns or copycat weapons before October 1, 2013, however, may continue to possess those weapons. Md. Code Ann., Crim. Law § 4-303(b)(3).

[9] The court will refer to such detachable magazines as "large capacity magazines" or "LCMs." It does not appear that CR § 4-305 bans mere possession of LCMs.

commission of a felony or a crime of violence. *Id.* § 4-306.

The Act exempts from the ban the transfer of an assault weapon from a law enforcement agency to a retired law enforcement officer as long as: (1) it is sold or transferred on retirement or (2) it "was purchased or obtained by the person for official use with the law enforcement agency before retirement." *Id.* § 4-302(7). The Act also exempts retired law enforcement officers from the ban on LCMs. *Id.* § 4-305(a)(2), (b).

Just days before the Firearm Safety Act was to go into effect, on September 26, 2013, the plaintiffs filed their complaint, followed the next day by a motion for a temporary restraining order ("TRO"), challenging the law's constitutionality with respect to its ban on assault long guns, copycat weapons, and LCMs. The court heard argument on the TRO on October 1, 2013, and decided that the plaintiffs did not show they were entitled to the extraordinary relief. Following the hearing on the TRO, the parties agreed that, instead of considering a preliminary injunction request, the court should proceed to consider this matter on the merits.

Accordingly, the court will now consider the plaintiffs' claims that the Firearm Safety Act (1) infringes their Second Amendment rights,[10] (2) violates the

[10] The plaintiffs challenge the bans imposed by the Firearm Safety Act on their face, not merely as applied to their particular circumstances. *See, e.g.*, *Ezell v. City of Chicago*, 651 F.3d 684, 698 (7th Cir. 2011) (explaining that, in a facial challenge, "[t]he remedy is necessarily directed at the statute itself and *must* be injunctive and declaratory; a successful facial attack means the

Equal Protection Clause of the Fourteenth Amendment, and (3) is void for vagueness.

ANALYSIS

I. Summary Judgment Standard

Federal Rule of Civil Procedure 56(a) provides that summary judgment should be granted "if the movant shows that there is no *genuine* dispute as to any *material* fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) (emphasis added). Whether a fact is material depends upon the substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Accordingly, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Id.* "A party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of [his] pleadings,' but rather must 'set forth specific facts showing that there is a genuine issue for trial.'" *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 522 (4th Cir. 2003) (alteration in original) (quoting Fed. R. Civ. P. 56(e)). The court must view the evidence in the light most favorable to the nonmovant and draw all justifiable inferences in his favor. *Scott v. Harris*, 550 U.S. 372, 378 (2007) (citation omitted); *see also Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, 721 F.3d

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statute is wholly invalid and cannot be applied *to anyone*" (emphasis in original)).

264, 283 (4th Cir. 2013) (citation omitted). At the same time, the court must not yield its obligation "to prevent factually unsupported claims and defenses from proceeding to trial." *Bouchat*, 346 F.3d at 526 (citation and internal quotation marks omitted).

II. Motion to Exclude Testimony

The plaintiffs ask the court to exclude various expert and fact testimony offered by the defendants. Rule 702 of the Federal Rules of Evidence, which governs the admissibility of expert testimony, states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

The party seeking to introduce expert testimony has the burden of establishing its admissibility by a preponderance of the evidence. *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 592 n.10 (1993). A district court is afforded "great deference . . . to admit or exclude expert testimony under *Daubert*." *TFWS, Inc. v. Schaefer*, 325 F.3d 234, 240 (4th Cir. 2003) (citations and internal quotation marks omitted); *see also Daubert*, 509 U.S. at

594 ("The inquiry envisioned by Rule 702 is . . . a flexible one. . . ."). "In applying *Daubert*, a court evaluates the methodology or reasoning that the proffered scientific or technical expert uses to reach his conclusion; the court does not evaluate the conclusion itself," *Schaefer*, 325 F.3d at 240, although "conclusions and methodology are not entirely distinct from one another," *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). In essence, the court acts as gatekeeper, only admitting expert testimony where the underlying methodology satisfies a two-pronged test for (1) reliability and (2) relevance. *See Daubert*, 509 U.S. at 589.

Rule 701 of the Federal Rules of Evidence, which governs the admissibility of lay testimony, states:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

"[L]ay opinion testimony *must* be based on personal knowledge. . . ." *United States v. Perkins*, 470 F.3d 150, 155-56 (4th Cir. 2006) (emphasis in original). "At bottom, . . . Rule 701 forbids the admission of expert testimony dressed in lay witness clothing. . . ." *Id.* at 156 (quoting *United States v. Santos*, 201 F.3d 953, 963 (7th Cir. 2000)).

A. Koper

Dr. Christopher Koper, as the plaintiffs admit, is the only social scientist to have studied the effects of the federal assault weapons ban that was in place from 1994 to 2004. (*See* Koper Decl., ECF No. 44-7, ¶ 5.) In addition, he has studied issues related to firearms policy for twenty years, publishing numerous studies in peer-reviewed journals on topics related to crime and firearms. (*Id.* ¶¶ 3, 6-7.) The plaintiffs ask the court to exclude Koper's expert testimony on two grounds, neither of which is persuasive.

First, the plaintiffs claim that Koper's opinion that the Firearm Safety Act is likely to advance Maryland's interest in protecting public safety is not based on sufficient data, as required by Rule 702, because his study of the federal ban found that the ban did not decrease firearms-related crimes, the lethality and injuriousness of gun crimes, or the criminal use of banned LCMs. (Pls.' Mot. to Exclude, ECF No. 65, at 3-4.) Further, the plaintiffs claim, his previous research revealed that state-level bans did not result in any reduction in crime. (*Id.* at 4.) The plaintiffs also allege that many of Koper's opinions regarding the efficacy of the Firearm Safety Act contradict deposition testimony. (*Id.* at 7.)

As an initial matter, the plaintiffs often mischaracterize Koper's statements and his research, cherry-picking items and presenting them out of context. For example, they cite Koper's acknowledgment in 2004 that a few studies suggest state-level assault weapons

bans did not reduce crime as inconsistent with his conclusions regarding the Firearm Safety Act. (*Compare* Koper Decl., Ex. B, at 81 n. 95 ("[A] few studies suggest that state-level AW bans have not reduced crime. . . . "), *with* Koper Decl. ¶¶ 77-86 (opining that the Firearm Safety Act is likely to, *inter alia*, limit the number of long guns in Maryland, limit the number of LCMs in circulation, reduce the number and lethality of gunshot victimizations, and reduce the use of assault weapons and LCMs in crime).) But the plaintiffs omit Koper's numerous qualifications of those state studies. (*See* Koper Decl., Ex. B, at 81 n. 95 ("[I]t is hard to draw definitive conclusions from these studies . . . : there is little evidence on how state AW bans affect the availability and use of AWs . . . ; studies have not always examined the effects of these laws on gun homicides and shootings . . . ; and the state AW bans that were passed prior to the federal ban . . . were in effect for only three months to five years . . . before the imposition of the federal ban, after which they became largely redundant with the federal legislation and their effects more difficult to predict and estimate.").) Even ignoring the context in which Koper's 2004 statement was made, there is nothing necessarily inconsistent about a 2004 statement that a few state-level bans were not shown to reduce overall crime and Koper's opinion that a different state-level ban, enacted in 2013, likely will reduce the negative effects of gun violence.

To the extent Koper's prior research concluded the federal ban was not effective in various ways, his opinions in the current case are based on several other

pieces of data, which the plaintiffs entirely ignore in arguing his testimony should be excluded. (*See, e.g.*, Koper Decl. ¶¶ 13-43.) Further, Koper is clear in noting that the federal weapons ban had several features that may have limited its efficacy that are not present with Maryland's ban. (*Id.* at ¶¶ 79-81.)

The plaintiffs also challenge Koper's testimony on the basis that he is unable to conclude the Firearm Safety Act will have the desired effects to a "reasonable degree of scientific certainty." It appears the plaintiffs are claiming that expert opinions may not be considered in determining the constitutionality of the bans at issue here unless they are stated with such scientific certainty. In making their argument, however, the plaintiffs fail to recognize that the inquiry under Rule 702, as noted above, is flexible, *see Daubert*, 509 U.S. at 594, and that, although a reasonable degree of scientific certainty is required for the admission of expert testimony to prove causation in medical malpractice cases – the types of cases the plaintiffs cite to support their position – applying such a standard here would misapprehend the court's inquiry. In attempting to further the state's important interests, the legislature is not required to refrain from acting until it has evidence demonstrating proposed legislation will certainly have the desired effects. It is allowed to make predictions. *See Turner Broadcasting Sys., Inc. v. F.C.C. (Turner I)*, 512 U.S. 622, 665 (1994) ("Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which empirical support

may be unavailable."). The court will defer to those predictions as long as they are the result of reasonable inferences and deductions based on substantial evidence. *See Heller v. District of Columbia (Heller III)*, ___ F. Supp. 2d ___, 2014 WL 1978073, at *8 (D.D.C. May 15, 2014) (citing *Turner Broadcasting Sys., Inc. v. F.C.C. (Turner II)*, 520 U.S. 180, 211 (1997)). Koper's testimony is well-suited to answer the question facing the court and is precisely the kind of evidence upon which other courts have relied in assessing similar assault weapon and LCM bans. *See Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1263 (D.C. Cir. 2011); *Fyock v. City of Sunnyvale*, ___ F. Supp. 2d ___, 2014 WL 984162, at *8-9 (N.D. Cal. Mar. 5, 2014); *San Francisco Veteran Police Officers Ass'n v. San Francisco*, ___ F. Supp. 2d ___, 2014 WL 644395, at *5, *7 (N.D. Cal. Feb. 19, 2014); *Shew v. Malloy*, ___ F. Supp. 2d ___, 2014 WL 346859, at *9 n.50 (D. Conn. Jan. 30, 2014); *NYSRPA*, 2013 WL 6909955, at *15-18.[11] The court will not, therefore, exclude Koper's testimony.

B. Webster

The plaintiffs argue that Dr. Daniel Webster's testimony should be excluded because he has not conducted any original research but rather has relied on

[11] It does not appear that the admissibility of similar testimony by Koper was challenged in any other case in which he was cited.

the work of Koper and the data he acquired from the *Mother Jones* publication.[12]

It is acceptable for an expert to rely on the studies of other experts in reaching his own opinions, although courts have excluded testimony where the expert failed to conduct any independent examination or research to ensure the reliability of the information on which he relies. *See Doe v. Ortho-Clinical Diagnostics, Inc.*, 440 F. Supp. 2d 465, 470 (M.D.N.C. 2006) (citation and internal quotation marks omitted) ("Where proffered expert testimony is not based on independent research, but instead on such a literature review, the party proffering such testimony must come forward with other objective, verifiable evidence that the testimony is based on scientifically valid principles. One means of showing this is by proof that the research and analysis supporting the proffered conclusions have been subjected to normal scientific scrutiny through peer review and publication."); *Berlyn, Inc. v. Gazette Newspapers, Inc.*, 214 F. Supp. 2d 530, 539-40 (D. Md. 2002) (excluding an expert because his methods were "wholly lacking in independent research," and there was no evidence that his opinion was "the product of

[12] The plaintiffs also claim that Webster's opinions in paragraphs seven through nine of his declaration, as to the dangerousness of particular firearms, are outside the scope of his expertise and, in any event, are not relevant to the present case. Because the court does not rely on or refer to Webster's opinions in that part of his declaration for its findings here, the court need not resolve the issue.

reliable principles and methods, and [was] based upon sufficient facts or data").

Here, over a nearly thirty-year career, Webster has devoted most of his research to gun-related injuries and violence, has directed numerous studies related to gun violence and its prevention, and has published seventy-nine articles in scientific, peer-reviewed journals. (*See* Webster Decl., ECF No. 44-6, ¶¶ 2-5.) Although it is true he relies on Koper's research in his declaration, Webster served as editor of the book that included Koper's 2013 report and, as editor, he subjected Koper's 2013 report to a peer review process. (*See* Koper Decl., Ex. A; Webster Dep., ECF No. 70-4, at 57:11-18.) Likewise, Webster relies on data from the *Mother Jones* publication, but the data were subject to independent analysis by Koper and his graduate student. (*See* Koper Decl. ¶¶ 25-28.) In any event, the plaintiffs have offered nothing to suggest the *Mother Jones* data are unreliable or inaccurate. Accordingly, the court is satisfied that the information on which Webster relies in forming his expert opinion is reliable, and will not exclude his testimony.

C. Vince and Law Enforcement Officers

The plaintiffs argue that the "ballistics opinions" of Joseph Vince and executive law enforcement officers should be excluded, as the opinions are outside the

scope of their expertise.[13] They do not, however, identify the paragraphs of Vince's declaration to which they take objection. As the court neither relies on nor refers to any testimony by Vince on "ballistics," the court need not resolve this issue. Turning to the disputed testimony offered by Baltimore County Police Department Chief James Johnson, Baltimore City Police Department Commissioner Anthony Batts, and Prince George's County Police Department Deputy Chief Henry Stawinski, the court agrees with the defendants that none of this testimony contains expert opinions on ballistics. Johnson merely acknowledges that some shots that may be loaded into a shotgun have a risk of over-penetration;[14] Batts offers testimony about research he directed and which was reported to him in connection with his official duties; and Stawinksi testifies on his personal observations of assault weapons piercing soft body armor. (*See* Johnson Decl., ECF No. 44-3, ¶ 35 (opining that "[a] shotgun would . . . be a superior self-defense weapon to an assault weapon, at least if it is loaded with [an] appropriate shot that does not give rise to too great a risk of over penetration");

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[13] Additionally, the plaintiffs claim that Vince's "firearms-related opinions," (*see* Vince Decl., ECF No. 44-8, ¶¶ 10-19, 31-32), should be excluded as outside his area of expertise. Because the court neither relies on nor refers to Vince's opinions in that part of his declaration, the court does not need to decide the issue.

[14] Johnson's familiarity with shotguns stems from his formal law enforcement training, as well as his personal ownership of a shotgun that he uses for hunting. (*See* Johnson Dep., ECF No. 62-2, at 6:8-12; 67:5-69:19.)

Batts Decl., ECF No. 44-4, ¶ 21 (testifying about research he personally directed regarding various rounds fired by officers under his command); Stawinski Decl., ECF No. 44-5, ¶ 30 (stating that "[m]ost assault weapons have significant penetration capabilities that are especially dangerous to both law enforcement officers and civilians alike").) The officers' testimony, based on their personal knowledge and experiences, is properly admissible.[15]

D. Allen

The plaintiffs claim that the court should exclude Lucy Allen's expert opinions related to the frequency with which the banned weapons are used defensively for two reasons. First, they claim that her conclusions are based on the coding of stories she did not independently verify. The court notes, however, that the database which Allen studied is maintained by the NRA, suggesting, if anything, that her study may have a bias in favor of finding more instances of the defensive use of firearms. Moreover, the plaintiffs proffer nothing to suggest the stories collected by the NRA are unreliable or inaccurate. Second, they argue that she cannot base her opinions on stories, which, they claim, are inappropriate anecdotal evidence. In light of the apparent dearth of other evidence demonstrating that the firearms at issue here are used for self-defense, Allen's use

[15] In any event, the court does not rely on or refer to Johnson's or Batts's disputed testimony, and the plaintiffs, therefore, are not prejudiced by its admission.

of the NRA database is appropriate and acceptable. Not only do the cases to which the plaintiffs cite for the opposite conclusion not stand for the proposition that an expert can never rely on anecdotal evidence, they expressly contemplate the use of such evidence.[16] *See Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1316 (11th Cir. 1999) (acknowledging that case reports do not provide reliable scientific proof of *causation*, but recognizing their importance for "raising questions and comparing clinicians' findings").[17]

E. Johnson and Bulinski

Finally, the plaintiffs seek to exclude Johnson's testimony in front of the Maryland General Assembly and Maximillian Bulinski's declaration because the defendants did not disclose them in accordance with Federal Rule of Civil Procedure 26(a) or (e). *See also* Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion. . . ."). Evidence a party has failed to timely disclose will not be excluded if the failure is substantially justified or

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[16] The court fails to see how one would find the rate with which guns are used for defensive purposes without relying on anecdotal evidence.

[17] To the extent the plaintiffs challenge Allen's reliance on the *Mother Jones* data, their challenge must fail. As explained above, the data were subject to independent review by Koper and his graduate student.

harmless. *S. States Rack and Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 595-96 (4th Cir. 2003) (articulating five factors the court should consider when deciding whether exclusion is proper: the surprise to the party against whom the evidence is offered, the ability of the party to cure that surprise, the extent to which the testimony would disrupt trial, the explanation for the failure, and the importance of the testimony).

Any failure to disclose Johnson's testimony in front of the General Assembly was harmless. The portions of Johnson's testimony relevant to the plaintiffs' challenge here are not substantively different from his statements in his declaration. Nor do the plaintiffs allege any manner in which they are different. The plaintiffs thus were not prejudiced because they were not deprived of a full opportunity to examine Johnson on his views of the Firearm Safety Act or gun-related crime.

The defendants' failure to disclose Bulinski's testimony is substantially justified. The defendants first had notice they would need to investigate evidence related to Bulinski's declaration when the plaintiffs filed their opposition memorandum on March 17, 2014. The defendants did not learn they would want to offer Bulinski's testimony until March 27, 2014, when he attempted to make the purchases about which he testifies. This was only fifteen days before they filed their reply memorandum. In addition, because the testimony is responsive to the plaintiffs' evidence, the testimony does not raise new issues of which the plaintiffs

were unaware such that the plaintiffs are prejudiced. In fact, the plaintiffs do not claim any prejudice in their papers. Further, Bulinski's testimony offers valuable information given the plaintiffs' limited evidence as to the availability of firearms magazines with capacities of ten rounds or less.

The court will not exclude Johnson's testimony or Bulinski's declaration.

III. Second Amendment

The plaintiffs claim that Maryland's ban on various assault weapons and LCMs infringes their Second Amendment rights. The Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed." U.S. Const. amend. II. It is applicable to the states through the Fourteenth Amendment. *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3026, 3050 (2010).

In *District of Columbia v. Heller (Heller I)*, the Supreme Court found that the Second Amendment codified a pre-existing, individual right to keep and bear arms and that its core protection was the right of "law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. 570, 592, 635 (2008). Accordingly, the Court found that a complete prohibition on handguns – the class of weapon "overwhelmingly chosen by American society for [the] lawful purpose [of self-defense]" in the home – infringed on the central protection of the Second Amendment and thus failed

any level of constitutional scrutiny. *Id.* at 628-29; *see also Woollard v. Gallagher*, 712 F.3d 865, 874 (4th Cir. 2013) (noting that self-defense in the home is the "core protection" of the Second Amendment right).

The Court also recognized, however, that the right to bear arms is not unlimited, and articulated some of its boundaries. With respect to the types of weapons protected, the Court found that the Second Amendment does not protect "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller I*, 554 U.S. at 626. Instead, it only protects those that are "'in common use at the time,'"[18] and "typically possessed by law-abiding citizens for lawful purposes."[19] *Id.* at 625, 627 (quoting *Miller*, 307 U.S. 174, 179 (1939)); *see also Heller II*, 670 F.3d at 1260 ("[W]e must also ask whether the prohibited weapons are typically possessed by law-abiding citizens for lawful purposes; if not, then they are not

[18] The Supreme Court has not articulated the time during which common use is measured. Most courts that have addressed the issue have looked at the current use of a weapon. At least one court has noted the Supreme Court's failure to clarify the time frame, although it still referenced statistics on current use. *See Shew*, 994 F. Supp. 2d at 244-46 & n. 37.

[19] With its holding, the Court rejected claims that the Second Amendment protects the right to possess weapons that would be effective in modern military combat, such as M-16 rifles, but that are "highly unusual in society at large." *Heller I*, 554 U.S. at 627-28. In doing so, the Court noted that "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." *Id.* at 627.

the sorts of 'Arms' protected by the Second Amendment." (internal citations omitted)). Further, the Court found "longstanding" regulations of firearms "presumptively lawful," identifying as examples regulations prohibiting the possession of firearms by felons or the mentally ill, prohibiting the carrying of firearms in "sensitive places," or imposing conditions on the commercial sale of firearms. *Heller I*, 554 U.S. at 626-27 & n.26.

Given that the right to bear arms is not boundless, the Fourth Circuit, like several others, applies a two-part approach to Second Amendment claims. *Woollard*, 712 F.3d at 874-75; *see also Peruta v. Cnty. of San Diego*, 742 F.3d 1144, 1150 (9th Cir. 2014); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Heller II*, 670 F.3d at 1252; *Ezell*, 651 F.3d at 703-04; *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010). First, the court determines whether the challenged law "imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *Woollard*, 712 F.3d at 875 (quoting *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010)). "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." *Id.* (quoting *Chester*, 628 F.3d at 680) (internal quotation marks omitted). If it was not, then the law regulating such conduct is valid. *Id.* If the conduct does fall within the scope of the Second Amendment right, then the court

must move to the second part of the inquiry and apply "the appropriate form of means-end scrutiny." *Id.* (quoting *Chester*, 628 F.3d at 680) (internal quotation marks omitted).

A. Infringement of the Second Amendment Right

The court must first determine whether the weapons at issue here are of the type falling within the Second Amendment's scope. The defendants do not appear to claim Maryland's ban on assault weapons and LCMs is longstanding such that it is presumptively valid. *See Heller II*, 670 F.3d at 1253 ("A requirement of newer vintage is not . . . presumed valid."). The court must instead evaluate whether the banned assault long guns and LCMs are in common use for lawful purposes. *See Heller I*, 554 U.S. at 625, 627; *Heller II*, 670 F.3d at 1260; *Shew*, 2014 WL 346859, at *5; *NYSRPA*, 2013 WL 6909955, at *10-11. If they are not – or if they are dangerous and unusual – they fall outside the Amendment's protections, and Maryland's law banning the weapons is valid without further analysis. *See Heller I*, 554 U.S. at 627; *Woollard*, 712 F.3d at 875.[20]

[20] There is an apparent tension between the requirement of a historical analysis that examines the scope of the right as understood in 1868, *see McDonald*, 130 S.Ct. at 3041-42, and the need to evaluate whether the banned firearms are "in common use" at the present time, but it is not necessary to address that tension for purposes of this opinion. It may be that the purpose of the right to bear arms – i.e., self-defense – is measured at the time of ratification, while the kind of weapons used for that purpose –

The plaintiffs contend that, according to data from the MSP, the banned long guns have been generally increasing in popularity since 1995. (*See* Dalaine Brady Decl., Ex. C, ECF No. 44-10.) Indeed, over the past three years in Maryland, there have been approximately 35,000 transfers of assault weapons and frames and receivers of such weapons.[21] (*Id.*) The plaintiffs also claim that at least 5 million of the banned assault weapons are possessed nationwide, and that the number may be as high as 8.2 million. (*See* Johnson Dep., ECF No. 55-17, at 43:2-9; *see also* James Curcuruto Decl., Ex. A, ECF No. 55-9, ¶ 1 ("Figures from the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) Annual Firearms Manufacturers and Exports Reports (AFMER) show that between 1990 and 2012, United States manufacturers produced approximately 4,796,400 AR-platform rifles for sale in the United States commercial marketplace. . . . During these same years, . . . approximately 3,415,000 AR- and AK-platform rifles were imported into the United States for sale in the commercial marketplace.").) The popularity of these firearms, the plaintiffs claim, is further

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e.g., handguns or assault rifles – is measured at the time the state law is passed.

[21] Since 1994, Maryland has gathered information regarding the transfer of regulated firearms. (*See* Brady Decl. ¶¶ 21-29.) It is important to note, however, that all transfers were recorded, even if the transfer was of a firearm previously transferred. (*Id.* ¶ 33.) Thus, for example, if a single firearm was transferred five times over the past two decades, it would appear as five separate transactions. (*Id.*) In this way, the information collected by Maryland may overstate the number of regulated firearms.

evidenced by the frequency with which they are manufactured and sold. (*See* Curcuruto Decl., Ex. A, ¶ 1 (noting that, in 2012, more AR- and AK-platform rifles were manufactured in or imported to the United States than the most commonly sold vehicle); *see also id.* ¶ 3 (indicating that retailers reported that AR- and AK-platform rifles accounted for 20.3% of the firearms they sold in 2012).)

As for the LCMs banned by the Firearm Safety Act, the plaintiffs assert that they are standard with the purchase of most new pistols, and have been sold in the civilian market for over one hundred years. (*See* Guy Rossi Decl., Ex. A, ECF No. 55-11, at 2; *see also* James Supica Decl., Ex. A, ECF No. 55-14, at 7.) They claim that, across the nation, LCMs represent seventy-five million, or forty-six percent, of all magazines in U.S. consumer possession between 1990 and 2012. (Curcuruto Decl., Ex. A, ¶ 6; *see also* Koper Decl., Ex. B, at 1 (stating that gun industry sources estimated that, as of 1995, there were 25 million LCMs available in the United States, and that an additional 4.7 million LCMs were imported into the country from 1995 to 2000).) Marylanders owned about 725,000 of those LCMs during that time. (Curcuruto Decl., Ex. A, ¶ 6.) Based on the absolute numbers of assault weapons and LCMs, the plaintiffs ask the court to conclude that they are in common use.

Further, the plaintiffs argue that the banned assault weapons and LCMs are commonly possessed for

self-defense and competitive marksmanship.[22] They claim that assault weapons banned by the Firearm Safety Act represent about sixty percent of the firearms used at AGC's firing range in Marriottsville, Maryland. (*See* John Josselyn Decl., ECF No. 55-6, ¶ 7.) In addition, "[f]or the past quarter of a century AR-15s have consistently been used by winning competitors at the U.S. Civilian Marksmanship National Match target shooting championships held each year at Camp Perry, Ohio." (Gary Roberts Decl., ECF No. 55-10, ¶ 18.) Likewise, some competitions "are designed specifically for pistols, rifles and shotguns capable of holding a greater number of rounds than the Act permits." (Rossi Decl., Ex. A, at 2.) Finally, the plaintiffs assert that the banned firearms and LCMs are used in a small percentage of crime in Maryland, are used infrequently in mass shootings and murders of law enforcement officers, and are no more dangerous to law enforcement officers than other rifles. (*See* Mark Gius Decl., Ex. A, ECF No. 55-12, at 2 (estimating that, at most, 2.52% of murder victims in the United States were killed with

[22] The plaintiffs also claim that the banned assault long guns and LCMs are in common use for hunting, which the Supreme Court has indicated may be a use protected by the Second Amendment. *See Heller I*, 554 U.S. at 599. The plaintiffs proffer no evidence, however, to suggest that the weapons at issue are used or even possessed for that purpose. Further, although the court recognizes the need to build proficiency with a firearm for the purposes of hunting or self-defense, there has been no indication from the Supreme Court that competitive marksmanship in itself is a purpose protected by the Second Amendment. *See id.* at 626 (noting the Second Amendment right is not one to "keep and carry any weapon whatsoever in any manner whatsoever and *for whatever purpose*" (emphasis added)).

assault rifles); Table 27, Law Enforcement Officers Feloniously Killed, ECF No. 5528 (indicating that, from 2003 to 2012, of the 493 law enforcement murders caused by firearms, 92 of those, or 18.7%, involved rifles, an unspecified subset of which were assault rifles); Webster Dep., ECF No. 55-18, at 104:9-17 (suggesting that rifles not banned under the Firearm Safety Act are equally effective in penetrating law enforcement armor as the assault rifles that are banned); *see also* Roberts Decl. ¶ 5 ("There is nothing ballistically special or different about a .223/5.56mm bullet whether fired from an AR-15 or some other rifle of the same caliber."); Buford Boone Decl., ECF No. 55-13, ¶ 4 ("[T]he soft body armor commonly worn by law enforcement officers is rated only to stop handgun rounds. It is not rated to stop most center-fire rifle rounds.").) The plaintiffs, therefore, maintain that the banned assault weapons and LCMs are commonly used for lawful purposes.

According to the defendants, by contrast, assault weapons comprise a small portion of the current civilian gun stock in the United States. (*See* Lawrence Tribe Testimony, ECF No. 44-74, at 24 (estimating that approximately seven million assault weapons are owned in the United States today); *see also* Marylanders to Prevent Gun Violence Br., ECF No. 40, at 4, 6-7 (estimating that the number of assault weapons in the United States is closer to the number of machineguns than the number of handguns).) Koper estimates that, at the time of the 1994 federal ban, assault

weapons comprised less than one percent of the civilian gun stock. (Koper Decl. ¶ 19.) Assuming that recent sales have increased the number of assault weapons in the current civilian market to nine million, such weapons would represent about three percent of the civilian gun stock. (*See* William J. Krouse, Cong. Research Serv., *Gun Control Legislation*, ECF No. 44-28, at 8 (estimating that, by 2009, the total number of firearms available to U.S. civilians was approximately 310 million).) The defendants also assert that the absolute number of assault weapons far exceeds the number of people who own them. In recent decades, gun ownership in the United States has become increasingly concentrated; fewer households own firearms, but those households owning guns own more of them. (*See* Webster Decl. ¶¶ 13-14; *see also* NSSF Rep., ECF No. 44-75, at 13 (indicating that the average owner of modern sporting rifles had 2.6 such weapons in 2010 and 3.1 such weapons in 2013).)[23] 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. In Maryland specifically, from 1994 to 2012, there were a total of 604,051 transfers of regulated firearms, of which only 46,577 were assault weapons.

[23] Although it is not entirely clear what weapon qualifies as a modern sporting rifle, it appears NSSF began using this term in an effort to rebrand assault weapons, and the plaintiffs use this term to refer to AR- and AK-platform rifles. (*See* Curcuruto Dep., ECF No. 44-44, at 79:14-80:21 (suggesting that he knows what a modern sporting rifle is when he sees it); *see also id.* at 69:9-72:16, 92:6-9 (indicating that NSSF created the term "modern sporting rifles" to cover, *inter alia*, "semi-automatic AR- or AK-platform rifle[s] and the variances thereof").)

(*See* Brady Decl., Ex. C.) Assuming again that the average assault weapons owner has 3.1 such weapons, this means approximately 15,000 Marylanders own 46,577 assault weapons. The defendants assert that, in light of Maryland's approximately 4.5 million adult residents, the number of Marylanders owning assault weapons is well below 1%.[24] *See* U.S. Census Bureau: State & County QuickFacts, Maryland (last revised July 8, 2014), *available at* http://quickfacts.census.gov/qfd/states/24000.html.

The defendants further claim that assault weapons and LCMs[25] are not commonly used for self-defense, and indeed the plaintiffs fail to identify a single incident in which a Marylander defended herself using an assault weapon. With the exception of one incident not relevant here,[26] Maryland law enforcement

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[24] The defendants recognize that, in 2013, the number of Marylanders owning assault weapons was likely higher due to the many last-minute sales leading up to the implementation of the Firearm Safety Act.

[25] The defendants dispute that LCMs are "bearable arms" falling within the scope of the Second Amendment's protection. *See Heller I*, 554 U.S. at 582 ("[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms. . . ."). The court need not resolve this issue and will assume, although not decide, that they are bearable arms under the Second Amendment.

[26] Anthony Batts, the Commissioner of the Baltimore Police Department, is aware of just one incident in which a civilian in Baltimore City fired more than ten rounds in a self-defense incident, but a number of the rounds were fired as the perpetrators were fleeing the scene. (Batts Decl. ¶ 31; *see also* Josselyn Dep., ECF No. 44-46, at 15:15-19:10.)

officials are unaware of any Marylander using an assault weapon, or needing to fire more than ten rounds, to protect himself. (Johnson Decl. ¶¶ 30-31, 39-40; Batts Decl. ¶¶ 29-31, 37; Stawinski Decl. ¶¶ 24-25, 34; Marcus Brown Decl., ECF No. 44-2, ¶ 18; *see also* Webster Decl. ¶ 20 (stating that he is aware of no study or data suggesting that assault weapons features and LCMs are necessary for personal defense); Tribe Testimony at 14 (explaining that "in the case of high-capacity magazines, significant market presence does not necessarily translate into heavy reliance by American gun owners on those magazines for self-defense").) The defendants' expert, Lucy Allen, confirms that it is rare for a self-defender to fire more than ten rounds. (Allen Decl., ECF No. 44-9, ¶ 8.) Upon analyzing the NRA Institute for Legislative Action's reports on self-defense incidents occurring between January 2011 and December 2013, she determined that, on average, 2.1 bullets were fired. (*Id.* ¶¶ 11-12.) Put simply, the defendants argue that, although the plaintiffs may believe that particular assault weapons and LCMs are well-suited for self-defense, there is no evidence to support their claims.

The defendants finally argue that the banned assault weapons and LCMs fall outside Second Amendment protection as dangerous and unusual arms. They assert that the banned firearms, which are substantially similar – and indeed, as discussed below, possibly more effective – in functioning, dangerousness, and killing capacity as their fully automatic counterparts, are military-style weapons designed for offensive use.

(*See* Supica Dep., ECF No. 44-41, at 75:7-77:8; Boone Dep., ECF No. 44-42, at 95:8-25; Curcuruto Dep., ECF No. 44-44, at 91:3-11; Rossi Dep., ECF No. 44-43, at 94:15-95:11; H.R. Rep. 103-489, ECF No. 44-23, at 18-20; *see also* 2011 Bushmaster Product Catalogue, ECF No. 44-70, at 3 (advertising the Bushmaster ACR (adaptive combat rifle) as "the ultimate military combat weapons system" and "[b]uilt specifically for law enforcement and tactical markets")); *see also Staples v. United States*, 511 U.S. 600, 602-03 & n.1 (1994) (identifying the AR-15 as "the civilian version of the military's M-16 rifle" and explaining that, although the AR-15 is only semi-automatic, it nevertheless "requires no manual manipulation by the operator to place another round in the chamber after each round is fired"). Likewise, LCMs serve an obvious military function by allowing the shooter to fire many rounds without having to pause to reload. (*See* 2011 ATF Study, ECF No. 44-16, at 10 (reporting the working group's determination that "magazines capable of holding large amounts of ammunition, regardless of type, are particularly designed and most suitable for military and law enforcement applications"); *see also* 1998 ATF Study, ECF No. 44-15, at 38 (explaining that a firearm's ability "to accept a detachable large capacity military magazine gives [it] the capability to expel large amounts of ammunition quickly," which "serves a function in combat and crime, but serves no sporting purpose").)

This capacity, the defendants reason, can allow a criminal to cause mass casualties, while depriving victims and law enforcement of an opportunity to escape

or overwhelm an assailant as he reloads his weapon. (*See* Gary Kleck Dep., ECF No. 44-51, at 139:11-25 (explaining that, in the mass shooting at an Aurora, Colorado movie theater, the assailant was able to fire 100 rounds without reloading); *see also* Newspaper Articles, ECF No. 44-40 (documenting situations in which bystanders or law enforcement officers were able to intervene as the assailant attempted to reload); Batts Decl. ¶ 49 (reasoning that, when a mass shooter must load ten 10-round magazines to fire 100 rounds, as opposed to a single 100-round drum, bystanders have about 6 to 9 more chances to escape and bystanders or law enforcement officers have about 6 to 9 more chances to intervene during a pause in firing).) Indeed, assault weapons and LCMs are disproportionately represented in mass shootings. (*See* Koper Decl. ¶ 25 (explaining that 21% of 62 mass shootings between 1982 and 2012 involved the use of an assault rifle, and that more than half of those incidents involved assault weapons, LCMs, or both); Allen Decl. ¶ 15 (indicating that, over the last three decades, LCMs were used in 85% of mass shootings where the magazine capacity was known, and that, in the past two years, LCMs were used in 5 of the 7 mass shootings with known magazine capacity); *see also* Webster Decl. ¶ 15). And the use of assault weapons and LCMs in mass shootings is correlated with more fatalities and more injuries than shootings in which they were not used. (*See* Koper Decl. ¶¶ 27, 37-43.) Beyond mass shootings, the defendants claim that assault weapons and LCMs are also disproportionately represented in murders of law

enforcement officers. (*See id.* ¶¶ 16, 22-23, 29, 35 (explaining that, before the federal assault weapons ban went into effect, assault weapons accounted for up to nine percent of murders of law enforcement officers, and that, in 1994, LCMs were involved in thirty-one to forty-one percent of murders of officers); Webster Decl. ¶ 18 (internal citations omitted) ("[A] study of murders of police officers while on duty in 1994 found that assault weapons were used in 16% of the murders and 31% to 41% of the police officers were murdered with a firearm with a[n] LCM. The Violence Policy Center examined data on law enforcement officers murdered in the line of duty from the FBI for 1998-2001 and found 19.4% (41 of 211) had been shot with an assault weapon.").) In sum, the defendants claim that assault weapons and LCMs are not commonly used and, in any event, are not useful or commonly used for self-defense.

Upon review of all the parties' evidence, the court seriously doubts that the banned assault long guns are commonly possessed for lawful purposes, particularly self-defense in the home, which is at the core of the Second Amendment right, and is inclined to find the weapons fall outside Second Amendment protection as dangerous and unusual. First, the court is not persuaded that assault weapons are commonly possessed based on the absolute number of those weapons owned by the public. Even accepting that there are 8.2 million assault weapons in the civilian gun stock, as the plaintiffs claim, assault weapons represent no more than 3% of the current civilian gun stock, and ownership of

those weapons is highly concentrated in less than 1% of the U.S. population. The court is also not persuaded by the plaintiffs' claims that assault weapons are used infrequently in mass shootings and murders of law enforcement officers. The available statistics indicate that assault weapons are used disproportionately to their ownership in the general public and, furthermore, cause more injuries and more fatalities when they are used.[27] As for their claims that assault weapons are well-suited for self-defense, the plaintiffs proffer no evidence beyond their desire to possess assault weapons for self-defense in the home that they are in fact commonly used, or possessed, for that purpose.[28] Finally, despite the plaintiffs' claims that they would

[27] In their papers and at the hearing on the parties' motions, the plaintiffs claim assault weapons are not used disproportionately in crimes, pointing to, for example, the fact that law enforcement officers are more likely to be killed by motor vehicles or handguns. (*See, e.g.*, Hr'g Tr., ECF No. 76, at 42:21-43:6.) The plaintiffs misunderstand the disproportionality to which the defendants are referring and which the court finds supports the legislature's conclusion. It may be that police officers are killed more often by handguns than assault weapons, but the evidence also demonstrates assault weapons are used disproportionately to their ownership in the population.

[28] Plaintiffs cite an NSSF survey of 5,070 "modern sporting rifle" owners in which "home defense" was the second most important reason responders gave for owning the guns, behind recreational target shooting, as evidence that assault weapons are commonly owned for self-defense. (Curcuruto Decl., Ex. B, at 33.) The survey question only asked how important home defense was for owning the weapon and provided an average rating between one and ten. The court is not persuaded that these data demonstrate assault weapons are commonly owned for self-defense.

like to use assault weapons for defensive purposes, assault weapons are military-style weapons designed for offensive use, and are equally, or possibly even more effective, in functioning and killing capacity as their fully automatic versions.[29]

Nevertheless, the court need not resolve whether the banned assault weapons and LCMs are useful or commonly used for lawful purposes, *see Woollard*, 712 F.3d at 875-76 (making clear that courts need not decide the infringement issue to rule on Second Amendment claims), and will assume, although not decide, that the Firearm Safety Act places some burden on the Second Amendment right. *See Heller II*, 670 F.3d at 1260-61.

B. The Appropriate Level of Means-End Scrutiny

Because the court assumes the Firearm Safety Act infringes on the Second Amendment, it must decide what level of means-ends scrutiny to apply to determine the law's constitutionality.

The Supreme Court held in *Heller I* that a heightened level of scrutiny applies to regulations found to burden the Second Amendment right, 554 U.S. at 628 n.27, but did not further articulate whether and when

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[29] The Supreme Court indicated in *Heller I* that M-16 rifles could be banned as dangerous and unusual. 554 U.S. at 627. Given that assault rifles like the AR-15 are essentially the functional equivalent of M-16s – and arguably more effective – the same reasoning would seem to apply here.

strict or intermediate scrutiny applies. From the Court's holding in *Heller I*, the Fourth Circuit has subsequently determined that whether strict or intermediate scrutiny applies requires the court to consider "the nature of the person's Second Amendment interest, the extent to which those interests are burdened by government regulation, and the strength of the government's justifications for the regulation." *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011).

The Fourth Circuit has likened the analysis to that under the First Amendment, where content-based regulations must survive strict scrutiny, while time, place, and manner restrictions only must survive intermediate scrutiny. *Id.* at 470-71; *Chester*, 628 F.3d at 682; *see also Heller II*, 670 F.3d at 1262; *United States v. Marzzarella*, 614 F.3d 85, 97-98 (3d Cir. 2010). Applying a similar framework to Second Amendment cases, the Fourth Circuit noted that "we assume that any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny." *Masciandaro*, 638 F.3d at 470. On the other hand, "less severe burdens on the right, laws that merely regulate rather than restrict, and laws that do not implicate the central self-defense concern of the Second Amendment, may be more easily justified."[30] *Id.* (quoting *Chester*, 628 F.3d at 682) (internal quotation marks omitted); *see also Peruta*, 742

[30] The Fourth Circuit has applied intermediate scrutiny to laws regulating the ability to carry arms outside the home and to laws prohibiting misdemeanants from possessing a firearm. *See,*

F.3d at 1167-68 (reserving a higher standard of scrutiny for those laws that destroy the core right, but a lower standard for those that merely burden it); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 93-96 (2d Cir. 2012) (holding intermediate scrutiny is appropriate where a firearm regulation does not burden the core protection of self-defense in the home); *Heller II*, 670 F.3d at 1261 (noting that the court determines the level of scrutiny "by assessing how severely the prohibitions burden the Second Amendment right"); *Marzzarella*, 614 F.3d at 97 (finding intermediate scrutiny was appropriate for evaluating the prohibition of unmarked firearms because the law did not severely limit the possession of firearms and left a person free to possess any otherwise lawful firearm of his choosing).

Applying that framework here, the court finds intermediate scrutiny is appropriate for assessing the constitutionality of Maryland's ban because it does not seriously impact a person's ability to defend himself in the home, the Second Amendment's core protection. It does not ban the quintessential weapon – the handgun – used for self-defense in the home. Nor does it prevent an individual from keeping a suitable weapon for protection in the home. In fact, the plaintiffs can point to

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e.g., *Woollard*, 712 F.3d at 876 (addressing a requirement that an individual demonstrate a "good and substantial reason" for carrying a handgun in public before he can obtain a permit to do so); *Masciandaro*, 638 F.3d at 471 (addressing a regulation barring the carrying of loaded weapons in a motor vehicle in a national park); *Chester*, 628 F.3d at 683 (addressing a statute prohibiting those convicted of a misdemeanor crime involving domestic violence from possessing a firearm).

no instance where assault weapons or LCMs were used or useful in an instance of self-defense in Maryland.[31] As already discussed, four law enforcement agents leading state and local law enforcement offices in Maryland could not identify a single instance in which an assault weapon or more than ten rounds of ammunition were used or were necessary to ward off an attacker. (Johnson Decl. ¶¶ 30-31, 39-40; Batts Decl. ¶¶ 29-31, 37; Stawinski Decl. ¶¶ 24-25, 34; Brown Decl. ¶ 18; *see also* Webster Decl. ¶ 20.) Therefore, although the bans remove a class of weapons that the plaintiffs *desire* to use for self-defense in the home, (*see, e.g.*, Kolbe Decl. ¶ 8), there is no evidence demonstrating their removal will significantly impact the core protection of the Second Amendment. Accordingly, intermediate scrutiny applies. *See Heller II*, 670 F.3d at 1261-62 (applying intermediate scrutiny where the court found the prohibitions on assault rifles and LCMs did not "effectively disarm individuals or substantially affect their ability to defend themselves"); *Colorado Outfitters Assoc. v. Hickenlooper*, ___ F. Supp. 3d ___, 2014 WL 3058518, at *14 (D. Colo. June 26, 2014) (finding intermediate scrutiny applied to a ban on LCMs with more than fifteen rounds because,

[31] The plaintiffs include a letter in the record from a former Maryland State Trooper in which the Trooper recounts an instance where, while on duty, he fired twenty-one rounds at a criminal who had a hostage – completely emptying the magazines in his two firearms – and actually shot the criminal eight times. (Letter from Lawrence J. Nelson, ECF No. 55-34, at 1.) The letter provides no evidence as to whether it was necessary to dispense all twenty-one rounds.

although touching the core right to bear arms for defense of self and home, it did not severely limit a person's ability to keep arms for that purpose); *Fyock*, 2014 WL 984162, at *6-7 (finding a ban on LCMs only warranted intermediate scrutiny because, although close to the core right of self-defense in the home, the law only created a minor burden on that right given the number of alternatives); *San Francisco Veteran Police Officers Ass'n*, 2014 WL 644395, at *4-5 (finding intermediate scrutiny applied to a ban on LCMs because the ban "merely burdens" but does not "destroy" the right to self-defense); *Shew*, 2014 WL 346859, at *7 (finding intermediate scrutiny appropriate because the challenged legislation "provides alternate access to similar firearms and does not categorically ban a universally recognized class of firearms"); *NYSRPA*, 2013 WL 6909955, at *12-13 (finding intermediate scrutiny appropriate because "nearly universally" courts had applied intermediate scrutiny in the Second Amendment context and because application of strict scrutiny would be inconsistent with the Supreme Court's holding that some regulations are presumptively valid).

The plaintiffs raise two arguments as to why strict scrutiny should apply, but they are not persuasive. First, they contend that, any time a firearm is in common use and used for lawful purposes, a ban on ownership is per se unconstitutional. There is nothing in the relevant case law to support such a claim and, in fact, such a holding would be contrary to established Fourth Circuit precedent. *See Masciandaro*, 638 F.3d at 470

(applying intermediate scrutiny to a regulation presumed to infringe on the Second Amendment's protections). Further, *Heller I* does not require such a holding. Although the Supreme Court found commonly used weapons to fall within the Second Amendment's protection, it said nothing of when intermediate or strict scrutiny applies. *See Heller I*, 554 U.S. at 628-29; *see also Chester*, 628 F.3d at 682 ("We do not apply strict scrutiny whenever a law impinges upon a right specifically enumerated in the Bill of Rights.").

Second, the plaintiffs claim that strict scrutiny should apply any time a regulation touches the core right of self-defense in the home, regardless of the extent to which the regulation burdens it. To support their position, the plaintiffs point to the Fourth Circuit's assumption in dicta in *Masciandaro* that "*any law* that would burden" the core right would be subject to strict scrutiny. 638 F.3d at 470 (emphasis added). The plaintiffs, however, ignore the rest of the Fourth Circuit's opinion. Immediately before the cited language, the Fourth Circuit recognized that not all burdens are treated the same under the Second Amendment and that it is only those that impose a "severe burden" on the core right that require "strong justification." *Id.* (quoting *Chester*, 628 F.3d at 682). The court concludes, therefore, that Fourth Circuit precedent is in line with the holdings of other circuits: where the burden is not severe, even assuming a regulation touches the core right, intermediate scrutiny applies.

C. Applying Intermediate Scrutiny

To survive intermediate scrutiny, the government must demonstrate that the laws at issue are "reasonably adapted to a substantial government interest." *Woollard*, 712 F.3d at 876 (quoting *Masciandaro*, 638 F.3d at 471) (internal quotation marks omitted); *Chester*, 628 F.3d at 683 (holding the government must demonstrate that there is a "reasonable fit" between the law at issue and the government's substantial interest). The Fourth Circuit has made clear that intermediate scrutiny "does not require that a regulation be the least intrusive means of achieving the relevant government objective, or that there be no burden whatsoever on the individual right in question." *Masciandaro*, 638 F.3d at 474. Nor does the fit have to be perfect. *Woollard*, 712 F.3d at 878. Instead, Maryland's interests only must be "substantially served" by the law. *Id.* Further, the Fourth Circuit in *Woollard* made clear that where the government has satisfied the requirements of the relevant level of scrutiny, the court would not question the government's policy judgments in favor of other options. *Id.* at 881 (noting that the court "cannot substitute [its] views for the considered judgment of the General Assembly"). Thus, the court cannot find a law unconstitutional solely because the plaintiffs have offered arguably more effective alternatives for serving the government's objective.[32]

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[32] To the extent the plaintiffs cite the Supreme Court's recent opinion in *McCullen v. Coakley*, 134 S.Ct. 2518 (2014), (*see* Pls.' Corr., ECF No. 74), to claim the intermediate scrutiny standard is somehow more stringent than the standard as articulated by the

The Fourth Circuit has expressly found that the government has a substantial interest in providing for public safety and preventing crime, *id.* at 877; *see also Masciandaro*, 638 F.3d at 473 (finding that the government has a substantial interest in providing for public safety in national parks), the interests the defendants advance here. In fact, the court has implied that protecting public safety may even be a compelling interest. *Masciandaro*, 638 F.3d at 473 (noting that cases have described the government's interest in public safety as "compelling" and citing cases). In any event, the plaintiffs admit that the government has a "compelling government interest" in ensuring public safety. (Pls.' Mem., ECF No. 55-1, at 31.)

Finding the government has a sufficient interest, the court must decide whether Maryland's ban on assault weapons and LCMs substantially serves that interest. As a preliminary matter, the plaintiffs contend that the court should look only to the evidence that was in front of the legislature when it enacted the law to determine whether the law passes intermediate scrutiny. Plaintiffs base their claim on the Supreme Court's

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Fourth Circuit, there is nothing in the Supreme Court's opinion to suggest that the Court intended to alter the standard in any way. Further, although courts have recognized parallels between the First Amendment and the Second Amendment when determining which standard of scrutiny to apply, no court has ever held they are exactly the same such that the court's analysis here is controlled by the First Amendment analysis regarding time, place, and manner restrictions. The Fourth Circuit has articulated how intermediate scrutiny is to be applied under the Second Amendment, *see, e.g.*, *Woollard*, 712 F.3d at 878-89; *Masciandaro*, 638 F.3d at 473-74, and this court is bound by its precedents.

statement in *Turner I* that when applying intermediate scrutiny, a court must "assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence." 512 U.S. at 666. In the only case plaintiffs cite to support their interpretation of this language, the Third Circuit did not hold that the court could consider only evidence that was in front of the legislature. Instead, it found that what the legislature relied on was unclear and then decided that the state could point to other means of support, such as common sense, history, and studies. *Drake v. Filko*, 724 F.3d 426, 437-38 (3d Cir. 2013) (citing *IMS Health, Inc. v. Ayotte*, 550 F.3d 42, 55 (1st Cir. 2008)). Notably, and as the defendants point out, the Supreme Court in *Turner I* also stated that Congress did not have to develop a record as an administrative agency would and indicated that evidence outside the legislative record could be introduced in the litigation. 512 U.S. at 666-67.

The Fourth Circuit has held that "the Constitution does not mandate a specific method by which the government must satisfy its burden under heightened judicial scrutiny," and that the government "may resort to a wide range of sources, such as legislative text and history, empirical evidence, case law, and common sense." *United States v. Carter*, 669 F.3d 411, 418 (4th Cir. 2012). In *Woollard*, for example, although citing several pieces of evidence that led to its finding that a reasonable fit existed between a "good and substantial reason" requirement for issuing handgun permits and the purpose of public safety, the court never mentioned

or investigated whether the evidence was also in front of the legislature. 712 F.3d at 879-80; *see also United States v. Chester*, 847 F. Supp. 2d 902, 906-07 (S.D.W.V. 2012) (on remand from the Fourth Circuit, considering evidence from non-legislative sources to find the government had satisfied its burden under intermediate scrutiny). Even where the Fourth Circuit has articulated the standard from *Turner I*, it has stated that the court could "look to evidence outside the legislative record in order to confirm the reasonableness of Congress's predictions." *Satellite Broadcasting and Comm. Ass'n v. Fed. Commc'ns Comm'n*, 275 F.3d 337, 357 (4th Cir. 2001) (citing *Turner II*, 520 U.S. at 196).

Turning to the record in this case, Maryland's ban on assault long guns and LCMs survives intermediate scrutiny.[33] The evidence demonstrates that assault weapons have several military-style features making them especially dangerous to law enforcement and civilians. (ATF, Importability of Certain Semi-automatic Rifles, ECF No. 44-14, at 6-7 (describing the military features of semi-automatic assault rifles); 1998 ATF Study at 1 (same).) The AR-15, for example, is essentially the same as the military's M-16 rifle, with the exception that the AR-15 is semi-automatic instead of fully automatic. (*See* Johnson Decl. ¶ 36 ("The only difference between automatic firearms actually used by

[33] Every court that has addressed the issue has considered evidence very similar – and sometimes identical – to that presented by the parties here and found bans on assault weapons and LCMs to survive intermediate scrutiny. *See, e.g.*, *Heller II*, 670 F.3d at 1262-64; *Shew*, 2014 WL 346859, at *8-9; *NYSRPA*, 2013 WL 6909955, at *14-18.

the military, such as the M16, and assault weapons covered by the ban, such as the AR-15, is that the M16 is fully automatic.")); *see also Staples*, 511 U.S. at 603 (noting that the AR-15 is "the civilian version of the military's M-16 rifle"). The difference in the rate of fire from a semi-automatic and fully automatic weapon, however, appears to be minimal. (*See* Brian Siebel Testimony, ECF No. 44-24, at 197 (noting that an assault rifle could empty a thirty-round magazine in two seconds on fully automatic mode and only five seconds on semi-automatic mode); Kleck Dep. at 151:10-15 (stating that an untrained person using a semi-automatic rifle can probably fire six rounds in a second); Johnson Decl. ¶ 36 ("The rate of fire from [semi-automatic] weapons is limited only by the speed at which the shooter can pull the trigger.")).

Having the features of military weapons, assault 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. (*See* U.S. Army's M16/M4 Training Manual, ECF No. 44-25, at 7-9 (stating that "rapid semi-automatic fire is superior to automatic fire in all measures: shots per target, trigger pulls per hit, and time to hit"); Brown Decl. ¶ 12 (explaining that the banned weapons are "designed for the battlefield, for the soldier to be able to shoot a large number of rounds across a battlefield at a high rate of speed"); 1998 ATF Study at 1 (noting that semi-automatic rifles "had a military configuration that was designed for killing

and disabling the enemy and that distinguished the rifles from traditional sporting rifles"); *see also* Johnson Decl. ¶¶ 22, 25-26, 32-33; Batts Decl. ¶¶ 20, 33; Stawinski Decl. ¶ 44; Siebel Testimony at 197-98.) Further, as already discussed above, the evidence demonstrates that assault weapons are often used in mass shootings and cause more fatalities and injuries when used. (*See, e.g.*, Koper Decl. ¶¶ 21-29.)

The evidence also demonstrates that criminals using assault rifles pose a heightened risk to law enforcement. (*See* Batts Decl. ¶ 45 (indicating that the military features of assault weapons, such as flash suppressors and pistol grips, provide criminals with a "military-style advantage" in a firefight with law enforcement).) For example, rounds shot from such weapons have the capability – more so than rounds shot from many other types of guns – to penetrate the soft body armor worn by law enforcement officers, as well as many kinds of bullet-resistant glass used by law enforcement.[34] (Johnson Decl. ¶ 45 (reasoning that assault weapons pose a particular threat to law enforcement officers because their rounds easily penetrate

[34] Plaintiffs claim the law enforcement officers' observations cannot support this finding because they are not ballistics experts. Although they may not be ballistics experts, their anecdotal and experience-based testimony is appropriately considered here. The plaintiffs also claim that assault weapons are not unique in their penetration capabilities. As discussed more fully below, however, that some other firearms also have increased penetration abilities does not undermine the legislature's conclusion that banning assault weapons would protect public safety and decrease the effects of violent firearm-related crime.

soft body armor); Stawinski Decl. ¶¶ 30-32 (offering personal observations of bullets from assault weapons piercing soft body armor and bullet-resistant glass where bullets from handguns and other firearms did not); *see also* Brown Decl. ¶ 23.) Further, assault weapons allow criminals to engage law enforcement officers with greater firepower, (Johnson Decl., Ex. A, at 2 (reasoning that assault weapons allow criminals to "up the ante with firepower in excess of what police officers typically use"); Johnson Decl., Ex. B, at 2 ("Assault weapons are routinely the weapons of choice for gang members and drug dealers . . . and are all too often used against police officers.")), and they have been used to murder law enforcement officers in a rate disproportionate to their presence in civilian society, (*see* Violence Policy Ctr., "*Officer Down" Assault Weapons and the War on Law Enforcement*, ECF No. 44-56, at 5 (citing FBI data demonstrating that 19.4% of law enforcement officers killed in the line of duty were killed by assault weapons between 1998 and 2001); *see also* Koper Decl. ¶¶ 16, 22-23, 29, 35; Webster Decl. ¶¶ 15, 18.) Finally, several law enforcement officers offered affidavit statements regarding their experience with criminals obtaining assault weapons through straw purchases from authorized retailers, on the secondary market from legal owners, or through theft from legal owners, (*e.g.*, Johnson Decl. ¶ 48; Batts Decl. ¶ 48); *see also Abramski v. United States*, 134 S. Ct. 2259, 2267-68, 2267 n.7 (2014) (describing a typical straw purchase in which a felon or other person barred from gun ownership purchases a gun through an intermediary and citing a Department of the Treasury report from

2000 that, in several prior years, almost half of all ATF firearm trafficking investigations involved straw purchases), suggesting that limiting the availability of the firearms generally will limit their availability to criminals.

Assault weapons pose a heightened risk to civilians as well. For civilians in their homes, the penetrating capabilities of bullets fired from assault weapons pose a higher risk than that posed by other firearms. They can penetrate walls and other home structures and remain more effective than penetrating bullets fired from other guns, endangering those in neighboring rooms, apartments, or even other homes. (Brady Ctr. to Prevent Gun Violence, *Assault Weapons "Mass Produced Mayhem"*, ECF No. 44-58, at 16 (citing a statement by Jim Pasco, executive director of the Fraternal Order of Police, that he would not be surprised if a bullet fired from an AK-47 went through six walls of conventional drywall in a home); *see also* Stawinski Decl. ¶ 33.) Further, with the military-style features of assault weapons, they are made even more dangerous because civilians often do not receive the same kind of training that law enforcement officers receive. (Vince Decl. ¶ 21.)

The evidence demonstrates, therefore, that the ban on assault weapons is likely to further the government's interest in protecting public safety by removing weapons that cause greater harm when used – to both civilians and police – and create greater obstacles for law enforcement in stopping and detaining criminals who are using them.

The record also shows a reasonable fit between banning LCMs and the government's substantial interest in protecting public safety and reducing the negative effects of firearm crimes. First, more rounds available equates with more shots fired and more individuals injured. (*E.g.*, Brown Decl. ¶ 24; Johnson Decl. ¶ 44; *see also* Koper Decl. ¶ 15 (noting that the "best available evidence" indicates that attacks with guns with LCMs "generally result in more shots fired, persons wounded, and wounds per victim").) In addition, the evidence demonstrates that over the last three decades LCMs of more than ten rounds were used in thirty-four out of forty mass shootings[35] in which the magazine capacity was known, and that the average number of shots fired, in the twenty-seven shootings for which the number was available, was seventy-five. (Allen Decl. ¶¶ 15-16.) They are also disproportionately used in the killing of law enforcement officers. (Koper Decl. ¶ 35 (noting that in 1994, LCMs were estimated to have been used in thirty-one to forty-one percent of gun murders of police).) There is also evidence that LCMs contribute to more fatalities per incident than in non-LCM cases. (*Id.* ¶¶ 38-42.) Further, the evidence demonstrates that the break in time when a shooter must reload because he has spent a magazine is critical to disabling someone engaged in a violent, offensive attack or to allow potential victims to

[35] For the purpose of these figures, mass shootings were those in which four or more people were killed and that did not include armed robbery or gang violence. (Allen Decl. ¶¶ 13-14.)

escape.[36] (*See* Johnson Decl. ¶¶ 54-56; Stawinski Decl. ¶ 40; *see also* Newspaper Articles, ECF No. 44-40 (citing several examples where a shooter was disabled while attempting to reload his firearm).)

With respect to civilians, untrained civilians using LCMs tend to fire more rounds than necessary, thus endangering more bystanders. (Johnson Decl. ¶ 38; Stawinski Decl. ¶ 35; *see also* Batts Decl. ¶ 42 ("The risk of indiscriminate firing from untrained or undertrained individuals with access to large numbers of highly-lethal rounds, especially combined with the improbability that such rounds will actually be necessary to end any particular attack, is an additional and, in my view, unacceptable risk to public safety. . . ."); Josselyn Dep. at 74:7-9 ("It's not uncommon to have the police arrive on a scene and see someone there still pulling the trigger, even though the gun is long empty. . . .")); *see also Heller II*, 670 F.3d at 1263-64 (finding an aggravated risk from "the tendency . . . for defenders to keep firing until all bullets have been expended" (quoting Siebel Testimony)). The court thus finds a reasonable fit between the ban on LCMs and the government's interest in public safety.

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[36] The plaintiffs state in their brief that a "shooter intent on firing as many rounds as possible can fire thirty rounds using three ten-round magazines and reloading equally as fast as a shooter firing deliberately can fire thirty rounds from a thirty-round magazine." (Pls.' Mem. at 77.) They point to no support in the record for such a claim.

The plaintiffs make several claims as to why the assault weapons ban does not further the government's substantial interests. Some of their arguments rely, however, on a misapplication of the intermediate scrutiny standard and are therefore not persuasive. For example, the plaintiffs claim there are several other types of guns which are not banned that can pierce soft body armor and walls as well. This argument ignores, however, that the fit between a regulation and the government's purpose need not be perfect. *See Woollard*, 712 F.3d at 877. The law at issue here does not have to eliminate all guns that have the ability to pierce soft body armor. The court cannot find the ban unconstitutional simply because it does not by itself solve an entire problem.[37] *See id.* at 881-82. Instead, the evidence demonstrates that the banned weapons pose a threat to law enforcement and public safety because of a combination of features of which the ability to penetrate soft body armor is just one. (*See* Webster Supp. Decl., ECF No. 62-6, ¶ 6.) Once finding that the ban will sufficiently further the government's substantial interests in protecting public safety and preventing crime – including murders of police officers – to pass intermediate scrutiny, the court cannot question the legislature's judgment that the Firearm Safety Act was the appropriate balance of various interests when compared to other possible regulations.

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[37] For similar reasons, the plaintiffs' claim that there is no reasonable fit because the evidence does not demonstrate *all* mass shootings would be eliminated is not persuasive.

The remainder of the plaintiffs' arguments rely on mischaracterizations of Koper's expert opinions and reports, as discussed earlier in this opinion. Plaintiffs place particular emphasis on Koper's findings regarding the federal assault weapons ban. The fact that some effects of the federal ban were hard to measure, however, or the fact that the ban was not entirely effective in eliminating all crime involving assault weapons, does not undermine Koper's conclusion that Maryland's ban on assault weapons and LCMs is likely to reduce the number and lethality of gunshot victimizations, and reduce the use of assault weapons and LCMs in crimes. (Koper Decl. ¶¶ 77-86.) First, Koper's expert opinion is based on more than the effects of the federal assault weapons ban. Second, as Koper points out, the federal assault weapons ban and the Maryland Firearm Safety Act are different, with Maryland's law closing some of the loopholes that may have made the federal ban less effective. (*Id.* ¶¶ 79-81.) The plaintiffs do not appear to dispute this fact. Nor do they appear to claim that the differences have no impact on the bans' relative effectiveness. Finally, the court emphasizes again that to pass intermediate scrutiny the law need not be the best solution for furthering the government's interest; it must only substantially further it. *See Woollard*, 712 F.3d at 877.

In sum, the defendants have met their burden to demonstrate a reasonable fit between the Firearm Safety Act and the government's substantial interests in protecting public safety and reducing the negative

effects of firearm-related crime. Accordingly, the Act does not violate the Second Amendment.

IV. Equal Protection

The plaintiffs argue that the Firearm Safety Act violates the Equal Protection Clause of the Fourteenth Amendment by treating retired law enforcement officers differently than other individuals. The Equal Protection Clause guarantees that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Accordingly, "all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985); *see also Morrison v. Garraghty*, 239 F.3d 648, 653-54 (4th Cir. 2001) (citation and internal quotation marks omitted) (stating that the Equal Protection Clause "keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike"). Nevertheless, when legislation is challenged on equal protection grounds, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."[38] *City of Cleburne*, 473 U.S. at 440.

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[38] "The general rule gives way," for example, "when a statute classifies by race, alienage, or national origin." *City of Cleburne*, 473 U.S. at 440. In that situation, the court applies "strict scrutiny," and upholds the statute only if it is narrowly tailored to serve a compelling state interest. *See Morrison*, 239 F.3d at 654. Neither party argues, however, that the court should apply a

This standard for considering equal protection challenges affords "the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others." *McGowan v. State of Md.*, 366 U.S. 420, 425 (1961). As further explained by the Supreme Court:

> The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Id. at 425-26. Accordingly, in general, when considering an equal protection challenge to legislation, the court should first determine whether the government is treating similarly situated individuals differently, and then decide whether there is a rational basis for the differential treatment.

The court agrees with the defendants that retired law enforcement officers are differently situated by virtue of their experiences ensuring public safety and their extensive training on the use of firearms. *See Shew*, 2014 WL 346859, at *9-11 (emphasis added) (rejecting an equal protection challenge to Connecticut legislation allowing on- and off-duty law enforcement

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heightened level of scrutiny in considering the plaintiffs' equal protection challenge.

officers to possess assault weapons and LCMs because "[t]he charge of protecting the public, *and the training that accompanies that charge*, is what differentiates the exempted personnel from the rest of the population"); *see also Williams v. Puerto Rico*, 910 F. Supp. 2d 386, 399-400 (D.P.R. 2012) (deciding that Puerto Rico's Weapons Act of 2000, which allowed certain former and current government officials to possess and carry firearms but prohibited other citizens from doing so, passed the rational basis test).[39]

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[39] The plaintiffs rely on *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002), *abrogated on other grounds by District of Columbia v. Heller (Heller I)*, 554 U.S. 570 (2008), to argue that the Firearm Safety Act violates equal protection, but the Ninth Circuit's analysis is flawed. In *Silveira*, the Ninth Circuit assessed the constitutionality of a California law, which imposed "a ban on the possession of assault weapons by private individuals" but made an exception "allowing the possession of assault weapons by retired peace officers who acquire them from their employers at the time of their retirement." *Id.* at 1059, 1089-92. The Ninth Circuit concluded that the "retired officer exception" lacked a rational basis, reasoning that "[t]he exception does *not* require that the transfer be for law enforcement purposes, and the possession and use of the weapons is not so limited." *Id.* at 1089-90. Although the *Silveira* court acknowledged that it must first determine whether a state action results in differential treatment of similarly situated persons, it did not analyze whether the California law resulted in such an outcome. *See id.* at 1088-92. It appears the court simply assumed that retired peace officers and private individuals were similarly situated, and went directly to whether the California law had a rational basis. Accordingly, to the extent the plaintiffs rely on *Silveira*, it is unpersuasive.

In Maryland, law enforcement officers who wish to carry firearms must successfully complete the applicable firearms classroom instruction, training, and qualification. *See* COMAR 12.04.02.03A; *see, e.g.*, COMAR 12.04.02.06 (requirements applicable to long guns). They must then submit to firearms training every year thereafter. *See* COMAR 12.04.02.08A. If the officers do not submit to the required annual training, their firearms are seized until the training is completed. *See* COMAR 12.04.02.08E. In addition to receiving extensive training on the use of firearms generally, law enforcement officers must receive further specialized training to use assault weapons. They are taught how and when assault weapons may be used, as well as techniques to minimize the risk of harm to innocent civilians. (*See* Batts Decl. ¶ 27; *see also* Johnson Decl. ¶¶ 18-22.) Even after they have received this training, they must undergo periodic requalification to continue carrying assault weapons in the line of duty. (*See* Batts Decl. ¶ 27; Johnson Decl. ¶ 20-21.) Retired law enforcement officers have also received training on the use of LCMs; in particular, they have been taught how to assess each shot for effectiveness and how to evaluate the circumstances before continuing to fire additional rounds. (*See* Johnson Decl. ¶ 27.) Finally, they have received judgment training on the use of deadly force and how to safely handle and store firearms, including in their homes. *See* COMAR 12.04.02.10C-D.

The plaintiffs attempt to argue that retired law enforcement officers are similarly situated to the general public because they may not have had training

specific to the banned firearms or magazines. In making this argument, however, the plaintiffs overlook the broader point that retired law enforcement officers are not similarly situated to other persons with respect to firearms training and experience generally. In any event, one of the exceptions in the Firearm Safety Act allows the transfer of an assault weapon from a law enforcement agency to a retired law enforcement officer if it was used by the officer in the course of duty before retirement. Thus, any officer qualifying for this exception must have had extensive training on that particular assault weapon. Moreover, in at least the MSP, Baltimore County Police Department, Baltimore Police Department, and Prince George's County Police Department, standard service weapons issued to law enforcement personnel come with LCMs. (*See* Brown Decl. ¶ 32 (MSP standard service weapons come with fifteen-round magazines); Johnson Decl. ¶ 23 (Baltimore County Police Department standard service weapons come with fourteen-round magazines); Batts Decl. ¶ 25 (Baltimore Police Department standard service weapons come with fifteen-round magazines); Stawinksi Decl. ¶ 11 (Prince George's County Police Department standard service weapons come with fifteen-round magazines).) Accordingly, officers retiring from those departments, at least in the recent past, have had training with respect to LCMs.

Based on all the training and instruction retired law enforcement officers have received, they are better equipped than the general public to handle and store firearms safely and to prevent them from getting into

the wrong hands. The court cannot conclude that the State of Maryland is treating differently persons who are in all relevant respects alike, and the plaintiffs' equal protection challenge must fail.

V. Void for Vagueness

Finally, the plaintiffs argue that the Firearm Safety Act is void because the list of banned assault weapons is unconstitutionally vague. In particular, they assert that the Act fails to inform a reasonable person as to what constitutes a "copy" of the banned assault long guns. *See* CR § 4-301(d) (emphasis added) (stating that an "[a]ssault weapon" is "(1) an assault long gun; (2) an assault pistol; or (3) *a copycat weapon*"); *see also* PS § 5-101(r)(2) (emphasis added) (stating that a "[r]egulated firearm" means "a firearm that is any of the following specific assault weapons *or their copies*, regardless of which company produced and manufactured that assault weapon").[40]

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not

[40] The defendants argue that the plaintiffs may not bring a facial vagueness challenge to the Firearm Safety Act, as it in no way implicates the First Amendment. While the Fourth Circuit has stated that a facial vagueness challenge to a criminal statute is allowed only when the statute implicates First Amendment rights, *see United States v. Klecker*, 348 F.3d 69, 71 (4th Cir. 2003), it has nevertheless considered such challenges to non-First Amendment criminal statutes, *see, e.g.*, *Martin v. Lloyd*, 700 F.3d 132, 135-37 (4th Cir. 2012). The court need not decide whether a facial vagueness challenge is available in this case because the Firearm Safety Act is not impermissibly vague.

clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A law may be impermissibly vague because it (1) fails to provide sufficient notice so that ordinary people understand what conduct it prohibits or (2) authorizes or even encourages arbitrary or discriminatory enforcement. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion); *see also Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). "As the Supreme Court has noted, 'perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *United States v. Lanning*, 723 F.3d 476, 482 (4th Cir. 2013) (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

In considering a facial vagueness challenge, the court must "first determine whether the enactment implicates a substantial amount of constitutionally protected conduct." *Martin v. Lloyd*, 700 F.3d 132, 135 (4th Cir. 2012). If the enactment does not, "then the challenge should only succeed if the law is impermissibly vague in all of its applications." *Id.* (citation and internal quotation marks omitted); *see also United States v. Comstock*, 627 F.3d 513, 518 (4th Cir. 2010) (citation and internal quotation marks omitted) (indicating that "a facial challenge cannot succeed if a statute has a plainly legitimate sweep"). Where a statute imposes criminal penalties, however, "the standard of certainty is higher and the statute can be invalidated on its face even where it could conceivably have . . . some valid

application." *Martin*, 700 F.3d at 135 (citation and internal quotation marks omitted); *see also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982) ("The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.").

Nevertheless, the Fourth Circuit has made clear that a statute is not impermissibly vague simply because it does not "spell out every possible factual scenario with celestial precision." *United States v. Hager*, 721 F.3d 167, 183 (4th Cir. 2013) (citation and internal quotation marks omitted); *see also*, *e.g.*, *Richmond Boro Gun Club, Inc. v. City of New York*, 896 F. Supp. 276, 289-90 (E.D.N.Y. 1995) (rejecting a facial vagueness challenge to a New York City law's definition of an "assault weapon" because citizens had notice of the "core" group of banned weapons), *aff'd*, 97 F.3d 681 (2d Cir. 1996). Rather, "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *Hager*, 721 F.3d at 183 (citation and internal quotation marks omitted).

Turning to the present case, the court notes that the term "copies" is not new to Maryland firearms law. In *NYSRPA*, the court considered how long the language at issue had existed in rejecting a vagueness challenge to New York's ban on "any magazine that 'can be *readily* restored or converted to accept' more than 10 rounds of ammunition." 2013 WL 6909955, at *22-23 (citation omitted) (emphasis added). Noting

that the "readily" language had been used in federal law since 1994, and was adopted by New York in 2000, the court found no evidence of any confusion in the years since. *Id.* at *22. Similarly, here, Maryland firearms law has regulated certain assault weapons and their copies for over two decades. *See* 1994 Laws of Md., Ch. 456. Yet, the plaintiffs have not identified any arrest or conviction resulting from a misunderstanding of the term "copies," nor have they identified any acquittal based on the alleged vagueness of this word. The court cannot conclude that the term "copies" is unconstitutionally vague when there has not been a single arrest, conviction, or acquittal based on a misunderstanding in more than twenty years.

Moreover, the plaintiffs fail to show the Firearm Safety Act lacks an identifiable "core" of prohibited conduct, even under the stricter standard for criminal statutes. The Act bans certain firearms listed by make and model, as well as their copies. *See* CR § 4-301(d); PS § 5-101(r)(2). Although the Act does not list all prohibited weapons – indeed it would be impossible to do so – the court cannot conclude the term "copies" is vague when read together with the list of banned firearms. *See Shew*, 2014 WL 346859, at *13-14 (rejecting a facial vagueness challenge to a Connecticut gun control statute that listed numerous banned firearm models and their "copies or duplicates"); *Coal. of New Jersey Sportsmen, Inc. v. Whitman*, 44 F. Supp. 2d 666, 679-80 (D.N.J. 1999) (rejecting a vagueness challenge to a New Jersey gun control statute that included a ban on certain firearms listed by make and model as

well as any firearms "substantially identical" to the listed firearms); *Wilson v. Cnty. of Cook*, 968 N.E.2d 641, 652 (Ill. 2012) (determining that the phrase "copies or duplicates," used in a Cook County ordinance banning particular models of assault weapons, was not vague when read together with the list of banned weapons); *see also Benjamin v. Bailey*, 662 A.2d 1226, 1241-42 (Conn. 1995) (deciding that use of the word "type" to capture like weapons – for example, the "AK-47 type" – did not render the statute facially vague).[41]

The term "copies" has been further clarified through a formal opinion of the Attorney General of Maryland and a Firearms Bulletin from MSP, the state entity primarily charged with enforcing the firearms law. *See Whitman*, 44 F. Supp. 2d at 680 ("A court should consider limiting constructions of the law offered by enforcement agencies."); *see also Village of Hoffman Estates*, 455 U.S. at 504 (indicating that a jurisdiction may "adopt administrative regulations that

[41] The plaintiffs attempt to rely on *Springfield Armory, Inc. v. City of Columbus*, 29 F.3d 250 (6th Cir. 1994), but in that case, the court took issue with language not included in the Maryland Firearm Safety Act. The ordinance at issue in *Springfield* banned "slight modifications or enhancements" of specific models of assault weapons. *Id.* at 252. As explained by the Sixth Circuit, an ordinary consumer cannot be expected to know which changes are "slight," nor can he be expected to know "the developmental history of a particular weapon." *Id.* at 253. This reasoning is not applicable to the plaintiffs' claims because the Firearm Safety Act does not require a citizen to be intimately familiar with the inner workings of any firearm. As explained below, consumers may consult with dealers and manufacturers to determine whether a particular weapon qualifies as a copy, and MSP is available to respond to their remaining inquiries.

will sufficiently narrow potentially vague or arbitrary interpretations of [an] ordinance"). According to the Attorney General, "[c]osmetic similarity to an enumerated assault weapon alone would not bring a weapon within the regulated firearms law;" rather, "to come within the definition of 'regulated firearm,' a copy of a designated assault weapon must be similar in its internal components and function to the designated weapon." 95 Op. Att'y Gen. Md. 101, 101 (2010). Relying on this opinion, MSP issued its bulletin explaining that it considers a firearm that is cosmetically similar to one of the enumerated assault weapons to be a copy only if it also possesses "completely interchangeable internal components necessary for the full operation and function of any one of the specifically enumerated assault weapons." (MSP Firearms Bulletin # 10-2, ECF No. 55-43; *see also* Brady Decl. ¶ 10.) Thus, in enforcing the Firearm Safety Act, MSP is limited by its published guidance, which has been distributed to Maryland firearms dealers and is available to the public. (Brady Decl. ¶ 7.)

Even the plaintiffs' own statements confirm that there is an identifiable core of prohibited conduct. For example, Wink's admits that a "substantial number" of the long guns it sells are now classified as assault weapons. (Carol Wink Decl., ECF No. 44-63, ¶ 4; *see also* Stephen Schneider Decl., ECF No. 44-62, ¶ 6 (admitting that regulated long guns classified now as assault weapons represent a "substantial number of all long guns sold by MLFDA's individual members, including Atlantic Guns").) Kolbe likewise indicates that

he would like to purchase an AR-15, but that he knows he cannot do so under the Act. (Kolbe Dep., ECF No. 44-55, at 57:19-58:9.) In light of the plaintiffs' demonstrated understanding of the firearms prohibited by the Firearms Safety Act, the court cannot conclude that the Act fails to provide sufficient notice of banned conduct.[42]

As for the plaintiffs' claims that the Firearm Safety Act encourages arbitrary enforcement, they do not offer any facts to suggest that MSP has engaged or will engage in arbitrary enforcement. "When the terms of a regulation are clear and not subject to attack for vagueness, the plaintiff bears a high burden to show

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[42] According to the plaintiffs, the Act is vague with respect to its application to the "Colt AR-15 Sporter H-BAR rifle." *See* PS § 5-101(r)(2)(xv) (emphasis added) (banning "Colt AR-15, CAR-15, and all imitations *except Colt AR-15 Sporter H-BAR rifle")*. They claim that they cannot figure out if a given rifle is permitted as a copy of a Colt AR-15 Sporter H-BAR rifle, or is banned as a copy of a Colt AR-15. As explained by the defendants, however, MSP relies on a "manufacturer's designation of a firearm as an H-BAR or heavy-barreled version of an AR-15 to determine whether it is exempt from the ban as a copy of a Colt AR-15 Sporter H-BAR." (Brady Decl. ¶ 17.) The plaintiffs simply need to inquire as to the manufacturer's designation to determine whether a particular firearm qualifies for the exception in § 5-101(r)(2)(xv). The plaintiffs also claim that the Act is vague because LWRC International, LLC, a Maryland-based firearms manufacturer, does not know whether the AR-style rifles it manufactures are banned. But, according to LWRC, MSP orally advised that the rifles it manufactures are exempt from the assault weapons ban. (*See* John Brown Decl., ECF No. 69-9, ¶¶ 3-6.) To the extent LWRC is still uncertain as to the status of particular AR-style rifles, the court concludes that it nevertheless has notice of the "core" group of banned weapons. *See Richmond Boro Gun Club, Inc.*, 896 F. Supp. at 289.

that the standards used by officials enforcing the statute nevertheless give rise to a vagueness challenge." *Wag More Dogs, Ltd. Liability Corp. v. Cozart*, 680 F.3d 359, 372 (4th Cir. 2012). As stated above, the plaintiffs have not pointed to a single arrest or prosecution based on a misunderstanding of the "copies" language, nor have they indicated that an arrest or prosecution has been threatened. MSP has published its standards for determining whether a firearm constitutes a copy and, to the extent consumers or dealers still have questions about specific firearms, it is available to respond to their inquiries.[43] (*See* MSP Firearms Search, ECF No. 74-3 (providing a list of questions to answer to determine whether a weapon is banned as a copy of an assault long gun and offering a list of firearms that have been reviewed by MSP and determined to be copies);

[43] The plaintiffs argue that MSP's change in interpretation as to certain firearms – in particular, the Saiga 12 shotgun, .22 caliber replicas of AR-15s, and the Bushmaster H-BAR – means the term "copies" is unconstitutionally vague. But MSP's change in interpretation with respect to the Saiga 12 shotgun and .22 caliber replicas of AR-15s resulted from the Attorney General's opinion, which in fact narrowed the interpretation of copies and thereby decreased the number of possible prosecutions. (Brady Supp. Decl., ECF No. 62-5, ¶¶ 2-5.) In any event, "[a]n agency is allowed to change its mind, so long as its new interpretation is reasonable." *United States v. Deaton*, 332 F.3d 698, 711 (4th Cir. 2003). As for MSP's changed interpretation regarding the status of the Bushmaster H-BAR, Brady explains that the change is the product of statutory interpretation based on a unique provision of the law applying specifically to Bushmaster semi-automatic rifles. (*See* Brady Decl. ¶¶ 18-20.) The court agrees with the defendants that this unique issue, limited to this specific firearm and based on a question of statutory interpretation, does not warrant a facial challenge to the entire Firearm Safety Act.

MSP Firearm Review Form, ECF No. 74-4 (allowing a consumer to request MSP review of a particular firearm after contacting a firearms dealer, the firearm's manufacturer, or an attorney); *see also* Brady Decl. ¶¶ 12-13; Schneider Dep., ECF No. 44-45, at 22:17-23:21; Robert Warnick Dep., ECF No. 44-49, at 49:11-19; Wink Dep., ECF No. 44-53, at 27:9-28:9.) In sum, the court rejects the plaintiffs' vagueness challenge to the Firearm Safety Act.

CONCLUSION

In summary, the Firearm Safety Act of 2013, which represents the considered judgment of this State's legislature and its governor, seeks to address a serious risk of harm to law enforcement officers and the public from the greater power to injure and kill presented by assault weapons and large capacity magazines. The Act substantially serves the government's interest in protecting public safety, and it does so without significantly burdening what the Supreme Court has now explained is the core Second Amendment right of "law-abiding, responsible citizens to use arms in defense of hearth and home." Accordingly, the law is constitutional and will be upheld.

A separate order follows.

August 22, 2014
Date

_____/S/_____
Catherine C. Blake
United States District Judge

FILED: March 4, 2016

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-1945
(1:13-cv-02841-CCB)

STEPHEN V. KOLBE; ANDREW C. TURNER; WINK'S SPORTING GOODS, INCORPORATED; ATLANTIC GUNS, INCORPORATED; ASSOCIATED GUN CLUBS OF BALTIMORE, INCORPORATED; MARYLAND SHALL ISSUE, INCORPORATED; MARYLAND STATE RIFLE AND PISTOL ASSOCIATION, INCORPORATED; NATIONAL SHOOTING SPORTS FOUNDATION, INCORPORATED; MARYLAND LICENSED FIREARMS DEALERS ASSOCIATION, INCORPORATED

Plaintiffs-Appellants

and

SHAWN J. TARDY; MATTHEW GODWIN

Plaintiffs

v.

LAWRENCE J. HOGAN, Jr., in his official capacity as Governor of the State of Maryland; BRIAN E. FROSH, in his official capacity as Attorney General of the State of Maryland;

COLONEL WILLIAM M. PALLOZZI, in his official capacity as Secretary of the Department of State Police and Superintendent of the Maryland State Police; MARYLAND STATE POLICE

Defendants-Appellees

STATE OF WEST VIRGINIA: STATE OF ALABAMA; STATE OF ALASKA; STATE OF ARIZONA; STATE OF FLORIDA; STATE OF IDAHO; STATE OF KANSAS; STATE OF LOUISIANA; STATE OF MICHIGAN; STATE OF MISSOURI; STATE OF MONTANA; STATE OF NEBRASKA; STATE OF NEW MEXICO; STATE OF NORTH DAKOTA; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF TEXAS; STATE OF UTAH; STATE OF WYOMING; COMMONWEALTH OF KENTUCKY; TRADITIONALIST YOUTH NETWORK, LLC; NATIONAL RIFLE ASSOCIATION OF AMERICA; CRPA FOUNDATION; GUN OWNERS OF CALIFORNIA; COLORADO STATE SHOOTING ASSOCIATION; IDAHO STATE RIFLE & PISTOL ASSOCIATION; ILLINOIS STATE RIFLE ASSOCIATION; KANSAS STATE RIFLE ASSOCIATION; LEAGUE OF KENTUCKY SPORTSMEN, INC.; NEVADA FIREARMS COALITION; ASSOCIATION OF NEW JERSEY RIFLE & PISTOL CLUBS; NEW MEXICO SHOOTING SPORTS ASSOCIATION; NEW YORK RIFLE & PISTOL ASSOCIATION; TEXAS STATE RIFLE ASSOCIATION; VERMONT FEDERATION OF SPORTSMAN'S CLUBS; VERMONT RIFLE &

PISTOL ASSOCIATION; GUN OWNERS OF AMERICA, INC.; GUN OWNERS FOUNDATION; U.S. JUSTICE FOUNDATION; THE LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION; THE ABRAHAM LINCOLN FOUNDATION FOR PUBLIC POLICY RESEARCH, INC.; CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND; INSTITUTE ON THE CONSTITUTION; CONGRESS OF RACIAL EQUALITY; NATIONAL CENTER FOR PUBLIC POLICY RESEARCH; PROJECT 21; PINK PISTOLS; WOMEN AGAINST GUN CONTROL; THE DISABLED SPORTSMEN OF NORTH AMERICA; LAW ENFORCEMENT LEGAL DEFENSE FUND; LAW ENFORCEMENT ACTION NETWORK; LAW ENFORCEMENT ALLIANCE OF AMERICA; INTERNATIONAL LAW ENFORCEMENT EDUCATORS AND TRAINERS ASSOCIATION; WESTERN STATES SHERIFFS' ASSOCIATION

Amici Supporting Appellant

LAW CENTER TO PREVENT GUN VIOLENCE; MARYLANDERS TO PREVENT GUN VIOLENCE, INCORPORATED; BRADY CENTER TO PREVENT GUN VIOLENCE; STATE OF NEW YORK; STATE OF CALIFORNIA; STATE OF CONNECTICUT; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF IOWA; STATE OF MASSACHUSETTS; STATE OF OREGON; DISTRICT OF COLUMBIA

Amici Supporting Appellee

ORDER

A majority of judges in regular active service and not disqualified having voted in a requested poll of the court to grant Appellees' petition for rehearing en banc,

IT IS ORDERED that rehearing en banc is granted.

The parties and amici curiae shall file, within 10 days of the date of this order, 16 additional paper copies of their briefs and appendices filed under the original briefing schedule.

En banc oral argument of this case is scheduled for Wednesday, May 11, 2016, at 9:00 a.m. in Richmond, Virginia.

For the Court

/s/ Patricia S. Connor, Clerk

CRIMINAL LAW
TITLE 4. WEAPON CRIMES
SUBTITLE 3. ASSAULT WEAPONS AND DETACHABLE MAGAZINES.

Md. CRIMINAL LAW Code Ann. § 4-301 (2014)

§ 4-301. Definitions.

(a) In general. – In this subtitle the following words have the meanings indicated.

(b) Assault long gun. – "Assault long gun" means any assault weapon listed under § 5-101(r)(2) of the Public Safety Article.

(c) Assault pistol. – "Assault pistol" means any of the following firearms or a copy regardless of the producer or manufacturer:

(1) AA Arms AP-9 semiautomatic pistol;

(2) Bushmaster semiautomatic pistol;

(3) Claridge HI-TEC semiautomatic pistol;

(4) D Max Industries semiautomatic pistol;

(5) Encom MK-IV, MP-9, or MP-45 semiautomatic pistol;

(6) Heckler and Koch semiautomatic SP-89 pistol;

(7) Holmes MP-83 semiautomatic pistol;

(8) Ingram MAC 10/11 semiautomatic pistol and variations including the Partisan Avenger and the SWD Cobray;

(9) Intratec TEC-9/DC-9 semiautomatic pistol in any centerfire variation;

(10) P.A.W.S. type semiautomatic pistol;

(11) Skorpion semiautomatic pistol;

(12) Spectre double action semiautomatic pistol (Sile, F.I.E., Mitchell);

(13) UZI semiautomatic pistol;

(14) Weaver Arms semiautomatic Nighthawk pistol; or

(15) Wilkinson semiautomatic "Linda" pistol.

(d) Assault weapon. – "Assault weapon" means:

(1) an assault long gun;

(2) an assault pistol; or

(3) a copycat weapon.

(e) Copycat weapon. –

(1) "Copycat weapon" means:

(i) a semiautomatic centerfire rifle that can accept a detachable magazine and has any two of the following:

1. a folding stock;

2. a grenade launcher or flare launcher; or

3. a flash suppressor;

(ii) a semiautomatic centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds;

(iii) a semiautomatic centerfire rifle that has an overall length of less than 29 inches;

(iv) a semiautomatic pistol with a fixed magazine that can accept more than 10 rounds;

(v) a semiautomatic shotgun that has a folding stock; or

(vi) a shotgun with a revolving cylinder.

(2) "Copycat weapon" does not include an assault long gun or an assault pistol.

(f) Detachable magazine. – "Detachable magazine" means an ammunition feeding device that can be removed readily from a firearm without requiring disassembly of the firearm action or without the use of a tool, including a bullet or cartridge.

(g) Flash suppressor. – "Flash suppressor" means a device that functions, or is intended to function, to perceptibly reduce or redirect muzzle flash from the shooter's field of vision.

(h) Licensed firearms dealer. – "Licensed firearms dealer" means a person who holds a dealer's license under Title 5, Subtitle 1 of the Public Safety Article.

Md. CRIMINAL LAW Code Ann. § 4-302 (2014)

§ 4-302. Scope of subtitle

This subtitle does not apply to:

(1) if acting within the scope of official business, personnel of the United States government or a unit of that government, members of the armed forces of the United States or of the National Guard, law enforcement personnel of the State or a local unit in the State, or a railroad police officer authorized under Title 3 of the Public Safety Article or 49 U.S.C. § 28101;

(2) a firearm modified to render it permanently inoperative;

(3) possession, importation, manufacture, receipt for manufacture, shipment for manufacture, storage, purchases, sales, and transport to or by a licensed firearms dealer or manufacturer who is:

(i) providing or servicing an assault weapon or detachable magazine for a law enforcement unit or for personnel exempted under item (1) of this section;

(ii) acting to sell or transfer an assault weapon or detachable magazine to a licensed firearm dealer in another state or to an individual purchaser in another state through a licensed firearms dealer; or

(iii) acting to return to a customer in another state an assault weapon transferred to the licensed firearms dealer or manufacturer under the terms of a warranty or for repair;

(4) organizations that are required or authorized by federal law governing their specific business or activity to maintain assault weapons and applicable ammunition and detachable magazines;

(5) the receipt of an assault weapon or detachable magazine by inheritance, and possession of the inherited assault weapon or detachable magazine, if the decedent lawfully possessed the assault weapon or detachable magazine and the person inheriting the assault weapon or detachable magazine is not otherwise disqualified from possessing a regulated firearm;

(6) the receipt of an assault weapon or detachable magazine by a personal representative of an estate for purposes of exercising the powers and duties of a personal representative of an estate;

(7) possession by a person who is retired in good standing from service with a law enforcement agency of the State or a local unit in the State and is not otherwise prohibited from receiving an assault weapon or detachable magazine if:

(i) the assault weapon or detachable magazine is sold or transferred to the person by the law enforcement agency on retirement; or

(ii) the assault weapon or detachable magazine was purchased or obtained by the person for official use with the law enforcement agency before retirement;

(8) possession or transport by an employee of an armored car company if the individual is acting within the scope of employment and has a permit

issued under Title 5, Subtitle 3 of the Public Safety Article; or

(9) possession, receipt, and testing by, or shipping to or from:

(i) an ISO 17025 accredited, National Institute of Justice-approved ballistics testing laboratory; or

(ii) a facility or entity that manufactures or provides research and development testing, analysis, or engineering for personal protective equipment or vehicle protection systems.

Md. CRIMINAL LAW Code Ann. § 4-303 (2014)

§ 4-303. Assault weapons – Prohibited

(a) In general. – Except as provided in subsection (b) of this section, a person may not:

(1) transport an assault weapon into the State; or

(2) possess, sell, offer to sell, transfer, purchase, or receive an assault weapon.

(b) Exception. –

(1) A person who lawfully possessed an assault pistol before June 1, 1994, and who registered the assault pistol with the Secretary of State Police before August 1, 1994, may:

(i) continue to possess and transport the assault pistol; or

(ii) while carrying a court order requiring the surrender of the assault pistol, transport the assault pistol directly to the law enforcement unit, barracks, or station if the person has notified the law enforcement unit, barracks, or station that the person is transporting the assault pistol in accordance with a court order and the assault pistol is unloaded.

(2) A licensed firearms dealer may continue to possess, sell, offer for sale, or transfer an assault long gun or a copycat weapon that the licensed firearms dealer lawfully possessed on or before October 1, 2013.

(3) A person who lawfully possessed, has a purchase order for, or completed an application to purchase an assault long gun or a copycat weapon before October 1, 2013, may:

(i) possess and transport the assault long gun or copycat weapon; or

(ii) while carrying a court order requiring the surrender of the assault long gun or copycat weapon, transport the assault long gun or copycat weapon directly to the law enforcement unit, barracks, or station if the person has notified the law enforcement unit, barracks, or station that the person is transporting the assault long gun or copycat weapon in accordance with a court order and the assault long gun or copycat weapon is unloaded.

(4) A person may transport an assault weapon to or from:

(i) an ISO 17025 accredited, National Institute of Justice-approved ballistics testing laboratory; or

(ii) a facility or entity that manufactures or provides research and development testing, analysis, or engineering for personal protective equipment or vehicle protection systems.

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Md. CRIMINAL LAW Code Ann. § 4-305 (2014)

§ 4-305. Detachable magazines – Prohibited

(a) Scope of section. – This section does not apply to:

(1) a .22 caliber rifle with a tubular magazine; or

(2) a law enforcement officer or a person who retired in good standing from service with a law enforcement agency of the United States, the State, or any law enforcement agency in the State.

(b) Prohibited. – A person may not manufacture, sell, offer for sale, purchase, receive, or transfer a detachable magazine that has a capacity of more than 10 rounds of ammunition for a firearm.

PUBLIC SAFETY
TITLE 5. FIREARMS
SUBTITLE 1. REGULATED FIREARMS

Md. PUBLIC SAFETY Code Ann. § 5-101 (2013)

§ 5-101. Definitions

(a) In this subtitle the following words have the meanings indicated.

(b) "Antique firearm" has the meaning stated in § 4-201 of the Criminal Law Article.

(c) "Crime of violence" means:

(1) abduction;

(2) arson in the first degree;

(3) assault in the first or second degree;

(4) burglary in the first, second, or third degree;

(5) carjacking and armed carjacking;

(6) escape in the first degree;

(7) kidnapping;

(8) voluntary manslaughter;

(9) maiming as previously proscribed under former Article 27, § 386 of the Code;

(10) mayhem as previously proscribed under former Article 27, § 384 of the Code;

(11) murder in the first or second degree;

(12) rape in the first or second degree;

(13) robbery;

(14) robbery with a dangerous weapon;

(15) sexual offense in the first, second, or third degree;

(16) an attempt to commit any of the crimes listed in items (1) through (15) of this subsection; or

(17) assault with intent to commit any of the crimes listed in items (1) through (15) of this subsection or a crime punishable by imprisonment for more than 1 year.

(d) "Dealer" means a person who is engaged in the business of:

(1) selling, renting, or transferring firearms at wholesale or retail; or

(2) repairing firearms.

(e) "Dealer's license" means a State regulated firearms dealer's license.

(f) "Designated law enforcement agency" means a law enforcement agency that the Secretary designates to process applications to purchase regulated firearms for secondary sales.

(g) "Disqualifying crime" means:

(1) a crime of violence;

(2) a violation classified as a felony in the State; or

(3) a violation classified as a misdemeanor in the State that carries a statutory penalty of more than 2 years.

(h) Firearm. –

(1) "Firearm" means:

(i) a weapon that expels, is designed to expel, or may readily be converted to expel a projectile by the action of an explosive; or

(ii) the frame or receiver of such a weapon.

(2) "Firearm" includes a starter gun.

(i) "Firearm applicant" means a person who makes a firearm application.

(j) "Firearm application" means an application to purchase, rent, or transfer a regulated firearm.

(k) "Fugitive from justice" means a person who has fled to avoid prosecution or giving testimony in a criminal proceeding.

(l) "Habitual drunkard" means a person who has been found guilty of any three crimes under § 21-902(a), (b), or (c) of the Transportation Article, one of which occurred in the past year.

(m) "Habitual user" means a person who has been found guilty of two controlled dangerous substance crimes, one of which occurred in the past 5 years.

(n) Handgun. –

(1) "Handgun" means a firearm with a barrel less than 16 inches in length.

(2) "Handgun" includes signal, starter, and blank pistols.

(o) "Licensee" means a person who holds a dealer's license.

(p) "Regulated firearm" means:

(1) a handgun; or

(2) a firearm that is any of the following specific assault weapons or their copies, regardless of which company produced and manufactured that assault weapon:

(i) American Arms Spectre da Semi-automatic carbine;

(ii) AK-47 in all forms;

(iii) Algimec AGM-1 type semi-auto;

(iv) AR 100 type semi-auto;

(v) AR 180 type semi-auto;

(vi) Argentine L.S.R. semi-auto;

(vii) Australian Automatic Arms SAR type semi-auto;

(viii) Auto-Ordnance Thompson M1 and 1927 semi-automatics;

(ix) Barrett light .50 cal. semi-auto;

(x) Beretta AR70 type semi-auto;

(xi) Bushmaster semi-auto rifle;

(xii) Calico models M-100 and M-900;

(xiii) CIS SR 88 type semi-auto;

(xiv) Claridge HI TEC C-9 carbines;

(xv) Colt AR-15, CAR-15, and all imitations except Colt AR-15 Sporter H-BAR rifle;

(xvi) Daewoo MAX 1 and MAX 2, aka AR 100, 110C, K-1, and K-2;

(xvii) Dragunov Chinese made semi-auto;

(xviii) Famas semi-auto (.223 caliber);

(xix) Feather AT-9 semi-auto;

(xx) FN LAR and FN FAL assault rifle;

(xxi) FNC semi-auto type carbine;

(xxii) F.I.E./Franchi LAW 12 and SPAS 12 assault shotgun;

(xxiii) Steyr-AUG-SA semi-auto;

(xxiv) Galil models AR and ARM semi-auto;

(xxv) Heckler and Koch HK-91 A3, HK-93 A2, HK-94 A2 and A3;

(xxvi) Holmes model 88 shotgun;

(xxvii) Avtomat Kalashnikov semiautomatic rifle in any format;

(xxviii) Manchester Arms "Commando" MK-45, MK-9;

(xxix) Mandell TAC-1 semi-auto carbine;

(xxx) Mossberg model 500 Bullpup assault shotgun;

(xxxi) Sterling Mark 6;

(xxxii) P.A.W.S. carbine;

(xxxiii) Ruger mini-14 folding stock model (.223 caliber);

(xxxiv) SIG 550/551 assault rifle (.223 caliber);

(xxxv) SKS with detachable magazine;

(xxxvi) AP-74 Commando type semi-auto;

(xxxvii) Springfield Armory BM-59, SAR-48, G3, SAR-3, M-21 sniper rifle, M1A, excluding the M1 Garand;

(xxxviii) Street sweeper assault type shotgun;

(xxxix) Striker 12 assault shotgun in all formats;

(xl) Unique F11 semi-auto type;

(xli) Daewoo USAS 12 semi-auto shotgun;

(xlii) UZI 9mm carbine or rifle;

(xliii) Valmet M-76 and M-78 semi-auto;

(xliv) Weaver Arms "Nighthawk" semi-auto carbine; or

(xlv) Wilkinson Arms 9mm semi-auto "Terry".

(q) "Rent" means the temporary transfer for consideration of a regulated firearm that is taken from the property of the owner of the regulated firearm.

(r) "Secondary sale" means a sale of a regulated firearm in which neither party to the sale:

(1) is a licensee;

(2) is licensed by the federal government as a firearms dealer;

(3) devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of earning a profit through the repeated purchase and resale of firearms; or

(4) repairs firearms as a regular course of trade or business.

(s) "Secretary" means the Secretary of State Police or the Secretary's designee.

(t) "Straw purchase" means a sale of a regulated firearm in which a person uses another, known as the straw purchaser, to:

(1) complete the application to purchase a regulated firearm;

(2) take initial possession of the regulated firearm; and

(3) subsequently transfer the regulated firearm to the person.