
14-1945

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

—◆◆—

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.;
MARYLAND LICENSED FIREARMS DEALERS ASSOCIATION, INC.,

Plaintiffs-Appellants,

—and—

SHAWN J. TARDY; MATTHEW GODWIN,

Plaintiffs,

—v.—

MARTIN J. O'MALLEY, GOVERNOR, in his official capacity as Governor of the
State of Maryland; DOUGLAS F. GANSLER, in his official capacity as Attorney
General of the State of Maryland; MARCUS L. BROWN, COLONEL, in his official
capacity as Secretary of the Department of State Police and Superintendent of the
Maryland State Police; MARYLAND STATE POLICE,

Defendants-Appellees.

(Caption continued on inside cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

**BRIEF FOR *AMICI CURIAE* LAW CENTER TO PREVENT GUN
VIOLENCE AND MARYLANDERS TO PREVENT GUN VIOLENCE, INC.**

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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 WEST VIRGINIA; STATE OF WYOMING; COMMONWEALTH OF KENTUCKY; TRADITIONALIST YOUTH NETWORK, LLC; NATIONAL RIFLE ASSOCIATION OF AMERICA, INCORPORATED; 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.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:
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I certify that on January 7, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Mark T. Ciani
(signature)

January 7, 2015
(date)

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INTEREST OF *AMICI CURIAE*¹

Amicus curiae the Law Center to Prevent Gun Violence (“the Law Center”) is a non-profit, national law center dedicated to reducing gun violence and the devastating impact it has on communities. The Law Center focuses on providing comprehensive legal expertise to promote smart gun laws. These efforts include tracking all Second Amendment litigation nationwide and providing support to jurisdictions facing legal challenges. As an *amicus*, the Law Center has provided informed analysis in a variety of firearm-related cases, including *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

The Law Center has a particular interest in this litigation because it was formed in the wake of an assault weapon massacre at a San Francisco law firm in 1993. The shooter in that rampage was armed with two assault weapons and multiple large capacity ammunition magazines, some capable of holding up to 50 rounds of ammunition.

Amicus curiae Marylanders to Prevent Gun Violence, Inc. (“MPGV”) is a Maryland non-profit, tax-exempt corporation established in January 2013,

¹ *Amici curiae* make the following disclosure pursuant to Fed. R. App. P. 29(c)(5): no party’s counsel authored this brief in whole or in part. No party, party’s counsel, nor any other person contributed any money to fund the preparation or submission of this brief, other than *amicus curiae*. All parties have consented to the filing of this brief.

following the episode of gun violence in Sandy Hook, Connecticut, and in contemplation of efforts in the 2013 session of the Maryland General Assembly to address longstanding concerns of Maryland citizens.

MPGV educates, motivates and organizes the citizens of Maryland with respect to relevant data and effective strategies to prevent gun violence in all its forms, works with local partners to understand the causes of violence by use of firearms that plague our citizenry in all sectors of Maryland, and to urge prompt adoption of strong and lasting measures to reduce unlawful use of guns, supports legislative efforts to adopt meaningful and effective laws and regulations calculated to keep guns out of the wrong hands and thereby prevent gun violence, and assists in the formulation and adoption of public policies designed to promote community healing, and to avoid the incidence of criminal, domestic and personal violence.

MPGV played a key role in securing the enactment of the Maryland Firearm Safety Act of 2013, and filed an amicus brief in the District Court. MPGV now seeks an opportunity to assist the Court by presenting additional arguments for upholding the constitutionality of all of the salutary provisions of the Act, including specifically, the provisions challenged by the plaintiffs in this action.

SUMMARY OF ARGUMENT

On December 14, 2012, a man walked into Sandy Hook Elementary School in Newtown, Connecticut, carrying an assault weapon with large capacity ammunition magazines and hundreds of rounds of ammunition. He shot 20 children and six adults before turning the gun on himself – all *within five minutes*. In that very short time, the gunman fired 155 bullets and shot each of his victims multiple times, including one six-year-old who was shot 11 times. To prevent such tragedies from happening in its state, Maryland banned both assault weapons and large capacity magazines, enacting the Firearm Safety Act of 2013 (the “Act”).

The District Court upheld the Act, holding that there is “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.” JA-192. This Court should affirm the District Court’s order as the Act is completely consistent with the Second Amendment.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the United States Supreme Court held that the Second Amendment protects the right of law-abiding, responsible citizens to possess an operable handgun in the home for self-defense. The Act does not conflict with this right, as residents may lawfully purchase and possess a wide array of handguns and ammunition magazines for use in self-defense. Appellants, however, demand that this Court radically extend *Heller* to

protect the possession of assault weapons and large capacity ammunition magazines, devices of military origin designed to kill large numbers of people quickly and efficiently. *Heller* does not support such an extension and, as all other courts addressing the issue have ruled, the Second Amendment does not guarantee the right to possess these devices, which are frequently employed in mass shootings and attacks on law enforcement officers and are not suitable for self-defense.

Appellants' challenge to the Act fails because the Act does not burden the Second Amendment. However, even if it does implicate the Second Amendment, the Act clearly passes constitutional muster under intermediate scrutiny, the appropriate standard of review.

ARGUMENT

I. THE ACT REGULATES CONDUCT WHICH FALLS OUTSIDE THE SCOPE OF THE SECOND AMENDMENT RIGHT RECOGNIZED IN *HELLER*.

A. Background of the Act.

The Act prohibits the possession, sale, transfer, purchase, and receipt of “assault weapons,” which include “assault long guns” and “copycat weapons,” the most widely owned of which are the Colt AR-15, the AK-47, and their copies. *See* Md. Code Ann., Crim. Law §§ 4-301(b), 4-301(d), 4-303(a)(2). Individuals who possessed “assault long guns” and “copycat weapons” before October 1, 2013,

however, are permitted to continue possessing them. Md. Code Ann., Crim. Law § 4-303(b)(3).

Maryland also enacted a prohibition on the manufacture, sale, purchase, receipt, and transfer of large capacity magazines (“LCMs”), defined as any “detachable magazine that has a capacity of more than 10 rounds of ammunition for a firearm.” Md. Code Ann., Crim. Law § 4-305(b). Mere possession of LCMs is not prohibited under the Act. *Id.*

State and local governments across the country have adopted laws restricting civilian access to assault weapons and LCMs because of the devastating role they repeatedly play in mass shootings and attacks on peace officers.² The shooting rampage at Sandy Hook is one of the more recent examples of the enormous public safety threat posed by assault weapons and LCMs. This threat is not new, however. For example:

² See Colo. Rev. Stat. Ann. §§ 18-12-301, 18-12-302 (West 2013); N.Y. Penal Law §§ 265.02(7)-(8), 265.37; Cal. Penal Code §§ 12275-12290 (2013); Haw. Rev. Stat. Ann. §§ 134-1, 134-4, 134-8 (2013); Conn. Gen. Stat. Ann. §§ 53-202a(1)(e), 53-202b(a)(1), 53-202w(b) (West 2013); Mass. Gen. Laws ch. 140, §§ 121-123, 131, 131M (2014); N.J. Stat. Ann. §§ 2C:39-1w, 2C:39-5, 2C:58-5, 2C:58-12, 2C:58-13 (West 2014); D.C. Code §§ 7-2551.01 – 7-2551.03 (2012); Cook Cnty., Ill., Code of Ordinances §§ 54-211 – 54-213; New York City, N.Y., Admin. Code § 10-301; San Francisco, Cal., Police Code § 619; Sunnyvale, Cal., Municipal Code § 9.44.050.

- In July 1993, a shooter armed with assault weapons and LCMs killed eight people and injured six others at a law firm in San Francisco.³
- In April 2007, the shooter responsible for the Virginia Tech massacre armed himself with numerous 15-round magazines in an attack that left 33 dead and 17 injured.⁴
- In January 2011, a shooter killed six people and wounded 13 others, including Congresswoman Gabrielle Giffords, in a parking lot in Tucson using a LCM holding 33 rounds.⁵
- In July 2012, a gunman killed 12 people and wounded 58 others in a movie theater in Aurora, Colorado, armed with, among other firearms, an AR-15 assault rifle with a 100-round ammunition magazine.⁶
- In July 2014, a shooter armed with an AR-15 semi-automatic rifle and 30-round magazines, fired 90 rounds, killing two people and wounding three law enforcement deputies in Fayetteville, North Carolina.⁷

Criminals disproportionately use both assault weapons and LCMs in two categories of crimes: those with multiple victims and those that target law enforcement. On average, shooters who use assault weapons or LCMs in mass

³ Karyn Hunt, *Gunman Said to Have List of 50 Names*, Charlotte Observer, July 3, 1993, at 2A. This tragedy led to the formation of *amicus* Law Center to Prevent Gun Violence.

⁴ Violence Policy Ctr., *Mass Shootings in the United States Involving High Capacity Ammunition Magazines* (Jan. 2011), http://www.vpc.org/fact_sht/VPCshootinglist.pdf.

⁵ *Id.*

⁶ Dan Frosch and Kirk Johnson, *Gunman Kills 12 in Colorado, Reviving Gun Debate*, N.Y. Times, July 21, 2012, at A1.

⁷ Martha Waggoner, *3 people killed, deputies wounded in NC shootout*, AP, July 30, 2014, available at <http://bigstory.ap.org/article/3-people-killed-3-deputies-wounded-shootout>.

shootings shoot 151% more people, and kill 63% more people than shooters who do not.⁸ In light of these alarming facts, the Maryland Legislature adopted the Act to strengthen prohibitions on the possession of assault weapons and LCMs.

B. The Second Amendment Does Not Protect a Right to Possess LCMs.

In *Heller*, the Supreme Court held that the Second Amendment right to bear “arms” protects the right of responsible, law-abiding citizens to possess a handgun in the home for self-defense. 554 U.S. at 635. However, the Court cautioned that the Second Amendment right is “not unlimited” and does not confer a “right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Id.* at 626. Furthermore, the Court explicitly excluded certain classes of weapons from the scope of the Second Amendment, endorsing the “historical tradition of prohibiting the carrying of dangerous and unusual weapons.” *Id.* at 627. For the reasons explained below, LCMs are not protected by the Second Amendment right to bear “arms” and the provisions of the Act regulating such magazines are constitutional.

1. LCMs Are Not “Arms.”

As a threshold matter, the right protected under the Second Amendment applies only to “arms.” *See Heller*, 554 U.S. at 581. The *Heller* Court undertook

⁸ Mayors Against Illegal Guns, Analysis of Recent Mass Shootings (2013), s3.amazonaws.com/s3.mayorsagainstillegalguns.org/images/analysis-of-recent-mass-shootings.pdf.

to define “arms,” looking first to the 1773 edition of Samuel Johnson’s dictionary, which defined “arms” as “weapons of offence, or armour of defence.” 554 U.S. at 581 (citing 1 Dictionary of the English Language 106 (4th ed.) (reprinted 1978)). A LCM is not a “weapon of offence” or “armour.” Instead, it is a special type of ammunition storage device, which merely enhances a firearm’s ability to fire more rounds without reloading; it is neither an integral nor necessary component of the vast majority of firearms.⁹

While a magazine necessary to supply a firearm with *some* number of bullets may be considered integral to its core functionality, the same cannot be said of a magazine that expands that supply beyond 10 rounds. This principle is grounded in America’s experience with handguns. Prior to the 1980s, the most common type of handgun was the revolver, which typically holds five or six rounds of ammunition. It was only during the 1980s that the firearms industry began focusing on the production and aggressive marketing of semiautomatic pistols, which can accept larger ammunition magazines.¹⁰ As a result, for the majority of

⁹ The *Heller* majority also relied on a historical legal definition of the term “arms”: “Servants and labourers shall use bows and arrows on Sundays, . . . and not bear other arms.” *Heller*, 554 U.S. at 581 (citing Timothy Cunningham, *A New and Complete Law Dictionary* (2d ed. 1771)). The definition is instructive here: guns are like bows and bullets are like arrows, but the analog to a LCM—the quiver—is conspicuously *not* an “arm.”

¹⁰ Violence Policy Center, Background on Glock 19 Pistol and Ammunition Magazines Used in Attack on Representative Gabrielle Giffords and Others (Jan. 2011), available at http://www.vpc.org/fact_sht/AZbackgrounder.pdf.

the last century and a half, an average American civilian using a handgun in the home for self-defense could generally fire six rounds before reloading. There is no evidence to suggest this was inadequate for self-defense purposes and there is good reason to believe that access to more rounds per magazine may pose a significantly increased threat to public safety.

As non-essential items that merely enhance a feature beyond what was previously available, LCMs are not “arms,” but, rather, firearm *accessories*. Historical sources support the conclusion that firearm accessories are separate and distinct from “arms.” In Justice Stevens’ *Heller* dissent, he cited Act for Regulating and Disciplining the Militia, 1785 Va. Acts ch. 1, § 3, p. 2, stating: “The Virginia military law, for example, ordered that ‘every one of the said officers . . . shall constantly *keep* the aforesaid arms, accoutrements, and ammunition, ready to be produced whenever called for. . . .” 554 U.S. at 650 (Stevens, J., dissenting) (emphasis in original). This source specifically differentiates between “arms,” “ammunition,” and “accoutrements.” LCMs are not arms, *nor are they ammunition*. They fall most readily into the separate category of accoutrements—i.e., accessories, akin to today’s detachable scopes or silencers. Accessories that do not affect the weapon’s core functionality are not “arms” and their use falls outside of the Second Amendment.

This “functionality” principle accords with definitions of “firearm accessories” found in state law. The state of Kansas, for example, recently defined “firearms accessories” as “items that are used in conjunction with or mounted upon a firearm but *are not essential to the basic function of a firearm*, including, but not limited to, telescopic or laser sights, *magazines*,...collapsible or adjustable stocks and grips, pistol grips, thumbhole stocks, speedloaders, [and] ammunition carries.” Kan. Stat. Ann. § 50-1203(b) (emphasis added).

As one court recently found after a full trial, prohibitions on LCMs do not deprive gun owners of the magazines they need for their weapons to function. *See Colorado Outfitters Assoc’n v. Hickenlooper*, Civ. Action No. 13-cv-01300, 2014 WL 3058518, at *14 (D. Col. June 26, 2014) (“The parties agree that semiautomatic weapons that use large-capacity magazines will also accept compliant magazines . . . and that compliant magazines can be obtained from manufacturers of large-capacity magazines. Thus, this statute does not prevent the people of Colorado from possessing semiautomatic weapons for self-defense, or from using those weapons as they are designed to function.”).

The firearm industry itself categorizes magazines as accessories, not as firearms. For instance, Mississippi Auto Arms, Inc. organizes its online store by item type, differentiating between items such as “firearms” and “ammunition,” and

offers magazines for sale under an entirely separate category: “accessories.”¹¹ Atlantic Firearms, Guns America, and Palmetto State Armory similarly categorize magazines as accessories, not firearms.¹² Where the firearm industry itself defines a magazine as an accessory rather than an “arm,” it bends credulity to assume otherwise

Amici do not contend that ammunition is not within the category of “arms,” nor that compliant magazines are not “arms.” Rather, amici’s assertion is that LCMs, accessories which enhance ammunition storage well above and beyond standard functionality, are not arms. Unlike ammunition, most firearms are fully operable without LCMs and function perfectly well with compliant magazines. A prohibition on LCMs has no impact whatsoever on the core functionality of the vast majority of firearms. *Compare Jackson v. San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (Without the ability to obtain *ammunition*, “the right to bear arms would be meaningless” by “mak[ing] it impossible to use firearms for their core purpose.”) (emphasis added) (citation omitted).

¹¹ See Mississippi Auto Arms, Inc., http://www.mississippiautoarms.com/sort-by-item-magazines-c-169_177.html.

¹² See Atlantic Firearms, <http://www.atlanticfirearms.com/accessories.html>; Guns America, <http://www.gunsamerica.com/BrowseSpecificCategory/Parent/Non-Guns/ViewAll.htm>; Palmetto State Armory, <http://palmettostatearmory.com/index.php/accessories.html>.

Just as the Second Amendment does not protect a person's right to possess other non-essential accessories, such as silencers, it does not protect a right to possess LCMs. *See United States v. McCartney*, 357 F. App'x. 73, 76 (9th Cir. 2009) (silencers are "not protected by the Second Amendment.").

2. Even If LCMs Are "Arms," They Are Still "Dangerous and Unusual" And Not Protected By The Second Amendment.

Even if LCMs are "arms," they are still not protected by the Second Amendment because they are "dangerous and unusual" weapons not typically possessed for lawful purposes. The *Heller* Court explicitly endorsed the "historical tradition of prohibiting the carrying of dangerous and unusual weapons" and held that the Second Amendment "does not protect those weapons not typically possessed by law-abiding citizens *for lawful purposes*." 554 U.S. at 625, *aff'g United States v. Miller*, 307 U.S. 174, 178 (1939) (short-barreled shotguns not protected by the Second Amendment because they are dangerous and unusual) (emphasis added) (internal quotation omitted).

Courts around the nation have confirmed the limited nature of the Second Amendment right recognized in *Heller*. *See United States v. Decastro*, 682 F.3d 160, 165 n.4 (2d Cir. 2012) ("[T]he Second Amendment right does not encompass all weapons, but only those 'typically possessed by law-abiding citizens for lawful purposes' and thus does not include the right to possess 'dangerous and unusual weapons.'" (quoting *Heller*, 544 U.S. at 625, 627)); *United States v. Fincher*, 538

F.3d 868, 874 (8th Cir. 2008) (machine guns not protected by the Second Amendment as those firearms fall “within the category of dangerous and unusual weapons”).

LCMs, which potentially enable a shooter to fire as many as 100 rounds without having to reload, are “dangerous and unusual” and unsuitable for lawful self-defense purposes. After hearing evidence at trial, the Court in *Colorado Outfitters* recently found that “large capacity magazines are frequently used in gun violence and mass shootings . . . [and] there is a positive correlation between the firearm ammunition capacity and the average number of shots fired during criminal aggression.” *Colorado Outfitters*, 2014 WL 3058518, at *16. Here, the District Court cited evidence that both assault weapons and LCMs are used “disproportionately” in mass shooting and “in the killing of law enforcement officers.” JA-190. Indeed, “over the last three decades LCMs of more than ten rounds were used in thirty-four out of forty mass shootings in which the magazines capacity was known.” JA-189-90.

Their exceedingly dangerous nature makes LCMs a popular choice for criminals and inappropriate for self-defense in the home. *See, e.g., Hightower v. City of Boston*, 693 F.3d 61, 66, 71-72 & n.7 (1st Cir. 2012) (noting that “large capacity weapons” are not “of the type characteristically used to protect the home.”). According to a former Baltimore Police Colonel, “[t]he typical self-

defense scenario in a home does not require more ammunition than is available in a standard 6-shot revolver or 6-10 round semiautomatic pistol. In fact, because of potential harm to others in the household, passerby, and bystanders, too much firepower is a hazard.” See Brian J. Siebel, Brady Ctr. To Prevent Gun Violence, Assault Weapons: Mass Produced Mayhem, 16 (2008), <http://www.bradycampaign.org/sites/default/files/mass-produced-mayhem.pdf> (quoting *Police Fear a Future of Armored Enemies*, USA Today, Mar. 3, 1997, at 02A). LCMs exacerbate the threat of stray bullets, because “the tendency for defenders [is] to keep firing until all bullets have been expended.” *Id.*

Responsible, lawful self-defense does not require the ability to continuously spray a multitude of bullets in the home without reloading. The *Colorado Outfitters* court found that a limitation on magazine capacity did not meaningfully impact “a person’s ability to keep and bear (use) firearms for the *purpose of self-defense*,” explaining that “[e]ven in the relatively rare scenario where the conditions are ‘ideal’ for defensive firing, there is no showing of a severe effect [of the magazine capacity limitation] on the defensive shooter.” *Colorado Outfitters*, 2014 WL 3058518, at *14, *15. Similarly, the District Court here observed that “the plaintiffs can point to no instance where . . . LCMs were used or useful in an instance of self-defense in Maryland.” JA-181. LCMs are “dangerous and

unusual” weapons, ill-suited for self-defense and not “typically possessed for lawful purposes,” which fall outside of the protection of the Second Amendment.

C. The Second Amendment Does Not Protect a Right to Possess Assault Weapons.

The Act also prohibits the possession of assault weapons. The Second Amendment only protects those weapons “in common use at the time for lawful purposes” and does not protect “dangerous and unusual” weapons. 554 U.S. at 625 (quotations omitted). Assault weapons are a category of dangerous and unusual firearms totally different from the handguns at issue in *Heller*.¹³ Assault weapons are generally semiautomatic versions of fully automatic weapons designed for combat. For example, the AR-15 rifle, some versions of which are prohibited by the Act, was originally designed as a military weapon and issued primarily to combat troops. *See ArmaLite, Inc., A Historical Review of ArmaLite*, 3, 12 (Jan. 4,

¹³ Appellants grievously misstate *Heller*’s holding. They say *Heller* “held that a prohibition of a class of firearms is an impermissible burden under the Second Amendment.” Appellants’ Brief at 25. That is not correct. *Heller* actually held that a prohibition on *handguns* is an impermissible burden on the Second Amendment. 554 U.S. at 629. Indeed, Appellants distort a quotation from *Heller* about policy choices taken “off the table” by the Second Amendment – “[t]hese include the absolute prohibition of handguns held and used for self-defense in the home,” *Id.* at 636, by substituting “[the Prohibited Firearms]” for “handguns.” *See* Appellants’ Brief at 35. Contrary to the impression Appellants seek to convey to this Court, the Supreme Court has never addressed the question of assault weapons and LCMs, and, as discussed below, every court that has addressed this question has rejected Appellants’ position on it.

2010). For the reasons discussed below, assault weapons fall outside of the protection of the Second Amendment.

1. Assault Weapons Are Not in “Common Use.”

The *Heller* Court held that the Second Amendment only protects those weapons “in common use at the time for lawful purposes like self-defense.” 554 U.S. at 624 (quotations omitted). The District Court here expressed “serious[] doubts” that the prohibited assault weapons “are commonly possessed for lawful purposes, particularly self-defense in the home.” JA-178.

Indeed, assault weapons are not commonly used or purchased by the public. While Appellants offer a lot of bluster about how supposedly common these weapons are, these weapons comprise only a small percentage of the total firearms in circulation. See Marianne W. Zawitz, U.S. Dep’t of Justice, *Guns Used in Crime*, 6 (1995) (assault weapons constituted about 1% of guns in circulation prior to the federal assault weapons ban). Citing the evidentiary record, the District Court noted that “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. JA-178. While gun sales in America have risen in recent years, the percentage of households owning guns has sharply dropped, reflecting the fact that more firearms are being sold to an ever-smaller group of

enthusiasts, thereby concentrating gun ownership substantially, undermining Appellants' argument that high production numbers equate with "common use."¹⁴

2. Assault Weapons Are "Dangerous and Unusual" And Not Protected By The Second Amendment.

The exceedingly dangerous nature of assault weapons makes them better suited for committing violent crime than for self-defense purposes. As the District Court here stated, to determine whether the prohibition on assault weapons impinges upon a Second Amendment right, one asks whether such weapons "are in common use *for lawful purposes* . . ." JA-171 (emphasis added). Just like fully automatic weapons, assault weapons are "designed to enhance [the] capacity to shoot multiple human targets very rapidly." *Heller v. Dist. of Columbia* ("*Heller II*"), 670 F.3d 1244, 1262 (D.C. Cir. 2011) (quoting JA-1151). The Bureau of Alcohol, Tobacco, Firearms, and Explosives confirms that "[a]ssault weapons were designed for rapid fire, close quarter shooting at human beings. That is why they were put together the way they were." JA-1264. "You will not find these guns in a duck blind or at the Olympics. They are mass produced mayhem." *Id.* Moreover, as the District Court here observed, "plaintiffs can point to no instance where assault weapons . . . were used or useful in an instance of self-defense in Maryland." JA-181.

¹⁴ See Hepburn et al., "The US Gun Stock: Results from the 2004 National Firearms Survey," Injury Prevention, 2007, at 15-19.

The only significant difference between civilian and military assault rifles is the manner in which they fire multiple bullets (i.e., whether they are “semiautomatic” or “automatic”). “A semiautomatic weapon fires one bullet for each squeeze of the trigger.” JA-412. In contrast, a fully automatic assault weapon “fires continuously as long as the trigger is held back - until it runs out of ammunition.” See Violence Policy Ctr., *Bullet Hoses: Semiautomatic Assault Weapons – What Are They? What’s So Bad About Them?* (May 2003), available at <http://www.vpc.org/studies/hosetwo.htm>.

The differences between firing a semiautomatic assault weapon and a fully automatic are minimal, and fully automatic firearms are unquestionably “dangerous and unusual” weapons. As the District Court here found, semiautomatic assault weapons are “equally, or possibly even more effective, in functioning and killing capacity as their fully automatic versions.” JA-179; cf. *Fincher*, 538 F.3d at 874 (machine guns are “within the category of dangerous and unusual weapons”). Most notably, both can fire hundreds of bullets in a single minute. As one District Court recently found, “[a]lthough semi-automatic firearms, unlike automatic M-16s, fire only one shot with each pull of the trigger, semi-automatics still fire almost as rapidly as automatics. . . .” *Shew v. Malloy*, 994 F. Supp. 2d 234, 249 n.51 (D. Conn. 2014) (citing *Heller II*, 670 F.3d at 1264). In a police department test, an automatic UZI with a 30-round magazine “emptied

in slightly less than two seconds...while the same magazine was emptied in just five seconds on semiautomatic” mode. JA-1150. Their characteristics are so similar that a semi-automatic assault weapon can be readily converted into a fully automatic weapon.¹⁵

The already fine line between these dangerous weapons only narrows when one considers the firepower of semiautomatic assault weapons. As the District Court found here, ammunition shot from semiautomatic assault weapons is powerful enough to penetrate walls, increasing the already significant threat of stray bullets harming innocent family members, neighbors, and passersby. *See* JA-189. With such a small difference between civilian assault weapons and their fully automatic military equivalents, it is plain that assault weapons are “dangerous and unusual” weapons outside of the Second Amendment’s scope. *See People v. James*, 174 Cal. App. 4th 662, 676-77 (2009) (upholding California’s assault weapon prohibition because assault weapons are “dangerous and unusual” and therefore unprotected by the Second Amendment).

Moreover, assault weapons like the AR-15, AK-47, and UZI models that are prohibited by the Act are frequently chosen by criminals. *See Heller II*, 670 F.3d at 1263 (citing Dep’t of Treasury, *Study on the Sporting Suitability of Modified*

¹⁵ *See, e.g., Lightning Link*, http://thehomegunsmith.com/pdf/fast_bunny.pdf (last visited December, 31 2014) (describing how AR-15 can be converted into fully automatic weapon in matter of *ten seconds*).

Semiautomatic Assault Rifles, 34-35, 38 (1998)) (“assault weapons are preferred by criminals . . . because of their high firepower.”). Assault weapons “account for a larger share of guns used in mass murders and murders of police, crimes for which weapons with greater firepower would seem particularly useful.” JA-495; JA-178-79; JA-187. A study analyzing FBI data found that 20% of the law enforcement officers killed in the line of duty were killed with an assault weapon.¹⁶ As just one example, in 2006 a teenager armed with an AK-47 semiautomatic rifle fired 70 rounds in an attack on a Virginia police station, murdering two officers during the rampage.¹⁷

For the reasons discussed above, both assault weapons and LCMs fall outside of the protection of the Second Amendment.

II. EVEN IF THE ACT IMPLICATES THE SECOND AMENDMENT, IT REMAINS CONSTITUTIONAL.

The fact that the Act does not burden the Second Amendment should end this Court’s inquiry. *See, e.g., United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). But even if this Court were to radically expand the limited holding of *Heller* and conclude that the Act implicates the Second Amendment, the Act would still pass constitutional muster. As the District Court correctly held, intermediate

¹⁶ *See* JA-1511; *see also* JA-188.

¹⁷ *Officer killed at Virginia police station shooting*, USA Today (May 9, 2006), http://usatoday30.usatoday.com/news/nation/2006-05-08-va-police-shooting_x.htm.

scrutiny is the most appropriate level of review and the Act easily meets this standard. JA-183.

A. If Heightened Scrutiny Is Necessary In Evaluating This Challenge, Strict Scrutiny Is Not Appropriate.

1. The Application of Strict Scrutiny to Firearm Regulations Is Inappropriate.

Appellants assert that the Act should be struck down without engaging in *any* sort of scrutiny – that “the Act’s prohibitions are unconstitutional *per se*.” Appellants’ Brief at 22. Appellants’ fallback position is that the Act must be subject to strict scrutiny because the Second Amendment protects a fundamental right. However, not all restrictions on constitutional rights—even those that are fundamental—trigger strict scrutiny. This Court has held that the appropriate level of scrutiny depends on “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); *see also Marzzarella*, 614 F.3d at 96-97 (noting that even the fundamental right to free speech “is susceptible to several standards of scrutiny, depending upon the type of law challenged and the type of speech at issue,” and finding that there is “no reason why the Second Amendment would be any different”) (internal citations omitted).

The application of strict scrutiny is inappropriate in the evaluation of firearm regulations. Protecting public safety is the bedrock function of government, and guns have a “unique potential to facilitate death and destruction and thereby to destabilize ordered liberty.” *McDonald v. City of Chicago*, 561 U.S. 742, 891 (2010) (Stevens, J., dissenting). Accordingly, state and local governments have a profound interest in safeguarding the public and law enforcement personnel from gun violence. *See Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (“promotion of safety of persons and property is unquestionably at the core of the State’s police power”).

Indeed, most courts that have chosen a level of scrutiny for evaluating Second Amendment claims, including this Court, have rejected strict scrutiny. *See, e.g., Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013); *Masciandaro*, 638 F.3d at 471; *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012); *Heller II*, 670 F.3d at 1256; *Jackson*, 746 F.3d at 964-65; *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010); *United States v. Williams*, 616 F.3d 685, 691-93 (7th Cir. 2010); *Marzzarella*, 614 F.3d at 96-97; *United States v. Walker*, 709 F. Supp. 2d 460, 466 (E.D. Va. 2010). *Cf. Tyler v. Hillsdale County Sheriff’s Dep’t*, No. 13–1876, 2014 WL 7181334, at *17 (6th Cir. Dec. 18, 2014).

2. Strict Scrutiny is Inconsistent with *Heller* and *McDonald*.

As “numerous other courts and legal scholars have pointed out, a strict scrutiny standard of review” does “not square with the majority’s references to ‘presumptively lawful regulatory measures.’” *Heller v. Dist. of Columbia*, 698 F. Supp. 2d 179, 187 (D.D.C. 2010) (citing *United States v. Skoien*, 587 F.3d 803, 811 (7th Cir. 2009) (noting that the court did “not see how the listed laws could be ‘presumptively’ constitutional if they were subject to strict scrutiny”)); *United States v. Marzzarella*, 595 F. Supp. 2d 596, 604 (W.D. Pa. 2009) (observing that “the Court’s willingness to presume the validity of several types of gun regulations is arguably inconsistent with the adoption of a strict scrutiny standard of review”); Dennis A. Henigan, *The Heller Paradox*, 56 UCLA L. Rev. 1171, 1197-98 (2009) (stating “the *Heller* majority . . . implicitly rejected strict scrutiny”).

Indeed, this Court has expressly rejected the indiscriminate application of strict scrutiny to firearms laws, unless they “implicate the central self-defense concern of the Second Amendment.” *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010). This Court previously held that “less severe burdens on the Second Amendment right . . . may be more easily justified” than is required under strict scrutiny. *Id.* This Court has compared the analysis to First Amendment jurisprudence, where content-based regulations must survive strict scrutiny, but time, place and manner restrictions need only survive intermediate scrutiny. *See*

Masciandaro, 638 F.3d at 470-71; *Chester*, 628 F.3d at 682. Indeed, the Second Circuit explained in *United States v. Decastro*, 682 F.3d 160 (2d Cir. 2012), that “it is . . . appropriate to consult principles from other areas of constitutional law, including the First Amendment”:

Regulation may “reduce to some degree the potential audience for [one’s] speech” so long as “the remaining avenues of communication are []adequate.” . . . By analogy, [a] law that regulates the availability of firearms is not a substantial burden on the right to keep and bear arms if adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense.

Id. at 167-168 (citations omitted).¹⁸

Appellants argue that strict scrutiny is appropriate because the Act impacts the availability of firearms that can be used to defend the home. *See* Appellants’ Brief at 29-32. That argument, however, is premised on a misreading of both *Heller* and this Court’s decision in *Chester*. The *Heller* Court struck down the handgun ban at issue because the regulation “bann[ed] from the home the most preferred firearm in the nation to keep and use for protection of one’s home and family.” *Heller*, 554 U.S. at 628-29. Similarly, in *Chester*, this Court explained that the “core right identified in *Heller*” is “the right of a law-abiding, responsible citizen to possess and carry *a* weapon for self-defense.” *Chester*, 628 F.3d at 683 (emphasis added). *A* weapon, not *any* weapon, because as *Heller* specifically held,

¹⁸ Compare *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (upholding content-neutral regulations on the time, place, and manner of speech, aimed at limiting the volume of amplified music and speeches)

the Second Amendment does not confer—even in the home—“a right to keep and carry any weapon whatsoever.” *Heller*, 554 U.S. at 526. Here, the Act’s prohibition on a limited class of weapons that are particularly dangerous and ill-suited for self-defense leaves citizens free to possess a vast array of firearms and magazines with which to defend themselves, including the “most preferred firearm in the nation,” the handgun. Accordingly, the application of strict scrutiny to the Act’s prohibition on assault weapons and LCMs is unwarranted.

B. If Heightened Scrutiny Applies, Intermediate Scrutiny is the Appropriate Level of Review.

Because the Act does not substantially burden the Second Amendment, intermediate scrutiny is the appropriate level of review, assuming that any heightened scrutiny is required. Courts have reached the same conclusion in cases involving similar prohibitions on certain classes of particularly dangerous weapons.

The U.S. Court of Appeals for the D.C. Circuit applied intermediate scrutiny to the District of Columbia’s ban on assault weapons and LCMs. *Heller II*, 670 F.3d at 1261. The court stated that the prohibition of assault weapons and LCMs was “more accurately characterized as a regulation of the manner in which persons may lawfully exercise their Second Amendment rights,” since the prohibition did not “prevent a person from keeping a suitable and commonly used weapon for protection in the home.” *Id.* at 1262. The court also summarized a fundamental distinction from the absolute handgun ban in *Heller*: “Unlike the law held

unconstitutional in *Heller*, [bans on assault weapons and LCMs] do not prohibit the possession of the ‘quintessential self-defense weapon,’ to wit, the handgun.” *Id.* at 1261-62 (quoting *Heller*, 544 U.S. at 629).

The District Court similarly applied intermediate scrutiny to Maryland’s ban on assault weapons and LCMs. Citing a half-dozen courts reaching the same conclusion, the District Court ruled that intermediate scrutiny is appropriate because “although the bans remove 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.” JA-181 (emphasis in original). Like the laws at issue in *Heller II*, the Act does not impose a substantial burden on an individual’s ability to exercise his or her Second Amendment right since it does not “prevent a person from keeping a suitable and commonly used weapon for protection in the home.” *Heller II*, 670 F.3d at 1262.

C. The Assault Weapons and LCM Bans Satisfy Intermediate Scrutiny.

Intermediate scrutiny requires a showing that the asserted governmental end is “significant,” “substantial,” or “important.” *See, e.g., Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 662 (1994); *United States v. Skoien*, 614 F.3d 638, 641-42 (7th Cir. 2010). It requires that the fit between the challenged regulation and the stated objective be reasonable, not perfect, and does not require that the regulation be the least restrictive means of serving the interest. *See, e.g., Lorillard Tobacco*

Co. v. Reilly, 533 U.S. 525, 556 (2001); *Marzzarella*, 614 F.3d at 98; *Jackson*, 746 F.3d at 965. The Act easily satisfies this standard.

1. Preservation of Public Safety and Prevention of Crime Are Paramount Government Interests.

In passing the Act, the Maryland Legislature was concerned by the enormous threat to public safety posed by assault weapons and LCMs. Citing *Masciandaro*, the District Court found that the legislature's interests in public safety and preventing crime were substantial interests, and perhaps even compelling interests. JA-184. *See also Woollard*, 712 F.3d at 877 (finding that interests in public safety and preventing crime are compelling). The District Court noted that Appellants conceded the "compelling government interest" in briefing before the District Court. JA-184.

2. Assault Weapons and LCMs Jeopardize Public Safety.

As demonstrated above, assault weapons and LCMs are particularly dangerous, military-style devices designed for combat use, making them a significant threat to public safety. Maryland has an interest in preventing devastating attacks committed with these weapons, such as the mass shootings at Sandy Hook Elementary School.

Maryland also has a substantial interest in protecting its law enforcement officers from harm. "[C]riminals using assault rifles pose a heightened risk to law enforcement." JA-187. The prohibition on LCMs protects these officers because

gun users limited to ten-round magazines must reload more frequently. For law enforcement confronting dangerous shootouts, “the 2 or 3 second pause to reload [ammunition] can be of critical benefit.” *Heller v. Dist. of Columbia*, 698 F. Supp. 2d 179, 194 (D.D.C. 2010); *see also* JA-190. The *Colorado Outfitters* court found that “[a] pause, of any duration, imposed on the offensive shooter can only be beneficial, allowing some period of time for victims to escape, victims to attack, or law enforcement to intervene.”¹⁹ *Colorado Outfitters*, 2014 WL 3058518, at *17.

3. The Act is Substantially Related to the Government’s Significant Interests.

This Court should affirm the District Court’s ruling that “the defendants have met their burden to demonstrate a reasonable fit between the [Act] and the government’s substantial interests in protecting public safety and reducing the negative effects of firearm-related crime.” JA-192. Given the real and immediate threats to public safety and law enforcement personnel posed by assault weapons and LCMs, Maryland has made the reasonable choice to prohibit access to these dangerous instruments of mass mayhem, while preserving access to handguns and other standard firearms. Since the most effective way to eliminate the danger posed by assault weapons and LCMs is to prohibit their use, possession, and sale, a substantial relationship clearly exists between the Act and the government’s

¹⁹ Indeed, in the attack on Congresswoman Gabrielle Giffords in Tucson, Arizona in 2011, the shooter was only prevented from continuing his rampage because he was subdued while reloading his weapon.

significant interests. *See* JA-191-92 (crediting testimony 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.”).²⁰

Moreover, the Act places no burden on an individual’s ability to possess a firearm in the home for self-defense. The Act prohibits only a fraction of available firearms—those with military-style features which facilitate rapid devastation of human life—that the Maryland Legislature deemed to be exceedingly dangerous. *See* JA-1264. The Act leaves handguns, the weapons “overwhelmingly chosen” by the American people for self-defense in the home, untouched. *See Heller*, 554 U.S. at 628. Nor does it prohibit standard rifles or shotguns. Citing *Heller*, Appellants contend that the Supreme Court “rejected” the argument that a regulation of firearms may be permissible because it leaves other firearms unregulated. Appellants’ Brief at 27. However, the *Heller* Court held that the D.C. ban on handguns could not withstand constitutional scrutiny not simply because a class of firearms was banned, but rather because the prohibited firearm constituted “the most popular weapon chosen by Americans for self-defense in the

²⁰ Appellants curiously argue that the Act’s ban on LCMs is not “narrowly tailored,” and thus, fails to withstand intermediate scrutiny, because it does not prohibit Marylanders from purchasing a LCM in another state and bringing it into Maryland. Appellants’ Brief at 17, 40-41. First, this undercuts Appellants’ claim that the Act reaches into their homes to take their LCMs away. More important, as the District Court properly held, “[t]he court cannot find the ban unconstitutional simply because it does not by itself solve an entire problem.” JA-191 (*citing Woollard*, 712 F.3d at 881-82).

home.” *Heller*, 554 U.S. at 629. Under the *Heller* rationale, the assault weapon prohibition is not marred by a similar defect as it only regulates a small subset of firearms which, as shown above, are incredibly deadly and not at all suitable for use in self-defense.

As a result, the Act is a reasonable means of serving vital government interests that is neither overly broad nor arbitrary. *See, e.g., Turner Broad. Sys.*, 512 U.S. at 662; *Heller II*, 670 F.3d at 1262; *Marzzarella*, 614 F.3d at 98. As the District Court noted here, “[e]very court that has addressed the issue has...found bans on assault weapons and LCMs to survive intermediate scrutiny.” JA-186.

CONCLUSION

For all of the reasons set forth above, this Court should affirm the District Court's Order.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 28(e)(2)(a) because this brief contains 6,965 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(viii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: January 7, 2015

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Brief for *Amici Curiae* Law Center to Prevent Gun Violence and Marylanders to Prevent Gun Violence, Inc. to be served on all counsel via Electronic Mail generated by the Court's electronic filing system (CM/ECF) with a Notice of Docket Activity pursuant to Local Rule 25:

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I certify that an electronic copy was uploaded to the Court's electronic filing system. Eight paper copies of the foregoing Brief for *Amici Curiae* Law Center to Prevent Gun Violence and Marylanders to Prevent Gun Violence, Inc. were sent to the Clerk's Office by Federal Express Next Business Day Delivery to:

Clerk of Court
United States Court of Appeals, Fourth Circuit
United States Courthouse Annex
1100 East Main Street, 5th Floor
Richmond, Virginia 23219
(804) 916-2700

on this 7th day of January 2015.

/s/ Samantha Collins
Samantha Collins

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
APPEARANCE OF COUNSEL FORM

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COUNSEL FOR: _____

_____ as the
(party name)

appellant(s) appellee(s) petitioner(s) respondent(s) amicus curiae intervenor(s)

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Name (printed or typed)

Voice Phone

Firm Name (if applicable)

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