

No. 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.

On Appeal from the United States District Court
for the District of Maryland at Baltimore
No. 13-02841 (CCB)

**BRIEF OF STATE FIREARMS RIGHTS ORGANIZATIONS AS AMICI CURIAE
IN SUPPORT OF APPELLANTS**

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**UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 14-1945 Caption: Kolbe v. O'Malley

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2. Does party/amicus have any parent corporations? Yes No
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

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If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ C.D. Michel

Date: November 12, 2014

Counsel for: Amici Curiae

CERTIFICATE OF SERVICE

I certify that on November 12, 2014 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:

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

Pursuant to Rule 29(c)(4) of the Federal Rules of Appellate Procedure, Amici Curiae State Firearms Rights Organizations, which include the 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, 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 Rifle & Pistol Association, and the Vermont Federation of Sportsmen's Clubs respectfully submit this amici curiae brief, with the consent of all parties, in support of Appellants.

CRPA Foundation is a non-profit 501(c)(3) corporation with headquarters in Fullerton, California. CRPA Foundation raises awareness about and defends the rights protected by the Second Amendment, promotes firearms and hunting safety, protects hunting rights, enhances marksmanship skills of those participating in the shooting sports, and educates the general public about firearms. CRPA Foundation supports law enforcement and various charitable, educational, scientific, and other firearms-related public interest activities that support and defend the Second Amendment rights of all law-abiding Americans.

Gun Owners of California (“GOC”), is a California non-profit organization formed in 1974. GOC is a leading voice in the state of California, supporting the rights to self-defense and to keep and bear arms guaranteed by the Second Amendment. It monitors government activities at the national, state, and local levels that may affect the rights of the American public to choose to own firearms.

Colorado State Shooting Association (“CSSA”) was formed to provide shooting opportunities for law-abiding residents of Colorado. The goal of CSSA is to unite shooters, hunters, sportsmen, collectors, and all other law-abiding firearm enthusiasts to promote the safe and responsible use of firearms, to provide a united voice at all levels of government, and to protect and defend the Constitutions of the United States and the State of Colorado.

Idaho State Rifle & Pistol Association (“ISRPA”) is dedicated to promoting the shooting sports in the state of Idaho and throughout the United States. The ISRPA recognizes the Second Amendment of the United States Constitution as the underpinning article in the Bill of Rights, which guarantees all other enumerated rights of American citizens. Its mission is to educate Idahoans of the rights guaranteed by both the Federal and Idaho State Constitutions, and it

pursues involvement in litigation in the interest of its members and gun owners of Idaho and the United States.

Illinois State Rifle Association (“ISRA”) is a non-profit association formed in 1913. ISRA’s main objective is to protect the right of citizens to keep and bear arms for the lawful defense of their families, persons, and property, and to promote public safety and law and order. With a membership of over 30,000 law-abiding gun owners, ISRA seeks to educate citizens on all matters affecting the lawful use and possession of firearms, firearm safety, self-defense, and competitive shooting and sport hunting. A fundamental goal of the organization is to further the rights and freedoms of all citizens protected by the Bill of Rights.

Kansas State Rifle Association (“KSRA”) was formed in 1928 as a 501(c)(4) membership association for the purpose of communication and cooperation for all those interested in shooting, reloading, collecting, and other endeavors related to firearms. KSRA seeks to promote safety, education, shooting competitions, wildlife conservation, and other firearm-related pursuits. KRSAs fundamental goal is to preserve the American heritage as exemplified and engendered in the Declaration of Independence, the Constitution, and the Bill of Rights for all citizens of the United States.

League of Kentucky Sportsmen (“LKS”) was formed to educate its members and the general public, especially the youth and sportsmen of Kentucky, to create an understanding of the importance of good sportsmanship and the conservation and wise use of the fish, wildlife, and other natural resources of the Commonwealth of Kentucky, the United States, and the world. LKS works with the Department of Fish & Wildlife Resources and seeks to deter legislation that is considered to be detrimental to the Department of Fish & Wildlife Resources or the organized sportsmen’s programs.

Nevada Firearms Coalition (“NVFAC”) is dedicated to the ownership and safe use of firearms for self-defense, competition, recreation, and hunting. NVFAC seeks to safeguard the rights of the citizens of Nevada to keep and bear arms in accordance with the Constitutions of the United States and the State of Nevada. NVFAC also seeks to further the ideals and programs of other organizations whose goals are patriotism, conservation, and other worthwhile purposes, and who support the general objectives of the Coalition.

Association of New Jersey Rifle & Pistol Clubs, Inc. (“ANJRPC”) is a non-profit membership corporation organized in 1936 to represent the interests of target shooters, hunters, competitors, outdoors people, and other law-abiding firearms owners in New Jersey. ANJRPC is the largest statewide organization

dedicated to the shooting sports and the right to keep and bear arms in New Jersey. ANJRPC seeks to aid such persons in every way within its power and to defend the people's right to keep and bear arms, including the right of its members and the public to purchase, possess, and carry firearms.

New Mexico Shooting Sports Association (“NMSSA”) is a non-profit corporation that serves as the official state association of the National Rifle Association (“NRA”). It seeks to promote social welfare, public safety, law and order, and the national defense. NMSSA also seeks to promote good sportsmanship and competitive shooting events, and to foster the conservation and wise use of renewable wildlife resources.

New York State Rifle & Pistol Association (“NYSRPA”) is a 501(c)(4) non-profit corporation, and it is New York State's largest and the nation's oldest firearm-advocacy organization. NYSRPA is also the official NRA-affiliated state association in New York. Since 1871, NYSRPA has been dedicated to the preservation of Second Amendment rights, firearm safety, education and training, and the shooting sports. NYSRPA membership consists of individuals and clubs throughout the state.

The Texas State Rifle Association (“TSRA”) is a 501(c)(4) non-profit organization formed in 1919 and incorporated in 1939. TSRA has tens of

thousands of members, and it has been recognized as the State Association of the Year by the NRA at least six times in recent years. Since its inception, TSRA has taken a leadership role in defending the United States Constitution and the rights of law-abiding Americans, protecting the lawful possession and use of firearms, providing gun safety training, supporting the shooting sports, and promoting hunter education and wildlife conservation efforts.

Vermont State Rifle & Pistol Association (“VSRPA”) is a 501(c)(7) non-profit corporation formed in 1938. VSRPA supports competitive shooting programs sponsored by the NRA and Civilian Marksmanship Program, and junior shooting programs in the state of Vermont. VSRPA seeks to promote and support junior shooters and junior-shooter activities, as well as to foster and expand competitive shooting in both rifle and pistol disciplines.

Vermont Federation of Sportsmens Clubs (“VTFSC”) is a 501(c)(7) non-profit corporation formed in 1875. VTFSC is an association of Vermont sporting clubs and other similar organizations that works to support the interests of sportsmen and women across Vermont. VTFSC has become a leader in Vermont for the promotion of safe firearm handling, teaching marksmanship skills, advocating for the construction of new ranges and enhancing existing ones, as well

as providing courses that facilitate and promote the safe handling and shooting of all firearms.

Amici herein offer their unique experience, knowledge, and perspective to aid the Court in the proper resolution of this case. They share a goal of defending the rights of law-abiding citizens, including their members, to acquire, possess, and use protected arms—as guaranteed by the constitutions of the United States and their respective states. Amici have at their service preeminent Second Amendment scholars, as well as reputable firearms and self-defense experts and lawyers with decades of experience in firearms litigation. As such, Amici respectfully submit that they are uniquely situated to bring an important perspective to the resolution of the issues raised in this appeal.

STATEMENT REGARDING PARTICIPATION BY PARTIES, THEIR ATTORNEYS, OR OTHER PERSONS IN FUNDING OR AUTHORIZING THE BRIEF

Pursuant to Federal Rule 29(c)(5), Amici attest that no counsel for a party authored this brief in whole or in part, and that no person other than amici, their members, or their counsel made a monetary contribution to its preparation or submission.

INTRODUCTION

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.

District of Columbia v. Heller, 554 U.S. 570, 634 (2008).

By prohibiting the acquisition and use of many of the most common rifles and magazines in circulation, Maryland has banned a broad class of arms that are used by tens of millions of law-abiding citizens for lawful purposes. These arms easily pass the “typically possessed by law-abiding citizens for lawful purposes” test that was established by the United States Supreme Court to determine which arms are protected by the Second Amendment. *Id.* at 625.

Because these protected arms are so common, it is not surprising that they are sometimes used by criminals and, on rare occasions, the mentally ill to commit crimes. Likewise, it is not surprising that, in addition to being preferred by millions of Americans for sporting and self-defense purposes, they are also preferred by law enforcement personnel, both while on-duty and off-duty in their homes.

Statistically speaking, banning the possession of magazines holding more than ten rounds likely will do little or nothing to reduce criminal violence—it may have the opposite effect. And to be fair, it may not often impact the ability of law-abiding citizens to defend themselves. But the court is ill-equipped to deal

with such issues. These are matters of policy. *See McDonald v. City of Chicago*, 561 U.S. 742, 790-91 (2010) (Second Amendment analysis does not “require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise.”).

But these particular policy matters are necessarily limited by the constitutional rights of the millions of Americans, including the Amici groups’ members, who desire to exercise their rights to acquire and use protected arms for lawful purposes. Whether, on balance, a ban will do more good than harm is not for the courts to decide. The Constitution, as interpreted by the Supreme Court, already made that decision; it “necessarily takes certain policy choices off the table.” *Id.* at 790. One of those choices is removing protected arms from law-abiding citizens because they are sometimes misused by criminals and other protected arms are available. But that is exactly what the State has done here and what the lower court improperly upheld.

In doing so, the court reasoned that the banned rifles and magazines represent just one subset of arms that are not necessary for self-defense, and that the State’s ban does not prevent an individual from having other suitable arms for self-defense. *Kolbe v. O’Malley*, No. 13-2841, 2014 WL 4243633, at *13 (D. Md. Aug. 22, 2014). In effect, the court found that, on balance, the right of law-abiding

citizens to possess the protected rifles and magazines was not a right “*really worth insisting upon.*” The *Heller* Court addressed these issues and came to the opposite conclusion. *Heller*, 554 U.S. at 634.

Indeed, the Supreme Court invalidated a ban on handguns and, in doing so, rejected Washington, D.C.’s argument that handguns are used in *most* crimes and other arms are readily available for in-home self-defense. *Id.* at 629. The Court found those arguments irrelevant, and it barely addressed them. *See, e.g., id.* (“It is no answer to say . . . other firearms . . . [are] allowed.”). Under *Heller*, the question of whether certain subsets of arms may be banned has nothing to do with whether they are “necessary” for self-defense or whether other arms can be effectively used in self-defense. Rather, the test is what firearms and magazines are “typically possessed” or “preferred” by “law-abiding citizens for lawful purposes.” *Id.* at 624-25, 628-30. Legislative diktat to the contrary cannot override public choice. The State’s disagreement with typical citizens’ preferences for rifles and magazines in this case is no more valid than D.C.’s was in *Heller*, and its ban should likewise be stricken.

In sum, the State cannot ban protected arms by arguing its ban imposes only a minor burden on the Second Amendment because it only applies to a subset of protected arms and other arms remain available. Defendants’ Memorandum in

Support of Motion for Summary Judgment at 39, *Kolbe v. O'Malley*, No. 13-2841 (Feb. 14, 2014), ECF No. 44-1. *Heller* explicitly bars such an approach. Arms are either protected, or they are not. The fact that people do not *need* a pistol (as opposed to a revolver) or a .44 Magnum (as opposed to a .57 or some other firearm) to defend themselves does not mean the government is free to ban them outright. Allowing state and local governments to prohibit protected arms, one subset at a time, so long as they don't ban all arms in one fell swoop, would render constitutional protections for common arms meaningless. The district court failed to appreciate this concept.

This underlying conceptual error led to the court's failure to find the ban invalid under any level of heightened scrutiny, as would have been mandated by a faithful application of *Heller*. It also led to the court's errors in selecting and applying intermediate scrutiny. Ultimately, it led the court to improperly grant the State's Motion for Summary Judgment and to deny Mr. Kolbe's cross-motion.

ARGUMENT

I. THE DISTRICT COURT ERRED BY FINDING THAT THE GOVERNMENT MAY BAN CONSTITUTIONALLY PROTECTED ARMS FROM ALL LAW-ABIDING CITIZENS TO REDUCE CRIMINAL ACCESS AND MISUSE

The District Court's error in this case was simple. It ignored the Supreme Court's clear guidance that Maryland's approach to addressing gun violence—i.e., banning protected arms from all law-abiding citizens—is not a constitutionally permissible means of accomplishing its goal under *any level of heightened scrutiny*. *Heller*, 554 U.S. at 628-29.

Here, Maryland has sought to reduce injuries from the misuse of protected arms by flatly banning the acquisition and use of those arms by the law abiding based on violence stemming from the few who might use them improperly. But to ban protected arms because certain members of society might misuse them is to tell law-abiding citizens that their liberties depend not on their own conduct, but on the conduct of the lawless minority who abuse those liberties—a perverse message indeed.¹

The notion that the government may flatly ban constitutionally protected

¹ Just as the First Amendment “knows no heckler’s veto,” the Second Amendment cannot tolerate restrictions on law-abiding citizens’ right to keep and bear protected arms based on the threat to public safety posed not by those citizens but by criminals who may obtain such firearms illegally. *See Robb v. Hungerbeeler*, 370 F.3d 735, 743 (8th Cir. 2004).

activity on the grounds that it could lead to abuses has been squarely rejected in other contexts, and it should be rejected here. For “ ‘a free society prefers to punish the few who abuse [their] rights . . . than to throttle them and all others beforehand.’ ” *Vincenty v. Bloomberg*, 476 F.3d 74, 85 (2d Cir. 2007) (quoting *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975)) (law banning sales of spray paint and broad-tipped markers to all law-abiding 18-21 year olds to combat access by certain members of society who use them to spread graffiti was unconstitutional under even intermediate scrutiny).

Ultimately, the State’s ban represents a policy choice as to the types of arms it desires its residents to use. But *Heller* is clear that such policy choices are off the table when considering commonly used, constitutionally protected arms. *See* 554 U.S. at 636. There, D.C. sought to ban handguns for the *same reasons* the State wishes to ban its residents from having common rifles and magazines—to decrease criminal misuse and prevent injuries involving those arms through decreased availability. *Id.* at 681-82, 693-96 (Breyer, J., dissenting). Despite these interests, the Court held that D.C.’s handgun ban would “fail constitutional muster” under “any of the standards of scrutiny the Court has applied” to fundamental rights. *Id.*

at 628-29 (maj. opn.).²

If the D.C. handgun ban could not even pass intermediate scrutiny (i.e., it lacked the required “fit” with the government’s public safety interests), it follows that Maryland’s ban on common arms cannot survive such scrutiny either. For if prohibiting law-abiding citizens from acquiring or possessing protected arms in their homes were a valid method of reducing criminal access and misuse, *Heller* would have been decided differently. Certainly, the justifications for a ban on handguns are substantially more related to the government’s public safety objectives than a ban on the arms that are the subject of this litigation. While criminals might sometimes misuse these arms, criminal misuse of handguns is all too common. Handguns are involved in the vast majority of firearm-related homicides in the United States. *See id.* at 697 (Breyer, J., dissenting) (some 81 percent from 1993 to 1997). They are misused by criminals in most violent gun crimes by far.³ And they make up the great majority of all guns stolen.⁴ But despite

² In making this pronouncement, the Supreme Court was surely aware that both strict and intermediate scrutiny are frequently applied to restrictions on such rights.

³ *Id.* at 698 (citing Caroline Wolf Harlow, Bureau of Justice Statistics, U.S. Dep’t of Justice, *Firearm Use by Offenders* 3 (Nov. 2001), <http://www.bjs.gov/content/pub/pdf/fuo.pdf>).

⁴ *Id.* (citing Marianne Zawitz, Bureau of Justice Statistics, U.S. Dep’t of Justice, *Guns Used in Crime* 3 (July 1995),

the government's compelling interest in keeping easily concealed firearms out of the hands of criminals and unauthorized users, *Heller* could not have been more clear that a ban on the possession of those protected arms by the law abiding lacks the required fit under *either strict or intermediate scrutiny*. *Id.* at 628-29 (maj. opn.).

Said differently, it is not as if *Heller* found the handgun ban to be so burdensome that it must trigger (and fail) strict scrutiny. Rather, after finding that handguns were constitutionally protected, and despite acknowledging that the government has a compelling interest in keeping them from those who might misuse them, the Court nonetheless instructed that removing those arms from all law-abiding citizens was plainly an overbroad approach to reducing the availability of those arms to criminals.

In 2010, Justice Alito succinctly explained the *Heller* Court's reasoning while writing for the plurality in *McDonald*:

[I]n *Heller*, we held that individual self-defense is the central component of the Second Amendment right [W]e found that this right applies to handguns because they are the most preferred firearm in the nation to keep and use for protection of one's home and family. Thus, we concluded, citizens must be permitted to use handguns for the core lawful purpose of self-defense.

<http://www.bjs.gov/content/pub/pdf/GUIC.PDF>).

561 U.S. at 767 (citations, emphasis, quotation marks, and brackets omitted).

In sum, because the Second Amendment “*applies* to handguns,” the Court instructed that “citizens *must* be permitted to” use them. *Id.* (emphasis added). As a result, D.C.’s complete ban on their possession and use was plainly unconstitutional.

The district court flatly ignored the Supreme Court’s critical instruction on this point. Although it properly assumed the prohibited rifles and magazines are constitutionally protected, it remarkably held that the State’s flat ban on their acquisition and use by the law abiding survived intermediate scrutiny. *Kolbe*, 2014 WL 4243633, at *14-18. But the court offered no explanation as to why a ban on handguns *is not* substantially related to the government’s public safety interests under *Heller*, but how a similar ban on common rifles and magazines *is* related to those interests, even though these arms are used in crime far less often than handguns. *Id.* at *17; *see also* Harlow, *supra* note 3, at 3 (for a comparison of handgun use and semiautomatic use by state and federal inmates). That is because there is no explanation. For just as the *Heller* handgun ban was not tailored to prevent criminal misuse of those arms, the State’s outright ban on the most popular rifles in existence and roughly half of the magazines possessed by law-abiding Americans is not sufficiently tailored to its interest in keeping those magazines

from criminals.⁵ Because the Second Amendment clearly applies to these arms, Maryland's prohibition on their acquisition and use by law-abiding citizens must fall.

II. THE DISTRICT COURT ERRED IN FINDING THAT THE STATE'S EVIDENCE COULD ESTABLISH THE REQUIRED FIT BETWEEN THE CHALLENGED LAWS AND THE STATE'S PUBLIC SAFETY INTERESTS

Ultimately, the district court held that the State provided sufficient evidence that Maryland's ban on protected arms may reduce the threat of gun violence.

Kolbe, 2014 WL 4243633, at *15-18. But to reach this conclusion, the court relied heavily on unsubstantiated and contradicted opinion testimony, as well as evidence that has been rejected by the Supreme Court as a basis to establish the required fit between an interest in reducing criminal misuse of protected arms and a law that divests the citizenry of those arms altogether. Because the court improperly relied on this evidence, it erred in concluding that the challenged laws can survive

⁵ The handful of courts that have denied injunctions or otherwise upheld similar bans have committed the same error the district court was guilty of here. They each improperly selected intermediate scrutiny and, in applying that test, ignored clear guidance from *Heller* that removing constitutionally protected arms from the homes of law-abiding Americans lacks the required fit under *any* level of scrutiny. See *Heller II*, 670 F.3d at 1262-64; *S.F. Veteran Police Officers Ass'n v. City & County of San Francisco*, No. 13-05351, 2014 WL 644395, at *5 (N.D. Cal. Feb. 19, 2014); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, No. 13-291S, 2013 WL 6909955, at *17-18 (W.D.N.Y. Dec. 31, 2013); *Shew v. Malloy*, No. 13-739, 2014 WL 346859, at *9 (D. Conn. Jan. 30, 2014).

intermediate scrutiny.

A. Opinion Testimony That the Ordinance Might Possibly Reduce Violent Crime is Unfounded and Cannot Validate the State's Total Ban

The district court's findings were heavily based on the unreliable and largely unfounded opinions of Dr. Christopher Koper, who raised a number of points in support of Maryland's recently enacted rifle and magazine bans. Defendants' Memorandum in Support of Motion for Summary Judgment, Exhibit 7 (hereafter "Koper Declaration"), *Kolbe v. O'Malley*, No. 13-02841 (Feb. 14, 2014), ECF No. 44-7. By relying on such opinions, the court ignored the inconsistencies with Dr. Koper's conclusions over time and the fatal flaws of the studies he relied on to inform them.

As Appellants correctly explain, Dr. Koper never considered that there is no evidence that Maryland's ban would be any more capable than the failed, and consequently expired, federal ban on similar arms. Br. for Plaintiffs-Appellants at 17. Additionally, Appellants correctly note that Dr. Koper's hypothesis ignored the fact that following the termination of the federal ban, sales of the prohibited rifles and magazines increased as violent crime and firearm-related injuries decreased.

Id.

And when Koper examined his own studies for trends in the use of the

prohibited arms in Baltimore, Milwaukee, Anchorage, and Louisville, he admitted that the available data in those cities “were too limited and inconsistent to draw any clear overall conclusions in this regard.” Koper Declaration at ¶ 63. He also recently admitted that the Jersey City study, *his most comprehensive data set, cannot support a finding that pistols with magazines over ten rounds are any more lethal than revolvers (which almost always hold less than ten rounds)*. *Id.* at ¶ 41. While Koper now asserts that, if given more time, the federal ban “could” have produced data supporting his conclusions, he has no data or evidence to support this claim other than his own post-hoc supposition for why the effects of the federal ban did not have the effects he expected. *Id.* at ¶¶ 77-86.

In an attempt to provide any data that might support his beliefs, Koper incredulously cited a non-scholar reporter’s “investigation” of the use of magazines capable of holding more than ten rounds in Virginia. *Id.* at ¶ 64. But this third-party newspaper article provides *no evidence* that more shots were fired in Virginia or that gun-shot injuries increased after the federal ban expired. And neither Koper’s declaration nor the article discusses the methodology used in the journalist’s investigation. Nor did Koper ever assess the study’s reliability or consider any reasonable explanation for the outcome.

In short, Koper’s study of the federal ban found no evidence of any

reduction in lethality of firearm-related violence. Thus, as he implicitly acknowledges, Koper's opinion is not based on valid data or actual evidence. *McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 801 (6th Cir. 2000) (expert's opinion "must have a basis in established fact").

Because Koper's ultimate opinions are highly unreliable, and given the wealth of evidence that a similar (but much more widespread) federal sales ban yielded no material public safety benefit, the district court was unjustified in relying on Koper's conclusory beliefs that a ban that removes them from law-abiding citizens in one state might, possibly, work in the future. *See Lorillard Tobacco Co.*, 533 U.S. at 555 (the government's burden is not satisfied by mere speculation or conjecture).

But more critically, even if Koper's conclusions *were* reliable, they simply cannot be used to justify an outright ban on the possession of protected arms by all law-abiding citizens. An undoubted many believe that banning the protected arms at issue in *Heller* would surely have some measurable impact on violent crime. *See, e.g.*, Brief for Petitioners at 50-55, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 102223. Yet the *Heller* Court did not detain itself with such opinions when declaring that the handgun ban would fail under any level of heightened scrutiny. The district court thus erred in upholding the State's total

ban on the possession of protected arms based on Dr. Koper's beliefs.

B. Characteristics of Protected Arms That Make Them Dangerous in the Hands of Criminals Cannot Warrant a Complete Ban on Lawful Possession

To establish that the challenged laws are sufficiently related to the Maryland's public safety interests, the district court also relied heavily on evidence that the prohibited rifles and magazines have characteristics that make them "especially dangerous." *Kolbe*, 2014 WL 4243633, at *15-17. The court created this test from whole cloth. *Heller* makes clear that such evidence will not establish the required fit between a law banning the lawful possession of protected arms and its goal of curbing unlawful misuse. To be sure, the government may properly restrict law-abiding citizens to using arms that are not "dangerous *and unusual*." *Heller*, 554 U.S. at 627; *see also* Pls.-Appellants' Br. at 23. But the government cannot claim that the features of protected arms that make them desired by millions of Americans, but also make them more dangerous in the hands of criminals, justify banning those arms from the homes of law-abiding citizens.

In *Heller*, D.C. argued that handguns could validly be banned because, "[b]y their nature, [they] are easy to steal and conceal, and especially effective for robberies and murders. The dangers those weapons cause are particularly acute in the District." Brief for Petitioners at 49, *District of Columbia v. Heller*, 554 U.S.

570 (2008) (No. 07-290), 2008 WL 102223. But the Supreme Court did not agree that the characteristics of handguns that make them particularly dangerous when used by criminals could justify banning the possession of those arms by law-abiding citizens. *See Heller*, 554 U.S. at 636. It did not give this evidence *any* weight and simply ruled that taking handguns from the law abiding necessarily fails even intermediate scrutiny, *id.* at 628-29, regardless of their potential for danger.

The take-away is that evidence of characteristics that make an otherwise protected arm more dangerous in the hands of criminals does not establish the necessary “fit” with the goal of reducing the unlawful misuse of those arms. And surely, this must be. For, as is the case with handguns, it is often those “dangerous” characteristics themselves that lead to the common use of certain arms for self-defense. *See id.* at 629 (discussing various reasons that handguns, because of their small size, are attractive for in-home self-defense). It defies logic that the very characteristics that advance an arm’s constitutional protection would simultaneously justify its confiscation.⁶

⁶ Judge Kavanaugh explained that the distinction between offensive and defensive weapons is illusory. *Heller II*, 670 F.3d at 1290 (Kavanaugh, J., dissenting). Professor Johnson has called this phenomenon the “regulatory paradox”—observing that the same characteristics that make a firearm especially useful also make it dangerous. *See* Nicholas J. Johnson, *Supply Restrictions at the*

Despite *Heller*, the district court relied on evidence that the prohibited firearms and magazines are “especially dangerous” because they facilitate the rapid firing of a greater number of rounds, potentially increasing the fatalities resulting from gun violence. *Kolbe*, 2014 WL 4243633, at *15-17. Admittedly, semi-automatic handguns and rifles, and magazines with greater capacities, can facilitate the firing of a higher number of rounds, increasing the likelihood that a gun owner will successfully hit her intended target. With respect to the prohibited rifles, the characteristics of these firearms that allow for increased stabilization and decreased recoil also increase the likelihood that a gun owner will thwart a criminal attacker with fewer shots fired. These are among the primary characteristics that compel millions of upstanding Americans to choose them for the core, lawful purpose of self-defense. The people of Maryland understandably wish to halt criminal access to dangerous firearms. But the *Heller* Court’s refrain from entertaining evidence of the inherent and particular dangerousness of a class of protected arms indicates that such evidence cannot justify banning protected arms from law-abiding citizens. The district court should not have relied on this evidence to uphold Maryland’s ban on arms the court itself assumed to be protected.

Margins of Heller and the Abortion Analogue: Stenberg Principles, Assault Weapons, and the Attitudinalist Critique, 60 *Hastings L.J.* 1285 (2009).

C. Evidence That Protected Arms Are Used Against Law Enforcement Does Not Justify Taking Them From All Law-Abiding Citizens

Finally, the district court took special note of the State's evidence that the banned items pose a special risk to law enforcement officers. *Kolbe*, 2014 WL 4243633, at *15-17. But, as with evidence of a firearm's characteristics that make them attractive to criminals, *Heller* teaches that such evidence is irrelevant in determining whether a law banning them from all law-abiding citizens is substantially related to the government's interest in improving public safety.

In *Heller*, the petitioners argued that handguns "pose particular dangers to police officers Of the 55 police officers killed in felonies in 2005, 42 deaths were from handguns." Brief for Petitioners at 51-52, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 102223. But despite that tragic fact, the *Heller* Court gave D.C.'s evidence *no weight* in determining the validity of D.C.'s handgun ban. Instead, the Court held the law could not survive even intermediate scrutiny—i.e., the evidence did not establish a substantial relationship between banning handguns and reducing criminal misuse to improve public safety. *Heller*, 554 U.S. at 628-29, 635-36.

Here, the district court highlighted evidence that the prohibited rifles and magazines have been used in 19.4% and 31-41% of firearm-related police

homicides, respectively. *Kolbe*, 2014 WL 4243633, at *16 (citing Violence Policy Center, “*Officer Down*”: *Assault Weapons and the War on Law Enforcement*, at 5 (citing FBI data from 1998-2001); Koper Declaration at ¶ 35 (cherry-picking data from 1994 alone)). As an initial matter, this evidence does not indicate whether the type of firearm or magazine used had any impact on the outcome of the attack. But even if it did, both the outcome and analysis of *Heller* instruct that the court’s reliance on such evidence was improper. The district court failed to explain why statistics regarding the use of protected arms against police were wholly irrelevant to the consideration of D.C.’s ban on handguns, but are somehow determinative of the validity of Maryland’s ban on protected arms.

While addressing violent crime, including violence against law enforcement officers, is a worthy goal, and while some may believe that prohibition is the answer, “the enshrinement of constitutional rights necessarily takes certain policy choices off the table,” *including* the prohibition of protected arms in common use for self-defense. *See Heller*, 554 U.S. at 636. The court’s reliance on evidence that protected arms can also be used against law enforcement to uphold a complete ban on those protected items by all law-abiding citizens ignores *Heller*’s clear message on this point.

It was not for the district court to determine that, in its estimation, the

Second Amendment's protections for commonly owned rifles and magazines were not "*really worth* insisting upon" simply because the State's evidence gave the court hope that doing away with those protections *might* potentially have some impact on public safety. *Id.* at 634.

CONCLUSION

Amici and its members share a deep interest with the state of Maryland in keeping the prohibited rifles and magazine, and all other dangerous arms, out of the hands of criminals. But rather than target the unlawful acquisition and use of these arms, Maryland has banned them from all law-abiding citizens. At the State's urging, the district court improperly held that the government may strip law-abiding citizens of their rights to access and use constitutionally protected arms in their homes in an attempt to curb the unlawful use of those items by a small segment of society. This reasoning lies in direct conflict with controlling Supreme Court precedent that makes clear that removing dangerous, but commonly chosen, arms from all law-abiding citizens lacks the required fit with the government's public safety interests under both intermediate and strict scrutiny.

The Court should reverse the judgment below to restore the rights of Maryland residents to access and use exceedingly common rifles and magazines for lawful purposes.

Dated: November 12, 2014

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure Rule 32(a)(7)(B) because this brief contains 5689 words, excluding the parts of the brief exempted by Federal Rules of Appellate Procedure Rule 32(a)(7)(B)(iii).

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Dated: November 12, 2014

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CERTIFICATE OF SERVICE

Case: *Stephen V. Kolbe, et al. v. Martin J. O'Malley, et al.*,
No.: 14-1945

I certify that the foregoing document's filing and service deadline was November 11, 2014, but due to the Clerk's Office's inaccessibility due to a state holiday (i.e., Veteran's Day), the foregoing was filed and served on November 12, 2014.

I further certify that on November 12, 2014, 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:

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