

No. 21-902

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

Dominic Bianchi, *et al.*,

Petitioners,

v.

Brian E. Frosh, in his official capacity as
Attorney General of Maryland, *et al.*,

Respondents.

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

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

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Western States Sheriffs' Association

National Association of Chiefs of Police

California State Sheriffs' Association

International Law Enforcement Educators and Trainers Association

Law Enforcement Legal Defense Fund

Second Amendment Law Center

Association of New Jersey Rifle & Pistol Clubs

Connecticut Citizens Defense League

CRPA Foundation

Delaware State Sportsmen's Association

Gun Owners' Action League Massachusetts

Gun Owners of California

Maryland State Rifle & Pistol Association

Vermont Federation of Sportsmen's Clubs

Vermont State Rifle and Pistol Association

Virginia Shooting Sports Association.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT	5
I. THE RIFLES BANNED BY MARYLAND ARE FUNCTIONALLY NO DIFFERENT FROM OTHER COMMONLY POSSESSED SEMIAUTOMATIC RIFLES.....	5
A. The AR-15 rifle is the most commonly possessed arm in America	5
B. The banned rifles are not machine guns	8
C. The rifles banned by Maryland are not “weapons of war”	11
II. THE SEMIAUTOMATIC RIFLES BANNED BY MARYLAND ARE NOT “EXCEPTIONALLY LETHAL”	14

A. The AR-15's rate of fire is no different from non-banned semiautomatic handguns, rifles, and shotguns14

B. The cartridge typically used by AR-15s is on the low end of the rifle power spectrum.....18

III. THE FIREARMS BANNED BY MARYLAND ARE SUITABLE FOR HOME DEFENSE AND LAW ENFORCEMENT PURPOSES.....20

IV. THE BANNED FIREARMS ARE RARELY USED IN CRIME AND ARE NOT USED IN MOST MASS SHOOTINGS.....23

V. THE FIREARMS BANNED BY MARYLAND ARE NOT USED DISPROPORTIONATELY IN SHOOTINGS OF LAW ENFORCEMENT OFFICERS27

CONCLUSION29

TABLE OF AUTHORITIES

Page

CASES

<i>Caetano v. Massachusetts</i> , 577 U.S. 411, 136 S. Ct. 1027 (2016).....	11
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).....	7
<i>Friedman v. City of Highland Park</i> , 784 F.3d 406 (7th Cir. 2015).....	10
<i>Heller v. District of Columbia</i> , 670 F.3d 1244 (D.C. Cir. 2011).....	10
<i>Kolbe v. Hogan</i> , 813 F.3d 160 (4th Cir. 2016).....	<i>passim</i>
<i>Kolbe v. Hogan</i> , 849 F.3d 114 (4th Cir. 2017) (<i>en banc</i>).....	<i>passim</i>
<i>New York State Rifle & Pistol Ass’n</i> <i>v. Cuomo</i> , 804 F.3d 242, 262 (2015).....	23
<i>Staples v. United States</i> , 511 U.S. 600 (1994).....	9, 12, 17
<i>Woollard v. Gallagher</i> , 712 F.3d 865 (4th Cir. 2013).....	28
<i>Worman v. Healey</i> , 922 F.3d 26 (1st Cir. 2019).....	19, 20, 23

CONSTITUTIONS, STATUTES, AND
REGULATIONS

U.S. CONST., AMEND II.....	<i>passim</i>
----------------------------	---------------

26 U.S.C. § 5845(b).....	8
2 Code of Colo. Reg. 406-2-I-203(A)(1)	19
4 Va. Admin. Code 15-270-10	19
Wash. Admin. Code 220-414-020(1)(c)	19

OTHER AUTHORITIES

Judith Bonderman, <i>In Search of Justice: Compensation for Victims of Assault Weapon Violence, 20 PRODUCT SAFETY & LIABILITY REP. 662 (Jun. 26, 1992)</i>	16
DENNIS P. CHAPMAN, <i>THE AR-15 CONTROVERSY: SEMIAUTOMATIC RIFLES AND THE SECOND AMENDMENT (2022)</i>	13, 17
The Dealer Wire, <i>NSSF-Adjusted NICS Background Checks for December 2021 (Jan. 7, 2022)</i>	7
EDWARD C. EZELL, <i>SMALL ARMS OF THE WORLD: A BASIC MANUAL OF SMALL ARMS (12th ed. 1990)</i>	17
FBI UCR (2010), Table 27 (Law Enforcement Officers Feloniously Killed, Type of Weapon, 2001–2010).....	29
FBI UCR (2020), Murder Victims by Weapon, 2016-2020	23

FBI UCR (2020) Table 28 (Law Enforcement Officers Feloniously Killed, Type of Weapon, 2011-2020).....	29
Mark Follman <i>et al.</i> , <i>A Guide to Mass Shootings in America</i> (updated Nov. 30, 2021)	25
Mark Follman <i>et al.</i> , <i>More Than Half of Mass Shooters Used Assault Weapons and High-Capacity Magazines, MOTHER JONES</i> (Feb. 27, 2013)	24
Mark Follman <i>et al.</i> , <i>US Mass Shootings, 1982–2021: Data From Mother Jones’ Investigation</i> , MOTHER JONES (Nov. 30, 2021)	25
GUNS & AMMO, <i>Cartridge Distance for Deer and Elk 6</i> , (Feb. 2022).....	19
Clint Hebert, <i>Lever Action Way of Life</i> , NORTH AMERICAN WHITETAIL (July 15, 2021)	13
H.R. REP. NO. 103-489 (1994)	15, 23
NICHOLAS J. JOHNSON, <i>ET AL.</i> , FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY (2022)	19

William J. Krouse and Daniel J. Richardson, <i>Congressional Research Service, Mass Murder with Firearms: Incidents and Victims 1999-2013</i> (Jul. 30, 2015).....	25
Massachusetts Municipal Police Training Committee, Basic Firearms Instructor Course: Patrol Rifle 3 (2007)	21
Joseph D. McNamara, <i>The Need for Gun Control: Developing a Rational, National Firearms Policy</i> , THE POLICE CHIEF 26 (Mar. 1998).....	16
MILITARY-TODAY.COM, <i>Assault and Battle Rifles</i>	12
NATIONAL SHOOTING SPORTS FOUNDATION, MODERN SPORTING RIFLE (MSR) COMPREHENSIVE CONSUMER REPORT 12 (2013).....	27
National Shooting Sports Foundation, <i>NSSF Releases Most Recent Firearm Production Figures</i> (Nov. 16, 2020)	6
National Shooting Sports Foundation, <i>Understanding America's Rifle</i>	6
Jon Schuppe, <i>America's Rifle: Why So Many People Love the AR-15</i> , NBC NEWS (Dec. 27, 2017).....	6
Josh Sugarmann, <i>Assault Weapons and Accessories in America</i> , unpaginated Conclusion (1988).....	10, 11

GABRIEL SUAREZ, THE TACTICAL RIFLE: THE PRECISION TOOL FOR URBAN POLICE OPERATIONS (1999).....	20
United States Department of the Army, Field Manual 3-22.9, Rifle Marksmanship: M16-/M4-Series Weapons (2008).....	17
United States Department of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives, <i>Firearms Commerce in the United States, Annual Statistical Update 2021</i> (Oct. 1, 2021)	7
E. Gregory Wallace, “Assault Weapon” <i>Lethality</i> , 88 TENN. L. REV. 1 (2020).....	17, 22
E. Gregory Wallace, “Assault Weapon” <i>Myths</i> , 43 SO. ILL. U. LAW J. 193 (2018)	8, 14, 15
R. L. WILSON, WINCHESTER: AN AMERICAN LEGEND (1991).....	13

INTEREST OF *AMICI CURIAE*¹**Western States Sheriffs' Association**

The Western States Sheriffs' Association was established in 1993, and consists of more than six hundred members from seventeen member states. In all of those states except California, possession of modern sporting rifles is legal and it is the experience of WSSA members that nearly all citizens who possess them use them for lawful purposes.

National Association of Chiefs of Police

The mission of the National Association of Chiefs of Police, a non-profit organization founded in 1967, is to promote and support the law enforcement profession. Membership is limited to command staff officers, and it currently has over 7,000 members.

California State Sheriffs' Association

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

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

International Law Enforcement Educators and Trainers Association

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

Law Enforcement Legal Defense Fund

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

Second Amendment Law Center

The Second Amendment Law Center is a leading Second Amendment scholarship and legal resource center committed to the preservation of the Second Amendment. Its mission is to reinforce the Second Amendment's solemn command that our government never unduly restrict law-abiding individuals from responsibly owning and using firearms.

The following are groups that promote the shooting sports, provide firearms safety training, enhance marksmanship, educate the public about firearms, and defend the rights protected by the Second Amendment:

Association of New Jersey Rifle & Pistol Clubs, CRPA Foundation, Connecticut Citizens Defense League, Delaware State Sportsmen's Association, Gun Owners' Action League Massachusetts, Gun Owners of California, Maryland State Rifle & Pistol Association, Vermont Federation of Sportsmen's Clubs, Vermont State Rifle & Pistol Association, and Virginia Shooting Sports Association.

SUMMARY OF ARGUMENT

The Petition should be granted because Courts of Appeals that have upheld bans such as Maryland's have relied on provably false claims that make it seem as if AR-15s and other banned rifles (modern sporting rifles, or MSRs) are somehow vastly different from and more dangerous than ordinary semiautomatic rifles. They are not.

The AR-15 is the most commonly possessed arm in the country. The best government and industry data show that there were at least 21 million MSRs in the national stock as of 2019. Because 40 million firearms were sold in 2020 and 2021, that number is likely much higher today.

MSRs are not machine guns, which are fully automatic weapons. A machine gun fires as long as the trigger is depressed or until it runs out of ammunition. AR-15s are ordinary semiautomatics and fire only once when the trigger is pulled, just like all firearms that are not fully automatic. This Court has recognized that distinction as fundamental. Bans on AR-15s and similar semiautomatics were enacted only after a program deliberately designed to mislead

legislatures and the public about so-called “assault weapons” began in the late 1980s.

MSRs are not “weapons of war,” as some Courts of Appeals have stated. The militaries of all nations use only fully automatic or selective-fire rifles as their main battle rifles. None of them use rifles that are solely semiautomatic, and all of the rifles banned by Maryland are solely semiautomatic. In addition, there has historically been great overlap between firearms developed for commercial or civilian use, which then are adopted by the military, and those developed for military use, which then come to be commonly used by civilians.

Nor are they “exceptionally lethal.” Some Courts of Appeals state that semiautomatic rifles can fire 300-500 rounds per minute, and therefore the difference between their firing rate and that of machine guns is “slight.” Those claims are unsubstantiated. The U.S. Army places the effective rate of fire of M4s and M16s in semiautomatic mode at 45 rounds per minute. The cartridge most often used in the AR-15 platform is not especially powerful; it is very near the bottom of the power spectrum for centerfire rifle cartridges.

MSRs are well-suited to home defense and law enforcement use because they are relatively light and accurate, have low recoil, are maneuverable and ergonomic, and use bullets that tend not to overpenetrate walls.

Contrary to some claims by courts, hard evidence shows that MSRs are very rarely used in crime and

are not used in most mass shootings. They are also not used disproportionately in killings of law enforcement officers.

ARGUMENT

I. THE RIFLES BANNED BY MARYLAND ARE FUNCTIONALLY NO DIFFERENT FROM OTHER COMMONLY POSSESSED SEMI-AUTOMATIC RIFLES.

The Petition should be granted because Courts of Appeals upholding such bans have relied on provably false claims that AR-15s and other banned rifles are somehow vastly different from and more dangerous than ordinary semiautomatic rifles. They are not. The Courts of Appeals quote each other and have created a jurisprudence based on misinformation that perpetuates the denial of Second Amendment rights to tens of millions of law-abiding American citizens. Only this Court can correct these errors and place Second Amendment jurisprudence on a solid factual and jurisprudential foundation.

A. The AR-15 rifle is the most commonly possessed arm in America.

The main target of Maryland's centerfire rifle ban is the AR-15 platform rifle, owned by millions for self-defense and other lawful purposes. The AR-15 "remains a jewel of the gun industry, the country's

most popular rifle, irreversibly lodged in American culture.”²

The National Shooting Sports Foundation (“NSSF”) is the leading firearms industry trade group, and produces the best data (based on government and industry figures) regarding the number of firearms produced and sold. It uses the term “modern sporting rifle” (“MSR”) to describe modern semiautomatic rifles, including the AR-15 and its offspring.³ In November 2020, based on production data through 2018, the NSSF estimated that “[s]ince 1990, there are an estimated 19.8 million Modern Sporting Rifles (MSRs) in circulation today.”⁴

Production, import, and export data for 2019 were not yet available at the time of the NSSF report, but are available now. According to ATF figures the total number of rifles made available for purchase on the American market in 2019 was 2,470,129. There were 1,957,667 rifles manufactured domestically, with 136,241 rifles bound for export, and 648,703 rifles

² Jon Schuppe, *America’s Rifle: Why So Many People Love the AR-15*, NBC NEWS (Dec. 27, 2017).

³ NSSF, *Understanding America’s Rifle*, <https://www.nssf.org/msr/>. Many manufacturers produce rifles based on the Colt AR-15. As used in this brief, “AR-15” includes those rifles made by other manufacturers.

⁴ NSSF, *NSSF Releases Most Recent Firearm Production Figures* (Nov. 16, 2020) (“NSSF 2020 Production Report”).

imported.⁵ Approximately one-half (48%) of all rifles produced and imported (less exports) in 2018 were MSRs.⁶ If the proportion is similar for 2019, there were well over 21 million MSRs as of 2019. Approximately 40 million firearms were sold in 2020 and 2021.⁷ Today the number of MSRs in the national stock must substantially exceed the figure of 21 million.

The AR-15 is clearly in “common use” by law-abiding citizens. As explained below, the AR-15 is well-suited for the lawful purpose of self-defense and is commonly used for that purpose. Thus, contrary to *Kolbe v. Hogan*,⁸ the AR-15 is a protected arm under the Second Amendment.⁹

⁵ United States Department of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives, *Firearms Commerce in the United States, Annual Statistical Update 2021*, 2, 4, 6 (Oct. 1, 2021).

⁶ NSSF 2020 Production Report.

⁷ The Dealer Wire, *NSSF-Adjusted NICS Background Checks for December 2021* (Jan. 7, 2022).

⁸ *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (*en banc*) (“*Kolbe*”). The Fourth Circuit stated in the instant case that it could not find for plaintiffs because it was powerless to overturn the *en banc* decision in *Kolbe*. App. 3a.

⁹ See *District of Columbia v. Heller*, 554 U.S. 570, 624-25 (2008).

B. The banned rifles are not machine guns.

While the AR-15 looks like a fully automatic military M16 rifle or M4 carbine, it is not a machine gun, nor does it fire as rapidly as a machine gun. The AR-15 is a semiautomatic rifle. It does not “spray fire” like a machine gun.¹⁰

The panel opinion in *Kolbe* correctly explains:

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.” By contrast, an automatic rifle, like an M-16, will continuously discharge rounds “for as long as the trigger [is depressed or] until the magazine is empty.”¹¹

The semiautomatic rifles banned by Maryland are like all other firearms that are not machine guns, including semiautomatic rifles, semiautomatic pistols, revolvers, semiautomatic shotguns, pump-action shotguns, bolt-action rifles, slide-action rifles, and lever-action rifles: the operator pulls the trigger once, and the gun fires once.

¹⁰ E. Gregory Wallace, “Assault Weapon” Myths, 43 SO. ILL. U. LAW J. 193, 197-99, 211-22 (2018).

¹¹ *Kolbe v. Hogan*, 813 F.3d 160, 169 n.1 (4th Cir. 2016) (citations omitted). See also 26 U.S.C. § 5845(b) (definition of machine gun).

What Maryland calls “assault weapons” have traditionally been considered to be firearms that can lawfully be owned and used by ordinary citizens. In *Staples v. United States*, this Court recognized the fundamental distinction between machine guns and semiautomatics:

The AR-15 is the civilian version of the military’s M-16 rifle, and is, unless modified, a semiautomatic weapon. The M-16, in contrast, is a selective fire rifle that allows the operator, by rotating a selector switch, to choose semiautomatic or automatic fire.¹²

As *Staples* observed, machine guns are heavily regulated and must be registered with the federal government under pain of severe penalties.¹³ Unlike machine guns and a few other items regulated by the National Firearms Act, civilian AR-15s are among those firearms that “traditionally have been widely accepted as lawful possessions....”¹⁴

Ban proponents exploit confusion surrounding so-called “assault weapons” by portraying them as operating like machine guns and thus being much more dangerous than other rifles. For example, in 1988 Josh Sugarmann, a gun control activist who is Executive Director of the Violence Policy Center, explained why it would be easier to demonize certain

¹² *Staples v. United States*, 511 U.S. 600, 603 (1994).

¹³ *Id.* at 602-03.

¹⁴ *Id.* at 612.

semiautomatics based on their appearance and other factors:

[H]andgun restriction is simply not viewed as a priority. Assault weapons ... are a *new* topic. The weapons' menacing looks, coupled with *the public's confusion over fully automatic machine guns versus semi-automatic assault weapons—anything that looks like a machine gun is assumed to be a machine gun*—can only increase the chance of public support for restrictions on these weapons.¹⁵

This misperception repeatedly appears in federal court decisions. For example, the Seventh Circuit, without citation, described the banned “assault weapons” as being “designed to spray fire rather than to be aimed carefully.”¹⁶ This is myth, not fact.

Mr. Sugarmann also conceded that the “assault weapons” he wanted to ban are indistinguishable (except by appearance) from ordinary semiautomatic firearms:

¹⁵ Josh Sugarmann, *Assault Weapons and Accessories in America*, unpaginated Conclusion (1988) (“Sugarmann, Assault Weapons”) (emphasis added).

¹⁶ *Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015); see also *Heller v. District of Columbia*, 670 F.3d 1244, 1263 (D.C. Cir. 2011) (“*Heller II*”) (“assault weapon” pistol grips “allow the shooter to spray-fire from the hip position.” Actually, pistol grips assist shoulder-firing, and make shooting from the hip more difficult.

Defining an assault weapon—in legal terms—is not easy. It’s not merely a matter of going after guns that are “black and wicked looking.” ... [I]t’s extremely difficult to develop a legal definition that restricts the availability of assault weapons without affecting legitimate semi-automatic guns.¹⁷

That is because there is no functional difference between ordinary semiautomatic rifles and those banned as so-called “assault weapons.”

C. The rifles banned by Maryland are not “weapons of war.”

Kolbe first stigmatizes modern sporting rifles as “weapons of war,” and then concludes that arms “most useful in military service” are not protected by the Second Amendment.¹⁸ That is the reverse of the standard applied in *Heller*, that bearable arms useful in warfare, as well as arms commonly used for lawful non-military purposes such as self-defense, are protected.¹⁹

Kolbe fails to identify any national military force in the world that uses the AR-15 or other semiautomatic-only rifle as its standard service rifle.

¹⁷ Sugarmann, Assault Weapons.

¹⁸ *Kolbe*, 849 F.3d at 121.

¹⁹ *Heller*, 554 U.S. at 624-25. See *Caetano v. Massachusetts*, 577 U.S. 411, 136 S. Ct. 1027, 1028 (2016) (rejecting the proposition that “only those weapons useful in warfare are protected.” (emphasis added)).

All military self-loading rifles are either automatic or selective fire (that is, they can be switched between automatic and semiautomatic).²⁰ This capability to fire in automatic mode is a uniquely-military feature.²¹ That is why this Court in *Staples* described the semiautomatic-only AR-15 as the *civilian* version of the M16.²²

Kolbe never explains how the AR-15 is “most useful in military service” when it lacks the capability for military applications requiring automatic fire. *None* of the battle rifles for the nations of the world are solely semiautomatic, but *all* of the Maryland banned rifles are solely semiautomatic.

The *Kolbe* test also is unworkable. Small arms have never been nicely separated into distinct categories of “military firearms” designed for the

²⁰ EDWARD C. EZELL, *SMALL ARMS OF THE WORLD: A BASIC MANUAL OF SMALL ARMS* 6-843 (12th ed. 1990) (containing descriptions by country); *see also* MILITARY-TODAY.COM, *Assault and Battle Rifles*, <http://www.military-today.com/firearms.htm> (listing all military assault and battle rifles used, by country; all have automatic capability as indicated by the “cyclic rate” listing for fully automatic fire). This source contains a short listing of semiautomatic rifles. However, these are all either obsolete or designed for the civilian market. None is the current assault or battle rifle for any nation’s military.

²¹ DENNIS P. CHAPMAN, *THE AR-15 CONTROVERSY: SEMIAUTOMATIC RIFLES AND THE SECOND AMENDMENT* 110-11 (2d ed. 2022).

²² *Staples*, 511 U.S. at 603.

battlefield and “civilian firearms” designed for hunting, target shooting, or self-defense.

As *Heller* recognizes, civilians have been using “weapons of war” since musket days. American militiamen in the colonial and revolutionary era fought with weapons they used for home defense.²³ The repeating rifles that first debuted in the Civil War evolved into the lever action rifles used by soldiers and civilians alike in the Old West, such as the iconic Winchester Model 1873.²⁴ Lever-action rifles manufactured by Winchester, Henry, Marlin, and others still are popular among hunters today.²⁵

The semiautomatic M1 Garand rifle and M1 carbine were used by the U.S. military in World War II and Korea. Civilian versions are sold commercially, and military surplus versions have been available for decades to qualified rifle clubs through the federal government’s Civilian Marksmanship Program.²⁶

Popular civilian handguns such as the iconic Browning-designed 1911, the Beretta 92 FS, and the SIG-Sauer P226 all were designed for and used by the U.S. military.²⁷ The Glock 17, probably the most

²³ *Heller*, 554 U.S. at 624-25, 627.

²⁴ R. L. WILSON, WINCHESTER: AN AMERICAN LEGEND 10-41 (1991).

²⁵ Clint Hebert, *Lever Action Way of Life*, NORTH AMERICAN WHITETAIL (July 15, 2021).

²⁶ CHAPMAN, THE AR-15 CONTROVERSY at 104-08.

²⁷ Wallace, “Assault Weapon” Myths at 201.

widely-owned civilian handgun in the world today, initially was designed for the Austrian military and police.²⁸ The bestselling gun in Remington Arms history, the Remington 870 pump-action shotgun, is commonly used by both civilians and militaries worldwide.²⁹

Does *Kolbe*'s “most useful in warfare” test mean that muzzleloading muskets and rifles, lever action rifles, single shot rifles, bolt action rifles, semiautomatic handguns, and semiautomatic rifles—that is, *virtually all modern firearms* and some not so modern—fall outside the scope of the Second Amendment's protection? That is where the logic of *Kolbe*'s analysis leads.

II. THE SEMIAUTOMATIC RIFLES BANNED BY MARYLAND ARE NOT “EXCEPTIONALLY LETHAL.”

A. The AR-15's rate of fire is no different from non-banned semiautomatic handguns, rifles, and shotguns.

Kolbe asserts that the rate of fire for the semiautomatic-only AR-15 is “nearly identical” to the military M16 firing in automatic mode.³⁰ It claims that any difference in the rates of fire is “slight,” citing as authority a 1994 congressional report stating that “[s]emiautomatic weapons can be fired at rates

²⁸ *Id.* at 201-02.

²⁹ *Id.* at 202.

³⁰ 849 F.3d at 136.

of 300 to 500 rounds per minute, making them virtually indistinguishable in practical effect from machine guns.”³¹ It further asserts that a semiautomatic rifle like the AR-15 can empty a 30 round magazine in five seconds.³²

The sources for these rate-of-fire claims are not firearms experts, military operators, or even experienced AR-15 shooters. Instead, they are advocates for “assault weapon” bans.³³ *Kolbe’s* “300 to 500 rounds per minute” figure can be traced to 1991 congressional testimony from Dewey R. Stokes, president of the national Fraternal Order of Police and a leading gun-control advocate.³⁴ Stokes cited no authority to support his claim.

Kolbe’s source for the claim that one can empty a 30 round magazine in five seconds is *Heller II*, which cites Brian Siebel, an attorney and lobbyist for the Brady Center to Prevent Gun Violence, a gun-control organization.³⁵ Siebel obtained that figure from an article authored by another gun control advocate.³⁶

³¹ *Id.* at 125 ((internal quotation marks omitted) (quoting H.R. REP. NO. 103-489 at 18 (1994)).

³² *Id.* at 125, 136.

³³ See Wallace, “Assault Weapon” *Myths* at 195.

³⁴ *Id.* at 220-21.

³⁵ *Heller II*, 670 F.3d at 1263.

³⁶ Judith Bonderman, *In Search of Justice: Compensation for Victims of Assault Weapon Violence*, 20 PRODUCT SAFETY & LIABILITY REP. 662 (Jun. 26, 1992).

That article in turn cited a 1988 police trade magazine article by San Jose Police Chief Joseph McNamara, another gun-control advocate.³⁷ McNamara's police department test-fired a confiscated Uzi submachine gun in both automatic and semiautomatic modes. McNamara did not specify the model of the Uzi, nor did he provide any information about the caliber, skill of the person firing semiautomatically, reliability of the timing procedures, who (if anyone) witnessed and verified this alleged test, or any other particulars to judge the test's validity. There is no way to verify the accuracy of McNamara's results.

Thus, the claims in *Kolbe* about the AR-15's high rate of fire are based on two unsubstantiated reports three decades old from ban proponents. Determinations by courts that affect the constitutional rights of citizens should not be based on uncritical acceptance of unverified, anecdotal claims.

Reliable evidence exists to determine the semiautomatic-only AR-15's rate of fire. When firing in automatic mode, the military's M-16 rifle and smaller M4 carbine have a cyclic (mechanical) rate of fire of 700 to 900 rounds per minute (12 to 15 rounds

³⁷ Joseph D. McNamara, *The Need for Gun Control: Developing a Rational, National Firearms Policy*, THE POLICE CHIEF 26 (Mar. 1998).

per second),³⁸ and thus can empty a standard 30-round magazine in two to two-and-a-half seconds. By contrast, the civilian AR-15 lacks the ability to fire multiple shots with one pull of the trigger and thus does not fire nearly as fast. It can fire only as fast as the shooter can pull the trigger.

The AR-15's rate of fire slows even more when the shooter engages in aimed semiautomatic fire at multiple or moving targets. The U.S. Army's Field Manual sets the maximum *effective* rate of fire for an M16 or M4 in semiautomatic mode at 45 rounds per minute, or less than one round per second.³⁹

Kolbe's contention that the rate of fire for semiautomatic rifles is almost the same as fully automatic ones is utterly unsupported.

Nearly identical or even faster rates of fire can be achieved by semiautomatic handguns, shotguns, and non-banned rifles.⁴⁰ Because all semiautomatic firearms operate the same way—one round fired for each trigger pull with automatic loading of the next round—they have comparable rates of fire. The AR-15 is no more lethal in its rate of fire than other semiautomatic firearms.

³⁸ U.S. Dep't of the Army, Field Manual 3-22.9, Rifle Marksmanship: M16-/M4-Series Weapons at 2-11 (2008).

³⁹ *Id.* at 2-1.

⁴⁰ See E. Gregory Wallace, "Assault Weapon" Lethality, 88 TENN. L. REV. 1, 24-27 (2020) (comparing rates of fire across semiautomatic firearm platforms).

B. The cartridge typically used by AR-15s is on the low end of the rifle power spectrum.

Federal courts upholding bans on MSRs have assumed the AR-15 is exceptionally lethal because its bullets somehow penetrate barriers more easily and supposedly cause more devastating wounds than other firearms. In fact, the AR-15 typically fires a .223 caliber cartridge that is very near the bottom of the power range for centerfire rifles.

Like most modern centerfire rifles, the AR-15 fires bullets at a higher velocity than modern handguns. But more velocity does not necessarily mean more devastating terminal performance. A ping-pong ball and a rifle bullet fired at the same velocity will produce very different impacts.

A cartridge's power is measured by the energy it is capable transferring to a target when it hits. This is known as *kinetic energy*, and when measured at the moment a bullet exits the muzzle of a gun is called *muzzle energy*. Muzzle energy generally is given in "foot-pounds." It is derived from a formula that includes the mass (weight) of the bullet and the velocity at which it leaves the barrel.

There is nothing special or magical about the .223 caliber cartridge typically used in AR-15s.⁴¹ Centerfire rifle cartridges come in a wide spectrum of sizes and calibers. The muzzle energy of the .223 is

⁴¹ Some AR-15s can fire the 5.56mm cartridge used by the military. It is virtually identical to the .223 caliber cartridge.

very much toward the less powerful end of the spectrum for centerfire rifles. The .223 cartridge in the most common bullet weights (55 grain and 62 grain) generates about 1300 foot-pounds of energy.⁴² Popular military and hunting calibers—for example, the .308 Winchester and .30-06 Springfield—are more than twice as powerful as the .223 cartridge. Those cartridges generate around 2670 and nearly 3000 foot-pounds of muzzle energy, respectively.⁴³

Both the .308 and the 30-06 are popular deer and big game cartridges. In some states, it is illegal to hunt deer with the .223 cartridge typically used in the AR-15, because it is considered too *underpowered* to result in clean, humane kills.⁴⁴ A popular shooting sports magazine recently published a chart of thirty-two cartridges that can be used on deer and, in some cases, elk. The .223 cartridge was ranked as having the least muzzle energy of those cartridges.⁴⁵

Kolbe and the First Circuit’s *Worman* decision assert that one reason “assault weapons” are more deadly than other firearms is that their bullets can penetrate walls and endanger people on the other

⁴² NICHOLAS J. JOHNSON, *ET AL.*, FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 1192 (2022).

⁴³ *Id.*

⁴⁴ See, e.g., 2 Code of Colo. Reg. 406-2-I-203(A)(1); 4 Va. Admin. Code 15-270-10; Wash. Admin. Code 220-414-020(1)(c).

⁴⁵ GUNS & AMMO, *Cartridge Distance for Deer and Elk* 6 (Feb. 2022).

side.⁴⁶ But nearly all handgun, rifle, and shotgun rounds will pass through walls. Generally, .223/5.56mm bullets penetrate *less* through building materials than common handgun and shotgun rounds.⁴⁷

Kolbe also emphasizes that rounds from “assault weapons” such as the AR-15 “easily pass through the soft body armor worn by most law enforcement officers.”⁴⁸ But this is true of *all* centerfire rifles. Soft body armor only stops rounds from handguns and shotguns; centerfire rifle rounds require steel, ceramic, or composite hard plates.

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

In applying “balancing tests” such as intermediate scrutiny, the Courts of Appeals have generally considered only what they consider to be the dangers of AR-15 platform rifles, and have not considered the advantages of that platform for home defense.

⁴⁶ *Kolbe*, 849 F.3d at 127; *Worman v. Healey*, 922 F.3d 26, 37 (1st Cir. 2019).

⁴⁷ See GABRIEL SUAREZ, *THE TACTICAL RIFLE: THE PRECISION TOOL FOR URBAN POLICE OPERATIONS* 38 (1999) (walls are more easily penetrated by pistol calibers; concerns about .223/5.56 overpenetration and resulting danger to the public have been greatly exaggerated; such rounds are safer than pistol bullets because they tend to fragment when shot through a wall, reducing penetration).

⁴⁸ *Kolbe*, 849 F.3d at 127.

AR-15 platform rifles are preferred by law enforcement for several important reasons, and the reasons many civilians prefer them for home defense are similar. A training course in the Patrol Rifle (AR-15) for Massachusetts Municipal Police points out advantages of that rifle in a number of common circumstances: The materials for the course state that:

The [AR-15] rifle is a superior tool. It allows the officer to either stand off from the threat or, if the situation requires, advance to the threat with the confidence that the tool in their hands can deal with almost any perceived threat.⁴⁹

After noting that the AR-15 platform has sufficient power, the course manual states that “[t]he longer sight radius makes it potentially a more accurate weapon which lowers the liability to the department.”⁵⁰

The AR-15 is comparatively easy to shoot. Its lighter weight, shorter barrel, and ergonomic stock and grip make it easier to handle than most long guns. These features make it more maneuverable inside rooms and hallways for both law enforcement officers and civilian home defense. The longer sight radius and increased accuracy provide the same benefits to civilians as to law enforcement. The AR-

⁴⁹ Massachusetts Municipal Police Training Committee, Basic Firearms Instructor Course: Patrol Rifle 3 (2007).

⁵⁰ *Id.*

15's reduced recoil makes it more manageable than larger hunting rifles or shotguns.⁵¹

The AR-15 also is safer for home defense than other firearms. The .223/5.56mm round for which most AR platform rifles are chambered also is adequate but not too powerful for home defense. As noted above, with the relatively light projectile fired in most AR-15s, there is less risk of overpenetration of walls than with larger caliber bullets, thus minimizing risk of stray rounds injuring or killing innocent persons in the next room, household, or street. This is an important consideration in law enforcement work, and to citizens acting in defense of their homes.

For these reasons, large numbers of law enforcement officers purchase AR-15 platform or AK pattern rifles for their own private ownership at home. According to a large-scale survey conducted by NSSF, 11% of private owners of modern sporting rifles had a law enforcement background.⁵² Of these, half were active law enforcement officers, and half were retired.⁵³ For respondents with a military or law enforcement background, "home defense" was the second most important reason (8.35 on a scale of 10)

⁵¹ See Wallace, "Assault Weapon" *Lethality* at 62-63.

⁵² NSSF, MODERN SPORTING RIFLE (MSR) COMPREHENSIVE CONSUMER REPORT 12 (2013).

⁵³ *Id.*

for owning an MSR, just slightly lower than “recreational target shooting” (8.86).⁵⁴

Despite the claims that the banned firearms are “exceptionally lethal weapons of war” with a “capability for lethality—more wounds, more serious, in more victims—far beyond that of other firearms in general, including other semiautomatic guns,”⁵⁵ the truth is more mundane: the banned firearms are just a subset of ordinary semiautomatic rifles, and are owned and used by many millions of law-abiding citizens and thousands of law enforcement agencies and officers for lawful purposes.

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

According to the FBI, the annual average number of homicides committed in the United States during the years 2016 through 2020 was 15,444. Only an average of 365, or 2.3%, were committed with rifles of all types.⁵⁶ Thus, though commonly and legally possessed in the many millions, rifles defined as

⁵⁴ *Id.* (unpaginated cross-tabulation tables).

⁵⁵ *Worman*, 922 F.3d at 31 (internal quotation marks omitted) (quoting H.R. Rep. No. 103-489 at 19–20 (1994)); *Kolbe*, 849 F.3d at 125, 137, 144 (same); *New York State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 262 (2015) (same).

⁵⁶ FBI Uniform Crime Reports, Murder Victims by Weapon, 2016-2020, available at <https://s3-us-gov-west-1.amazonaws.com/cg-d4b776d0-d898-4153-90c8-8336f86bdfec/CIUS/downloads/2020/expanded-homicide-2020.zip>.

“assault weapons” by Maryland are probably used to commit only around 1% of the homicides in this country. By contrast, far more homicides were committed during this period with “blunt objects” such as clubs and hammers (an average of 440, or 2.9%) than with all rifles.⁵⁷ Nearly twice as many were committed with “personal weapons” such as hands, fists, and feet (an average of 680, or 4.4%), and roughly five times as many using “knives or cutting instruments” (an average of 1,593, or 10.3%) than with all rifles.⁵⁸

Nor are the banned rifles used disproportionately in mass shootings. *Kolbe* claims, without citation, that “[o]ne 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...”⁵⁹ The opinion fails to mention that this “study” was not an academic study, but a sensational “investigation” by *Mother Jones* magazine.⁶⁰

Mother Jones keeps a running database for what it calls “mass shootings” and *Kolbe* also referred to

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Kolbe*, 849 F.3d at 126-27.

⁶⁰ Mark Follman *et al.*, *More Than Half of Mass Shooters Used Assault Weapons and High-Capacity Magazines*, MOTHER JONES (Feb. 27, 2013), <https://www.motherjones.com/politics/2013/02/assault-weapons-high-capacity-magazines-mass-shootings-feinstein/>.

these statistics as “mass shootings.”⁶¹ However, the materials gathered by *Mother Jones* relate only to mass *public* shootings—*i.e.*, shootings that occur in public places—not “mass shootings,” as the *Kolbe* opinion states.⁶²

The criteria used by *Mother Jones* for inclusion of an event as a mass public shooting are apparently quite subjective, non-standard, and *ad hoc*. “Mass shootings,” including “mass public shootings,” generally are distinguished from “spree” killings or “serial” killings, in which a perpetrator kills a number of people over a period of time in various locations.⁶³ *Mother Jones* admits this, but then includes 19 incidents (out of a total of 125 incidents) which it classifies as spree killings.⁶⁴ It also excludes an unknown number of mass shootings involving armed robbery, gang violence, or domestic violence in a

⁶¹ Mark Follman *et al.*, *A Guide to Mass Shootings in America* (updated Nov. 30, 2021), <https://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data/>.

⁶² See William J. Krouse and Daniel J. Richardson, *Congressional Research Service, Mass Murder with Firearms: Incidents and Victims 1999-2013* (Jul. 30, 2015) (“CRS Report”) (distinguishing between mass shootings and mass public shootings).

⁶³ *Id.* at 6.

⁶⁴ Data downloadable at Mark Follman *et al.*, *US Mass Shootings, 1982–2021: Data From Mother Jones’ Investigation*, MOTHER JONES (Nov. 30, 2021), <https://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data/>.

home.⁶⁵ It purports to study only shootings in public places, but then includes some that weren't in public places, such as "a party on private property in Crandon, Wisconsin, and another in Seattle, where crowds of strangers had gathered, essentially constituting a public crowd."⁶⁶

Furthermore, the *Mother Jones* lists all firearms that were "possessed" by the shooter, but does not specify which ones were actually used (most mass public shooters have had multiple firearms). In short, the data for the *Mother Jones* "investigation" is of distinctly questionable reliability.

The distinction between "mass shootings" and "mass public shootings" (*i.e.*, a mass shooting in a public place) is important. The Congressional Research Service defines "mass shooting" as a "multiple homicide incident in which four or more victims are murdered with firearms—not including the offender(s)—within one event, and in one or more locations in close geographical proximity."⁶⁷ The FBI definition of "mass murder" is essentially the same.⁶⁸ A "mass public shooting" is a mass shooting in which "at least some of the murders occurred in a public location or locations in close geographical proximity (e.g., a workplace, school, restaurant, or other public

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ CRS Report at 13.

⁶⁸ *Id.* at 2 (citing sources).

settings), and the murders are not attributable to any other underlying criminal activity or commonplace circumstance....”⁶⁹

While mass public shootings receive considerable media attention, they are quite rare. According to the CRS, during the period 1999-2013, mass public shootings constituted a small subset (about 4.4 incidents per year) of the average of approximately 21 mass shootings per year.⁷⁰

So-called “assault weapons,” even though they are possessed in the millions, are infrequently used in mass shootings. The CRS Report states that in only 31 out of 317 mass shootings were firearms that “could” be characterized as “assault weapons” carried or used. That is 9.7%, or fewer than one in ten mass shootings.⁷¹

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

Without citing a source, the *en banc* opinion in *Kolbe* argues that “Another study determined that assault weapons, including long guns and handguns, were used in 16% of the murders of on-duty law enforcement officers in 1994....” Whether unidentified data from an unknown source from 1994

⁶⁹ *Id.* at 16.

⁷⁰ *Id.* at 13.

⁷¹ *Id.* at 29.

is of much relevance may be questioned. What is unquestionable is that the vast majority of law enforcement officers who are slain on duty are killed with ordinary handguns, not with rifles, as more current information shows.

Nationwide, for the combined ten-year period 2011-2020, of the 503 law enforcement officers feloniously killed in the line of duty, 458 were slain with a firearm of some type.⁷² Of those killed with firearms, 326 (71.1%) were killed with handguns, far more than all rifles (20.1%), shotguns, and other firearms combined. A law enforcement officer is thus about three and a half times more likely to be killed with a handgun than a rifle. The rifles which Maryland calls "assault weapons," such as the AR-15 platform, would constitute only a fraction of the rifles used against law enforcement officers.⁷³

In the years 1990-2012, eight million AR and AK platform rifles were manufactured in the United States or imported from abroad.⁷⁴ As shown above, that number now is well over 21 million, in just nine years.

⁷² FBI UCR (2020) (Table 28, Law Enforcement Officers Feloniously Killed, Type of Weapon, 2011-2020).

⁷³ See also *Woollard v. Gallagher*, 712 F.3d 865, 877 (4th Cir. 2013) (evidence offered by Maryland shows that "handguns have persisted as 'the largest threat to the lives of Maryland's law enforcement officers'").

⁷⁴ *Kolbe*, Joint Appendix 1877.

So, if MSRs have multiplied by the millions, has the number of law enforcement officers killed by rifles jumped radically over the past decade or so? It has not. For the period 2001-2010, the total number of law enforcement officers killed with rifles of any kind was 99, or slightly less than ten per year.⁷⁵ Over the period 2011-2020, the total number killed with rifles was 95—again, a little less than ten per year.⁷⁶ Thus, while the number of MSRs was increasing rapidly, the number of law enforcement officers killed by rifles was staying about the same. While any law enforcement deaths are deeply regrettable, a ban on a subset of rifles is not an effectual means for protecting officers.

CONCLUSION

The Petition for Certiorari should be granted.

⁷⁵ FBI UCR (2010), Table 27 (Law Enforcement Officers Feloniously Killed, Type of Weapon, 2001–2010).

⁷⁶ FBI UCR (2020), Table 28 (Law Enforcement Officers Feloniously Killed, Type of Weapon, 2011-2020).

30

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