

In The
Supreme Court of the United States

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STEPHEN V. KOLBE, *et al.*,

Petitioners,

v.

LAWRENCE J. HOGAN, JR. GOVERNOR, *et al.*,

Respondents.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

—◆—
**BRIEF AMICUS CURIAE OF
PINK PISTOLS AND WOMEN AGAINST
GUN CONTROL AND THE NATIONAL
AFRICAN AMERICAN GUN ASSOCIATION
IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICI CURIAE¹

Amici are civil-rights organizations comprising segments of the American population that are disproportionately the targets of armed criminal violence. Amici therefore vigorously support the right to keep and bear arms.

Pink Pistols is a shooting society that honors gender and sexual diversity and advocates the responsible use of firearms for self-defense. Pink Pistols is open to all without regard to gender identity. Its creed is that, “Without self-defense, there *are* no gay rights.” It has chapters throughout the United States.

Women Against Gun Control has been a leading national advocacy group for women’s Second Amendment rights for more than two decades. Its philosophy is: “The Second Amendment *is* the Equal Rights Amendment.”

The National African American Gun Association (NAAGA) was founded to preserve, protect and defend the Second Amendment rights of members of the African American community with respect to firearm ownership, self-defense, and defense of the home. Its motto is: “Education. Training. Safety. Self-Defense. Advocacy. For and By African Americans.” NAAGA has

¹ No counsel for a party authored this brief in whole or in part nor did such counsel or any party make a monetary contribution to fund this brief. Preparation and submission of this brief was funded in part by the NRA Civil Rights Defense Fund. The parties have courteously consented to the filing of this brief. Parties received notice at least 10 days in advance.

chapters across the country, many of them named in honor of civil rights pioneers such as Harriet Tubman. NAAGA welcomes people of all religious, social and racial perspectives.



SUMMARY OF ARGUMENT

Amici are groups representing those who are far more likely than average to become victims of firearms violence: African Americans, women, and members of the Lesbian, Gay, Bisexual or Transgender community (LGBT). We are filing this brief to dispel the misleading and insulting caricature that supporters of Second Amendment rights are either tobacco-chewing, gap-toothed, camouflage-wearing rednecks or Hollywood-commando posers who are morbidly fascinated with firepower.



ARGUMENT

I. THIS COURT HAS STRESSED THE CRITICAL IMPORTANCE OF THE SECOND AMENDMENT FOR MINORITY GROUPS WHO ARE DISPROPORTIONATELY SUBJECT TO ARMED CRIMINAL VIOLENCE.

The occasion for this Court's application of the Second Amendment to the States was a case wherein the Court acknowledged that the right to keep and bear arms in self-defense "is especially important for women and members of other groups that may be especially vulnerable to violent crime." *McDonald v.*

Chicago, 561 U.S. 742, 790 & n.33 (2010) (citing amicus briefs – filed both there and in previous litigation – of Pink Pistols *et al.*, Women State Legislators *et al.* and Jews for the Preservation of Firearms Ownership).

During the Anti-Slavery Free-Soil movement that led to civil strife in the 1850s in “Bleeding Kansas,” abolitionist Senator Charles Sumner “proclaimed that ‘never was the rifle more needed in just self-defense than now in Kansas.’” *Id.* at 770 (brackets and citation omitted). In the aftermath of the Civil War, “the greatest outrages [were] perpetrated” on African Americans “by armed men who go up and down the country searching houses, disarming people, committing outrages of every kind and description.” *Id.* at 772 (citation omitted). The need for federal protection of the right to bear arms in self-defense was deemed especially exigent for “many of the over 180,000 African Americans who served in the Union Army [and then] returned to the States of the old Confederacy, where systematic efforts were made to disarm them and other blacks.” *Id.* at 771 (citing *District of Columbia v. Heller*, 554 U.S. 570, 614-16 (2008)). Returning Union veterans were stripped of the very rifles and revolvers which they had carried home from their combat service during the war. *See McDonald*, 561 U.S. at 772 (discussing a typical incident where the local “marshal took all arms from returned colored soldiers’”) (brackets and citation omitted); *id.* at 774 n.23 (Congressman complaining that it was a “disgrace to the Federal Government that the “reconstructed” State authorities

of Mississippi were allowed to rob and disarm our veteran soldiers.’”) (citation omitted).

Frederick Douglass memorably summarized the situation of American citizens – and in particular, that of citizens from minority groups – this way: “A man’s rights rest in three boxes: the ballot box, the jury box and the cartridge box.” This was never more true than during the era of Jim Crow. In a time when, on average, one black person was lynched every three days in the South, anti-lynching crusader Ida B. Wells wrote that a “Winchester rifle should have a place of honor in every black home, and it should be used for that protection which the law refuses to give.”²

A century and a half later, it is still the case that some groups have a particularly acute need for armed self-defense. The *McDonald* case presented the constitutional claim of Otis McDonald, an African American man “in his late seventies, [who] lives in a high-crime neighborhood,” where his role as “a community activist involved with alternative policing strategies and his efforts to improve his neighborhood have subjected him to violent threats from drug dealers.” 561 U.S. at 751. The Court acknowledged that, in such circumstances, “the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public

² IDA B. WELLS, SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES 16 (1892), available at <http://www.gutenberg.org/files/14975/14975-h/14975-h.htm#PREFACE>.

officials.” *Id.* at 790. Furthermore, nearly half of all hate crimes are racially motivated, and more than half of the known perpetrators are white.³

Women, too, fall victim to higher rates of violence because of their supposed vulnerability as “easy prey” for male predators, whether in the form of domestic violence by husbands and boyfriends or street violence by common muggers and rapists. And sexual minorities – whether gay, lesbian, bisexual or transgender – are likewise especially subject to violence (often by gangs) based on discriminatory animus. Congress recognized this when it enacted the Matthew Shepard/James Byrd, Jr. Hate Crimes Prevention Act of 2009, which expanded the scope of the federal statute to include violence driven by the perpetrator’s animus toward the victim’s actual or perceived sexual orientation or gender identity. *See* 18 U.S.C. § 249(a)(2). The FBI reports that approximately one-fifth of all hate crimes are motivated by such bias, which makes this category of hate crime second only to crimes based on racial animus.⁴

Amici are the people who must endure both hate crimes and the more mundane and routine (but no less violent) crimes that are disproportionately visited

³ *See* FBI, *Hate Crime Statistics 2012* (Nov. 25, 2013), <https://www.fbi.gov/news/stories/latest-hate-crime-statistics-annual-report-shows-slight-decrease>.

⁴ *See* FBI, *Hate Crime Statistics: Incidents and Offenses 2012*, https://ucr.fbi.gov/hate-crime/2012/topic-pages/incidents-and-offenses/incidentsandoffenses_final.

upon blacks, women, and members of the LGBT community. Therefore the right to bear arms cannot be dismissed as some sort of atavistic constitutional curiosity that is of interest only to tobacco-chewing rednecks who have a firearms fetish or camouflage-wearing survivalists and militia-wannabes who harbor an adolescent and morbid fascination with firepower.

Today, it is we Amici – female, black, gay and transgender Americans – who are the face of the Second Amendment.

II. THE DECISION BELOW ALLOWS THE GOVERNMENT TO BAN RIFLES AND MAGAZINES THAT ARE “IN COMMON USE FOR LAWFUL PURPOSES.”

In its decision last year in *Caetano v. Massachusetts*, this Court “held that ‘the Second Amendment extends, prima facie, to all instruments that constitute bearable arms.’” 136 S. Ct. 1027, 1027 (2016) (per curiam) (quoting *Heller*, 554 U.S. at 582). And in *Heller*, the Court ruled that the Second Amendment protects “arms ‘in common use at the time’ for lawful purposes like self-defense.” *Heller*, 554 U.S. at 624. Indeed, the Court reiterated that passage several times and expressly stated that it is *a legal test – a constitutional touchstone*:

We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts

of weapons protected were those “in common use at the time.”

Id. at 627 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).⁵ And in *Caetano*, two members of the Court took pains to reiterate this test: “As the foregoing makes clear, the pertinent Second Amendment inquiry is whether stun guns are commonly possessed by law-abiding citizens for lawful purposes today.” 136 S. Ct. at 1032 (Alito, J., joined by Thomas, J., concurring in the judgment). This is the constitutional rule that the court below repeatedly dismisses as an inane and unsuitable “popularity” contest. App. 45-46, 57, 58, 59, 60, 63, 66.

Under the test established by this Court in *Heller* and *Caetano*, the decision below cannot stand. *It is undisputed that many millions of semiautomatic rifles and ammunition magazines that are banned by the challenged statute are commonly possessed by Americans for lawful purposes including self-defense, hunting and recreational and competitive shooting:*

- The courts below acknowledged that American civilians own at least eight million semi-automatic rifles of the types outlawed by the challenged law. *See* App. 24 (en banc court);

⁵ *See also Heller*, 554 U.S. at 624 (“Ordinarily when called for militia service able-bodied men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.”) (quoting *Miller*, 307 U.S. at 179) (internal brackets omitted).

App. 86 (Traxler, J., dissenting); App. 218, 222 (district court).

- The AR-15 semiautomatic rifle design, which mainstream journalists have dubbed “America’s Rifle,” accounts for 60% of all civilian rifles sold and a quarter of all firearms sales each year in the United States.⁶
- The en banc court below did not dispute that the AR-15 is the most popular semiautomatic rifle design in America. App. 29.
- The versatile AR-15 is widely used for hunting – the .223 caliber Remington cartridge that it fires was developed from a hunting cartridge, not a military round⁷ – and it also dominates target shooting competition: “If you are not shooting an AR-15, you are not in the game.”⁸

⁶ See Dan Haar, *America’s Rifle: Rise of the AR-15*, HARTFORD COURANT (Mar. 9, 2013), http://articles.courant.com/2013-03-09/business/hc-haar-ar-15-it-gun-20130308_1_new-rifle-colt-firearms-military-rifle; see also GUNS & AMMO, BOOK OF THE AR-15: 300 BLACKOUT EDITION 4 (Eric R. Poole ed., 2013).

⁷ See GARY PAUL JOHNSTON & THOMAS B. NELSON, THE WORLD’S ASSAULT RIFLES 19-20, 23, 1036 (2010).

⁸ Glenn M. Gilbert, *The Making of a Match Rifle*, in SHOOTING ILLUSTRATED, THE AMERICAN RIFLEMAN GUIDE TO BLACK RIFLES 38, 40 (Michael O. Humphries ed., 2006); see also *id.* at 43 (“The AR-15 has come a long way. Long derided as a plastic toy, it is now the benchmark in accuracy among semiauto rifles.”); AMERICAN RIFLEMAN: ARMALITE 50 YEARS 76 (Dec. 2004) (“Even a casual observer of these highpower service rifle matches would recognize one thing quickly – the dominance of the AR-style rifle on the firing line.”).

It is equally beyond cavil that the challenged statute's ban on ammunition magazines holding more than ten rounds likewise invades the individual right to keep and bear arms that are in widespread, common use for lawful purposes:

- Firearm magazines with a capacity of more than ten rounds have been popular on the civilian market for over a century. App. 29 (en banc court).⁹
- Americans own *seventy-five million* magazines with a capacity of more than ten rounds. *Id.* That is close to *half of all* the ammunition magazines that are privately owned. *Id.*
- Magazines holding more than ten rounds are the *standard equipment* with which the vast majority of semiautomatic rifles and handguns in America are sold. *Id.*

Maryland cannot coherently deny that magazines like these and semiautomatic rifles like the AR-15 are useful and entirely suitable for fending off armed criminals, because Maryland arms its own police with these very same weapons: semiautomatic pistols holding

⁹ See GUN: A VISUAL HISTORY 68-69, 81, 170-71, 174-75, 196-97 (Chris Stone ed., 2012); WILL FOWLER & PATRICK SWEENEY, WORLD ENCYCLOPEDIA OF RIFLES AND MACHINE GUNS 138, 141 (2012); K.D. KIRKLAND, AMERICA'S PREMIER GUNMAKERS: BROWNING 31 (2013).

magazines up to 22 rounds¹⁰ and semiautomatic AR-15 rifles with magazines holding 30 rounds.¹¹

The racial and sexual minorities that amici represent need the most effective firearms they can obtain,

¹⁰ For example, the Maryland State Police recently transitioned from the Beretta PX4 semiautomatic handgun (with its 14-round magazine) to the Glock 22, another semiautomatic handgun with standard magazines holding 15, 17, or even 22 rounds. See *Maryland State Police Switch from Berettas to Glocks*, WBALTV (June 6, 2012, 8:38 AM), www.wbalvtv.com/news/maryland/Maryland-State-Police-switch-from-Berettas-to-Glocks/-/9379376/14743582/-/m1j154z/-/index.html. See also *22 Round .40 Glock Factory Magazine*, GLOCKMEISTER, www.glockmeister.com/22-Round-40-GLOCK-Factory-Magazine/productinfo/G22MAGHF22. The nation's nearly one million law enforcement agents at the federal, state and local levels are armed with semiautomatic handguns with magazines holding more than ten and as many as 20 rounds of ammunition. See MASSAD AYOUB, *THE COMPLETE BOOK OF HANDGUNS* 50 (2013) (discussing police transition from revolvers to semiautomatics with large magazines); *id.* at 87 (“Known as the Glock 22, this pistol is believed to be in use by more American police departments than any other.”); *id.* at 90 (“The most popular police handgun in America, the Glock is also hugely popular for action pistol competition and home and personal defense.”).

¹¹ The semiautomatic AR-15 that is demonized by both the Maryland legislature and the court below is the most widely issued police patrol rifle in America. See Michael Remez, *A Civilian Version of an M-16: Bushmaster Rifle a Common Choice*, HARTFORD COURANT (Oct. 25, 2002), articles.courant.com/2002-10-25/news/0210252068_1_bushmaster-firearms-john-allen-williams-distributor-in-washington-state; CHRISTOPHER R. BARTOCCI, *BLACK RIFLE II: THE M16 INTO THE 21ST CENTURY* 126 (2004). More than a dozen police departments in Maryland use Colt AR-15s with their standard 30-round magazines, and this does not even include police departments that issue AR-15s made by other manufacturers. See *Agencies that Carry Colt Firearms*, COLT <http://goo.gl/HkwCIY>.

especially when they are attacked by gangs bent on venting hatred. In situations where isolated black, female, gay or transgender victims face multiple predators, every single shot counts, and Maryland's restriction on magazines holding more than ten rounds dangerously impairs (as a practical matter) those citizens' ability to defend themselves and infringes (as a constitutional matter) their Second Amendment right to keep and bear arms in self-defense. These are the very same magazines that Maryland and its municipalities issue to their own law enforcement officers. Thus Maryland takes the position that highly trained, able-bodied cops with flak vests, shotguns and AR-15 rifles in their patrol cars (and SWAT teams for backup) nevertheless need large-capacity magazines for their handguns, but law-abiding citizens – who lack all those resources – supposedly do not.

A lone woman accosted late at night in her office building's parking garage by a group of thugs has a very unpleasant choice to make if she carries – in accord with the law challenged here – only a six-shot revolver or a semiautomatic pistol with a ten-round magazine. This is not a game of Russian roulette that any American citizen should be forced to play.

The firepower provided by a standard high-capacity handgun magazine is essential in encounters with armed criminals. The FBI recently made a major change in its firearms training protocol based on its discovery that 75% of FBI agent shoot-outs involved

criminals who were within nine feet of the agent.¹² This tracks the experience of police officers nationwide: 65% of law enforcement officers who have been murdered in the line of duty were killed by assailants who stood within ten feet.¹³ Yet even at such close range, highly trained police officers miss their target far more often than they hit it. Examples from two of the nation's elite municipal police forces provide an illustration. A study of the Metro-Dade police in Florida revealed that officers who fired at suspects, even at these close ranges, missed with 85% of their shots.¹⁴ New York City's police did only slightly better: its officers missed 83% of the time when the assailant was nine to twenty-one feet away, and when the assailant was within six feet the police still missed 62% of the time.¹⁵

¹² See Brian McCombie, *An Inside Look at FBI Handgun Training*, GUNS & AMMO HANDGUNS (June 20, 2013), www.handgunsmag.com/2013/06/20/new-fbi-handgun-training/.

¹³ *Id.* (considering data from 2002 through 2011).

¹⁴ *Id.* (considering a decade of data).

¹⁵ *Id.* When one is suddenly placed in a life-or-death situation, adrenalin floods the bloodstream. When our ancestors were hunter-gatherers on the veldt in Africa, this hormone-fueled "flight or fight" reaction enabled the large muscle groups in the arms and legs to power our ancestors to flee on foot or climb a tree to escape danger. But in the 21st century, that same adrenalin rush drastically degrades the fine motor control necessary to shoot accurately and that is why even the most highly trained police officers usually miss when firing their weapons at criminals who are little more than an arms-length away. See generally Lt. Col. Dave Grossman, *ON COMBAT: THE PSYCHOLOGY AND PHYSIOLOGY OF DEADLY CONFLICT IN WAR AND IN PEACE* (3d ed. 2012).

Given how hard it is for even trained professionals to shoot accurately at close range, maximum firepower – in the form of a magazine holding more than ten rounds – is a necessity for police officers and civilians alike. It is not some gimmick desired only by militia half-wits besotted by the cinematic gunplay of Hollywood action movies.

The court below strives to depict the firearms proscribed by Maryland as “weapons of war” (App. 12, 18, 47, 57, 65) and “instruments of mass carnage” (App. 80) (Wilkinson, J., joined by Wynn, J., concurring) that have no place in civilian life, and that are suitable only “to perpetrate mass slaughters” on a battlefield. App. 57. But if these ubiquitous rifles and magazines are useful only for mass slaughter of the innocent, then “such killing machines have no place in the hands of domestic law enforcement.” David B. Kopel, *Assault Weapons*, in *GUNS: WHO SHOULD HAVE THEM* 176, 202 (David B. Kopel ed., 1995). Yet as demonstrated above – and as neither the court below nor the Respondents can deny – police departments throughout the United States (including Maryland) judge these firearms entirely suitable for fending off armed criminals. We are nonetheless told that no sensible or responsible civilian wants or needs these firearms and magazines; we are told that millions of people do not use them for self-defense or hunting or sport shooting; we are told that they are the reviled “weapons of choice for those who in a commando spirit wish to charge into a public venue and open fire.” App. 80 (Wilkinson, J., joined by Wynn, J., concurring). That insulting caricature has

appeal only to those who do not take seriously the Second Amendment rights of women, African Americans, and the LGBT community.



CONCLUSION

The Court should grant the writ.

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