No. 17-127

IN THE
Supreme Court of the United States

STEPHEN V. KOLBE *et alia*,

Petitioners,

v.

LAWRENCE J. HOGAN, *et alia*,

Respondents.

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

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF EDWIN VIEIRA, JR., DOMINIC J. VIEIRA, AND VICTOR H. SPERANDEO IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37.2(b) of the Rules of this Court, Edwin Vieira, Jr., Dominic J. Vieira, and Victor H. Sperandeo respectfully move for leave to file their annexed brief *amici curiae* in support of Petitioners. Pursuant to Rule 37.2(a), on July 27, 2017, counsel for both parties received timely notice of the *Amici's* intent to file the brief which accompanies this motion. *Per* letter of August 1, 2017, from John Parker Sweeney, counsel for Petitioners, to Edwin Vieira, Jr., Petitioners refused their consent for the filing of this brief. As of the date of this motion, Respondents have not answered.

INTEREST OF THE *AMICI CURIAE*

Edwin Vieira, Jr. has authored numerous studies concerning the Second Amendment, including *The Nation in Arms* (2007), *The Sword and Sovereignty: The Constitutional Principles of "the Militia of the Several States"* (2012), *Thirteen Words* (2013), *Three Rights* (2013), and *By Tyranny Out of Necessity: The Bastardy of "Martial Law"* (2014, 2016). Dominic J. Vieira is a law student whose senior collegiate thesis was *The World Turned Upside Down: the Militia of the Several States, the National Guard and the Constitution* (Christendom College, 2012). And Victor H. Sperandeo is an avid student of the Constitution and firearms collector who owns several semiautomatic rifles.

The *Amici* consider the decision of the Court of Appeals for the Fourth Circuit at issue here—*Kolbe* v. *Hogan,* 849 F.3d 114 (4th Cir. 2017)—to be arguably the most egregious judicial affront to the Second Amendment ever handed down.

In addition, as citizens of Virginia, the Vieiras are potentially exposed to application of the Court of Appeals' decision as a binding precedent in the Federal courts in that Commonwealth. And although a citizen of Texas, Mr. Sperandeo is concerned that courts in his own State may consider the Court of Appeals' reasoning persuasive because its decision was handed down *en banc*.

PURPOSE OF THE BRIEF *AMICI CURIAE*

Relying on this Court's Rule 37.1, the *Amici* desire to "bring[ ] to the attention of the Court relevant matter[s]" concerning the "well regulated Militia" which the Second Amendment declares to be "necessary to the security of a free State"—matters that will "not

* * * [be] brought to its attention by the parties", but nevertheless "may be of considerable help to the Court." Because these matters have "not [been] specifically noticed in the objections taken in the records or briefs of counsel" for the parties in a satisfactory manner to date, and are unlikely to be raised hereafter, this Court should take them under consideration by way of the *Amici's* brief, "that the Constitution may not be violated from the carelessness or oversight of counsel in any particular." *See Pollock* v. *Farmers' Loan & Trust Co.,* 157 U.S. 429, 604 (1895) (separate opinion of Field, J.).

In particular, the *Amici's* brief will demonstrate that the pending petition is especially worthy of consideration because it presents this Court with an unique opportunity for the first time to integrate in a definitive fashion the two leading decisions on the Second Amendment: *United States* v. *Miller*, 307 U.S. 174 (1939) and *District of Columbia* v. *Heller*, 554 U.S. 570 (2008). Although Petitioners and Respondents will undoubtedly argue tenaciously for what they perceive to be their interests, the *Amici* expect that their presentations, along with the Court of Appeals' opinion, will deflect this Court's inquiry from the true constitutional problem. As did the Court of Appeals, the parties will focus on the applicability *vel non* to so-called "assault rifles" available in the civilian market of certain *dicta* in *Heller* concerning "weapons that are most useful in military service—M-16 rifles and the like". *Compare* 554 U.S. at 627 *with Kolbe*, 849 F.3d at 121. Although this is a significant issue which this Court needs to address, the actually controlling question is the applicability to such firearms of *Miller*, to which the Court of Appeals, on the basis of the parties' arguments below, gave only the most perfunctory and ill-informed consideration. *See* 849 F.3d at 126.

In addition, the *Amici's* brief will explain how, in light of the constitutional analysis employed in *Miller*, the Court of Appeals' decision not only infringes upon private parties' rights of personal self-defense upheld in *Heller*, but (worse yet) also interferes with the constitutional and statutory powers and duties of the President of the United States, of Congress, and even of the Governor of Maryland (Respondent Hogan). Given the expectable absence of filings from the President and Members of Congress, the certain reluctance of Respondents to advert to these matters, and Petitioners' disinterest in the information the *Amici* wish to present (as evidenced by Petitioners' refusal to consent to the *Amici's* participation in these proceedings), *only* the *Amici's* brief will likely be available to bring these considerations to this Court's attention.

PRAYER FOR RELIEF

Wherefore, the *Amici* pray that this Court grant their motion and order the filing of their annexed brief *amici curiae*.

Respectfully submitted,

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August 23, 2017

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BRIEF *AMICI CURIAE* OF EDWIN VIEIRA, JR., DOMINIC J. VIEIRA, AND VICTOR H. SPERANDEO IN SUPPORT OF PETITIONERS

Pursuant to their motion for leave to file under Rule 37.2(b), and to Rule 37.1, of the Rules of this Court, Edwin Vieira, Jr., Dominic J. Vieira, and Victor H. Sperandeo file this brief *amici curiae* in support of Petitioners.[1]

[1] Pursuant to this Court's Rule 37.2(a), counsel for all parties received notice of the *Amici's* intention to file this brief more than ten days prior to the due date for its filing. Petitioners denied consent. As of the date of filing of this brief, Respondents have not answered. Pursuant to Rule 37.6, the *Amici* affirm that no

INTEREST OF THE *AMICI CURIAE*

Edwin Vieira, Jr. has authored numerous studies concerning the Second Amendment, including *The Nation in Arms* (2007), *The Sword and Sovereignty: The Constitutional Principles of "the Militia of the Several States"* (2012), *Thirteen Words* (2013), *Three Rights* (2013), and *By Tyranny Out of Necessity: The Bastardy of "Martial Law"* (2014, 2016). Dominic J. Vieira is a law student whose senior collegiate thesis was *The World Turned Upside Down: the Militia of the Several States, the National Guard and the Constitution* (Christendom College, 2012). And Victor H. Sperandeo is an avid student of the Constitution and firearms collector who owns several semi-automatic rifles.

The *Amici* consider the decision of the Court of Appeals for the Fourth Circuit at issue here—*Kolbe* v. *Hogan,* 849 F.3d 114 (4th Cir. 2017) ("*Kolbe*"), upholding Maryland's Firearm Safety Act of 2013 ("FSA")—to be arguably the most egregious judicial affront to the Second Amendment ever handed down.

In addition, as citizens of Virginia, the Vieiras are potentially exposed to application of the Court of Appeals' decision as a binding precedent in the Federal courts in that Commonwealth. And although a citizen of Texas, Mr. Sperandeo is concerned that courts in his own State may consider the Court of Appeals' reasoning persuasive because its decision was handed down *en banc*.

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counsel for any party authored this brief in whole or in part, and that no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amici* has made such a contribution.

SUMMARY OF THE ARGUMENT

According to the Court of Appeals, the "assault weapons and large-capacity magazines [banned by the FSA] are *not* constitutionally protected arms" because, "[a]lthough self-defense is a conceivable use of the banned assault weapons", such "'weapons * * * are most useful in military service'". *Kolbe*, 849 F.3d at 130, 127, 121. On the negative side, this decision controverts the plain text and confounds the central purpose of the Second Amendment; distorts and otherwise disregards *United States* v. *Miller*, 307 U.S. 174 (1939) (*"Miller"*); misrepresents and misinterprets *District of Columbia* v. *Heller*, 554 U.S. 570 (2008) (*"Heller"*); and endangers "the security of a free State" in the States within the Fourth Circuit surely, and in other States predictably. On the positive side, the Court of Appeals' decision affords this Court an opportunity to interpret the Second Amendment in a comprehensive manner, to integrate *Miller* and *Heller* in a coherent fashion, and to instruct the lower courts in the correct way to enforce "the right of the people to keep and bear Arms" in the future—thus finally "clarify[ing] the entire field", which *Heller* left undone. *See* 554 U.S. at 635.

ARGUMENT

I. The Court of Appeals' Decision Controverts the Plain Text and Confounds the Central Purpose of the Second Amendment

A. To parse it, the Second Amendment must be read *in its entirety*. *See Williams* v. *United States,* 289 U.S. 553, 572-573 (1933). The Amendment's goal is "the security of a free State". It declares "[a] well regulated Militia" to be "necessary" for that purpose. And to

guarantee that such Militia exist, it commands that "the right of the people to keep and bear Arms, shall not be infringed". Howsoever that "right" embraces "Arms" convenient for an individual's *self*-defense, it unquestionably protects *all* "Arms" useful for "the people['s]" *collective* defense of "a free State" through the efforts of "[a] well regulated Militia".[2] *That* is the Amendment's central concern. For all citizens are duty-bound to defend their polity. *Hamilton* v. *Regents*, 293 U.S. 245, 262-263 (1934).

No citizen can perform this duty outside of establishments fit for that purpose, however. For some, those establishments are the "Armies" and "Navy" of the United States. U.S. Const. art. I, § 8, cls. 12 through 14. For others, they are the "Troops, or Ships of War" which the States may "keep * * * in time of Peace" "with[ ] the Consent of Congress". U.S. Const. art. I, § 10, cl. 3. For the great majority, they are "the Militia of the several States". U.S. Const. art. I, § 8, cls. 15 and 16 *and* art. II, § 2, cl. 1; and various State laws. In performance of that duty in any of these forces, each citizen must disregard considerations of *self*-defense, even to the point of sacrificing his own life.

Yet individual self-defense is integral to community self-defense. Individual self-defense is a "natural right" which allows for direct and immediate execution of the laws by a victim of aggression against its perpetrator. William Blackstone, *Commentaries on the Laws of England* (American Edition, 1771-1773), Volume 3, at 3-4. Defending himself, an individual also defends his

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[2] The *only* "Arms" at issue here, however, are certain semiautomatic rifles (and detachable magazines). *See* 849 F.3d at 121-123. Being only semiautomatic, these are not true "*assault* rifles". But as the Court of Appeals persistently misapplied that adjective, the *Amici* will so denote them.

community *pro tanto*. One constitutional responsibility of the Militia is "to execute the Laws of the Union" (and the laws of their own States as well, because they are "the Militia of the several States"). U.S. Const. art. I, § 8, cl. 15 and art. II, § 2, cl. 1; Md. Const. art. II, § 8. Every act of individual self-defense performs this "militia" function.

B. To understand it, the Second Amendment must be perused "in the light of the law as it existed at the time it was adopted". *See Mattox* v. *United States*, 156 U.S. 237, 243 (1895). Throughout the 1700s, Americans knew, as a matter of law as well as fact, that "a well regulated militia[is] composed of the body of the people, trained to arms". Va. Declaration of Rights (1776) art. 13. For statutes of the Colonies and then the independent States had provided that:

- With limited exemptions from service, all adult able-bodied free males from about sixteen years of age to superannuation—"the body of the people"—were enrolled in the Militia.[3] No Militia law prohibited superannuated men from volunteering for Militia service, however.
- All militiamen (except conscientious objectors) were to be provided with "small arms": long guns and pistols. Those who were financially able purchased their arms in the free market, then possessed them as private property *in their homes at all times*. Those with insufficient means were

[3] Today, evolution in their legal status includes women in "the body of the people" potentially, but not necessarily, subject to enrollment. *See* 10 U.S.C. § 246; Md. Code, Public Safety, §§ 13-202 and 13-203.

supplied with firearms the Militia or some other governmental body usually procured in the market, in most instances retaining possession of those arms whilst enrolled. This reliance on a *permanent private market* for firearms guaranteed that most militiamen, *through their own efforts*, could always obtain firearms suitable for both collective and individual self-defense, and forestalled tyranny by precluding rogue public officials from monopolizing the production, distribution, and possession of firearms.

- Besides British, French, and other army issue, suitable firearms included civilian products as good as miliary specimens, slightly inferior to them (because without provisions for mounting bayonets), or superior to most of them (because equipped with rifled rather then smooth-bored barrels). Whatever its provenance, though, *every* firearm in a militiaman's hands was a "weapon of war", because Militia service was largely "military" in nature.[4] Nonetheless, *every* such "small arm" would also have served for individual self-defense — particularly muskets, the firearms most militiamen possessed *at home*.

[4] But not exclusively so, as the Constitution evidences in the responsibilities assigned to the Militia "to execute the Laws of the Union, suppress Insurrections and repel Invasions". U.S. Const. art. I, § 8, cl. 15. Only the third of these is primarily "military" in character. The first is a "police" function; the second a "police", "*para*-military", or "military" function, depending on circumstances.

- Because "a well regulated militia[was] composed of the body of the people, *trained to arms*", militiamen regularly exercised in the field to maximize their effectiveness, which discipline prepared them for individual as well as collective self-defense.

See Edwin Vieira, Jr., *The Sword and Sovereignty: The Constitutional Principles of "the Militia of the Several States"* (2012), Chapters 2, 3, 5 through 14, 16 through 23, 25, and 26 (the historical evidence); 27, 28, 33 through 36, 38 through 42, 45, and 46 (application of these principles today). This work focuses on Rhode Island and Virginia; but the selfsame conclusions arise from the laws of Maryland reproduced in The Selective Service System, *Military Obligation: The American Tradition,* Special Monograph No. 1, Volume II, Part 5 (1947). To the same effect are the Militia laws relied upon by *Miller*. 307 U.S. at 179-182. As to the firearms used in that era, *see* Bill Ahearn, *Flintlock Muskets in the American Revolution and Other Colonial Wars* (2005); De Witt Bailey, *Small Arms of the British Forces in America 1664-1815* (2009).

No *pre*-constitutional Militia statutes disallowed law-abiding citizens from possessing firearms specified for Militia service (or any other firearms). In those days, only criminals, slaves, some free persons of color, hostile Indians, and politically disaffected individuals were usually (but not always) prohibited from, or strictly controlled with respect to, such possession. *See The Sword and Sovereignty, ante*, at 297-307, 727-749. Except for disarmament predicated on criminal misbehavior, these disabilities have become historical curiosities. Others have been enacted into modern law.

E.g., 18 U.S.C. § 922(g). Whatever their legitimacy, none apply to Petitioners.

C. To construe the Second Amendment accurately, "we must * * * place ourselves in the position of the men who framed and adopted the Constitution, and inquire what they must have understood to be [the Amendment's] meaning and scope". *See South Carolina* v. *United States,* 199 U.S. 437, 450 (1905). When the Founders incorporated "the Militia of the several States" into the federal system, these statutory establishments acquired *constitutional* status. U.S. Const. art. I, § 8, cls. 15 and 16; art. II, § 2, cl. 1. The "obvious purpose" of the Second Amendment was "to assure the continuation and render possible the effectiveness of [those] forces". *Miller,* 307 U.S. at 178. Moreover, because "the Militia of the several States" had long existed, their constitutional definition naturally adopted the composition, organization, equipment, and operations with which generations of Americans had become personally familiar under the laws of the Colonies and independent States. Plainly, too, the Founders deemed "the Militia of the several States", *as they existed at that time pursuant to law*, to be "*well regulated* Militia", because experience had proven as much (or "the Militia of the several States" would never have been incorporated as such into the Constitution). Therefore, Congress or the States today cannot so abuse their powers as to render "the Militia of the several States" other than "well regulated Militia" *according to the standards elaborated in the 1700s, including especially those applicable to firearms.*

D. Had the Court of Appeals delved into the history and present circumstances of "well regulated Militia", it would have identified the Second Amendment's central purpose, and concluded that the FSA infringes

Petitioners' rights *even absent consideration of any of this Court's pronouncements on the subject*.

1.a. As a matter of law, *all* eligible citizens of Maryland who have not joined the National Guard or the Maryland Defense Force, or who are not statutorily exempted from service, are members of "the unorganized militia" of both Maryland and the United States (and were they members of the Guard or the Defense Force would be members of "the organized militia" in both jurisdictions). *See* Maryland Code, Public Safety, §§ 13-101(c) and (d), 13-202, 13-203, 13-205, 13-206(a), 13-401(a)(1), 13-501, and 13-503; 10 U.S.C. §§ 246 and 247.[5] In particular, absent contradictory evidence (which Respondents have not adduced), Petitioners Kolbe and Turner are presumptively members of at least Maryland's "unorganized militia". *See* Maryland Code, Public Safety, §§ 13-202 and 13-203. So the principles of "[a] well regulated Militia" embodied in the Second Amendment apply to them.[6]

Along with the Militia Clauses of the original Constitution, "the right of the people to keep and bear Arms" *so as to be capable of serving in "*[*a*] *well regu-*

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[5] Were they members of the Guard (and, presumably, of the Defense Force, too), the FSA would not apply under certain circumstances. Md. Code, Criminal Law, § 4-302(1). This discrimination between "the organized militia" and "the unorganized militia" raises a further question of equal protection. U.S. Const. amend. XIV, § 1.

[6] In any event, they desire to obtain "assault rifles" and "large-capacity magazines" for self-defense. *Kolbe*, 849 F.3d at 129. And, as noted *ante*, self-defense constitutes a "militia" function, *whoever* engages in it. Moreover, as explained *post*, the remaining Petitioners have standing to assert the rights of innumerable other Marylanders who undoubtably are members of "the unorganized militia".

lated Militia" necessarily presumes the permanent settlement of "[a] well regulated Militia" in each of the several States, as well as a constitutional duty incumbent upon every eligible American to serve in such a Militia when called forth, and therefore a constitutional right to acquire "Arms" suitable for that purpose. Thus, all Marylanders eligible for the Militia should never be prohibited from possessing firearms meet for that service were they ever called forth thereto, which for "the unorganized militia" is always possible. *See* U.S. Const. art. I, § 8, cl. 15 and 10 U.S.C. §§ 251, 252, and 253; Md. Const. art. II, § 8 and Md. Code, Public Safety, § 13-701.

Perforce of its power "[t]o provide for * * * arming * * * the Militia", Congress could order some public agency to supply Marylanders in "the unorganized militia" with such firearms. U.S. Const. art. I, § 8, cl. 16. Or Maryland might do so. Md. Const. art. IX, § 1. Or Congress and Maryland might simply allow them to obtain those firearms in the free market, in accordance with *pre*-constitutional practice. In fact, Congress has tacitly adopted the latter policy. But Maryland's FSA prohibits them from possessing "the banned assault rifles" the Court of Appeals admits *are* "'weapons * * * most useful in military service'"—and from which rifles, *for that very reason*, it withholds the Second Amendment's protection. 849 F.3d at 121-123, 124-125, 130. On that basis alone, the FSA totters on shaky ground. *Cf. by analogy, e.g., Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 353-356 (1951) (preëmption perforce of the "dormant" Commerce Clause).[7]

[7] Self-evidently, arming members of the establishments the Second Amendment declares to be "necessary to the security of a free State", and to which the Constitution assigns the respon-

Worse yet, by denying individuals eligible for "the unorganized militia" "the right * * * to keep and bear [those] Arms", the FSA interferes with Congress's power "[t]o provide for calling forth [from Maryland] the [unorganized] Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions", as well as with the authority of the President of the United States to "call into Federal service such of the militia of [that] State * * * as he considers necessary"—in both cases with "the unorganized militia" *suitably armed*, *as "*[*a*] *well regulated Militia" must always be. See* U.S. Const. amend. II and art. I, § 8, cl. 15; 10 U.S.C. § 252; and U.S. Const. art. VI, cl. 2. Furthermore, the FSA licenses the Governor of Maryland, Respondent Hogan, to evade his responsibility under Maryland law to "order out the unorganized militia"—again, *suitably armed*—"[i]f the militia of the State is ordered under the Constitution and laws of the United States into the active military service of the United States". *Contrast* Md. Code, Public Safety, § 13-701(a) and Md. Const. art. II, § 8 *with* the authorities cited immediately heretofore.

b. Kolbe and Turner need not rely only on eligibility for "the unorganized militia", because simply as citizens they may take advantage of the free market in firearms that must exist to support "[a] well regulated Militia". In *pre*-constitutional times, every law-abiding free adult American enjoyed the right to purchase firearms suitable for Militia service (or other employments) *irrespective of enrollment in the Militia*. This right likely derived from the provision in the English

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sibilities "to execute the Laws of the Union, suppress Insurrections and repel Invasions", is more consequential than regulating interstate commerce in dairy products. *Contrast* U.S. Const. art. I, § 8, cl. 15 *with* art. I, § 8, cl. 3.

Bill of Rights "[t]hat the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law." 1 William & Mary Chap. 2, Sess. 2 (1688). Disregarding restrictions reflective of England's established religion ("Protestants") and rigid social stratifications ("their Conditions"), Colonial Americans extended "allow[ance] by Law" to all (under the Militia statutes establishing the *duty* of *every* eligible citizen to possess "Arms for the [common] Defence"). Whether protection of this general "allow[ance]" should now be ascribed to the Second Amendment alone (as *Heller* did), or to intersections among the Second, Ninth, Tenth, and Fourteenth Amendments, Kolbe and Turner are its beneficiaries.

2. Because "well regulated Militia" could not have functioned effectively during *pre*-constitutional days and cannot function now without a free market in firearms, as federally licensed firearms dealers Petitioners Wink's Sporting Goods and Atlantic Guns enjoy a right allied with the right the Second Amendment guarantees to members of "the unorganized militia". For the latter cannot "keep and bear Arms" they cannot even acquire. Absent the FSA, they could purchase "assault rifles" from licensed dealers or private parties. But (with certain exceptions irrelevant here) the FSA prohibits dealers (along with private parties) from selling, purchasing, receiving, transferring, or even transporting into Maryland a laundry-list of "assault weapons". Md. Code, Criminal Law, §§ 4-301(b) through (f); 4-303(a); 4-305(b); and 4-306(a). This denies every member of "the unorganized militia" the ability, and therefore the right, "to keep and bear [those] Arms" for Militia purposes. To preserve that right for their own present and potential customers, the rights of Wink's Sporting Goods and Atlantic Guns to deal in such "Arms" must be

protected. And *vice versa*. *See Craig* v. *Boren,* 429 U.S. 190, 192-197 (1976); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535-536 (1925).

Petitioners National Shooting Sports Federation and Maryland Licensed Firearms Dealers Association count among their members federally licensed firearms dealers, and therefore can vindicate those members' rights. *See Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 342-345 (1977). Thereby, they also can assert the rights of all of those dealers' present and potential customers who are members of "the unorganized militia".

3. That Petitioners Associated Gun Clubs of Baltimore, Maryland Shall Issue, and Maryland State Rifle and Pistol Association engage in education and training which can prepare Marylanders for service in "the unorganized militia", and thus enhance its readiness, entitles them to standing as well. *See id.*

II. The Court of Appeals' Decision Distorts and Otherwise Disregards *United States* v. *Miller*.

The Court of Appeals' nod to *Miller*—that *Miller* supposedly "reject[ed a] Second Amendment challenge" to the prohibition of citizens' possession of unregistered "short-barreled shotguns and machineguns"—distorts that decision as to "machineguns" (which were *not* at issue) and disregards what it actually held as to "short-barreled shotguns". 849 F.3d at 126.

A. *Miller* did not consider whether the Second Amendment protects a shotgun which could be used for individual self-defense. Instead, relying on the type of *pre*-constitutional history presented above, it observed that "the Militia comprised all males physically capable of acting in concert for the common defense",

and that "ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time". 307 U.S. at 179-182. On *this* basis it held that,

> [i]n the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

Id. at 178.[8]

Here, relying on *uncontroverted evidence* that "the most popular of the prohibited assault weapons—the AR-15—is simply the semiautomatic version of the M16 rifle used by our military and others around the world"; that "civilian versions of the AR-15 and AK-47 * * * are semiautomatic but otherwise retain the military features and capabilities of the fully automatic M16 and AK47"; that "[s]everal other FSA-banned assault weapons are * * * semiautomatic versions of machineguns initially designed for military use"; that "[t]he difference between the fully automatic and semi-automatic versions of those firearms is

[8] *Miller* did *not* hold such a shotgun unprotected by the Amendment, only that no decision was possible by dint of judicial notice alone. So "[t]he cause [was] remanded for further proceedings." 307 U.S. at 183. None were held, leaving the issue unresolved.

slight"; that "like their fully automatic counterparts, the banned assault rifles 'are firearms designed for the battlefield'"; and that "the banned assault weapons * * * possess an amalgam of features that render those weapons * * * like M16s and most useful in military service"—the Court of Appeals held that "the banned assault weapons and large-capacity magazines are *not* protected by the Second Amendment"! 849 F.3d at 124-125, 144, 121.

This would be incredible were it not indelible on the pages of the Court of Appeals' opinion. Moreover, it is intolerable. For, according to *Miller's* criteria, this evidence proves beyond any reasonable doubt that the banned "assault weapons" "*at this time* [*do* have] some reasonable relationship to the preservation or efficiency of a well regulated militia" because they *are* practically equivalent to "ordinary military equipment"; and that therefore their "use *could* contribute to the common defense". Thus, the Second Amendment *must* protect their possession by citizens who might be "expected to appear [for Militia service] bearing [such] arms supplied by themselves and of the kind in common use at the time." 307 U.S. at 178, 179 (emphases supplied).

No one could conclude from the words "of the kind in common use at the time", however, that under color of *Miller* the mere percentage of American gun-owners who today possess "assault rifles", or of "assault rifles" among all firearms, determines whether the Second Amendment protects such rifles. For that phrase referred to the *pre*-constitutional era, when *all* of the "arms" militiamen "supplied by themselves" were "of the kind in common use", because just about all firearms then available were suitable for Militia service. In various localities, surplus British army muskets

were "common", or captured French army muskets not "common", or smooth-bored more "common" than rifled muskets (or *vice versa*); or the only "common" firearms were whatever militiamen happened to possess. *But these differences the Militia statutes accepted*. *See The Sword and Sovereignty*, *ante*, Chapters 7 and 19. *All* of those firearms were, as a matter of law, "in common use" *because used for a common purpose*.

B. The Court of Appeals' disregard of *Miller* is not excusable on the plea that *Heller* cast doubt on *Miller*. For those opinions are coincident in their foundations and complementary in their results.[9] On the one hand, *Miller* noted that the "obvious purpose" of the Second Amendment is "to assure the continuation and render possible the effectiveness of [the Militia]". 307 U.S. at 178. Likewise, *Heller* acknowledged that "the Second Amendment's prefatory clause" ("[a] well regulated Militia, being necessary to the security of a free State") "announces the purpose for which the right was codified: to prevent elimination of the militia." 554 U.S. at 599. *Heller* did hold that "[t]he prefatory clause does not suggest that preserving the militia was the only reason Americans valued the * * * right". *Id.* But *Miller* did not question the Second Amendment's application to firearms which "the people" might lawfully employ for other than Militia purposes.

On the other hand, *Miller* addressed (without answering) the question of whether a short-barreled shotgun "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia". 307 U.S. at 178. Whereas the only "Arms" at issue in *Heller* were handguns, as to which

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[9] *Miller* and *Heller* apply to the States perforce of *McDonald* v. *City of Chicago,* 561 U.S. 742 (2010).

it upheld a right of personal possession for self-defense in the home, irrespective of their suitability for Militia service. 554 U.S. at 573-576, 628-636.[10] Thus *Heller* constitutes *an addition or alternative to Miller*. Under *Miller*, the Second Amendment protects all "small arms" proved suitable for Militia service, regardless of their peculiar usefulness for personal protection in the home. Under *Heller*, the Amendment protects one class of "small arms" useful for personal protection in the home, whether or not such firearms especially serve some other Militia purpose. Under *Miller*, the more useful a firearm for typical "military" service in the Militia, the greater the protection the Second Amendment affords to it. Under *Heller*, the more suited a firearm for personal protection in the home, the arguably less relevant is its usefulness for other sorts of Militia service.

Kolbe and Turner asserted a right—applicable not only to themselves but also to every Marylander eligible for "the unorganized militia"—to keep "assault rifles" in their homes for self-defense; *but Respondents argued, and the Court of Appeals decided, this case on a "weapons-of-war" theory*. *See* 849 F.3d at 129, 124-125, 136-137, 142-144. So *Miller* is the directive authority here. Because of their indisputable suitability for "military" service, the "assault rifles" which every member of "the unorganized militia" would keep at home are protected under *Miller*. Their presence in

[10] This was a distinction without a difference, because individual self-defense, even with only a handgun, is itself a "militia" function; during the *pre*-constitutional era handguns were prominent among militiamen's "Arms"; and today the Armed Forces and law-enforcement agencies employ many of the same types (and even the same brands) of handguns ordinary citizens possess.

the home being thus constitutionally guaranteed, those rifles would always be available for self-defense there, and consequentially are protected under *Heller,* too.

III. The Court of Appeals' Decision Misrepresents and Misinterprets *District of Columbia* v. *Heller*.

A. The heart of the Court of Appeals' opinion is a robotic "the-devil-made-us-do-it" excuse blamed on *Heller*:

> We conclude * * * that the banned assault weapons and large-capacity magazines are *not* protected by the Second Amendment. * * * [They] are among those arms that are "like" "M-16 rifles"—"weapons that are most useful in military service"—which the *Heller* Court singled out as being beyond the Second Amendment's reach. * * * [W]e have no power to extend Second Amendment protection to the weapons of war that the *Heller* decision explicitly excluded from such coverage.

849 F.3d at 121.

This misrepresents *Heller*, because the "exclu[sion]" of rifles "'like' 'M-16 rifles'" (or *any* rifles) from "the Second Amendment's reach" was *not* at issue there.

Moreover, it misinterprets *Heller's dicta*. *Heller* observed that,

> if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause. But * * * the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of

> military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. * * * But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.

554 U.S. at 627-628. (*Heller's* speculative verbiage "*if*" and "[i]t *may* well be true" should have alerted the Court of Appeals to this passage's hypothetical nature.)

Contemporary Militia may not be "as [*absolutely*] effective" against a modern "standing army" as were the *pre*-constitutional Militia against the British army. But to serve the purposes of the Militia Clauses of the original Constitution and the Second Amendment today, they need be only "as [*relatively*] effective" as is reasonably possible. Speculation about "weapons that are *most* useful in military service—M-16 rifles and the like" obscures the reality that semiautomatic "assault rifles" are *sufficiently* "useful in military service" for citizens called forth in "the unorganized militia"—a point the Court of Appeals implicitly conceded. *See* 849 F.3d at 124-125, 136-137, 142-144. "[M]odern developments" have not "limited the fit between the prefatory clause and the protected right" in point of fact, *and in constitutional principle could never do so to any degree*. Rather, the selfsame "fit" obtains now as in *pre*-constitutional times: "[T]he people" have a "right * * * to keep and bear Arms" adequate for Militia equipped, as historically they always were, with "small arms" *not significantly inferior*

to those employed by "standing armies". Semiautomatic "assault rifles" fill the bill perfectly. In any conflict between the Militia and some "standing army", inevitably one infantry *armed with rifles* would contest the ground against another infantry *also armed with rifles*. Because, as the Court of Appeals held, "[t]he difference between the fully automatic and semiautomatic versions of ['assault'] firearms is slight", the Militia would not be disadvantaged by fielding such armament. *See* 849 F.3d at 125.

B. Hedging its bad bet on *Heller's dicta*, the Court of Appeals assumed *arguendo* that the Second Amendment applies to "assault rifles", but then employed a dilute "balancing test" of "intermediate scrutiny" to sustain the FSA. 849 F.3d at 138-141. This Court should reaffirm that *Miller* employed *no*, and *Heller* rejected *every*, such "test", because the Second Amendment "is the very product of an interest balancing by the people". 307 U.S. at 178 and 554 U.S. at 634-635. And even We the People cannot allow "the security of a free State" to be "balanced" away in favor of the insecurity of ever-encroaching despotism, whether by legislative, executive, *or judicial fiat*.

Besides, the FSA's ban on "assault rifles" cannot survive *any* constitutionally plausible "balancing test", because it imposes no merely "incidental", but instead a *direct*, "infringe[ment]" on "the right * * * to keep and bear Arms". *See United States* v. *O'Brien,* 391 U.S. 367, 376-377 (1968). The FSA mandates no merely limited "time, place, and manner" restriction on that right with respect to "assault rifles", but prohibits it at *all* times, in *every* place, and in *any* manner within Maryland. If under the Court of Appeals' reasoning a citizen can suffer both criminal prosecution for possessing the very "Arms" "necessary to the security of a

free State", as well as dispossession of those "Arms", then no jot or tittle of that right is safe from "be[ing] taken away if the Government finds it sufficiently imperative or expedient to do so". *Compare* Md. Code, Criminal Law, §§ 4-306(a) and 4-304 *with Konigsberg* v. *State Bar*, 366 U.S. 36, 67-68 (1961) (Black, J., dissenting).

IV. The Court of Appeals' Decision Endangers "the Security of a Free State" Throughout the United States

"A well regulated Militia, being necessary to the security of a free State", the "Arms" which enable it to be "well regulated" are equally "necessary". The Court of Appeals, however, impugned the people of Maryland (and, by extension, of every other State) who constitute "the unorganized militia" as too knavish to guard their own "free State", because they are untrustworthy to "keep and bear [the] Arms" indispensable for that purpose! In so doing, it eviscerated the Second Amendment, emasculated the Militia Clauses of the original Constitution, and furnished a judicial template, not only for obliteration of the most important of all Second-Amendment rights today, but thereby for the eventual suppression of *every* right characteristic of "a free State" secured by "[a] well regulated Militia", *as "a free State" must always be*.

The Court of Appeals dilated on how "[t]he FSA bans only certain military-style weapons and detachable magazines, leaving citizens free to protect themselves with a plethora of other firearms", including "most importantly—handguns". 849 F.3d at 138-139. The issue, however, is not whether Marylanders possess "*other* firearms" with which to protect themselves against attacks by ordinary criminals, but instead whether "the unorganized militia" will be armed with

"*military-style* weapons" when "the security of a free State" is imperilled.

America's Founders knew that "when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny", and "that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents." *Heller*, 554 U.S. at 598. But with *what* "people's arms" were the Founders concerned? Merely handguns? Or the muskets—the quintessential "*military-style* weapons" identical, basically equivalent, or even superior to those issued to the "standing armies" of that era—with which most militiamen were armed *at home* as well as in the field?

Even if sufficient for individuals' self-defense in the home, handguns alone are inadequate for a community's resistance to tyranny. For every aspiring tyrant will deploy myrmidons equipped with "*military-style* weapons" to overawe the populace. Individuals cowering in isolation in their homes with only handguns in their possession can neither defeat nor deter such forces. Only "well regulated Militia" equipped with "*military-style* weapons" can thwart aggressors fielding such weapons. And only patriots who *always* possess "*military-style* weapons" can come forth in "the unorganized militia" to provide "security" to their "free State" if the aggressors turn out to be a domestic "select militia" (such as the National Guard) or "standing army" (such as the regular Armed Forces). This is not to denigrate the National Guard or the Armed Forces. Although trustworthy today, those establishments *could conceivably* turn rogue in the future, as the experiences of other countries attest. Which is why

"[t]he sentiment of the [Founders'] time strongly disfavored standing armies". *Miller*, 307 U.S. at 179. A suspicion the Constitution reflects. U.S. Const. art. I, § 8, cl. 12 and § 10, cl. 3. And one which Marylanders should always entertain. *See* Md. Const., Declaration of Rights arts. 28, 29, and 30.

Presumably, facilitation of tyranny is an unintended consequence of the FSA. Nonetheless, disarmament of the Militia inevitably constitutes the most telling event in "a long train of abuses and usurpations * * * [which] evinces a design to reduce the[People] under absolute Despotism". Declaration of Independence. *That* threat can *never* be discounted, if "the security of a free State" is to perdure.

By using Petitioners' case to integrate *Miller* and *Heller,* this Court can alleviate that danger.

CONCLUSION

The Court of Appeals' decision cries out for reversal. Therefore, this Court should grant the Petition.

Respectfully submitted,

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