No. 17-127

IN THE

Supreme Court of the United States

STEPHEN V. KOLBE, ET AL.,

Petitioners,

v.

LAWRENCE J. HOGAN, JR., ET AL.,

Respondents.

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

BRIEF OF *AMICI CURIAE* CATO INSTITUTE, NATIONAL SHERIFFS' ASSOCIATION, SECOND AMENDMENT FOUNDATION, AND INDEPENDENCE INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Can a state ban firearms that are in common citizen and law-enforcement (not military) use?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF THE *AMICI CURIAE*[1]

The **National Sheriffs' Association** is a 501(c)(4) that promotes the fair and efficient administration of criminal justice. The NSA advocates for over 3,000 sheriffs nationwide, promotes the public-interest goals of law enforcement, and participates in litigation that affects the vital interests of law enforcement.

The **Cato Institute** is a non-partisan public policy research foundation that advances the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was founded in 1989 to restore the principles of constitutional government that are the foundation of liberty.

The **Second Amendment Foundation** is a non-profit foundation dedicated to protecting the right to keep and bear arms through educational and legal action programs. SAF has over 650,000 members, in every State of the Union. SAF organized and prevailed in *McDonald v. City of Chicago*.

The **Independence Institute** is a non-profit Colorado educational public policy research organization founded on the eternal truths of the Declaration of Independence. The Institute's *amicus* briefs in *District of Columbia v. Heller* and *McDonald v. City of Chicago* (under the name of lead *amicus* Int'l Law Enforcement Educators & Trainers Association (ILEETA)) were cited in the opinions of Justices Breyer (*Heller*), Alito (*McDonald*), and Stevens (*McDonald*).

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[1] All parties were timely notified of *amici*'s intent to file this brief and have consented. No counsel for any party authored this brief in whole or in part. No person or entity other than *amici* funded its preparation or submission.

This case concerns *amici* in that it goes to the heart of the fundamental right to armed self-defense, as protected by the Second and Fourteenth Amendments.

INTRODUCTION AND SUMMARY OF ARGUMENT

Maryland's firearm and ammunition restrictions stem from a misunderstanding of firearms that are in common use by citizens and law enforcement agencies.

Most sheriffs and deputies carry semi-automatic handguns with magazines larger than 10 rounds that are banned in Maryland; many patrol vehicles carry a rifle that is banned in Maryland. Classifying typical sheriffs' arms as "weapons of war" alienates the public from law enforcement. Among the many harmful consequences: when a deputy uses deadly force, people will say that he or she used a military weapon. This is inflammatory, and false.

Law-abiding Americans have always looked to law enforcement for guidance in defensive firearms selection, as they should. Law enforcement firearms are chosen because they are the *most* suitable arms for the defense of innocents. Citizens should be encouraged to choose the same reliable, accurate, life-saving arms that law enforcement chooses after extensive testing and consideration.

Repeating arms, like those Maryland bans, have existed since the 16th century. By the time the Fourteenth Amendment was adopted, such arms were in common use. During Prohibition, a few states enacted (and later repealed) ammunition-capacity restrictions. None was as severe as Maryland's, and none is "longstanding."

Maryland's restrictions are unconstitutional.

ARGUMENT

I. THE ARMS MARYLAND BANS ARE NOT MILITARY WEAPONS

A. Falsely Claiming That Sheriffs Carry Military Weapons Creates Deadly Peril for Law Enforcement Officers and Undermines Policing by Consent

The standard handgun of the vast majority of sheriffs and their deputies is a semi-automatic pistol with a standard capacity manufacturer-supplied magazine of 11–20 rounds, which Maryland prohibits. Md. Code Ann., Crim. Law § 4-305(b). Almost all sheriffs' patrol cars carry a rifle, a shotgun, or both. The rifle is usually a semi-automatic that Maryland labels an "assault weapon"—for example, rifles that have an adjustable stock, so that the rifle will fit a tall deputy or a short deputy. Md. Code Ann., Pub. Safety § 5-101(r)(2); Md. Code Ann., Crim. Law § 4-301(e)(1)(i).

Yet according to the Fourth Circuit, those typical sheriffs' arms are "weapons that are most useful in military service," similar to "M-16 rifles and the like." *Kolbe v. Hogan*, 849 F.3d 114, 121, 131, 135–37, 142–45 (4th Cir. 2017) (en banc) (making "military service" claim 22 times, and "M–16" claim 12 times). Similarly, the lower court claims that all magazines over 10 rounds "are unquestionably most useful in military service." *Id.* at 137, 155. Without so intending, the Fourth Circuit's rationale has cast unwarranted aspirations on law enforcement and threatens to exacerbate existing tensions between the police and the public they have sworn to protect. If the error is not corrected by the Supreme Court, the law enforcement community will suffer the consequences.

Every day, citizens see deputies bearing common handguns from Ruger, Springfield, Glock, Smith & Wesson, etc.[2] According to the Fourth Circuit, these citizens are supposed to think their county sheriffs's deputies are bearing military weapons. To the contrary, in a typical Sheriff's Office, only a small number of deputies possess genuinely military arms, such as machine guns or stun grenades. These arms are deployed only for unusual situations, such as hostage scenarios or high-risk warrant service. These are certainly not the arms that a citizen would see a deputy carrying during standard foot, bicycle, or automobile patrol. Neither sheriffs nor the public would tolerate the use of military equipment for routine law enforcement.

Even well-justified law enforcement use of force often leads to great controversy. Community fear and alienation about justified force will be worsened by the spread of the Fourth Circuit view: that sheriffs and police carry military weapons. Which is correct: "Deputy X shot the suspect with a common handgun" or "Deputy X shot the suspect with a military weapon"? Did the deputy really use what the Fourth Circuit calls "efficient instruments of mass carnage"? *Id.* at 152.

Every use of deadly force, including by law enforcement officers, should be scrutinized. Unlawful uses, including by law enforcement officers, must be rigorously prosecuted. In recent years, however, some fully justified uses of force have been maliciously and falsely

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[2] We use "citizens" in the sense that many Sheriffs' Offices do—to refer respectfully to all persons who are not law enforcement officers. The usage is not intended to disparage the Second Amendment rights of legal permanent-resident aliens.

portrayed, greatly damaging law enforcement relations with the community. One consequence has been ambush attacks on law enforcement officers.

The pernicious assertion that ordinary law enforcement officers carry military weapons for "mass carnage" substantially worsens the problem of alienation and anger. To put it bluntly, the more that people believe the lower court's claims—that standard American law enforcement is carried out with the weapons of military occupation—the more attacks there may be on law enforcement officers.

The Fourth Circuit vision is military policing from above. This is the opposite of the American system of policing by consent. Sheriffs and deputies are part of their community, but the Fourth Circuit makes them abnormal—armed like soldiers, ruling like an occupying army. Such misperceptions make citizens less willing to cooperate with law enforcement, and creates artificial, unnecessary division and fear.

Unlike the military, Sheriffs' Offices are under the immediate and direct control of the people. Almost all sheriffs are elected by the voters of their county. The election of sheriffs had roots in Anglo-Saxon England, but was later weakened and finally obliterated in the centuries after the Norman Conquest. Starting in 1652 in Virginia, Americans re-asserted their right to elect sheriffs. Since the early 19th century, it has been standard for American sheriffs to be elected by the people. David Kopel, *The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. Crim. L. & Criminol. 671, 776–81,

786–87 (2015).[3] In America, the Office of Sheriff is of, by, and for the people—not above them.

B. Citizens Should Choose the Safest and Best Defensive Firearms: the Types Used by Ordinary Law Enforcement Officers

American citizens have always looked to local law enforcement for guidance in choosing defensive firearms. This is prudent, because law enforcement firearms are selected with care. Sheriffs choose their duty arms for only one purpose: the lawful defense of innocents. Sheriffs' firearms may not be ideal for hunting or other recreational purposes. They are certainly not selected for the purpose of "mass carnage." Instead, sheriffs' firearms are best for defense of self and others, including against multiple attackers. In the 1870s, sheriffs and citizens chose high quality revolvers from companies like Colt or Smith & Wesson. Today, they choose well-made pistols from those companies and from newer ones, such as Ruger, Springfield, or Glock. Citizens also copy sheriffs' rifles, from the lever-actions of the 19th century to semi-automatics—which fire only one shot per trigger pull—in the 21st.

The first and most important reason why citizens can and should copy sheriffs' firearms selections is to ensure that citizens will have reliable and sturdy firearms for defense of self and others. These arms will be powerful enough for defense against violent criminals, *and* these arms will be appropriate for use in civil society, because sheriffs' arms are *not* military arms.

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[3] The exceptions are Alaska (which has no counties), Hawaii, Rhode Island, and Connecticut (where the Office of Sheriff was abolished in 2000).

Second, citizens who choose to become deputies are easier to train when they are already familiar with the types of arms used by Sheriffs' Offices. In any given law-enforcement academy, the time that can be spent on firearms training is finite. The same is true for continuing professional training. New deputies who are already familiar with the firearms they will carry on duty typically reach higher levels of proficiency.

Third, law-abiding citizens often come to the aid of law-enforcement officers who are being attacked. Many officers' lives have been saved by these heroic citizens. The best guns for these citizen rescuers are the same guns that law enforcement carries.

Fourth, in many jurisdictions, law enforcement relies on trained volunteers. For example, in Colorado, the Colorado Mounted Rangers is a volunteer organization of 200 citizens that provides assistance pursuant to formal agreements with over 30 Colorado Sheriffs' Offices, Police Departments, and other local governments. In 2013, they supplied 50,000 hours of services to local governments. They respond to violent crimes, prison escapes, natural disasters, backcountry search and rescue, and everything else that law enforcement officers do. Although they train to the same high standards as the Colorado State Patrol, these unpaid volunteers are not government employees and are not peace officers except when activated by the requesting government agency. Statutes like Maryland's prevent these volunteer organizations from possessing and training with the types of arms used by the law enforcement agencies they assist.

Other citizen helpers include the members of the *posse comitatus*. Since the days of Alfred the Great, sheriffs have had the authority to summon armed

members of the community to assist in keeping the peace. *Id.* at 789–91. In the words of James Wilson, shortly before President Washington appointed him to the Supreme Court, the *posse comitatus* is "the high power of ordering to [the sheriff's] assistance the whole strength of the county over which he presides" in order "to suppress . . . unlawful force and resistance." James Wilson, *Of Government*, *in* 2 Collected Works of James Wilson 1016 (Kermit Hall & Mark David Hall eds., 2007). Alexander Hamilton maintained in Federalist 29 that a federal *posse comitatus* power flows from the Necessary and Proper Clause. As Justice Story observed in 1833, the *posse comitatus* suffices for maintaining law and order in most situations, but there are some circumstances when either a militia or standing army would be necessary. Joseph Story, 3 Commentaries on the Constitution 81–82 (1833) (§ 1196).

Posses were constantly employed throughout the United States in the 19th century. Kopel, *supra*, at 793–803. In the 21st century, when the number of full-time law enforcement officers is much greater, the use of posses is less common—but it is still common in many jurisdictions. In almost every state, the sheriff's common law *posse comitatus* power is given expression by a statute on the subject. *Id.* at 830–50 (appendix reprinting statutes). In 2012, this Court recapitulated some leading *posse comitatus* precedents. *Filarsky v. Delia*, 566 U.S. 377, 388 (2012).

Today in Colorado, at least 17 county Sheriffs' Offices have organized posses, composed of citizen volunteers.[4] All posse members are trained by the Sheriff's Office and required to follow regulations promulgated

[4] The counties include Adams (460,000 population), Larimer (310,000), Weld (264,000), and Mesa (148,000). *Id.* at 810 n.269.

by the sheriff. Posses perform a wide range of duties based on the sheriff's determination. For posse members who carry firearms, they are almost always required to pass the same qualification as full-time deputies, and they have usually been given firearms training by the Sheriff's Office. *Id.* at 808–12, 817–21.

In modern Colorado, sheriffs can and do summon whatever citizens are available to assist in an emergency. Examples include: securing small towns to prevent looting during the September 2013 floods, securing a burglarized building, or manhunts for escaped criminals. *Id.* at 815–17. Most famously, large Colorado volunteer posses thwarted the escape of serial killer Ted Bundy after he escaped from the Pitkin County Courthouse during a hearing recess. A large citizen posse also blocked the escape of a pair of criminals on a nationwide spree, who had murdered Hinsdale County Sheriff Roger Coursey. *Id.* at 812–15.

Whether in an *ad hoc* manhunt or in a continuing posse that receives regular training, it is obviously preferable for the members of a posse to have firearms similar to, and compatible with, the firearms of the officers whom they are assisting.

The Second Amendment right is, of course, a right of all law-abiding individuals. Yet there is an explicit third-party beneficiary: the militia. Creating the conditions for a well-regulated, functional militia also has the obvious and inescapable benefit of ensuring a strong and vigorous *posse comitatus*. A well-armed population fosters both. The original meaning of the Constitution was that the militia *and* the posse could be used to assist the federal government. The militia and the posse are complementary institutions, each of them requiring that the people be armed—including

with arms appropriate for the duties of a citizen. For maintenance of civil order, this means arms like those used by civil law enforcement officers for that purpose.

C. Reserve Ammunition Capacity Is Needed for Effective Defense of Self and Others

The Fourth Circuit's opinion relies heavily on its claims about how often citizens fire more than 10 rounds in self-defense. This reliance is mistaken.

Limiting rights by attempting to enumerate defensive uses is contrary to *District of Columbia v. Heller*, which observed that defensive handgun ownership is widespread, but treated quantification of defensive shootings as irrelevant. 554 U.S. 570, 634–35 (2008) (rejecting an interest-balancing test that weighed handgun crime against handgun defense); *McDonald v. City of Chicago*, 561 U.S. 742, 790–91 (2010) (noting that *Heller* and *McDonald* reject a quantitative "costs and benefits" approach).

What mattered to this Court was whether handguns were in "common use at the time." *Heller*, 554 U.S. at 624, 627. While the Court noted many advantages of handguns for self-defense, it ultimately concluded that what mattered was whether handguns were commonly *chosen* for that purpose. *Id.* at 629 ("Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid."). As Justice Stevens explained, "[t]he Court struck down the District of Columbia's handgun ban not because of the *utility* of handguns for lawful self-defense, but rather because of their *popularity* for that purpose." *McDonald*, 561 U.S. at 890 n.33 (Stevens J., dissenting) (emphasis in original). Maryland bans some

of the most popular arms in the country: over 8 million firearms (including the best-selling rifle of all time) and 75 million magazines. *Kolbe*, 849 F.3d at 128, 129.

It cannot be that the Second Amendment only protects arms that are frequently used in actual defensive shootings. The bizarre result would be that the safer the country became, the less rights people would have, because fewer arms would be used in self-defense. The vast majority of American law enforcement officers will never fire one defensive shot in their careers. Does this mean most officers should not carry firearms? To the contrary, a firearm, like a fire extinguisher, is a tool for rare emergencies, and in those emergencies, essential to survival.

The Maryland statute concedes that ordinary law enforcement officers need more than 10 rounds. Because such officers possess firearms *solely* for defensive purposes, the statute's discrimination against law-abiding citizens is unjustifiable, for citizens need an adequate ammunition reserve just as much as law enforcement officers do.

When officers or citizens do shoot defensively, firing more than 10 shots is rare. So why do law-enforcement officers almost always carry firearms with greater capacity? For the same reason that citizens should: reserve capacity.

Among the purposes of reserve capacity is credible deterrence. Even law-enforcement officers, who spend far more time training than most citizens, hit their assailants at only a rate of about 20 to 40 percent. *See*, *e.g.*, Bernard Rostker et al., Evaluation of the New York City Police Department Firearm Training and Firearm-Discharge Review Process 14 (2008),

http://on.nyc.gov/2tmMWaw ("Between 1998 and 2006, the average hit rate [for NYPD officers] was 18 percent for gunfights. Between 1998 and 2006, the average hit rate [for NYPD officers] in situations in which fire was not returned was 30 percent"). Unlike in the movies, a single hit usually does not immediately stop an assailant. *See* John Eligon, *One Bullet Can Kill, but Sometimes 20 Don't, Survivors Show*, N.Y. Times, Apr. 3, 2008, http://nyti.ms/2tmTmq7 ("80 percent of targets on the body would not be fatal blows"). Accordingly, a handgun with a 16- or 17-round magazine is a more credible deterrent than one with a 10-round magazine—especially for a victim menaced by multiple criminals. That is why repeating arms became popular long ago, as will be detailed *infra*.

This is even truer for citizens than for law enforcement. It is quite challenging for a citizen facing an imminent attack to extract a cell phone and dial 911. Usually, the only magazine that a citizen will have is the one in her firearm. In contrast, law enforcement officers usually wear small always-ready radios on their shoulders, to immediately summon back-up. Unlike the typical citizen, the typical officer will have several back-up magazines readily available on his or her duty belt. While law enforcement officers can sometimes call for back-up before taking on a situation, the citizen never has such an option, because the criminals decide the time and place for attack.

Further, violent confrontations are inherently unpredictable. If a victim sees one assailant, she does not know if a second assailant may be hiding nearby. As law-enforcement officers are taught, "If you see one, there's two. If you see two, there's three." When a defender knows that she has a greater reserve, she will

fire more shots, because she knows she will have sufficient ammunition to deal with a possible second or third attacker. Obviously, the more shots the defender fires, the greater the possibility that the attacker(s) will be injured and the lesser the chance that the defender will be injured. By constricting reserve capacity, the Maryland law increases the risk of injury for victims and reduces it for attackers. That is the opposite of the Second Amendment's intent and purpose.

II. REPEATING ARMS WITH A CAPACITY OF MORE THAN 10 ROUNDS ARE TRADITIONAL AMERICAN ARMS

A. Colonial Period

Repeating arms, as well as magazines with a capacity of greater than 10 rounds, predate the Second Amendment by over two centuries.

The first known repeating firearms—those that can fire multiple times without reloading—date back to between 1490 and 1530, with guns that fired 10 rounds utilizing a revolving cylinder (much like a modern revolver does). M.L. Brown, Firearms in Colonial America: The Impact on History and Technology, 1492-1792, at 50 (1980). King Henry VIII (reigned 1509–1547) owned a repeater with a revolving cylinder. W.W. Greener, The Gun and Its Development 81–82 (9th ed. 1910). Around 1580, a 16-round repeater was created. *See* Lewis Winant, Firearms Curiosa 168–70 (2009); *16-Shot Wheel Lock*, America's 1st Freedom, May 10, 2014, http://bit.ly/2tngSDD.

More repeaters entered the market in the 17th century; including English revolvers and lever-action weapons, a four-barreled pistol capable of firing 15 shots in a few seconds, and the Lorenzoni Repeater—

an Italian pistol that "used gravity to self-reload" (similar to the function of a semi-automatic firearm). Martin Dougherty, Small Arms Visual Encycl. 34 (2011). The first repeater to be produced in bulk was a 1646 Danish long gun with two tubular magazines; it fired 30 shots without reloading. Brown, *supra*, at 106–7.

In 1722, John Pim, of Boston, impressed some Indians with a repeater he had made. "[L]oaded but once," it "was discharged eleven times following, with bullets in the space of two minutes each which went through a double door at fifty yards' distance." 5 Samuel Niles, A Summary Historical Narrative of the Wars in New England, Massachusetts Historical Society Collections, Series No. 4, at 347 (1837). Pim's repeater was probably the same type that had become "popular in England from the third quarter of the 17th century," which started being manufactured in Massachusetts decades later. Harold Peterson, Arms and Armor in Colonial America 1526–1783, at 215–17 (Dover reprint 2000) (Smithsonian Inst. 1956). Around this same time, Joseph Belton, a Philadelphian, created a more rapidly firing repeater. It could shoot eight times in three seconds. *Id*. at 217.

B. Founding Era and Early Republic

When the Second Amendment was ratified, the state-of-the-art repeater was the Girandoni air rifle—which was ballistically equal to a powder gun. John Plaster, The History of Sniping and Sharpshooting 69–70 (2008). The Girandoni was invented for the Austrian army, and used by its sharpshooters. It was famously carried by Meriwether Lewis on the Lewis and

Clark expedition.[5] It could consecutively shoot 21 or 22 rounds in .46 or .49 caliber, and it was powerful enough to take an elk with a single shot. Jim Supica et al., Treasures of the NRA National Firearms Museum 31 (2013).

Not all multi-shot firearms in the Founding Era were repeaters. The most common alternative was the Blunderbuss pistol. It could fire either one large projectile, or several at once. Most often it was loaded with about 20 large pellets, making it devastating at short range. In the 17th and 18th centuries, it was popular for close quarters self-defense (*e.g.*, in the home, or by stagecoach drivers and passengers), but it was inaccurate at a distance.

Repeating arms became the most common arms in the 19th century. To function properly, repeaters require much closer fittings among their parts than do single-shot firearms. Through the 18th century, gun manufacture was artisanal. Until the invention of machine tools to make uniform parts, the quantity of labor required to build a repeater made such guns expensive and inaccessible to most Americans. Repeaters were limited to persons who could afford one, or who (like John Pim or John Belton) were skilled enough to make their own.

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[5] Lewis demonstrated the rifle to impress various tribes encountered on the expedition. Meriwether Lewis and William Clark, The Journals of the Lewis & Clark Expedition (Gary Moulton ed. 1983) (13 vols.) (Aug. 3, 19, 1804; Oct. 10, 29, 1804; Aug. 17, 1805; Jan. 24, 1806; Apr. 3, 1806). The demonstrations may have made the point that although the expedition was usually outnumbered by any given band, the smaller group could defend itself.

By the middle of the 19th century, repeaters were widely available due to a revolution in firearms manufacturing. The federal armories at Springfield, Massachusetts and (to a lesser extent) Harpers Ferry, Virginia, led an industrial revolution in mass production. The result was parts manufactured with machine tools (*i.e.*, tools that make other tools), which allowed firearms to be produced at a greater rate and with greater uniformity. Soon, the advances were shared with the consumer market. *See*, *e.g.*, David R. Meyer, Networked Machinists: High-Technology Industries in Antebellum America 81–84, 252–62, 279–80 (2006).

In 1821, the *New York Evening Post* reported that New Yorker Isaiah Jennings produced a repeater whose "number of charges may be extended to fifteen or even twenty . . . and may be fired in the space of two seconds to a charge." "[T]he principle can be added to any musket, rifle, fowling piece, or pistol" to make it capable of firing "from two to twelve times." *Newly Invented Muskets*, N.Y. Evening Post, Apr. 10, 1822, *in* 59 Alexander Tilloch, The Philosophical Magazine and Journal: Comprehending the Various Branches of Science, the Liberal and Fine Arts, Geology, Agriculture, Manufactures, and Commerce 467–68 (Richard Taylor ed., 1822), http://bit.ly/2tn4raZ.

C. Middle and Latter 19th Century

In the 1830s, the popular pepperbox handguns were introduced. These pistols had multiple barrels that would fire sequentially. Lewis Winant, Pepperbox Firearms 7 (1952). Most models had four to eight barrels, but some models had 12, 18, and even 24 independently firing barrels. Jack Dunlap, American British & Continental Pepperbox Firearms 148–49, 167

(1964). That same decade, the Bennett and Haviland Rifle used the same concept as the pepperbox. It had 12 individual barrels that fired sequentially. Norm Flayderman, Flayderman's Guide to Antique American Firearms and Their Values 711 (9th ed. 2007).

Revolvers were also introduced in the 1830s, by Samuel Colt. They fire repeating rounds like the pepperbox, but use a rotating cylinder rather than rotating barrels. Pin-fire revolvers with capacities of up to 21 rounds entered the market in the 1850s. Supica, *supra*, at 48–49; Winant, Pepperbox Firearms, *supra*, at 67–70. Also in the 1850s, Alexander Hall introduced a rifle with a 15-round rotating cylinder. Flayderman, *supra*, at 713, 716. Around that same time, Parry W. Porter created a rifle with a 38-shot canister magazine. The Porter Rifle could fire 60 shots in 60 seconds. *A New Gun Patent*, Athens (Tenn.) Post, Feb. 25, 1853, http://bit.ly/2tmWUbS (reprinted from *N.Y. Post*).

In 1855, an alliance between Daniel Wesson (later, of Smith & Wesson) and Oliver Winchester led to a series of famous lever-action repeating rifles. First came the 30-shot Volcanic Rifle, which an 1859 advertisement boasted could be loaded then fired 30 times within a minute. Harold F. Williamson, Winchester: The Gun that Won the West 26–27 (1952). Next came the 16-shot Henry Rifle of 1861. It evolved into the 18-shot Winchester Model 1866, which was advertised as being able to "be fired thirty times a minute," *id*. at 49, and was also touted as having a capacity of "eighteen charges, which can be fired in nine seconds." Louis A. Garavaglia & Charles G. Worman, Firearms of the American West 1866–1894, at 128 (1985). The earlier repeating rifles sometimes had reliability problems,

but these were solved with the 1861 Henry and 1866 Winchester—and both models are still made today.

Also in 1866, the 20-round Josselyn belt-fed chain pistol entered the market. Other chain pistols had even greater capacities. *See, e.g.*, Winant, Firearms Curiosa, *supra*, at 204, 206. Additionally, handguns using detachable box magazines were first patented in 1862. *Id.* at 244–45. The Evans Repeating Rifle was introduced in 1873; its innovative rotary helical magazine held 34 rounds. Dwight Demeritt, Maine Made Guns & Their Makers 293–95 (rev. ed. 1997); Flayderman, *supra*, at 694. That same year, the Winchester Model 1873 came out and became known as "The Gun that Won the West." It had a 15-round magazine. Dougherty, *supra*, at 62. So did its successor, the Model 1886, and then the Model 1892, made legendary by Annie Oakley, and later by John Wayne. *Model 1892 Rifles and Carbines*, Winchester Repeating Arms, http://bit.ly/2tn03IN (last visited July 23, 2017).

While lever-action repeaters were popular, they were outpaced later in the century by pump-actions, bolt-actions, and semi-automatics. One iconic pump-action rifle of the 19th century was the Colt Lightning. It could fire 15 consecutive rounds. Flayderman, *supra*, at 122. In 1885, the semi-automatic action was invented. Like revolvers, lever-actions, pump-actions, and bolt-actions, semi-automatics fire one round per each pull of the trigger. In contrast, automatic firearms (commonly called "machine guns") fire continuously when the trigger is pressed. This unique feature is the reason militaries around the world use automatic weapons. The first automatics were huge, heavy, and very expensive. Not to mention the enormous cost of ammunition. The relatively lower-cost Thompson

submachine gun was introduced in the 1920s. But "[c]ommercially, then, the gun was a flop," and it was popular only with gangsters. John Ellis, The Social History of the Machine Gun 151–60 (1975).

Unlike the court below, this Court recognizes the difference between ordinary arms that fire "only one shot with each pull of the trigger," which "traditionally have been widely accepted as lawful possessions," versus machine guns, which have the "quasi-suspect character we attributed to owning hand grenades." *Staples v. United States*, 511 U.S. 600, 603 n.1, 611–12 (1994).

III. THERE IS NO LONGSTANDING REGULATION OF THE ARMS MARYLAND BANS

Heller takes account of whether a given gun control is "longstanding" and is based on "historical tradition." *Heller*, 554 U.S. at 626–27. As this Court elucidated in *Heller* and *McDonald*, the most significant periods for historical analysis are when the Second and Fourteenth Amendments were ratified, respectively—since a core purpose of the Fourteenth Amendment was to make the individual right to keep and bear arms enforceable against state and local governments.

When the Second Amendment was ratified in 1791, repeating arms were already three centuries old. As noted, the state-of-the-art as of 1791 was a rifle that could fire 22 consecutive shots. By 1868, when the Fourteenth Amendment was ratified, firearms had become more accurate, reliable, and durable. Americans had seen 24-shot handguns, 12-shot rifles, 21-round revolvers, 38-round canister magazines, 20-round belt fed pistols, and rifles capable of firing 60 shots in 60 seconds. Most significantly, as of 1868, two of the most popular firearms were the 16-shot Henry Rifle and the

18-shot Winchester M1866. Repeating arms capable of firing more than 10 rounds were in very common use.

By the end of the 19th century, semi-automatics and every other type of firearm available at present-day gun stores were on the market. Since then, there have been many improvements in manufacture that have reduced cost while increasing durability, accuracy, and reliability. But firearms' core operating systems have not changed much.

During a seven-year period of the alcohol prohibition era, six states enacted restrictions involving ammunition capacity. *See* 1927 R.I. Pub. Laws 256, §§ 1, 4 (banning sales of guns that fire more than 12 shots semi-automatically without reloading); 1927 Mich. Pub. Acts ch. 372, § 3 (banning sales of firearms "which can be fired more than sixteen times without reloading"); 1933 Minn. Laws ch. 190 (banning "machine gun[s]" and including in the definition semi-automatics "which have been changed, altered or modified to increase the magazine capacity from the original design as manufactured by the manufacturers"); 1933 Ohio Laws 189, 189 (license needed for semi-automatics with capacity of more than 18); 1933 Cal. Laws, ch. 450 (licensing system for machine guns, defined to include semi-automatics with detachable magazines of more than 10 rounds); 1934 Va. Acts ch. 96 s137, §§ 1(a), 4(d) (defining machine guns as anything able to fire more than 16 times without reloading, and prohibiting possession for an "offensive or aggressive purpose"; presumption of such purpose when possessed outside one's residence or place of business, or possessed by an alien; registration required for "machine gun" pistols of calibers larger than .30 or 7.62mm).

All of the above statutes were repealed, sometimes in stages. *See* 1959 Mich. Pub. Acts 249, 250 (sales ban applies only to actual machine guns); 1959 R.I. Acts & Resolves 260, 260, 263 (exempting .22 caliber and raising limit for other calibers to 14); 1975 R.I Pub. Laws 738, 738–39, 742 (sales ban applies only to actual machine guns); 1963 Minn. Sess. L. ch. 753, at 1229 (following federal law by defining "machine gun" as automatics only); 1965 Stats. of Calif., ch. 33, at 913 ("machine gun" fires more than one shot "by a single function of the trigger"); 1972 Ohio Laws 1866 (exempting .22 caliber; for other calibers, license required only for 32 or more rounds); H.R. 234, 2013–2014 Leg., 130th Sess. § 2 (Ohio 2014) (full repeal); 1975 Va. Acts, ch. 14, at 67 (defining "machine gun" as automatics only).

None of the state laws prohibited possession of standard firearms and their magazines. California and Ohio had licensing systems. Ohio did not even require a license to purchase any firearm or magazine; a license was needed only for the simultaneous purchase of the magazine and the relevant firearm. *See* David Kopel, *The History of Firearm Magazines and Magazine Prohibitions*, 78 Albany L. Rev. 849, 865 (2015). Rhode Island and Michigan limited sales, but not possession. Minnesota's statute applied only to altering a firearm from the way it had been manufactured. Virginia's law forbade carry of some arms in public places, and registered some handguns.

The only place a ban on possession existed was the District of Columbia. A 1932 law banned any firearm that "shoots automatically or semiautomatically more than twelve shots without reloading." Pub. L. No. 72-275, §§ 1, 8, 47 Stat. 650, 650, 652. Soon after Home

Rule was granted, the District in 1975 prohibited functional firearms in the home, and handguns altogether. When this Court ruled these prohibitions unconstitutional in *Heller*, the District enacted a new ban on magazines capable of holding more than 10 rounds. 2008 District of Columbia Laws 17-372 (Act 17–708). Thus, only the District of Columbia banned the *possession* of arms, like Maryland does. And only California's law went as low as 10 rounds, like Maryland's does—and that was a licensing system, not a prohibition.

None of these laws banned firearms regardless of ammunition capacity, like Maryland does. Instead, the laws applied to certain arms capable of firing a certain number of consecutive rounds. Minnesota had no capacity limit, and only forbade altering firearms from how they had been manufactured. In contrast, Maryland bans 45 firearms and "their copies"—apparently including "copies" with non-removable magazines of 10 rounds or fewer. None of the above laws are "longstanding," for all have been repealed. After all, something that is "longstanding" has two characteristics: being "long" and being "standing." *See* 1 Shorter Oxford English Dictionary 1625 (1993) ("*adj.* Of long standing; that has existed a long time, not recent.").

As for modern bans, like Maryland's, the District of Columbia's handgun ban was 33 years old when this Court struck it down in *Heller*; proving that 33 years is not "longstanding." The earliest present-day ban on ordinary rifles is California's 1989 statute. Cal. Stats. 1989, ch. 19, § 3, p. 64. The earliest modern magazine ban is New Jersey's 15-round limit enacted in 1990. Act of May 30, 1990, ch. 32, §§ 2C:39-1(y), -3(j), 1990 N.J. Laws 217, 221, 235 (codified at N.J. Stat. Ann. § 2C:39-1(y), -3(j) (West 2014)). Because these bans are

newer than the handgun ban struck down in *Heller*, no current ban on semi-automatic firearms or magazines can be considered longstanding.

CONCLUSION

Prohibiting the home possession of firearms and magazines in common use violates the Second Amendment. The false assertion that sheriffs and their deputies routinely carry military weapons alienates the public from law enforcement, and is contrary to American sheriffs' tradition of policing by consent.

For public safety and the safety of law enforcement, law-abiding citizens should be encouraged—not forbidden—to possess the arms most suitable for keeping the peace: the types of firearms and magazines typically possessed by sheriffs and their deputies.

The petition should be granted.

Respectfully submitted,

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