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Maryland Rifle Ban in the Supreme Court

Professors' and think tanks' amicus brief urges Court to grant certiorari

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Today I filed an amicus brief in support of a cert. petition challenging Maryland's ban on various semiautomatic rifles. The case is *Bianchi v. Frosh*, and was brought by the Firearms Policy Coalition, the Second Amendment Foundation, and individual plaintiffs. Petitioners are represented by the D.C. powerhouse litigation boutique Cooper & Kirk. (Docket page here, Petition here.)

Maryland Attorney General Frosh initially waived his right to file a response to the petition, but on January 14 the Supreme Court called for a response. The Court granted Frosh (and consequently his amici) an extension of time for the response, which is due March 14.

My brief, co-written with several other lawyers, including University of Wyoming law professor George Mocsary, is on behalf of a dozen professors of Second Amendment law, including the VC's Randy Barnett. It is also on behalf of the Independence Institute (the Denver think tank where I work), the John Locke Foundation (a North Carolina think tank), the Cato Institute, and the Center to Keep and Bear Arms (a project of the Mountain States Legal Foundation).

Led by Arizona and West Virginia, twenty-five state Attorneys General have filed an amicus brief in support of the petition. They argue that cert. should be granted because:

1. Many lower courts have narrowed *Heller* from below.
2. Failure to grant review would tempt Congress to enact a national ban, over-riding the policy choices of 43 states.
3. The Fourth Circuit's novel rule that governments can ban all firearms that are supposedly "like" military arms is based on an egregious misreading of one phrase from *Heller*. The Fourth Circuit rule would uphold a ban on many common firearms, such as the ubiquitous Colt 1911 .45 caliber pistol, and every semiautomatic pistol that is essentially similar to the Colt, which is to say all of them.
4. The Maryland ban harms public safety because the rifles that it singles out for prohibition are easier to fire accurately, easier to store safely, and often superior for lawful self-defense. To say that improved firearms can be banned because

> criminals might take advantage of the improvements would be to say that firearms can never be improved.

Any other amicus briefs in support of the cert. petition will be due on Monday, Feb. 14. There is sometimes a lag between when a brief is filed and when it appears on the Court's docket page.

Here is the Summary of Argument from my brief:

Circuit court decisions upholding rifle bans like those in this case rely on untenable reasoning. The Fourth Circuit's rule, at issue here, would authorize prohibiting the most common arms of the colonial and Founding periods: the all-in-one American long gun that was made for hunting, personal defense, and militia use.

The Seventh Circuit purported to favor arms like those of the Founding Era. Yet the court upheld a ban on self-loading firearms, a type that preceded the Second Amendment by a century-and-a-half.

The Second Circuit employed an especially unfavorable version of intermediate scrutiny that considers only the government's evidence, and that does not consider less restrictive alternatives. The First Circuit second-guessed law-abiding citizens' personal choices of common defensive arms.

All four of this Court's Second Amendment precedents on arms bans—*Heller*, *McDonald*, *Caetano*, and *Miller*—eschewed means-ends balancing. This Court's approach has always been categorial.

The rifles at issue here are "in common use," as lower courts have acknowledged. "Common use" is not determined by how often a gun is fired in self-defense. "Common use" encompasses all lawful uses, including hunting and self-defense. Arms bans do not become constitutional if they slice protected classes of arms into smaller subclasses. Dick Heller's 9-shot .22 caliber revolver was not particularly common, but handguns are very common.