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COMMENT

TO BAN OR NOT TO BAN: THE IMPACT OF EXCEPTIONS IN MARYLAND FIREARMS' REGULATIONS ON LEGISLATIVE INTENT

*By: Robert J. Taylor**

I. INTRODUCTION

Like any legislative action, the devil is in the details. Firearms regulations are no different. In April of 2013, the Maryland General Assembly passed Senate Bill 281 (cross-filed with House Bill 294).¹ The legislature invited Maryland residents to believe that the sale of assault weapons is banned in Maryland.² However, the law fell short of its objective by carving out an exception for certain firearms tantamount to assault weapons.³ Referred to as the heavy-barrel or “H-BAR” exception, the law effectively abrogates Maryland’s assault weapon ban.⁴ This exception allows AR-15 style firearms that are functionally indistinguishable from banned assault weapons to be legally sold, transferred, and possessed throughout the state.⁵

This article provides a brief history of some of the pertinent firearms’ regulations in the United States and Maryland. It surveys the effect of the General Assembly’s decision to except, by name, the Colt AR-15 Sporter H-

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¹ See 2013 Md. Laws 4195.

² See MD. CODE ANN., CRIM. LAW § 4-303(a) (LexisNexis 2022); Off. of Governor Martin O’Malley, *Comprehensive Public Safety Package Passes Maryland Legislature*, MARYLAND.GOV (Apr. 4, 2013), <https://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/019000/019952/unrestricted/20141047e-004.pdf>.

³ See MD. CODE ANN., PUB. SAFETY § 5-101(r)(2)(xv) (LexisNexis 2022).

⁴ See *id.* (excepting COLT AR-15 Sporter H-BAR rifles from the definition of assault weapon); see also MD. CODE ANN., CRIM. LAW § 4-301(d) (LexisNexis 2022).

⁵ The term “assault weapon” is the subject of intense public debate. For the purposes of this article, an “assault weapon” means those weapons enumerated in MD. CODE ANN., CRIM. LAW § 4-301(d) and includes the Colt AR-15 Sporter H-BAR rifle and other AR-15-style imitations.

BAR rifle, and its imitations in section 5-101(r) of the Public Safety Article and briefly summarizes the impact that these types of firearms have on communities across the United States. Finally, the article concludes by proposing legislative action to remove the illogical exceptions in the law to effectively support an assault weapons ban in Maryland.

II. BACKGROUND

A. A Brief History of Firearms Regulations at the National and State Levels is Necessary for Understanding How the State and Federal Governments Operate in Tandem to Support Firearms' Regulations.

The concept of federalism in the United States plays an essential role in firearms legislation due to overlapping federal and state laws.⁶ Federalism is “central to the constitutional design [and] adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect.”⁷ In the context of firearms legislation, this means that states and the federal government each have separate (and co-existing) regulations.⁸

Congress defines a firearm as “any weapon which will or is designed to or may readily be converted to expel a projectile [or bullet] by the action of an explosive, or the frame or receiver of any such weapon[.]”⁹ The term semiautomatic indicates that a firearm uses energy gathered from the discharge of a projectile to extract a fired cartridge and chamber the next cartridge.¹⁰ A semiautomatic firearm “requires a separate pull of the trigger to fire each cartridge.”¹¹ Rifles, shotguns, and handguns each have semiautomatic versions.¹²

⁶ See generally 1996 Md. Laws 3139-40; Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, § 108 Stat. 1796, 2000 (1994) (repealed 2004).

⁷ *Hosford v. Chateau Foghorn LP*, 229 Md. App. 499, 509, 145 A.3d 616, 622 (2016) (quoting *Arizona v. United States*, 567 U.S. 387, 399 (2012)).

⁸ See 18 U.S.C. §§ 921-931 (2022); *Hosford*, 229 Md. App. at 509, 145 A.3d at 622 (quoting *Arizona*, 567 U.S. at 399).

⁹ 18 U.S.C. § 921(a)(3) (2022) (cleaned up).

¹⁰ See 18 U.S.C. § 921(a)(29) (2022) (defining the functionality of various semiautomatic firearms).

¹¹ *Id.* (explaining semiautomatic firearm in the context of a repeating rifle).

¹² See BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, ATF GUIDEBOOK – IMPORTATION & VERIFICATION OF FIREARMS, AMMUNITION, AND IMPLEMENTS OF WAR 4, <https://www.atf.gov/firearms/docs/guide/atf-guidebook-importation-verification-firearms-ammunition-and-implements-war> [hereinafter ATF GUIDEBOOK].

A semiautomatic firearm is not a machinegun.¹³ A machinegun, by contrast, is designed to fire more than one cartridge (or bullet) each time the trigger is pulled, e.g., fully automatic or bursts of three to five rounds.¹⁴ Other firearms, such as bolt and lever action rifles or pump shotguns, require physical manipulation of the firearm by the operator, to extract a fired cartridge and chamber the next round.¹⁵

Under Maryland law, firearms are placed into two categories.¹⁶ These categories include: (1) regulated firearms, which includes handguns and an itemized list of semiautomatic assault weapons; and (2) all other firearms, including rifles and shotguns.¹⁷ Firearms in this category are impliedly unregulated.¹⁸ As described in section III below, the distinction between these categories is inconsistent, and many semiautomatic weapons remain unregulated simply because they are not included in the list of regulated firearms.¹⁹

B. A Brief History of Federal Firearms Regulations

In 1968, Congress passed the Gun Control Act of 1968 (“Gun Control Act”).²⁰ The “principal purpose [of the Gun Control Act] was ‘to make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency.’”²¹ Then, in 1994, Congress passed the Violent Crime Control and Law Enforcement Act.²² This Act built upon restrictions enacted to regulate

¹³ See 26 U.S.C. § 5845(b) (2022) (defining a machine gun as a firearm capable of firing more than one shot, automatically, with a single pull of the trigger).

¹⁴ See *id.* The laws governing machine gun possession in the United States have a long history dating back to prohibition-era alcohol smuggling and are not at issue in this article. The information here provides the reader with enough background to understand the distinction between semiautomatic weapons and machine guns.

¹⁵ See ATF GUIDEBOOK, *supra* note 12, at 5-9.

¹⁶ See MD. CODE ANN., PUB. SAFETY §§ 5-101(r)(1), (2)(i)-(xlv) (LexisNexis 2022); see also MD. CODE ANN., CRIM. LAW § 4-301(c) (LexisNexis 2022).

¹⁷ MD. CODE ANN., PUB. SAFETY §§ 5-101(r)(1) and (2)(i)-(xlv) (LexisNexis 2022); see also MD. CODE ANN., CRIM. LAW § 4-301(c) (LexisNexis 2022) (explaining that the statute lists semiautomatic assault weapons by make and model).

¹⁸ See MD. CODE ANN., PUB. SAFETY § 5-101(r)(1), (2)(i)-(xlv) (LexisNexis 2022).

¹⁹ Compare MD. CODE ANN., PUB. SAFETY §§ 5-101(r)(1), 2(i)-(xiv) (LexisNexis 2022), with MD. CODE ANN., CRIM. LAW §§ 4-301(d), (h) (LexisNexis 2022).

²⁰ Gun Control Act of 1968, Pub. L. No. 90-618, § 102, 82 Stat. 1213 (1968) (codified as amended at 18 U.S.C. §§ 921-931 (2022)).

²¹ *Barret v. United States*, 423 U.S. 212, 220 (1976) (quoting S. Rep. No. 1501, 90th Cong., 2d Sess., 22 (1968)).

²² Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 108 Stat. 1796.

dangerous weapons under the Gun Control Act of 1968.²³ Included in this legislation was the Public Safety and Recreational Firearms Use Protection Act (the “Recreational Firearms Use Protection Act”).²⁴ One purpose of the legislation was to ban certain types of firearms, including semiautomatic assault weapons.²⁵

Congress defined semiautomatic assault weapons by listing the make and model of prohibited weapons and also by including a list of features such as folding stocks, pistol-style grips, bayonet mounts, flash suppressors, or threaded barrels that, if present, would classify an unlisted semiautomatic firearm as an assault weapon.²⁶ A minimum of two features (the “two-feature test”) were required to classify a rifle as a semiautomatic assault weapon per the statute.²⁷ The legislation included an outright ban on the Colt AR-15 series rifle.²⁸

The Recreational Firearms Use Protection Act also made it unlawful for any person to “manufacture, transfer, or possess a semiautomatic assault weapon.”²⁹ Notably, the Recreational Firearms Use Protection Act established both an effective date for the statute and an automatic repeal date that would require the expiration of the statute in ten years unless amended by Congress.³⁰ On September 13, 2004, the federal ban on semiautomatic assault weapons expired.³¹

C. A Brief History of Maryland State Firearms Regulations

The Maryland General Assembly also enacted firearms legislation during this period. In 1989, Senate Bill 531 was enacted for the purpose of prohibiting the sale and possession of assault weapons in certain circumstances.³² There, the Colt-AR 15 “in any format” was designated as an assault weapon, along with twenty-four specific firearms.³³ There was no H-BAR exception.

²³ *See id.*

²⁴ Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, § 108 Stat. 1796, 1996 (1994) (codified as amended at 18 U.S.C. §§922(a)(30)(A)-(B) (1994) (repealed 2004)).

²⁵ *Id.*

²⁶ Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322 §§ 108 Stat. 1796, 1997-98 (1994) (codified as amended at 18 U.S.C. §§ 921(a)(30)(A)-(B) (1994) (repealed 2004)).

²⁷ *See* 18 U.S.C. § 921(a)(3)(B) (1994) (repealed 2004).

²⁸ *See* 18 U.S.C. §§ 921(a)(30)(A)-(B) (1994) (repealed 2004).

²⁹ 18 U.S.C. 922 § v(1) (1994) (repealed 2004).

³⁰ Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, § 108 Stat. 1796, 2000 (1994) (repealed 2004).

³¹ *Id.*

³² *See* 1989 Md. Laws 2483.

³³ *Id.* at 2485-2486.

In 1996, the General Assembly passed the Maryland Gun Violence Act (the “Gun Violence Act”).³⁴ The purpose of the Gun Violence Act was to further reduce the availability of assault weapons to the public.³⁵ As the court noted in *Moore v. State*, the General Assembly “chose to follow the federal model” and made additional changes to the law to “prevent weapons from being possessed by individuals who should not hold them . . . [adding a prohibition] on possession of firearms by felons convicted of crimes of violence or enumerated drug crimes.”³⁶ However, beyond just expanding prohibited persons, the bill expanded the list of banned assault weapons to forty-five, but this time the Colt AR-15 ban included the H-BAR exception.³⁷

Then, in response to the Sandy Hook Elementary School shooting that occurred in Newtown, Connecticut in 2012, Maryland enacted the Firearms Safety Act of 2013 (the “Firearms Safety Act”).³⁸ One purpose of the act was to further designate certain firearms as assault weapons.³⁹ The Firearms Safety Act expressly prohibited the future possession, sale, exchange, transfer, or receipt of assault weapons (or so the public was led to believe).⁴⁰ The bill also allowed persons who owned an “assault [weapon] or a copycat weapon before October 1, 2013” to retain lawful possession.⁴¹

III. ISSUE

The Firearms Safety Act was widely heralded as an assault weapons ban.⁴² However, the Act retained two provisions from previous legislation that created a polarizing effect on any purported assault weapons ban. First, the H-BAR exception in section 5-101(r)(2) of the Public Safety Article.⁴³ And second, a statutory definition of “copycat weapon” in section 4-301 of the Criminal Law Article.⁴⁴ These provisions operate to effectively reverse Maryland’s ban on assault weapons.⁴⁵

³⁴ See 1996 Md. Laws 3175.

³⁵ *Chow v. State*, 163 Md. App. 492, 507, 881 A.2d 1148, 1157 (2005).

³⁶ *Moore v. State*, 424 Md. 118, 134, 34 A.3d 513, 522 (2010).

³⁷ See 1996 Md. Laws 3183-3184.

³⁸ See 2013 Md. Laws 4195-4256.

³⁹ *Id.*

⁴⁰ *Id.* at 4195.

⁴¹ See MD. CODE ANN., CRIM. LAW § 4-303(b)(3) (LexisNexis 2022); 2013 Md. Laws 4195-4256.

⁴² See Aaron C. Davis, *Assault Weapons Ban Survives in Md. Gun-Control Bill*, WASH. POST (Mar. 29, 2013), https://www.washingtonpost.com/local/md-politics/assault-weapons-ban-survives-in-md-gun-control-bill/2013/03/29/26ac09ec-98c9-11e2-b68f-dc5c4b47e519_story.html?tid=a_inl_manual.

⁴³ See MD. CODE ANN., PUB. SAFETY § 5-101(r)(2)(xv) (LexisNexis 2022).

⁴⁴ See MD. CODE ANN., CRIM. LAW § 4-301(h)(1) (LexisNexis 2022).

⁴⁵ Compare MD. CODE ANN. PUB. SAFETY §§ 5-101(r)(1), 2(i)-(xiv) (LexisNexis 2022), with MD. CODE ANN. CRIM. LAW § 4-301(h) (LexisNexis 2022).

A. The Regulated and Unregulated Distinction in Maryland's Firearms' Statute Creates Arbitrary Classifications of Firearms.

Assault weapons are plainly regulated firearms under Maryland law.⁴⁶ Among other definitions, “assault weapon” means an “assault long gun” (or rifle) listed under section 5-101(r)(2) of the Public Safety Article.⁴⁷ Included in section 5-101(r)(2) are forty-five shotguns and rifles manufactured by various companies.⁴⁸ The statute also incorporates “specific assault weapons or their copies, regardless of which company produced or manufactured that assault weapon” into the definition.⁴⁹ Out of the forty-five listed firearms, only one contains an exception—the “Colt AR-15 Sporter H-BAR rifle.”⁵⁰

When exempting the Colt AR-15 Sporter H-BAR rifle, the General Assembly did not define “H-BAR rifle” in the statute.⁵¹ Instead, what constitutes H-BAR often turns on “the manufacturer’s designation of a firearm as an H-BAR or heavy-barreled version of an AR-15[.]”⁵² Even the Bureau of Alcohol, Tobacco, Firearms and Explosives’ (the “ATF”) Federal Firearms Regulations Reference Guide does not provide a definition for H-BAR.⁵³ The commonly accepted definition of “H-BAR” is that it is “a heavy barrel iteration of the AR-15[.]”⁵⁴

The removal of the Colt AR-15 H-BAR rifle (and its imitations) from section 5-101(r)(2)(xv) of the Criminal Law Article reverses its classification as an assault weapon under section 4-301(d) of the Criminal Law Article despite *identical functionality* to its banned counterparts.⁵⁵ The result is that firearms that are *indistinguishable* from each other in (among other things) their lethality and functionality are simultaneously included and excluded as part of Maryland’s ban under section 5-101(r)(2).⁵⁶

⁴⁶ See MD. CODE ANN., PUB. SAFETY § 5-101(r) (LexisNexis 2022).

⁴⁷ See MD. CODE ANN., CRIM. LAW §§ 4-301(b), (d) (LexisNexis 2022).

⁴⁸ See MD. CODE ANN., PUB. SAFETY §§ 5-101(r)(2)(i)–(xlv) (LexisNexis 2022).

⁴⁹ MD. CODE ANN., PUB. SAFETY § 5-101(r)(2) (LexisNexis 2022).

⁵⁰ MD. CODE ANN., PUB. SAFETY § 5-101(r)(2)(xv) (LexisNexis 2022).

⁵¹ See MD. CODE ANN., PUB. SAFETY § 5-101 (LexisNexis 2022).

⁵² STEPHEN P. HALBROOK, FIREARMS LAW DESKBOOK § 10:12 (2020) (discussing the Maryland State Police’s reliance on manufacturer designations to denote H-BAR designations on firearms).

⁵³ See generally U.S. DEP’T OF JUST., ATF FEDERAL FIREARMS REGULATIONS REFERENCE GUIDE (2014).

⁵⁴ Kolbe v. Hogan, 813 F.3d 160, 169 n.4 (4th Cir. 2016).

⁵⁵ See MD. CODE ANN., CRIM. LAW § 4-301(d) (LexisNexis 2022) (emphasis added).

⁵⁶ Compare AR-556, Model: 8500, RUGER (Mar. 11, 2021, 2:45 PM), <https://ruger.com/products/ar556/specSheets/8500.html> (noting specifications that the caliber is 5.56 NATO), with AR-556, Model: 8502, RUGER (Dec. 28, 2020, 11:07 AM),

The following illustrations highlight the result:

Figure 1 illustrates a semiautomatic rifle, categorized as an assault weapon per section 5-101(r)(2) and currently banned under Maryland law.⁵⁷



Figure 1 – Assault Weapon Per section 5-101(r)(2).⁵⁸

Figure 2 highlights a semiautomatic rifle not subject to the assault weapons ban under Maryland law.⁵⁹



Figure 2 – Unregulated Firearm Under Maryland Law.⁶⁰

<https://ruger.com/products/ar556/specSheets/8502.html> (noting specifications that the caliber is 5.56 NATO) (emphasis added).

⁵⁷ See MD. CODE ANN., CRIM. LAW § 4-301(b) (LexisNexis 2022) (defining any assault weapon as a weapon listed under § 5-101(r)(2) of the Public Safety Article).

⁵⁸ *AR-556, Model: 8500*, RUGER (Mar. 11, 2021, 2:45 PM),

<https://ruger.com/products/ar556/specSheets/8500.html>; see also *Maryland State Police Firearms Search*, MARYLAND.GOV STATE POLICE,

<https://mdsp.maryland.gov/Organization/Pages/CriminalInvestigationBureau/LicensingDivision/Firearms/FirearmSearch.aspx> (last visited Feb. 21, 2023) (listing this firearm as “Banned” as of Nov. 9, 2015).

⁵⁹ See MD. CODE ANN., PUB. SAFETY § 5-101 (LexisNexis 2022).

⁶⁰ *AR-556, Model: 8502*, RUGER (Dec. 28, 2020, 11:07 AM),

<https://ruger.com/products/ar556/specSheets/8502.html>; see also *Maryland State Police Firearms Search*, MARYLAND.GOV STATE POLICE,

https://mdsp.maryland.gov/Organization/Pages/CriminalInvestigationBureau/LicensingDivision/Firearms/FirearmSearch.aspx?Paged=TRUE&p_Manufacturer=LRB%20Arms&p_St

In *all functional aspects*, the firearms shown in *Figure 1* and *Figure 2* are identical.⁶¹ And while, the figures contain depictions of firearms with detachable magazines of varying capacities,⁶² this fact does not impact the basic internal operation of the firearm.⁶³ The manufacturer uses an identical instruction manual to explain the safety, operation, disassembly, reassembly, and other details for both firearms.⁶⁴ The result highlighted in *Figures 1* and *2* is illogical considering as recently as 2010, the Attorney General of Maryland remarked that a firearm’s “internal components and function” are the important characteristics that will “bring a weapon within the regulated [assault weapons ban] firearms law.”⁶⁵ The Attorney General’s statement illuminates the issue clearly—the presence of a heavy-barrel on an AR-15-style rifle places the weapon outside of the assault weapons ban—despite *identical internal components and function*.⁶⁶

atus=BANNED&p_ID=294&PageFirstRow=201&&View={EB794138-CE9C-4E9E-B3D2-B78C316F87DF (last visited Feb. 21, 2023) (listing this firearm as “Not Regulated by Statute” as of Oct. 18, 2016).

⁶¹ Compare *AR-556, Model: 8500*, RUGER (Mar. 11, 2021, 2:45 PM), <https://ruger.com/products/ar556/specSheets/8500.html>, with *AR-556, Model: 8502*, RUGER (Dec. 28, 2020, 11:07 AM), <https://ruger.com/products/ar556/specSheets/8502.html> (noting the Instruction Manual for these firearms is identical) (emphasis added).

⁶² *Id.*

⁶³ A “detachable magazine” is an “ammunition feeding device that can be removed readily from a firearm without requiring disassembly of the firearm action or without the use of a tool, including a bullet or cartridge.” MD. CODE ANN., CRIM. LAW § 4-301(i) (LexisNexis (2022)). Detachable magazines that have a capacity of more than 10 rounds of ammunition cannot be sold, transferred, purchased, or received in Maryland. *See* MD. CODE ANN., CRIM. LAW § 4-305(b) (LexisNexis 2022). *Figure-1* depicts a magazine with a capacity of 30 rounds of ammunition; *Figure-2* depicts a magazine with a capacity of 10 rounds of ammunition.

⁶⁴ Compare *AR-556, Model: 8500*, RUGER (Mar. 11, 2021, 2:45 PM), <https://ruger.com/products/ar556/specSheets/8500.html>, with *AR-556, Model: 8502*, RUGER (Dec. 28, 2020, 11:07 AM), <https://ruger.com/products/ar556/specSheets/8502.html> (noting the Instruction Manual for these firearms is identical).

⁶⁵ 95 OP. ATT’Y GEN. 101 (Md. 2010) (clarifying for the Maryland State Police how the statutory language related to “copies” or “imitations” is to be interpreted with respect to regulated assault weapons).

⁶⁶ *See* MD. CODE ANN., PUB. SAFETY § 5-101(r)(2)(xv) (LexisNexis 2022) (emphasis added); compare *AR-556, Model: 8500*, RUGER (Mar. 11, 2021, 2:45 PM), <https://ruger.com/products/ar556/specSheets/8500.html>, with *AR-556, Model: 8502*, RUGER (Dec. 28, 2020, 11:07 AM), <https://ruger.com/products/ar556/specSheets/8502.html> (noting the Instruction Manual for these firearms is identical) (emphasis added).

B. How Maryland’s H-BAR Exemption Circumvents the Assault Weapon Ban’s Policy Goals and Threatens the Safety of Communities

Assault weapons are “exceptionally lethal weapons of war.”⁶⁷ As the Supreme Court noted in *Staples v. United States*, the AR-15-style rifle “is the civilian version of the military’s M-16 rifle, and is, unless modified, a semiautomatic weapon.”⁶⁸ The effect of Maryland’s Colt AR-15 Sporter H-BAR exemption defeats the legislative intent of the assault weapons ban—which was to prohibit weapons “designed for the battlefield, for the soldier to be able to shoot a large number of rounds across a battlefield at a high rate of speed.”⁶⁹ Federal Bureau of Investigation (“FBI”) shared statistics from 2000 through 2013 that illustrate the impact that rifles have on communities across the United States.⁷⁰

The previous statistics are not indicative of the specific type, manner, or legality of how a particular firearm was obtained or used; instead, they illustrate the dangers that all firearms pose to communities when possessed by persons with malintent.⁷¹ Currently, “no national data source” is available to identify the “numbers of homicides, non-fatal shootings, or other crimes committed with [assault weapons]”.⁷² Nonetheless, the weapon of choice in many of these events was the AR-15-style rifle.⁷³

In the United States, a majority of criminal homicides involve the use of a handgun.⁷⁴ According to the FBI: “[h]andguns comprised 62.1 percent of the firearms used in murder and nonnegligent manslaughter incidents in

⁶⁷ *Kolbe v. Hogan*, 849 F.3d 114, 124 (4th Cir. 2017).

⁶⁸ *Staples v. United States*, 511 U.S. 600, 603 (1994).

⁶⁹ *Kolbe*, 849 F.3d at 125 (quoting *J.A.* at 206) (upholding Maryland’s assault weapon ban).

⁷⁰ FED. BUREAU OF INVESTIGATION, U.S. DEP’T OF JUST., A STUDY OF ACTIVE SHOOTER INCIDENTS IN THE UNITED STATES BETWEEN 2000 AND 2013 22-43 (2013) [hereinafter *Active Shooter Incidents, 2000-2013*].

⁷¹ *See id.*

⁷² Christopher S. Koper, William D. Johnson, Jordan L. Nichols, Ambrozie Ayers & Natalie Mullins, *Criminal Use of Assault Weapons and High-Capacity Semiautomatic Firearms: An Updated Examination of Local and National Sources*, 95 J. OF URB. HEALTH VOL. 313, 314 (2017).

⁷³ Jonathan Franklin, *Where AR-15-Style Rifles Fit in America’s Tragic History of Mass Shootings*, NAT’L PUB. RADIO (May 26, 2022), <https://www.npr.org/2022/05/26/1101274322/uvalde-ar-15-style-rifle-history-shooter-mass-shooting>.

⁷⁴ *See Crime in the U.S. 2019, Table 20, Murder by State, Types of Weapons, 2019*, FED. BUREAU OF INVESTIGATION (2019), <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019//tables/table-20> [hereinafter, FBI, *Murder by State – 2019*].

2019.”⁷⁵ Nationally, only five percent of firearms used in reported homicides involved a rifle or shotgun.⁷⁶ In 2019, murders resulting from rifles and shotguns accounted for only 1.7% of all criminal homicides in Maryland.⁷⁷ These statistics show that the potential for death or serious injury by a rifle or shotgun is lower than the risk presented by handguns; however, when assault weapons, like those noted *supra*, are used during active shooter incidents, the results are exceedingly devastating.⁷⁸

Active shooter incidents that involve the use of rifles or shotguns have steadily increased in the United States over the last twenty years.⁷⁹ The FBI defines an active shooter incident as one where “an individual actively engage[s] in killing or attempting to kill people in a confined and populated area.”⁸⁰ Between 2000 and 2013, 47 of the 160 active shooter incidents that occurred in the United States involved at least one rifle or shotgun; by 2019 that number had risen to nearly fifty percent.⁸¹ Of the active shooter incidents occurring between 2000 and 2019 involving at least one rifle or shotgun, more than 500 people were killed and over 1100 people have been injured, with immeasurable impacts on communities and families across the United States.⁸²

⁷⁵ *Crime in the U.S., 2019, Expanded Homicide*, FED. BUREAU OF INVESTIGATION (2019), <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/expanded-homicide>.

⁷⁶ See FBI, *Murder by State – 2019*, *supra* note 74, at Table 8.

⁷⁷ *Id.*

⁷⁸ FBI, *Murder by State – 2019*, *supra* note 74, at Table 8.

⁷⁹ John Gramlich, *What the Data Says About Gun Deaths in the U.S.*, PEW RSCH. CTR. (Feb. 3, 2022), <https://www.pewresearch.org/fact-tank/2022/02/03/what-the-data-says-about-gun-deaths-in-the-u-s/>.

⁸⁰ *How Can We Help You: Active Shooter Safety Resources*, FED. BUREAU OF INVESTIGATION, (<https://www.fbi.gov/how-we-can-help-you/safety-resources/active-shooter-safety-resources>) (last visited Feb. 2, 2023).

⁸¹ See Active Shooter Incidents, 2000-2013, *supra* note 70, at 22-44; *Criminal Use of Assault Weapons and High-Capacity Semiautomatic Firearms: An Updated Examination of Local and National Sources*, *supra* note 72, at 314.

⁸² See Active Shooter Incidents, 2000-2013, *supra* note 70 at 22-43; FBI, ACTIVE SHOOTER INCIDENTS IN THE UNITED STATES IN 2014 AND 2015 6-11 (2016), https://www.fbi.gov/file-repository/activeshooterincidentsus_2014-2015.pdf/view; FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., ACTIVE SHOOTER INCIDENTS IN THE UNITED STATES IN 2016 AND 2017 (2018) 9-11 (2018), <https://www.fbi.gov/file-repository/active-shooter-incidents-us-2016-2017.pdf/view> [hereinafter Active Shooter Incidents, 2016 and 2017]; FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., ACTIVE SHOOTER INCIDENTS IN THE UNITED STATES IN 2018 9-12 (2019), <https://www.fbi.gov/file-repository/active-shooter-incidents-in-the-us-2018-041019.pdf/view> [hereinafter Active Shooter Incidents, 2018]; FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUST., ACTIVE SHOOTER INCIDENTS IN THE UNITED STATES IN 2019, 12-15 (2020), <https://www.fbi.gov/file-repository/active-shooter-incidents-in-the-us-2019-042820.pdf/view>.

In 2017, the people of Nevada experienced the extraordinary dangers that assault weapons present to communities.⁸³ Fifty-eight people were killed in a single incident when a person “armed with four AR-15-style rifles began shooting into a crowd of people . . . in Las Vegas, Nevada[.]”⁸⁴ An additional 489 people were injured in this incident.⁸⁵ The year prior, at the Pulse Nightclub shooting in Orlando, Florida, a person armed with an AR-15-style rifle killed forty-nine people.⁸⁶ Just last year, in May of 2022, a person armed with an AR-15-style rifle killed ten people at a grocery store in Buffalo, New York.⁸⁷

There is no serious dispute that AR-15-style firearms are designed for a battlefield.⁸⁸ Active shooter incidents in recent history demonstrate that large numbers of people can be killed or maimed in an extremely short period of time when the firearm used in an active shooter incident is an AR-15 style firearm.⁸⁹ While legislatures across the country try to mitigate the hazards to communities these weapons of war present, the failure by lawmakers to investigate and understand basic concepts regarding the functional operation of firearms leads to arbitrary and capricious implementation of these laws.⁹⁰

C. State Legislative Firearms Restrictions Consistently Fail Because of Ambiguities in the Laws.

The Maryland General Assembly is not the only legislative body in the United States to struggle over regulations related to firearms legislation.⁹¹ Under New Jersey law, “[a]ny person who knowingly [possesses] an assault

⁸³ Active Shooter Incidents, 2016 and 2017, *supra* note 82, at 9-17.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 10.

⁸⁷ Jonathan Franklin & Emily Olson, *The Buffalo Tops Shooting Suspect Pleads Guilty to State Murder Charges*, NAT’L PUB. RADIO (Nov. 28, 2022), <https://www.npr.org/2022/11/28/1138700312/buffalo-tops-shooter-guilty-plea-state-charges>.

⁸⁸ *Kolbe*, 849 F.3d at 125 (quoting J.A. at 206) (upholding Maryland’s assault weapons ban).

⁸⁹ Active Shooter Incidents, 2016 and 2017, *supra* note 82, at 9-17.

⁹⁰ *Compare AR-556, Model: 8500*, RUGER, <https://ruger.com/products/ar556/specSheets/8500.html> (last visited Mar. 11, 2021, 2:45 PM), *with AR-556, Model: 8502*, RUGER, <https://ruger.com/products/ar556/specSheets/8502.html> (last visited Dec. 28, 2020, 11:07 AM) (noting the Instruction Manual for these firearms is identical); *What Should America Do About Gun Violence: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 20-21 (2013) (testimony of David Kopel, Adjunct Professor, Advanced Constitutional Law, Denver University, Sturm College of Law, Denver, Colorado).

⁹¹ *See* Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, § 108 Stat. 1796, 1996 (1994) (repealed 2004).

firearm is guilty of a crime in the second degree[.]”⁹² New Jersey defines an assault firearm by enumerating thirty-six firearms by manufacturer or model.⁹³ Like the Maryland statute, the Colt AR-15 and CAR-15 assault rifles are listed in the New Jersey statute.⁹⁴ Unlike Maryland, however, New Jersey provides no exception for heavy-barrel (H-BAR) AR-15-style rifles.⁹⁵

The absence of an H-BAR exception in the New Jersey statute does not cure the statute’s failure to regulate assault weapons.⁹⁶ New Jersey further restricts “[a]ny firearm manufactured under any designation which is *substantially identical* to any of the firearms listed [in section 2C:39-1(w)(1)].”⁹⁷ The New Jersey legislature did not define “substantially identical” in the statute.⁹⁸ Responding to questions from prosecutors and other law enforcement officials regarding the vague language, the Attorney General for New Jersey released guidance clarifying section 2C:39(w)(2).⁹⁹ The Attorney General concluded that a semi-automatic firearm is substantially identical to a named assault weapon when:

the semi-automatic rifle has the ability to accept a detachable magazine and has at least [two] of the following: a folding or telescoping stock, a pistol grip that protrudes conspicuously beneath the action of the weapon, a bayonet mount, a flash suppressor or threaded barrel . . . or a grenade launcher[.]¹⁰⁰

The language above is similar in many aspects to Maryland’s “copycat” provision noted in section III above.¹⁰¹ The combination of the “substantially identical” language and the Attorney General’s interpretation of its meaning results in the same outcome in New Jersey that was noted *supra* in *Figure 1*

⁹² N.J. STAT. ANN. § 2C:39-5(f) (West 2013).

⁹³ N.J. STAT. ANN. § 2C:39-1(w)(1) (West 2020).

⁹⁴ *Id.*

⁹⁵ See MD. CODE ANN., PUB. SAFETY § 5-101(r)(xv) (LexisNexis 2019); N.J. STAT. ANN. § 2C:39(w)(1) (West 2020).

⁹⁶ See N.J. STAT. ANN. § 2C:39-1(w)(2) (West 2020) (stating that firearms that are “substantially identical” to those enumerated in the statute are prohibited but failing to define what “substantially identical” means).

⁹⁷ N.J. STAT. ANN. § 2C:39-1(w)(2) (West 2020) (emphasis added).

⁹⁸ See *id.*

⁹⁹ Letter from Peter Verniero, N.J. Att’y Gen., to Dir. Terrance P. Farley, Dir. Of Div. of Crim. Just. (Aug. 19, 1996), <https://www.state.nj.us/lps/dcj/agguide/3assltf.pdf> (issuing guidelines regarding the “substantially identical” provision in the New Jersey statute).

¹⁰⁰ N.J. STAT. ANN. § 2C:39-1(w)(2) (West 2020) (internal numbering removed for clarity).

¹⁰¹ See MD. CODE ANN., CRIM. LAW § 4-301(h)(1) (LexisNexis 2022).

and *Figure 2*.¹⁰² New Jersey's arbitrary statutory scheme nullifies their asserted comprehensive assault weapons ban.¹⁰³

Congress's effort to regulate assault weapons has not yielded different results.¹⁰⁴ Despite its statutorily imposed repeal, the Recreational Firearms Use Protection Act was largely unsuccessful due to its own ambiguities.¹⁰⁵ Testifying before Congress in 2013 regarding the Recreational Firearms Use Protection Act, Professor David Kopel highlighted that from 1994 through 2004, the statutory period the ban was in effect, the Department of Justice ("DOJ") concluded that federal assault weapons ban had no effect on criminal activity.¹⁰⁶ The ban, according to the DOJ, had not saved any lives; nor had it "reduced the number of bullets that were fired [during] crimes."¹⁰⁷ The failure of the Recreational Firearms Use Protection Act was not in its statutorily imposed expiration, but that the legislation was based on superficial characteristics instead of the functionality of a firearm.¹⁰⁸ The precise functionality that the Maryland Attorney General stated was the feature that mattered.¹⁰⁹

IV. SOLUTION

The FBI statistics above demonstrate that active shooter incidents are often "perpetrated by individuals with military-style assault rifles[.]"¹¹⁰ The

¹⁰² Compare N. J. Stat. Ann § 2C:39-1(w)(2) (West 2020), with Letter from Peter Verniero, N.J. Att'y Gen., to Dir. Terrance P. Farley, Dir. of Div. of Crim. Just. (Aug. 19, 1996); Compare AR-556, Model: 8500, RUGER, <https://ruger.com/products/ar556/specSheets/8500.html> (last visited Mar. 11, 2021, 2:45PM), with AR-556, Model: 8502, RUGER (Dec. 28, 2020, 11:07AM), <https://ruger.com/products/ar556/specSheets/8502.html> (last visited Dec. 28, 2020, 11:07AM) (noting the Instruction Manual for these firearms is identical).

¹⁰³ See N.J. STAT. ANN. § 2C:39-5(f) (West 2013); N.J. STAT. ANN § 2C:39-1(w)(2) (West 2020).

¹⁰⁴ Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, § 108 Stat. 1796, 1996(1994) (repealed 2004).

¹⁰⁵ See *id.*; *What Should America Do About Gun Violence: Hearing Before the S. Comm. on the Judiciary*, *supra* note 90 at 14-16.

¹⁰⁶ See *What Should America Do About Gun Violence*, *supra* note 90, at 22 (testimony of David Kopel, Adjunct Professor, Advanced Constitutional Law, Denver University, Strum College of Law, Denver, Colorado).

¹⁰⁷ *Id.* at 14-15.

¹⁰⁸ *Id.*

¹⁰⁹ Whether a Weapon is a "Copy" of a designated Assault Weapon and Therefore subject to the Regulated Firearms Law, 95 Md. Att'y Gen. Op. 101 (2010) (clarifying for the Maryland State Police how the statutory language related to "copies" or "imitations" is to be interpreted with respect to regulated assault weapons).

¹¹⁰ *Gallinger v. Becerra*, 898 F.3d 1012, 1018 (9th Cir. 2018); see also *Active Shooter Incidents, 2000-2013*, *supra* note 70.

aim of Maryland's Firearm Safety Act was to "reduce the availability of assault long guns and large capacity magazines so that when criminals act, [they] do so with a less dangerous weapon and less severe consequences."¹¹¹ As the court noted in *Gallinger v. Becerra*, "assault weapons are more dangerous than other kinds of firearms."¹¹²

Maryland's H-BAR exception in section 5-101(r) de-regulates firearms functionally identical to those the statute sought to prohibit.¹¹³ Aside from the limiting effect that the H-BAR exception has on the assault weapons ban, Maryland's copycat statute also erodes the purpose of the assault weapons ban.¹¹⁴ Section 4-301(h)(2) is nearly identical to the "two-feature" test implemented as part of the Recreational Firearms Use Protection Act in 1994.¹¹⁵ At the federal level, the "two-feature" test received heavy criticism for focusing attention on "superficial, cosmetic characteristics and accessories" rather than functionality of the firearm.¹¹⁶ Testifying before Congress in 2013, the Executive Director for the Coalition to Stop Gun Violence noted that federal legislation similar to Maryland's "copycat" statute "made it possible for the gun industry to manufacture [military style assault rifles] that violated the intent of the law."¹¹⁷ This criticism is directly applicable to Maryland's alleged assault weapons ban.¹¹⁸ Essentially, even if

¹¹¹ *Kolbe*, 849 F.3d at 140 (quoting Brief of Appellees at 42).

¹¹² *Gallinger*, 898 F.3d at 1018.

¹¹³ See MD. CODE ANN., PUB. SAFETY § 5-101(r)(2)(xv) (LexisNexis 2022); MD. CODE ANN., CRIM. LAW § 4-301(h)(1) (LexisNexis 2022).

¹¹⁴ See MD. CODE ANN., CRIM. LAW § 4-301(h)(1) (LexisNexis 2022); *What Should America Do About Gun Violence*, *supra* note 90, at 26 (testimony of David Kopel, Adjunct Professor, Advanced Constitutional Law, Denver University, Strum College of Law, Denver, Colorado).

¹¹⁵ See Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, § 108 Stat. 1796, 1996 (1994) (repealed 2004); MD. CODE ANN., CRIM. LAW § 4-301(h)(1) (LexisNexis 2022).

¹¹⁶ *What Should America Do About Gun Violence: Hearing Before the S. Comm. on the Judiciary*, *supra* note 90, at 14-15 (testimony of David Kopel, Adjunct Professor, Advanced Constitutional Law, Denver University, Strum College of Law, Denver, Colorado).

¹¹⁷ *Id.* at 152 (testimony of Joshua Horwitz, Executive Director, Coalition to Stop Gun Violence discussing the "two-feature test" enumerated Recreational Firearms Use Protection Act).

¹¹⁸ *Id.* at 14-15 (testimony of David Kopel, Adjunct Professor, Advanced Constitutional Law, Denver University noting that the federal prohibition on assault weapons concerned physical characteristics as opposed to functional operation of a firearm). See also MD. CODE ANN., PUB. SAFETY § 5-101(r)(2)(xv) (LexisNexis 2022); MD. CODE ANN., CRIM. LAW § 4-301(h)(1) (LexisNexis 2022); see also MD. CODE ANN., CRIM. LAW § 4-303(a) (LexisNexis 2022).

Maryland resolved the H-BAR exception, the “two-feature” test would forestall the General Assembly’s efforts.¹¹⁹

The idea of expanding firearms legislation to prohibit assault weapons is often met with resistance.¹²⁰ Powerful lobbying groups, like the National Rifle Association (NRA), routinely oppose federal and state efforts to expand firearms legislation that further restricts semiautomatic firearms.¹²¹ Testifying before Congress in 2013, NRA leadership claimed that “[l]aw-abiding gun owners will not accept blame for the acts of violent or deranged criminals.”¹²² This assertion by the NRA is consistent with their position that assault weapon bans have limited effect on reducing gun violence.¹²³ This is supported primarily because firearms legislation is often based on “superficial, cosmetic characteristics and accessories” rather than the functionality of the firearm.¹²⁴ Notwithstanding the NRA’s opposition to firearms safety legislation, Justice Ginsburg summed up the problem and the solution of firearms safety legislation succinctly: “[f]irearms are dangerous, and extraordinary dangers sometimes justify unusual precautions.”¹²⁵

While implementing restrictions on firearms is highly controversial, the Maryland General Assembly should adopt legislation to establish a commission to review the efficacy of Maryland’s assault weapon ban.¹²⁶ The commission would be responsible for thoroughly evaluating the language in the applicable statutes and making recommendations that align the code with the original purpose of the Firearms Safety Act.¹²⁷ The commission would address both the ambiguity in the copycat statute and the H-BAR exemption to underscore the language’s actual effect on an assault weapons ban.¹²⁸ The result should demand a logical, enforceable statute that regulates firearms functionally identical to those the Firearms Safety Act sought to prohibit.¹²⁹

¹¹⁹ MD. CODE ANN., PUB. SAFETY § 5-101(r)(2)(xv) (LexisNexis 2022); *see also* MD. CODE ANN., CRIM. LAW § 4-303(a) (LexisNexis 2022).

¹²⁰ *See What Should America Do About Gun Violence*, *supra* note 90, at 15-16 (testimony of Wayne LaPierre, Executive Vice President, National Rifle Association of America).

¹²¹ *See id.*

¹²² *Id.*

¹²³ *See What Should America Do About Gun Violence*, *supra* note 90 at 9.

¹²⁴ *Id.*

¹²⁵ *Florida v. J.L.*, 529 U.S. 266, 272 (2000) (discussing the threat firearms pose to public safety and its relationship to police stop and frisk policies based on reasonable suspicion).

¹²⁶ *See* S. 281, 2013 Leg., 433rd Sess. (Md. 2013); Christopher S. Koper, William D. Johnson, Jordan L. Nichols, Ambrozie Ayers & Natalie Mullins, *Criminal Use of Assault Weapons and High-Capacity Semiautomatic Firearms: An Updated Examination of Local and National Sources*, 95 J. OF URB. HEALTH 313, 313 (2018).

¹²⁷ *Kolbe*, 849 F.3d at 140 (quoting Brief of Appellees at 42).

¹²⁸ *See* MD. CODE ANN., PUB. SAFETY § 5-101(r)(2)(xv) (LexisNexis 2022); MD. CODE ANN., CRIM. LAW § 4-301(h)(1) (LexisNexis 2022).

¹²⁹ *See* MD. CODE ANN., PUB. SAFETY § 5-101(r)(2)(xv) (LexisNexis 2022); MD. CODE ANN., CRIM. LAW § 4-301(h)(1) (LexisNexis 2022).

V. CONCLUSION

Maryland's narrow legislation, exempting AR-15-style rifles with a heavy barrel, allows firearms that are functionally identical to banned assault weapons to be sold, transferred, and possessed in the state.¹³⁰ The exemption permits firearms that would ordinarily be prohibited under section 4-303 to be freely purchased from licensed firearms dealers and private citizens throughout Maryland.¹³¹ In effect, the H-BAR exemption eviscerates Maryland's assault weapon ban and allows any resident to legally obtain firearms tantamount to banned assault weapons—those weapons the Firearms Safety Act sought to prohibit.¹³²

The General Assembly's purpose for passing the Firearms Safety Act was to reduce the accessibility of assault weapons among the general public.¹³³ By passing the legislation, the General Assembly led the citizens of Maryland to believe the legislature had achieved a major milestone in preventing weapons "designed for the battlefield" from propagating throughout the state.¹³⁴ Unfortunately, the H-BAR exception creates enough inconsistency in the law to allow firearms manufacturers to easily bypass the assault weapons ban and sell firearms in Maryland identical in functionality to those the law sought to prohibit.¹³⁵ To give the Firearms Safety Act any credible effect in Maryland, the General Assembly must establish a commission to evaluate and make recommendations to remove those inconsistencies and refine the language in the Maryland code that removes those exemptions and properly addresses assault weapons.¹³⁶ Otherwise, the law has no meaningful effect.

¹³⁰ See MD. CODE ANN., PUB. SAFETY § 5-101 (LexisNexis 2022) (defining regulated firearms, however providing no express definition for unregulated firearms).

¹³¹ See MD. CODE ANN., CRIM. LAW. § 4-303(a) (LexisNexis 2022); *see id.*

¹³² Compare *AR-556, Model: 8500*, RUGER, <https://ruger.com/products/ar556/specSheets/8500.html>, (last visited Mar. 11, 2021, 2:45PM), with *AR-556, Model: 8502*, RUGER, <https://ruger.com/products/ar556/specSheets/8502.html>, (last visited Dec. 28, 2020, 11:07AM) (noting specifications that the caliber is 5.56 NATO).

¹³³ *Chow*, 163 Md. App. at 507, 881 A.2d at 1157.

¹³⁴ *Kolbe*, 849 F.3d at 125 (quoting *J.A.* at 1693) (upholding Maryland's assault weapon ban).

¹³⁵ *What Should America Do About Gun Violence*, *supra* note 90, at 152 (testimony of Joshua Horwitz, Executive Director, Coalition to Stop Gun Violence discussing the "two-feature test" enumerated Recreational Firearms Use Protection Act).

¹³⁶ See MD. CODE ANN., PUB. SAFETY § 5-101 (LexisNexis 2022) (defining regulated firearms, however providing no express definition for unregulated firearms).