

**In the
Supreme Court of the United States**

DOMINIC BIANCHI, et al.,
Petitioners,
v.

BRIAN E. FROSH, in his Official Capacity as Attorney
General of Maryland, et al.,
Respondents.

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

**BRIEF OF ARIZONA, WEST VIRGINIA, AND
TWENTY-THREE OTHER STATES AS *AMICI*
CURIAE IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICI CURIAE

Amici Curiae—the States of Arizona, West Virginia, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wyoming (“Amici States”)—file this brief in support of Petitioners.¹ The undersigned are their respective states’ chief law enforcement or chief legal officers and have authority to file briefs on behalf of the states they represent.

Amici States protect public safety and advance citizen interests by allowing individuals to lawfully possess and use arms the challenged Maryland law would ban. In fact, Amici States are among the forty-three states that permit the commonly used civilian firearms that Maryland has banned outright (the “Affected Firearms”). These States have advanced their compelling interests in promoting public safety, preventing crime, and reducing criminal firearm violence without a rifle ban such as the one here.

The other states’ experience shows that the Affected Firearms are common to the point of ubiquity among law-abiding gun owners. Allowing their use promotes public safety. Meanwhile, calling the Affected Firearms “assault weapons” is a misnomer. Law-abiding individuals use them in a variety of peaceful civilian activities, and the guns are no more lethal than many other rifles chambered in similar calibers

¹ Counsel of record for all parties received notice of Amici States’ intent to file at least ten days prior to this brief’s due date. See Sup. Ct. R. 37.2(a).

that Maryland's ban does not reach. There is nothing sinister about citizens bearing the Affected Firearms. Indeed, many of these firearms advantage individuals who find standard guns more challenging to operate. In short, law-abiding citizens bearing the Affected Firearms benefit public safety, counter-balance the threat of illegal gun violence, and help make our streets safer.

Amici States believe that in upholding Maryland Code, Criminal Law 4-303 ("the Act"), the Fourth Circuit erroneously construed the U.S. Constitution, thereby compromising the Second Amendment rights of millions of citizens. Amici States therefore wish to provide their unique perspective on these constitutional questions and protect the critical rights at issue, including the rights and interests of their own citizens.

Amici States file this brief because Maryland's law goes too far. States may enact reasonable firearm regulations that do not categorically ban common arms core to the Second Amendment. But the challenged law fails because it is broadly prohibitive rather than regulatory. The Court should not allow Maryland to invade its own citizens' constitutional rights. And it should not permit the Fourth Circuit to imperil the rights of citizens in other states with its analysis, either.

SUMMARY OF ARGUMENT

This case presents the Court with a unique chance to provide additional guidance to the lower courts about the scope of the individual right protected under the Second Amendment. Fifteen years after *Heller*, lower courts continue to refuse to recognize the full extent of that right. For example, while some lower courts have correctly concluded that the Second Amendment protects the right to carry arms outside of the home, others have concluded that the Second Amendment does not confer such a right. Lower courts have also, inconsistent with *Heller*, upheld broad bans on constitutionally protected arms so long as some arms of some type remain available for use. And many lower courts continue to utilize “tiers of scrutiny with interest balancing” tests to uphold nearly all firearm regulations. This case is an ideal vehicle to provide clarity in each of those areas.

If left untouched, Maryland’s unconstitutional ban on firearms commonly possessed by law-abiding citizens for lawful purposes, and others like it, threatens the constitutional rights of all Americans. If a sufficient number of states are allowed to impose such bans, it could pave the way for future courts to find that such weapons now owned by millions are no longer in common lawful use. Such an attempt to artificially change the firearms landscape justifies this Court’s review. Left to fester, the continued violation of citizens’ rights in states like Maryland could result in a renewed federal ban (as was passed in 1994 and continues to be introduced by certain members of Congress), which would infringe the rights of all Americans.

Rather than asking whether law-abiding citizens commonly use a banned firearm for lawful purposes, the Fourth Circuit asks whether the firearm is most useful in military service. If so, the ban is upheld. Not only is that novel standard inconsistent with the Court's existing Second Amendment jurisprudence, the standard leads to absurd results: a firearm declared most useful in military service is eligible for a ban regardless of whether the weapon is in common, lawful use by the civilian population (thus contradicting the military use conclusion). Correcting the Fourth Circuit's wayward standard, in and of itself, justifies review.

Lastly, lawful possession of weapons subject to Maryland's ban, such as modern sporting rifles, improves public safety. The features of modern sporting rifles benefit people of smaller stature or limited strength, who count on a firearm to reverse the disadvantage they face when defending against a larger attacker. And particular features targeted by Maryland's ban, such as flash hiders and folding stocks, serve the public interest by increasing the likelihood of a weapon's safe use in self-defense. The former decreases the odds a defender will suffer impaired sight and lose accuracy due to muzzle flash, risking collateral damage, and the latter allows for better storage and access to the firearm in tight living quarters, as are often found in densely populated areas.

For these reasons, Maryland's unconstitutional ban and the Fourth Circuit's mis-reading of precedent justify this Court's review and reversal of the decisions below.

ARGUMENT

I. The Court Should Grant Review To Reaffirm *Heller*'s Meaning In The Face Of Continuing Confusion In The Lower Courts.

The Court should grant certiorari for one simple reason: the lower courts need help. In the almost fifteen years since the Court decided *Heller*, lower courts have construed it inconsistently and narrowly. And while the Court has addressed at least one outrageous case, *see, e.g., Caetano v. Massachusetts*, 577 U.S. 411 (2016) (per curiam) (reversing decision affirming state ban on stun guns), it has become increasingly clear that the lower courts require a firmer hand. Even these many years later, the lower courts do not appear to have “any firm idea about who the Second Amendment protects, what the Second Amendment protects, where those protections exist, and—to the extent that they do exist—why they exist.” Michael B. de Leeuw, *The (New) New Judicial Federalism: State Constitutions and the Protection of the Individual Right to Bear Arms*, 39 FORDHAM URB. L.J. 1449, 1450 (2012). This case offers a unique chance for the Court to resolve these questions. It fairly presents multiple important questions that have confounded the lower courts, and it is the right vehicle to reiterate that *Heller* means what it says.

1. Take first the issue of guns outside the home. *Heller* expressly held that the Second Amendment secures an individual's right to “possess and carry weapons in case of confrontation.” *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). The opinion then discussed, at length, the many historical

sources from colonial times that contemplated carrying weapons outside the home. *See, e.g., id.* at 601 (discussing Georgia’s 1770 law requiring “men who qualified for militia duty ... to carry arms to public places of worship”) (cleaned up); *see also id.* at 585-86, 602, 628-30 (similar state law examples from the founding era). So while “self-defense within the home” is the “most notabl[e]” application of the Second Amendment, it is not the *only* place the right applies. *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010).

Some courts, then, have correctly held that the Second Amendment protects the right to carry arms outside the home. Confrontations, after all, “are not limited to the home.” *Moore v. Madigan*, 702 F.3d 933, 935-36 (7th Cir. 2012) (Posner, J.) (“*Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one’s home.”); *Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017) (“[T]he individual right to carry common firearms beyond the home for self-defense ... falls within the core of the Second Amendment’s protections.”).

Yet a great many other lower courts have bypassed *Heller* and found that the Second Amendment does *not* confer a right to carry arms in public spaces. *See Gould v. Morgan*, 907 F.3d 659, 671 (1st Cir. 2018) (holding that the “core Second Amendment right is limited to self-defense in the home,” and collecting authorities). Others have at least expressed doubt that such a right exists. *See, e.g., Drake v. Filko*, 724 F.3d 426, 430 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012); *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir.

2011). Indeed, purporting to rely on the same “historical record” that drove *Heller*, the Ninth Circuit has flatly declared that “[t]here is no right to carry arms openly in public; nor is any such right within the scope of the Second Amendment.” *Young v. Hawaii*, 992 F.3d 765, 821 (9th Cir. 2021).

2. Lower courts have also justified broad bans on constitutionally protected arms so long as some arms of some type remain available for use. Courts seem to give weight to the availability of other arms so long as the case does not involve a handgun ban of the sort seen in *Heller*. See, e.g., *Friedman v. City of Highland Park*, 784 F.3d 406, 411 (7th Cir. 2015) (“[A]llowing the use of most long guns plus pistols and revolvers ... gives householders adequate means of defense.”); *New York State Rifle & Pistol Ass’n, Inc. v. Cuomo*, 804 F.3d 242, 260 (2d Cir. 2015) (same); *Heller v. District of Columbia* (“*Heller II*”), 670 F.3d 1244, 1262 (D.C. Cir. 2011) (same). But *Heller* was blunt on this issue, too: An unconstitutional abridgement of the Second Amendment (whether involving handguns or otherwise) cannot be saved by the fact that “the possession of other firearms ... is allowed.” 554 U.S. at 629. Courts must analyze laws restricting constitutional gun ownership on their own terms, not by imagining how many other restrictions a State potentially could have enacted, too. And nothing in *Heller* says this principle uniquely applied to handguns. Nor is this problem confined to the circuit courts; district courts are confused about this alternative-arms test as well—unsurprisingly, divorced as it is from *Heller*. Compare *Avitabile v. Beach*, 368 F. Supp. 3d 404, 416 (N.D.N.Y. 2019) (finding that a statewide ban on civilian possession of

tasers and stun guns could *not* be justified by alternative means of defense), with *Kolbe v. O'Malley*, 42 F. Supp. 3d 768, 790 (D. Md. 2014) (holding that the broad Maryland ban at issue was sustainable in part because it did not “prevent an individual from keeping a suitable weapon for protection”). Without guidance from this Court, lower courts might trim the Second Amendment to almost nothing, so long as regulators leave untouched some narrow class of arms.

3. Lastly, but perhaps most importantly, lower federal courts have applied various tiers of scrutiny that are nowhere to be found in *Heller*. *Heller* said only that an outright ban on a class of weapons commonly used for self-defense would “fail constitutional muster” under “any of the standards of scrutiny that [this Court has] applied to enumerated constitutional rights.” 554 U.S. at 628-29. It pointedly “decline[d] to establish a level of scrutiny for evaluating Second Amendment restrictions.” *Id.* at 634. Even so, lower courts have gone about fashioning these levels themselves. Most often, they apply a level—usually intermediate—that justifies upholding bans on possessing types or classes of firearms beyond handguns. *See, e.g., Heller II*, 670 F.3d at 1261-63 (intermediate scrutiny); *Cuomo*, 804 F.3d at 260 (same); *Fyock v. Sunnyvale*, 779 F.3d 991, 999 (9th Cir. 2015) (same); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (same); *Wilson v. Cook Cnty.*, 937 F.3d 1028, 1033 (7th Cir. 2019) (same). Worse still, the lower courts have created a Second Amendment-specific gloss on intermediate scrutiny, “fill[ing] [a] self-created analytical vacuum with a two-step inquiry that incorporates tiers of scrutiny on

a sliding scale”—a scale that almost invariably favors restriction over rights. *Rogers v. Grewal*, 140 S. Ct. 1865, 1866 (2020) (Thomas, J., dissenting from the denial of certiorari).

And make no mistake: some lower courts have used these doctrinal uncertainties to keep the Second Amendment right alive in only the narrowest ways. One striking example is the Ninth Circuit’s decision in *Jackson v. City and County of San Francisco*. There, the court upheld “a flat prohibition on keeping unsecured handguns in the home.” 746 F.3d 953, 962 (9th Cir. 2014). The statute there required firearms to be “stored in a locked container or disabled with a trigger lock” whenever they were not on the homeowner’s person. *Id.* at 958. The Ninth Circuit held this mandate did not amount to a “substantial burden on [a] Second Amendment right.” *Id.* at 965. The problem? *Heller* held unconstitutional a D.C. “requirement ... that firearms in the home be rendered and kept inoperable at all times”—a restriction essentially identical to the one the Ninth Circuit left in place in San Francisco. 554 U.S. at 630. *Heller* says that the Second Amendment protects the right to keep a firearm “operable for the purpose of immediate self-defense,” *id.* at 635, and that laws render guns inoperable make self-defense practically “impossible” in certain routine circumstances, *id.* at 630. But the Ninth Circuit perceived enough ambiguity in *Heller* to revive those impermissible restrictions anyway.

* * * *

This case provides a clean opportunity to fix these misapplications. The Maryland statute here applies inside and outside the home alike. It constitutes a

broad ban on an entire class of weapons. It undermines the ability of Marylanders and others in the Fourth Circuit to defend themselves. And the Fourth Circuit sustained the law using a flawed intermediate-scrutiny framework. See *Kolbe v. Hogan*, 849 F.3d 114, 138 (4th Cir. 2017).

The Court should grant the Petition to reiterate what should have been obvious: *Heller* was not a one-day ticket to ride. In contrast, if the Court fails to act, “the passage of time” will continue to see “*Heller*’s legacy shrink to the point that it may soon be regarded as mostly symbolic.” Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 962-63 (2016). For a decade-and-a-half, *Heller* has been dangerously “narrowed from below.” *Id.*; accord *Rogers*, 140 S. Ct. at 1866 (Thomas, J., dissenting from the denial of certiorari) (“Instead of following the guidance provided in *Heller*, [many lower] courts minimized that decision’s framework.”). It is time to reverse that trend.

II. The Decision Below Exacerbates Confusion That In Turn Threatens The Laws And Policy Preferences Of Amici States.

The Court should also grant certiorari because allowing States and Congress to enact laws like Maryland’s injures Amici States. Like most States, Amici States have laws and policies protecting the legal status of modern sporting rifles. But decisions like the one below invite more states to pass broad bans in the hopes of skewing the Second Amendment analysis in an “anti-arms” direction. And they encourage a renewed federal ban on possession of

these firearms. Besides being unconstitutional in its own right, that ban would displace the reasoned policy judgments of most States, creating tension between these States and the federal government. This Court should not wait to halt these troubling developments.

1. Firearms bans like Maryland’s are rare. The law challenged here generally prohibits the possession, sale, transfer, or receipt of so-called “assault weapons.” Md. Code, Crim. Law § 4-303(a); *see also id.* §§ 4-302, 303(b) (defining various narrow exceptions). The law defines “assault weapons” broadly: the term includes semiautomatic rifles with “an overall length of less than 29 inches,” those with a fixed ammunition capacity of more than ten rounds, and those with the ability to accept a detachable magazine and that have two of three other specific features (a folding stock, a grenade or flare launcher, or a flash suppressor). *Id.* § 4-301(d), (h). The law also automatically labels 45 specific makes and models of firearms—along with undefined “copies” of them—as “assault weapons.” *Id.* § 4-301(b), Md. Code, Pub. Safety § 5-101(r)(2).

Only six other States and the District of Columbia have any type of ban on possessing semi-automatic rifles or handguns. *See* Cal. Penal Code § 30605; Conn. Gen. Stat. §§ 53-202a–53-202o; D.C. Code § 7-2502.02; Haw. Rev. Stat. § 134.4; Mass Gen. Laws ch. 140, §§ 121, 131M; N.J. Stat. § 2C:39-1(w), 5; N.Y. Penal Law § 265.00, 265.02. One of these States has a more limited ban on some semi-automatic weapons only. *See* Haw. Rev. Stat. § 134-1, -8 (ban on “assault pistols” defined as semi-automatic pistols that accept detachable magazines and have certain other features). But the other five States and the District of

Columbia ban certain weapons outright based on a list of prohibited firearms, semi-automatic firing capability coupled with a list of features, or both. Cal. Penal Code §§ 30605, 30510; Conn. Gen. Stat. §§ 53-202a–53-202o; D.C. Code §§ 7-2502.01, -.02; Mass. Gen. Laws ch. 140, §§ 121, 131m; N.J. Stat. § 2C:39-1(w); N.Y. Penal Law § 265.00.

By contrast, the vast majority of States have recognized their citizens’ right to possess commonly owned weapons like these—not only by refusing to ban them, but by forbidding political subdivisions from doing so, either. These States (including all Amici States) have enacted statutes or constitutional provisions that say local governments cannot restrict the possession of firearms, including modern sporting rifles.² Fifteen of these States have also sought to insulate their policy decisions from federal encroachment through adopting policies that would

² See Ala. Code § 13A-11-61.3(c); Alaska Stat. § 29.35.145; Ariz. Rev. Stat. § 13-3108; Ark. Code § 14-16-504(b)(1)(A); Del. Code tit. 9, § 330(c); *id.* tit. 22, § 111; Fla. Stat. § 790.33; Ga. Code § 16-11-173; Idaho Code § 18-3302J; 430 Ill. Comp. Stat. 65/13.1(c); Ind. Code § 35-47-11.1-2; Iowa Code § 724.28; Kan. Stat. § 12-16, 124; Ky. Rev. Stat. § 65.870; La. Rev. Stat. § 40:1796; Me. Rev. Stat. tit. 25, § 2011; Mich. Comp. Laws § 123.1102; Minn. Stat. § 471.633; Miss. Code § 45-9-51; Mo. Rev. Stat. § 21.750; Mont. Code § 45-8-351; Neb. Rev. Stat. §§ 14-102(6), 15-255, 16-227, 17-556; Nev. Rev. Stat. § 268.418; N.H. Rev. Stat. § 159:26; N.M. Const. art. II, § 6; N.C. Gen. Stat. § 14-409.40; N.D. Cent. Code § 62.1-01-03; Ohio Rev. Code § 9.68; Okla. Stat. tit. 21, §§ 1289.24, 1289.24e(A); Or. Rev. Stat. § 166.170; 18 Pa. Con. Stat. § 6120; R.I. Gen. Laws § 11-47-58; S.C. Code § 23-31-510; S.D. Codified Laws § 7-18A-36; Tenn. Code § 39-17-1314; Tex. Loc. Gov’t Code § 229.001; Utah Code § 76-10-500; Vt. Stat. tit. 24, § 2295; Va. Code § 15.2-915; Wash. Rev. Code § 9.41.290; W. Va. Code § 8-12-5a; Wis. Stat. § 66.0409; Wyo. Stat. § 6-8-401.

limit, resist, or frustrate efforts to apply a federal ban on modern sporting rifles against their citizens.³

Indeed, Maryland’s ban extends to some of the most popular firearms in lawful use today. Among other common firearms, the Maryland law bans the AR-15, the Bushmaster semiautomatic rifle, varieties of the Ruger mini-14 rifle, and the Mossberg 500 shotgun. Md. Code, Pub. Safety § 5-101(r)(2) (xi), (xv), (xxx), (xxiii). “[M]any Americans” own semiautomatic rifles modeled on the AR-15, for example—the “modern sporting rifles”—for “lawful purposes like self-defense, hunting, and target shooting.” *Friedman v. City of Highland Park*, 136 S. Ct. 447, 447 (2015) (Thomas, J., dissenting from denial of certiorari). Around 19.8 million modern sporting rifles have entered circulation in the United States since 1990. Nat’l Shooting Sports Found., *NSSF Releases Most Recent Firearm Production Figures* (Nov. 16, 2020), <https://www.nssf.org/articles/nssf-releases-most-recent-firearm-production-figures/>. Those rifles accounted for nearly half of all rifles produced or imported to the country in 2018. *Id.*

2. If allowed to stand, the Fourth Circuit’s decision will exacerbate trends in Second Amendment jurisprudence that both directly and indirectly imperil Amici States’ laws and policy preferences.

³ Alaska Stat. § 44.99.500; Ariz. Rev. Stat. §§ 1-272, 13-3114; Ark. Code § 1-6-104; Idaho Code § 18-3315B; 2013 Kan. Sess. Laws ch. 100; Mo. Rev. Stat. §§ 1.420-1.450; Mont. Code § 45-8-368; N.D. Cent. Code § 62.1-01-03.1; Okla. Stat. tit. 21, § 1289.24e (B)-(E); S.D. Codified Laws § 37-35-2; Tenn. Code § 38-3-119; Tex. Penal Code § 1.10; Utah Code § 53-5b-102; W. Va. Code §§ 61-7B-5, 6; Wyo. Stat. § 6-8-405.

The decision below indirectly threatens those preferences because it invites incremental increases in firearms restrictions, leading to a “death by a thousand cuts” for the Second Amendment. Delaying review and allowing unconstitutional laws to proliferate threatens the Second Amendment right itself. As this Court has noted, the Second Amendment bars the “prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for th[e] lawful purpose” of self-defense. *Heller*, 554 U.S. at 628. So while the firearms that Maryland banned *currently* fall into that category, *see supra* 11-13, they would not necessarily remain so if this Court does not act now. Leaving Maryland’s ban in place emboldens other States to enact similar bans, reducing the number of modern sporting rifles and similar firearms owned by the public—and thereby tilting the scales of *Heller* analysis. Developments will come less in the form of reasoned and independent judicial analysis, and more in the form of hasty enactments informed by a desire to strike while the iron is hot.

The decision below directly threatens Amici States’ policies because it deepens a line of cases suggesting that a federal ban on modern sporting rifles—preempting all state protections—could be constitutional. A federal ban would override the policy preferences of the overwhelming majority of States to allow their citizens to possess these weapons. It would also undermine the protections that forty-two States provide by foreclosing municipal bans of modern sporting rifles.

The threat of a federal ban is real—Congress once imposed a firearm ban much like Maryland’s on the

federal level. If left unchecked, decisions like the one below improperly strengthen the case for that misguided policy. In 1994, Congress enacted a federal ban on “semiautomatic assault weapons.” The ban covered semi-automatic rifles with the ability to accept a detachable magazine and two of these features: 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, and a grenade launcher. 18 U.S.C. §§ 921, 922 (1994). The ban also prohibited certain firearms by name, including the AR-15. *Id.* § 921(a)(30)(A) (1994). Courts upheld the law against Commerce Clause and Equal Protection Clause challenges. *Navegar, Inc. v. United States*, 192 F.3d 1050, 1054-65 (D.C. Cir. 1999); *Olympic Arms v. Buckles*, 301 F.3d 384, 388-90 (6th Cir. 2002). But no one challenged it on Second Amendment grounds, and in any event, the law expired before this Court decided *Heller*.

Since the 1994 federal ban expired, federal policymakers have repeatedly sought to impose renewed or expanded versions. Even *before* the ban was set to expire in 2004, California Senator Diane Feinstein introduced the Assault Weapons Ban Reauthorization Act of 2003, which would have repealed the sunset date on the original ban. Assault Weapons Ban Reauthorization Act of 2003, S. 1034, 108th Cong. §§ 2, 3(a)(2) (2003). Congress considered similar, if not identical, legislation in both chambers throughout 2004 and 2005. *See, e.g.*, Assault Weapons Ban Reauthorization Act of 2005, S. 620, 109th Cong. § 2 (2005) (reinstating the 1994 assault weapons ban); An Act To Extend the Sunset on the Assault Weapons

Ban for 10 Years, H.R. 3831, 108th Cong. (2004) (same); An Act To Reinstate the Repealed Criminal Provisions Relating to Assault Weapons and Large Capacity Ammunition Feeding Devices, H.R. 5099, 108th Cong. (2004) (same); Assault Weapons Ban Reauthorization Act of 2004, S. 2109, 108th Cong. § 2 (2004) (providing a ten-year extension of the ban).

Heller did not stem this tide. The same month this Court decided *Heller*, Illinois Congressman Mark Kirk introduced legislation in the House of Representatives to reinstitute a ban nearly identical to the 1994 one. Assault Weapons Ban Reauthorization Act of 2008, H.R. 6257, 110th Cong. (2008). In 2013, Senator Feinstein introduced the Assault Weapons Ban of 2013. The law would have banned all semi-automatic rifles able to accept a detachable magazine with one of several characteristics. S. 150, 113th Cong. (2013). More recently, in 2015, Rhode Island Congressman David Cicilline introduced the Assault Weapons Ban of 2015. Like its predecessors, the bill would have regulated the possession, transfer, and manufacture of semi-automatic rifles possessing various features (a pistol grip, a telescoping or detachable stock, a barrel shroud, or a threaded barrel). H.R. 4269, 114th Cong. (2015). As recently as last April, President Biden called for Congress to reenact the ban during his first address to a joint session of that body. *Remarks by President Biden in Address to a Joint Session of Congress*, THE WHITE HOUSE (Apr. 28, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/29/remarks-by-president-biden-in-address-to-a-joint-session-of-congress/>. And taking up that call, both Senator Feinstein and Congressman Cicilline reintroduced their bills in the most recent

session of Congress. *See* S. 736, 117th Cong. (2021), H.R. 1808, 117th Cong. (2021).

These direct and indirect threats highlight the need for this Court’s involvement. If the Court grants certiorari and reverses the Fourth Circuit, the decision would continue the much-needed development of Second Amendment jurisprudence before opportunistic gamesmanship alters the playing field.

III. The Fourth Circuit’s Novel “Military Service” Standard Contravenes This Court’s Precedent.

Broader trends aside, the Fourth Circuit’s decision in *Kolbe*, and the cases (like this one) that follow it, pose a special threat to Second Amendment rights by, creating a novel standard that sets the holding in *Heller* on its head. Although *Heller* held that the right to keep and bear arms extends to firearms that are “in common use” for “lawful purposes,” the Fourth Circuit held that “weapons most useful in military service” are “outside the ambit of the Second Amendment” without regard to whether these same weapons are also in common use for lawful purposes. *Kolbe*, 849 F.3d at 136. In relying on *Kolbe* to issue its decision below, the Fourth Circuit followed an erroneous standard that allows states to ban firearms that should be covered under the core of *Heller*’s protections.

Instead of asking whether law-abiding citizens commonly use the item banned for lawful purposes, the Fourth Circuit has crafted a unique and unsupported standard. It fashioned its new rule by mis-reading a single conditional statement made in

dicta in *Heller* in response to a separate hypothetical argument. 554 U.S. at 627. The Court did not hold outright that states may ban the fully-automatic M-16—and it certainly did not suggest that states could ban its semi-automatic civilian cousin, the AR-15. Rather, *Heller* addressed an argument about the connection of the Second Amendment right to the prefatory clause “if weapons that are most useful in military service ... may be banned.” *Id.* at 627. The Fourth Circuit’s standard thus redirects focus from “the *central component*” of the right secured by the Second Amendment—an individual’s right to self-defense—and bypasses the Court’s common lawful use standard. *Id.* at 599.

On its face, the Fourth Circuit’s novel standard leads to absurd and confusing results. For instance, the Model 1911 .45 caliber pistol may be considered a weapon “most useful in military service” given the military used it as its standard sidearm for nearly 75 years. Yet it is also one of the most popular civilian handguns today. Scott Engen, *The History of the 1911 Pistol*, BROWNING (2013) (explaining that gun was used from 1911 to 1985).⁴ While John M. Browning designed the 1911 pistol specifically for the military, it “was based on the Models 1900, 1903, and 1905s, which were all commercial guns” and the 1911 was simultaneously “prevalent in both the military and civilian market” after its military adoption. *Id.*; *Stop Gun Violence: Ghost Guns: Hearing before the Subcomm. on the Const., Comm. on the Judiciary*, 117th Cong. 11 (2021) (testimony of Ashley

⁴ Available at <https://www.browning.com/news/articles/history-1911-pistol.html>.

Hlebisnky, Curator Emerita & Senior Firearms Scholar, Cody Firearms Museum).

The Fourth Circuit’s upside-down analysis would first examine the Model 1911’s military utility and declare it eligible for a ban *before* acknowledging that the weapon is in widespread common, lawful use by the civilian population. Yet such focus on military use would either ignore the scores of other handguns that may be more powerful or accurate than the 1911 or—worse, and as the holding below essentially does for rifles—lead the Court to declare that almost all semiautomatic pistols that even look like or share features of the 1911 are subject to ban. This broad ban would fly in the face of *Heller*, which recognized “that the American people have considered the handgun to be the quintessential self-defense weapon [and] the most popular weapon chosen by Americans for self-defense in the home.” Such guns are thus in common use and critical to the exercise of their core Second Amendment right to self-defense. 554 U.S. at 629.

Upholding Maryland’s rifle ban would endorse a topsy-turvy application of *Heller* in the same way: it would outlaw another class of popular weapons in common use for self-defense and other lawful purposes.

IV. Allowing Law-Abiding Citizens to Lawfully Possess Weapons Subject To Maryland’s Ban Improves Public Safety.

Private ownership of firearms increases public safety. At the individual level, having a firearm ready markedly improves outcomes for victims of crimes. Allowing citizens to protect themselves with firearms,

especially those in common use and selected by the individual to best fit their own abilities and circumstances, is of vital importance to the public safety mission of every state. A 2013 review by the National Research Council reveals that crime victims who resist with a gun are less likely to suffer serious injury than victims who either resist in other ways or offer no resistance at all. INST. OF MED. AND NAT'L RSCH. COUNCIL, PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE 15-16 (Alan I. Leshner et al. eds., Nat'l Acads. Press 2013) ("Studies that directly assessed the effect of actual defensive uses of guns ... found consistently lower injury rates among gun-using crime victims compared with victims who used other self-protective strategies").⁵ "Defensive use of guns by crime victims is a common occurrence," and "[a]lmost all national survey estimates indicate that defensive gun uses by victims are at least as common as offensive uses by criminals." *Id.* at 15.

Numerous studies have found that guns aid crime victims. Robbery victims who resist with firearms are significantly less likely to have their property taken or be injured. GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 170 (1997). "Robbery and assault victims who used a gun to resist were less likely to be attacked or to suffer an injury than those who used any other methods of self-protection or those who did not resist at all." *Id.* at 171. Moreover, "victim resistance with a gun almost never provokes the criminal into inflicting either fatal or nonfatal violence." *Id.* at 174. Similarly, "rape victims using

⁵ Available at <https://doi.org/10.17226/18319>.

armed resistance were less likely to have the rape attempt completed against them than victims using any other mode of resistance,” and defensive gun use did not increase the victim’s risk of “additional injury beyond the rape itself.” *Id.* at 175.

Yet Maryland’s ban undermines this public safety benefit because it targets firearms and features that make it easier for lawful gun owners to defend themselves. For instance, firearms subject to Maryland’s ban can provide extra benefit to crime victims: “The AR-15, in particular, is an easy firearm to shoot accurately and is generally easier to fire accurately than a handgun. The AR-15 rifle is light in weight, and has good ergonomics, and is suitable for people of all statures and varying levels of strength.” *Miller v. Bonta*, 19-CV-1537-BEN (JLB), 2021 WL 2284132, at *17 (S.D. Cal. June 4, 2021). Additionally, Maryland bans semiautomatic rifles with two or more of a list of features including “a folding stock” and “a flash suppressor,” but these items increase accuracy and convenience, not lethality or dangerousness, of the weapon. Md. Code, Crim. Law § 4-301(h)(1)(i).

A folding stock “serve[s] legitimate, non-military purposes,” and its “one principal function” is “to make the rifle easier to transport, stow, or secure.” Dennis P. Chapman, *Features and Lawful Common Uses of Semi-Automatic Rifles*, 80, 82 (July 16, 2019) (“Chapman”).⁶ This function allows individuals to store their firearms safely while still keeping them easily accessible for self-defense—even with limited

⁶ Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3436512.

space to do so, such as an owner possessing a smaller gun safe or living in tight quarters. The folding stock does not make a gun deadlier. The military's default firing position "is from the shoulder," a position that requires a stock that is *not* folded away. *Id.* at 82-83. Thus, "[t]he ability to reduce the size of the rifle by folding or otherwise collapsing the stock is a simple matter of convenience, not of lethality or tactical surprise, and this convenience is of equal utility in civil as well as military life." *Id.* Folding stocks thus make defensive ownership more convenient but do not "make [rifles] substantially more dangerous as instruments of crime than their fixed stock analogues." *Id.* at 87; *Miller*, 2021 WL 2284132, at *18.

Beyond convenience, flash hidere (or "flash suppressors") confer an accuracy and situational awareness benefit on citizens who use them for self-defense. A flash hider "is a device fitted on the end of a muzzle which diverts the muzzle flash through several slots or holes." *Miller*, 2021 WL 2284132, at *17 n.49. Its primary advantage is to "prevent[] the night-time home defender from being blinded by her own muzzle flash." *Id.* at *17. Without such a device, under low light circumstances, the user is likely to suffer impaired vision or even temporary blindness due to the muzzle flash. That blindness "plac[es] a law-abiding user at a disadvantage to a criminal attacker." *Id.* at *17 n.49. With a flash hider, a law-abiding user can continue to defend himself or herself and maintain accuracy, which helps prevent innocent bystanders from becoming victim. *Id.* at *19. On the other hand, flash hidere do not make the weapon or

its projectile any more dangerous or deadly. *Id.* at *30.

Some argue that any benefit conferred on a lawful user in self-defense may also be conferred on a criminal. But this dismissive approach ignores *Heller*, which rejects a focus on “weapons which are commonly used by criminals” as a means to shape the meaning of the Second Amendment. 554 U.S. 623-24. Such a view of “improvements that make firearms better and safer for lawful use” may “simply lead[] to the absurdity that firearms may never be improved because the harm of a more accurate firearm in a criminal’s hands will always justify a ban.” *Miller*, 2021 WL 2284132, at *20. And this misguided method ignores how similar advantages are readily available in firearms that courts have already said are protected by the Second Amendment. *Id.* at *38. Courts should not employ such inconsistent reasoning to deny the public or individual citizens of the safety benefits lawful possession of these arms confers.

CONCLUSION

For the foregoing reasons, Amici States respectfully request that the Court grant certiorari to review the decision below.

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