No. ________

In the
Supreme Court of the United States

DOMINIC BIANCHI, DAVID SNOPE, MICAH SCHAEFER, FIELD TRADERS, LLC, FIREARMS POLICY COALITION, INC., SECOND AMENDMENT FOUNDATION, INC., and the CITIZENS COMMITTEE FOR THE RIGHT TO KEEP AND BEAR ARMS,

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

PETITION FOR WRIT OF CERTIORARI

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December 16, 2021

QUESTION PRESENTED

Whether the Constitution allows the government to prohibit law-abiding, responsible citizens from protecting themselves, their families, and their homes with a type of "Arms" that are in common use for lawful purposes?

PARTIES TO THE PROCEEDING

Petitioners Dominic Bianchi; David Snope; Micah Schaefer; Field Traders, LLC; Firearms Policy Coalition, Inc; Second Amendment Foundation, Inc.; and the Citizens Committee for the Right To Keep and Bear Arms were the plaintiffs before the District Court and the plaintiffs-appellants in the Court of Appeals.

Respondents Brian E. Frosh, in his official capacity as Attorney General of Maryland; Col. Woodrow W. Jones, III, in his official capacity as Secretary of State Police of Maryland; R. Jay Fisher, in his official capacity as Sheriff of Baltimore County, Maryland; and Jim Fredericks, in his official capacity as Sheriff of Anne Arundel County, Maryland were defendants before the District Court and defendants-appellees in the Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Field Traders, LLC has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

Firearms Policy Coalition, Inc., has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

Second Amendment Foundation, Inc., has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

Citizens Committee for the Right To Keep and Bear Arms has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Bianchi v. Frosh*, No. 21-1255 (4th Cir. Sept. 17, 2021)
- *Bianchi v. Frosh*, No. 20-cv-3495 (D. Md. Mar. 4, 2021)

There are no other proceedings in state or federal court, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii).

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In *District of Columbia v. Heller*, this Court held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation," and that because handguns are "typically possessed by law-abiding citizens for lawful purposes," "a complete prohibition of their use is invalid." 554 U.S. 570, 592, 625, 629 (2008). The Second Amendment, the Court explained, simply took such a complete ban "off the table." *Id.* at 636. As the Court described and reaffirmed its reasoning in *McDonald v. City of Chicago*, because "the Second Amendment right" "*applies* to handguns," "citizens *must* be permitted to use handguns for the core lawful purpose of self-defense." 561 U.S. 742, 767-68 (2010) (emphases added) (alterations omitted) (quotation marks omitted).

Despite the clarity and insistence of these teachings, the lower courts have divided over the question whether complete bans on common arms are constitutional—and even over the analysis that should be used in answering that question. Two state courts of last resort have applied an analysis that hews closely to the categorical inquiry dictated by *Heller* and *McDonald* and have struck down flat bans on common arms—stun guns—as *per se* unconstitutional. *Ramirez v. Commonwealth*, 94 N.E.3d 809, 815 (Mass. 2018); *People v. Webb*, 131 N.E.3d 93, 97, 98 (Ill. 2019); *see also Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (advocating a categorical approach). But the

federal circuits that have addressed the constitutionality of state bans on so-called "assault weapons"—a pejorative and inaccurate label for a category of common semi-automatic firearms—have ultimately taken a starkly different approach. Like the handguns at issue in *Heller* and *McDonald*, these semi-automatic firearms are "in common use" and "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 624, 625. They may be freely purchased and used in the vast majority of States, they are no more dangerous than any other semi-automatic firearm, and Americans own them by the millions for purposes such as home-defense, hunting, and target shooting. Yet the federal appellate courts have uniformly upheld bans on these common and constitutionally protected arms.

While the lower federal courts are united in upholding these bans on common firearms—and in affirmatively *rejecting* the categorical analysis set forth by this Court in *Heller* and *McDonald*—they have been unable to agree on *the reason* why the bans are purportedly constitutional. The result has been a grab-bag of ad-hoc constitutional tests, varying from circuit to circuit. Four circuits have settled on a form of review that they call "intermediate scrutiny"—but that in practice is hard to distinguish from rational-basis review. The label ultimately matters little, since *Heller* rejected *either* form of scrutiny in Second Amendment cases. *See* 554 U.S. at 628 n.27 (rejecting rational-basis review); *Heller II*, 670 F.3d at 1275-78 (Kavanaugh, J., dissenting) (explaining that *Heller*

"expressly dismissed … [an] intermediate scrutiny approach"). And the Seventh Circuit upheld a ban on so-called "assault weapons" based upon an invented three-part test seemingly designed to repudiate as much of *Heller*'s reasoning as possible in one stroke. *See Friedman v. City of Highland Park, Ill.*, 577 U.S. 1039, 136 S. Ct. 447, 448-49 (2015) (Thomas., J., dissenting from the denial of certiorari).

The Fourth Circuit's *en banc* decision in *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc)—applied by the court below in upholding Maryland's ban on common semi-automatic rifles—represents perhaps the most extreme test contrived thus far. The foundation-stone of *Heller*'s constitutional analysis was the question whether the arms restricted by the government are "in common use at the time for lawful purposes like self-defense," 554 U.S. at 624 (quotation marks omitted), but *Kolbe* rejected this "common use" test as *utterly irrelevant* to the constitutionality of flat bans on the common semi-automatic firearms at issue. Instead, the Fourth Circuit reasoned that the detailed textual and historical analysis in *Heller* laying out the common-use test was all effectively nullified by an oblique passage in the Court's opinion explaining why the common-use standard did not conflict with the Second Amendment's prefatory clause even though, in the modern world, it may place outside the Second Amendment's protections some "weapons that are most useful in military service—M-16 rifles and the like." *Id.* at 627. The Fourth Circuit claimed to find, buried in this aside, the ultimate key to the

constitutional analysis of gun bans: if the banned firearms are " 'like' 'M-16 rifles,' i.e., 'weapons that are most useful in military service,' " then they are outside the ambit of the Second Amendment." *Kolbe*, 849 F.3d at 136 (quoting *Heller*, 554 U.S. at 627).

This "useful in military service" test blatantly misreads *Heller* and is irreconcilable with the Second Amendment's text. It completely divorces the Second Amendment right from the militia-protecting purpose announced in the Amendment's prefatory clause—in direct contradiction of *Heller*'s instructions. 554 U.S. at 577. And read literally, the test would result in stripping constitutional protection from *virtually all firearms*—since "nearly all firearms can be useful in military service." *Kolbe*, 849 F.3d at 157 (Traxler, J., dissenting). The gravity of the Fourth Circuit's departure from this Court's precedent—on the critically important issue whether common firearms owned by millions of Americans for self-defense enjoy Second Amendment protection—is alone enough to justify this Court's review.

The Fourth Circuit, however, is not alone. *Kolbe*'s "useful in military service" test is merely the latest and most dissonant note in the cacophonous chorus of Second Amendment tests devised by the lower courts to uphold bans, like the one at issue here, on common and constitutionally protected firearms. This Court should intervene to ensure a uniform understanding of the Second Amendment and prevent lower courts from nullifying rights guaranteed by the text of the Constitution.

Given the importance of the issue, and the degree of conflict and confusion in the lower courts, this Court should grant plenary review. And at a bare minimum, it should hold the case until it has handed down its decision in *New York State Rifle & Pistol Ass'n v. Bruen*, No. 20-843 (submitted Nov. 3, 2021). The proper standard of constitutional analysis in Second Amendment cases is squarely presented in that case, and if the Court's opinion there brings further clarity to this issue, it should at the very least grant this Petition, vacate the Forth Circuit's judgment, and remand the case to that court for reconsideration of the constitutionality of Maryland's ban in the first instance.

OPINIONS BELOW

The order of the Court of Appeals affirming the District Court's dismissal of the case is reported at 858 Fed. Appx. 645 and reproduced at App.1a. The order of the District Court dismissing Petitioners' complaint is not reported in the Federal Supplement, but it is reproduced at App.4a.

JURISDICTION

The Court of Appeals issued its judgment on September 17, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant portions of Amendments II and XIV to the United States Constitution and the Maryland

Code are reproduced in the Appendix beginning at App.6a.

STATEMENT

I. Maryland's ban on common firearms

The State of Maryland deems scores of common semiautomatic rifle models "assault weapons"—and bans them outright. Subject to certain minor exceptions, MD. CODE ANN., CRIM. LAW §§ 4-302, 4-303(b), Maryland's ban criminalizes the sale, transfer, or possession of any of the following:

> (i) a semiautomatic centerfire rifle that can accept a detachable magazine and has any two of the following:
>
> 1. a folding stock;
>
> 2. a grenade launcher or flare launcher; or
>
> 3. a flash suppressor;
>
> (ii) a semiautomatic centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds;
>
> (iii) a semiautomatic centerfire rifle that has an overall length of less than 29 inches.

Id. § 4-301(h)(1); *see also id.* §§ 4-301(d); 4-303(a). The ban also specifically applies to a list of 45 enumerated

rifle types. *Id.* § 4-301(b); MD. CODE ANN., PUB. SAFETY § 5-101(r)(2).[1]

Maryland's ban thus singles out for special disfavor not a recognized type of *firearm*, but certain *features* included on some firearms. That makes Maryland's law particularly irrational, since most of the features it bans actually serve to make the firearms on which they are included *safer*. *See Miller v. Bonta*, 2021 WL 2284132, at *17-18 (S.D. Cal. June 4, 2021). A folding stock, for example, merely makes long guns easier to carry and more maneuverable in tight home spaces, and facilitates safe firearm storage. App.32a-33a, 34a. Similarly, a flash suppressor is a simply a common accessory that suppresses (but does not eliminate) the flash of light from a firearm shot and thus both reduces the chances that a home-invader will mark his victim's position and diminishes the home-defender's momentary blindness when firing in self-defense. App.32a-33a, 34a. And a rifle that is less than 29 inches long (but still more than 26 inches long, as required by federal law) is especially helpful in home-defense situations, as it reduces the mass of a firearm at its least-supported position and makes it easier to move around obstacles, through hallways, and the like.

[1] Maryland also prohibits certain semiautomatic pistols and shotguns and certain ammunition magazines. Before this Court, Petitioners challenge only Maryland's ban on semiautomatic rifles.

App.33a.[2] None of these features make a firearm somehow more dangerous or powerful.

If an ordinary, law-abiding citizen keeps or bears a rifle banned by Maryland, Respondents may seize and dispose of that arm. MD. CODE ANN., CRIM. LAW § 4-304. Moreover, any ordinary, law-abiding citizen who possesses such a rifle commits a criminal offense and is subject to severe sanctions, including imprisonment for up to three years for the first offense. *Id.* §§ 4-303, 4-306(a).

Maryland dubs a semiautomatic firearm that possesses one of the prohibited features an "assault weapon," but that is nothing more than argument advanced by a political slogan in the guise of a definition. As even anti-gun partisans have admitted, "assault weapon" is a political term designed to exploit "the public's confusion over fully automatic machine guns versus semi-automatic assault weapons." JOSH SUGARMANN, ASSAULT WEAPONS AND ACCESSORIES IN AMERICA (1988), https://bit.ly/3m5OW5V. In truth, the odd assortment of firearms Maryland calls "assault weapons" are mechanically identical to any other semiautomatic firearm—arms that, as no one disputes, are exceedingly common and fully protected by the Second Amendment. Unlike a fully-automatic

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[2] Maryland's ban also encompasses semiautomatic rifles equipped with "[a] grenade launcher or flare launcher." MD. CODE ANN., CRIM. LAW § 4-301(h)(1)(i)(2). Petitioners do not take issue with the regulation of grenade launchers; in any event, grenades are separately banned by Maryland law. *See id.* §§ 4-501(b); 4-503(a).

"machine gun," which continues to fire until its magazine is empty so long as its trigger is depressed, every *semiautomatic* firearm, including the ones banned by Maryland, fires only a single shot for each pull of the trigger. *See Staples v. United States*, 511 U.S. 600, 602 n.1 (1994).

These firearms are in common use. They are legal in 44 States[3] and they "traditionally have been widely accepted as lawful possessions." *Staples*, 511 U.S. at 612. Indeed, the gerrymandered class of firearms Maryland has banned includes some of the most popular firearms in America—including the AR-15, "the best-selling rifle type in the United States." Nicholas J. Johnson, *Supply Restrictions at the Margins of* Heller *and the Abortion Analogue*, 60 HASTINGS L.J. 1285, 1296 (2009). By 2018, industry sources estimated that nearly 20 million AR-model and other modern sporting rifles had been sold in the United States domestic market. NSSF, *Industry Intelligence Reports: Firearm Production in the United States* 7 (2020), https://bit.ly/3blGybB; *see also Worman v. Healey*, 922 F.3d 26, 35 (1st Cir. 2019); *Duncan v. Becerra*, 366 F.Supp.3d 1131, 1145 (S.D. Cal. 2019). Also as of 2018, roughly thirty-five percent of all newly manufactured guns sold in America were modern sporting rifles. Bloomberg, *Why Gunmakers Would Rather Sell AR-15s Than Handguns*, FORTUNE (June 20, 2018), https://bit.ly/2OJC72H. And according to a

[3] Giffords Law Center, *Assault Weapons*, https://bit.ly/3Bel0bW.

comprehensive 2021 survey, approximately 24.6 million people have owned an AR-model or similar rifle. William English, *2021 National Firearms Survey* 17 (July 13, 2021), https://bit.ly/3rs4zHW.

The rifles banned by Maryland are commonly and overwhelmingly possessed by law-abiding citizens for lawful purposes. In a 2013 survey of 21,942 confirmed owners of such firearms, home-defense followed (closely) only recreational target shooting as the most important reason for owning these firearms. Amicus Curiae Br. of the Nat'l Shooting Sports Found. in Supp. of Pet'rs, *Friedman v. City of Highland Park*, No. 15-133, 2015 WL 5139321, at *13; *see also Friedman v. City of Highland Park*, 68 F.Supp.3d 895, 904 (N.D. Ill. 2014), *aff'd sub nom. Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015). Use of these firearms for unlawful purposes, by contrast, is exceedingly rare. As Department of Justice researcher Christopher Koper noted in a much-cited 2004 study, so-called "assault weapons" "are used in a small fraction of gun crimes," largely because they "are more expensive and more difficult to conceal than the types of handguns that are used most frequently in crime." CHRISTOPHER S. KOPER, UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN 15-16 (2004), https://bit.ly/3nulOon (citation omitted); *see also* GARY KLECK, TARGETING GUNS 112 (1997) (evidence indicates that "well under 1% [of crime guns] are 'assault rifles.' "); *Expanded Homicide Data Table 8: Murder Victims by Weapon, 2015-2019*, Crime in the United States, 2019, FBI, U.S. Dep't of Justice,

https://bit.ly/31WmQ1V (only 364 out of 13,927 murders were committed in 2019 with *any* type of rifle).

II. The ban's effect on Petitioners

Petitioners Bianchi, Snope, and Schaefer are ordinary, law-abiding, adult citizens of Maryland. App.21a-22a. Each is legally qualified to purchase and possess firearms, and each wants to acquire a banned firearm for self-defense and other lawful purposes but has been barred from doing so by Maryland's ban. App.21a-22a, 34a-37a. Similarly, Firearms Policy Coalition, Inc., Second Amendment Foundation, and the Citizens Committee for the Right to Keep and Bear Arms each have numerous members in Maryland who are otherwise eligible to acquire banned firearms and would do so but for the ban. App.36a-37a. Finally, Field Traders LLC is a licensed firearm dealer in Maryland that has been forced to deny numerous sales of these firearms because of the ban. App.36a.

III. Proceedings below

1. On December 1, 2020, Petitioners filed this suit in the District of Maryland, alleging that Maryland's categorical ban on the possession of common semiautomatic firearms is facially unconstitutional under the Second Amendment, which is applicable to Maryland under the Fourteenth Amendment. The district court had jurisdiction under 28 U.S.C. Sections 1331 and 1343. Petitioners' Complaint conceded that their Second Amendment claim was foreclosed at the district-court level by the Fourth Circuit's decision in *Kolbe*, 849 F.3d 114, App.20a-21a.

2. *Kolbe* was an earlier challenge to Maryland's semiautomatic rifle ban. The District of Maryland upheld Maryland's ban under intermediate scrutiny. *Kolbe v. O'Malley*, 42 F.Supp.3d 768, 791-97 (D. Md. 2014). In 2016, a divided panel of the Fourth Circuit vacated and remanded. It concluded that the banned semi-automatic rifles were protected by the Second Amendment, that the ban substantially burdened the right to self-defense in the home, and that strict scrutiny was required. *Kolbe v. Hogan*, 813 F.3d 160, 178, 179-82 (4th Cir. 2016).

The full Fourth Circuit granted *en banc* rehearing of the case, vacated the panel's opinion, and upheld Maryland's ban. The *en banc* court purported to find in this Court's decision in *Heller* a "dispositive" exception from the Second Amendment's scope for any firearm deemed sufficiently "like M-16 rifles, i.e., weapons that are most useful in military service." 849 F.3d at 136 (quotation marks omitted). If a firearm meets this "useful in military service" test, the court concluded, they are "outside the ambit of the Second Amendment." *Id.* And, the court further concluded, with respect to the semiautomatic firearms banned by Maryland, "[t]he answer to that dispositive and relatively easy inquiry is plainly in the affirmative." *Id.* Finally, the court also held, in the alternative, that even if Maryland's ban did impinge upon Second Amendment rights, it would at most be subject to intermediate scrutiny—and that the district court had correctly upheld the ban under that standard. *Id.* at 138-41.

3. Judge Traxler—who had authored the now-vacated panel opinion—dissented from the *en banc* decision upholding the ban, joined by Judges Niemeyer, Shedd, and Agee. Judge Traxler concluded that the *en banc* majority's "heretofore unknown 'test' … is clearly at odds with the Supreme Court's approach in *Heller*." *Id.* at 155 (Traxler, J., dissenting). Indeed, "the majority's singular concoction" "turns *Heller* on its head," effectively removing "nearly *all* firearms from Second Amendment protection as nearly all firearms can be useful in military service." *Id.* at 156-57. Under the *appropriate* test for Second Amendment protection—whether the arms at issue are in common use by Americans for lawful purposes—Judge Traxler concluded that it "is beyond debate" that the semiautomatic rifles banned by Maryland are constitutionally protected. *Id.* at 156.

4. Petitioners here conceded, in their complaint, that their challenge to Maryland's ban was foreclosed by *Kolbe*, explaining that they believed that decision was wrongly decided and were bringing suit "to vindicate their Second Amendment rights and to seek to have *Kolbe* overruled." App.20a-21a. Noting this concession, the district court ordered Petitioners to show cause why their case should not be dismissed *sua sponte* for failure to state a claim. App.4a-5a. Petitioners again conceded that *Kolbe* was controlling at the district-court stage, and on March 3, 2021, the court dismissed Petitioners' complaint. *Id.*

5. Petitioners appealed to the Fourth Circuit. Again before that court, Petitioners conceded that the

en banc decision in *Kolbe* was controlling at the panel level, but that "they … continue to pursue this litigation to vindicate their Second Amendment rights and seek to have *Kolbe* overruled by a court competent to do so." 4th Cir. Doc. 18. p. 2 (Apr. 19, 2021). On September 17, 2021, the Fourth Circuit affirmed the district court's order dismissing the case. App.1a.

REASONS FOR GRANTING THE WRIT

I. This Court should grant review to resolve the conflict in the lower courts over the constitutionality of laws banning commonly possessed arms.

"*Heller* has left in its wake a morass of conflicting lower court opinions regarding the proper analysis to apply to challenged firearms regulations," *United States v. Chester*, 628 F.3d 673, 688-89 (4th Cir. 2010) (Davis, J., concurring in the judgment), and nowhere is this conflict more acute than in the case law grappling with laws, like Maryland's, that ban arms in common use for lawful purposes. The federal circuit courts and state courts of last resort that have passed upon such laws have generated no fewer than five separate and conflicting ways of analyzing them. Indeed, the split has become increasingly stark, with some courts striking down bans that would clearly be upheld under the approaches adopted by other courts, including the courts below. This Court's review is needed to resolve the clear division of authority over the constitutionality of these types of bans.

1. As noted above, the Fourth Circuit takes a novel and quite extraordinary approach to bans on entire classes of arms. Rather than asking only whether the arms in the prohibited category are "in common use at the time for lawful purposes like self-defense" as *Heller* directs, 554 U.S. at 624 (quotation marks omitted), the Fourth Circuit asks whether the arms "are 'like' M16 rifles" in that they "are clearly most useful in military service," *Kolbe*, 849 F.3d at 126, 137. That was the approach implicitly followed by the courts below in this case, which simply applied *Kolbe*'s holding. App.1a; 4a.

2. The Fourth Circuit in *Kolbe* held, in the alternative, that Maryland's ban should be upheld under "intermediate scrutiny." 849 F.3d at 138, 139. That approach follows the path marked out by five other circuits, which have upheld similar bans on common arms under what they call "intermediate" scrutiny—but what in application turns out to be little more than a rational-basis-type test that the government always passes. *See Heller II*, 670 F.3d at 1260; *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 260 (2d Cir. 2015); *Association of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney General, New Jersey*, 910 F.3d 106, 119 (3d Cir. 2018); *Worman*, 922 F.3d at 36; *Duncan v. Bonta*, 2021 WL 5577267, at *11 (9th Cir. 2021) (en banc).

These courts have reasoned that because bans on *one* category of common arms leave law-abiding citizens free to use *other* types of arms, they do "not severely burden the core protection of the Second

Amendment." *Kolbe*, 849 F.3d at 138. The decisions adopting this reasoning have never adequately explained how that line of analysis can even conceivably be squared with *Heller*, which explicitly held that "[i]t is no answer to say … that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed," since the fact that handguns are in common use means, quite simply, that "a complete prohibition of their use is invalid." 554 U.S. at 629.

3. As this passage from *Heller* suggests, rather than adopting one of the "tiers of scrutiny," this Court's Second Amendment opinions have hewed to a categorical approach. In *Heller*, the Court explained that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home," taking a ban on the possession of common arms completely "off the table." *Id.* at 635. In *McDonald*, the Court reaffirmed that because the Second Amendment "right applies to handguns," it follows that "citizens must be permitted to use handguns for the core lawful purpose of self-defense." 561 U.S. at 767-68 (alterations omitted). And in *Caetano v. Massachusetts*, the Court summarily vacated a state-court decision refusing Second Amendment protection to stun guns. 577 U.S. 411, 412 (2016). While the Court's brief *per curiam* opinion did not take a position on whether stun guns could constitutionally be banned under the proper analysis, Justice Alito's concurrence explained that "the pertinent Second Amendment inquiry is whether stun

guns are commonly possessed by law-abiding citizens for lawful purposes" and that, if so, a "categorical ban of such weapons therefore violates the Second Amendment." *Id.* at 420 (Alito, J., concurring).

Both Massachusetts's and Illinois's highest courts have followed *Caetano*'s approach in the context of stun guns. Following the decision in *Caetano*, the Massachusetts Supreme Judicial Court held that the Massachusetts law in question, which "bars *all* civilians from possessing or carrying stun guns, even in their home, is inconsistent with the Second Amendment and is therefore unconstitutional," reasoning that because those instruments "are 'arms' within the protection of the Second Amendment," they "may be regulated, but not absolutely banned." *Ramirez*, 94 N.E.3d at 815. In like form, the Illinois Supreme Court has held that because stun guns "are bearable arms that fall within the scope of the second amendment," a "comprehensive ban that categorically prohibits possession and carriage of stun guns and tasers in public" "necessarily cannot stand." *Webb*, 131 N.E.3d at 97, 98.

These decisions are simply irreconcilable with the approach taken by the First, Second, Third, Ninth, and D.C. Circuits—and by the Fourth Circuit's alternative holding in *Kolbe*. The Massachusetts and Illinois courts did not justify those States' stun-gun bans on the basis that *other* types of arms remained available, nor did they stop to ask whether those bans furthered important government interests. And the categorical approach that the Massachusetts and Illinois

high courts *did* apply would necessarily have resulted in the invalidation of the state prohibitions on so-called "assault weapons" that these federal circuit courts, and the courts below in this case, upheld. *See also Heller II*, 670 F.3d at 1271, 1287, 1288, 1290-91 (Kavanaugh, J., dissenting) (advocating similar categorical analysis, under which bans on common semi-automatic arms are plainly unconstitutional). Of all the alternative standards that have been developed by the lower courts, only this categorical approach is fully consistent with the Second Amendment and this Court's opinion in *Heller*.

4. The now-vacated panel opinion in *Kolbe* also charted a course far more faithful to this Court's directions than the one adopted by the *en banc Kolbe* decision and the courts below. Reasoning that "[a] wholesale ban on an entire class of common firearms is much closer to the total handgun ban at issue in *Heller* than more incidental restrictions that might be properly subject to intermediate scrutiny," the panel concluded that such a law should be "subject to strict scrutiny," *Kolbe*, 813 F.3d at 183, 197—an approach also urged by the panel's author, Judge Traxler, in his dissent from the *en banc* court's ruling, *Kolbe*, 849 F.3d at 160-61 (Traxler, J., dissenting). A panel of the Ninth Circuit also applied strict scrutiny to a similar California law banning common firearm magazines, though that opinion, too, was vacated for rehearing, with the *en banc* court ultimately applying intermediate scrutiny instead. *Duncan v. Becerra*, 970 F.3d

1133, 1152-62 (9th Cir. 2020), *rev'd en banc*, *Duncan*, 2021 WL 5577267, at *11.

5. Finally, the Seventh Circuit has adopted its own, outlier test governing challenges to bans on common semi-automatic arms. *Friedman*, 784 F.3d 406. Rather than applying *Heller*'s categorical test, or even a scrutiny analysis, the Seventh Circuit thought "it better to ask whether a regulation bans weapons that were common at the time of ratification or those that have some reasonable relationship to the preservation or efficiency of a well regulated militia, and whether law-abiding citizens retain adequate means of self-defense." *Id.* at 410 (citations omitted) (quotation marks omitted); *see also Wilson v. Cook Cnty.*, 937 F.3d 1028, 1033-36 (7th Cir. 2019). Every part of that bizarre test is contrary to *Heller*—which rejected as "bordering on the frivolous" the argument "that only those arms in existence in the 18th century are protected by the Second Amendment," held that the Second Amendment protects "an individual right *unconnected* with militia service," and rejected the District of Columbia's argument "that it is permissible to ban the possession of handguns so long as the possession of other firearms … is allowed." 554 U.S. at 582, 629 (emphasis added).

* * * * *

Accordingly, the lower courts have divided over whether laws banning common arms are constitutional—as well as over the proper approach for answering that question. That doctrinal cacophony is simply intolerable; judicial protection of the

fundamental Second Amendment right cannot be allowed to schizophrenically ebb and flow from circuit to circuit. This Court should grant the writ to resolve the split that has developed in the lower courts on this important issue and to clarify their increasingly muddled approach to these types of bans.

If the Court decides not to grant plenary review, at the very least it should hold this Petition pending its decision in *New York State Rifle & Pistol Ass'n v. Bruen*. That case squarely presents this Court with the opportunity to clarify the correct form of constitutional review in Second Amendment challenges. Accordingly, the Court at a minimum should hold the instant case pending its decision in *New York State Rifle & Pistol Ass'n*—and, if that decision provides further guidance on the correct standard of Second Amendment analysis, grant, vacate, and remand this case to the Fourth Circuit for reconsideration in light of that guidance.

II. This Court should grant review because the decision below is flatly inconsistent with *Heller*.

This Court's intervention is also called for because the approach to the Second Amendment applied below is in plain and direct conflict with this Court's precedents. This Court's Rule 12(c).

1. *Heller* was "this Court's first in-depth examination of the Second Amendment," and it did not purport "to clarify the entire field." 554 U.S. at 635. But neither did it leave future courts directionless in "a

vast *terra incognita*" of Second Amendment jurisprudence, *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011), nor give them carte blanche to chart their own meandering course through that terrain. Indeed, this Court was quite explicit about the guiding test for determining the Second Amendment's application to laws that ban certain types of firearms: has the government banned firearms "typically possessed by law-abiding citizens for lawful purposes," or has it instead banned "dangerous and unusual weapons" that are "highly unusual in society at large"? *Heller*, 554 U.S. at 625, 627. And if the answer is the former, the ban must be struck down, because when the Second Amendment "right *applies* to" certain types of firearms, "citizens *must* be permitted to use [them] for the core lawful purpose of self-defense." *McDonald*, 561 U.S. at 767-68 (emphases added) (quotation marks omitted).

The firearms banned by Maryland—AR-15s and other similar semi-automatic rifles—are "in common use" on any definition. They are lawful in the vast majority of States, they have common functionality, and law-abiding Americans own at least 20 million of them. NSSF, *Industry Intelligence Reports*, *supra* at 7. In 2018 alone, nearly 2 million of these rifles were sold in the United States, *id.*—more than double the number of Ford F-series trucks, the most commonly-sold

vehicle that year.[4] No one would dream of suggesting that traditional rifles or shotguns are not "in common use"; yet in 2018, more AR-type rifles were manufactured for the American market than the number of traditional rifles and shotguns *combined*.[5] Moreover, they are overwhelmingly used for the same "lawful purposes" as other commonly-owned firearms: hunting, target shooting, and home defense. Amicus Curiae Br. of the Nat'l Shooting Sports Found., *supra*, at *13.

Accordingly, the firearms banned by the Maryland law challenged here are unquestionably in common use for lawful purposes. Under this Court's analysis in *Heller*, "that is all that is needed for citizens to have a right under the Second Amendment to keep such weapons." *Friedman*, 136 S. Ct. at 449 (Thomas, J., dissenting from the denial of certiorari).

2. As noted above, the Fourth Circuit in *Kolbe* did not deny that the semiautomatic rifles Maryland bans are in common use. Instead, the court interpreted *Heller* to exclude from Second Amendment

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[4] Todd Lassa, *The Year in Auto Sales: Facts, Figures, and the Bestsellers from 2018*, MOTOR TREND (Jan 4, 2019), https://bit.ly/3nwV86o.

[5] In 2018, an estimated 1,729,000 modern sporting rifles were manufactured in the United States and not exported. NSSF, *Industry Intelligence Reports*, *supra* at 7. In the same year, 536,119 shotguns and 1,176,178 traditional rifles (2,905,178 total rifles minus 1,729,000 modern sporting rifles) were manufactured in the U.S.—a total of 1,712,297. *Id.* at 2, 7, 8.

protection any firearms that "are 'like' 'M-16 rifles'—'weapons that are most useful in military service,' " 849 F.3d at 135 (quoting *Heller*, 554 U.S. at 627). That standard not only sanctions the absolute prohibition of common, constitutionally protected arms; it would strip away Second Amendment protection from the very types of arms that the Founders assumed ordinary citizens "would bring … [from their] home to militia duty." *Heller*, 554 U.S. at 627.

The Fourth Circuit's standard is purportedly based on the following passage from *Heller*, which comes after the Court's discussion of "the historical tradition of prohibiting the carrying of dangerous and unusual weapons," *i.e.*, weapons that are not "in common use at the time," *id.*:

> It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful

> against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.

Heller, 554 U.S. at 627-28.

The full context of *Heller*'s statement concerning "M-16 rifles and the like" makes clear that this Court was not recognizing a free-standing exception to the scope of the Second Amendment. Rather, the Court was merely responding to the potential objection that its interpretation of the Second Amendment as excluding weapons that are not in common use may result in the prohibition, today, of arms—such as fully automatic machine guns and other "sophisticated arms that are highly unusual in society at large," *id.*—that are most useful for modern military service, despite the Amendment's militia-centric Prefatory Clause. The Court's casual reference to "M-16 rifles" and other "weapons that are most useful in military service" was plainly not meant as a definition of the category of arms that the Second Amendment's protections do not reach. *Id.* at 627. In the immediately preceding paragraph, the Court *already supplied* the governing definition of the dividing line between protected and unprotected arms: firearms that are "in common use at the time" are protected, while "dangerous and unusual weapons" are not. *Id.*

The Fourth Circuit's rule that a firearm's usefulness in military service disqualifies it from

constitutional protection is flatly contrary to the Second Amendment's text and history. As *Heller* explained, "[t]he traditional militia was formed from a pool of men bringing arms in common use at the time for lawful purposes like self-defense." *Id.* at 624 (quotation marks omitted). Thus, at the Founding, "a settler's musket, the only weapon he would likely own and bring to militia service, would be most useful in military service—undoubtedly a weapon of war." *Kolbe*, 849 F.3d at 156 (Traxler, J., dissenting). The Fourth Circuit's test would thus apparently have stripped Second Amendment protection from the very arms that Founding-Era citizens would have brought with them when mustering for militia service. The Second Amendment plainly could not "assure the existence of a 'citizen's militia' as a safeguard against tyranny"—the principal reason it was included in the Constitution to begin with—if it left the government free to ban commonly held arms most useful in militia service. *Heller*, 554 U.S. at 599, 600. The Fourth Circuit's test thus completely divorces the Second Amendment right from the purpose announced in the provision's Prefatory Clause—in direct conflict with *Heller*'s teaching that "[l]ogic demands that there be a link between" the purpose announced the Second Amendment's preface and the operative right that it protects. *Id.* at 577.

3. The Fourth Circuit's alternative holding in *Kolbe*—that Maryland's ban is subject to, and survives, intermediate scrutiny—is just as grievously wrong. As discussed above, *Heller* directs that an

absolute ban on arms commonly possessed by Americans for lawful purposes is categorically unconstitutional, not subject to "a judge-empowering 'interest-balancing inquiry' " like one of the tiers of scrutiny. 554 U.S. at 634. After all, "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Id.* at 634-35. *Heller* thus "did not adopt a strict or intermediate scrutiny test and rejected judicial interest balancing" in the Second Amendment context. *Heller II*, 670 F.3d at 1284 (Kavanaugh, J., dissenting).

But even assuming some sort of scrutiny analysis applies to Maryland's law, the correct standard would surely be strict scrutiny, not the milquetoast variety of intermediate scrutiny applied by the Fourth Circuit. As this Court has explained, "strict judicial scrutiny [is] required" whenever a law "impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). And the right to bear arms is not only enumerated in the constitutional text; it was also counted "among those fundamental rights necessary to our system of ordered liberty" by "those who drafted and ratified the Bill of Rights." *McDonald*, 561 U.S. at 768, 778. The Fourth Circuit's application of merely intermediate scrutiny, by contrast, relegates the Second Amendment to "a second-class right." *Id.* at 780 (plurality opinion).

At any rate, the court below was wrong to uphold Maryland's ban even under intermediate scrutiny. Under true intermediate scrutiny, the government must show that the challenged law "serves important governmental objectives and that the … means employed are substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 524 (1996) (quotation marks omitted). Respondents cannot make that showing.

a. Maryland's ban fails intermediate scrutiny at the threshold because the ban could even conceivably reduce gun violence only by *reducing the number of constitutionally protected firearms available to the public*. *See Kolbe*, 849 F.3d at 140 ("[T]he primary goal of the FSA 'is to reduce the availability of assault long guns ….' "). Under the Second Amendment, that is "not a permissible strategy"—even if used as a means to the further end of increasing public safety. *Grace v. District of Columbia*, 187 F.Supp.3d 124, 148 (D.D.C. 2016), *aff'd sub nom. Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017). That conclusion follows directly from this Court's precedents in the secondary-effects area of free speech doctrine.

In the First Amendment context, courts will analyze some government restrictions on certain types of constitutionally protected conduct—most commonly, zoning ordinances that apply specifically to establishments engaged in the exhibition or sale of non-obscene adult films, products, or performances—under merely intermediate scrutiny even though they technically are content-based. *City of Renton v.*

Playtime Theatres, Inc., 475 U.S. 41, 47-51 (1986). But this lesser scrutiny applies only so long as the *purpose and effect* of the restrictions is to reduce the negative secondary effects of the expression—such as the increased crime that occurs in neighborhoods with a high concentration of adult theatres—rather than to suppress the expression itself. *Id.* at 48.

As made clear in Justice Kennedy's separate opinion in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002)—which, as the lower courts have recognized, is the opinion based on the narrowest grounds and thus has controlling precedential effect, *e.g.*, *Joelner v. Village of Washington Park*, *Ill.*, 378 F.3d 613, 624 n.7 (7th Cir. 2004); *Center for Fair Pub. Pol'y v. Maricopa Cnty., Ariz.*, 336 F.3d 1153, 1161 (9th Cir. 2003)—this requirement that the *purpose* of a regulation analyzed under the secondary-effects rubric be unrelated to the suppression of speech has implications for the way the intermediate-scrutiny analysis is conducted. For in showing how its restriction is narrowly tailored to further an important governmental interest, part of the government's reasoning cannot be "that it will reduce secondary effects by reducing speech in the same proportion." *Alameda Books*, 535 U.S. at 449 (Kennedy, J., concurring). "It is no trick to reduce secondary effects by reducing speech or its audience; but [the government] may not attack secondary effects indirectly by attacking speech." *Id.* at 450; *see also Heller v. District of Columbia (Heller III)*, 801 F.3d 264, 280 (D.C. Cir. 2015) (striking down a ban on registering more than one pistol per month

designed to "limit the number of firearms" because "taken to its logical conclusion, that reasoning would justify a total ban on firearms kept in the home"); *Grace*, 187 F.Supp.3d at 148.

That is precisely what Maryland has done here. Its ban does not regulate the *manner* of bearing arms or seek to promote safe use. No, the ban's purpose and effect is to *restrict the types of firearms available to the public*. Maryland's ban thus "destroys the ordinarily situated citizen's right to bear arms not as a side effect of applying other, reasonable regulations … but by design." *Wrenn*, 864 F.3d at 666. That is "not a permissible strategy," *Grace*, 187 F.Supp.3d at 148, under any level of heightened scrutiny.

b. Even setting this threshold objection aside, Maryland's ban would still fail constitutional muster. That is so, first, because it is not sufficiently tailored. To survive intermediate scrutiny, the State must have considered less constitutionally intrusive alternatives to the course it adopted. *McCullen v. Coakley*, 573 U.S. 464, 494-95 (2014). In *McCullen*, for example, this Court struck down a Massachusetts "buffer zone" law forbidding certain types of speech outside of abortion clinics, reasoning that the State had failed to show that measures substantially less restrictive than such an extreme prophylactic measure were not just as "capable of serving its interests." *Id.* at 494. Even in the context of intermediate scrutiny, the Court explained, the State must "show[ ] that it seriously undertook to address the problem with less intrusive tools readily available to it," or at the least, "that it considered

different methods that other jurisdictions have found effective." *Id.*

The ban fails *McCullen*'s requirement because nothing on the face of the statutes establishing Maryland's ban suggests that the State considered less restrictive alternatives. *See* Firearm Safety Act of 2013, 2013 Md. Laws Ch. 427 (S.B. 281); Criminal Procedure – Firearms – Transfer, 2018 Md. Laws Ch. 251 (H.B. 1646). To "justify its choice to adopt the [semiautomatic rifle ban]," Maryland "would have to show either that substantially less-restrictive alternatives were tried and failed, or that the alternatives were closely examined and ruled out for good reason." *Bruni v. City of Pittsburgh*, 824 F.3d 353, 370 (3d Cir. 2016). These statutes do not even generally "say that other approaches have not worked," which in any event is "not enough" to overcome "the vital [Second] Amendment interests at stake." *McCullen*, 573 U.S. at 496. Under the Second Amendment, Maryland unconstitutionally chose to "forego a range of alternatives—which would burden substantially less [arms-bearing] than a blanket prohibition on Plaintiffs' [possession of common arms]—without a meaningful record demonstrating that those options would fail to alleviate the problems meant to be addressed." *See Bruni*, 824 F.3d at 371.

c. Maryland's ban also fails intermediate scrutiny, regardless of how narrowly it is tailored, because it does nothing to meaningfully advance the State's proffered interest in public safety. To show that its ban is "substantially related to the achievement" of its

purported objective of reducing gun crime, *Virginia*, 518 U.S. at 533, the State necessarily has to prove that three propositions are sufficiently plausible. First, that its restriction will in fact reduce the number of banned arms in criminal hands. Second, that this reduction will not simply be offset by an *increase* in crimes perpetrated by other arms that remain legal. And third, that any net reduction in crime traceable to the ban will not be cancelled out by an *increase* in crime due to the impediment the ban creates to effective, lawful self-defense. Under genuine intermediate scrutiny, Maryland's showing on each of these fronts would have to be "exceedingly persuasive." *Id.* The available evidence does not come even close.

In an attempt to prove the first proposition, Maryland in *Kolbe* relied on the expert opinion of Dr. Christopher Koper, who pointed to data suggesting that the federal ban on "assault weapons" from 1994 to 2004 may have reduced criminal usage of those arms during that period. *See Kolbe*, 849 F.3d at 129 n.8. But this reliance on federal data to show the potential efficacy of a state ban ignores the obvious reason why state-level attempts to restrict the circulation of disfavored firearms are far less likely to succeed in this endeavor: the banned items continue to be legal in the vast majority of the States. All a criminal in Maryland who wishes to obtain one of the banned firearms needs do is take a short car ride across the border to Virginia, West Virginia, Pennsylvania, or Delaware—none of which impose a ban like Maryland's. Indeed, Professor Koper *himself* has acknowledged

that "the impact of these [state] laws is likely undermined to some degree by the influx of ['assault weapons'] from other states," and that several studies—including one that he co-authored—"suggest that state-level ['assault weapons'] bans have not reduced crime." KOPER, UPDATED ASSESSMENT, *supra* at 81 n.95.

Moreover, flat bans on certain disfavored firearms—whether state or federal—are unlikely to actually reduce the number of such arms in criminal hands for an additional reason. Most violent criminals, who are bent on breaking the law and who generally acquire the firearms they use to do so *illegally*, are unlikely to obey Maryland's ban. *See, e.g.*, JAMES D. WRIGHT & PETER H. ROSSI, ARMED & CONSIDERED DANGEROUS xxxv (2d ed. 2008) ("[M]ost of the methods through which criminals acquire guns and virtually everything they ever do with those guns are *already* against the law."); ANTHONY J. PINIZZOTTO ET AL., VIOLENT ENCOUNTERS 50 (U.S. Department of Justice, 2006) (97% of handguns used to assault law enforcement officers participating in study were acquired illegally).

With respect to the second necessary premise of Maryland's law—that most criminals would not simply substitute still-legal (and functionally identical) firearms for the banned ones—the evidence falls equally short. To begin, because the firearms Maryland calls "assault weapons" are accountable for such a minuscule percentage of gun crime—no more than 2% in most studies, KLECK, TARGETING GUNS, *supra*,

at 112—even if the State's ban was *entirely* successful in ridding those arms from circulation, the overall impact on crime could only be very small. And this remains true of the narrow categories of gun crime that Maryland has singled out for special emphasis: mass shootings and murders of police officers. *Kolbe*, 849 F.3d at 139. As Maryland's expert, Professor Koper, has conceded, these terrible crimes are "particularly rare events," and the use of assault weapons in these crimes is even rarer. KOPER, UPDATED ASSESSMENT, *supra* at 15-16.

As Professor Koper subsequently acknowledged, his research for the Department of Justice on the 10-year federal ban "showed no discernible reduction in the lethality or injuriousness of gun violence" while the ban was in effect. Christopher S. Koper, *America's Experience with the Federal Assault Weapons Ban, 1994-2004*, *in* REDUCING GUN VIOLENCE IN AMERICA: INFORMING POLICY WITH EVIDENCE AND ANALYSIS 165 (Daniel W. Webster & Jon S. Vernick eds., 2013), https://bit.ly/3vOBrug. Indeed, that accords both with Professor Koper's initial finding in 1997 that there is "no statistical evidence of post-ban decreases in either the number of victims per gun homicide incident, the number of gunshot wounds per victim, or the proportion of gunshot victims with multiple wounds," JEFFREY A. ROTH & CHRISTOPHER S. KOPER, IMPACT EVALUATION OF THE PUBLIC SAFETY AND RECREATIONAL FIREARMS USE PROTECTION ACT OF 1994 6 (1997), https://urbn.is/3BbVX9u, and with his conclusion in 2004 that "[s]hould it be renewed, the ban's effects on

gun violence are likely to be small at best and perhaps too small for reliable measurement," KOPER, UPDATED ASSESSMENT, *supra* at 3.

These findings should come as no surprise once it is recalled that the specific features banned by Maryland simply have no relation to the functioning or dangerousness of the arms that possess them. *See supra*, pp. 7-8. The notion that the havoc perpetrated by violent criminals will be measurably lessened once they are forced to use firearms that, for example, are 27 inches long, rather than 26, cannot be taken seriously.

Finally, even setting all of these objections aside and assuming, contrary to evidence and reason, that Maryland's ban *could* have some modest effect on gun crime, the Fourth Circuit entirely failed to take into account the *offsetting harm* to public safety caused by the burden Maryland has placed upon law-abiding citizens who seek to use the disfavored arms in self-defense. Defensive gun uses "are about three to five times as common as criminal uses, even using generous estimates of gun crimes." Gary Kleck & Mark Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. CRIM. L. & CRIM'Y 150, 170 (1995), https://bit.ly/2Zv7lgj. And as explained above, there are valid reasons why law-abiding citizens may prefer to possess rifles banned by Maryland for self-defense, and millions of Americans have indeed chosen to possess them. Under *Heller*, it is the choices of these law-abiding citizens, not speculation about the effects of a ban on a small subset of

gun crimes, that must govern. Maryland "ha[s] to provide … more than merely a rational basis for believing that its uniquely sweeping ban is justified by an increase in public safety." *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012). Because it cannot meet this burden, its ban cannot pass muster even under intermediate scrutiny.

III. This Court should grant review because the question presented is exceptionally important.

1. The question presented in this case is of extraordinary importance, because it concerns the constitutional right to possess, in the home, the most popular rifle-type in the Nation, owned by millions of Americans for self-defense. As noted above, nearly 20 million rifles of the kind Maryland bans have been sold in the United States, and they are commonly used by law-abiding citizens throughout the country for self-defense. "Whatever the reason," these firearms are thus among "the most popular weapon[s] chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Heller*, 554 U.S. at 629. Yet the nearly 85 million people living in Maryland and the five other States (and the District of Columbia) with similar bans on common semi-automatic rifles are flatly prohibited from keeping or bearing these arms, solely because they live on one side of

a state line rather than the other.[6] That situation is intolerable, and only this Court's intervention can correct it.

2. The question presented is also exceptionally important because of the implications of the "useful in military service" standard adopted by the Fourth Circuit and applied below. Not only would this standard perversely result in eliminating constitutional protection from the very arms the Founders expected law-abiding citizens to bring with them when mustering for militia service, as discussed above, but taken to the limits of its logic, this standard threatens to strip constitutional protection from virtually *all* firearms. For as Judge Traxler noted in dissent in *Kolbe*, "nearly all firearms can be useful in military service." 849 F.3d at 157 (Traxler, J., dissenting).

The *en banc* majority in *Kolbe* protested that its test was narrower than Judge Traxler described because it excises from the Second Amendment only those arms "*most* useful in military service." *Id.* at 143 (majority). But the fact that the court concluded that the common semiautomatic firearms at issue here meet that test—even though "millions of law-abiding Americans *actually use* these versatile guns, while there do not seem to be any military forces that routinely carry an AR-15 or other semiautomatic sporting rifles as an officially-issued service weapon," *id.* at 159

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[6] *Compare* Giffords Law Center, *supra*, *with* U.S. Census Bureau, *Annual Estimates of the Resident Population for the Nation and States* (July 2021), https://bit.ly/3EgowUY.

(Traxler, J., dissenting)—renders these assurances about the supposedly limited nature of the standard completely illusory.

3. Finally, this case is also deeply significant because the feckless version of "intermediate scrutiny" applied by the Fourth Circuit's alternative holding in *Kolbe*, if left uncorrected, threatens to spread beyond the confines of this case or even the Second Amendment generally, degrading constitutional protections in other contexts governed by this standard of heightened scrutiny.

As discussed above, Maryland's ban on common semiautomatic firearms plainly could not survive genuine intermediate scrutiny. The Fourth Circuit concluded otherwise only by *entirely ignoring* the "narrow tailoring" inquiry demanded by this Court's precedents and by nakedly deferring to the State's say-so that the ban would "curtail [the banned firearms'] availability to criminals and lessen their use in mass shootings, other crimes, and firearms accidents." *Kolbe*, 849 F.3d at 140. Without meaningfully discussing the voluminous evidence refuting that suggestion—including the findings, discussed above, by Professor Koper, Maryland's own expert—the *Kolbe* majority simply intoned that the State's position "is precisely the type of judgment that legislatures are allowed to make without second-guessing by a court." *Id.*

That deferential inquiry was a far cry from the type of analysis this Court has called "intermediate

scrutiny," and this perversion of intermediate scrutiny review "risks long-term harm" by creating "a casebook guide to eviscerating" the standard in future cases. *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 478 (2015) (Kennedy, J., dissenting). The lower courts routinely rely on major Second Amendment cases for authority in other contexts, *see, e.g.*, *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 918 (7th Cir. 2015) (citing *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011))—in some cases, for their articulation of the intermediate scrutiny test, *see Johnson v. Whitehead*, 647 F.3d 120, 133 (4th Cir. 2011) (citing *Chester*, 628 F.3d 673); *Capital Associated Indus., Inc. v. Stein*, 922 F.3d 198, 210 (4th Cir. 2019) (citing *Chester*, 628 F.3d 673)). There is thus every reason to fear that the Fourth Circuit's flaccid application of intermediate scrutiny will have real and pernicious spillover effects on other areas of constitutional jurisprudence that rely on that doctrinal test. This Court should grant the writ to prevent the guide penned by the Fourth Circuit from leading the lower courts down a path that will eviscerate the protections intermediate scrutiny was designed to afford.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for certiorari.

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