No. 21-902

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

AMICI CURIAE BRIEF OF SAN DIEGO COUNTY GUN OWNERS POLITICAL ACTION COMMITTEE, CALIFORNIA GUN RIGHTS FOUNDATION, POWAY WEAPONS AND GEAR, JAMES MILLER, WENDY HAUFFEN, AND JOHN PHILLIPS IN SUPPORT OF PETITIONERS

JOHN W. DILLON
DILLON LAW GROUP APC
2647 Gateway Road
Suite 105, No. 255
Carlsbad, CA 92009
(760) 642-7150
jdillon@dillonlawgp.com

GEORGE M. LEE
Counsel of Record
SEILER EPSTEIN LLP
275 Battery Street
Suite 1600
San Francisco, CA 94111
(415) 979-0500
gml@seilerepstein.com

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF AMICI CURIAE[1]

The **San Diego County Gun Owners Political Action Committee (SDCGO)** is a diverse and inclusive 1,300+ member political organization. SDCGO is dedicated to preserving and restoring citizens' Second Amendment rights. It has developed a strong, permanent foundation that focuses on changing the face of firearm ownership and use by collaborating with volunteers in state and local activities and outreach. Since its beginning in 2015, SDCGO has profoundly influenced and advanced policies protecting the Second Amendment. SDCGO's primary focus is on expanding and restoring Second Amendment rights within San Diego County and in California due to an aggressive and largely successful legislative and regulatory effort to significantly limit or eliminate the firearms industry and the ownership and use of various arms at the state, county, and municipal levels.

California Gun Rights Foundation ("CGRF") was founded by long-time civil rights activists in California to counter the marginalization of gun owners and combat civilian disarmament. It is a 501(c)(3) nonprofit organization that serves its members, supporters, and the public through education, cultural, and judicial efforts to advance Second Amendment and

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[1] Counsel of record for all parties received notice of amici curiaes' intent to file at least ten days prior to this brief's due date and provided written consent to the filing of this brief. *See* Sup. Ct. R. 37.2(a). No counsel for any party authored this brief in whole or in part. No person, other than amici curiae, contributed money intended to fund the brief's preparation and submission.

related civil rights. CGRF has held governments accountable to the Constitution and the law in matters that directly affect the rights of law-abiding gun owners through its legal action, education, and research programs. CGRF has also filed important supporting amicus briefs in lawsuits filed in court across the nation, including the landmark *McDonald v. Chicago* case before the United States Supreme Court. CGRF defends and advances freedom and individual liberties—including the fundamental right to keep and bear arms—and promotes sound, principled, and constitutionally-based public policy. CGRF respectfully believes that its substantial experience and expertise in the Second Amendment field would aid this Court.

SDCGO, **CGRF**, **James Miller**, **Wendy Hauffen**, **John Phillips**, and **Poway Weapons and Gear** (collectively "Amici") are some of the plaintiffs in *Miller v. Bonta*, a Second Amendment challenge to California's Assault Weapon Control Act ("AWCA"). 542 F. Supp.3d 1009 (S.D. Cal. June 4, 2021). There, Amici successfully argued in the district court that, just like Maryland's assault weapon ban, California's AWCA was a categorical prohibition on commonly owned arms with common characteristics, and thus was unconstitutional under both the "*Heller* test" and the Ninth Circuit's two-step levels-of-scrutiny test. Amici's case, now on appeal, has been stayed pending the outcome of *Rupp v. Becerra* and this Court's decision in *New York State Rifle & Pistol Ass'n, Inc., et al. v. Bruen.* This case concerns Amici because it directly impacts their own challenge to a state's assault weapons ban,

and their ability to exercise their right to keep and bear arms. Amici had the benefit of litigating this specific Second Amendment issue through a bench trial and believe that their experience and evidence would aid this Court.

SUMMARY OF ARGUMENT

At issue is Maryland's categorical ban on common semiautomatic rifles, dubiously deemed "assault weapons" pursuant to Md. Code Ann., Crim. Law §§ 4-302, 4-303(b). Like California's Assault Weapons Control Act ("AWCA"), Maryland bans so-called "assault weapons" based on their characteristics such as magazine capacity, detachable magazines, folding stocks, flare launchers, and flash suppressors. Maryland's categorical prohibition was upheld *en banc* by the Fourth Circuit in *Kolbe v. Hogan* on the inaccurate assertion that commercial, commonly owned AR-15 rifles were deemed sufficiently *like* M-16 rifles, "*i.e.*, weapons that are most useful in military service," to take them outside the protections of the Second Amendment. 849 F.3d 114, 136 (4th Cir. 2017).

The Fourth Circuit's novel standard of review is another addition to the number of lower federal court cases that have affirmatively rejected the clear categorical analysis proscribed by this Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). In sharp contrast, the court in Amici's case, *Miller v. Bonta*, applied

proper review standard, using the "hardware test" and asking the simple question: Does the law ban a firearm commonly owned by law-abiding citizens for lawful purposes? This test draws a distinction between commonly owned arms for lawful purposes and arms that are *both* dangerous *and* unusual, such as arms solely useful for military purposes (e.g., grenades, missiles). If the law bans commonly owned arms, the law is unconstitutional. End of analysis. *Miller v. Bonta*, 542 F. Supp.3d 1009, 1021 (S.D. Cal. June 4, 2021).

This Court also identified the proper means for determining "common use" in *Caetano v. Massachusetts*, 577 U.S. 411 (2016). In *Miller*, Amici showed that modern rifles are commonly owned under every metric used for determining common use. For example, a numerical analysis proved beyond doubt that modern rifles are commonly owned in the tens of millions, and a jurisdictional analysis showed that modern rifles are lawfully owned in the vast majority of states.

Like the assault weapons ban in California, Maryland's ban prohibits common arms with common characteristics that make firearms safer, more accurate, better suited for different statures and body types, and ideal for both individual self-defense and militia service. These firearms are used for a variety of lawful purposes including self-defense, recreation, hunting, target shooting, and sport. They are legal in 44 states and "traditionally have been widely accepted as lawful possessions." *Staples v. United States*, 511 U.S. 600, 612 (1994).

This Court should grant review. For over a decade, lower courts have ignored or misconstrued the text of the Constitution, the binding precedent of this Court, and the relevant history and tradition to improperly uphold bans on constitutionally protected arms in common use. This case presents the Court with the opportunity to instruct the lower courts on the proper standard of review in Second Amendment cases challenging the constitutionality of laws prohibiting commonly-possessed firearms. With federal circuit courts and state courts producing at least *five* separate and conflicting ways of analyzing laws that ban arms in common use for lawful purposes, it is imperative that this Court grant the petition, and apply the categorical test under *Heller* to prevent any further erosion of this Court's holdings.

ARGUMENT

I. This Court Should Grant Review to Stop Lower Courts from Ignoring Established Precedent Set By *Heller* and *McDonald*.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. It "guarantees the right to carry weapons 'typically possessed by law-abiding citizens for lawful purposes.'" *Caetano*, 136 S.Ct. at 1030 (Alito, J., concurring). "A weapon may not be banned unless it is *both* dangerous *and* unusual." *Id.* at 1031. When analyzing whether an arm or

weapon is "unusual," Justice Alito emphasized that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, *even those that were not in existence at the time of the founding*." *Id.* at 1030 (Alito, J., concurring) (quoting *Heller*, 554 U.S. at 582). Thus, even if an arm was not in existence during the Founding era, it does not mean the weapon is "unusual." The Second Amendment guarantee also includes a right to keep and bear arms that have "some reasonable relationship to the preservation or efficiency of a well-regulated militia." *United States v. Miller*, 307 U.S. 174, 178 (1939).[2] Importantly, where a "weapon belongs to a class of arms commonly used for lawful purposes," "the relative dangerousness of a weapon is *irrelevant*." *Caetano*, 136 S.Ct. at 1031 (Alito, J., concurring) (citing *Heller*, 554 U.S. at 627, emphasis added).

Despite this Court's precedent in *Heller* and *McDonald*, lower courts have established their own standards of review when analyzing bans on commonly owned arms. For example, the Ninth Circuit implements a two-step level of scrutiny test most akin to a sliding-scale interest balancing test. The Seventh Circuit determines the constitutionality of categorical bans on arms by asking whether a law 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

[2] *United States v. Miller* supports the common use test, as it would imply protection of the right to keep firearms in common use that are useful for militia purposes.

whether law-abiding citizens retain adequate means of self-defense. *Friedman v. City of Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015). The Fourth Circuit asks whether the arms "are 'like' M16 rifles" and "clearly most useful in military service." *Kolbe*, 849 F.3d at 126, 137. Not only were these tests not applied in *Heller*, they explicitly contradict the analysis in *Heller*. In contrast to other lower courts, the district court in Amici's case, *Miller v. Bonta*, properly applied the appropriate test to categorical bans on common arms after a full trial on the merits. Using the "*Heller* test," the court found that bans on commonly owned arms are categorically unconstitutional. This Court should grant Petitioners' writ, apply the "*Heller* test" to Maryland's "assault weapons" ban, and correct the inconsistent and grasping standards applied to Second Amendment claims in the lower courts.

A. The District Court in *Miller v. Bonta* Applied the Correct "*Heller* Test" to Bans on Commonly Owned Arms.

"The Second Amendment extends, prima facie, to *all* instruments that constitute bearable arms." *Heller*, 554 U.S. at 582 (emphasis added). As stated in *Heller*, the right to keep and bear arms is a right enjoyed by all law-abiding citizens to keep and bear arms that are "in common use" "for lawful purposes like self-defense." *Heller*, 554 U.S. at 624. The district court in *Duncan* described this analysis as "a hardware test." "Is the firearm hardware commonly owned? Is the hardware commonly owned by law-abiding citizens? Is

the hardware owned by those citizens for lawful purposes? If the answers are 'yes,' the test is over. The hardware is protected." *Duncan v. Becerra*, 366 F. Supp.3d 1131, 1142 (S.D. Cal. 2019), *aff'd*, 970 F.3d 1133 (9th Cir. 2020); *see also Miller v. Bonta*, 542 F. Supp.3d at 1020-21. "In other words, it identifies a presumption in favor of Second Amendment protection, which the State bears the initial burden of rebutting." *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 257 n.73 (2d Cir. 2015) ("*NYSRPA I*"). Thus, in *NYSRPA I*, the Second Circuit struck a ban on a pump-action rifle because the state focused exclusively on semiautomatic weapons and "the presumption that the Amendment applies remain[ed] unrebutted." *Id*.

Once it is determined that the Second Amendment applies to a particular type of arm, it is unconstitutional for the government to ban it. This flows directly from *Heller*, which categorically struck down the District of Columbia's handgun ban. Indeed, this is precisely how this Court described *Heller*'s holding in *McDonald*: because "we found that [the Second Amendment] right applies to handguns," the Court explained, "we concluded, citizens must be permitted to use handguns for the core lawful purposes of self-defense." *McDonald*, 561 U.S. at 767 (cleaned up).

Here, the arms that Maryland bans are presumptively protected under *Heller*'s analysis, and the State could not rebut that presumption. Citizens must be permitted to possess and use those arms for the core lawful purpose of self-defense, and Maryland's ban of those arms is unconstitutional. In *Caetano v.*

Massachusetts, Justice Alito's concurring opinion stated that "[t]he more relevant statistic is that '[h]undreds of thousands of Tasers and stun guns have been sold to private citizens,' who it appears may lawfully possess them in 45 States. [. . .] While less popular than handguns, stun guns are widely owned and accepted as a legitimate means of self-defense across the country. Massachusetts' categorical ban of such weapons therefore violates the Second Amendment." 136 S.Ct. at 1032-33.

Thus, this Court's test for commonality involves a nationwide inquiry. Indeed, the Second Amendment does not mean different things in different parts of the United States. The *Heller* analysis asks simply whether the arms are "*both* dangerous *and* unusual," *Caetano*, 136 S.Ct. at 1031 (Alito, J., joined by Thomas, J., concurring) (italics original), and if they are not both, it determines if the category of arms are in common use for lawful purposes. *Duncan v. Becerra*, 366 F. Supp.3d at 1142. The text of the Second Amendment, as it is informed by history and tradition, all point in the same direction because "the pertinent Second Amendment inquiry is whether [the banned weapons] are commonly possessed by law-abiding citizens for lawful purposes *today*." *Caetano*, *supra*, at 1032 (italics original).

The arms banned as "assault weapons" under Maryland law are not *both* dangerous *and* unusual, as the Supreme Court defined in *Heller*. To the contrary, they are common in all respects: (1) they are common functionally, as they are all semiautomatic in their

operation; (2) they are common characteristically, as they are all commercially popular types of arms with various common characteristics like detachable magazines and folding stocks; and (3) they are common jurisdictionally, available in the vast majority of states. As further proof, they are common numerically, in that they are owned by tens of millions of citizens throughout the United States.

While numerical data are entirely sufficient to determine if a particular weapon is commonly used for lawful purposes (especially considering the overwhelming numbers of modern rifles in the U.S.), it must be acknowledged that the constitutionally protected status of arms cannot turn on fact-bound sales numbers of *specific makes, models, or even specific configurations*. Said differently, courts must be aware that a pure statistical analysis *can* be misleading; in the context of the Second Amendment, an unchallenged unconstitutional law prohibiting arms may be the sole cause that an arm is not common in the first place. "[I]t would be absurd to say that the reason a particular weapon can be banned is that there is a statute banning it, so that it isn't commonly owned. A law's existence can't be the source of its own constitutional validity.") *Friedman*, 784 F.3d at 409. Thus, when an arm is numerically uncommon because of a government bans, or even a new market technology/design, the government bears the burden of demonstrating that there is something about that arm that makes it *qualitatively* more dangerous than typical firearms. Thus, this Court can also consider the number of

jurisdictions that allow for the lawful possession and carrying of such arms and their lawful use for all lawful purposes, including but not limited to, self-defense.

The question should focus on a categorical analysis of type and function, set against a backdrop of permissibility and availability throughout the United States. "While less popular than handguns, stun guns are widely owned and accepted as a legitimate means of self-defense across the country." *Caetano*, 136 S.Ct. at 1033 (2016) (Alito, J., concurring). So too are semiautomatic modern rifles in various configurations and characteristics which Maryland prohibits. These firearms are commonly used by responsible, law-abiding citizens for various lawful purposes such as self-defense, hunting, recreation, competition, and collecting. *Miller v. Bonta*, 542 F. Supp.3d at 1020-23, 1033-37.

For example, a future model of a semiautomatic handgun, rifle, or shotgun, though when first released will not be numerically common based on sales (because it has not yet been sold), will nonetheless be constitutionally protected because it is *categorically common*—that is to say, it will be an iterative semiautomatic handgun, rifle, or shotgun, which are categorically common and protected bearable arms. The same goes for firearms that Maryland bans based on one or more characteristics, and their evolutionary and technological successors. Just like the argument "that only those arms in existence in the 18th century are protected by the Second Amendment [is] not merely wrong, but bordering on the frivolous," the "Second Amendment extends, prima facie, to all instruments

that constitute bearable arms . . . " *Caetano*, 136 S.Ct. at 1030 (internal quotations omitted). The fact that the Maryland may act to ban thousands of discrete configurations of common semiautomatic arms held in respectively smaller numbers than the over-arching category of "assault weapons" is irrelevant to the constitutional inquiry under *Heller*.

1. Numerical Analysis

Today, semiautomatic firearms with one or more common characteristics are among the most popular firearms in the United States. *Miller v. Bonta*, 542 F. Supp.3d at 1020-23. Indeed, the district court in *Miller* found that in 2018 alone, 1,954,000 modern rifles were either manufactured in or imported into the U.S. for sale. *Miller*, 542 F. Supp.3d at 1022. Over the last 30 years, 19,797,000 modern rifles have been manufactured or imported into the United States. *Id.* "For female gun buyers in 2018, after a handgun, a modern rifle was the next most popular choice. The same was true of all first-time gun buyers in 2018." *Id.* (citations omitted). Again in 2018, "approximately 18,327,314 people participated nationally in in target and sport shooting specifically with modern rifles." *Id.*

The popularity of these banned firearms is undeniable. For example, California was the first state to ever implement an assault weapon ban and arguably the state with the most expansive assault weapons regulations. However, despite being banned for 20 to 30 years, the court in *Miller* found that according to

the State's own evidence, there were 185,569 "assault weapons" registered with the California Department of Justice. *Miller*, 542 F. Supp.3d at 1021. The Court also found that another 52,000 assault weapon registrations were backlogged and left unregistered when the last California registration period closed in 2018. *Id.* The district court in *Miller* determined that of the 1,345,367 firearms that were purchased in California from January 2020 to March 2021, it is reasonable to infer that 176,801 of those firearms were modern rifles. *Id.*, at 1022.

Modern rifles are indeed popular. Almost one-half of all rifles (48%) produced in 2018 were modern rifles—or 664,360 rifles. *Miller v. Bonta*, 542 F. Supp.3d at 1022. At this point, they are likely more popular than the Ford F-150 truck. *Id.*, at 1022-23. Other courts agree. "Even accepting the most conservative estimates cited by the parties and by amici, the assault weapons . . . at issue are 'in common use' as that term was used in *Heller*." *NYSRPA I*, 804 F.3d at 255. "We think it clear enough in the record that semi-automatic rifles . . . are indeed in 'common use.' " *Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) ("*Heller II*").

Notably, this Court indicated that as few as 200,000 stun guns owned nationwide by law-abiding citizens was enough to show common ownership and receive constitutional protection. *Caetano*, 577 U.S. at 420 (Alito, J., and Thomas, J., concurring) (approximately 200,000 civilians owned stun guns as of 2009) ("While less popular than handguns, stun guns are

widely owned and accepted as a legitimate means of self-defense across the country."). Amici in *Miller* were able to show that based on the evidence presented at trial, that upwards of 1,000,000 modern rifles are owned in California alone. *Miller v. Bonta*, 542 F. Supp.3d at 1023. Common sense dictates that modern rifles are indeed common. They are common in California, common in Maryland, and common throughout the United States. As such, they are fully protected by the Second Amendment.

Not only did the court in *Miller* find overwhelming data supporting the commonality of modern rifles, it also found that the State failed to present evidence at trial that modern rifles—or "assault weapons"—are often used in crime. To the contrary, the evidence showed that most modern rifles are owned by law-abiding citizens who use them for lawful purposes. The district court in *Miller* found that in 2018, "34% of buyers purchased a modern rifle for personal protection, while 36% purchased for target practice or informal shooting, and 29% purchased for hunting." *Miller v. Bonta*, 542 F. Supp.3d at 1022. "For female gun buyers in 2018, after a handgun, a modern rifle was the next most popular choice." *Id.* The same was true of all first-time gun buyers in 2018. *Id.* Nationally, the sport of 3-gun shooting—in which modern rifles are one of the three classes of arms used—is the activity with the highest mean days of participation (23.8 days). The next highest activity is target shooting with a modern rifle (15.3 days). *Id.* "In the west region, target shooting with a modern rifle is the top activity." *Id.*

The same is true for the Fourth Circuit. In fact, the Fourth Circuit relied on assumptions and figures that were specifically proven false at trial in *Miller*. For example, the Fourth Circuit stated that rounds from assault weapons "easily pass through the soft body armor worm by most law enforcement officers." *Kolbe*, 849 F.3d at 127. However, most rifle rounds will defeat police body armor as it is designed only to resist lower caliber ammunition fired from a handgun. *Miller v. Bonta*, 542 F. Supp.3d at 1053. The district court in *Miller* also specifically refuted the state's contention that only 2.2 shots are fired on average in self-defense. *Id.* at 1041-46. In fact, many of the arguments relied on by the Court in *Kolbe* were specifically refuted at trial in *Miller*. Such weak, and frankly non-existent evidence cannot be permitted to be relied on by the lower courts to cripple fundamental Second Amendment rights.

2. Jurisdictional Analysis

In contrast to the strong historical support for the constitutional protection of the arms at issue here, there is no historical support for laws prohibiting firearms with the characteristics prohibited under Maryland's ban. Amici in *Miller v. Bonta* showed at trial that semiautomatic rifles, pistols, shotguns, and detachable magazines have been in existence since the late 1800s and early 1900s. Characteristics such as the ergonomic pistol-style grip and thumbhole stock, collapsible stock, flash suppressor, and forward vertical grips have been commercially available and offered on

semiautomatic firearms for up to, and in some instances, over a century. Yet these characteristics were not regulated. *Miller v. Bonta*, 542 F. Supp.3d at 1024-25. As early as 1779, firearms had ammunition capacities greater than 10 rounds. During World War I, detachable magazines with capacities of up to 32 rounds were introduced and available in the commercial market. These early firearms were equipped with many of Maryland's currently banned characteristics such as "large-capacity" magazines, detachable magazines, and adjustable/folding stocks.

Notably, the only federal regulation on semiautomatic firearms having characteristics at issue here did not occur until 1994 in the Public Safety and Recreational Firearms Use Protection Act (the "Federal Assault Weapons Ban") (103rd Congress (1993-1994)), a subsection of the Violent Crime Control and Law Enforcement Act of 1994 (Pub. L. 103-322). This prohibition was allowed to sunset 10 years later due to its lack of effect on crime. *Miller v. Bonta*, 542 F. Supp.3d at 1031.

The few other state bans on "assault weapons" have an even shorter "historical pedigree." Such late-adopted restrictions by a small handful of jurisdictions do not qualify as the historically presumptive limits mentioned in *Heller*. *Cf. Heller II*, 670 F.3d at 1260 ("We are not aware of evidence that prohibitions on either semiautomatic rifles or large-capacity magazines are longstanding and thereby deserving of a presumption of validity"); *Staples*, 511 U.S. at 603 n.1, 612 (discussing the AR-15 and stating that weapons that fire

"only one shot with each pull of the trigger" "traditionally have been widely accepted as lawful possessions"). In fact, the first state "assault weapons" ban was enacted in 1989 by the State of California. Since 1989, the definition of what constitutes an "assault weapon" has changed at least four separate times, each time expanding the definition to encompass more firearms.

In addition, unconstitutional prohibitions are extremely rare and only implemented in a small minority of states. Specifically, forty-four (44) states do not ban semiautomatic rifles that are unlawful to purchase, possess, and use under Maryland's ban. Forty-one (41) states do not ban semiautomatic firearms with or without characteristics like pistol grips, collapsible stocks, threaded barrels, and flash suppressors, whether they are semiautomatic rifles, pistols, or shotguns. Thus, these firearms have been sold to and owned by private citizens for over a century throughout the United States and continue to be sold to this day in most places without additional restrictions.

There is no genuine question—the semiautomatic firearms banned by Maryland are common, not prohibited in the vast majority of States, and have been used for almost a century by millions of responsible, law-abiding people for various lawful purposes such as self-defense, hunting, recreation, competition, and collecting. The only rarity regarding such firearms is the very few States that seek to restrict them by wrongly recasting them as "assault weapons."

B. Modern Rifles Are Not "Dangerous and Unusual" Arms but Are Ideal for Self-Defense.

In *Miller*, the district court found that "[l]ike the Swiss Army Knife, the popular AR-15 rifle is a perfect combination of home defense weapon and homeland defense equipment. Good for both home and battle, the AR-15 is the kind of versatile gun that lies at the intersection of the kinds of firearms protected under [*Heller*] and *United States v Miller*[.]" *Miller*, 542 F. Supp.3d at 1014.

While the Fourth Circuit claimed a "lack of evidence that the banned assault weapons and large-capacity magazines are well-suited to self-defense," this was not the case in *Miller*. *See Kolbe*, 849 F.3d at 127. Amici in *Miller* successfully showed that the common firearms banned under the California's AWCA (and also banned under Maryland's ban) are not only in common use, but ideal for self-defense. *Miller*, 542 F. Supp.3d at 1033-37. The court in *Miller* found that "without question, there is clear evidence that AR-15 rifles are and have been used for self-defense." *Id.*, at 1033.

In *Miller*, Amici showed at trial that the regulated characteristics improve the control, accuracy, function, and safety of firearms. *Miller v. Bonta*, 542 F. Supp.3d at 1034-39. These characteristics also make them ideal for lawful purposes such as sport and hunting. *Id.* The characteristics Maryland uses to define "assault weapons," individually and collectively, are neither unusual

nor dangerous. Instead, they provide material benefits to millions of law-abiding firearm users, including improved ergonomics, enhanced control and accuracy while firing, and safer operation. For example, a folding or adjustable stock, is simply a stock that is readily adjustable "to properly fit the user" and does not significantly affect the firearm's concealability. *Id.*, at 1036. Firearms with adjustable stocks can be safer and more easily controlled by law-abiding users—and thus safer for others—by allowing them to fit the firearm properly to their size, stature, and other factors. *Id.* The "flash suppressor" likewise improves safety by protecting the user's vision by mitigating muzzle flash directed at the firearm user, though others could still see the flash from other angles. "The use of a [firearm] without a flash suppressor under [low-light] circumstances is likely to temporarily blind the user, or at least seriously impair the user's vision, placing the law-abiding user at a disadvantage to a criminal attacker." *Id.*, at 1035-36. This characteristic would be important, for example, to a homeowner defending against a home invasion at night, when much violent crime occurs. *Id.*

Far from the menacing hazards Maryland implies when it categorizes firearms with such characteristics as "assault weapons," these firearms are instead a meaningfully safer and controllable category of firearms in common use for lawful purposes. As such, the court in *Miller* found these characteristics made the modern rifle ideal for self-defense—and such firearms are fully protected by the Second Amendment.

Standard characteristics that enhance accuracy, control, and safety should be encouraged, not banned. Rather than promoting safer firearm handling, Maryland's regulatory scheme prevents firearm users from maximizing the safe and controlled use of common semiautomatic firearms. Unquestionably, the characteristics that trigger prohibition, in fact, improve the safe and controlled use of such firearms. *Miller v. Bonta*, 542 F. Supp.3d at 1033-37. Thus, they improve public safety relating to the lawful use of such firearms.

As for unlawful use, there is no indication that criminals are particularly concerned about avoiding collateral or unintended damage through greater accuracy or control. In any event, there is no evidence that criminals would be any less destructive using compliant firearms without the banned characteristics. *Id.*, at 1037-39. The prohibited characteristics in Maryland's ban do not change the fundamental semiautomatic function of the firearms, nor do they affect the ballistics of their projectiles.

More to the point, the court in *Miller* found the evidenced showed semiautomatic firearms with the regulated characteristics are not more deadly in the hands of a criminal than a firearm without those characteristics. *Miller*, 542 F. Supp.3d at 1038-39. Many notable crimes have been committed by criminals with semiautomatic firearms that did not have the regulated characteristics. In fact, some of the worst mass shootings involved handguns.

1. Modern Rifles Are Ideal for Women and Those of Smaller Stature.

The same characteristics that make the modern rifle so popular throughout the United States and ideal for self-defense, also make it ideal for women and those of smaller stature looking for a defensive firearm that is easily operable and specifically fit to the size of the user. In *Miller*, Amici submitted evidence stating that many semiautomatic, centerfire firearms with listed features, like the AR-15 rifle, are well-suited to women shooters, because of its relatively light weight and because it can easily be customized to accommodate smaller shooters. In particular, the collapsible/telescoping stock which is common on most AR-15 pattern rifles makes it an ideal rifle with which to instruct and train women, and for women to own and use for self-defense and other purposes. In the firearms and training communities, this is a widely-held and accepted understanding. The ability to easily adapt modern rifles, and to adjust them to fit the user makes them the preferred firearm for many female gun owners and those of smaller statures. *See* "Female Gun Owners: We Prefer the AR-15," Washington Free Beacon on November 10, 2019, available at https://freebeacon.com/issues/female-gun-owners-we-prefer-the-ar-15/.[3]

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[3] *See also* "Benefits of the AR-15 For Female Shooters," The Well Armed Woman, available at: https://thewellarmedwoman.com/about-guns/benefits-of-the-ar-15-for-female-shooters/; and "5 Reasons Why an AR is the Perfect Platform for Her," NRA Women, available at: https://www.nrawomen.com/content/5-reasons-why-an-ar-is-the-perfect-platform-for-her/.

C. Modern Rifles Are Ideal for Militia Service.

In *Miller*, Amici were also able to show that California's assault weapons ban could not stand, because it prohibited, among other weapons, the AR-15 rifle in its most common configurations, which make it particularly well-suited for militia service. Through the use of expert testimony, Amici were specifically able to show that the rifle's use of standardized magazines, its reliability, low cost, and light weight, would enable it to serve the same purposes sought to be achieved by the drafters of the founding era militia acts. Moreover, the modularity and standardization of the AR-15, along with its ubiquity, commonality, and widespread ownership in common chamberings, and the interchangeability of parts, including magazines, makes it the *ideal* weapon for militia service.

Thus, contrary to what the Fourth Circuit held in *Kolbe*, that the AR-15 may have some military use makes it a protected firearm precisely *because* it is useful for militia service, under *United States v. Miller*, 307 U.S. 174 (1939). The 1939 *Miller* case, now construed after *Heller*, implies that the Second Amendment protects an individual's right to bear arms when they are useful to militia service, and in common use for other lawful purposes. In *United States v. Miller*, Justice McReynolds stated that in the absence of any evidence showing that possession of a short-barreled shotgun had some "reasonable relationship to the preservation or efficiency of a well regulated militia," the Court "cannot say that the Second Amendment

guarantees the right to keep and bear such an instrument. Certainly, it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense." 307 U.S. at 178, 59 S.Ct. at 818. Justice McReynolds then pointed out:

> The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. 'A body of citizens enrolled for military discipline.' And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves *and of the kind in common use at the time*.

307 U.S. at 179 (emphasis added). The Court again pointed out that many militia required periodical but common musters of able-bodied male citizens, and that these citizens were expected to keep and maintain arms suitable for this purpose. 307 U.S. at 182. *See also Heller*, 554 U.S. at 627, 128 S.Ct. at 2817.

Forwarding 82 years to the modern *Miller* case, Amici were able to supply precisely what Justice McReynolds required: Evidence establishing that the AR-15 rifle has more than a "reasonable relationship" to the preservation or efficiency of a well-regulated militia. The district court agreed, holding:

> In this case, the evidence overwhelmingly shows that AR-15 platform rifles are ideal for use in both the citizens' militia and a state-organized militia. Quite apart from its practicality as a peacekeeping arm for home-defense, a modern rifle can also be useful for war. In fact, it is an ideal firearm for militia service. Major General D. Allen Youngman, U.S. Army (retired) testified credibly about the usefulness for militia service of rifles built on the AR-15 platform. [¶] He describes three tiers of militia service. General Youngman testified that a state may or may not have a statute authorizing a state defense force. California does have a state defense force of approximately 1,000 members. During World War II, California used a state defense force much larger than 1,000 to secure critical infrastructure. For this type of militia use, the AR-15 "would be absolutely the perfect weapon for the individual member of that force to be equipped for—for a variety of missions to include infrastructure protection and ones like that."

Miller v. Bonta, 542 F. Supp.3d at 1062.

The Fourth Circuit's analysis in *Kolbe* turned this upside-down. It found that because a firearm was "like" an M-16, it was most useful in military service, and it could therefore be banned on this ground alone, as being "beyond the Second Amendment's reach." *Kolbe*, 849 F.3d at 121.

Review should be granted to address the Fourth Circuit's holding which is directly contrary to both *Heller* and *United States v. Miller*.

CONCLUSION

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

Respectfully submitted,

JOHN W. DILLON
DILLON LAW GROUP APC
2647 Gateway Road
Suite 105, No. 255
Carlsbad, CA 92009
(760) 642-7150
jdillon@dillonlawgp.com

GEORGE M. LEE
Counsel of Record
SEILER EPSTEIN LLP
275 Battery Street
Suite 1600
San Francisco, CA 94111
(415) 979-0500
gml@seilerepstein.com

Counsel for Amici Curiae

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