No. 21-902

In The Supreme Court of the United States

DOMINIC BIANCHI, *et al.*,

Petitioners,

v.

BRIAN FROSH, ATTORNEY GENERAL OF MARYLAND, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Maryland's ban on assault rifles is valid under the Second Amendment.

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BRIEF IN OPPOSITION

In *District of Columbia v. Heller*, this Court held that the Second Amendment protects the right of "law-abiding, responsible citizens to use arms in defense of hearth and home" and invalidated a complete ban on "handgun possession in the home." 554 U.S. 570, 635 (2008). The Court reasoned that "[t]he handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society" for self-defense; "the American people have considered the handgun to be the quintessential self-defense weapon"; and "handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Id.* at 628, 629. But the Court recognized that the Second Amendment does not protect an unlimited class of "arms." Although "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms," *id.* at 582, the Court recognized that the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons,'" *id.* at 627 (quoting 4 Blackstone, *Commentaries* 148-49 (1769)), means that jurisdictions may ban certain arms, including "weapons that are most useful in military service—M-16s and the like." *Id.*

Consistent with this Court's guidance, the State of Maryland, like five other States, has prohibited certain highly dangerous, military-style assault rifles. These States responded to a wave of mass public killings where the assailants used these weapons. The States found that the compelling interest in public safety

justified this narrowly targeted measure. In *Kolbe v. Hogan*, the en banc Fourth Circuit rejected a constitutional challenge to Maryland's assault-rifle ban. 849 F.3d 114 (4th Cir.), *cert. denied*, 138 S. Ct. 469 (2017). The court explained that the ban accords with the Second Amendment as interpreted in *Heller* and is justified to achieve Maryland's compelling interest in protecting public safety while not impairing residents' ability to defend themselves with an array of weapons, including handguns. The Fourth Circuit's decision accords with rulings of the First, Second, Seventh, and D.C. Circuits, and no circuit has ruled to the contrary. The Fourth Circuit's approach also aligns with the analytical framework used by every circuit in addressing Second Amendment claims under *Heller*. Reflecting that consistency in outcome and approach, this Court has denied certiorari in every challenge to assault-rifle bans—most recently in 2020.

In this case, petitioners advance the identical Second Amendment challenge that the courts of appeals have rejected in case after case and that this Court has consistently declined to review. Certiorari is no more warranted here than in those cases. Petitioners point to no changes that would warrant review: there is still no conflict and no new analyses. *Heller* no more bars States now from enacting these limited and reasonable measures to protect public safety than it did in *Kolbe* itself or any of the other petitions this Court has declined to review. Review is particularly unwarranted at this time, when the same issue is currently under consideration in cases pending before

another court of appeals, and this case is especially ill-suited for this Court's review, given the absence of any factual record. Accordingly, the petition should be denied.[1]

STATEMENT

Mass Shootings and Assault-Rifle Bans

1. During recent decades, the United States has experienced an upsurge in the frequency and severity of mass public shootings.[2] Assault rifles figured prominently in many of the most catastrophic episodes:[3]

- On December 14, 2012, in Newtown, Connecticut, a gunman opened fire at Sandy Hook

[1] The petition need not be held pending the Court's decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, No. 20-843 (argued Nov. 3, 2021). But, consistent with its actions in related contexts, the Court may, in the alternative, wish to hold the petition pending its decision in *Bruen* and then dispose of it accordingly. *See* pp. 18, 35-36, *infra*.

[2] *See* Christopher S. Koper, *Assessing the Potential to Reduce Deaths and Injuries from Mass Shootings Through Restrictions on Assault Weapons and Other High-Capacity Semiautomatic Firearms*, 19 Criminology & Public Policy 147, 150 (2020).

[3] The information on mass shootings presented below is principally drawn from the Violence Project's Mass Shooter Database, accessible through https://www.theviolenceproject.org/mass-shooter-database/. The project, supported by the National Institute of Justice, compiled the data from open sources. *See* https://nij.ojp.gov/topics/articles/public-mass-shootings-database-amasses-details-half-century-us-mass-shootings.

Elementary School, murdering 27 first graders and adults.

- On December 2, 2015, in San Bernardino, California, a married couple opened fire at a San Bernardino County Department of Public Health training event and Christmas party, murdering 14 and injuring 22 people.
- On June 12, 2016, in Orlando, a gunman opened fire at a nightclub, murdering 49 people and injuring 53 others.
- On October 1, 2017, in Las Vegas, a gunman firing from his hotel room into a music festival crowd murdered 58 people and wounded 413 others.
- On November 5, 2017, in Sutherland Springs, Texas, a gunman opened fire on churchgoers who had gathered to worship at the First Baptist Church on Sunday morning, murdering 25 and wounding 20.
- On February 14, 2018, in Parkland, Florida, a gunman opened fire at Marjory Stoneman Douglas High School, murdering 17 classmates and staff members, and wounding 17 others.
- On August 3, 2019, a gunman opened fire at a crowded Walmart in El Paso, murdering 23 people and wounding at least 26 others.

From 1981 through 2017, "[a]ssault rifles accounted for 430 or 85% of the total 501 mass-shooting

fatalities reported . . . in 44 mass-shooting incidents."[4] The typical assault rifle used in these tragic attacks has exceptional destructive power.[5]

2. In 1994, Congress banned semiautomatic assault weapons "because of shootings in which large numbers of innocent people have been killed and wounded, and in which law enforcement officers have been murdered." H.R. Rep. No. 103-489, at 19-20 (1994) (House Report). From 1994 to 2004, the federal assault weapon ban made it unlawful to transfer and possess semiautomatic assault weapons. Violent Crime Control and Law Enforcement Act of 1994, Pub. Law No. 103-322, § 110102, 108 Stat. 1796 (Sept. 13, 1994). Congress relied on evidence that assault weapons have heightened "capability for lethality—more wounds, more serious, in more victims—far beyond other firearms in general, including other semiautomatic guns." House Report 19-20. Although the ban did not eliminate all assault weapons, studies have found that during the ban's existence it was effective in reducing deaths from gun massacres.[6]

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[4] Charles DiMaggio, *et al.*, *Changes in U.S. Mass Shooting Deaths Associated with the 1994-2004 Federal Assault Weapons Ban: Analysis of Open-Source Data*, 86 J. Trauma Acute Care Surg. No. 1, at 12 (2019).

[5] *See* Gina Kolata and C.J. Chivers, *Wounds from Military-Style Rifles? 'A Ghastly Thing to See,'* N.Y. Times (Mar. 4, 2018) (describing trauma surgeons' recollections of "grievous bone and soft tissue wounds" inflicted by "lightweight, high-speed bullets" fired by AR-15 semiautomatic rifles).

[6] *See*, *e.g.*, John Donohue III & Theodora Boulouta, *The Assault Weapons Ban Saved Lives* (Oct. 15, 2019), available at

In response to the same heightened concerns about the use of assault weapons in mass shootings, and acting shortly after the Sandy Hook Elementary School shooting, Maryland banned assault rifles. Firearm Safety Act of 2013, Md. Code Ann., Crim. Law § 4-303(a). Five other States and the District of Columbia have similarly enacted a variety of prohibitions on assault rifles.[7] Maryland also bans large-capacity magazines, Crim. Law § 4-305(b), but that ban is not challenged here. "Growing evidence," while limited, indicates that state restrictions on large capacity magazines (frequently used with assault weapons) have the potential to reduce deaths and injuries from mass shootings, and States with such restrictions have fewer mass shootings.[8]

3. Maryland bans, *inter alia*, the possession, sale, offer for sale, transfer, purchase, or receipt of an "assault long gun" or a "copycat weapon." Crim. Law § 4-301(d). "Assault long gun" is defined by reference to 45 specific weapons or their copies, including the Colt AR-15 and the AK-47 in all forms. Crim. Law § 4-301(b). "Copycat weapon" refers to firearms with specific features: (i) a semiautomatic centerfire rifle that

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https://law.stanford.edu/publications/the-assault-weapon-ban-saved-lives/.

[7] Cal. Penal Code §§ 16350, 16790, 16890, 30500-31115; Conn. Gen. Stat. §§ 53-202a–53-202o; DC Code Ann. §§ 7-2501.01(3A), 7-2502.02(a)(6), 7-2505.01, 7-2505.02(a), (c); Mass. Gen. Laws ch. 140, §§ 121, 122, 123, 131M; N.J. Stat. Ann. §§ 2C:39-1w, 2C:39-5, 2C:58-5, 2C:58-12, 2C:58-13; N.Y. Penal Law §§ 265.00(22), 265.02(7), 265.10, 400.00(16-a).

[8] Koper, *supra*, at 147-50.

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; and (iii) a semiautomatic centerfire rifle that has an overall length of less than 29 inches. Crim. Law § 4-301(h)(1). A grandfather clause permits individuals who possessed assault long guns and copycat weapons as of October 1, 2013, to continue possessing them. Crim. Law § 4-303(b)(3). And the ban leaves available to Maryland residents a broad range of legal firearms, including a wide variety of semiautomatic handguns and rifles.[9]

The Fourth Circuit's Decision Upholding Maryland's Ban

1. In September 2013, a group of individuals, firearms retailers, and firearms-related organizations challenged Maryland's assault-rifle ban on constitutional grounds, including a claim that the ban violated the Second Amendment. After discovery, the district court granted the State's motion for summary judgment, upon concluding that the ban on assault weapons is constitutional under the Second Amendment. *Kolbe v. O'Malley*, 42 F. Supp. 3d 768 (D. Md. 2014). The district court assumed that the assault weapons fit

[9] The Maryland State Police website lists banned and allowed firearms. *See* https://mdsp.maryland.gov/Organization/Pages/CriminalInvestigationBureau/LicensingDivision/Firearms/FirearmSearch.aspx.

within the class of arms protected by the Second Amendment, *id.* at 789, but held that, under intermediate scrutiny, the restrictions were constitutionally valid, *id.* at 789-97.

2. A divided panel of the court of appeals reversed, *Kolbe v. Hogan*, 813 F.3d 160 (4th Cir. 2016), but the full court granted the State's petition for rehearing en banc, *Kolbe v. Hogan*, 636 F. App'x 880 (4th Cir. 2016), and affirmed the district court, *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir.) (en banc), *cert denied*, 138 S. Ct. 469 (2017). The en banc court concluded that "the banned assault weapons" fall outside the scope of the Second Amendment's protection and that, in any event, the ban "is subject to—and readily survives—the intermediate scrutiny standard of review." *Kolbe*, 849 F.3d at 130.

a. The court of appeals began by describing the State's "extensive uncontroverted evidence demonstrating that the assault weapons outlawed by the [law] are exceptionally lethal weapons of war." *Id.* at 124. That evidence, the court explained, established that the "most popular of the prohibited weapons—the AR-15—is simply the semiautomatic version of the M16 rifle used by our military and others around the world." *Id.* The court described the military's post-World War II development of the AR-15 and its proven status as "a very lethal combat weapon that was well-liked for its size and light recoil." *Id.* (internal quotation marks and ellipsis omitted). Following field testing in Vietnam, the court noted, the Department of Defense purchased more than 100,000 AR-15 rifles,

which the Department renamed as the "M16." *Id.* at 124-25.

The M16, like the original AR-15, is a "selective-fire rifle," able to fire "in either automatic mode (firing continuously as long as the trigger is depressed) or semiautomatic mode (firing one round of ammunition for each pull of the trigger and, after each round is fired, automatically loading the next)." *Id.* at 124. The civilian versions of the AR-15 (and other assault rifles, like the AK-47), the court explained, are "semiautomatic but otherwise retain the military features and capabilities of the fully automatic M16 and AK-47." *Id.* at 125. The difference between selective fire and semiautomatic firing, the court found, has limited relevance: because of the rapid rate of fire of the AR-15, a shooter can empty a 30-round magazine "in as little as five seconds." *Id.* And "soldiers and police officers are often advised to choose and use semiautomatic fire, because it is more accurate and lethal than automatic fire in many combat and law enforcement situations." *Id.* The court also observed that certain features on many of the banned weapons—such as flash suppressors and folding stocks—were "designed to achieve their principal purpose—killing or disabling the enemy on the battlefield." *Id.* (internal quotation marks omitted). Based on that evidence, the court concluded that assault rifles, "like their fully automatic counterparts, . . . are firearms designed for the battlefield," and "[t]heir design results in a capability for lethality—more wounds, more serious, in more victims—far beyond that of other firearms in general, including other

semiautomatic guns." *Id.* (internal quotation marks omitted).

The court also described the lethal potential of assault rifles in civilian society and their limited use for self-defense. "[A]ccording to the State's evidence," the "banned assault weapons have been used disproportionately to their ownership in mass shootings and the murders of law enforcement officers." *Id.* at 126. At the same time, the court explained, the evidence did not support the claim that the banned weapons "are well-suited to self-defense." *Id.* at 127. "Neither the plaintiffs nor Maryland law enforcement officials could identify a single incident in which a Marylander has used a military-style rifle . . . to protect herself." *Id.*

b. Turning to the legal analysis, the court applied a two-part test that mirrors the analytical approach of other circuits. *Id.* at 132-33 (collecting cases from the Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits). Under that approach, the first inquiry is whether the law at issue burdens conduct that falls within the Second Amendment's scope; if it does, the court assesses the appropriate level of scrutiny by considering the extent of the burden on Second Amendment protections. *Id.* at 133, 138.

i. As a threshold matter, the en banc court concluded that the law does not burden protected conduct because the covered assault rifles fall outside the Second Amendment's scope. The court explained that, in *Heller*, this Court stated that weapons "like . . . M-16

rifles" that are "most useful in military service," *id.* at 121 (quoting *Heller*, 554 U.S. at 627), were "singled out as being beyond the Second Amendment's reach." *Id.* Relying on that language, the court determined that "[b]ecause the banned assault weapons . . . are 'like' 'M-16 rifles'—'weapons that are most useful in military service'—they are among those arms that the Second Amendment does not shield." *Id.* at 135 (quoting *Heller* at 627). The court explained that the similarities between the M16 and AR-15 made this a "dispositive and relatively easy inquiry." 849 F.3d at 136. While "an M16 rifle is capable of fully automatic fire and the AR-15 is limited to semiautomatic fire," both weapons have rapid fire rates and "in many situations, the semiautomatic fire of an AR-15 is more accurate and lethal than the automatic fire of an M16"; beyond that, the AR-15 "shares the military features . . . that make the M16 a devastating and lethal weapon of war." *Id.* In light of *Heller*'s "clear and dispositive pronouncement" that the Second Amendment does not protect "'M-16 rifles and the like,'" *id.* at 142 (quoting *Heller* at 627), the court found it unnecessary to answer the many factual questions needed to apply *Heller*'s statement that the Second Amendment protects weapons "in common use at the time" or to define the relationship between that test and the "dangerous and unusual weapons" that *Heller* viewed as falling within the "historical tradition" of permissible bans. 849 F.3d at 131, 135-36 & n.10 (quoting *Heller* at 627).

ii. In the alternative, the court concluded that if assault rifles are within the Second Amendment's

scope, Maryland's restriction on their possession is subject to intermediate scrutiny and survives that review. 849 F.3d at 138-41.

The court explained that intermediate scrutiny is the appropriate framework because "the [law] does not severely burden the core protection of the Second Amendment, *i.e.*, the right of law-abiding, responsible citizens to use arms for self-defense in the home." *Id.* at 138. While military-style assault rifles are prohibited, "citizens [remain] free to protect themselves with a plethora of other firearms." *Id.* These include not only a variety of non-automatic and semiautomatic long guns, but "most importantly—handguns," which *Heller* described as "'the quintessential self-defense weapon.'" *Id.* (quoting *Heller* at 629). In contrast, the court found "scant evidence in the record" that the prohibited weapons "are possessed, or even suitable, for self-protection." 849 F.3d at 138. And the court rejected the suggestion that the banned assault weapons formed a "class of weapons" entitled to the same protection that *Heller* accorded handguns. *Id.* Maryland had restricted not an entire "class" of firearms, but "just some of the semiautomatic rifles and shotguns in existence." *Id.* And the court distinguished the State's limited restriction here from the law at issue in *Heller*, which banned in the home the "'entire class of arms that is overwhelmingly chosen by American society for [self-defense],'" *i.e.* handguns. *Id.* (quoting *Heller* at 628) (emphasis omitted).

"Turning to the application of intermediate scrutiny," the court found that the ban on assault rifles is

"reasonably adapted to [the] substantial governmental interest" in public safety and, therefore, satisfied the applicable standard. 849 F.3d at 139-40. The State's interest in "protection of its citizenry and the public safety is not only substantial, but compelling." *Id.* at 139. The court disagreed with the claim that the State's interest was reduced because some non-banned firearms had destructive potential similar to that of the banned firearms; few crimes are committed with assault rifles; and criminals can obtain such rifles from other States. *Id.* at 139-40. The court found these arguments not germane to the law's "primary goal," which seeks to reduce the scale of lethal attacks in mass shootings, whose perpetrators find the banned weapons to be "particularly attractive." *Id.* at 139-40. The "military-style features" of the prohibited weapons also "pose heightened risks to innocent civilians and law enforcement officers" not only due to their "capability to penetrate building materials and soft body armor, but also because of an amalgam of other capabilities that allow a shooter to cause mass devastation in a very short amount of time." *Id.* In sum, the court concluded that the "judgment made by the General Assembly of Maryland" in banning assault rifles warranted "substantial deference" because of the legislature's superior capacity to make "predictive judgments" based on the evidence before it. *Id.* at 140.

c. Judge Wilkinson, joined by Judge Wynn, filed a separate concurrence to emphasize that *Heller*'s ruling—protecting "handguns broadly utilized for self-defense in the home"—did not strip legislatures of

their authority to address "the wholly separate subject of assault weapons suitable for use by military forces around the globe." *Id.* at 150. "The weapons that Maryland sought to regulate . . . are emphatically not defensive in nature." *Id.* at 151. "The Maryland legislature could readily conclude that assault weapons, unlike handguns, are efficient instruments of mass carnage, and in fact would serve as weapons of choice for those who in a commando spirit wish to charge into a public venue and open fire." *Id.* And the "properties and usages of this or that firearm are the kind of empirical inquiries routinely reserved for legislative bodies which possess fact-finding capabilities far superior" to those of courts operating on thin records. *Id.*

d. Judge Diaz concurred in part. *Id.* at 151. In his view, it was unnecessary to resolve whether assault rifles are protected by the Second Amendment because the judgment could be affirmed "solely on the majority's alternative (and compelling) rationale—that even if Maryland's statute implicates the Second Amendment, it nonetheless passes constitutional muster." *Id.*

e. Judge Traxler, joined by three other judges, dissented. *Id.* at 151-63. They would have held that the assault rifles at issue fall within the protection of the Second Amendment because, in their view, "[s]emiautomatic rifles are commonly possessed by law-abiding citizens," *id.* at 152, and that this sufficed for protection under *Heller, id.* at 152-53. Having so concluded, the dissent determined that Maryland's law should have

been subjected to strict scrutiny and that it could not survive that test. *Id.* at 160-63.

3. The *Kolbe* petition for further review in this Court presented essentially the same Second Amendment question presented here. This Court denied certiorari. 138 S. Ct. 469 (2017) (No. 17-127).

Procedural History

1. Three years later, petitioners—a different set of individual, business, and organizational plaintiffs—filed a complaint seeking declaratory and injunctive relief on the theory that Maryland's assault-rifle ban violates the Second Amendment. (Pet. App. 17a-44a.) Their complaint acknowledged that "the result they seek is contrary to *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017)." (Pet. App. 20a-21a.) Petitioners offered no new evidence or legal theories to challenge *Kolbe*.

The district court, on its own initiative, and after noting that petitioners conceded that their "theory of liability is foreclosed by" the court of appeals' opinion in *Kolbe*, ordered petitioners to "show cause . . . why this case should not be dismissed *sua sponte* for plain failure to state a claim upon which relief may be granted." (Pet. App. 4a-5a.) Petitioners responded with a further concession that the relief sought was foreclosed by *Kolbe* and that dismissal was therefore required. (Pet. App. 5a.) In light of that concession, the district court dismissed the complaint. (Pet. App. 5a.)

2. The court of appeals affirmed in an unpublished per curiam opinion. (Pet. App. 2a-3a.) Noting that petitioners conceded that their Second Amendment argument that the assault-rifle ban is unconstitutional "is squarely foreclosed by" *Kolbe*, the panel explained that it was bound by the court of appeals' en banc decision. (Pet. App. 3a.)

ARGUMENT

Petitioners contend that review is warranted to address the constitutionality of Maryland's ban on assault rifles. They assert that there is a "clear division of authority over the constitutionality of these types of bans" (Pet. 14) and claim that the Fourth Circuit's analysis in *Kolbe* conflicts with this Court's decision in *Heller* (Pet. 20-35). Those claims lack merit, and this Court's review is unwarranted. As petitioners concede (Pet. 2), the courts of appeals have unanimously rejected Second Amendment challenges to bans on assault rifles, and this Court has consistently declined to review those holdings. The Court has denied at least five petitions seeking review of this issue, including one challenging the en banc decision in *Kolbe*—on which the decision below relied. Indeed, this Court denied two petitions raising the identical claim just 22 months ago, with no recorded dissent.

Nothing has changed since those denials that would warrant review now. Petitioners' recycled legal claims under *Heller* continue to lack merit. This

Court's invalidation of a complete ban of in-home possession of handguns—which "the American people have considered . . . to be the quintessential self-defense weapon"—does not prevent legislatures from reaching a different conclusion about a limited class of military-style semi-automatic rifles associated with mass shootings. As Judge Wilkinson explained, that is a "wholly separate subject." *Kolbe*, 849 F.3d at 150 (Wilkinson, J., concurring). And *Heller*'s decision that the handgun ban did not survive "any of the standards of scrutiny that [the Court has] applied to enumerated constitutional rights," *Heller*, 554 U.S. at 628, does not preclude the use of intermediate scrutiny (which is far more demanding than the rational-basis review that *Heller* rejected) to review a limited state-law restriction that does not substantially burden Second Amendment rights. Residents of Maryland retain an abundant choice of firearms for self-defense, including "handguns[, which] are the most popular weapon chosen by Americans for self-defense in the home." *Id.* at 629.

Finally, review is particularly unwarranted here for at least two additional reasons. First, the Ninth Circuit is currently considering the identical legal issue arising from conflicting district court decisions. This Court should await the outcome of those proceedings before granting review to consider an issue on which the circuits are currently uniform. Second, this case would be an especially poor vehicle for this Court's review because the record is barren of current information pertinent to the challenged law. The record

consists solely of petitioners' complaint. It contains no new factual information to challenge Maryland's judgment—echoed by five other States and the District of Columbia—that assault rifles pose heightened dangers to public safety, particularly in mass shootings. Nor does the record contain evidence to support petitioners' bare assertion that the banned assault rifles are used (or needed) for self-defense in the home. Nor is there fresh evidence about the precise characteristics of assault rifles (such as the AR-15) in comparison to standard-issue military rifles (the M16), which *Heller* made clear can be banned without triggering Second Amendment concern. Thus, not only does no conflict exist that would warrant this Court's review, but this case would be a strikingly unsuitable vehicle for review. The petition should therefore be denied.

Petitioners also suggest (Pet. 20), that if the Court does not grant plenary review, it should hold the petition in this case pending the Court's decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, No. 20-843 (argued Nov. 3, 2022). In *Bruen*, this Court granted review on the question "[w]hether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment." 141 S. Ct. 2566 (2021). The issue in *Bruen* differs materially from the question presented here: *Bruen* involves a challenge to New York's law allowing individuals to carry concealed handguns in public only on a showing of "proper cause," which is unlike Maryland's ban on specific types of assault rifles. While outright denial of the petition is warranted for the reasons

stated, in the alternative, the Court may wish to hold this petition pending its decision in *Bruen*. But in no event is plenary review warranted.

A. No Conflict Exists over the Constitutionality of Assault-Rifle Bans.

Petitioners cite no authority that would suggest the courts of appeals are in conflict over the constitutionality of assault-rifle bans, and for good reason: every court of appeals that has addressed Second Amendment challenges to bans on assault rifles has held that the bans are constitutional. Petitioners instead assert that the courts of appeals have relied on divergent reasoning to uphold assault-weapon bans. But the contention that lower courts rely on different analytical paths to reach a common conclusion, even if accurate, would not warrant this Court's intervention. In any event, the courts of appeals have converged on strikingly consistent modes of analysis for resolving Second Amendment claims under *Heller* on the dispositive issues here. Finally, petitioner's reliance on inapposite decisions addressing stun guns and tasers has no bearing on the issue in this case. Unlike assault rifles, stun guns and tasers have no track record of use in mass shootings and thus do not implicate the combat-weapon features and heightened dangers that support assault-rifle bans.

1. The courts of appeals agree about the question in this case: whether a ban on assault rifles violates the Second Amendment. Every court of appeals that

has considered the constitutionality of similar bans has upheld those laws. *Wilson v. Cook County*, 937 F.3d 1028 (7th Cir. 2019) (per curiam); *Worman v. Healey*, 922 F.3d 26 (1st Cir. 2019); *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015) ("*NYSRPA*"); *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015); *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) ("*Heller II*"). And just as consistently, this Court has denied certiorari: *Wilson v. Cook County*, 141 S. Ct. 110 (2020) (No. 19-704); *Worman v. Healey*, 141 S. Ct. 109 (2020) (No. 19-404); *Kolbe v. Hogan*, 138 S. Ct. 469 (2017) (No. 17-127); *Shew v. Malloy*, 579 U.S. 917 (2016) (No. 15-1030); *Friedman v. City of Highland Park*, 577 U.S. 1039 (2015) (No. 15-133). Thus, petitioners can point to no conflict over the validity of these laws: the courts that have addressed the same Second Amendment claims petitioners make have unanimously rejected them. Petitioners concede this point. (Pet. 2) ("[T]he federal appellate courts have uniformly upheld bans on these common and constitutionally protected arms.").

2. Petitioners argue (Pet. 14) that the courts of appeals have "generated no fewer than five separate and conflicting ways of analyzing" Second Amendment claims under *Heller*. Even if that contention were correct, it would provide no basis for this Court to grant review. This Court has often remarked that it "'reviews judgments, not statements in opinions.'" *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956)). If true analytical disagreements among the circuits give rise

to inconsistent outcomes in future cases, involving firearms regulations different from the assault weapons at issue here, this Court can intervene. In any event, petitioners' central premise is wrong; the circuits have reached a remarkable degree of consistency in their mode of analysis, and the purportedly divergent rationales petitioners identify have not resulted in conflicting results.

a. As the Fourth Circuit noted in *Kolbe*, the circuits have converged on a two-part framework for evaluating Second Amendment claims. 849 F.3d at 132-33. At the first level, the inquiry asks whether based on history, tradition, and practice, the regulated conduct falls within the scope of the Second Amendment. If it does not, the inquiry is at an end. If the conduct does come within the Second Amendment's coverage, then the question is what standard of scrutiny applies. *Id.* at 133. *Heller* ruled out rational-basis review, but did not otherwise delineate the proper standard because the total ban on handgun possession in the home failed any recognized standard of scrutiny. 554 U.S. at 628-29. To determine the appropriate standard, courts have asked "how close the law comes to the core of the Second Amendment right and the severity of the law's burden on that right." *Wilson*, 937 F.3d at 1032 (internal quotation marks omitted); *accord*, *e.g.*, *NYSRPA*, 804 F.3d at 258; *Heller II*, 670 F.3d at 1252 ("adopt[ing], as have other circuits, a two-step approach to determining the constitutionality" of the laws at issue). As the Second Circuit noted in *NYSRPA*, this method of analysis "broadly comports with the prevailing two-step

approach of other courts, including the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits, and with the approach used in other areas of constitutional law." 804 F.3d at 254 (internal quotation marks omitted); *see id.* at 254 nn.49-50 (citing cases); *see also Worman*, 922 F.3d at 33 (same two-step approach applies in the First Circuit).

Petitioners recognize (Pet. 15) that, in a variety of contexts, the courts of appeals have upheld bans of particularly dangerous weapons based on intermediate scrutiny. Petitioners cite three cases involving assault-rifle bans (*Heller*, *NYSRPA*, *Worman*) and two cases involving challenges to bans on arms not involved in this case: large capacity magazines (*Association of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen.*, 910 F.3d 106 (3d Cir. 2018), and *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021) (en banc), *petition for cert. pending*, No. 21-1194 (filed Feb. 28, 2022)). Petitioners critique the application of intermediate scrutiny in these cases because the courts considered the availability of alternative firearms in concluding that the bans on particular weapons did not impose a severe burden on Second Amendment rights. According to petitioners, that analysis overlooks *Heller*'s refusal to uphold D.C.'s handgun ban on the ground that it left available the possession of long guns. (Pet. 16) (citing *Heller* at 629). But courts have repeatedly explained why no such inconsistency exists. *See NYSRPA*, 804 F.3d at 260 n.98 (rejecting the identical argument; "[o]ur consideration of available alternatives for self-defense . . . squares with *Heller*'s focus on protecting that 'core

lawful purpose' of the Second Amendment right" (quoting *Heller* at 630)); *Friedman*, 784 F.3d at 411 ("*Heller* did not foreclose the possibility that allowing the use of most long guns plus pistols and revolvers . . . gives householders adequate means of defense."). *Heller*'s focus on the singular burden imposed by D.C.'s handgun ban reflected the unique popularity and utility of handguns as means of self-defense; the Court recognized the handgun as the "quintessential self-defense weapon." 554 U.S. at 629. In contrast, the ban on military-style automatic rifles leaves Americans with "a plethora of other firearms and ammunition," including, of course, handguns. *Kolbe*, 849 F.3d at 138. Given those options, *Heller* does not justify treating the limited burden imposed by the assault-rifle ban as severe, nor does *Heller* rule out intermediate scrutiny for such moderate burdens.

Petitioners contend (Pet. 19) that the Seventh Circuit in *Friedman* adopted a unique "outlier test" in upholding a ban on assault weapons. That assertion is incorrect. *Friedman* surveyed the intermediate-scrutiny approach of other circuits before determining to apply a more "concrete" inquiry, 784 F.3d at 410, asking (1) whether the regulation at issue banned arms that were in common use in the framing era and/or that have a "reasonable relationship" to militia service, and (2) whether the law leaves law-abiding citizens with sufficient arms for self-defense, *id.* The Seventh Circuit has since clarified that *Friedman*'s more "concrete" formulation supported the court's conclusions that the regulation at issue "did not strike at the heart of the

Second Amendment" and left residents with adequate "means of self-defense." *Wilson*, 937 F.3d at 1034; *id.* at 1036 (reconciling the court's approach with the more "general principles" used in other circuits and noting that *Friedman*, "like our sister circuits," considered the "justifi[cations]" for the ban to assess its validity). Those conclusions reflect the "application and extension" of intermediate-scrutiny principles, *id.* at 1036, rather than a departure from them. *See id.* (confirming that *Friedman* was consistent with the court of appeals' intermediate-scrutiny framework in its Second Amendment precedent in *Ezell v. City of Chi.*, 651 F.3d 684,703-04 (7th Cir. 2011)).

Like other circuits, the Seventh Circuit emphasized in *Friedman* that the challenged ban left "ample means to exercise the 'inherent right of self-defense'" in the home, while pointing out that "assault weapons with large-capacity magazines can fire more shots, faster, and thus can be more dangerous" than handguns, which makes assault weapons the "weapons of choice in mass shootings[.]" 784 F.3d at 411. And the Seventh Circuit also recognized, like the Fourth Circuit and other courts of appeals, that a legislature may conclude based on the evidence that a ban on those weapons might "reduce the carnage if a mass shooting occurs," *id.*, and "reduce the overall dangerousness of crime," *id.* at 412. The Seventh Circuit's reasoning thus accords with the Fourth Circuit and other courts of appeals that have addressed these issues.

b. In addition to broad agreement on the framework of analysis, the decisions upholding assault-rifle

bans agree on core principles. The Fourth Circuit echoed the Second Circuit's conclusion that "assault weapons . . . pose unusual risks," because, "[w]hen used, these weapons tend to result in more numerous wounds, more serious wounds, and more victims[,]" and also because such "weapons are disproportionately used in crime, . . . particularly in criminal mass shootings" and "to kill law enforcement officers." *Kolbe*, 849 F.3d at 140 (quoting *NYSRPA*, 804 F.3d at 262); *accord Heller II*, 670 F.3d at 1263. And the First, Second, Fourth, and D.C. Circuits all reasoned that the military-style features of the banned assault weapons create a "capability for lethality . . . far beyond that of other firearms in general, including other semiautomatic guns." *Kolbe*, 849 F.3d at 137 (internal quotation marks omitted); *Worman*, 922 F.3d at 39-40 (noting "ample evidence of the unique dangers posed by the proscribed weapons"); *NYSRPA*, 804 F.3d at 262 (citing the same evidence); *accord Heller II*, 670 F.3d at 1262 (explaining that the military features "are designed to enhance their capacity to shoot multiple human targets very rapidly," making assault weapons attractive to criminals and putting police officers at risk) (internal quotation marks omitted).

Based on this evidence, the Fourth Circuit agreed with the Second and D.C. Circuits that the challenged bans are substantially related to the government's important objective in protecting public safety, and so survive intermediate scrutiny. *Kolbe*, 849 F.3d at 139-41; *NYSRPA*, 804 F.3d at 263-64; *Heller II*, 670 F.3d at 1263-64. Since then, the First Circuit has reached the

same conclusion. *Worman*, 922 F.3d at 39-40. Explaining that "intermediate scrutiny is appropriate as long as a challenged regulation either fails to implicate the core Second Amendment right or fails to impose a substantial burden on that right," the First Circuit in *Worman* found that the burden of an assault-weapons ban is "modest." *Id.* at 38. And *Worman* noted that "[t]he plaintiffs do not dispute the extensive evidence regarding the lethality of the proscribed weapons and the frequency of their use in mass shootings" and that "it strains credulity to argue that the fit between the [ban] and the asserted governmental interest is unreasonable." *Id.* at 40. The Seventh Circuit also recently reaffirmed its holding that an assault-weapon ban is valid. *Wilson*, 937 F.3d at 1035-36. It noted that the challengers had failed to come up with "*any* authority or developments" since its prior holding that cast doubt on its reasoning or conclusion and that "every court of appeals to have considered the issue has reached the same conclusion that we did: bans on assault weapons . . . do not contravene the Second Amendment." *Id.* at 1035. The agreement on those central principles underscores the absence of any conflict meriting this Court's review.

c. Petitioners note (Pet. 15) that the Fourth Circuit in *Kolbe* determined, as a threshold matter, that assault weapons fall outside the scope of the Second Amendment. *Kolbe* reasoned that assault rifles' resemblance to the M16 made them a weapon most useful in military service, 849 F.3d at 126, 137, 144, and applied that test rather than ask whether the weapons are "in

common use at the time," *Heller* at 627. Other courts, in contrast, merely assumed, without deciding, that the bans at issue burdened the Second Amendment right, *Worman*, 922 F.3d at 30, 36; *NYSRPA*, 804 F.3d at 257; *Heller II*, 670 F.3d at 1261**,** or did not squarely address the issue, *Friedman*, 784 F.3d at 408-09. The Fourth Circuit's decision to resolve a threshold consideration that other courts had deemed it unnecessary to address does not merit review. The court's resolution of that issue did not affect the judgment.

Beyond that, the Fourth Circuit's focus on a traditional basis for deeming arms unprotected—their highly dangerous and military character—provides additional support for its conclusion. *Heller* at 627. History supports that judgment: States have long regulated certain semiautomatic firearms. *See* Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 Law & Contemp. Probs. 55, 68-71 (2017) (collecting state laws from 1927-1934 banning semiautomatic firearms); Report of Firearms Committee, *Handbook of the National Conference on Uniform State Laws and Proceedings of the Thirty-Eighth Annual Meeting* 422-23 (1928) (setting forth model law prohibiting possession of "any firearm which shoots more than twelve shots semi-automatically without reloading").

d. Finally, petitioners rely (Pet. 17) on two state supreme court decisions holding that stun guns and tasers are arms within the protection of the Second Amendment and invalidating bans on their possession. *People v. Webb*, 131 N.E.3d 93 (Ill. 2019); *Ramirez v.*

Commonwealth, 94 N.E.3d 809 (Mass. 2018). These decisions involved materially different weapons that implicate materially different interests. Stun guns and tasers do not typically inflict fatal injuries, and their limited capabilities do not lend themselves to the purpose of causing massive loss of life in wanton shootings. *See Webb*, 131 N.E.3d at 95 ("stun guns are by their specific nature far less lethal than firearms") (internal quotation marks omitted); *Ramirez*, 94 N.E.3d at 817 (stun guns are "less lethal than a handgun"); *see also Caetano v. Massachusetts*, 577 U.S. 411, 415 n.2 (2016) (Alito, J., concurring) ("[T]hese sorts of electrical weapons are "non-lethal force" "designed to incapacitate"—"not kill"—a target."). And even if useful in military settings, *Caetano* at 419 (Alito, J., concurring), stun guns and tasers lack the resemblance to a weapon—the M16—that *Heller* treated as outside the scope of Second Amendment protection. The invalidity of a ban on stun guns and tasers thus says nothing about bans on military-style assault rifles. That point is confirmed by the Massachusetts Supreme Judicial Court's decision upholding the Massachusetts assault-weapons ban. *Commonwealth v. Cassidy*, 96 N.E.3d 691, 701-03 (Mass. 2018), *cert. denied*, 139 S. Ct. 276 (2018).

B. The Court of Appeals' Decision Is Correct and Consistent with *Heller*.

As this Court made clear in *Heller*, the Second Amendment does not guarantee "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 554 U.S. at 626.

Consistent with that recognition, the Second Amendment does not afford petitioners any right to possess "dangerous and unusual weapons" *id.* at 627, or, in this case, assault weapons that are designed for the battlefield and used disproportionately in mass shootings. Given their characteristics, "[i]t is, therefore, not surprising that AR-15s equipped with [large capacity magazines] have been the weapons of choice in many of the deadliest mass shootings in recent history, including horrific events in Pittsburgh (2018), Parkland (2018), Las Vegas (2017), Sutherland Springs (2017), Orlando (2016), Newtown (2012), and Aurora (2012)." *Worman*, 922 F.3d at 39. What is more, the evidence in *Kolbe* did not show that these weapons are commonly used for self-defense, and the record in this case contains no evidence of any kind. *Accord Worman* at 35 (noting "sparse" evidence of use of assault weapons for self-defense). And Maryland's law leaves ample alternative firearms available for self-defense: not only semiautomatic handguns and rifles, but also semiautomatic rifles closely resembling the AR-15.[10]

In these circumstances, nothing in *Heller* suggests that legislatures are rendered powerless to ban particular assault rifles that pose unusually dangerous threats. As the Fourth Circuit and every other circuit to address the question have held, a ban on

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[10] *See* the Maryland State Police Firearms Search website (n.9, *supra*), which contains an extensive list of firearms that are banned and not banned. The Armalite entry in the database indicates that the Armalite AR-10, M153GN18, and M15-A2 National Match are not banned. *Id*.

military-style assault weapons is subject to intermediate scrutiny because its burden on Second Amendment rights is modest. And it passes that test because there is substantial evidence that the ban reasonably furthers the State's compelling interest in protecting the public from what have been the "weapons of choice" in many of the Nation's most costly and cataclysmic mass shootings. *Worman* at 39.

Petitioners contend (Pet. 20-25) that in upholding Maryland's law, the Fourth Circuit erred and departed from *Heller* by applying a test focusing on whether particular arms are most useful in military service, rather than asking whether the arms are in common use for lawful purposes. Petitioners further contend (Pet. 25-35) that *Heller* requires categorical protection for covered arms; that if any scrutiny is permitted, it should be strict scrutiny; and that Maryland's ban fails even intermediate scrutiny. None of those contentions has merit, and none suggests that the uniform course of decisions upholding assault-weapon bans is wrong.

1. Initially, the court of appeals in *Kolbe* correctly interpreted *Heller* to place an "important limitation" on the types of arms that are protected under the Second Amendment. *Kolbe*, 849 F.3d at 131 (quoting *Heller*, 554 U.S. at 627). After noting that weapons "in common use at the time" would be protected, while "dangerous and unusual weapons" would not, *Heller* observed that this interpretation reduced the "degree of fit between the [Second Amendment's] prefatory clause and the protected right" because the "weapons that are most useful in military service—M-16 rifles

and the like—may be banned." *Heller* at 627-28. *Heller* then singled out "M-16 rifles and the like" as outside the sphere of protection. *Id.* The court of appeals explained why the AR-15 and M16 deserve comparable treatment, *Kolbe* at 135-37, 141-45, and that analysis is not inconsistent with *Heller*, which did not address the issue.

2. Petitioners' attack on the court of appeals' adoption and application of intermediate scrutiny as the standard of review fares no better. *Heller* ruled out rational basis and "freestanding 'interest balancing'" as standards. 554 U.S. at 628 n.27, 634. But the Court did not go further than that. And across the range of constitutional rights—notably, the First Amendment and equal protection rights—the Court applies standards of scrutiny responsive to the nature and degree of the intrusion and the respective government interests at stake. *Compare*, *e.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015) (strict scrutiny applies to certain content-based restrictions under the First Amendment) *with*, *e.g.*, *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 661-62 (1997) (intermediate scrutiny applies to content-neutral restrictions on speech because they "do not pose such inherent dangers to free expression, or present such potential for censorship or manipulation, as to justify application of the most exacting level of First Amendment scrutiny"); and *compare Fisher v. University of Tex.*, 136 S. Ct. 2198, 2208 (2016) (strict scrutiny applies to racial classifications under the Equal Protection Clause "because racial characteristics so seldom provide a relevant basis for disparate

treatment") (internal quotation marks omitted) *with Clark v. Jeter*, 486 U.S. 456, 461 (1988) (intermediate scrutiny applies to "discriminatory classifications based on sex or illegitimacy").

The Second Amendment does not stand as a unique constitutional exception to that framework. Certain restrictions, of course, may so fundamentally strike at the core of a right that they could not survive any form of review. The Court confronted that situation in *Heller*, when it concluded that "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights," the handgun ban failed. 554 U.S. at 628. But a wholesale abandonment of standards of review in favor of a single categorical inquiry would unjustifiably depart from this Court's general approach to enumerated rights and elevate the Second Amendment to a preferred position in the Constitution that neither text, history, nor tradition supports.

Petitioners object (Pet. 26) to the use of intermediate scrutiny rather than strict scrutiny. But *Heller* acknowledged that "the traditionally expressed levels" include "intermediate scrutiny," 554 U.S. at 634, and it makes sense to apply less stringent review to modest burdens on a right, while reserving a higher level of scrutiny for more severe intrusions. *Heller* does not "suggest that a regulation of arms that only modestly burdens the core Second Amendment right must be subject to the strictest form of constitutional review." *Worman*, 922 F.3d at 38. Rather, especially in view of the unquestionably compelling interest in public

safety that firearms regulation addresses, intermediate scrutiny should apply to a limited ban on a specific type of weapon that has not been shown to "have commonly been used for home self-defense purposes" and where the ban leaves ample effective alternatives for self-defense, including many semiautomatic weapons and handguns. *Id.* at 37.

Finally, petitioners argue at length (Pet. 27-35) that Maryland's ban fails even intermediate scrutiny. Initially, petitioners object (Pet. 27-29) to Maryland's law because it purportedly protects public safety generally by banning a particular weapon, which (they assert) is an impermissible choice under the Second Amendment. That argument overlooks the reality that Maryland banned assault weapons principally because of their association with mass shootings and their potential to exponentially increase the lethal toll of such events. Maryland's law does not seek to generally reduce violence simply by reducing the quantity of guns in private hands. Petitioners' extensive reasoning (Pet. 27-29) from First Amendment secondary-effects cases underscores both petitioners' failure to appreciate the purposes of Maryland's law and the limits of transposing specific First Amendment doctrines to other constitutional contexts. Second Amendment analysis, unlike free-expression analysis, must take into account public-safety dangers posed by unregulated access to firearms—dangers that are not posed by speech.

Petitioners' effort to demonstrate (Pet. 30-35) that Maryland's law will be ineffective and thus fails intermediate scrutiny is similarly flawed. That effort slights

the "substantial deference" owed to the legislature's "predictive judgments" under intermediate scrutiny. *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997); *see Worman*, 922 F.3d at 40 (a reviewing court's role "is limited to ensuring that, in formulating its judgments, the legislature has drawn reasonable inferences based on substantial evidence") (internal quotation marks and brackets omitted). As Judge Wilkinson has explained, "[l]eaving the question of assault weapons bans to legislative competence preserves the latitude that representative governments enjoy in responding to changes in facts on the ground." *Kolbe*, 849 F.3d at 150 (Wilkinson, J., concurring). And petitioners' focus (Pet. 2, 35) on other States' laws overlooks the latitude that the Second Amendment leaves for "[s]tate and local experimentation with reasonable firearms regulations." *McDonald v. City of Chi.*, 561 U.S. 742, 785 (2010) (plurality opinion) (internal quotation marks omitted). Maryland (and five other States and the District of Columbia) are not bound to follow the same path as other States facing different local conditions and problems. And the choices of those States cannot preclude Maryland from addressing issues according to its best judgment for the benefit of its citizens. Petitioners and *amici curiae* disagree with the Fourth Circuit's extensive analysis of empirical experience with assault rifles. *Compare*, *e.g.*, Pet. 30-34, *with Kolbe* at 125-130, 139-41. Petitioners' and *amici*'s arguments, however, underscore the sound reasons for this Court to refrain from making constitutional judgments based on a host of secondary sources that have

not been tested in the crucible of the adversarial process.

C. Review Is Particularly Unwarranted at this Time, and This Is a Particularly Unsuitable Vehicle for Review.

For all of the reasons above, review of the question presented is unwarranted as a general matter. But this would be a particularly inappropriate case in which to grant review.

1. First, the Ninth Circuit has pending before it two appeals from district courts whose extensive opinions reached opposite conclusions on the validity of California's assault weapons ban. *Compare Rupp v. Becerra*, 401 F. Supp. 3d 978 (C.D. Cal. 2019) (upholding the assault weapons ban), *appeal pending sub nom Rupp v. Bonta*, No. 19-56004 (9th Cir.), *with Miller v. Bonta*, 542 F. Supp. 3d 1009 (S.D. Cal. 2021) (invalidating the ban), *appeal pending*, No. 21-55608, *stayed pending resolution of Rupp v. Bonta*, 2021 WL 2659807 (9th Cir.). On December 6, 2021, the Ninth Circuit ordered the parties in *Rupp v. Bonta* to state whether they agreed with the panel's unanimous view that judicial economy would be served by holding the appeal in abeyance pending this Court's resolution of *New York State Rifle & Pistol Association, Inc. v. Bruen*, No. 20-843. *See* No. 19-56004 Dkt. 66 (9th Cir.). On December 15, 2021, the parties submitted a letter agreeing that holding the case in abeyance pending the decision in *Bruen* was warranted, and the next day, the court of

appeals so ordered. *Id.* at Dkt. 67, 68. The appeals from the two conflicting district court opinions present the opportunity for the Ninth Circuit to consider the issue afresh, on factual records, with the benefit of this Court's forthcoming decision in *Bruen*. This Court has no reason to intervene at this juncture when further litigation in the courts of appeals may shed additional light on the issue.

Second, review would be especially inopportune in this case, where the only record is petitioners' complaint. They introduced no evidence, and the courts below issued no findings of fact. While petitioners and their amici now rely on a mass of reports and secondary sources, those sources have not been submitted to, challenged in, or reviewed by the courts below. To the extent that the record evidence matters, an up-to-date analysis of the facts and the opportunity for a court to evaluate conflicting contentions would be essential. Regardless of whether this issue might ever warrant review, the bare-bones record here makes this case an inapt vehicle.

2. Petitioners briefly and in the alternative suggest that this Court should hold the petition in this case pending *Bruen* for any light it may shed "on the correct standard of Second Amendment analysis." (Pet. 20.) *Bruen* involves a challenge to a proper-cause condition on granting a handgun permit, while this case involves the legislature's targeted ban on particular types of assault rifles. Given the distinction in the issues presented in the two cases, the continued litigation in the lower courts, and the multiple grounds

supporting the analysis in *Kolbe*, holding the petition here is unnecessary.

Nevertheless, Maryland recognizes that the Court appears to be holding for *Bruen* the petition in *Association of New Jersey Rifle & Pistol Clubs, Inc. v. Bruck*, No. 20-1507 (filed Apr. 26, 2021), which challenges the Third Circuit's decision upholding New Jersey's ban on large-capacity magazines. And Maryland is aware that, as an alternative to arguments based on text, history, and tradition, the parties and the United States' briefs in *Bruen* made arguments based on the application of the standard of review to Second Amendment claims, and members of the Court asked questions about standard-of-review issues during oral argument. *See* Pet'r Br. 44-48; Resp. Br. 36-47; U.S. Amicus Br. 23; Tr. Arg. 46, 53-54, 113-14. To the extent that the Court concludes that the decision in *Bruen* may have a bearing on the resolution of the petition here, the Court may wish, in the alternative to an outright denial, to hold the petition for *Bruen* and then dispose of it accordingly.

CONCLUSION

The petition for a writ of certiorari should be denied or, in the alternative, held pending the decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, No. 20-843, and then disposed of accordingly.

Respectfully submitted,

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