No. 23-863

In The
Supreme Court of the United States

DOMINIC BIANCHI, *et al.*,

Petitioners,

v.

ANTHONY G. BROWN, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court decline to grant certiorari to consider the constitutionality of Maryland's assault weapons ban where (1) petitioners have not demonstrated the "imperative public importance" that might warrant a grant of certiorari before judgment; (2) only one court of appeals has addressed the application of *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), to assault weapons bans; and (3) Maryland's prohibitions are consistent with this Court's statement in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that jurisdictions may ban "weapons that are most useful in military service—M-16 rifles and the like"?

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BRIEF IN OPPOSITION

INTRODUCTION

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court left no doubt that "weapons that are most useful in military service—M-16 rifles and the like—may be banned." *Id.* at 627. Consistent with that pronouncement, the State of Maryland, like nine other states and the District of Columbia, has prohibited possession of certain highly dangerous, military-style assault weapons, of the sort used in a series of highly publicized mass shootings.

In *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc), the Fourth Circuit applied *Heller*'s plain language to reject a constitutional challenge to Maryland's ban on assault weapons. *Id.* at 135-37. The court concluded 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*, 554 U.S. at 627).

This Court's decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), did not call that analysis into question. Although *Bruen* rejected the tiers-of-scrutiny framework that many courts of appeals had applied, the Court left intact its pronouncement in *Heller* that "M-16 rifles and the like" are weapons that "may be banned." Nonetheless, in the wake of *Bruen*, this Court vacated the Fourth Circuit's

decision in this case and remanded for consideration in light of *Bruen*.

Now, less than two years after *Bruen*, petitioners want this Court to consider the constitutionality of Maryland's assault weapons ban. They point to no split among the circuits regarding assault weapons bans, though, nor can they credibly argue that the Fourth Circuit's *Kolbe* decision conflicts with any decision of this Court, whose unambiguous statement in *Heller* regarding "weapons that are most useful in military service—M-16 rifles and the like" remains undisturbed.

Still, even if this Court were otherwise inclined to assess the continuing vitality of that statement after *Bruen*, or to consider the application of *Bruen* to assault weapons bans, this petition is doubly premature. First, there are no circumstances that would justify the extraordinary step of granting a writ of certiorari before judgment, particularly where the en banc Fourth Circuit heard oral argument just last month. Second, the application of *Bruen* to assault weapons bans is a question that has scarcely begun to percolate in the courts of appeals. Ten states and the District of Columbia, covering seven circuits, have some form of ban on the possession of assault weapons. Yet to date, only one court of appeals—the Seventh Circuit—has considered the application of *Bruen* to assault weapons bans. And it has done so only in reviewing decisions whether to grant preliminary injunctive relief. There is no reason why this Court should stray from its usual practice of allowing questions to percolate in multiple courts of

appeals, with arguments tested and refined in cases litigated through final judgment on the merits, before granting certiorari.

STATEMENT

Maryland's Assault Weapons Ban

In response to heightened concerns about the use of assault weapons in mass shootings, and acting shortly after the 2012 shooting at Sandy Hook Elementary School, Maryland enacted a ban on assault rifles.[1] *See* Md. Code Ann., Crim. Law § 4-303(a) (LexisNexis 2021). That ban encompasses the possession, sale, offer for sale, transfer, purchase, or receipt of an "assault long gun" or a "copycat weapon."[2] *Id.* § 4-301(d). "Assault long gun" is defined to include 45 specific weapons or their analogues, known as "copycat weapons." *Id.* § 4-301(b). "Copycat weapons," in turn, are firearms with specific features, including (1) "a semiautomatic centerfire rifle that can accept a detachable magazine and has any two of the following: 1. a folding stock; 2. a grenade launcher or flare launcher; or 3. a flash

[1] 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." Charles DiMaggio, et al., *Changes in US 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).

[2] Maryland also bans large-capacity magazines, *see* Crim. Law § 4-305(b), but petitioners have not challenged that ban in this case.

suppressor"; (2) "a semiautomatic centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds"; and (3) "a semiautomatic centerfire rifle that has an overall length of less than 29 inches." *Id.* § 4-301(h)(1)(i)-(iii). The ban leaves available to Maryland residents a broad range of firearms, including a wide variety of semiautomatic handguns and rifles.[3] Nine other states and the District of Columbia have similarly enacted a variety of prohibitions on assault weapons.[4]

The Fourth Circuit's En Banc Decision in *Kolbe* Upholding Maryland's Ban

In September 2013, a group of plaintiffs challenged Maryland's assault weapons ban. After discovery, the district court granted the State's motion for summary judgment, concluding that the ban on

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

[4] *See* Cal. Penal Code §§ 16350, 16790, 16890, 30500-31115; Conn. Gen. Stat. §§ 53-202a–53-202o; Del. Code tit. 11 §§ 1465, 1466; D.C. Code Ann. §§ 7-2501.01(3A), 7-2502.02(a)(6), 7-2505.01, 7-2505.02(a), (c); Haw. Rev. Stat. § 134-8; 720 Ill. Comp. Stat. 5/24-1.9; Mass. Gen. Laws ch. 140, §§ 121-123, 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); Wash. Rev. Code § 9.41.390. In addition, Congress enacted a ban on certain semiautomatic assault weapons in 1994, but that ban expired by its terms in 2004. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. Law No. 103-322, § 110102, 108 Stat. 1796 (Sept. 13, 1994).

assault weapons did not violate the Second Amendment. *Kolbe v. O'Malley*, 42 F. Supp. 3d 768 (D. Md. 2014). A divided panel of the Fourth Circuit reversed. *See Kolbe v. Hogan*, 813 F.3d 160 (4th Cir. 2016). After granting rehearing, though, the en banc court affirmed the district court, holding that "the banned assault weapons" fell outside the scope of the Second Amendment's protection. *Kolbe v. Hogan*, 849 F.3d 114, 130 (4th Cir. 2017) (en banc).

The Fourth Circuit 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 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 observed, 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). The Fourth Circuit 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. It observed that 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. On that score, the court stressed that "[n]either 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.*

Turning to the legal analysis, the en banc court concluded that the law does not burden protected conduct because the covered assault weapons 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*, 554 U.S. at 627). The court explained that the similarities between the M16 and AR-15 made this a "dispositive and relatively easy inquiry." *Id.* 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.*

This Court denied certiorari in *Kolbe*. *Kolbe v. Hogan*, 583 U.S. 1007 (2017).

This Litigation

Three years after *Kolbe*, 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 weapons ban violates the Second Amendment. Pet. App. 22a-49a. Petitioners acknowledged that "the result they seek is contrary to *Kolbe v. Hogan*." Pet. App. 25a-26a. The district court, on its own initiative, therefore 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," even though the State had filed an answer. Pet. App. 9a-10a. Petitioners responded by again conceding that *Kolbe* foreclosed the relief they sought. Pet. App. 10a. In light of that concession, the district court dismissed the complaint. Pet. App. 10a.

The Fourth Circuit affirmed in an unpublished per curiam decision. Pet. App. 6a-8a. Noting that petitioners had conceded that their Second Amendment argument was "squarely foreclosed by" *Kolbe*, the panel explained that it was bound by the court of appeals' en banc decision in that case. Pet. App. 8a.

Petitioners sought certiorari and, while their petition was pending, this Court decided *Bruen*. The Court granted the petition, vacated the Fourth Circuit's

decision, and remanded the case for further consideration in light of *Bruen*. Pet. App. 5a.

The Fourth Circuit, in turn, ordered supplemental briefing, and a panel of that court heard oral argument on December 6, 2022. While a decision remained pending, a different panel decided *Maryland Shall Issue, Inc. v. Moore*, holding Maryland's handgun qualification license statute unconstitutional under *Bruen*. 86 F.4th 1038 (4th Cir. 2023). On the State's petition, the en banc court granted rehearing in *Maryland Shall Issue*. *See Maryland Shall Issue, Inc. v. Moore* (No. 21-2017), 2024 WL 124290 (4th Cir. Jan. 11, 2024). The next day, it granted rehearing in this case, Pet. App. 1a-2a, which the panel had not yet decided. Less than one month later, petitioners responded by seeking a writ of certiorari before judgment in this Court.

The en banc Fourth Circuit heard oral argument in this case on March 20, 2024. It has not yet issued a decision.

REASONS FOR DENYING REVIEW

Petitioners' argument for certiorari is that, even though there is no split among the courts of appeals regarding the constitutionality of assault weapons bans,[5] those courts are misapplying *Heller* by

[5] Petitioners halfheartedly argue that the Seventh and Ninth Circuit are split regarding the significance of whether particular weapons are militarily useful. Pet. 23. The Ninth Circuit decision they cite, however, concerns butterfly knives, not assault

upholding such bans and thus denying what petitioners believe is a fundamental right. Pet. 21-24. That argument provides no basis for granting the petition. First, despite petitioners' pleas of urgency, this case presents none of the circumstances that might warrant the extraordinary step of granting certiorari before judgment. Second, the courts of appeals have barely begun to consider how *Bruen* applies to challenges to assault weapons bans. And third, the Fourth Circuit's decision in *Kolbe* is consistent both with *Heller* and with the principles announced more recently in *Bruen*.

I. This Case Does Not Meet the Stringent Standard for Certiorari Before Judgment.

Supreme Court Rule 11 provides that a petition for a writ of certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Because this is a "very demanding standard," *Mount Soledad Mem'l Ass'n v. Trunk*, 573 U.S. 954, 954 (2014) (Alito, J., respecting the denial of the petition for writ of certiorari before judgment), certiorari before judgment is an "extremely rare occurrence," *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 n.* (1976) (Rehnquist, J., in chambers).

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weapons; in any event, it has been vacated by a decision to rehear the case en banc. *See Teter v. Lopez*, 93 F.4th 1150 (9th Cir. 2024).

Consistent with the standard that Rule 11 recites, this Court has granted certiorari before judgment only in cases that are of "great constitutional significance" or have "extraordinary national importance for other reasons." Stephen M. Shapiro, et al., *Supreme Court Practice* § 4.20 (11th ed. 2019); *see id*. ("The public interest in a speedy determination must be exceptional . . . to warrant skipping the court of appeals in this fashion."). For example, the Court has granted certiorari before judgment where vital foreign policy interests and their practical effects were at stake. *See*, *e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654, 667-68 (1981) (resolving challenge that had the potential to unravel the settlement that freed the Iran hostages); *Wilson v. Girard*, 354 U.S. 524, 526 (1957) (addressing whether an American serviceman would be handed over to Japan for trial in its criminal courts); *Ex Parte Quirin*, 317 U.S. 1, 19-20 (1942) (addressing whether Nazi saboteurs could be tried through a military commission).

Similarly, this Court has stepped in to resolve issues with broad-ranging and imminent domestic consequences. *See*, *e.g.*, *Mistretta v. United States*, 488 U.S. 361, 371 (1989) (granting certiorari before judgment to resolve "disarray among the Federal District Courts" over the constitutionality of the sentencing guidelines statute); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584 (1952) (resolving an appeal of a presidential order to seize steel mills); *United States v. United Mine Workers*, 330 U.S. 258, 269 (1947) (resolving issues relating to a nationwide coal strike).

Finally, this Court has intervened in cases with significant and time-sensitive political ramifications. *See*, *e.g.*, *Department of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) (resolving issue relating to proposed census question on an expedited basis to meet the deadline for the printing of the census); *United States v. Nixon*, 418 U.S. 683, 686-87 (1974) (granting review of presidential confidentiality "because of the public importance of the issues presented and the need for their prompt resolution").[6]

Petitioners do not claim that any of these concerns is present here. Instead, they assert that a "fundamental right is at stake" and that, in their view, "the proper outcome is clear." Pet. 4. For this reason, they insist, immediate intervention is necessary.

Regardless of whether petitioners' assertions are true, they do not establish that "the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Sup. Ct. R. 11. Petitioners have not explained why their bare desire to own the particular weapons banned by Maryland compels this Court to deviate from its standard procedure and address this desire on an expedited basis. With regard to self-defense in particular—"the *central component*

[6] In certain other circumstances, this Court has treated a party's request for injunctive relief as a petition for certiorari before judgment. *See*, *e.g.*, *Gish v. Newsom*, 141 S. Ct. 1290 (2021) (challenge to COVID-19 regulations). Even in such circumstances, the standard for granting certiorari before judgment remains the same.

of the [Second Amendment] right itself," *Heller*, 554 U.S. at 599—petitioners have failed to explain how their ability to defend themselves has been compromised, or why they cannot defend themselves with the many other firearms that remain legal under Maryland law. Indeed, petitioners have never even sought any form of interim relief with respect to the ban they challenge now—a fact that belies any claim of urgency, and that only underscores the inappropriateness of certiorari before judgment.

II. Certiorari Would Be Premature Because the Courts of Appeals Have Just Begun to Consider *Bruen*'s Application to Assault Weapons Bans.

This case's procedural posture is reason enough to deny the petition. But even if this were not a request for certiorari before judgment, and even if this Court were inclined to consider the constitutionality of assault weapons bans despite the absence of a circuit split, certiorari still would be premature.

Any consideration of that question by this Court would have to encompass how *Bruen* applies to assault weapons bans. The State's position here, for instance, is that *Bruen* left undisturbed *Heller*'s statement regarding "M-16 rifles and the like." Petitioners, by contrast—besides taking a different view of that statement's meaning, *see* Pet. 15-16—might well take a different view of its continued viability. Further questions would emerge concerning whether the claimed

common-use status of assault weapons, as well as whether they are "dangerous and unusual," should be considered only in determining whether those weapons fall within the Second Amendment's compass, or in conducting *Bruen*'s "historical tradition" inquiry as well. And, especially if the answer is the latter, the Court would have to consider whether bans on assault weapons are in fact "consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 17.

The courts of appeals, however, have scarcely begun to consider these questions. Less than two years have passed since this Court decided *Bruen*. During that time, only one court of appeals has addressed the decision's application to assault weapons bans. *See Bevis v. City of Naperville, Illinois*, 85 F.4th 1175 (7th Cir. 2023). And it has done so only in reviewing decisions whether to grant preliminary injunctive relief, not any final judgment on the merits. *See id.* at 1187 (stressing that "we are not here today to rule definitively on the constitutionality of the Act or any of the municipal ordinances" because "[t]he only issue before us concerns preliminary injunctive relief"). This Court thus lacks the benefit of even a single court of appeals decision fully addressing the panoply of issues potentially implicated by the question whether assault weapons bans are constitutional after *Bruen*. Even if the Court were to grant certiorari and vacate the district court's decision in this case, for instance, it would still have to remand for that court to consider such fact-intensive issues as the suitability of assault

weapons for self-defense and whether those weapons are in common use for that purpose. As part of that process, the State would be entitled to test and rebut the mass of reports and secondary sources that petitioners have cited in this Court, but that the district court has never considered.

At the same time, it is likely that the courts of appeals *will* address the relevant legal and factual issues in the coming years. As noted, at least ten states and the District of Columbia ban assault weapons in some respect. Some of those jurisdictions' bans are subject to pending challenges. *See*, *e.g.*, *Capen v. Campbell*, No. 24-1061 (1st Cir.); *Miller v. Bonta*, No. 23-2979 (9th Cir.) (argued Jan. 24, 2024); *National Ass'n for Gun Rights v. Lamont*, No. 23-1162 (2d Cir.). As these cases are litigated, the parties will develop legal and factual records regarding, for instance, the extent to which assault weapons are in common use for self-defense; the distinctive dangers that assault weapons pose; and historical analogues to assault weapons bans. The constitutionality of state bans currently in force could ultimately be decided by as many as seven courts of appeals: the First, Second, Third, Fourth, Seventh, Ninth, and D.C. Circuits. *See* discussion above at page 4.

Should this Court wish to address the application of *Bruen* to assault weapons bans, even in the absence of a circuit split, it will be best positioned to do so after litigants and courts in other cases flesh out the relevant legal and factual arguments. Allowing the issue to percolate in this manner will ensure that, if the

Court does consider the issue, it does so with the benefit of arguments that have been well-developed and repeatedly tested through the adversarial process. That benefit is virtually nonexistent today, though, and certiorari therefore would be premature for this reason, too.

III. The Fourth Circuit's Decision in *Kolbe* Is Consistent with *Heller* and *Bruen*.

As explained above, the Fourth Circuit in *Kolbe* straightforwardly applied *Heller* in concluding that the assault weapons banned by Maryland fall outside the protections of the Second Amendment. This Court's decision in *Bruen* did not disturb the framework that *Heller* announced relating to the types of weapons coming within those protections. The decision in *Kolbe* thus does not conflict with any decision of this Court, and the prospect that the en banc Fourth Circuit will adhere to that decision does not warrant certiorari.

A. Under *Heller*, Certain Types of Weapons Are Not Protected by the Second Amendment.

When this Court struck down the District of Columbia's prohibition on handgun possession in *Heller*, it explained that the Second Amendment right was not "unlimited." 554 U.S. at 626. Instead, the historical tradition established that the Second Amendment does not embody "a right to keep and carry any weapon whatsoever in any manner whatsoever for whatever

purpose." *Id.* The Court explained that the source of this "historical understanding" was the common-law "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons' " that Blackstone had set forth in his Commentaries on the Laws of England, and that Founding-era legal commentators on this side of the Atlantic had then repeated. *Id*. at 627 (citations omitted).

Heller also made clear how this principle would apply to circumstances like these. Consistent with its observation regarding "dangerous and unusual" weapons, this Court acknowledged that the weapons of today "that are most useful in military service—M-16 rifles and the like—may be banned." *Id*. And *Kolbe*, in turn, faithfully applied *Heller* in upholding Maryland's assault weapons ban: "Because 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." *Kolbe*, 849 F.3d at 135 (quoting *Heller*, 554 U.S. at 627).

B. *Bruen* Did Not Alter *Heller*'s Pronouncements Regarding What Weapons the Second Amendment Protects.

In *Bruen*, this Court held that the individual right to keep and bear arms recognized in *Heller* also encompasses a "similar right to carry handguns publicly for . . . self-defense." 597 U.S. at 9. *Bruen* addressed the constitutionality of New York's "may issue" public-carry licensing regime—specifically, the requirement

that, to obtain a license to carry a handgun publicly, an applicant had to show "proper cause," defined to mean "a special need for self-protection distinguishable from that of the general community." *Id*. at 12.

In striking down the "proper cause" requirement, this Court began by addressing the two-part test that nearly all courts of appeals had adopted for Second Amendment claims. It deemed "[s]tep one of the predominant framework," which asks whether "the regulated conduct falls beyond the Amendment's original scope," to be "broadly consistent with *Heller*." *Id*. at 19. Regarding the second part of the test, however, the Court rejected "applying a means-end scrutiny in the Second Amendment context." *Id*. The Court explained that, "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 24. "The government must then justify its regulation," the Court continued, "by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* (citation omitted).

Bruen reaffirmed, however, that the scope of the Second Amendment is not "unlimited." As to the types of weapons the amendment protects, the Court echoed its assertion in *Heller* that the Second Amendment "right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Bruen*, 597 U.S. at 21 (quoting *Heller*, 554 U.S. at 626). As Justice Alito recognized in his

concurring opinion in *Bruen*, the decision left *Heller*'s principles intact in this area: "Our holding decides nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun. *Nor does it decide anything about the kinds of weapons that people may possess*." *Bruen*, 597 U.S. at 72 (Alito, J., concurring) (emphasis added).

Thus, nothing in *Bruen* supports the notion that the decision repudiated *Heller*'s statement regarding "weapons that are most useful in military service—M-16 rifles and the like," *Heller*, 554 U.S. at 627, or repudiated *Kolbe*'s holding that Maryland's ban is constitutional because such weapons "may be banned," 849 F.3d at 131. *Kolbe* does not conflict with any decision of this Court but, rather, hews to its considered pronouncements in *Heller*.

C. Maryland's Assault Weapons Ban Is Consistent with the Nation's Historical Tradition of Banning Exceptionally Dangerous Weapons That Pose Heightened Risks.

As discussed above, *Kolbe*'s analysis remains sound. That analysis upheld Maryland's assault weapons ban under what would come to be the first step of *Bruen*'s framework, i.e., whether the regulated conduct comes within the Second Amendment's scope. But Maryland's assault weapons ban also survives scrutiny under *Bruen*'s second step because it is consistent with our Nation's historical tradition of

firearms regulation, which encompasses regulation of novel arms posing heightened dangers to public safety.[7] These predecessor laws, regulating an array of extraordinarily dangerous arms and hazardous features, imposed "comparable burden[s]" and are "comparably justified" to Maryland's assault weapons ban, which responds to the recent advent of mass public shootings committed with a particular type of highly dangerous arm. *Bruen*, 597 U.S. at 29; *see id.* at 30 (explaining that "analogical reasoning" in this context requires only a "historical analogue, not a historical twin" or a "dead ringer"); *id.* at 29 (salient question is "how and why the [historical] regulations burden a law-abiding citizen's right to armed self-defense"); *see also Heller*, 554 U.S. at 614 (considering post-Civil-War practices as confirmation of prior historical tradition that bore on the interpretation of the Second Amendment).[8]

Dangerous weapons: Between 1837 and 1929, 37 laws across 22 states restricted weapons that were

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[7] Petitioners are incorrect to suggest that if particular arms are in common use, their prohibition cannot fit within the "historical tradition of prohibiting the carrying of dangerous and unusual weapons." Pet. 16. Neither *Heller* nor *Bruen* held that common use would automatically invalidate weapons prohibitions regardless of their historical antecedents. *See Bruen*, 597 U.S. at 31 ("Like *Heller*, we 'do not undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment.' " (quoting *Heller*, 554 U.S. at 626)).

[8] *Bruen* itself declined to consider late-nineteenth-century and early-twentieth-century evidence, but only because it "contradict[ed] earlier evidence" that overwhelmingly established a contrary tradition. 597 U.S. at 66 & n.28.

especially dangerous, associated with criminality, or both. *See* C.A. ECF 59 Add. A (cataloging laws). These predecessors are relevantly analogous because they reflect a comparable burden that is comparably justified. *Bruen*, 597 U.S. at 29. Just as new weapons were regulated in an earlier era because of their damaging potential in offensive use, assault weapons used in mass shootings inflict carnage on the human body much worse than bullets from non-assault weapons can. *See* C.A. ECF 59 Add. D. (cataloging empirical evidence of the unique brutality of gunshot wounds from assault weapons). And just as those weapons were closely associated with criminality, so too are assault weapons disproportionately used in gang crime, mass shootings, and other crimes. *See*, *e.g.*, Robert J. Spitzer, *Gun Accessories and the Second Amendment: Assault Weapons, Magazines, and Silencers*, 83 Law & Contemp. Probs. 231, 240-42 (2020).

Dangerous modifications: Between 1771 and 1895, at least five states banned trap guns, spring guns, and guns rigged to discharge by added mechanisms like strings or ropes, suggesting that those modifications heightened the danger posed by the guns above and beyond their ordinary potential. *See* C.A. ECF 59 Add. B (cataloging laws). As technological advancements made it easier to modify firearms to become deadlier and better suited to criminals' needs, regulations evolved to keep pace. Between 1909 and 1933, at least eight States banned silencers, and at least one (Minnesota) banned modifying weapons to increase their firing capacity. C.A. ECF 59 Add. B. Maryland's

law is similarly structured to reach "copycat" features that pose heightened harms. In particular, the ban restricts specific components of semiautomatic centerfire rifles that increase their dangerousness and facilitate use by criminals in mass shootings and other tactical scenarios—for example, flash suppressors, the capability to accept magazines of more than ten rounds, and an overall length shorter than 29 inches. Crim. Law § 4-301(h)(1).

Semiautomatic rifles: In the early twentieth century, technological advances led to the emergence of a new threat: practical semiautomatic weapons with the capacity to rapidly fire multiple rounds. As with prior novel technological and societal dangers, jurisdictions reacted with targeted regulations to contain those risks. *See* C.A. ECF 59 Add. C (cataloging laws); Model Law: Report of Firearms Committee, Handbook of the National Conference on Uniform State Laws and Proceedings of the Thirty-Eighth Annual Meeting 422, 428 (1928) (prohibiting possession of "any firearm which shoots more than twelve shots semi-automatically without reloading"). Here, too, Maryland responded to the new danger posed by technological innovation—this time, the rise of battlefield assault rifles adapted to purported civilian use—by enacting restrictions comparable to those enacted nearly a century earlier. Like those earlier restrictions, the banned weapons had ready application in offensive (and military) settings, yet had more attenuated application to civilian self-defense. Finally, the Maryland law's burden on the right of armed self-defense is "comparable" to those

predecessors: like all these laws, Maryland's law focuses on the weapons posing the heightened danger, while leaving open ample access to firearms for self-defense.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted,

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