

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.

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

**BRIEF OF THE MADISON SOCIETY
FOUNDATION, INC. AND
THE DC PROJECT AS *AMICI CURIAE*
SUPPORTING PETITIONERS**

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QUESTION PRESENTED

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

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INTERESTS OF *AMICI CURIAE*¹

The Madison Society Foundation, Inc. (“MSF”) is a not-for-profit 501(c)(3) corporation based in California. It seeks to promote and preserve the Constitution of the United States, in particular the right to keep and bear arms. MSF provides the public and its members with education and training on this important right. MSF contends that this right includes the right of a law-abiding citizen to purchase firearms in all states and territories, subject to federal law.

The DC Project is a not-for-profit 501(c)(4) organization of women committed to safeguarding the Second Amendment. This non-partisan initiative of daughters, mothers, and sisters believe that education, not legislation, is the key to safer communities. Its women offer the actual experiences of women gun-owners as an alternative to the politicized narratives of those who would ban guns without any first-hand experience of needing or using guns. The women of the DC Project utilize all platforms of firearms for sport, hunting, and self-defense. Modern sporting rifles, particularly the AR-15 platform, are commonly used and owned by its women, and therefore this case is of particular interest to our organization. As the fastest growing

¹ All parties consented to the filing of this brief more than 10 days before its filing. No counsel for a party authored it in whole or in part, nor did any person or entity, other than *Amici* and their counsel, make a monetary contribution to fund the brief's preparation or submission. *Amici* are not publicly traded and have no parent corporations. No publicly traded corporation owns 10% or more of either *Amicus*.

demographic of gun owners, women have a profound interest and an important voice in the dialogue around gun issues today. The DC Project underscores the reality that the right to keep and bear arms is a women's issue in addition to being a constitutional issue.

INTRODUCTION AND SUMMARY OF ARGUMENT

Semiautomatic firearms with various popular characteristics are among the most common arms in the country. Maryland bans a broad range of popular firearms by name, and numerous other popular firearms merely because they contain possible features. For example, many modern sporting rifles, including those based on the popular AR-15 platform, are banned by name due to their common and useful features, such as vertical grips, adjustable stocks, and other modern improvements to ergonomics and safety. Other common features such as foldable stocks and muzzle devices that reduce flash are also bases for prohibition under Maryland law.

Because Maryland is an outlier among States in its disparaging and arbitrary characterization, and prohibition, of the entire class of common firearms that it calls "assault weapons," *Amici* agree with the Petitioners that Maryland's ban violates the Second and Fourteenth Amendments. Pet. 11. They write separately to address several other points that make the Court's review in this case important and necessary.

First, the lower courts are hopelessly confused about the standards for determining whether a type of

firearm is both “dangerous and unusual” and thus potentially outside of the Second Amendment’s protection. In particular, courts frequently ignore that *all* arms are inherently “dangerous” and hence, to fall outside the scope of Second Amendment protection, any disqualifying danger must be substantially different in kind and greater than the intrinsic dangers of “usual” arms used for lawful purposes. In other words, particular weapons must be dangerous in ways beyond the central function of arms—effective force projection. That category of “danger” to those against whom force is intentionally directed is the very reason the right to keep and bear arms is protected in the first place, not a ground for *removing* such protection.

As the petition emphasizes (at 2), the semi-automatic firearms Maryland has banned are “no more dangerous than any other” semiautomatic weapon. Accordingly, any “dangerousness” inquiry must be looking for something beyond the dangers inherent to firearms, including the danger of misuse by a violent criminal. Applying a uniquely or unusually dangerous standard here would have shown that the semiautomatic firearms that are the subject of Maryland’s ban are no more or differently dangerous than other firearms, such as handguns or hunting rifles.

Second, the Question Presented is important because the very features of modern sporting rifles that make them common and popular are also what make them safer and more useful for a diverse range of law-abiding citizens. AR-15 rifles, for example, can be configured in ways that make them easier to use

and control, and hence safer and more effective, for people with a wide range of statures, strength, and physical limitations. They are thus an effective, safe, and popular platform for home defense, especially for women and others who may not fit the cookie-cutter mold of those using less modern or less flexible rifle platforms. See, e.g., *Miller v. Bonta*, 542 F. Supp. 3d 1009, 1057 (S.D. Cal. 2021) (addressing “a number of examples in evidence of AR-15 type rifles being useful and used in self-defense”), *appeal docketed*, No. 21-55608 (9th Cir. June 10, 2021). By banning common firearms with features that are helpful to people of diverse sizes, abilities, and needs, Maryland’s ban cuts to the core of the Second Amendment.

ARGUMENT

I. The Petition Is a Good Vehicle for Clarifying that the Dangerousness Inherent in Common Firearms Cannot Serve as a Predicate for Excluding Them from Second Amendment Protection.

Beyond the reasons for granting included in the petition, this case also provides the Court with an opportunity to clarify the very limited reach of *Heller*'s reference to dangerous and unusual arms as being potentially beyond the scope of Second Amendment coverage.

1. In his concurrence in *Caetano v. Massachusetts*, Justice Alito reiterated *Heller*'s instruction that States cannot ban weapons unless they are “*both* dangerous *and* unusual.” 577 U.S. 411, 417 (2016) (Alito, J., joined by Thomas, J., concurring). “If *Heller* tells us anything, it is that firearms cannot be categorically prohibited just because they are dangerous.” *Id.* at 418. That, of course, makes inevitable sense. The Second Amendment means little if it does not protect the right to bear dangerous arms given that all arms are, by definition, dangerous to those against whom they are directed. *Heller* itself observed that “arms” under the Second Amendment include “any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.” *District of Columbia v. Heller*, 554 U.S. 570, 581 (2008). Indeed, the threat of harm posed by arms are the very point of keeping and bearing them.

To the extent “dangerous and unusual” arms can be excluded from Second Amendment coverage,

therefore, danger must be understood to mean something different in kind and greater than the inherent and *useful* danger posed by arms being used to project force. Otherwise, any exclusion would threaten to swallow the rule and would allow States to do what Maryland has done here: suppress particular firearms (or even their features) not because they are uniquely dangerous, but because they do the same thing as every firearm—effectively project force—too well or too accurately.

Properly applying a “dangerousness” analysis that looks beyond the dangerousness inherent in all firearms, the categorical ban on semi-automatic rifles at issue here is lacking. AR-15s, the best-selling rifle in the United States, Pet. 9, like other weapons Maryland propagandistically deems “assault weapons,” are “generally * * * chambered for small rounds” and are accordingly, if anything, “*less* dangerous per bullet.” *Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015) (emphasis added); see also *Miller v. Bonta*, 542 F. Supp. 3d 1009, 1051 (S.D. Cal. 2021) (the “rounds typically used” in semi-automatic rifles are “lower velocity rounds than” the rounds used in “hunting rifle[s]”), *appeal docketed*, No. 21-55608 (9th Cir. June 10, 2021). Indeed, the “injuries from firearms” like those Maryland has banned here are “no different from other firearms that are common and lawful to own.” *Miller*, 542 F. Supp. 3d at 1050. The common modern sporting rifles and other semiautomatic weapons at issue here are no more or differently dangerous than any other firearm, and they cannot be excluded from robust Second Amendment protection.

2. Nor would it be appropriate to consider weapons to be unusually or uniquely “dangerous” just because they could be misused in the hands of a violent criminal. Any weapon, in the wrong hands, is dangerous. And any improvements to a weapon that make it better, safer, and more effective at pursuing lawful activities, moreover, would inevitably bring such general benefits to unlawful users as well. As with the general danger from firearms, the risk of criminal misuse of arms has always been true, is among the reasons for guaranteeing law-abiding citizens the right to defend themselves with force against such criminals, and cannot justify a moratorium on the improvement of arms for lawful use.

Consider the benefits of various features of many of the modern sporting rifles banned by Maryland: Popular platforms such as the AR-15 often come with vertical or pistol grips, flash suppressors, adjustable stocks, and other ergonomic improvements that facilitate safe and effective operation by a broad and diverse range of owners. A flash suppressor helps to ensure that the shooter will not experience “momentary blindness when firing in self-defense.” Pet. 7 (citing App.32a-33a). Pistol grips make it easier for many persons, including those with certain disabilities, to hold and maintain control of their rifles and to better aim their shots. Adjustable stocks improve the fit of the rifle to those with large or small statures, again with the benefits of control, safety, and accuracy. While a criminal could also benefit from such improvements, they are likely more important to a law-abiding defender concerned with avoiding

collateral injuries and ensuring the accuracy of their use of force in a responsible manner.

Maryland treats these modern firearms and features as vices solely because they could be misused in the wrong hands. But if the improved effectiveness with which firearms could be *unlawfully* used were enough to justify banning them, it would lead to the absurdity that firearms may never be improved at all because the risk of misuse will always be the other side of the coin to the benefits to lawful use of any such improved arms. The Second Amendment exists precisely because the Framers struck the balance of those risks and benefits themselves in favor of a broad *right* to keep and bear arms, not a mere legislative privilege subject to rebalancing whenever the political winds changed. The Second Amendment is “the very *product* of an interest balancing by the people” that “elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” *Heller*, 554 U.S. at 634-635. Allowing courts to rebalance those risks and benefits with every improvement of commonly owned arms would require courts to “act as legislators, not judges.” *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring in the judgment).

The Fourth Circuit ignored the constitutional balance already struck when it decided *Kolbe v. Hogan*, the case on which this case expressly turned. 849 F.3d 114 (4th Cir. 2017) (en banc). After citing a string of tragic shootings, the en banc court determined that the “banned assault weapons” could be used to shoot “more shots” and cause “more fatalities and injuries” than “other firearms.” *Id.* at

120, 127. But that logic could just as easily require cabining protected arms to muzzle-loaded muskets or similarly archaic weapons given that improvements since then likewise allow more shots to be fired more quickly and hence more potential injuries or fatalities. But that would ignore that improvements in firearms equally improve the ability of law-abiding citizens to fire more rounds and to injure or kill more persons who would attack their persons, their homes, or even their nation. It is simply not the place of courts to decide that the benefits of a *right* are not worth the risks of misuse inherent in that same right.

That modern sporting rifles may be popular among criminals—as among law abiding citizens in general—hardly justifies their prohibition. As Justice Breyer correctly recognized in *Heller*, *handguns* are involved in the overwhelming majority of all firearm-related deaths. 554 U.S. at 695-696 (Breyer, J., dissenting). But the Court rejected any argument that the link between handguns and violent crime provided sufficient cause to ban them, despite the government’s interest in preventing or mitigating firearm-related homicides. *Id.* at 628-629 (majority opinion). Instead, the mere fact that popular and usual firearms are also popular and usual among criminals was a risk obvious to and understood by the Framers of the Second and Fourteenth Amendments and was not a barrier to protecting the right to keep and bear such arms.

This case provides the Court with an opportunity to reemphasize that a common and effective firearm does not lose constitutional protections just because it is common and effective for citizen and criminal alike.

3. By banning a broad class of firearms that do their job too well for Maryland's liking, the challenged ban is categorically illegitimate. But beyond being categorically wrong, Maryland's sweeping ban on firearms that it considers to do their job too well also lacks a reasonable fit to the State's stated interest. In any other context, it would be unthinkable for a State to try to "regulate the secondary effects" of a constitutional right by "suppressing the [right] itself." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 445 (2002) (Kennedy, J.). Yet that is what Maryland has done here.

To draw an analogy, in the First Amendment context, the State's "assault weapons" ban would be equivalent to a ban on computers and the Internet—"high-powered" delivery mechanisms of protected speech—because they can and sometimes do make it easier for bad actors to libel people to a broader audience (a "mass" libeling, if you will), incite riots, bully people, or even foment rebellion. The printing press made libel and slander easier to disseminate, more damaging in its reach, and hence more harmful than merely speaking from a soap box in the town square. And the Internet likewise has multiplied the number of people able to speak in a rapid-fire way—see, *e.g.*, Twitter—to a large audience. In Maryland's terms, Internet-connected modern computers would be the "assault weapons" of speech. But it is inconceivable under the First Amendment that the State could ban the printing press, restrict the speed or capacity of the Internet, or limit the features, functions, or connectivity of personal computers for all law-abiding citizens to reduce the speed, reach, and effectiveness of speech simply because such qualities

could be (and are) used by bad actors as well as by law-abiding citizens. Suppressing, even to a small degree, a means of communication precisely because one objects to the communicative impact or the content of some speech is forbidden. *Grosjean v. Am. Press Co., Inc.*, 297 U.S. 233 (1936) (striking down tax on newspaper advertising in papers with large circulation).

Likewise, suppressing the nature and qualities of arms because one objects to the potential misuse and misapplication of the central function of arms—effective force projection—is illegitimate and forbidden. Any contrary approach would be absurd on its face, allowing the government to prohibit any improvements in firearm safety, ergonomics, accuracy, or effectiveness simply because such improvements would help criminals as well as lawful users.

Because the Fourth Circuit has adopted a standard seeking to rebalance the central determination of the Second Amendment regarding the risks and benefits of keeping and bearing common arms, this Court should grant certiorari to correct the Fourth Circuit's flawed reasoning.

II. The Semiautomatic Firearms Banned Here Have Common Features that Are Helpful to People of All Stripes.

Another reason this Court should grant the petition is that Maryland's ban directly burdens the core of the Second Amendment right by outlawing common firearms with common features that help with the defense of hearth and home, particularly by

women and others who may not fit the standard mold of firearms users.

1. Modern sporting rifles, such as the AR-15, are well-suited for self-defense in the home because of their accuracy, enhanced by their ergonomics, light weight, maneuverability, and ease of use. These benefits also enhance and encourage civilian training.

These benefits exist not despite their features, typical among many of the firearms banned by the Maryland law, but because of them. As the petition explains, for example, a flash suppressor both prevents the shooter from being temporarily blinded by the bright light as she shoots and “reduces the chances that a home-invader will mark his victim’s position.” Pet. 7. Despite those benefits to a person exercising the core of the Second Amendment right, a flash suppressor may well serve as the reason why a gun is unlawful in Maryland. Md. Code Ann., Crim. Law § 4-301(h)(1); see also *id.* §§ 4-301(d); 4-303(a).

Folding stocks also have clear self-defense benefits, as they “make[] long guns easier to carry and more maneuverable in tight home spaces, and facilitate[] safe firearm storage.” Pet. 7. A folding stock, moreover, “does not turn a semiautomatic rifle into a common instrument of crime, since it does not make a rifle easily concealable for most criminal activities.” *Miller*, 542 F. Supp. 3d at 1036. Indeed, at least with respect to the AR-15—one of the weapons expressly forbidden, a “folding stock” is “almost irrelevant” as the firearm can be “easily separated into two halves by pulling out two pins[.]” *Ibid.* A handgun, of course, is “far more concealable than either and much more often used in crime.” *Ibid.*

2. In addition to the benefits from particular features, many of the firearms that Maryland bans by name have valuable features that are helpful to people of different statures, particularly women.

The AR-15, as just one example, “has many benefits for female shooters.”² In the main, the firearm, in addition to being “lightweight and practical” also “produces low levels of recoil” and is “easy to shoot.”³ These benefits stem directly from the AR-15’s customizability, which allows women to, among other things, tailor their weapon to “fit their stature” with an “adjustable stock.”⁴ Such telescoping stocks “enable[] the rifle stock to be quickly and properly adjusted to fit the user, which is particularly beneficial to persons of smaller stature.” *Miller*, 542 F. Supp. 3d at 1036. Additionally, AR-15s are “designed with a pistol grip and in-line stock and muzzle,” which “results in a decreased felt-recoil” and gives women “greater confidence and control.”⁵ The common features found in that and other banned weapons thus level the playing field against physical aggressors by helping women more safely and effectively fire the weapon they have chosen to protect themselves.

²Carrie Lightfoot, *Benefits of the AR-15 For Female Shooters*, The Well Armed Woman: About Guns (Mar. 31, 2019), <https://tinyurl.com/2p84uwme>.

³ Celia Bigelow & Aubrey Blankenship, *Why Young Women Want AR-15s*, Nat’l Rev. (Jan. 23, 2013, 5:00 PM), <https://tinyurl.com/m7vvrhn2>.

⁴ Stephkimmell, *AR-15 for Women | Home Defense*, Tactical News Online (Nov. 11, 2019), <https://tinyurl.com/yc5uzsut>.

⁵ Stephkimmell, *supra* n.4.

Maryland law's prohibition on the AR-15 and other semiautomatic firearms and features that are overwhelmingly chosen for lawful self-defense and other purposes thus does real violence to the Second Amendment. Indeed, the very features that Maryland's laws directly and indirectly prohibit are the features best suited for safe and effective defensive use in the first place. The State's apparent rationale in prohibiting firearms with these characteristics, which amounts to a declaration that "we don't want people to be able to shoot accurately, rapidly," fails on its face because it is not and cannot be a legitimate state interest at all, let alone a compelling one. A blanket prohibition on firearms in common use nationwide for lawful purposes that are "too accurate", or which do their jobs "too effectively" by allowing citizens to defend their lives "too well," severely infringes upon Second Amendment rights. While a more narrowly tailored approach might increase the penalties for using such firearms in the commission of a crime, a broad prohibition barring even lawful uses sweeps too far. It cannot survive a categorical analysis, much less the strict scrutiny that should apply if tiered scrutiny is to be used at all.

This Court should grant review to guarantee that the people of Maryland can more effectively and safely defend themselves with common and modern arms that they, in the exercise of their constitutional rights, deem best suited to their individual circumstances and needs.

CONCLUSION

Maryland has banned common firearms that are no more dangerous than other common and lawful

firearms. Because the Second Amendment does not allow such categorical prohibitions, the Court should grant the petition and reverse the Fourth Circuit. In the process, it should emphasize that any potential “unusual and dangerous” limitation on the scope “arms” protected by the Second Amendment requires far more than a showing that the firearm carries the ordinary “dangers” of effective force projection or criminal misuse common to popular “arms” in general.

Respectfully submitted,

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