No. 21-902

In the Supreme Court of the United States

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

Petitioners,

v.

BRIAN E. FROSH, in his official capacity as Attorney General of Maryland, *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The disclosure statement in the petition for writ of certiorari remains accurate.

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The Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home," *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), yet the lower courts have divided both over the constitutionality of flat bans on common arms and on how to analyze them in the first place. The issue has been exhaustively ventilated in the lower courts, with 25 separate federal-appellate and state-supreme-court opinions articulating at least five distinct approaches to the constitutionality of these types of bans—most of which are flatly inconsistent with this Court's opinions in *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). And while Respondents resist this Court's review, they do not dispute the existence of this split or its fundamental importance. The time has come for the Court to intervene, end the conflict and confusion in the lower courts, and make clear once and for all that flat bans on commonly possessed arms are "off the table." *Heller*, 554 U.S. at 636.

I. This Court's review is needed to resolve the split in authority over the constitutionality of blanket bans on common arms, and Respondents fail to show otherwise.

A. Respondents do not dispute that there is a split over the question presented: whether blanket bans on arms in common use are, as the court below held, constitutional or, instead, categorically "inconsistent with the Second Amendment," *Ramirez v.*

Commonwealth, 94 N.E.3d 809, 815 (Mass. 2018). Instead, they try to minimize the importance of the conflict, arguing that the cases striking down stun-gun bans "implicate materially different interests," because stun guns "do not lend themselves to the purpose of causing massive loss of life in wanton shootings." BIO.28. Rather than diminishing the existence or importance of the lower-court conflict, this response *merely defends one side* of it with anti-gun rhetoric. For *the whole basis* of the conflict is that under the (correct) analysis of the courts that have struck these bans down, these "different interests" are all *irrelevant*, since the arms simply may "not [be] absolutely banned." *Ramirez*, 94 N.E.3d at 337.

B. Respondents also fail to reconcile the four distinct, and conflicting, approaches used by even those courts that have reached the same bottom-line result.

Several courts analyze these bans under a weak-tea version of "intermediate scrutiny" that the Government always manages to pass. *See, e.g.*, *Kolbe v. Hogan*, 849 F.3d 114, 138, 139 (4th Cir. 2017) (en banc). A few appellate opinions have held that strict scrutiny applies—only to be vacated *en banc* by circuit courts bent on sustaining the bans at issue. *Kolbe v. Hogan*, 813 F.3d 160, 183, 197 (4th Cir. 2016), *rev'd en banc*, 849 F.3d 114; *Duncan v. Becerra*, 970 F.3d 1133, 1152-62 (9th Cir. 2020), *rev'd en banc*, 19 F.4th 1087 (9th Cir. 2021). And two circuits have stuck off on completely different paths (albeit to the same destination of upholding the challenged bans).

In *Friedman v. Highland Park*, the Seventh Circuit adopted an anomalous test that asks "whether a regulation bans weapons that were common at the time of ratification or those that have some reasonable relationship to the preservation or efficiency of a well regulated militia, and whether law-abiding citizens retain adequate means of self-defense." 784 F.3d 406, 410 (7th Cir. 2015). Respondents try to massage this test into the intermediate scrutiny framework, BIO.23-24, but the parts will not fit. None of *Friedman*'s three factors have anything to do with means-ends scrutiny, and the court in fact *expressly refused* to adopt a particular " 'level' of scrutiny." 784 F.3d at 410. Respondents argue that *Wilson v. Cook County*, 937 F.3d 1028 (7th Cir. 2019), "reconcil[ed]" *Friedman*'s anomalous test with the scrutiny approach applied elsewhere, BIO.24, but *Wilson* expressly declined "to revisit *Friedman*." 937 F.3d at 1036.

The Fourth Circuit, in the *Kolbe* decision applied by the panel below, has also adopted its own, outlier test, asking whether the banned firearms are "like" M16 rifles in the sense that they are "most useful in military service." 849 F.3d at 121. No other court has adopted that radical approach. Respondents reply that this test "did not affect the judgment" in *Kolbe*, BIO.27, but the fact remains that the "useful in military service" test is a stark departure from the approaches used in other circuits. And that difference matters, for the Fourth Circuit's bizarre test "would remove nearly *all* firearms from Second Amendment

protection." *Kolbe*, 849 F.3d at 157 (Traxler, J., dissenting).

This court may "review[ ] judgments, not statements in opinions," BIO.20, but the morass of circuit court opinions upholding bans like the one here have yielded a multiplicity of approaches that disagree in their central reasoning, not in matters of extraneous detail. That conflict and confusion threatens to severely undermine the fundamental protections of the Second Amendment. This Court should grant the writ.

II. In addition to being inconsistent with each other in significant respects, *all* of the opinions upholding bans on common semi-automatic firearms are inconsistent with this Court's decision in *Heller*.

a. As explained in our Petition, the "useful in military service" test adopted in *Kolbe* and applied below is gravely inconsistent with *Heller*. Respondents do not meaningfully defend *Kolbe*'s misreading of *Heller*. And while they repeatedly smear the common and popular semi-automatic firearms banned by Maryland as "military-style assault rifles" that purportedly possess "military features," BIO.1, 9, they *nowhere* explain how *any* of the cosmetic features that define the scope of Maryland's ban—such as a folding stock, or an overall length of less than 29 inches rather than 26 inches—actually render them more "highly dangerous," or "military style," BIO.1, 9, than any other firearm. *See* Madison Society Amicus 11-14 (Feb. 14, 2022).

Respondents concede that the banned firearms *do not* possess the key feature that differentiates them from *actual* military firearms: the capability of firing in "automatic mode." BIO.9. They attempt to sweep this distinction aside as having "limited relevance," but as this Court itself has explained, the difference between semi-automatic and fully automatic fire is a crucial one, since it differentiates actual machine guns from ordinary firearms that "traditionally have been widely accepted as lawful possessions." *Staples v. United States*, 511 U.S. 600, 612 (1994). Indeed, the Department of Justice recently (and accurately) described AR-15s—one of the most common rifle types on Maryland's banned list—as "**one of the most popular firearms** in the United States."[1] *See also* States Amicus 13 (Jan. 26, 2022); Law Professors Amicus 18-25 (Feb. 11, 2022); San Diego Gun Owners Amicus 12-14 (Feb. 14, 2022). In light of the commonality of these firearms, Respondents cannot conceivably bear their burden of rebutting the presumption that "the Second Amendment extends" to these "bearable arms." *Heller*, 554 U.S. at 582.

The common firearms banned by Maryland are not "weapons of war," *Kolbe*, 849 F.3d at 130, and any interpretation of the Second Amendment that places them categorically outside of that provision's scope has taken an obvious wrong turn.

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[1] Definition of "Frame or Receiver" and Identification of Firearms at 5 (signed Apr. 10, 2022) (to be codified at 27 C.F.R. Parts 447, 478, & 479), https://bit.ly/3jQBJMn (emphasis added).

b. The Fourth Circuit's alternative holding adopting "intermediate scrutiny" is also impossible to square with *Heller*. Where the government bans an entire class of arms "typically possessed by law-abiding citizens for lawful purposes," the courts must invalidate such a frontal assault on the Second Amendment categorically. 554 U.S. at 625.

Respondents impugn *Heller*'s categorical test as "unjustifiably depart[ing] from this Court's general approach to enumerated rights," BIO.32, but that is not so. The so-called tiers of scrutiny "are not employed in the Court's interpretation and application of many other individual rights provisions of the Constitution," including "the Jury Trial Clause, the Establishment Clause, the Self-Incrimination Clause, the Confrontation Clause, the Cruel and Unusual Punishments Clause, or the Habeas Corpus Clause, to name a few." *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1283 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); *see also* Joel Alicea & John Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 41 NAT'L AFF. 72, 82-83 (2019). Accordingly, the fact that *Heller* adopts a categorical test hardly elevates the Second Amendment to "a preferred position in the Constitution." BIO.32.

c. Even if one of the tiers of scrutiny did apply, the Fourth Circuit erred in not selecting the strictest one. The courts would not apply "intermediate scrutiny" to a ban as burdensome as Maryland's in the context of any other enumerated constitutional right, and the Second Amendment cannot "be singled out

for special—and specially unfavorable—treatment." *McDonald*, 561 U.S. at 778-79. The fact that "alternative firearms" remain available cannot justify resort to a lesser form of scrutiny. BIO.22. The same was true in *Heller*, yet this Court emphatically rejected that line of thinking as providing "no answer." 554 U.S. at 629. A contrary rule would allow the government to eliminate the Second Amendment by degrees—first banning one type of arm, then another, and then another. *See* States Amicus, *supra*, at 7-8, 14. Accordingly, Respondents' attempt to cabin *Heller*'s holding on this point to handguns only—based on their "unique popularity and utility … as means of self-defense," BIO.23—is completely untenable. *See Caetano v. Massachusetts*, 577 U.S. 411, 420 (2016) (Alito, J., concurring).

Respondents argue that lesser scrutiny is called for by "the unquestionably compelling interest in public safety that firearms regulation addresses." BIO.32. That is wrong twice over. While the supposed superstrength of its interest may help it *pass* strict scrutiny, it is hard to see why it should be double-counted, as also somehow entitling the government to *a less stringent form* of scrutiny. *See Association of N.J. Rifle & Pistol Clubs, Inc. v. Attorney Gen. N.J.*, 910 F.3d 106, 128-29 (3d Cir. 2018) (Bibas, J., dissenting). And in any event, "[t]he right to keep and bear arms … is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the

same category." *McDonald*, 561 U.S. at 783 (plurality).

d. Having selected the incorrect standard of constitutional scrutiny, the Fourth Circuit in *Kolbe* then went wrong again by applying it incorrectly. Respondents attempt to shore up the Fourth Circuit's conclusion, based principally on two pieces of evidence. Neither is persuasive.

First, they assert that "[f]rom 1981 through 2017, assault rifles accounted for 430 or 85% of the total 501 mass-shooting fatalities reported … in 44 mass-shooting incidents." BIO.4-5 (cleaned up). Unfortunately, this line of argument is built on sand, because the 85 percent figure has been exposed as completely unfounded. The statistic comes from an article by Prof. Charles DiMaggio, but as explained in a letter to the editor from Prof. Louis Klarevas—a prominent gun-control *proponent*—Prof. DiMaggio "misidentified the involvement of assault weapons in roughly half of the incidents."[2] Prof. DiMaggio counted any incident in which the firearm was described as "semi-automatic" as involving a so-called "assault rifle," even though most of these firearms were simple semi-automatic pistols. When this error was corrected, "the percentage of mass shootings involving assault weapons in the DiMaggio et al. data set [falls] from *77% to 30%*," and "the percentage of mass shooting fatalities resulting from incidents involving assault weapons

[2] Louis Klarevas, *Letter to the Editor*, 86 J. TRAUMA & ACUTE CARE SURG. 926 (2019).

decreases from 86% to 47%"—results that, as Prof. Klarevas quite delicately puts it, "call into question … any broader conclusion that can be drawn from the study." *Id.* (emphasis added).

Respondents next argue that "limited" but "[g]rowing evidence … indicates that state restrictions on large capacity magazines (frequently used with assault weapons) have the potential to reduce deaths and injuries from mass shootings." BIO.6. As is apparent from the face of this statement, this "growing evidence" concerns a type of law *that is not even at issue here*: restrictions on so-called "large capacity" *magazines* (or "LCMs"). Whatever claims Respondents may make about the public-safety impact of restricting these (in-fact standard capacity) magazines, there is no reason to believe that the conclusions would carry over to restrictions on common semi-automatic firearms. Indeed, the article by Professor Christopher Koper that Respondents cite explicitly makes this very point:

> LCM restrictions are arguably the most important components of AW-LCM laws—and thus the most relevant to the amelioration of mass shootings …. [A]n LCM is the most functionally important feature of an AW-type firearm.… *In other respects, AW-type firearms do not operate differently than*

> *other comparable semiautomatics, nor do they fire more lethal ammunition.*[3]

Just so. Because the semi-automatic firearms at issue do not themselves have some sort of "heightened capability for lethality," BIO.5 (quotation marks omitted), Respondents' justification for banning them comes apart at the seams. *See also* Law Enforcement Amicus 14-20 (Feb. 14, 2022).

Finally, Respondents' intermediate-scrutiny analysis entirely fails to account for the public-safety *harm* these bans cause by inhibiting self-defense. Like the handguns in *Heller*, "[t]here are many reasons that a citizen may prefer a [semi-automatic rifle] for home defense," 554 U.S. at 629, including their low recoil, light weight, and features (such as flash suppressors) that promote accuracy and therefore save lives by minimizing stray fire.

III.a. Respondents say nothing to question the critical importance of the question presented. Instead, they contend that this Court should "await the outcome" of two cases in the Ninth Circuit raising "the identical legal issue [and] arising from conflicting district court decisions." BIO.17. It is hard to see why. While the Ninth Circuit can end the division in that circuit, only this Court can settle the split on the

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[3] 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 & PUB. POL'Y 147, 149 (2020) (emphasis added).

question presented that has arisen *between* the circuits and state courts of last resort. And it is not as though the issue requires further percolation in the courts of appeal. By Petitioners' count, there are 25 separate federal appellate and state supreme court opinions addressing the question presented—some striking down bans like these, some upholding them, and collectively articulating every analytical approach imaginable. What is needed is a *resolution* of these conflicting approaches, not a further proliferation of them.

Respondents also claim that this case is a "poor vehicle" because it comes to the Court on a motion to dismiss, and therefore "the courts below issued no findings of fact." BIO.36. Parties seeking to avoid this Court's review have routinely advanced this argument, and the Court has routinely rejected it—most recently in *New York State Rifle & Pistol Ass'n v. Bruen*. The Respondents in that case, too, argued that "[i]n rushing to obtain appellate review …, petitioners failed to provide this Court with the facts that it would need to determine" the constitutionality of New York's law. Br. in Opp'n at 18, No. 20-843 (Feb. 22, 2021). This Court (correctly) granted review anyway. Indeed, *both Heller* and *McDonald* came to this Court in *precisely the same posture*: review of a district-court decision granting the government's motion to dismiss. In neither case did the absence of "findings of fact" hinder this Court's review.

The Court has been right to reject this argument, for at least two reasons. First, the outcome in

challenges to blanket bans like these turns solely on questions of law and of "legislative fact"—such as the historical understanding of the Second Amendment's scope at the Founding, or (potentially) empirical evidence bearing on the effectiveness of the challenged measure. Both types of issues have been exhaustively ventilated in prior appellate opinions and will be further ventilated by the parties and their amici. This Court thus can, and routinely does, resolve both types of issues for itself without regard for any lower-court factual findings. *See, e.g.*, *Heller*, 554 U.S. at 576-626 (resolving numerous disputed historical issues); *Ballew v. Georgia*, 435 U.S. 223, 232 (1978) (plurality) (discussing "recent empirical data" on the impact of jury size); *see also Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017) (remanding for entry of judgment because "the merits of the plaintiffs' challenge are certain and don't turn on disputed facts"); *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012) ("[O]nly legislative facts are relevant to the constitutionality of the Illinois gun law.").

Second, if the absence of factual findings *were* an impediment to this Court's review, that would create a ready blueprint for lower courts to evade this Court's supervision—particularly where challengers seek to overturn widespread and established, but erroneous, circuit precedent. The problem would be especially pronounced in Second Amendment litigation, where anyone with eyes can see that "the lower courts are resisting this Court's decisions in *Heller* and *McDonald*." *Silvester v. Becerra*, 138 S. Ct. 945, 950 (2018)

(Thomas, J., dissenting from denial of certiorari). Since Second Amendment challenges in the many circuits that have adopted a crabbed interpretation of the Amendment will *virtually always* be decided on an early motion to dismiss, Respondents' "no review without factual findings" rule would effectively insulate these circuit precedents from certiorari.

b. At a minimum, this Court should hold this case pending its decision in *Bruen*. Respondents make a feint towards resisting that course of action, but they ultimately concede that it would be appropriate. BIO.37. For all of the reasons given above and in our petition, the Court should grant plenary review in this case now and hold that the Fourth Circuit's approach to bans on common arms is beyond the pale. Alternatively, it should hold the case and then grant it or, at a bare minimum, remand it after the decision in *Bruen*, so that the court below can take another pass at the issue in light of this Court's further teachings.

CONCLUSION

For the above reasons, the Court should grant certiorari.

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Respectfully Submitted

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