No. _____

In the Supreme Court of the United States

DOMINIC BIANCHI, an individual and resident of Baltimore County, *et al.*,

Petitioners,

v.

ANTHONY G. BROWN, in his official capacity as Attorney General of Maryland, *et al.*,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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February 8, 2024

QUESTION PRESENTED

Whether the Constitution allows the government to prohibit law-abiding, responsible citizens from protecting themselves, their families, and their homes with semiautomatic rifles that are in common use for lawful purposes.

PARTIES TO THE PROCEEDING

Petitioners 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 were the plaintiffs before the District Court and the plaintiffs-appellants in the Court of Appeals.

Respondents Anthony G. Brown, in his official capacity as Attorney General of Maryland, and Colonel Woodrow W. Jones III, in his official capacity as Secretary of State Police of Maryland, Roland L. Butler, Jr., in his official capacity as Sheriff of Baltimore County were the defendants before the District Court and the defendants-appellees in the Court of Appeals.[1]

[1] The Court of Appeals substituted Brown as a defendant to this proceeding after his election as Attorney General of Maryland. See Bianchi v. Brown, No. 21-1255, Doc. 74 (Aug. 8, 2023). The originally named defendant sued in his official capacity as Attorney General of Maryland was Brian E. Frosh. The Court of Appeals has not replaced R. Jay Fisher, the former head of the Maryland State Police, as a defendant in this action, but pursuant to Fed. R. App. P. 43, his successor in office, Butler, is automatically substituted for him.

CORPORATE DISCLOSURE STATEMENT

Field Traders, LLC, has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

Firearms Policy Coalition, Inc., has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

Second Amendment Foundation, Inc., has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

Citizens Committee for the Right to Keep and Bear Arms has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Bianchi v. Frosh*, No. 21-902 (U.S. Aug. 1, 2022)
- *Bianchi v. Brown*, No. 21-1255 (4th Cir. Sept. 17, 2021)
- *Bianchi v. Frosh*, No. 20-cv-3495 (D. Md. Mar. 4, 2021)

There are no other proceedings in state or federal court, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT

From the founding of this Nation, the rifle has been a paradigmatic American arm, facilitating the struggle for independence from the British and serving as "the companion" and "tutelary protector" of the westward pioneers. *District of Columbia v. Heller*, 554 U.S. 570, 609 (2008) (quotation marks omitted). The modern iteration of this paradigmatic arm is epitomized by the AR-15-style rifle, a semiautomatic firearm that is popular for self-defense, hunting, and range training due to its accuracy, ease of use, and ergonomic design. Indeed, AR-15s and similar semiautomatic rifles are the best-selling rifles in the history of the Nation. They are owned by millions of Americans and have accounted for approximately 20% of all firearm sales in the country for over a decade.

Despite the utility and popularity of semiautomatic rifles, a small minority of states such as Maryland have sought to ban them. But under *Heller*, these bans are blatantly unconstitutional. After all, *Heller* established that law-abiding Americans have an absolute right to possess and use firearms that are in common use for lawful purposes, and semiautomatic rifles plainly fit the bill. In short, "semi-automatic rifles have not traditionally been banned and are in common use today, and are thus protected under *Heller*." *Heller v. District of Columbia*, 670 F.3d 1244, 1287 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("*Heller II*").

Despite the patent unconstitutionality of semiautomatic rifle bans under *Heller*, the federal courts of appeals strained to uphold those bans in the wake of

that decision. Some did so by applying the intermediate scrutiny framework that this Court repudiated in *Bruen*. *See Heller II*, 670 F.3d 1244; *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015); *Worman v. Healey*, 922 F.3d 26 (1st Cir. 2019). Others seized upon language from *Heller* about weapons "most useful in military service," *see Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc), or devised a bespoke three-part test, each component of which clashed with *Heller*, *see Friedman v. City of Highland Park, Ill.*, 784 F.3d 406 (7th Cir. 2015), to justify bans of these extraordinarily popular civilian arms. These attempts to evade the clear import of *Heller* led two Justices of this Court to call for summary reversal of a decision upholding a semiautomatic rifle ban. *See Friedman v. City of Highland Park, Ill.*, 136 S. Ct. 447, 449–50 (2015) (Thomas, J., dissenting).

Following *Bruen*, the unconstitutionality of semiautomatic rifle bans is clearer than ever. For in *Bruen*, the conceded fact that handguns are "in common use today" for lawful purposes was sufficient to establish constitutional protection of the type of arm at issue in that case. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 32 (2022). And *Bruen* further explained that colonial bans on dangerous and unusual weapons could not justify laws restricting the use "of weapons that are unquestionably in common use today." *Id.* at 47. To the extent any doubt about the constitutionality of bans on common arms was left by *Heller*, *Bruen* eliminated it.

And yet today, a year-and-a-half after *Bruen*, history is repeating itself as the federal courts of appeals are failing to heed the clear teaching of this Court's

precedents. The Seventh Circuit somehow concluded that its decision in *Friedman* is "basically compatible with *Bruen*" and embraced the Fourth Circuit's pre-*Bruen* "most useful in military service" test to refuse to enjoin Illinois bans on modern semiautomatic rifles and other arms. *Bevis v. City of Naperville, Ill.*, 85 F.4th 1175, 1189, 1193 (7th Cir. 2023). An en banc panel of the Ninth Circuit reached out to stay an injunction against a California law restricting the capacity of ammunition magazines, *see Duncan v. Bonta*, 83 F.4th 803 (9th Cir. 2023), and a panel of that court is holding a case challenging California's ban on modern semiautomatic rifles and other firearms pending the outcome of *Duncan*, *see* Order, *Miller v. Bonta*, No. 23-2979 (9th Cir. Jan. 26, 2024), ECF No. 61.1. If history is any guide, the en banc court is unlikely to rule in favor of the Second Amendment. *See Duncan v. Bonta*, 19 F.4th 1087, 1160 (9th Cir. 2021) (VanDyke, J., dissenting).

The actions of the Fourth Circuit below in this case are the most brazen yet. The Fourth Circuit initially affirmed the dismissal of Petitioners' claims by applying that court's precedent in *Kolbe*. Petitioners sought review in this Court, and this Court granted review, vacated the decision below, and remanded for further consideration in light of *Bruen*. *Bianchi v. Frosh*, 142 S. Ct. 2898, 2899 (Mem.) (2022). Consistent with the remand order, a panel of the Fourth Circuit heard argument in December 2022. In January 2024, however, the court issued not an opinion but rather an order granting rehearing en banc despite no party requesting the court to do so. *See* Order, *Bianchi v. Brown*, No. 21-1255 (4th Cir. Jan. 12, 2024), ECF No. 76. The only plausible explanation is that a majority

of the en banc court was not pleased with the outcome that the panel was prepared to reach. *Cf. Wise v. Circosta*, 978 F.3d 93, 117–118 (4th Cir. 2020) (Niemeyer, J., dissenting). And given the court's grant of en banc rehearing in another case in which the panel ruled in favor of the Second Amendment, *see Md. Shall Issue, Inc. v. Moore*, No. 21-2017(L), 2024 WL 124290 (4th Cir. 2024), it appears that the en banc court was seeking to avoid a similar opinion even seeing the light of day.

Nearly sixteen years after *Heller*, the time is ripe for this Court to establish what should have been clear the day that decision was released: bans on firearms commonly possessed by law-abiding citizens are simply "off the table." 554 U.S. at 636. The application of that principle to this case is plain. Modern semiautomatic rifles such as the AR-15 "traditionally have been widely accepted as lawful possessions," *Staples v. United States*, 511 U.S. 600, 614 (1994), and today are owned in the tens of millions by law-abiding Americans for self-defense and other lawful purposes. Such arms simply cannot be banned.

While granting certiorari before judgment is not standard operating procedure, the situation facing the Court is atypical. A fundamental right is at stake, the proper outcome is clear, and the behavior of the lower courts indicates that this Court's intervention likely is necessary for that fundamental right to be vindicated. This Court should grant review and hold that Maryland's semiautomatic rifle ban is unconstitutional.

OPINIONS BELOW

The order of the Court of Appeals granting rehearing *en banc* is reproduced at Pet.App.1a–2a. The order of this Court granting certiorari, vacating the judgment of the Court of Appeals, and remanding for further consideration in light of *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), is reported at 142 S. Ct. 2898 and reproduced at Pet.App.5a. The order of the Court of Appeals affirming the district court's dismissal of the case is reported at 858 F. App'x 645 and reproduced at Pet.App.6a–8a. The order of the District Court dismissing Petitioners' complaint is not reported in the Federal Supplement, but it is reproduced at Pet.App.9a–10a.

JURISDICTION

This petition is filed under Supreme Court Rule 11, and the Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2101(e).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant portions of Amendments II and XIV to the United States Constitution and the Maryland Code are reproduced in the Appendix beginning at Pet.App.11a.

STATEMENT

I. Maryland's ban on common firearms

The State of Maryland tendentiously deems scores of common semiautomatic rifle models "assault weapons" and bans them outright. Subject to certain minor exceptions, MD. CODE ANN., CRIM. LAW §§ 4-302, 4-303(b), Maryland's ban criminalizes the sale, transfer, or possession of any of the following:

> (i) 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 suppressor;
>
> (ii) a semiautomatic centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds;
>
> (iii) a semiautomatic centerfire rifle that has an overall length of less than 29 inches.

Id. § 4-301(h)(1); *see also id.* §§ 4-301(d); 4-303(a). The ban also specifically applies to a list of 45 enumerated rifle types, including AR-15s. *Id.* § 4-301(b); MD. CODE ANN., PUB. SAFETY § 5-101(r)(2).

If an ordinary, law-abiding citizen keeps or bears a rifle banned by Maryland, Respondents may seize

and dispose of that arm. MD. CODE ANN., CRIM. LAW § 4-304. Moreover, any ordinary, law-abiding citizen who possesses such a rifle commits a criminal offense and is subject to severe sanctions, including imprisonment for up to three years for the first offense. *Id.* §§ 4-303, 4-306(a).

Maryland dubs a semiautomatic firearm that possesses the prohibited features an "assault weapon," but that is nothing more than argument advanced by a political slogan in the guise of a definition. As even anti-gun partisans have admitted, "assault weapon" is a political term designed to exploit "the public's confusion over fully automatic machine guns versus semiautomatic" firearms. JOSH SUGARMANN, ASSAULT WEAPONS AND ACCESSORIES IN AMERICA (1988), https://bit.ly/3m5OW5V. In truth, the firearms Maryland calls "assault weapons" are mechanically identical to any other semiautomatic firearm—arms that no one disputes are exceedingly common and fully protected by the Second Amendment. Unlike a fully automatic "machine gun," which continues to fire until its magazine is empty so long as its trigger is depressed, every *semiautomatic* firearm, including the ones banned by Maryland, fires only a single shot for each pull of the trigger. *See Staples*, 511 U.S. at 602 n.1.

These firearms are in common use. They "traditionally have been widely accepted as lawful possessions." *Id.* at 612. Indeed, Maryland bans firearms that are among the most popular in America—including the AR-15, "the best-selling rifle type in the United States." Nicholas J. Johnson, *Supply Restrictions at the Margins of* Heller *and the Abortion*

Analogue: Stenberg Principles, Assault Weapons, and the Attitudinalist Critique, 60 HASTINGS L.J. 1285, 1296 (2009). According to a comprehensive 2021 survey, approximately 24.6 million Americans have owned an AR-type or similar rifle. William English, *2021 National Firearms Survey: Updated Analysis Including Types of Firearms Owned* at 17 (May 13, 2022), https://bit.ly/3yPfoHw. A recent survey conducted by the Washington Post came to a similar conclusion. *Poll of current gun owners* at 1, WASH. POST-IPSOS (Mar. 27, 2023), https://bit.ly/46CqzRa (20% of current gun owners own an AR-15 or similar style rifle). Industry data shows that from 1990 to 2021 over 28 million such rifles were produced for sale in the United States. *Firearm Production in the United States With Firearm Import and Export Data* at 7, NAT'L SHOOTING SPORTS FOUND., INC. (2023), https://bit.ly/42qYo7k. And in recent years they have been the second-most common type of firearm sold, at approximately 20% of all firearm sales, behind only semiautomatic handguns. *See 2021 Firearms Retailer Survey Report* at 9, NAT'L SHOOTING SPORTS FOUND., INC. (2021), https://bit.ly/3gWhI8E; *see also* Exhibit 5 at 119, *Miller v. Becerra*, No. 3:19-cv-01537 (S.D. Cal. Dec. 6, 2019), ECF No. 22-13.

The rifles banned by Maryland are commonly and overwhelmingly possessed by law-abiding citizens for lawful purposes. The 2021 National Firearms Survey found that the most common reason for owning AR-15 or similar style rifles were target shooting (66% of owners), home defense (61.9% of owners) and hunting (50.5% of owners), English, *2021 National Firearms Survey* at 33–34, and the Washington Post's data again confirms this finding. In that poll, 60% of

respondents cited target shooting as a "major reason" for owning their AR-15 style rifle, and an additional 30% cited that as "minor reason." WASH. POST-IPSOS, *Poll* at 1. Protection of self, family, and property rated as even more important (65% listed it as a major reason and 26% as a minor reason). *Id.* Another recent industry survey of over 2,000 owners of such firearms reached similar results, showing again that home-defense and recreational target shooting are the two most important reasons for owning these firearms. *See Modern Sporting Rifle: Comprehensive Consumer Report* at 5, NAT'L SHOOTING SPORTS FOUND., INC. (July 14, 2022), https://bit.ly/3GLmErS; *see also Sport Shooting Participation in the U.S. in 2020* at *iii*, NAT'L SHOOTING SPORTS FOUND., INC. (2021), https://bit.ly/3sPuEQl (noting that in 2020, 20 million American participated in sport or target shooting with firearms like those banned by Maryland). "AR-style rifles are popular with civilians . . . around the world because they're accurate, light, portable, and modular. . . . [The AR-style rifle is] also easy to shoot and has little recoil, making it popular with women. The AR-15 is so user-friendly that a group called 'Disabled Americans for Firearms Rights' . . . says the AR-15 makes it possible for people who can't handle a bolt-action or other rifle type to shoot and protect themselves." FRANK MINITER, THE FUTURE OF THE GUN 46–47 (2014).

Use of these firearms for unlawful purposes, by contrast, is exceedingly rare. Indeed, handguns are used in homicide in this country approximately *twenty times* more frequently than rifles. *Expanded Homicide Data Table 8: Murder Victims by Weapon, 2015-2019*, *Crime in the United States*, FBI, U.S. DEP'T OF

JUST. (2019), https://bit.ly/31WmQ1V. "[I]f we are constrained to use [Maryland's] rhetoric, we would have to say that *handguns* are the quintessential 'assault weapons' in today's society." *Heller II*, 670 F.3d at 1290 (Kavanaugh, J., dissenting).

II. The ban's effect on Petitioners

Petitioners Bianchi, Snope, and Schaefer are ordinary, law-abiding, adult citizens of the United States and residents of Maryland. Pet.App.26a–27a. Each is legally qualified to purchase and possess firearms, and each wants to acquire a banned firearm for self-defense and other lawful purposes but has been barred from doing so by Maryland's Ban. Pet.App.26a–27a. Similarly, Firearms Policy Coalition, Inc., Second Amendment Foundation, and the Citizens Committee for the Right to Keep and Bear Arms each have numerous members in Maryland, including Bianchi, Snope, and Schaefer, who are otherwise eligible to acquire banned firearms and would do so but for the ban. Pet.App.27a–29a. Finally, Field Traders LLC is a licensed firearm dealer in Maryland that has been forced to deny numerous sales of these firearms because of the ban. Pet.App.27a, 41a.

III. Procedural history

A. On December 1, 2020, Petitioners filed this suit in the District of Maryland, alleging that Maryland's categorical ban on the possession of common semiautomatic firearms is facially unconstitutional under the Second Amendment, which is applicable to Maryland under the Fourteenth Amendment. The district court had jurisdiction under 28 U.S.C. Sections 1331 and 1343. Petitioners' complaint conceded that their Second Amendment claim was foreclosed at the district-

court level by the Fourth Circuit's decision in *Kolbe*, 849 F.3d at 114; Pet.App.25a–26a.

B. *Kolbe* was an earlier challenge to Maryland's semiautomatic rifle ban. The ban was upheld by the district court, *Kolbe v. O'Malley*, 42 F. Supp. 3d 768, 791–97 (D. Md. 2014), a decision that was vacated by a panel of the Fourth Circuit, *Kolbe v. Hogan*, 813 F.3d 160, 178, 179–82 (4th Cir. 2016), which decision was itself reversed by the *en banc* Fourth Circuit, holding that *Heller* had included a "dispositive" exception from the Second Amendment's scope for any firearm deemed sufficiently "like M-16 rifles, i.e., weapons that are most useful in military service," *Kolbe*, 849 F.3d at 136 (quotation marks omitted). If a firearm meets this "useful in military service" test, the court concluded, it falls "outside the ambit of the Second Amendment[.]" *Id.* Judge Traxler—who had authored the original panel opinion—dissented from the *en banc* decision upholding the ban, concluding that the majority's "heretofore unknown 'test' . . . is clearly at odds with the Supreme Court's approach in *Heller*." *Id.* at 155 (Traxler, J., dissenting).

In light of *Kolbe*, the district court ordered Petitioners to show cause why their case should not be dismissed *sua sponte* for failure to state a claim. Pet.App.9a–10a. As they had in their complaint, Petitioners conceded that *Kolbe* was controlling at the district-court stage, and on March 3, 2021, the court dismissed Petitioners' complaint. 849 F.3d at 155.

C. Petitioners appealed to the Fourth Circuit. Petitioners again conceded that the *en banc* decision in *Kolbe* was controlling at the panel level, but "they . . . continue[d] to pursue this litigation to vindicate their

Second Amendment rights and seek to have *Kolbe* overruled by a court competent to do so." Brief of Plaintiffs-Appellants at 2, *Bianchi v. Frosh*, No. 21-1255 (4th Cir. Apr. 19, 2021), ECF No. 18. On September 17, 2021, the Fourth Circuit affirmed the district court's order dismissing the case. Pet.App.6a–8a. Petitioners timely sought certiorari from this Court. *See* Pet. for Writ of Certiorari, *Bianchi v. Frosh*, No. 21-902 (U.S. Dec. 16, 2021). This Court granted the petition, vacated the Fourth Circuit's judgment, and remanded for further consideration in light of the Supreme Court's decision in *Bruen*. *See* Pet.App.5a.

D. On remand, the Fourth Circuit directed the parties to submit supplemental briefs regarding the application of *Bruen* to this case and set the case for argument before a panel of the Fourth Circuit in December 2022. *See* Pet.App.3a–4a. The parties completed briefing and argument, but following argument there was silence for over a year until the Fourth Circuit issued an order sua sponte granting rehearing en banc and setting en banc oral argument for March 2024. *See* Pet.App.1a–2a. No panel opinion ever issued following this Court's remand.

REASONS FOR GRANTING THE PETITION

I. This case requires only the straightforward application of *Heller* and *Bruen*.

A. *Heller* speaks directly to the issue presented and requires judgment in Petitioners' favor.

Before this Court decided *Bruen*, the circuit courts were divided over *how* to assess bans on certain types

of bearable arms, though they broadly agreed that such bans should be permitted one way or another. The D.C., First, Second, Third, and Ninth Circuits had all, prior to *Bruen*, upheld bans on so-called "assault weapons" or "large capacity magazines"—despite acknowledging, in several cases, that the banned items were "in common use for lawful purposes—by applying "intermediate" scrutiny which was, in application, a little more than a rubber stamp on the judgment of state legislatures. *See Heller II*, 670 F.3d at 1261–62; *Worman*, 922 F.3d at 38; *Cuomo*, 804 F.3d at 255, 260; *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y General of N.J.*, 910 F.3d 106, 119 (3d Cir. 2018); *Duncan*, 19 F.4th at 1104.

The Seventh Circuit employed a divergent approach to reach the same result. Rather than resorting to scrutiny analysis, the court thought "it better to ask 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." *Friedman*, 784 F.3d at 410 (cleaned up); *see also Wilson v. Cook County*, 937 F.3d 1028, 1033–36 (7th Cir. 2019). And as explained above, the Fourth Circuit took the novel approach of asking whether the banned firearms "are 'like' M16 rifles" in that they "are clearly most useful in military service," and, if they were judged to be like an M16, then they could be banned. *Kolbe*, 849 F.3d at 136–37.

These approaches were clearly wrong before *Bruen*. The majority approach was specifically repudiated in *Bruen*. As this Court has now made clear,

Heller directed courts to resolve Second Amendment claims by analyzing the text of the Amendment and our country's history and tradition of firearms regulation. It did not support the use of means-ends scrutiny to counterbalance the right to keep and bear arms.

The Seventh Circuit's old test was even less rooted in this Court's precedent than interest balancing. Indeed, *every element* of the Seventh Circuit's three-part test directly conflicts with *Heller*. *See* 554 U.S. at 582 (rejecting "the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment."); *id.* at 581 (concluding that "arms" includes "weapons that were not specifically designed for military use and were not employed in a military capacity."); *id.* at 629 (explaining that "it is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms . . . is allowed").

The Fourth Circuit's test wrenched language from *Heller* out of its context to reach a rule that ironically would sever entirely the protection afforded by the Second Amendment's operative clause from the purpose announced by its prefatory clause. After interpreting the text, *Heller* consulted history to, among other things, determine the limits on this textually grounded right. At the conclusion of this analysis, the Court explained that that there was one "important limitation on the right to keep and carry arms" that would permit the government to ban a firearm even though it fell within the plain text meaning of "arms." *Id.* at 627. Specifically, *Heller* explained that the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons,' " permitted certain arms

to be banned. *Id.* (citing 4 BLACKSTONE'S COMMENTARIES 148–49) (1769)) But, the Court made clear, arms "in common use" are "protected" and therefore cannot be banned. *Id* at 627 (internal quotation marks omitted). This was a rule developed from "*the historical understanding* of the scope of the right," *id.* at 625 (emphases added), and it was consistent with another historical tradition: as the prefatory clause of the Second Amendment notes, the explicit purpose for which the right to keep and bear arms was included in the Constitution was to ensure the preservation of the militia, and "[t]he traditional militia was formed from a pool of men bringing arms 'in common use at the time' for lawful purposes like self-defense." *Id.* at 624.

This interpretation did have one difficulty, which this Court confronted directly. "It may be objected," *Heller* noted, that if some of the "weapons that are most useful in military service—M-16 rifles and the like" are "highly unusual in society at large" and therefore "may be banned, then the Second Amendment right is completely detached from the prefatory clause." *Id.* at 627. This was the passage that the Fourth Circuit, in *Kolbe*, misinterpreted to create its rule that firearms that are "like M-16 rifles" in that they "are most useful in military service" fall outside the protection of the Second Amendment. *Kolbe*, 849 F.3d at 135 (cleaned up). But that position is almost precisely the opposite of what *Heller* said. Rather, *Heller* was, in this passage, addressing the tension between the stated purpose of the Amendment to protect the militia and the fact that its protections would not extend to all military firearms. The reason for that tension, the Court explained, was that "the conception of the militia at the time of the Second Amendment's

ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty"; in other words, they would be armed with those weapons that were "in common use" as opposed to those "that are highly unusual in society at large." *Heller*, 554 U.S. at 627. Today, of course, some arms that are used by the military *are not* in common use, thus introducing a degree of disconnect between the Second Amendment's stated purpose and the scope of its protection. But *Heller* did not, of course, hold that merely because a firearm is used by the military (or like a firearm used by the military), it could not *also* be in common use for lawful purposes by civilians. In other words, *Heller* was explaining that certain arms could be banned *despite* their utility in military service, not because of it.

Indeed, the reasons why the Founders valued the militia make nonsensical any argument that an amendment meant to preserve that institution would fail to protect arms *because* they could be useful for military purposes. As *Heller* explains, the militia was "useful in repelling invasions and suppressing insurrections," "render[ed] large standing armies unnecessary," and enabled the people to be "better able to resist tyranny." *Id.* at 597–98. It would be counterintuitive, to say the least, for an amendment designed to preserve the militia to categorically exclude the types of arms most suited to the militia's purposes.

Under *Heller* then, all firearms are arms, and arms that constitutionally may be banned are only those that are dangerous and unusual. Arms in common use for lawful purposes are, by definition,

neither. That makes this case a very straightforward one. There can be absolutely no debate that the semiautomatic rifles banned by Maryland are "in common use" today by law-abiding citizens. Semiautomatic firearms "traditionally have been widely accepted as lawful possessions." *Staples*, 511 U.S. at 612. Such firearms have been commercially available for over a century. *See Heller II*, 670 F.3d at 1287 (Kavanaugh, J., dissenting); David B. Kopel, *Rational Basis Analysis of "Assault Weapon" Prohibition*, 20 J. Contemp. L. 381, 413 (1994). According to industry estimates, there were over 43 million semiautomatic rifles sold in the United States between 1990 and 2018. *See Firearm Production in the United States With Firearm Import and Export Data* at 17, NAT'L SHOOTING SPORTS FOUND., INC. (2020), https://bit.ly/3v5XFvz. Apart from the now-expired ten-year federal assault weapons ban, the federal government has not banned them and, currently, the vast majority of states do not ban semiautomatic "assault weapons" either. *See* Shawna Chen, *10 states with laws restricting assault weapons*, AXIOS, https://bit.ly/3v2N0So (last updated Apr. 28, 2023). Because the State's ban makes it illegal to possess certain semiautomatic rifles and semiautomatic rifles are indisputably in common use, it follows that the ban is invalid under the Second Amendment.

Even if the Court accepts the artificial "assault weapon" framing created by Maryland's law, then the banned firearms *still* easily satisfy the common use test. The dispositive point under *Heller* and *Bruen* is that millions of law-abiding citizens choose to possess firearms in this category. *See Friedman*, 136 S. Ct. at 449 (Thomas, J., dissenting from denial of certiorari) (reasoning that "citizens . . . have a right under the

Second Amendment to keep" "AR-style semiautomatic rifles" because "[r]oughly five million Americans own" them and "[t]he overwhelming majority . . . do so for lawful purposes[.]"); *Att'y Gen. of N.J.*, 910 F.3d at 116 (finding an "arm" is commonly owned because "[t]he record shows that millions . . . are owned"); *Cuomo*, 804 F.3d at 255 ("Even accepting the most conservative estimates cited by the parties and by amici, the assault weapons . . . at issue are 'in common use' as that term was used in *Heller*."); *Heller II*, 670 F.3d at 1261 ("We think it clear enough in the record that semi-automatic rifles . . . are indeed in 'common use.' ").

The popularity of these firearms can be demonstrated by looking at the AR-15-style rifle and similar modern semiautomatic rifles that epitomize the firearms Maryland lumps together in this category. The AR-15 is America's "most popular semi-automatic rifle," *id.* at 1287 (Kavanaugh, J., dissenting), and in recent years it has been "the best-selling rifle type in the United States," Johnson, *supra*, at 1296. Today, the number of AR-rifles and other modern rifles in circulation in the United States exceeds *twenty-four million*. *Commonly Owned: NSSF Announces Over 24 Million MSRS in Circulation*, NAT'L SHOOTING SPORTS FOUND., INC. (July 20, 2022), https://bit.ly/3QBXiyv; *see also* WASH. POST-IPSOS, *Poll* at 1; English, *2021 National Firearms Survey* at 1–2 (finding that an estimated 24.6 million American gun owners have owned AR-15s or similar rifles). In recent years they have been the second-most common type of firearm sold, at approximately 20% of all firearm sales, behind only semiautomatic handguns. *See* 2021 *Firearms Retailer Survey Report*, *supra*, at 9.

It is noteworthy that many of the same arguments that were made against the District of Columbia's handgun ban in *Heller* have been repurposed now to combat these so-called "assault weapons." If those arguments could not justify the District of Columbia's ban, they likewise cannot save Maryland's. It is edifying to compare them. Take, for example, the District of Columbia's assertion in *Heller* that "some gun rights' proponents contend" that "shotguns and rifles . . . are actually the weapons of choice for home defense," Brief of the Petitioners, *District of Columbia v. Heller*, No. 07-290, 2008 WL 102223, at *54 (U.S. Jan. 4, 2008), citing an article "preferring rifles." *Id.* The very same claim is now being made in reverse in cases just like this one across the country, where states are extolling the virtues of handguns and the dangers of rifles in the hope that, at least the latter can be banned even if *Heller* forecloses the former. *See, e.g.*, Appellant's Br. at 24, *Miller v. Bonta*, No. 23-2979 (9th Cir. Dec. 2, 2023), ECF No. 25.1 (arguing that, unlike handguns "objective characteristics of the assault weapon categories at issue here show why the defined weapons are ill-suited to 'ordinary self-defense' " (quoting *Bruen*, 597 U.S. at 70)). But again, *Heller* has settled this issue, since the only "objective characteristic" that matters under *Heller* is whether a particular type of firearm is commonly possessed for lawful purposes. *Heller* held that handguns were protected because Americans used them for the lawful purpose of self-defense, "[w]hatever the reason" was for them making that choice. *Heller*, 554 U.S. at 629. The same is indisputably true here, and so *Heller* requires judgment in Petitioners' favor.

B. *Bruen* merely underscores that *Heller*'s analysis is dispositive here.

Bruen removed any uncertainty that remained after *Heller* as to whether firearms in common use are protected by the Second Amendment. *Bruen* made *Heller*'s text-and-history standard explicit, explaining that it was applying the same "test that we set forth in *Heller*," and reaffirmed that *Heller* announced the rule of decision that governs arms ban cases. 597 U.S. at 26. In directing lower courts how to analyze the Second Amendment, *Bruen* noted that in some cases they will need to account for "technological changes," and explained that *Heller* demonstrated "at least one way in which the Second Amendment's historically fixed meaning applies to new circumstances: Its reference to 'arms' does not apply 'only [to] those arms in existence in the 18th century.' " *Id.* at 28 (quoting *Heller*, 554 U.S. at 582). Instead, the Second Amendment's "general definition" of "arms" "covers modern instruments that facilitate armed self-defense." *Bruen*, 597 U.S. at 28.

And in characterizing the historical analysis, *Bruen* once again pointed to *Heller*, noting that *Heller* used the "historical understanding of the Amendment to demark the limits on the exercise of [the] right," and it was on this basis that it had found that "the Second Amendment protects the possession and use of weapons that are 'in common use at the time.' " *Id.* at 21 (quoting *Heller*, 554 U.S. at 627). Indeed, because it was conceded that handguns are in common use for lawful purposes, no further analysis was required to determine that the type of arm at issue in the case was protected. 597 U.S. at 32. In short, *Bruen* both

elaborated upon *Heller*'s text-and-history approach and reaffirmed that law-abiding citizens have an absolute right to possess firearms that are in common use. *See* Mark W. Smith, *What Part of "In Common Use" Don't You Understand?: How Courts Have Defied* Heller *in Arms-Ban-Cases—Again*, PER CURIAM, HARV. J.L. & PUB. POL'Y (Sept. 27, 2023), https://bit.ly/3PWhqwH.

II. This Court's intervention is required to correct the continued refusal of lower courts to recognize that the Second Amendment protects semiautomatic rifles.

Although this case should be straightforward under *Heller*, and although *Bruen* eradicated the erroneous interest-balancing analysis most courts of appeals had previously used to uphold bans like Maryland's, the circuit courts already have begun to search for a new way around this Court's decisions. In that vein, Illinois—like several other states—passed new legislation in the wake of this Court's decision in *Bruen*. *See* H.B. 5471, 102nd Gen. Assemb., Reg. Sess. (Ill. 2023). The new Illinois law contained an "assault weapons" ban similar to the Maryland law at issue here. Several lawsuits were immediately filed, seeking to enjoin the restrictions. The district courts in Illinois divided on whether a preliminary injunction should issue. *See Barnett v. Raoul*, --- F. Supp. 3d ----, 2023 WL 3160285 (S.D. Ill. April 28, 2023) (granting preliminary injunction); *Bevis v. City of Naperville*, 657 F. Supp. 3d 1052 (N.D. Ill. 2023) (denying preliminary injunction); *Herrera v. Raoul*, --- F. Supp. 3d ----, 2023 WL 3074799 (N.D. Ill. Apr. 25, 2023) (denying

preliminary injunction). The Seventh Circuit, deciding all of the cases together, held that the law was likely constitutional and in doing so it revived portions of both *Friedman* and *Kolbe* as a way around this Court's decisions in *Bruen* and *Heller*. *Bevis*, 85 F.4th at 1175.

After a long preamble in which it argued that its precedent in "*Friedman* [is] basically compatible with *Bruen*," *id.* at 1189, the Seventh Circuit proceeded to badly misapply *Bruen* and *Heller*. Its analysis began (and, for practical purposes, ended) with the text. The court recounted that in *Heller* this Court had concluded that the Second Amendment's text extends to "all instruments that constitute bearable arms," *id.* at 1193 (quoting *Heller*, 554 U.S. at 582), but it purported to find this language impossibly opaque, asking what "bearable" could mean and concluding it must not mean merely those that are "capable of being held" because *Heller* excluded " 'weapons that are most useful in military service—M16 rifles and the like,' which 'may be banned,' " *id.* (quoting *Heller*, 554 U.S. at 627). This reading repeats the errors of the past. As already discussed, as a matter of plain text, the Second Amendment's protection extends to all firearms; permissible restrictions on those firearms must come from history. And, as explained above, it is getting things precisely backwards to conclude that *Heller* held that weapons could be banned *because* of their utility in military service. This was, nevertheless, the critical point for the Seventh Circuit, as it announced a new rule that "the Arms protected by the Second Amendment do not include weapons that *may be reserved for military use*." *Id.* at 1194 (emphasis added). The court held that it believed the banned

semiautomatic firearms were likely to be the type that could be so "reserved" because they are "much more like machineguns and military-grade weaponry than they are like the many different types of firearms that are used for individual self-defense (or so the legislature was entitled to conclude)." *Id.* at 1195. As the dissent pointed out, however, "[n]o army in the world uses a service rifle that is only semiautomatic," *id.* at 1222 (Brennan, J., dissenting), and AR-15s and similar semiautomatics indisputably are "civilian" firearms, *Staples*, 511 U.S. at 603, not military ones.

The Seventh Circuit's approach conflicts with the Ninth Circuit's approach in *Teter v. Lopez*, 76 F.4th 938 (9th Cir. 2023), which addressed Hawaii's ban on butterfly knives. The Ninth Circuit held that "it is irrelevant whether the particular type of firearm at issue has military value," because the only thing that matters, under the Second Amendment's plain text, is whether it "fit[s] the general definition of 'arms.' " *Id.* at 949. *Teter* furthermore held, consistent with *Heller*, that since there is no tradition of "categorically ban[ning] the possession of" arms in common use, no historical analogues could justify a ban on butterfly knives, which are commonly owned today. *Id.* at 951. Unfortunately, there is reason to doubt that *Teter* will remain good law. The Ninth Circuit is still considering a petition to rehear *Teter* en banc and, regardless of whether that request is ultimately granted, an en banc panel of that court will decide a case involving California's limit on magazine capacity. The same en banc panel, writing before *Bruen*, endorsed a strikingly similar view to the one that the Seventh Circuit has put forward *after Bruen*, suggesting that magazines holding more than ten rounds may not be

protected precisely because they are useful in military service. *Duncan*, 19 F.4th at 1102. If that view carries the day again, then the correct side of this emerging division among the circuits will be pruned and the circuits will again—just as they were before *Bruen*—be united in their refusal to recognize the validity of these challenges.

III. This case warrants certiorari before judgment.

This case raises an issue of imperative importance. It involves the exercise of a fundamental right that currently is being denied by several states in the same way, and the lower courts repeatedly have refused to heed this Court's clear guidance and have denied protection of that fundamental right. There is no need for these issues to develop further; this Court should grant certiorari and decide this case now.

Petitioners recognize that this case comes to the Court in an unusual posture. Two terms ago, this Court granted, vacated, and remanded this case, and now Petitioners find themselves in the unfortunate position of *still* not having been able to secure a judgment from the Fourth Circuit and asking this Court, yet again, to take this case and resolve it. Although this case was briefed and argued shortly after it was remanded to the Fourth Circuit, the court of appeals did not act on the case for over a year after argument was held until, suddenly in January of this year, it sua sponte issued an order directing that the case would be reheard en banc, with arguments scheduled for March 20, 2024. Pet.App.1a–2a. No reason was given for the delay, nor was there an explanation for why the decision to take the case up for consideration en

banc was not made in the preceding year and a half when the case was pending before the court.

That is not to say it is at all unclear what is happening here. The Fourth Circuit executed a similar maneuver in *Wise v. Circosta*, 978 F.3d 93 (4th Cir. 2020) (en banc), a case which dealt with a challenge to North Carolina extending the timeframe in which it could receive and count mail-in ballots in an imminently approaching election. In that case, "the work of the panel [originally assigned to hear the case] was hastily preempted by an en banc vote requested by the panel's dissenter after the panel majority had shared its views but before those views could be published." *Id.* at 117 (Niemeyer, J., dissenting). This was a "departure from [the court's] traditional process," *id.* at 118 (Niemeyer, J., dissenting), and the direct result of the en banc court desiring to take the case from a panel with which it disagreed.

This case appears to have fallen prey to the same tactic with one significant difference. Whereas the Fourth Circuit in *Wise* acted expeditiously to issue an en banc decision "two weeks before election day," *id.* (Niemeyer, J., dissenting), and so its actions might be excused, or at least explained away on that ground, here the en banc court has delayed for over a year the consideration of this important issue. After all, as long as *Bruen* and *Heller* have not been appropriately applied here, Petitioners continue to be denied the exercise of a fundamental right.

While this Court has explained that, "in an appropriate case, a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court

below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before we rule on the merits, and alleviates the 'potential for unequal treatment that is inherent in our ability to grant plenary review of all pending cases raising similar issues," *Lawrence v. Chater*, 516 U.S. 163, 167 (1996), subsequent events following the GVR in *this case* show that the ordinary benefits will not obtain here. The Court has cautioned that whether a GVR is appropriate "depends further on the equities of the case" and where there is evidence of "an unfair or manipulative litigation strategy, or if the delay and further cost entailed in remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate." *Id.* at 168. Here, the Fourth Circuit's actions since remand demonstrate an attempt to slow walk Petitioners' claims, even though, as discussed above, the unconstitutionality of the law in question has been clear since *Heller* was decided over 15 years ago. Discussing the similar ban in *Friedman*, Justice Thomas lamented that the lower courts were "flouting" this Court's Second Amendment precedents and argued that such treatment called for summary reversal, not delay or further percolation. *Friedman*, 136 S. Ct. at 449–50 (Thomas, J., dissenting). The correctness of that view only becomes more apparent with time. The Court should step in now to make clear once and for all that the most popular rifles in the history of the nation are protected by the Second Amendment.

CONCLUSION

The Court should grant the petition for certiorari before judgment.

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Respectfully submitted,

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