No. 24-203

IN THE

Supreme Court of the United States

DAVID SNOPE, 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 a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF IDAHO, ALABAMA, ALASKA, ARKANSAS, FLORIDA, GEORGIA, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WEST VIRGINIA, WYOMING, AND THE ARIZONA AND WISCONSIN LEGISLATURES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

The States of Idaho, Alabama, Alaska, Arkansas, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wyoming, and the Arizona and Wisconsin Legislatures respectfully submit this brief as *amici curiae*[1] petitioners. *Amici* respect the people's right to keep and bear arms, which is "necessary to the security of a free State." U.S. CONST. amend. II. The States' law-abiding citizens need the ability to arm and defend themselves, and they should not be deprived of commonly used firearms for that purpose.

The Fourth Circuit disagrees, holding that the most popular rifle in America is not an "arm" within the scope of the Second Amendment—and that it may therefore be banned at governments' pleasure without any historical inquiry or justification. Its decision permits Maryland to infringe the rights of countless law-abiding Americans, including citizens visiting from amici States. It affects businesses in amici States that have lost a market for selling the hundreds of types of firearms that Maryland bans.

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[1] Pursuant to Rule 37.2, *amici* provided timely notice of their intent to file this brief to all parties.

Pursuant to Rule 37.6, *amici curiae* affirm that no Counsel for any Party authored this Brief in whole or in part, and no Counsel or Party made a monetary contribution intended to fund the preparation or submission of this Brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

The Court should reject this latest attempt to give a critical constitutional right "second-class" status. *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010). Without correction, the Fourth Circuit's decision will muddle the clear Second Amendment standards that this Court has adopted. And its decision will encourage other governments to erode Americans' essential right to keep and bear arms.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In 2010, this Court struck down handgun bans, vindicating Marylanders' Second Amendment rights. *See McDonald v. City of Chicago*, 561 U.S. 742 (2010). Undeterred, Maryland passed "one of the toughest gun control plans in the country": the Firearms Safety Act. *See Md. House Passes Gun Control Bill, 78-61*, CBS News (Apr. 3, 2013), https://www.cbsnews.com/baltimore/news/maryland-house-set-to-vote-on-gun-control/. In doing so, it banned the mere ownership of hundreds of types of firearms that were lawful prior to the law and remain lawful in most of the country. This new ban is just as unlawful as the restrictions struck down in *McDonald*.

Maryland has no prerogative to limit available firearms to whatever it deems "necessary" for self-defense. That is not how the Second Amendment works. The Amendment, rather, stands as a reminder to governments—state and federal alike—that "the people" have a "*pre-existing*" right to keep and bear arms. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). The right guarantees the people the very "Arms" Maryland has banned. Maryland's job is to recognize and respect that right, not empty it. *See id.* at 585; *see also* James Wilson, Of Crimes Against the

Right of Individuals to Personal Safety, *in* 2 Collected Works of James Wilson 1137, 1142, n.x (K. Hall & M. Hall eds., 2007), https://tinyurl.com/2p8244t4 (the right to bear arms "cannot be repealed, or superseded, or suspended by any human institution").

Confronted with Maryland's sweeping firearms ban, the Fourth Circuit should have made short work of it. This Court's precedents establish a straightforward test that requires asking whether the "plain text of the Second Amendment" covers the conduct at issue and, if so, whether history justifies the restriction. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 32 (2022). And this Court's precedents emphatically reject the notion that the phrase "to keep and bear Arms" carries a cramped, idiosyncratic meaning, explaining that it covers all bearable arms, including "weapons used by militiamen and weapons used in defense of person and home." *Heller*, 554 U.S. at 625; *see Bruen*, 597 U.S. at 21. The plain meaning of "Arms" includes the hundreds of types of firearms Maryland has banned through the Firearms Safety Act.

Remarkably, however, the Fourth Circuit held that the firearms that the Firearms Safety Act bans are not actually "Arms." In defiance of the Second Amendment's text and this Court's precedents, the Fourth Circuit carved out "military-style" weapons from the ordinary definition of "Arms." It adopted a view that requires citizens—not the government—to show that widely used weapons are appropriate for them to use for self-defense based on whether the weapon has a low enough level of "firepower" and "accuracy." App.33. And the Fourth Circuit compounded its error by excusing Maryland of its obligation to identify a "well-established and representative historical *analogue*" justifying the

Firearm Safety Act severe restrictions. *See Bruen*, 597 U.S. at 30 (emphasis in original). The court instead held that Maryland could ban the mere possession of hundreds of firearms based on examples that *Bruen* held were insufficient to justify bans on the public carry of handguns. These examples certainly cannot justify the far more restrictive bans at issue here.

Amici recognize that gun violence kills many thousands of Americans annually, including some of their own citizens. But at ratification, the people acted to ensure that they would always remain able to arm themselves with effective and useful weapons to defend themselves against such violence. This does not deprive Maryland of the ability to act: it can and should respond to gun violence by investigating crime and holding criminals fully responsible for their unlawful conduct. Maryland, however, cannot act by stripping law-abiding citizens of proven ways to defend themselves. The Court should reverse the Fourth Circuit's anti-textual, presumption-defying analysis and strike down the Firearms Safety Act to provide clarity and vindicate the people's Second Amendment rights.

ARGUMENT

I. The Second Amendment and This Court's Decisions Supply a Clear, Principled Method for Determining What Conduct Is Protected.

The Second Amendment contains a clear, concise command: It provides that "the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. As this Court recently reiterated in *Bruen*, this command does not invite or authorize "any judge-empowering interest-balancing inquiry." *Bruen,* 597 U.S. at 24 (cleaned up). Rather, the Second

Amendment simply requires courts to ask whether its "plain text covers an individual's conduct." *Id.* at 17. If it does, then the individual's conduct is "presumptively protect[ed]," and "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation" for the regulation to be upheld as constitutional. *Id.* at 17; *see id.* at 26–27.

As this Court's precedents illustrate, only a few questions must be answered to determine whether the Second Amendment's plain text covers the conduct at issue. These include whether the regulation implicates "the people," *see Bruen*, 597 U.S. 31–32 ("two ordinary, law-abiding, adult citizens . . . are part of 'the people' whom the Second Amendment protects"), and whether it regulates "keep[ing]" or "bear[ing]" "Arms," *see Heller*, 554 U.S. at 582–92. This Court has already done much of the work in explaining what those terms mean. "[T]he people" presumptively includes "all Americans." *Id.* at 580–81. "[T]o keep and to bear" refers to possessing and carrying arms. *Id.* at 581–82. And "Arms" includes, "prima facie," "all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.* at 582. In short, the term "Arms" presumptively includes "any thing that a man . . . takes into his hands, or useth in wrath to cast at or strike another." *Id.* at 581; *see Bruen*, 597 U.S. at 28 ("covers modern instruments that facilitate armed self-defense").

Many courts around the country have had no difficulty applying the Second Amendment's text, as unpacked by this Court. "Taking [a] cue from the Supreme Court," they have recognized that the Second Amendment speaks in "broad," "unambiguous[]" terms.

Lara v. Comm'r Pa. State Police, 91 F.4th 122, 130 (3d Cir. 2024) (quoting *Heller*, 554 U.S. at 581); *see Teter v. Lopez*, 76 F.4th 938, 949 (9th Cir. 2023), reh'g en banc granted, opinion vacated, 93 F. 4th 1150 (9th Cir. 2024). These courts have found it "clear" that "the plain text of the Second Amendment covers" a wide variety of conduct engaged in by law-abiding citizens—from "carrying a firearm" in particular locations, *Wolford v. Lopez*, 686 F. Supp. 3d 1034, 1055–56 (D. Haw. 2023), rev'd in part on other grounds, No. 23-16164, 2024 WL 4097462 (9th Cir. Sept. 6, 2024), to owning various kinds of "firearm[s] [and] ammunition," *United States v. Jackson*, 699 F. Supp. 3d 500, 505 (N.D. Miss. 2023); *see Rhode v. Bonta*, 2024 WL 374901, at *4–5 (S.D. Cal. Jan. 30, 2024) (stating it is "clear that acquiring ammunition is conduct covered by the plain text of the Second Amendment"); *Renna v. Bonta*, 667 F. Supp. 3d 1048, 1062 (S.D. Cal. 2023) ("reject[ing]" argument that "fail[ed] to address the plain text of the Amendment").

Most other courts confronted with weapons restrictions similar to Maryland's have thus rejected out of hand the argument that certain weapons are "not 'arms.'" *Duncan v. Bonta*, 695 F. Supp. 3d 1206, 1221, 1222, 1233, 1250 (S.D. Cal. 2023) (concluding that "the best reading of 'arms' include magazines" because "whether thought of as a firearm able to fire a certain number of rounds because of its inserted magazine, or as a separate ammunition feeding component, magazines are usable 'arms' within the meaning of the Second Amendment"); *see, e.g.*, *Miller v. Bonta*, 699 F. Supp. 3d 956, 975–76 (S.D. Cal. 2023), appeal held in abeyance, No. 23-2979, 2024 WL 1929016 (9th Cir. Jan. 26, 2024) (concluding that "possess[ing] and carry[ing] firearms deemed 'assault weapons,'" including "the AR-15 rifle" "is covered by the plain text of the Second

Amendment"); *Del. State Sportsmen's Ass'n, Inc. v. Del. Dep't of Safety*, 664 F. Supp. 3d 584, 591 (D. Del. 2023) (concluding that "the 'textual elements' of the Second Amendment's operative clause apply to the conduct being restricted," namely possessing "assault weapons" and "LCMs"). Even courts that have ultimately upheld the restrictions on historical grounds have conceded that the weapons covered are, indeed, "Arms." *See, e.g.*, *Nat'l Ass'n for Gun Rights v. Lamont*, 685 F. Supp. 3d 63, 94 (D. Conn. 2023) ("magazines as a general category constitute bearable arms").

II. The Fourth Circuit's Pronouncement That Arms Owned by Millions of Law-Abiding Americans Are Not "Arms" Defies Logic.

The analysis in this case should have been simple. The Firearms Safety Act bans firearms and magazines owned by millions of law-abiding Americans. It plainly prohibits the "the people" from "keep[ing]" "Arms," so it is presumptively unconstitutional. *Bruen*, 597 U.S. at 17. At *Bruen*'s second step, where Maryland bears the burden, there is no "historical tradition of firearm regulation" even close to the Firearms Safety Act's prohibitions. *Id.* at 34. The statute therefore does not pass constitutional muster.

Rather than enforce the Second Amendment and hold the Firearms Safety Act unconstitutional, the Fourth Circuit chose to reimagine the Second Amendment. *Id.* at 17. It created an atextual carveout from the term "Arms" for weapons that judges deem "military-style." App.3. Then it erroneously concluded at step two that a historical tradition exists of banning common weapons based purely on dangerousness, relying on an eclectic set of firearm regulations that look nothing like Maryland's all-out ban on weapons

widely used by Americans. Its decision cannot possibly be correct.

A. The Firearms at Issue Are "Arms" Under the Second Amendment's Plain Text.

At step one of the *Bruen* analysis, the firearms at issue here are obviously "Arms" within the plain text of the Second Amendment. *Heller* explained that the Second Amendment "extends, prima facie, to all instruments that constitute bearable arms," and explains that "bearable arms" include all weapons possessed or carried "for offensive or defensive action in a case of conflict." 554 U.S. at 582, 584. For support, the Court cited a founding-era "source [that] stated that *all* firearms constituted 'arms.'" *Id.* at 581 (cleaned up) (emphasis added). *Heller* did not exclude any bearable weapons from its definition of the term "Arms." *Bruen* reaffirmed *Heller*'s understanding of the term "Arms," making clear that the term broadly "covers modern instruments that facilitate armed self-defense." *Bruen*, 597 U.S. at 28. It did not limit the term to arms supposedly considered non-militaristic. And *Nunn v. State*—which the *Bruen* Court found "particularly instructive," *id.* at 54—explained the right to keep and bear arms to include "arms of every description, and not such merely as are used by the militia." 1 Ga. 243, 251 (1846) (emphases omitted).

Under *Heller* and *Bruen*, the so-called "assault weapons" that Maryland bans—along with the magazines necessary to operate them—are "Arms." They are "bearable arms"; they are possessed or carried for "offensive or defensive action"; and they are "modern instruments that facilitate armed self-defense." *Heller*, 554 U.S. at 582, 584; *Bruen*, 597 U.S. at 28.

Bruen's analysis underscores the point. There, the Court had "little difficulty concluding" that the Second Amendment protected the right to carry all types of handguns publicly for self-defense. *Bruen*, 597 U.S. at 32. The Court did not even question whether the firearms at issue were "Arms." *Id.* It did not pause and count round capacity. Nor did it consider whether or how the military used them. It simply noted that the "textual elements" of the Second Amendment "guarantee the individual right to possess and carry weapons in case of confrontation." *Id.* Beyond establishing that an arm is "bearable," the class, type, capacity, and military use of a weapon play no part in the textual analysis of "Arms."

The Fourth Circuit's analysis bears no resemblance to the analysis prescribed by this Court. The majority quoted *Heller*'s instruction that "Arms" includes "all . . . bearable arms"—but immediately disregarded it. App.10–11. Instead, seizing on dicta from *Heller* regarding machine-gun ownership, the Fourth Circuit surmised that weapons covered by the law were "'like' 'M-16 rifles', i.e., 'weapons that are most useful in military service,' and thus outside the ambit of the Second Amendment." App.18 (finding Bruen did not abrogate a previous Fourth Circuit decision concerning this law). It did not purport to derive that understanding from any definition of "Arms."

That understanding of "Arms" contravenes any plausible meaning of the word. The Second Amendment's text nowhere suggests that firearms somehow are not "Arms." Every definition this Court has recited comports with the commonsense

conclusion that a *firearm* is an "*Arm*[]." *Heller*, 554 U.S. at 582, 584; *Bruen*, 597 U.S. at 28.

Nor did *Heller* purport to introduce some tortured reading of "Arms" through its machine-gun remark, which appears in a paragraph that never once mentions the constitutional text. *Heller*, 554 U.S. at 624–65. Instead, in distinguishing between machine guns and widely used weapons, *Heller* was focused on the extent to which our Nation's historical traditions define "the scope of the right." *Id.*; *Teter*, 76 F.4th at 950 (*Heller* "did not say that dangerous and unusual weapons are not *arms*") (emphasis in original); *compare Bruen*, 597 U.S. at 47 (observing at step two that the Second Amendment protects carrying arms that are "in common use" but not those that are "dangerous and unusual"). The dissenting opinion in the Fourth Circuit correctly identified this analysis as relating to *Bruen*'s second step. App.120–21.

The only other ground the Fourth Circuit cited for its gerrymandered definition of "Arms" fares no better. It cited *Heller*'s observation that "the central component" of the individual right codified by the Second Amendment was "self-defense." App.19. *See Heller*, 554 U.S. at 599. Of course, *Heller* did *not* say that "Arms" covers *only* weapons "reasonably related or proportional to the end of self-defense." App.23. That's because the parties in *Heller* agreed that the Second Amendment reached "the right to possess and carry a firearm in connection with militia service," and the question was whether it *also* covered the "right to possess a firearm unconnected with service in a militia." 554 U.S. at 577. The statement from *Heller* that the Fourth Circuit plucked from context was meant to *expand*, not limit, the Second

Amendment's scope—a point made even clearer by the surrounding discussion. *Id.* at 581 (explaining that "Arms" includes "all firearms" and "any thing a man wears for his defense").

By embedding limitations beyond the text into step one, the Fourth Circuit has relieved government entities of the burden to justify their gun restrictions. Under *Bruen*, a plaintiff challenging a firearms regulation need only show that "the Second Amendment's plain text covers [his] conduct." 597 U.S. at 24. At that point, "the Constitution presumptively protects that conduct." *Id.* at 17. The government then bears the burden to demonstrate that its "firearm regulation is consistent with this Nation's historical tradition," which it may do, for example, by showing that the regulated firearms are "dangerous and unusual." *Id.* at 17, 47. Under the Fourth Circuit's approach, however, the presumption is inverted. The *challenger* must show that the arms are not "military grade or gangster-style"—apparently a proxy for the "dangerous and unusual" inquiry. App.26. Through its convoluted approach, the Fourth Circuit denies citizens the presumption to which they are entitled.

The impact is to resurrect the "judge-empowering" approach to the Second Amendment that *Bruen* rejected. *Bruen*, 597 U.S. at 22 (cleaned up). As explained below, there is no principled distinction between weapons that are "for military use" and weapons that are "for private use." By pretending otherwise, the Fourth Circuit authorizes itself to ignore the Second Amendment whenever it thinks a weapon looks too much like a soldier's. And this leaves citizens, businesses, and regulators guessing as to

what supposedly makes an arm "most useful in military service"—after all the Fourth Circuit said that even weapons with only semiautomatic capabilities may be considered best suited for the military, App.28, even if the military does not actually use such weapons. *See* App.28–29; *Staples v. United States*, 511 U.S. 600, 603 (1994) ("The AR–15 is the civilian version of the military's M–16 rifle, and is, unless modified, a semiautomatic weapon."). The Court should not permit impressionistic judgments about weapons to overrule the "Second Amendment's 'unqualified command.'" *Bruen*, 597 U.S. at 17.

B. The Fourth Circuit's Conclusion That "Military-Style" Weapons Are Not Protected Is Wrong and Illogical.

Even apart from having no basis in the text of the Second Amendment, the Fourth Circuit's artificial divide between "military-style" firearms and firearms used for self-defense is indefensible.

While this Court has emphasized that the right to keep and bear arms goes beyond the militia to include an individual right to self-defense, *see Bruen*, 597 U.S. at 19–20; *Heller*, 554 U.S. at 599, it has never limited the right to individual self-defense. "[P]reserving the militia" and "hunting" are additional legitimate reasons "Americans valued the ancient right." *Heller*, 554 U.S. at 599; *id.* at 581 (noting that definition of "arms" included "instruments of offence *generally* made use of in war" (cleaned up)). Indeed, it was not long ago that Maryland itself argued to this Court that the Second Amendment protected *only* militaristic firearms. *See District of Columbia v. Heller*, No. 07-290, 2007 WL 2962910, at *6 (U.S. Oct. 5, 2007) (arguing as an amicus party that the Second

Amendment only protected firearms that are "ordinary military equipment").

There's good reason why the Second Amendment protects many so-called "military-style" arms. The Framers included the right as "a strong moral check against the usurpation and arbitrary power of rulers" that would "enable the people to resist and triumph over them." 3 J. Story, *Commentaries on the Constitution of the United States: Amendments to the Constitution* § 1890, at 746 (1833), https://tinyurl.com/4j2rdcbt. That is why they referred to the right as "the true palladium of liberty" and warned that government narrowing the right would place liberty "on the brink of destruction." Tucker, *supra*, at 238–39; *see also McDonald v. City of Chicago*, 561 U.S. 742, 769 (2010). And the militia—a citizen military force armed with personal weapons—was seen as necessary to secure liberty and repel tyranny.

The distinction between "military-style" firearms and firearms used for self-defense does not make sense on its own terms, either. For one, it appears any firearm can be classified as "militaristic." Consider the 1911. It is arguably the most popular handgun in the world—protected by the Second Amendment per the express holdings of *Bruen* and *Heller*—and yet Colt designed it at the request of, and for, the U.S. military. The 1911 is far more "militaristic" than the AR-15 banned by Maryland, which the U.S. military has not adopted. The Fourth Circuit's rationale would therefore justify banning the 1911, even though the Court has already said it cannot be banned. If "virtually every covered arm would qualify as [military-style]," then that cannot be the touchstone of Second Amendment protection. *Caetano v.*

Massachusetts, 577 U.S. 411, 417–18 (2016) (Alito, J., concurring) (rejecting a "dangerous" test for the same reason).

The Fourth Circuit's analysis underscores the lack of any real limits to its "military-style" analysis. It recognized that the AR-15 is a semiautomatic firearm while an M-16 (which is used by the military) is automatic. Yet the Fourth Circuit concluded that the difference "pales in significance compared to the plethora of combat-functional features that makes the two weapons so similar." App.35. At first, it half-heartedly relied on characteristics like the type of ammunition the guns use or the kinetic energy upon firing. But its main move was to imagine that the AR-15 had been physically modified so that it acted more like the M-16. For instance, the majority notes that both weapons can be modified to add "a flash suppressor, recoil compensator, silencer . . . sights, scopes, slings, flashlights, lasers, foregrips, bipods, bayonets, and under-barrel grenade launchers or shotguns"—even though the Firearms Safety Act bans unmodified AR-15s all the same. App.31–33. If the Fourth Circuit's test can be satisfied whenever the firearm in question bears abstract similarities to a gun used by the military, or can be altered to more closely resemble a gun used by the military, then it permits practically any weapon to be banned as a non-Arm.

Finally, even if the Fourth Circuit's made-up "militaristic vs. self-defense" dichotomy were the standard, the banned "assault weapons" *are* used by "average Americans for the purpose of self-preservation." App.46. Millions of them are owned by millions of Americans. According to the Bureau of

Alcohol, Tobacco, Firearms and Explosives, the firearms Maryland targets are both suitable for "home and self-defense" and "popular" for "self-defense." *Report and Recommendation of the ATF Working Group on the Importability of Certain Semiautomatic Rifles*, Dep't of the Treasury: Bureau of Alcohol, Tobacco and Firearms (July 6, 1989), https://www.atf.gov/file/61761/download; *see also Heller v. District of Columbia*, 670 F.3d 1244, 1261 (D.C. Cir. 2011) ("We think it clear enough in the record that semi-automatic rifles and magazines holding more than ten rounds are indeed in 'common use.'"); *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 255 (2d Cir. 2015) (same).

A few harrowing reports make the point. In 2019, two masked and armed burglars invaded a family's home just outside of Tampa, Florida. *See* Amelia Wynne, *Heavily pregnant mother uses an AR-15 to kill a home intruder after two men burst into her Florida home, pistol whipped her husband and grabbed their 11-year-old daughter,* Daily Mail (Nov. 4, 2019), https://tinyurl.com/3m6yzs6c. They pointed their guns at the father and his 11-year-old daughter and pistol-whipped and kicked the father while demanding money. *Id.* The mother, who was pregnant at the time, was in another part of the house, got ahold of the family's AR-15, and opened fire on the armed invaders. *Id.* The father would later say, "the AR did its thing" and saved his family's life. *Id.*

In 2014, a Detroit mother protected her children from men who had kicked her door down. *See Detroit Mom Fires Assault Rifle To Protect Family From Home Invaders,* NewsOne (Feb. 20, 2014), https://tinyurl.com/yc659xtt. With an "assault rifle" in

hand, she warned the intruders that she had a gun. *Id.* They scoffed and she fired a warning shot, which sent them scrambling back out the door. *Id.* Detroit Police Chief James Craig said the mother "did the right thing," and her husband expressed relief that he had armed his wife and prepared her for that kind of situation. *Id.* Had he not, he recognized that he "could have came home to a family that was gone." *Id.*

In 2017, a civilian in Sutherland Springs, Texas used an AR-15 to stop an active shooter at a church. *See* Michael J. Mooney, *The Hero of the Sutherland Springs Shooting Is Still Reckoning With What Happened That Day,* Texas Monthly (Nov. 2018), https://tinyurl.com/yact97dt. When Stephen Willeford heroically went to the aid of his community, he had many types of guns he could have taken with him. *Id.* But he deliberately chose his AR-15. *Id.* And it's a good thing. The shooter had an AR-15, "but," as Willeford says, "so did I." *Sutherland Springs Hero Honored At NRA Convention: 'He Had An AR-15 And So Did I'*, CBS Texas (May 4, 2018), https://tinyurl.com/5n899j8z.

Numerous similar accounts could be retold. But the ones above are response enough to the Fourth Circuit's charge that the AR-15 is not the type used by "average Americans" for self-defense. It served precisely that function for the pregnant mother in Tampa, the mom home alone with her kids in Detroit, and the Sutherland Springs hero. Each repelled force with force, and an assault weapon was their lawful and effective weapon of choice.

C. The Fourth Circuit's Historical Examples Do Not Justify Maryland's Total Ban on Common Arms.

At *Bruen*'s second step, the Fourth Circuit's analysis is equally unsound. Because the Firearms Safety Act is presumptively unconstitutional, the statute can be salvaged only upon proof that there is a "historical tradition of firearm regulation" showing that "the pre-existing right codified in the Second Amendment . . . does not protect [the] course of conduct" being restricted. *Bruen*, 597 U.S. at 34. That proof will often take the form of analogous historical regulations that are "relevantly similar" to the Firearms Safety Act based on "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 29–30. No such regulations appear in the Fourth Circuit's opinion—because no such regulations exist.

In comparing historical regulations based on "why" they burden the right to armed self-defense, the majority reasoned that (1) the Firearms Safety Act is meant to respond to society's call about the "harm certain excessively dangerous weapons are wreaking . . . pursuant to its police power," and (2) "the Maryland statute is but another example of this constructive, indeed indispensable, dialogue." App.48. As for the "how," the majority found there was a "strong tradition" of banning excessively dangerous weapons. App.69.

In other words, the Fourth Circuit tried to place the Firearms Safety Act within the historical tradition of banning "dangerous and unusual weapons"—but only considered half of the phrase. It summarily pronounced the AR-15 "dangerous," but declined to

ask whether it was "unusual." That is a critical mistake. There is no American historical tradition that lets governments ban whatever firearms they deem "dangerous." "[F]irearms cannot be categorically prohibited just because they are dangerous" because "virtually every" firearm can be labeled dangerous. *Caetano*, 577 U.S. at 418 (Alito, J., concurring) (reversing application of "dangerousness" test to stun guns). More is needed to fit within the historical tradition.

And this is confirmed by the Fourth Circuit's sparse historical evidence. In fact, none of the court's examples show a historical tradition of banning "excessively dangerous weapons," without explicitly considering whether or not those weapons are in common use for lawful purposes. App.202–08 (Richardson, J., dissenting).

The majority's only Founding-era guidance (considered explicitly and rejected as irrelevant by *Heller*) was regulations on gunpowder storage—the purpose of which were to prevent outbreaks of fires, not preventing acts of violence. *See* App.203–04 (Richardson, J., dissenting). Further, these sorts of laws were explicitly considered and rejected as irrelevant by *Heller*. *See* 554 U.S. at 632.

The majority next invoked many nineteenth-century restrictions which prohibited possession of certain pistols and Bowie knives. App.204–06 (Richardson, J., dissenting). However, glossed over by the majority but supported by the cases it cites is the fact that states enacted these laws because the weapons at issue were both dangerous *and unusual*. *Id.*

For instance, the majority cited a Tennessee case which sustained a conviction of a man who concealed a Bowie knife. App.62. The majority quoted the court as saying, "[t]he Legislature . . . ha[s] a right to prohibit the wearing or keeping weapons dangerous to the peace and safety of the citizens." App.62 (quoting *Aymette v. State*, 21 Tenn. 154, 159 (1840)). Unmentioned by the majority is the second half of the exact same sentence—"*and which are not usual in civilized warfare, and would not contribute to the common defence*." *Aymette*, 21 Tenn. at 159 (emphasis added).

After citing other inapplicable regulations such as prohibitions on carrying *concealed* weapons, the majority relied heavily on twentieth-century regulations on automatic and semi-automatic rifles. However, as this Court noted, "20th-century evidence . . . does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Bruen*, 597 U.S. at 56 n.28.

Fundamentally, the Fourth Circuit's few examples simply do not reveal a tradition of banning weapons purely because they were "invented for offensive purposes"—however that's defined. App.69. In fact, its evidence shows that there is assuredly no such tradition.

And this lack of any similar regulation says it all. As this Court explained, "when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Bruen*, 597 U.S. at 26. The problem of gun violence targeted by

the Firearms Safety Act has an unfortunately long pedigree. In 1876, a man shot and killed his "lover" out of jealousy. *Nat'l Rifle Ass'n v. Bondi*, 61 F.4th 1317, 1319 (11th Cir. 2023). In 1884, an 18-year-old in Philadelphia shot a 14-year-old girl and then turned the gun on himself "because she would not love him." *Id.* And in 1949, Howard Unruh embarked upon his "walk of death" murdering 13 people. *See* Patrick Sauer, *The Story of the First Mass Shooting in U.S. History,* Smithsonian Magazine (Oct. 14, 2015), https://tinyurl.com/578szh6v. But governments did not respond to the depraved and criminal actions of these and other individuals by banning law-abiding citizens from owning firearms in the way that Maryland has here. In the absence of any "distinctly similar historical regulation" addressing the problem of gun violence, the Firearms Safety Act is unconstitutional.

III. This Court's Intervention Is Needed Now.

The States, their citizens, and businesses require clarity on what conduct the Second Amendment covers. In *Bruen*, the Court acknowledged the mess that lower courts had made of Second Amendment analysis, rejected the injection of interest balancing as "one step too many," and clarified that the presumption of protection applies when the conduct falls within the Second Amendment's plain text. 597 U.S. at 19, 24. The Court could not have been clearer.

The Fourth Circuit's atextual and convoluted approach to *Bruen*'s first step disrupts that clarity for the States and citizens within its borders and threatens to do further damage beyond. At least one other circuit has signaled similar defiance. *See Duncan v. Bonta*, 83 F.4th 803, 809 (9th Cir. 2023)

(Bumatay, J., dissenting) (lodging serious concerns with the majority's "summary order" staying an injunction "even after the Supreme Court directly ordered [it] to apply *Bruen* to this very case"). Further percolation will only result in more unremedied Second Amendment violations.

Amici need this Court to intervene. Just over two years ago, the Court cleaned up the confusion and waning respect for the Second Amendment that had been brewing among lower courts since *Heller* and *McDonald*. *See Bruen*, 597 U.S. at 18. It should act now to prevent a similar problem from escalating to that degree.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari and reverse the decision below.

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