No. 17-127

In The

Supreme Court of the United States

STEPHEN V. KOLBE., *et al.*,

Petitioners,

v.

LAWRENCE J. HOGAN, JR., GOVERNOR, *et al.*,

Respondents.

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

BRIEF OF AMICUS CURIAE THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The National Rifle Association of America, Inc. ("NRA") is the oldest civil rights organization in America and the Nation's foremost defender of Second Amendment rights. Founded in 1871, the NRA has approximately five million members and is America's leading provider of firearms marksmanship and safety training for civilians. The NRA has a strong interest in this case because its outcome will affect the ability of the many NRA members who reside within the Fourth Circuit and—if this Court grants review—throughout the Nation to exercise their fundamental right to keep and bear firearms in common use for lawful purposes.

INTRODUCTION

In its decision below, the Fourth Circuit, sitting en banc, held that the Second Amendment provides absolutely *zero* protection to the most popular long guns in the country and standard-capacity ammunition magazines that number in the tens of millions. One line in the court's decision epitomizes just how far its reasoning departed from this Court's Second

[1] Pursuant to SUP. CT. R. 37.2(a), amicus certifies that counsel of record for all parties received timely notice of the intent to file this brief; and that all parties have given written consent to the filing of this brief. Pursuant to SUP. CT. R. 37.6, amicus certifies that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amicus, its members, or its counsel made such a monetary contribution.

Amendment jurisprudence. Responding to a dissenting opinion, the en banc majority stated, with apparent disdain, that "the dissent would leave it to individual citizens . . . to determine whether a weapon may be possessed for self-defense." *Kolbe v. Hogan*, 849 F.3d 114, 145 (4th Cir. 2017) (en banc), Pet.App.68.

Although a majority of the judges on the Fourth Circuit apparently find unsettling the prospect of the law-abiding, responsible citizens of this Nation determining for themselves which arms best suit their own self-defense needs, that is precisely what this Court held in *District of Columbia v. Heller*, 554 U.S. 570 (2008), to lie at the heart of the Second Amendment. "[T]he right of the people to keep and bear Arms," *Heller* explained, extends to all those arms "of the kind in common use," as opposed to "those weapons not typically possessed by law-abiding citizens for lawful purposes." *Id.* at 624-25. And if a particular firearm is protected it cannot be banned, for the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635.

It is thus the choices of citizens, not their elected representatives or other government officials, that matter for purposes of Second Amendment analysis. Indeed, this Court's reasoning in *Heller* leaves no room for confusion about this issue. *See, e.g.*, *id.* at 634 ("The very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon."); *id.* at 634-35 ("Constitutional rights are

enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad."); *id.* at 636 ("[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table."); *id.* at 629 ("It is no answer to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed.").

And yet, despite *Heller*'s clarity, confusion has ensued in the form of lower-court decisions refusing to apply the common-use test. *See Friedman v. City of Highland Park*, 136 S. Ct. 447, 448-49 (2015) (Thomas, J., dissenting). Indeed, just last year, this Court summarily and unanimously reversed a decision of the Massachusetts Supreme Judicial Court that departed from *Heller* in this respect. *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016).

Even after *Caetano*, the Fourth Circuit explicitly refused to employ *Heller*'s common-use test. *See, e.g.*, Pet.App.46 n.10. Instead, the court held that the banned firearms and magazines are unprotected because they purportedly are "like" military firearms. *See* Pet.App.46. This conclusion is incorrect even on its own terms—indeed, this Court already has held that semiautomatic rifles of the type banned by Maryland are "civilian" firearms that "traditionally have been widely accepted as lawful possessions." *Staples v. United States*, 511 U.S. 600, 603, 612 (1994). The Fourth Circuit's test, moreover, is irreconcilable with *Heller* and the Second Amendment. The Second

Amendment, *Heller* explained, "was codified . . . to prevent elimination of the militia," 554 U.S. at 599, the members of which "were expected to appear bearing arms supplied by themselves and of the kind in common use at the time" when called into service, *id.* at 624. It would be strange indeed for a constitutional amendment enacted to preserve the militia not to protect those common arms most useful for militia purposes.

Heller leaves no doubt that "bearable arms" in common use for lawful purposes enjoy Second Amendment protection and thus are not subject to an outright ban for any reason. Yet lower courts continue to misunderstand or disregard this direction. The result is a steady erosion of the fundamental right to keep and bear arms. In this case, the citizens of Maryland have been stripped of their constitutional right to keep or bear entire categories of protected arms. In no other context would such a widespread, overt, and severe entrenchment upon constitutional rights be tolerated. This Court should grant the writ and reverse the Fourth Circuit's en banc decision upholding Maryland's ban.

SUMMARY OF ARGUMENT

I. This Court customarily grants certiorari to correct lower court decisions at odds with its own precedents. The need for oversight is particularly acute when lower courts repeatedly misapply a precedent, as is the case here. The Fourth Circuit explicitly refused to apply the "common use" test set forth by this Court in *Heller*. It held that even arms in common use may be banned, if, in the court's view, they are like M–16 rifles in the sense that they are "most useful for military service." It therefore refused to extend Second Amendment protections to some of the most popular firearms in the country and standard-capacity magazines. This decision is at odds with *Heller*.

The decision below also continues a troubling pattern among lower courts of rejecting the "common use" test and upholding outright bans on arms that are in "common use." Although this Court summarily reversed one such decision last year—and summary reversal would certainly be justified in this case—a plenary review is warranted to clarify the scope of the Second Amendment and prevent further erosion of this fundamental right.

II. Wholly apart from the widespread confusion about *Heller*'s meaning in the lower courts, the stakes of this case merit certiorari. This Court frequently grants certiorari to prevent infringement on constitutional rights, and in this case, the entire population of Maryland faces a widespread deprivation of their right to keep and bear arms.

Heller makes clear not only that arms in common use for lawful purposes enjoy Second Amendment protection, but also that the Second Amendment takes outright bans off the table. Because the semiautomatic rifles and magazines that are subject to Maryland's ban are in common use for lawful purposes, law-abiding citizens must be permitted to acquire and use them for defense of hearth and home.

ARGUMENT

I. The Court Should Grant Certiorari Because the Decision Below Continues a Pattern of Lower Courts Disregarding this Court's Decision in *Heller*.

A writ of certiorari is justified when the decision on review disregards this Court's precedents. Rule 10(c) ("compelling reasons" for granting certiorari include that "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court"); *see, e.g.*, *Knowles v. Mirzayance*, 556 U.S. 111, 120 (2009); *KSR Int'l. Co. v. Teleflex Inc.*, 550 U.S. 398, 407 (2007). It is all the more justified in this case, as the decision below continues a *pattern* of lower courts disregarding *Heller*'s unequivocal holding concerning the scope of the right to keep and bear arms. The Court should grant certiorari to stop the erosion of this fundamental right.

A. The Decision Below Is Directly Contrary to *Heller*.

In *Heller*, this Court held unequivocally that the Second Amendment extends to all firearms "in common use" by law-abiding citizens. 554 U.S. at 627. The court below disregarded this holding when it upheld a ban on popular semiautomatic firearms and magazines with a capacity of more than ten rounds on the ground that they purportedly are similar to M–16 rifles used by the military.

The "common use" test requires a straightforward inquiry, which finds support in the textual, structural, historical, and doctrinal bases of the *Heller* decision. The term "Arms" in the Second Amendment "extends, prima facie, to all instruments that constitute bearable arms." *Id.* at 582. By announcing the purpose for which the pre-existing right to keep and bear arms was codified, *id.* at 599 ("to prevent elimination of the militia"), the prefatory clause clarifies but "does not limit or expand the scope" of the right so codified, *id* at 578. Because "[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.* (quotation marks omitted), it follows that "arms in common use at the time for lawful purposes" lie at the core of the Second Amendment. *See id.* at 627. This understanding is consistent with the leading pre-*Heller* Supreme Court precedent concerning the *type of arms* protected by the Second Amendment: *United States v. Miller*, 307 U.S. 174 (1939). In that case, the Court held that short-barreled shotguns

were not eligible for Second Amendment protection because they were not "in common use at the time." *Id.* at 178-79.

It follows from the "common use" test that "weapons not typically possessed by law-abiding citizens for lawful purposes" are not eligible for Second Amendment protection. *Heller*, 554 U.S. at 625. Accordingly, this Court in *Heller* found the "common use" test to be consistent with the historical prohibitions on "the carrying of dangerous and unusual weapons." *Id.* at 627 (quotation marks omitted). That is because firearms in common use by definition cannot be considered dangerous and unusual.

Disregarding *Heller*'s careful analysis of the meaning and scope of the Second Amendment, the court below zeroed in on an aside regarding "M–16 rifles and the like." It misunderstood this language to identify a separate exception to the scope of the Second Amendment. Specifically, it concluded that it need not consider whether the banned arms are in common use for lawful purposes, Pet.App.45, because "*Heller* also presents us with a dispositive and relatively easy inquiry: Are the banned assault weapons and large-capacity magazines 'like' 'M–16 rifles,' i.e., 'weapons that are most useful in military service,' and thus outside the ambit of the Second Amendment?" Pet.App.45-46 (citing *Heller*, 554 U.S. at 627). It then proceeded to explain that the salient characteristic of M–16 rifles is that they are "weapons that are most useful in military service" and to conclude that *Heller*'s inquiry excluded from the scope of the Second

Amendment any arm that is more useful in military service than it is for other lawful purposes, like self-defense. Pet.App.47-48.

The M–16 passage upon which the court below relies follows upon the heels of the Court's recognition of "the historical tradition of prohibiting the carrying of dangerous and unusual weapons." It states in full as follows:

> It may be objected that if weapons that are most useful in military service—M–16 rifles and the like—may be banned, then the Second Amendment right is completely detached from the prefatory clause. But as we have said, 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. It may well be true today that a militia, to be as effective as militias in the 18th century, *would require sophisticated arms that are highly unusual in society at large*. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.

Heller, 554 U.S. at 627-28 (emphasis added).

The full context of its statement concerning "M–16 rifles and the like" makes it clear that the Court was not recognizing a free-standing exception to the scope of the Second Amendment. Instead, it was attempting to justify the fact that the historically-based exclusion of weapons that are not in common use may result in the prohibition of the very arms that are most useful for modern military service (i.e., arms that are more useful *than other arms* for military service). Although this result is in some tension with the Amendment's prefatory clause, the Court explains why it does not cast doubt on the construction of the Second Amendment announced in *Heller*.

While this passage confirms that the prefatory clause does not compel the conclusion that "weapons that are most useful in military service"—and only "weapons that are most useful in military service"—enjoy constitutional protection, it would be counterintuitive indeed if a firearm's usefulness for military service were a disqualifying characteristic. *Id.* As *Heller* makes clear, the potential for privately held arms to be useful for use in militia service was the main reason the Second Amendment was codified in the Constitution to begin with, even if its protection extended beyond that motivating concern to encompass the possession of arms for private self-defense. *Id.* at 599.

The correct interpretation of the Court's statement is confirmed by its context, in which the Court was describing *historical* limitations on the right to keep and bear arms. Because "[l]ogic demands that

there be a link between the stated purpose and the command" of the Second Amendment, *id.* at 577, and because the stated purpose of the Second Amendment was to prevent the elimination of the militia, there could be no historical basis for excluding "weapons that are most useful in military service" *because* they are useful in military service. The Court was merely confronting the possibility "that modern developments have limited the degree of fit between the prefatory clause and the protected right" *incidentally*, by resulting in a type of warfare in which the "most useful" weapons are those that are "highly unusual in society at large" and are therefore subject to prohibition notwithstanding the Second Amendment. *Id.* at 627-28.

In short, a firearm is protected by the Second Amendment if it is in "common use," irrespective of whether it is also useful for military service. By holding that arms in common use are not protected by the Second Amendment because they purportedly are more useful for military service than for other lawful purposes, the court below erred.

It is clear that semiautomatic rifles are not "most useful" for military service in any event. *See* Pet.App.96 (Traxler, J., dissenting). As this Court recognized in *Staples*, the AR-15 rifle, the paradigmatic type of firearm that Maryland seeks to ban, is a "civilian" rifle. 511 U.S. 600, 603 (1994). Whereas it is a "semiautomatic," "[t]he M–16 . . . is a selective fire rifle that allows the operator, by rotating a selector switch, to choose semiautomatic or automatic fire." *Id.*

This major functional difference is one this Court has identified as marking the boundary between firearms that "traditionally have been widely accepted as lawful possessions" and those that have not. *Id.* at 612. The difference has significant practical consequences. Contrary to the Fourth Circuit's assertion that the rates of fire of semiautomatic and automatic firearms are "nearly identical," the United States Army sets the maximum effective rates of M–16 rifles in semiautomatic mode at less than one-third that of the same arms operating in fully automatic mode. Pet.App.96-97. What is more, that maximum effective semiautomatic rate of fire is about one round per second, nowhere near the six rounds per second posited by the Fourth Circuit. *Id*. at 97. At any rate, the fact that the military uses rifles capable of automatic fire, as opposed to the strictly semiautomatic AR-15, cements the conclusion that the AR-15 is not among the firearms "that are most useful in military service." *Heller*, 554 U.S. at 627.

B. The Decision Below Is Part of a Growing Trend of Lower Courts Disregarding the "Common Use" Test.

The decision below is not an isolated mistake, but part of a growing trend of lower courts disregarding *Heller*, and especially the "common use" test.

In *Caetano v. Massachusetts*, this Court reviewed a decision of the Massachusetts Supreme Judicial Court upholding a ban on stun guns on the grounds

that such arms are dangerous and were not in common use at the time the Second Amendment was ratified. 136 S. Ct. 1027, 1027 (2016). The Court considered *Heller*'s holding that weapons in common use are protected by the Second Amendment to be so straightforward that it unanimously vacated the decision, without argument. *Id.* at 1028.

Unfortunately, the Massachusetts Supreme Judicial Court is not alone in disregarding *Heller*'s clear command. In *Friedman v. City of Highland Park*, the Seventh Circuit upheld a municipal ban similar to the ban at issue in this case, even though the record was "unequivocal" that semiautomatic rifles are in common use. 784 F.3d 406, 415 (7th Cir. 2015) (Manion, J., dissenting). The panel majority expressly declined to consider whether an arm is "commonly owned for lawful purposes." *Id.* at 408-09. Although the test the Seventh Circuit articulated differs in certain respects from that "like the M–16" test developed by the court below, that court similarly disregarded *Heller*'s clear holding to devise a test of its own making.

The Court did not grant certiorari in *Friedman*, but since that time, the lower courts' confusion concerning *Heller* has grown more pronounced. As the decision below demonstrates, even this Court's unanimous reaffirmation of the common-use test in *Caetano* has not sufficed to ensure lower courts follow *Heller*'s clear instructions. Today, in consequence, the exact same arms enjoy different measures of constitutional protection across different jurisdictions. *Compare* Pet.App.8-77 (semiautomatic rifles and magazines

outside the scope of the Second Amendment), *and Friedman*, 784 F.3d 406 (semiautomatic rifles outside the scope of the Second Amendment), *with N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015) (semiautomatic firearms and magazines presumptively protected by the Second Amendment but may be banned), *and Heller v. District of Columbia ("Heller II")*, 670 F.3d 1244 (D.C. Cir. 2011) (same), *and Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015) (magazines protected by the Second Amendment but likely may be banned), *with Duncan v. Becerra*, 2017 WL 2813727 (S.D. Cal. June 29, 2017) (magazines protected by the Second Amendment and likely may not be banned). This result is at odds with the Second Amendment, which "takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon," *Heller*, 554 U.S. at 634.

II. The Court Should Grant Certiorari Because Maryland's Ban Violates the Second Amendment.

The Court routinely grants certiorari to vindicate constitutional rights, even in the absence of other factors militating in favor of review. *See, e.g.*, *Glossip v. Gross*, 135 S. Ct. 1885 (2015) (Eighth Amendment); *Ontario v. Quon*, 560 U.S. 746 (2010) (Fourth Amendment); *Hill v. Colorado*, 530 U.S. 703 (2000) (First Amendment). The State of Maryland has struck at the heart of the Second Amendment by banning a large category of arms that are in common use in the United

States. The Court should grant certiorari to safeguard the fundamental rights of citizens of Maryland.

The Second Amendment safeguards an "individual right to possess and carry weapons in case of confrontation." *Heller*, 554 U.S. at 592. Because that right is among the "fundamental rights necessary to our system of ordered liberty," States are prohibited by the Fourteenth Amendment from infringing it. *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010) (Alito, J., opinion).

1. Despite the Second Amendment's specific protection of "the right of the people to keep and bear Arms," U.S. CONST. amend. II, the State of Maryland bans some of this Nation's most popular arms through its ban on certain semiautomatic firearms (inaccurately labeled "assault weapons") and standard-capacity magazines capable of holding more than ten rounds of ammunition. *See* MD. CODE ANN., CRIM. LAW §§ 4-303(a), 4-305(b). The banned firearms include America's "most popular semi-automatic rifle," the AR-15. *Heller II*, 670 F.3d at 1287 (Kavanaugh, J., dissenting); *see* MD. CODE ANN., CRIM. LAW § 4-301(d); MD. CODE, PUB. SAFETY § 5-101(r)(2)(xv). Indeed, the State has admitted that the banned AR-15 is the "most popular type of centerfire semiautomatic rifle in the United States." Defs.' Mem. in Supp. of Mot. for Summ. J. at 8, CA JA2744.[2] Between 1990 and 2012, American manufacturers produced nearly 5 million AR-platform rifles for the domestic market. *See* CA

[2] Citations to the record below are given as "CA JA___."

JA1877. When imported AR- and AK-platform rifles are added in, the total number increases to over 8 million. *See id.*; Pet.App.86. A survey of firearms retailers found that over 20% of all firearms sold in 2012 were "modern sporting rifles" such as the AR-15s, making them second in popularity only to semiautomatic handguns among all firearms. CA JA1979; Pet.App.86; *see also* Pet.App.86-90 (collecting additional facts and statistics concerning the popularity of semiautomatic rifles).

The banned magazines are standard equipment on many of this Nation's most popular firearms. *See* CA JA2096; Pet.App.88. Americans own approximately 75 million magazines capable of holding more than ten rounds of ammunition, a number that amounts to nearly half of all magazines owned in this country. *See* CA JA1880.

Maryland's ban on some of this Nation's most popular semiautomatic firearms and standard-capacity ammunition magazines infringes the Second Amendment rights of the people of the State. Indeed, *Heller* demonstrates that Maryland's ban is flatly unconstitutional.

First, *Heller* establishes that the semiautomatic firearms and ammunition magazines that Maryland bans are protected by the Second Amendment. As explained above, *Heller* recognizes that the Second Amendment "extends, prima facie, to *all* instruments that constitute bearable arms." *Heller*, 554 U.S. at 582 (emphasis added). The government thus bears the

burden to show that any bearable arms that it seeks to ban are unprotected. To do so it must show that such arms are "not typically possessed by law-abiding citizens for lawful purposes," but rather are "highly unusual in society at large." *Id*. at 625, 627.

Heller's standard for identifying protected arms is based on historical practices and "the historical understanding of the scope of the right." *Id*. at 625. On the one hand, "[t]he traditional militia" that the Second Amendment was designed to protect "was formed from a pool of men bringing arms in common use at the time for lawful purposes like self-defense." *Id*. at 624 (quotation marks omitted). On the other hand, the right to bear arms coexisted with a "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.' " *Id*. at 627.

As explained above, the banned semiautomatic firearms and banned ammunition magazines are far from unusual. Millions of Americans own millions of them, and they are among the most popular firearms and magazines in the country. It follows that the banned items are protected by the Second Amendment.

Second, *Heller* establishes that arms protected by the Second Amendment *cannot be banned*. The text of the Second Amendment provides that "the right of the people to keep and bear *Arms*, shall not be infringed." U.S. CONST. amend. II (emphasis added). It follows that there are certain "instruments that constitute

bearable arms," *Heller*, 554 U.S. at 582, that law-abiding, responsible, adult citizens have an inviolable right to acquire, possess, and use.

Heller confirms this implication of the constitutional text. There, this Court held that the Second Amendment "*elevates above all other interests* the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635 (emphases added). Thus, all that needs to be done to resolve a challenge to a flat ban of certain firearms is to determine whether they are "arms" protected by the Second Amendment. *Caetano*, 136 S. Ct. at 1033 (Alito, J., concurring in judgment) (concluding that a "categorical ban" of arms that "are widely owned and accepted as legitimate means of self-defense across the country" "violates the Second Amendment"); *Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from denial of certiorari) ("Under our precedents, that [a firearm is in common use] is all that is needed for citizens to have a right under the Second Amendment to keep such weapons."). Any further evaluation of allegedly competing public-policy considerations is foreclosed by the constitutional text. That text is the "very *product* of an interest balancing by the people," and "[t]he very enumeration of the right [to keep and bear arms] takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634, 635 (emphases in original).

Consistent with this reasoning, this Court's decisions addressing restrictions on certain types of firearms have turned on whether the firearms in question were constitutionally protected. In *Heller*, of course, this Court found that handguns are "arms" protected by the Second Amendment, and thus struck down the District of Columbia's "absolute prohibition of handguns held and used for self-defense in the home" as a "policy choice[ ]" that the Second Amendment takes "off the table." *Id.* at 636. In *United States v. Miller*, 307 U.S. 174 (1939), by contrast, the Court found that "the type of weapon at issue [a short-barreled shotgun] was not eligible for Second Amendment protection," *Heller*, 554 U.S. at 622 (emphasis omitted), and thus affirmed an indictment for transporting such a firearm in interstate commerce without registering it with the federal government.

McDonald confirms this understanding of this Court's precedents. There, the Court explained that, "in *Heller*, . . . we found that [the Second Amendment] right *applies* to handguns . . . . Thus, we concluded, citizens *must* be permitted to use handguns for the core lawful purpose of self-defense." *McDonald*, 561 U.S. at 767-68 (emphasis added) (brackets and quotation marks omitted). In other words, once it is determined that the Second Amendment applies to a certain type of firearm, it necessarily follows that law-abiding, responsible citizens have the right to possess that type of firearm for self-defense.

In sum, this Court's authority establishes that Maryland's ban is unconstitutional. Because the Second Amendment right applies to the popular semiautomatic firearms and standard-capacity ammunition magazines that Maryland bans, law-abiding citizens must be permitted to acquire and use them.

2. Perhaps recognizing the tension between its primary holding and the Constitution and this Court's precedents, the Fourth Circuit alternatively held that, even if the arms subject to Maryland's ban were protected by the Second Amendment, the ban survives intermediate scrutiny. This holding does not provide an alternative ground to uphold the decision below.

Even were a tiers-of-scrutiny analysis justified (as just explained, it is not), the court below erred in holding that intermediate scrutiny, rather than strict scrutiny, applies to a ban on popular semiautomatic firearms and standard-capacity ammunition magazines. As an initial matter, the Fourth Circuit's reliance on *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), as a touchstone for intermediate scrutiny analysis is a clear red flag, because the "*Heller* majority flatly *rejected* [the] *Turner Broadcasting*-based approach" that "Justice Breyer's *dissent* explicitly advocated." *Heller II*, 670 F.3d at 1280 (Kavanaugh, J., dissenting) (emphases added). Whereas *Turner* compels "substantial deference to the predictive judgments of [the legislature]," Pet.App.55-56 (alteration in original), *Heller* recognizes that it is the "interest balancing by the people" who ratified the Second Amendment that commands deference in

cases concerning burdens on the right to keep and bear arms, "whether or not future legislatures. . . think [the] scope [of that right] too broad." *Heller*, 554 U.S. at 635. *Heller* thus establishes that "cases applying intermediate scrutiny" do not provide the proper mode of analysis for reviewing a flat ban on protected arms. *Id.* at 704 (Breyer, J., dissenting).

A ban on protected arms strikes at the very heart of a fundamental, enumerated constitutional right. To avoid treating the Second Amendment as a "second-class" right, *McDonald*, 561 U.S. at 780 (Alito, J., opinion), such a ban at a minimum must be reviewed under strict scrutiny. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (applying strict scrutiny to law targeting practices of particular religion); *Brown v. Entertainment Merch. Ass'n*, 564 U.S. 786, 799 (2011) (applying strict scrutiny to law targeting content of protected speech).

The Fourth Circuit nevertheless held that intermediate scrutiny applies because Maryland's ban "leav[es] citizens free to protect themselves with a plethora of other firearms and ammunition." Pet.App.50. But "restating the Second Amendment right in terms of what IS LEFT after the regulation rather than what EXISTED historically, as a means of lowering the level of scrutiny, is exactly backward from *Heller*'s reasoning." *National Rifle Ass'n of America, Inc. v. BATFE*, 714 F.3d 334, 345 (5th Cir. 2013) (Jones, J., dissenting from denial of rehearing en banc). *Heller* establishes that a ban on certain protected arms cannot be justified by the availability of

other protected arms that are not banned. "It is no answer," *Heller* held, "to say . . . that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed." 554 U.S. at 629. As the D.C. Circuit decision affirmed by *Heller* put it, the District of Columbia's attempt to justify its handgun ban on the grounds that " 'residents still have access to hundreds more' " types of firearm was "frivolous." *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007).

Even on its own terms, however, the en banc court erred. Maryland's ban cannot survive even intermediate scrutiny, and the Fourth Circuit's analysis to the contrary is both unavailing and reinforces the impropriety of this form of review.

The court below reasoned that Maryland has a compelling "interest in the protection of its citizenry and the public safety," and that there is a "reasonable fit" between the ban and that interest because "by reducing the availability of such weapons and magazines overall, the FSA will curtail their availability to criminals and lessen their use in mass shootings, other crimes, and firearms accidents." Pet.App.53-55.

The problem is that the decision below, and the record on which it was based, provide little evidence to back this assertion up. Even under intermediate scrutiny, the government bears the burden to demonstrate that its law was "designed to address a real harm" and that it "will alleviate [that harm] in a material way." *Turner*, 520 U.S. at 195. In determining

whether the government has carried this burden, *Turner* instructs courts to ensure that the legislature "grounded" its judgment on "reasonable factual findings supported by evidence that is substantial for a legislative determination." *Id*. at 224. The government may not rely upon mere "anecdote and supposition." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 822 (2000). Instead, the government must identify evidence substantial enough to support a determination that its ban will advance public safety in a material way.

Taking the goal of crime reduction as an illustration, available evidence points the other way. Experience shows that violent criminals are unlikely to care whether any particular firearm or magazine they want to use is banned. Indeed, "most of the methods through which criminals acquire guns and virtually everything they ever do with those guns are *already* against the law." JAMES D. WRIGHT & PETER H. ROSSI, ARMED & CONSIDERED DANGEROUS xxxv (2d ed. 2008). In order for a ban to work, then, it must at a minimum make it more difficult for criminals to obtain the banned items. Yet the available evidence indicates that a State ban on popular semiautomatic firearms and standard-capacity ammunition magazines *will not* decrease criminal misuse of the banned items. Indeed, Maryland's own expert, Professor Christopher Koper, concluded that a 10-year *national* ban *did not* result in "a clear decline in the use of" banned semiautomatic rifles (as opposed to banned semiautomatic handguns) and "*fail[ed]* to reduce"

criminal use of banned magazines. CA JA410 (emphasis added). While bans like Maryland's may be stricter than the federal ban in certain respects, they are almost certain to be less effective because they *do not apply in the vast majority of states that lack similar bans*. CA JA489. Given this state of the evidence, it is sheer speculation whether or not a ban like Maryland's actually will reduce criminal use of the banned firearms or magazines. And this speculation cannot satisfy intermediate scrutiny.

That the Fourth Circuit's flawed reasoning would support the very firearms ban struck down in *Heller* underscores the impropriety of intermediate scrutiny. *Heller* struck down the District of Columbia's ban on the possession of handguns in the teeth of far more robust social science evidence that the banned arms posed a threat to public safety. As Justice Breyer noted in dissent in that case, it is indisputable that handguns "are the overwhelmingly favorite weapon of armed criminals." 554 U.S. at 682 (Breyer, J., dissenting). "From 1993 to 1997," for example, "81% of firearm-homicide victims were killed by handgun," and "[i]n a 1997 survey of inmates who were armed during the crime for which they were incarcerated, 83.2% of state inmates and 86.7% of federal inmates said that they were armed with a handgun." *Id.* at 697-98. In Maryland, criminals appear to favor handguns by an even more overwhelming margin. *See Woollard v. Gallagher*, 712 F.3d 865, 877 (4th Cir. 2013) (noting that in Maryland in 1997, "97.4% of all

homicides by firearm were committed with handguns"). According to Professor Koper, by contrast, so-called "assault weapons" "are used in a small fraction of gun crimes," largely because they "are more expensive and more difficult to conceal than the types of handguns that are used most frequently in crime." CA JA423-24 (citation omitted); *see also* GARY KLECK, TARGETING GUNS 112 (2006) (evidence indicates that "well under 1% [of crime guns] are 'assault rifles.' "). If there were any plausible case that the Government is justified in banning semiautomatic rifles because of its "interest in the protection of its citizenry and the public safety," Pet.App.53, it would follow *a fortiori* that the ban in *Heller* was justified by this interest. Yet the majority in *Heller did not even discuss* the District's interest in preventing violent crime, except to note that while "[t]he Constitution leaves the District of Columbia a variety of tools for combating that problem, . . . the enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home." *Heller*, 554 U.S. at 636. The same reasoning applies to the commonly held arms at issue here.

CONCLUSION

For the above reasons, this Court should grant the writ and reverse the judgment of the Fourth Circuit.

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Respectfully submitted,

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