No. 17-127

In the

Supreme Court of the United States

STEPHEN KOLBE, ET AL.,

Petitioners,

v.

LAWRENCE J. HOGAN, GOVERNOR 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 *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Center for Constitutional Jurisprudence
c/o Fowler School of Law
Chapman University
One University Drive
Orange, CA 92866
(877) 855-3330
caso@chapman.edu

Counsel for Amicus Curiae

QUESTIONS PRESENTED

1. Whether *Heller* excludes the most popular semiautomatic rifles and magazines from Second Amendment protection and whether such weapons may be banned even though they are typically possessed for lawful purposes, including self-defense in the home?

2. What standard of review should courts employ when considering regulation of the fundamental right of self-defense protected by the Second Amendment?

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES...................................... iii
INTEREST OF AMICUS CURIAE..............................1
SUMMARY OF ARGUMENT......................................1
REASONS FOR GRANTING THE WRIT...................4
I. The Right to Bear Arms Protected by the Second Amendment Is a Codification of the Natural Right of Self-Defense. 4
II. Infringement of a Textually Explicit Fundamental Right Should Be Reviewed Under Strict Scrutiny... 7
CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Aptheker v. Secretary of State,
378 U.S. 500 (1964)..7

District of Columbia v. Heller,
554 U.S. 570 (2008)....................................... passim

Dunn v. Blumstein,
405 U.S. 330 (1972)..7

Florida Bar v. Went For It, Inc.,
515 U.S. 618 (1995)..8

Friedman v. City of Highland Park,
136 S. Ct. 447 (2015)..3, 10

Heller v. District of Columbia,
670 F.3d 1244 (D.C. Cir. 2011)...............................8

Jackson v. City and County of San Francisco,
746 F.3d 953 (9th Cir. 2014) 8

Kachalsky v. County of Westchester,
701 F.3d 81 (2d Cir. 2012).......................................8

Kadrmas v. Dickinson Pub. Sch.,
487 U.S. 450 (1988)..7

Kolbe v. Hogan,
849 F.3d 114 (4th Cir. 2017) ....i, 1, 7

Kramer v. Union Free School District,
395 U.S. 621 (1969)..7

Moore v. Madigan,
702 F.3d 933 (7th Cir. 2013) 4

National Rifle Ass'n v. BATF,
700 F.3d 185 (5th Cir. 2012) 8

Perry Educ. Ass'n v. Perry Local Educators' Ass'n,
460 U.S. 37 (1983)..7

Peruta v. California,
137 S. Ct. 1995 (2017)..................................1, 3, 10

Police Dept. of the City of Chicago v. Mosley,
408 U.S. 92 (1972)..7

San Antonio Indep. Sch. Dist. v. Rodriguez,
411 U.S. 1 (1973)..7

United States v. Carolene Products,
304 U.S. 144 (1938)..7

United States v. Cruikshank,
92 U.S. 542 (1876)..6

Washington v. Glucksberg,
521 U.S. 702 (1997)..7

Other Authorities

Center for Disease Control, First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws (available at https://www.cdc.gov/mmwr/preview/mmwrhtml /rr5214a2.htm 2

Cicero, Marcus Tullis, SELECTED SPEECHES OF CICERO (Michael Grant ed. and trans., 1969).........6

Cramer, Clayton E. and Burnett, David, TOUGH TARGETS, WHEN CRIMINALS FACE ARMED RESISTANCE FROM CITIZENS (Cato Institute, 2012) 2, 9

FBI Expanded Homicide Data Table 8 (available at https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/ offenses-known-to-law-enforcement/expanded-homicide/expand-

ed_homicide_data_table_8_murder_victims_by_weapon_2009-2013.xls 2

Grotius, Hugo, THE RIGHTS OF WAR AND PEACE (A.C. Campbell trans., 1901) 6

Halbrook, Stephen P., THAT EVERY MAN BE ARMED (Univ. of New Mexico Press 2013) 5

Hobbes, Thomas, LEVIATHAN (Richard Tuck ed., 1991) 6

Kates, Don B. and Mauser, Gary, *Would Banning Firearms Reduce Murder and Suicide?*, 30 Harv. J. Law & Pol. 649 (2007) 3

Kopel, David, Gallant, Paul & Eisen, Joanne D., *The Human Right of Self Defense*, 22 BYU J. Pub. Law 43, (2007-2008) 6

Locke, John, SECOND TREATISE OF CIVIL GOVERNMENT (1690) 6

Rules

Sup. Ct. Rule 37.2(a) 1

Sup. Ct. Rule 37.6.. 1

INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life. This includes the principle at issue in this case that the preexisting fundamental right of armed self-defense is protected by the Second Amendment against state regulation not supported by a compelling interest. The Center has previously participated in a number of cases before this Court addressing the Second Amendment, including *Peruta v. California*, 137 S. Ct. 1995 (2017) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

SUMMARY OF ARGUMENT

The State of Maryland banned law-abiding citizens from owning an AR-15 rifle. This is "the most popular civilian rifle design in America." *Kolbe v. Hogan*, 849 F.3d 114, 128-29 (4th Cir. 2017). Indeed, Maryland uses it for its own police force and, under the law, retired officers are permitted to own the otherwise banned weapons. *Id*. at 146-47.

The FBI apparently does not publish statistics for crimes committed with specific types of rifles. But the statistics they do keep show that it is five times more likely for a homicide to be committed with a knife than

---

[1] Pursuant to Rule 37.2(a), all parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amici* made a monetary contribution to fund the preparation and submission of this brief.

all types of rifles combined.[2] It is four times more likely that a homicide was committed with a blunt object or by punching and kicking than by a rifle. In 2013, of the 12,243 homicides committed, rifles were only used in 285 cases – about two. An AR-15 is only one type of rifle included in that small number. Further, between 1992 and 2011, the homicide rate where any type of firearm was used declined by 49 percent.[3]

While it is rare for a rifle of any type to be used in the commission of a homicide, it is quite common for firearms (including rifles) to be used in self-defense. One study showed that there were "2.45 million defensive gun uses per year in the United States." Clayton E. Cramer and David Burnett, TOUGH TARGETS, WHEN CRIMINALS FACE ARMED RESISTANCE FROM CITIZENS (Cato Institute, 2012) at 3. This includes so-called "assault" rifles. *Id*. at 13. Banning any type of firearm that is in common use is almost certainly going to put a law-abiding citizen at risk. Available data from the Center for Disease Control show that there is no reliable evidence that banning a class of weapons has any effect on preventing violence. Some studies show a decrease in violence while other studies show an increase.[4]

---

[2] FBI Expanded Homicide Data Table 8 (available at https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/offenses-known-to-law-enforcement/expanded-homicide/expanded_homicide_data_table_8_murder_victims_by_weapon_2009-2013.xls (last visited August 24, 2017)).

[3] *Id*.

[4] Center for Disease Control, First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws (available at https://www.cdc.gov/mmwr/preview/mmwrhtml/rr5214a2.htm (last visited August 24, 2017). *See* Don B. Kates

Since the Maryland law is quite likely to put law-abiding citizens at risk, taking away an entire class of weapons that law abiding citizens can use to defend themselves, while at the same time almost certainly not accomplishing any public safety goals, one might ask how such a law survived *any* sort of scrutiny. It appears that the court below applied a rational basis review masquerading as "intermediate" scrutiny. The court did not give any weight to the fundamental nature of the right of armed self-defense in reviewing the law.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court declined to settle on a standard of review beyond its rejection of a "judge-empowering 'interest-balancing inquiry'"—that is, beyond its rejection of rational basis review. *Id*. at 634-35. Whatever the reason for leaving the question of the standard of review to a later decision, it is time for the Court to take up that question now. The continued delay relegates the "Second Amendment to a second-class right." *Friedman v. City of Highland Park*, 136 S. Ct. 447, 450 (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (2015); *see Peruta v. California*, 137 S. Ct. at 1999 (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari).

The right to armed self-defense is a natural right that predates the Second Amendment. It is a "fundamental right" in every sense the Court uses that term. As such, restrictions on that right—such as outlawing an entire class of weapons that is one of the most popular in America—should be judged by strict scrutiny.

---

and Gary Mauser, *Would Banning Firearms Reduce Murder and Suicide?*, 30 Harv. J. Law & Pol. 649, 685-86 (2007).

Even if there is some reason to denigrate this fundamental natural right by subjecting legislative infringements to "intermediate scrutiny," that scrutiny must focus on the facts before the legislature that the infringement will actually accomplish something. The Maryland law here will only put law-abiding citizens at greater risk by taking away a means of self-defense.

REASONS FOR GRANTING THE WRIT

I. The Right to Bear Arms Protected by the Second Amendment Is a Codification of the Natural Right of Self-Defense.

This Court has held, twice, that Second Amendment protects an "individual right to keep and bear arms for the purpose of self-defense." *McDonald*, 561 U.S. at 748; *District of Columbia v. Heller*, 554 U.S. at 599.

This Court's decision in *Heller* explored the right's origins, noting that the 1689 English Bill of Rights explicitly protected a right to keep arms for self-defense. 554 U.S. at 593. In fact, by 1765, Blackstone was able to assert that the right to keep and bear arms was "one of the fundamental rights of Englishmen." *Id*. at 594. These principles were not unique to England as "Blackstone's assessment was shared by the American colonists." *Id*.; *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2013).

This Court in *Heller* acknowledged that the Second Amendment's protection of the right to "bear arms" was a right to "carry" a weapon. 554 U.S. at 584. This right to "carry" a weapon is inextricably linked to the right of self-defense. *Id*. at 585 and n.10. (citing 2 Collected Works of James Wilson at 1142 (K. Hall M. Hall

ed. 2007) (citing Pa. Const., Art. IX § 21 (1790)). The early state constitutions of Pennsylvania, Vermont, Indiana, Mississippi, Connecticut, Alabama Missouri, and Ohio explicitly protect the right to bear arms for self-defense, defense of the state, and as a protection against tyranny.[5]

The founders of the American Republic did not originate the concept of a right to bear arms in self-defense. The fundamental right of self-defense has long been recognized. Even Aristotle stated that "arms bearing" was an essential aspect of each citizen's proper role. Stephen P. Halbrook, THAT EVERY MAN BE ARMED (Univ. of New Mexico Press 2013) at 9.

The right to self-defense is a basic human right recognized throughout history. Hugo Grotius, THE RIGHTS OF WAR AND PEACE 76-77, 83 (A.C. Campbell

---

[5] *Heller*, 554 U.S. at 585 and n.8, 602 (citing Pa. Declaration of Rights § 13 (1776) ("That the people have a right to bear arms for the defence of themselves and the state."); Vt. Declaration of Rights § 15 ("That the people have a right to bear arms for the defence of themselves and the State."); Ky. Const. of 1792, art. XII, § 23 ("That the right of the citizens to bear arms in defence of themselves and the State shall not be questioned."); Ohio Const. of 1802, art. VIII, § 20 ("That the people have a right to bear arms for the defence of themselves and the State."); Ind. Const. of 1816, art. I, § 20 ("That the people have a right to bear arms for the defense of themselves and the State."); Miss. Const. of 1817, art. I, § 23 ("Every citizen has a right to bear arms, in defence of himself and the State."); Conn. Const. of 1818, art. I, § 17 ("Every citizen has a right to bear arms in defence of himself and the state."); Ala. Const. of 1819, art. I, § 23 ("Every citizen has a right to bear arms in defence of himself and the State."); Mo. Const. of 1820, art. XIII, § 3 ("That [the people's] right to bear arms in defence of themselves and of the State cannot be questioned.")).

trans., 1901) ("When our lives are threatened with immediate danger, it is lawful to kill the aggressor"); Marcus Tullis Cicero, SELECTED SPEECHES OF CICERO 222, 234 (Michael Grant ed. and trans., 1969) ("[Natural law lays] down that, if our lives are endangered by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right"); *see also* David Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self Defense*, 22 BYU J. Pub. Law 43, 58-92 (2007-2008) (detailing writings of early philosophers regarding the right and duty of self-defense).

John Locke identified this natural right of self-defense as the "fundamental, sacred, and unalterable law of self-preservation." John Locke, SECOND TREATISE OF CIVIL GOVERNMENT § 149 (1690). Locke understood, and subsequently argued, that the right to use force in self-defense is a necessity. *Id*. at § 207. The writings of Thomas Hobbes also recognize the right to self-defense as a self-evident proposition: "[a] covenant not to defend my selfe from force, by force, is always voyd." Thomas Hobbes, LEVIATHAN 98 (Richard Tuck ed., 1991).

There should not be a need to repeat these authorities. This Court already recognized that armed self-defense is a fundamental natural right. The Second Amendment codifies this preexisting right. *Heller*, 554 U.S. at 592. It is not a right "granted" by the Congress that proposed and the states that ratified the Bill of Rights. *United States v. Cruikshank*, 92 U.S. 542, 553 (1876).

II. Infringement of a Textually Explicit Fundamental Right Should Be Reviewed Under Strict Scrutiny.

In *United States v. Carolene Products*, 304 U.S. 144 (1938), this Court noted that enhanced scrutiny is especially appropriate when legislation trenches on "a specific prohibition of the Constitution, such as those of the first ten Amendments." *Id*. at 152 n.4. Thus, this Court has long recognized that the appropriate test for government action that burdens fundamental constitutional rights is strict scrutiny. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973); *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 101-02 (1972); *Dunn v. Blumstein*, 405 U.S. 330, 335-36 (1972). Regulations limiting non-textual fundamental rights are also tested by strict scrutiny. *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969).

Identification of a compelling interest alone is not sufficient when fundamental rights are at stake. The state must still prove that the regulation or ordinance is narrowly tailored to further that interest. *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964). This analysis applies when the regulation interferes with a constitutional right or a liberty interest recognized as "fundamental." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457-58 (1988); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983).

The Fourth Circuit, however, chose to apply what it termed "intermediate scrutiny," requiring merely that the government show that the restriction was "reasonably adapted to a substantial governmental interest." *Kolbe v. Hogan*, 849 F.3d at 133. The court

found that Maryland met this test because the banned guns could be used to endanger public safety. *Id*. at 139. This is consistent with the resistance to the decisions in *Heller* and *McDonald* that seems to underlie several decisions of the various Courts of Appeals. None apply strict scrutiny, notwithstanding that the laws they consider infringe on a textually explicit constitutional right. Instead, they, like the Fourth Circuit here, apply what they term "intermediate" scrutiny.[6] *E.g.*, *Jackson v. City and County of San Francisco*, 746 F.3d 953, 965 (9th Cir. 2014); *National Rifle Ass'n v. BATF*, 700 F.3d 185, 207 (5th Cir. 2012); *Kachalsky v. County of Westchester*, 701 F.3d 81, 96-97 (2d Cir. 2012); *Heller v. District of Columbia*, 670 F.3d 1244, 1262 (D.C. Cir. 2011). But standard of review applied by the Fourth Circuit and these other Circuit Courts of Appeal is not "intermediate scrutiny" as described by this Court.

Even under the laxer intermediate scrutiny standard, it is not enough merely to posit a public safety rationale. Instead, the state must demonstrate that the regulation at issue "advances the Government's interest in a direct and material way." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 624 (1995). This standard cannot be satisfied by mere conjecture, as was the case in the court below. Instead, the government must demonstrate that the restriction will actually alleviate some real harm in a material way. *Id*. at 626.

---

[6] Even the decision of the Seventh Circuit striking down a ban on carrying a weapon did not apply strict scrutiny. *Moore v. Madigan*, 702 F.3d at 941 ("[O]ur analysis is not based on degrees of scrutiny, but on Illinois's failure to justify the most restrictive gun law of any of the 50 states.")

The statistics cited above demonstrate that Maryland cannot carry this burden. The Center for Disease Control reviewed studies and concluded that it was not possible to demonstrate any decrease in gun violence by laws that banned a class of weapons.[7] Rifles of all types are rarely used in homicides.[8]

While there is little or no evidence that this infringement on the Second Amendment will advance public safety, the statistics show that it is quite likely to have the opposite effect. Americans use guns millions of times a year to protect themselves, their property, and the lives of others. TOUGH TARGETS, at 3. This defensive use of guns includes the exact gun now banned in Maryland. *Id.* at 13. A proper application of even "intermediate" scrutiny should have led the court to find the law in violation of the Second Amendment.

---

[7] *See* note 4, *supra*.
[8] *See* footnote 2, *supra*.

CONCLUSION

It is apparent that many legislators and judges are uncomfortable with guns. They do not share the desire of many Americans to own a weapon for self-protection or even just recreation. As many as five million Americans own the weapon that Maryland has banned. *Friedman*, 136 S.Ct. at 449 (Thomas, J., dissenting from denial of certiorari). Yet the Maryland legislators that enacted the ban and the judges that upheld it "work in marbled halls, guarded constantly by a vigilant and dedicated police force." *Peruta*, 137 S.Ct. at 1999-2000 (Thomas, J., dissenting from denial of certiorari). Ordinary Americans do not have that luxury. This Court has waited long enough to return to the question of the level of scrutiny for reviewing restrictions on Second Amendment rights. This case presents the Court the opportunity to do so.

DATED: August 2017

Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Center for Const'l Jurisprudence
c/o Chapman University
Fowler School of Law
One University Drive
Orange, CA 92866

Counsel for Amicus Curiae