No. 23-863

In the Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Petitioners agree with Maryland that this Court's decision in *Bruen* left *Heller* "undisturbed." Br. in Opposition at 13 ("BIO"). But that fact undermines Maryland's opposition. With respect to timing, this Court decided *Heller* in 2008, which refutes the argument that it is premature to address the question whether state bans on common semiautomatic rifles are consistent with the Second Amendment. With respect to the merits, a straightforward application of *Heller* demonstrates that Maryland's ban is unconstitutional. As *Heller* holds, and *Bruen* repeatedly confirms, law-abiding citizens have an absolute right to possess firearms that are in common use for lawful purposes. *See District of Columbia v. Heller*, 554 U.S. 570, 624–25 (2008); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 21, 31–32, 47 (2022). And there can be no question that the rifles Maryland bans are in common use—indeed, they include the most popular rifles in the history of the Nation.

To be sure, granting certiorari before judgment is not typical. But neither is the sua sponte seizure of this case by the en banc Fourth Circuit thirteen months after argument. Nor is the continued incapacity of lower courts to grasp the plain teaching of *Heller* in this context. *Cf. Friedman v. City of Highland Park*, 136 S. Ct. 447, 449–50 (2015) (Thomas, J., dissenting from denial of certiorari). This Court should grant certiorari to make "more explicit" what should have been apparent with the issuance of *Heller* in 2008—that the government simply lacks the authority to ban commonly possessed arms. *See Bruen*, 597 U.S. at 31.

I. Maryland's opposition underscores the importance of granting certiorari to correct a persistent and spreading misinterpretation of *Heller*.

There is broad agreement between the parties on the foundation of this case: *Bruen* left *Heller* undisturbed, and it was in *Heller* that this Court determined when a firearm can be banned consistent with the Second Amendment. Where the parties diverge is on what *Heller* said on that point and whether *Kolbe* accurately interpreted *Heller*. Those are not new questions; they are, rather, old questions that have taken on a new importance in the lower courts in the wake of *Bruen*.

Petitioners'[1] position is straightforward: *Bruen* reaffirmed *Heller*, and in *Heller*, this Court analyzed both the text and history of the Second Amendment to determine that while textually Americans presumptively have the right to keep and bear "all instruments that constitute bearable arms," 554 U.S. at 582, historically it carried the caveat that "dangerous and unusual weapons" could be banned, *id*. at 627. Consistent with this holding, this Court in *Bruen* confirmed that arms "in common use" cannot be banned without violating the Second Amendment. *Bruen*, 597 U.S. at 21 (cleaned up); *Heller*, 554 U.S. at 624–25. It follows that this is a straightforward case. The paradigmatic arm banned by Maryland is the AR-15 type rifle, the most popular type of rifle in American

[1] Dominic Bianchi and Micah Schaefer no longer reside in Maryland, and Field Traders LLC no longer does business there. Petitioner David Snope continues to reside in Maryland.

history, and one of the bestselling firearms of any type today. *See* Pet. 18–19. Such a firearm cannot be banned consistent with *Heller* and *Bruen*.

Even here, there is a modicum of agreement between the parties. Maryland effectively concedes that the "dangerous and unusual" limitation found in *Heller* is a rule derived from *history* (where *Bruen* makes clear the burden falls on the government to defend its law). *See* BIO at 16–17 (quoting *Heller*, 554 U.S. at 626–27). But Maryland disagrees that *Heller* announced just *one* rule governing the types of arms that can be banned, and it asserts that "this Court left no doubt that 'weapons that are most useful in military service—M-16 rifles and the like—may be banned.' " BIO at 1 (quoting *Heller*, 554 U.S. at 627).

As Petitioners have already explained, the "most useful in military service" language in *Heller* was not intended to create an additional test *beyond* the "dangerous and unusual" test but rather was an attempt to confront one of the apparent difficulties in applying that historical tradition to modern circumstances. *See* Pet. 15-16. It has *never* been the case that an arm can be banned *because* it is useful in military service. *Heller* instead was addressing the reality that in modern times, unlike at earlier periods of our history, *some weapons* (for example, machine guns) can be banned *despite* their utility in war because they are dangerous and unusual "in society at large." *Heller*, 554 U.S. at 627. As Petitioners have already explained, Maryland's reading gets this backwards and is nonsensical both as a matter of the Second Amendment's text and our Nation's history. Pet. 16.

Nevertheless, this pernicious and persistent misreading of *Heller* plagued the lower courts for years prior to *Bruen*, though its importance at the time was diminished by the fact that the courts of appeals commonly upheld the challenged bans either primarily or alternatively based on the application of interest balancing. *See Kolbe v. Hogan*, 849 F.3d 114, 142 (4th Cir. 2017) (en banc); *Duncan v. Bonta*, 19 F.4th 1087, 1102 (9th Cir. 2021) (en banc) (finding "significant merit" in *Kolbe*'s interpretation but resting its decision on the application of intermediate scrutiny), *vacated and remanded*, 142 S. Ct. 2895 (2022) (Mem.); *Worman v. Healey*, 922 F.3d 26, 36 (1st Cir. 2019) (reviewing district court decision that followed *Kolbe* but declining to decide whether AR-15s are "like M-16 rifles" and applying interest balancing to uphold law). With *Bruen*'s explicit eradication of interest balancing, courts have fewer ways to resist the obvious implications of *Heller*, and this error therefore has taken on heightened importance. *See Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 48 (1st Cir. 2024) ("Consider, too, an additional category of weapons that the Supreme Court has deemed outside the ambit of the Second Amendment: 'weapons that are most useful in military service.' " (quoting *Heller*, 554 U.S. at 627)); *Bevis v. City of Naperville*, 85 F.4th 1175, 1194 (7th Cir. 2023) (excluding from the scope of the Second Amendment "weapons that are exclusively or predominantly useful in military service"); *Hanson v. District of Columbia*, 671 F. Supp. 3d 1, 11–12 (D.D.C. 2023) (stating that " 'weapons that are most useful in military service' fall outside of Second Amendment protection" and declaring "*Kolbe* is no outlier" (first quoting *Heller*, 554 U.S. at 627)); *Or. Firearms Fed'n, Inc. v. Brown*, 644 F. Supp. 3d 782, 799–802 (D. Or.

2022) (favorably citing *Kolbe* and finding that magazines holding more than ten rounds were unprotected in part because they "are often used in law enforcement and military situations").

Given the heightened stakes of the analysis of the text and history of the Second Amendment in a post-*Bruen* context, while this issue merited correction before *Bruen*, *see Friedman*, 136 S. Ct. at 447 (Thomas, J., dissenting from the denial of certiorari), it even more urgently requires correction now. This Court has many times granted certiorari to correct important and widespread misunderstandings of its precedents. *See, e.g.*, *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (granting certiorari "to resolve an apparent conflict with this Court's precedents"). Meanwhile, waiting for a split here may be futile, as demonstrated by the Ninth Circuit's grant of rehearing en banc in *Teter v. Lopez*, 93 F.4th 1150 (9th Cir. 2024) (Mem.), and the Fourth Circuit's sua sponte grant of en banc review in this case before the panel could even issue a decision.

II. This case warrants certiorari before judgment.

A. Maryland offers no reason why further development of this case is necessary.

1. Maryland argues that the court of appeals must have the opportunity to assess, under *Bruen*, the validity of its historical argument in favor of its ban on common semiautomatic rifles. *See* BIO at 19–23. As already discussed, *Heller* already conducted the historical analysis, and Maryland's argument on this point proves the correctness of *Heller*'s conclusions.

First, Maryland points to a tradition of, it claims, banning "[d]angerous weapons," citing 37 laws from 22 states in the period from 1837-1929 that "restricted" various weapons in some way. BIO at 20–21.[2] This is, at most, *half* correct, as the State brazenly drops "unusual" from this Court's formulation. Entirely absent from the list of proffered analogues, *see id.* (referencing C.A. ECF 59 Add. A), is a single law even approaching one that outlaws mere possession of the most popular rifles in contemporary society. Furthermore, the laws Maryland relies on come much too late in time to be useful. All date to after the Founding period, which this Court has treated as most informative about the scope of the Bill of Rights, *Bruen*, 597 U.S. at 37, and more than half of them come from the twentieth century, a period *Bruen* did not even analyze

[2] As for the idea that the banned rifles are, in any relevant sense, "dangerous," Maryland's contention is unsupported. The State opens its brief by citing a discredited study, *see* BIO at 3 n.1, that greatly exaggerated the use of so-called "assault rifles" in mass shootings by counting *all* semiautomatic firearms, including *handguns*, as "assault rifles," *see* Charles DiMaggio et al., *Changes in US Mass Shooting Deaths Associated with the 1994-2004 Federal Assault Weapons Ban: Analysis of Open-Source Data*, 86(1) J. TRAUMA ACUTE CARE SURG. 1, 13 (2019); Louis Klarevas, *Letter to the editor re: DiMaggio, C. Et al. "Changes in U.S. mass shooting deaths associated with the 1994-2004 federal assault weapons ban: Analysis of open-source data*, 86(5) J. OF TRAUMA ACUTE CARE SURG.926, 926–28 (2019). And of the evidence it puts forward of "the unique brutality of gunshot wounds from assault weapons," BIO at 21, the only peer-reviewed study Maryland cites confirms that AR-15s are intermediate rifles that are underpowered compared to many rifles that Maryland has not banned (including one actual "weapon of war," the M1 Garand), *see* Peter M. Rhee et al., *Gunshot wounds: A review of ballistics, bullets, weapons, and myths*, 80(6) J. TRAUMA ACUTE CARE SURG. 853, 856 Tbls. 3 & 4 (2016).

because it was too remote from 1791 *or* 1868. 597 U.S. at 66 n.28. Of the seven laws that even predate the enactment of the Fourteenth Amendment, six come from states that would soon secede and join the Confederacy and so offer meager guidance on the proper understanding of the scope of the Bill of Rights. *See Hirschfeld v. BATFE*, 5 F.4th 407, 440 (4th Cir. 2021), *vacated as moot*, 14 F.4th 322.

Maryland's second set of allegedly similar historical regulations fares even worse. These laws banned the setting of "trap guns" (designed to fire when a "trap" is triggered, without a human choosing to fire the gun). These did not ban possession of any type of firearm, but merely criminalized a type of misuse (which is still criminalized in many places today). And as for the reliance on a handful of laws that the State claims restricted semiautomatic firearms, those laws were short lived aberrations, and in any event were concerned with ammunition capacity and were not flat bans on semiautomatic firearms. As this Court has noted, semiautomatic firearms, including AR-15 rifles, "traditionally have been widely accepted as lawful possessions[.]" *Staples v. United States*, 511 U.S. 600, 612 (1994).

To consider any of these analogues to vindicate Maryland's ban would not only misapply *Bruen* but also would directly contradict both *Staples* and *Heller*, which of course the Fourth Circuit may not do. There is, therefore, no reason that this case needs to wait for the Fourth Circuit to weigh these issues.

2. Maryland argues that there are "fact-intensive issues" in this case, including "the suitability of assault weapons for self-defense and whether those

weapons are in common use for that purpose" that must be analyzed by the district court in the first instance. BIO at 14–15. Neither concern is valid. As to the first point, whether any firearm is "suitable" for lawful purposes is not a question for the courts to answer at all. It is, instead, a question for the American people. That is how this Court approached the question in *Heller* when it surveyed possible reasons why a person might choose a handgun for home defense and then remarked that "*whatever the reason*," what mattered was that handguns were "the most popular weapon chosen by Americans for self-defense in the home." 554 U.S. at 629 (emphasis added). The Court accordingly rejected the Solicitor General's suggestion that the case be remanded for precisely the type of inquiry Maryland calls for here: "whether, and to what extent, long guns provide a functionally adequate alternative to handguns for self-defense in the home." Br. for the United States as Amicus Curiae, *District of Columbia v. Heller*, No. 07-290, 2008 WL 157201, at *31 n.9 (U.S. Jan. 11, 2008). Here, too, the choices of the American people decide the case: they have found the banned firearms useful for lawful purposes including self-defense. *See* Pet. 8–9. The AR-15 is second-best selling firearm type in the nation behind semiautomatic handguns, and unless *Heller* is to be confined to its facts and read to mean that *only* handguns are protected, then semiautomatic rifles including the AR-15 must be lawful for the same reason.

As to the question of whether the banned firearms are in common use, the matter is "beyond debate." *Kolbe*, 849 F.3d at 156 (Traxler, J., dissenting); *see* Pet. 7–8. They are owned by millions of Americans, they are the second-best selling firearm type in the

nation, and they have constituted approximately 20% of *all* firearms domestically produced for the American market for over a decade. Pet. 18. No development of the record is necessary. Indeed, the commonality of these firearms has been apparent for years. *See Friedman*, 136 S. Ct. at 449 (Thomas, J., dissenting from denial of certiorari) (finding common use because "[r]oughly five million Americans own" AR-15 style rifles); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 255 (2d Cir. 2015) (finding common use because "nearly four million units of a single assault weapon, the popular AR-15, have been manufactured between 1986 and March 2013"); *Heller v. District of Columbia,* 670 F.3d 1244, 1261 (D.C. Cir. 2011) (finding common use because "[a]proximately 1.6 million AR-15s alone have been manufactured since 1986"). And given their tremendous popularity, these arms only get more common every day, with over three times as many owners today than were reflected in Justice Thomas's dissent from denial of certiorari in *Friedman*. *See* Emily Guskin et al., *Why do Americans own AR-15s*, WASH. POST (Mar. 27, 2023), https://wapo.st/3IDZG5I ("[A]bout 16 million Americans own an AR-15."). This Court, in both *Heller* and again in *Bruen*, dismissed concerns from the Department of Justice and from New York that similar factual development was necessary. *See* Br. for the United States at 31 n.9, *District of Columbia v. Heller*, No. 07-290 (Jan. 2008); *Bruen*, 597 U.S. at 33 n.8. There is no more reason to require fact development here than there was in either of those cases.

B. This Court frequently has granted certiorari before judgment in recent years.

This Court has granted certiorari before judgment in a number of cases in recent years. *See Moyle v. United States*, No. 23-726 (Whether EMTALA preempts Idaho's Defense of Life Act.); *Idaho v. United States*, No. 23-727 (same); *Students for Fair Admissions v. Univ. of N.C.*, No. 21-707 (Whether institutions of higher education can constitutionally use race as a factor in admissions.); *Whole Women's Health v. Jackson*, 21-463 (Whether state law could limit federal-court review of a statute restricting abortions by delegating enforcement authority to the general public.); *ZF Auto. US, Inc. v. Luxshare, Ltd.,* 21-401 (Whether private commercial arbitral tribunals constitute "foreign or international tribunal[s]" within the meaning of 28 U.S.C. § 1782(a).); *Gish v. Newsom*, No. 20A120 (Whether COVID-19 related ban on indoor religious services violated the First Amendment.); *United States v. Higgs*, No. 20-927 (Whether a federal district court should identify an alternate state whose law shall prescribe the manner of executing a convict under 18 U.S.C. § 3596(a).);, *Robinson v. Murphy*, No. 20A95 (Whether COVID-19 related limitations on attendance at worship services and imposition of mask mandate at the same violated the First Amendment.) *High Plains Harvest Church v. Polis*, No. 20A105 (Whether COVID-19 related limitation on attendance at worship services violated the First Amendment.); *Harvest Roch Church, Inc. v. Newsom*, No. 20A94 (same); *Ross v. California*, No. 18-1214 (Whether district court erred in enjoining the Secretary of Commerce from including a citizenship

question on the 2020 census.); *Dep't of Commerce v. New York*, No. 18-966 (same); *Wolf v. Vidal*, No. 18-589 (Whether Department of Homeland Security decision to rescind DACA was reviewable and lawful under the APA.); *Trump v. NAACP*, No. 18-588 (same); *DHS v. Regents of the Univ. of Calif.*, No. 18-587 (same).

This case merits similar treatment. Indeed, there is nothing to gain from delay. The question of whether states may ban common semiautomatic rifles is a purely legal one that has been wrongly answered by the courts of appeals both before and after this Court's decision in *Bruen*. The correct answer to the question is straightforward under *Heller*. And the continued refusal of the lower courts to apply *Heller* properly in this context inflicts irreparable harm on Americans who are denied their fundamental constitutional right to protect themselves, their homes, and their families with common arms.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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Respectfully submitted,

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