No. 24-203

IN THE
Supreme Court of the United States

DAVID SNOPE, *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 *Amici Curiae* of Gun Owners of America, Gun Owners Fdn., Gun Owners of California, Heller Foundation, Tennessee Firearms Assn., Tennessee Firearms Fdn., Va. Citizens Defense League, Va. Citizens Defense Fdn., Grass Roots N.C., Rights Watch Int'l, America's Future, U.S. Constitutional Rights Legal Def. Fund, and Conservative Legal Def. and Education Fund in Support of Petitioners

JOHN I. HARRIS, III
SCHULMAN, LEROY & BENNETT, P.C.
3310 West End Avenue
Suite 460
Nashville, TN 37203

WILLIAM J. OLSON*
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com
Attorneys for *Amici Curiae*
**Counsel of Record*

September 23, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners of America, Inc., Gun Owners Foundation, Gun Owners of California, Heller Foundation, Tennessee Firearms Association, Tennessee Firearms Foundation, Virginia Citizens Defense League, Virginia Citizens Defense Foundation, Grass Roots North Carolina, Rights Watch International, America's Future, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code.

These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

Some of these *amici* are currently litigating a challenge to an assault weapons ban imposed by the State of Illinois. After the Seventh Circuit denied injunctive relief, they filed a petition for certiorari (U.S. Supreme Court No. 23-1010), and litigation

---

[1] It is hereby certified that counsel of record for all parties received timely notice of the intention to file this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

continues below. *See Gun Owners of America, Inc., et al. v. Raoul, et al.*, 144 S. Ct. 2491 (July 2, 2024). Justice Alito would have granted that petition, and Justice Thomas issued a Statement explaining that while *Heller* provided some guidance, "[w]e have never squarely addressed what types of weapons are 'Arms' protected by the Second Amendment.... By contorting what little guidance our precedents provide, the Seventh Circuit concluded that the Second Amendment does not protect 'militaristic' weapons [which conclusion] seems unmoored from both text and history." *Id*.

STATEMENT OF THE CASE

In 2013, the Maryland legislature enacted its "Firearms Safety Act of 2013" ("the Act"), which effectively banned private possession of many semiautomatic weapons in the state. *Bianchi v. Brown,* 2024 U.S. App. LEXIS 19624, at *3 (4th Cir. 2024) ("*Bianchi*").

In a previous challenge by different parties, the Fourth Circuit upheld the Act. *See Kolbe v. Hogan,* 849 F.3d 114 (4th Cir. 2017).[2] Several years later, the plaintiffs brought this action challenging the Act again. The case was dismissed by the District of

[2] Some of these *amici* filed an *amicus* brief in support of the *Kolbe* challengers. *See* Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al., Kolbe v. Hogan* (Nov. 12, 2014). They also filed in support of *Kolbe*'s petition for certiorari, which was denied. *See* Brief *Amicus Curiae* of Gun Owners Foundation, *et al.*, *Kolbe v. Hogan*, U.S. Supreme Court No. 17-127 (Aug. 25, 2017).

Maryland, stating that *Kolbe* controlled. *See Bianchi v. Frosh*, 2021 U.S. Dist. LEXIS 271013 (D. Md. 2021). That dismissal was affirmed by the Fourth Circuit. *See Bianchi v. Frosh*, 858 Fed. Appx. 64 (4th Cir. 2021). After the plaintiffs filed their petition for writ of certiorari, this Court decided *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), granted the *Bianchi* petition, vacated the decision, and remanded the case for further consideration in light of *Bruen*. *See Bianchi v. Frosh*, 142 S. Ct. 2898 (2022).

On remand, the Fourth Circuit eventually ordered rehearing *en banc*. *Bianchi v. Brown*, 2024 U.S. App. LEXIS 974 (4th Cir. 2024). Upon rehearing *en banc*, the Fourth Circuit again upheld the Act, over a five-judge dissent, concluding that *Bruen* did not foreclose legislative determinations that assault weapons are not protected arms. *See Bianchi v. Brown*, 2024 U.S. App. LEXIS 19624 at *4-5 (4th Cir. 2024).

SUMMARY OF ARGUMENT

Maryland's law criminalizes possession of semiautomatic rifles, handguns, and shotguns artificially characterized as "assault weapons" — which are at core ordinary semiautomatic weapons and are "commonly used," if not ubiquitous among the gun owning public, except where banned by a few states. The Second Amendment two-step test used since 2010, used in *Kolbe* to circumvent *Heller* in approving Maryland's ban on assault weapons, was rejected in *Bruen*. The revised test used below allowed the court to circumvent *Bruen* to achieve the same result. One would think that the Fourth Circuit at

least would concede that "the Second Amendment's plain text covers an individual's conduct" in possessing such a weapon. *Bruen* at 17. That approach still would have allowed Maryland an opportunity to demonstrate "this Nation's historical tradition of firearm regulation." *Id*. Rather, the Fourth Circuit denied that the "plain text" of the Second Amendment covers millions of common "arms" by erroneously adding a "historical" component to what should have been a simple application of ordinary interpretive principles. *Bianchi* at *17.

The Fourth Circuit explained that: "The upshot is that the text of the Second Amendment, like the text of other constitutional provisions, must be interpreted against its historical and legal backdrop." *Id*. at *19. The Fourth Circuit misrepresents the threshold inquiry of the *Bruen* test. No words such as "historical and legal backdrop" appear in the *Bruen* decision. Clearly, the "plain text" of the Second Amendment presumptively protects bearable firearms which the Maryland law bans. If Maryland wants to defend its law and rebut the presumption that the Second Amendment protects so-called "assault weapons," it has the burden to demonstrate relevant historical analogues. But the Fourth Circuit should not be able to enable Maryland to evade that burden by shoehorning "historical background" into the "plain txt" analysis, almost identically to what it previously did at step one of the two-step test in *Kolbe*.

What Maryland bans as "assault weapons" are clearly bearable arms. Once the artifice used by the Fourth Circuit to empower the majority of judges on

that court to disarm Marylanders is understood, its conflict with both *Heller* and *Bruen* is apparent.

ARGUMENT

I. THE FOURTH CIRCUIT'S *BIANCHI* OPINION OPERATES TO CIRCUMVENT *BRUEN* JUST AS ITS *KOLBE* DECISION OPERATED TO CIRCUMVENT *HELLER*.

The Fourth Circuit contends that its decision is fully consistent with *Bruen*. In fact, the Fourth Circuit has a record of manipulating this Court's decisions to minimize Second Amendment rights. This process began two years after *District of Columbia v. Heller*, 554 U.S. 570 (2008), with the court's adoption of a two-step test in *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010). That same two-step test reached full flower when it was used to deny a challenge to Maryland's ban on assault weapons in *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017).

In *Kolbe*, the circuit court used an approach entirely expressly rejected in *Bruen*. In fact, the *Kolbe* court actually implemented part of the methodological approach recommended by Justice Breyer in dissent in *Heller*, urging use of judicial interest balancing which had been rejected in Justice Scalia's opinion for the Court. *Heller* at 634-35. The Fourth Circuit, then and now, believes that giving the text of the Second Amendment its natural meaning would impose substantive limitations on government power to control firearms. Of course, that is exactly why the

Second Amendment was proposed by Congress and ratified by the People.

In *Kolbe*, under step one of its two-step test, the Fourth Circuit explained:

> First, we ask "whether the challenged law imposes a burden on conduct falling within the **scope** of the Second Amendment's guarantee.... The answer to this question requires "an **historical inquiry**" into "whether the conduct at issue was understood to be within the scope of the right at the time of ratification." [*Kolbe* at 171-72 (quoting *Chester*) (emphasis added).]

Then, Step two authorized the court to engage in judicial interest balancing:

> "If the challenged regulation burdens conduct that was within the scope of the Second Amendment as historically understood, then we move to the second step of applying an appropriate form of means-end scrutiny." [*Id.* at 172 (citing *Chester*).]

Flatly rejecting this approach, Justice Thomas' opinion for the *Bruen* Court began with the memorable language that "despite the popularity of this two-step approach, it is one step too many." *Bruen* at 19. The Court then explained:

> In keeping with *Heller*, we hold that when the Second Amendment's **plain text covers an**

> **individual's conduct**, the Constitution **presumptively protects** that conduct. [*Bruen* at 17 (emphasis added).]

The "plain text" analysis requires a court to do nothing more than consider — the plain text: "the right of the people to keep and bear arms shall not be infringed." If the challenged restriction applies to a United States citizen — a member of "the people" — and if it applies to an "arm" and if it restricts the ability to "keep and bear" it, the "plain text" threshold is met.

Here, the *Bianchi* court refused to follow that methodlolgy. It explained its very different approach:

> Pursuant to *Bruen*, we begin by asking whether the "plain text" of the Second Amendment guarantees the individual right to possess the assault weapons covered by the Maryland statute.... **At first blush**, it may **appear that these assault weapons fit comfortably within the term "arms"** as used in the Second Amendment. We know however, that text cannot be read in a vacuum.... [*Bianchi* at *17 (emphasis added).]

The *Bianchi* court would have done well to have remained with its "first blush" approach, as that would have been consistent with *Bruen*.

Under *Bruen*, it is only after the plain text applies that other considerations come into play:

> To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, **the government must demonstrate** that the regulation is **consistent with this Nation's historical tradition** of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command. [*Bruen* at 17 (emphasis added).]

From this it can be seen that the *Bianchi* court has attempted to shove the historical inquiry into the threshold plain text inquiry. In this way, it seeks to transform the simple "plain text" inquiry into a complex, full-blown, historically based contextual analysis[3] which would give it the power to declare that the most popular rifles in America are not even "Arms." Indeed, the circuit court's approach prevents the burden ever being placed on the government to demonstrate historical analogues under the actual *Bruen* test, since the circuit court is pretending that it is still wrestling with the threshold "plain text" issue.

Consider the view of the Justice who penned the *Bruen* decision as set out in his Statement on denial of certiorari in *Gun Owners of America, Inc., et al. v.*

---

[3] The *Bianchi* court's transformation of the "plain text" threshold inquiry into a complex test, that is anything but "plain," is reminiscent of Judge Benitez's description of the two-step test: "a tripartite binary test with a sliding scale and a reasonable fit." *Rhode v. Becerra*, 342 F. Supp. 3d 902, 930 (S.D. Ca. 2020).

Raoul, et al., 144 S. Ct. 2491 (July 2, 2024): a judicial finding that "the Second Amendment does not protect 'militaristic' weapons ... seems unmoored from both text and history."

Compare the following approaches. The first is how the Fourth Circuit described its upholding of the assault weapons ban before *Bruen*, in *Kolbe*:

> We first concluded that the assault weapons at issue were "not constitutionally protected arms." *Kolbe* at 130. [*Bianchi* at *8.]

The second is how the Fourth Circuit described its upholding of the same assault weapons ban after *Bruen*, in *Bianchi*:

> We hold that the covered firearms are not within the scope of the constitutional right to keep and bear arms for self-defense. [*Bianchi* at *15-16.]

These two rulings are indistinguishable. In *Bianchi*, the court believed that *Bruen* imposed no meaningful constraint on its discretion. It simply took step one of its old two-step test, and, to avoid a "vacuum," engaged in a lengthy, background, contextual analysis of plain text. Based on this verbal legerdemain, without requiring Maryland to make any historical showing whatsoever, the court decreed that the most popular rifle in America is not a bearable "arm" under the Second Amendment.

II. THE *BIANCHI* DECISION IS BASED ON A NON-CONSTITUTIONAL FOUNDATION.

Although the Fourth Circuit claims to be a court struggling to apply *Bruen* "with great respect" (*Bianchi* at *5), elsewhere it is rather candid in its belief that it would be dangerous and reckless for any court to allow private ownership of the category of firearms banned by Maryland.

The Court repeatedly asserted the generalization that the Second Amendment right "is not unlimited" (*Heller* at 626) as justification for any limit the court might want to impose. However, military type "arms" are protected because the Framers wanted to protect the sort of weapons which they had just used to win a war against the British. Indeed, it was those arms which the framers of the Second Amendment believed were "necessary to the security of a free State" should the People ever need to resist tyranny and reconstitute their government. See Section IV, *infra*. The Fourth Circuit simply could not bring itself to uphold the People's right to "keep and bear" a large swath of those bearable arms — largely because: (A) these guns are scary; (B) the people demanded such laws and the Legislature responded; and (C) absent those laws, people could get hurt, discussed *infra*. With these new motivations, the Fourth Circuit created the worst possible manner ever devised to interpret a written constitution.

A. So-called Assault Weapons Are Scary.

The Fourth Circuit's opinion provides much colorful rhetoric about the danger of allowing the people to have "military-style assault weapons," evoking images of "sniper fire," "sustained combat operations," "excessively dangerous" weapons, "primary instruments of mass killing and terrorist attacks" — and that is just the first pages of its opinion. *Bianchi* at *3-5. The court conflated semiautomatic rifles with fully-automatic rifles. *Id.* at *49. Interpretation of a written Constitution requires dispassionate and thoughtful legal analysis, not emotional rhetoric more suited to the political branches than the judiciary.

B. The People Demanded Such Laws and the Legislature Responded.

The court began its opinion by asserting: "[t]he elected representatives of the people of Maryland enacted the Firearms Safety Act of 2013 in the wake of mass shooting across the country and a plague of gun violence in the state." *Id.* at *2-3. It asserted that "the basic obligation of government [is] to ensure the safety of the governed." *Id.* at *4-5. Perhaps the court should have been more concerned about its own basic duty — to ensure that the political branches have not exceeded their constitutional powers and infringed on the rights of the People.

Our written Constitution was adopted as the law which governs government. The Fourth Circuit apparently finds it inconceivable that words on paper

should constrain the Maryland government from protecting the people from danger. After all, the challenged law was enacted as an exercise of "self-governance." *Id*. at *5. If the Fourth Circuit were to consider the constitutionality of a law enacted restricting abortion, would the court defer to it by calling it an exercise of "self-governance" and a response "to the demands of its own citizens?" *Id*. at *17.

The Fourth Circuit states that, in allowing Maryland to ban the most popular rifle in America, it is "honor[ing] the worthy virtues of federalism and democracy, not ... stifle them." *Id*. at *18. To be sure, states may take differing approaches in many areas, but since *McDonald v. Chicago*, it is clear the Second Amendment fully applies to the states. If the Fourth Circuit approach is advancing a new justification for the Constitution to be cast aside whenever the people so desire, then the Constitution truly is only a "parchment barrier," incapable of resisting arbitrary exercises of government power.

At its core, the Fourth Circuit's rationale for *Bianchi* is entirely unchanged since *Kolbe*. Indeed, writing in concurrence in *Kolbe*, Judges Wilkinson and Wynn claimed that the ban on assault weapons was necessary because the people wanted it:

> **[d]isenfranchising the American people** on this life and death subject would be the gravest and most serious of steps. **It is their community, not ours**. It is their safety, not ours. It is their lives, not ours. To say in the

> wake of so many mass shootings in so many localities across this country that the people themselves are now to be rendered newly powerless, that all they can do is stand by and watch as federal courts design their destiny — this would deliver a body **blow to democracy** as we have known it since the very founding of this nation. [*Kolbe* at 150 (Wilkinson, J., concurring) (emphasis added).][4]

In its zeal to protect "democracy," this concurrence apparently failed to realize that this nation's political system is not merely a "democracy," but rather a constitutional republic limited by certain fixed, written rules — one of them being that "the right of the People to keep and bear arms shall not be infringed." By deferring to some abstract notion of "democracy" (a vague concept they are not obliged by oath to defend), the *Kolbe* concurrence has diverted focus from their very real and concrete obligation to "support and defend the Constitution of the United States...." *See* 5 U.S.C. § 3331.

This concurring opinion went even further, claiming that "[n]o one really knows what the right

---

[4] In fact, this Court in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), squarely rejected this "federalism" argument, noting that "[t]here is nothing new in the argument that, in order to respect federalism and allow useful state experimentation, a federal constitutional right should not be fully binding on the States," and concluding that the Second Amendment's "guarantee is fully binding on the States and thus *limits* (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values." *Id.* at 784.

answer is with respect to the regulation of firearms [and] [t]he question before us ... is ... how we may best find it." *Kolbe* at 149-150. The best answer, the concurrence asserted, is to leave determinations of Second Amendment rights entirely up to the legislatures, lest "another tragedy is inflicted or irretrievable human damage has once more been done." *Id*. at 150. This opinion does not seem to grasp that "it is a constitution we are expounding." *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819). This concurrence claimed that "[a]s *Heller* recognized, there is a balance to be struck here." *Kolbe* at 151 (Wilkinson, J., concurring). To the contrary, as *Bruen* has again made clear there is no balancing involved. This *Kolbe* concurrence badly misread *Heller*, and *Bianchi* badly misreads *Bruen*. There is no balance to be struck; rather, there is the exercise of arbitrary power to be resisted and an enumerated right to be vindicated.

C. Absent Such Laws, People Could Get Hurt.

The *Bianchi* court recited many ways by which firearms could hurt people. It gave no attention whatsoever to the frequent and legitimate use of such weapons for self-defense, nor for the basic need of the people to posess arms sufficient to deter the government from abusing their rights. The *Heller* Court recognized that reason (*Heller* at 598), but to the *Bianchi* court, the only possible legitimate use of a firearm is for personal defense against individual criminals. *See* Section IV, *infra*.

III. UNDER *HELLER* AND *BRUEN*, ASSAULT WEAPONS ARE BEARABLE ARMS.

A. Assault Weapons Are Bearable Arms.

The *Bianchi* court has decided that so-called "assault weapons" are not bearable "arms." The court intimates that semiautomatic rifles are analogous to "weapons of crime and war," like weapons that "became infamously associated with 'notorious Prohibition-era gangsters like Bonnie Parker and Clyde Barrow,'" raising the fantastical specter of guns which "release slow-acting poison," and even a "nuclear weapon ... light enough for one person to carry." *Bianchi* at *27-29. This type of rhetoric is well short of what one would hope a court would analyze a case like this. In any event, this Court has long made clear that modern, military style firearms weapons are bearable weapons:

> The 18th-century meaning is no different from the meaning today. The 1773 edition of Samuel Johnson's dictionary defined "arms" as "[w]eapons of offence, or armour of defence." … Timothy Cunningham's important 1771 legal dictionary defined "arms" as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." … Although one founding-era thesaurus limited "**arms**" (as opposed to "weapons") to "instruments of offence ***generally*** **made use of in war**," even that source stated that **all firearms constituted "arms."** [*Heller* at 581-82 (bold added).]

Lest the definition of arms be viewed too narrowly, the Court added, "[s]ome have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way...." *Id.* at 582. Indeed, "[j]ust as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Bruen* at 28 (quoting *Heller* at 582).

The Fourth Circuit created an arbitrary classification for weapons used for "military" purposes, in an effort to somehow read those weapons out of the Second Amendment's plain text. Then, analogizing assault weapons to fully automatic weapons, held that they should be treated the same. "Therefore, just like the M16, the AR-15 is 'most useful in military service' and 'may be banned' consistent with the Second Amendment." *Bianchi* at *49. But *Heller* anticipated and already rejected such arguments. *Heller* made clear that weapons used for military purposes were not only permitted but also explicitly contemplated under the Second Amendment's protections: "'[i]n the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same.'" *Heller* at 624-625. Indeed, the members of the militia "were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *Id.* at 624.

Nothing in the Second Amendment's "plain text" supports the Fourth Circuit's arbitrary and atextual conclusion that adding useful features to a semiautomatic rifle takes it outside of the definition of a bearable arm.

B. The Fourth Circuit Failed to Cite Relevant Historical Analogues to Uphold Maryland's Assault Weapon Ban.

Since "assault weapons" are presumptively protected by the Second Amendment, the only remaining issue is whether Maryland has "demonstrate[d] that the regulation is **consistent with this Nation's historical tradition** of firearm regulation." *Bruen* at 17 (emphasis added). There is no means-end scrutiny to be employed and no need or utility for recitations of the dangers and risks of firearms. There is no deference to the legislative branch whatsoever because, "while that judicial deference to legislative interest balancing is understandable — and, elsewhere, appropriate — it is not deference that the Constitution demands here. The Second Amendment 'is the very *product* of an interest balancing by the people....'" *Id.* at 26 (citing *Heller* at 635).

The Fourth Circuit made too much out of *Bruen*'s dicta: "if a case 'implicat[es] unprecedented societal concerns or dramatic technological changes,' courts may need to take 'a more nuanced approach.'" *Bianchi* at *58 (citing *Bruen* at 27). The court of appeals then held that semiautomatic rifles with certain features involve "'dramatic technological changes'" since the

days of muskets, and that shootings are an "'unprecedented societal concern,'" thereby justifying a ban on some semiautomatic rifles as a "'nuanced'" response. *Id*.

The basic rule of *Bruen*, of course, is anything but "nuanced." *Bruen* describes the Second Amendment as an "'unqualified command'" (*Bruen* at 17), demanding "unqualified deference" from the courts. *Id.* at 26. The fact that modern firearms are more modern than revolution-era weapons is not dispositive, or every new type of gun would be subject to ban. The court below considered the issue and noted that by the time the Fourteenth Amendment was ratified in 1868, firearms had undergone "dramatic technological changes" since 1791. Yet the technological advancements did not change the meaning of the Second Amendment right.

The Fourth Circuit then claimed to "take the instruction of *Bruen* to engage in a 'more nuanced approach' to address these 'unprecedented societal concerns.'" *Bianchi* at *61. It then "canvassed the historical record of arms regulations" to find that "the Maryland statute fits comfortably within this venerable tradition." But far from finding actual analogues, the Fourth Circuit's nuanced approach allowed it to cite to 19th Century restrictions on certain "excessively dangerous weapons such as Bowie knives." *Id*. at *66. It drew upon some vague "arc of technological innovation and corresponding arms regulations" to reach this conclusion. *Id*. at *75. The Fourth Circuit bent *Bruen*'s analysis to determine whether a challenged regulation is "relevantly similar" beyond its breaking point. Using the *Bianchi*

approach to reviewing historical analogues, there is almost no restriction on modern firearms that would ever violate the Second Amendment. Any state could defend most any firearm restriction as being consistent with some perceived broad "arc" of historical regulation.

IV. THE COURT ERRED IN VIEWING THE RIGHT OF SELF-DEFENSE AGAINST CRIMINALS AS THE SOLE PURPOSE OF THE SECOND AMENDMENT.

The court below repeatedly stated that "the purpose" of the "right to keep and bear arms" is "individual self-defense" and "self-preservation," that "the lawful purpose" of bearing arms is "individual self-defense," and that "the Second Amendment's purpose [is] personal protection." *Bianchi* at *53, *54, *63, *77. The court purported to ground its position on *Bruen*'s statement that "individual self-defense is 'the **central component**' of the Second Amendment right." *Bianchi* at *29 (quoting *Bruen* at 29) (emphasis added). But what *Bruen* refers to as the "central component" of the right, *Bianchi* first rebrands as the only purpose of the right, and then further narrows that to only "civilian self-defense," quoting the First Circuit that "civilian self-defense rarely — if ever — calls for the rapid and uninterrupted discharge of many shots." *Bianchi* at 48 (quoting *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 45 (1st Cir. 2024)).

The Fourth Circuit court flips on its head what the *Heller* Court was addressing when it referred to

"individual" self-defense. The *Heller* Court was not asserting a military right to firepower greater than law-abiding "civilians" who can have only the weapons possessed by other "civilians." Rather, in using the phrase "individual self-defense," this Court was countering the view that the right to bear arms was for a state militia only, and covered no "individual" right for "civilians" at all.

> [T]he threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right — unlike some other English rights — was codified in a written Constitution. Justice Breyer's assertion that individual self-defense is merely a "subsidiary interest" of the right to keep and bear arms ... is profoundly mistaken. He bases that assertion solely upon the prologue — but that can only show that self-defense had little to do with the right's codification; it was the central component of the right itself. [*Heller* at 599.]

Contrary to the *Bianchi* court's view, this Court declared that preserving the "citizens' militia" from destruction by the federal government was the reason the Second Amendment was specifically enumerated at all. That is, the fact that the Second Amendment exists to ensure that the People may defend themselves against a government that could become tyrannical is beyond question. Lest there be any doubt, this Court immediately proceeded to distinguish the "people's militia" from the "organized militia" the English kings had used to perpetuate their tyranny.

> [I]f ... the **organized militia** is the sole institutional beneficiary of the Second Amendment's guarantee ... it does not assure the existence of a "**citizens' militia**" as a safeguard against tyranny. For Congress retains plenary authority to organize the militia, which must include the authority to say who will belong to the organized force.... Thus, if petitioners are correct, the Second Amendment protects citizens' right to use a gun in an organization from which Congress has plenary authority to exclude them. It guarantees a select militia of the sort the Stuart kings found useful, but not **the people's militia** that was the concern of the founding generation. [*Heller* at 600 (emphasis added).]

Judge Richardson makes this point in his dissent. He cites *Heller*'s recognition that, "[b]y the American Founding, the English Bill of Rights was understood to enshrine an individual right to keep arms for protection against **public and private violence**." *Bianchi* at *111 (Richardson, J., dissenting) (emphasis added). He notes that, by the time of the Founding, even the English understanding was that "the right to have arms existed for **mutual as well as private [defense]**. But it also allowed them to defend against government violations of their rights, such as when the sanctions of society and laws are found insufficient to restrain the violence of oppression." *Id.* at *112 (Richardson, J., dissenting) (internal quotations omitted) (emphasis added). The right is not a purely

"personal," "individual" right only to be exercised in one-on-one confrontations against criminals.

The *Bianchi* court's great fear, it would seem, is a citizenry possessing "arms upon arms." *Bianchi* at *5. In contrast, the great fear of the Framers of the Second Amendment was precisely that individual "civilians" might not be able to protect themselves against a tyrannical government, without which recourse the colonies would never have broken free from the King.

This Court cited the treatise of William Rawle, a member of Pennsylvania's Assembly that ratified the Bill of Rights, who stated:

> No clause in the constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature [prior to the Fourteenth Amendment and incorporation]. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both. [*Heller* at 607.]

Heller also cited St. George Tucker's early American edition of Blackstone's Commentaries, wherein Tucker said of the Second Amendment:

> [It] may be considered as **the true palladium of liberty**.... The right to self defence is **the first law of nature**: in most governments it has been the study of rulers to confine the

> right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction. [*Id.* at 606 (emphasis added).]

The *Heller* Court noted that as late as 1868, the year the Fourteenth Amendment was ratified, Professor John Pomeroy's treatise declared:

> a militia would be useless unless the citizens were enabled to exercise themselves in the use of **warlike weapons**. To preserve this privilege, and **to secure to the people the ability to oppose themselves in military force against the usurpations of government**, as well as against enemies from without, that government is forbidden by any law or proceeding to invade or destroy the right to keep and bear arms. [*Heller* at 618 (emphasis added).]

If *Bianchi* were allowed to stand, it would completely undo this aspect of *Heller*. This Court recognized that the Second Amendment was enumerated precisely to ensure a balance of power between the citizen and the government. As Judge Richardson correctly stated in dissent, "self-defense can be individual or collective. And the Second Amendment expressly ensures that the people can preserve 'the security of a free State' — that is, a 'free country' or 'free polity' — should their government ever

threaten their inviolable liberties." *Bianchi* at *120 (Richardson, J., dissenting).

Lastly, there is yet a third purpose of the Second Amendment this Court has recognized — the right to protect oneself and one's community against civil unrest if the police cannot or do not come in time to assist. At the Founding, this Court noted in *Heller*, "Americans understood the right of self-preservation as permitting a citizen to repe[l] force by force when the intervention of society in his behalf, may be too late to prevent an injury." *Heller* at 595 (internal quotations omitted).

Judge Richardson made the point in his dissent. "Militias served many important public functions [during the Founding era]. They protected communities from bandits and vigilantes, guarded prisoners, served as patrols, prevented lynchings when unpopular executions were scheduled, had riot duty, helped settle land-related disputes, and helped manage public ceremonies and parades, providing domestic security of the state." *Bianchi* at *113 (Richardson, J., dissenting).

As Justice Thomas pointed out in his concurrence in *McDonald v. Chicago*, newly freed black Americans organized militias for defense when state governments refused to protect them against mass terror campaigns by the Ku Klux Klan. State laws disarming blacks led to horrific mass murders of many of those unable to defend themselves. Sometimes, only "the use of firearms allowed targets of mob violence to survive."

McDonald v. City of Chicago, 561 U.S. 742, 855-858 (2010) (Thomas, J., concurring).

This aspect of the Second Amendment right to collective defense when law enforcement fails to intervene has been exercised repeatedly by Americans in recent years as well. In 1992, as riots rocked Los Angeles after the police beating of Rodney King, looters repeatedly targeted Korean-owned stores. As the *Los Angeles Times* reported, on numerous occasions, police were called and simply did not respond to the areas where the looting was occurring. Finally, "Koreans from throughout the area ... rushed to Koreatown, spearheaded by a small group of elite Korean marine veterans," and patrolled the riot-torn areas with firearms to stop the looting.[5] "'Where are the police? Where are the soldiers?' asked John Chu, who was vacationing in Los Angeles when the riots broke out and rushed to help defend the California Market. 'We are not going to lose again. We have no choice but to defend ourselves.'" *Id.*

Notably, many of the Korean shop owners carried rifles in spite of the fact that new purchases of "assault weapons" had been banned by California three years earlier.[6]

---

[5] A. Dunn, "King Case Aftermath: a City in Crisis: Looters, Merchants Put Koreatown Under the Gun: Violence: Lacking confidence in the police, employees and others armed themselves to protect mini-mall," *Los Angeles Times* (May 2, 1992).

[6] C. Keller and A. Mendelson, "FAQ: The California assault weapons ban," LA1st.com (Dec. 31, 2015).

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

JOHN I. HARRIS, III
SCHULMAN, LEROY & BENNETT, P.C.
3310 West End Avenue
Suite 460
Nashville, TN 37203

WILLIAM J. OLSON*
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com
Attorneys for *Amici Curiae*
*Counsel of Record

September 23, 2024