No. 24-203

In the
Supreme Court of the United States

DAVID SNOPE, an individual and resident of Baltimore County, *et al.*,

Petitioners,

v.

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

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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REASONS FOR GRANTING THE PETITION

Thirty years ago, this Court described the semiautomatic AR-15 rifle as a "civilian," "commonplace," "generally available," and "traditionally … lawful" firearm. *Staples v. United States*, 511 U.S. 600, 603, 611–12 (1994). Sixteen years ago, this Court confirmed that the Second Amendment protects the right of individual citizens to possess firearms that are in common use for lawful purposes. *District of Columbia v. Heller*, 554 U.S. 570, 624–25 (2008). In the intervening sixteen years, semiautomatic rifles have continued to be "commonly available," *Garland v. Cargill*, 602 U.S. 406, 429–30 (2024) (Sotomayor, J., dissenting), and the AR-15 today is "one of the most popular firearms in the United States," *Definition of "Frame or Receiver" & Identification of Firearms*, 87 F.R. 24562-01, 24,652 (2022). This therefore should be an easy case—the Second Amendment protects common firearms, semiautomatic rifles like the AR-15 are among the most common firearms in the Nation, therefore bans on semiautomatic rifles like the AR-15 violate the Second Amendment. Yet, incredibly, in the sixteen years since *Heller* every single court of appeals to consider the question has concluded that such bans are constitutional, employing a variety of tests that are uniform only in their failure to adhere to the principles established by this Court. Maryland asks this Court to deny certiorari to allow even more time for percolation, but enough is enough. The lower courts have proven themselves incapable of following *Heller*'s clear guidance, and this Court should intervene without delay.

I. There is a long-running and intractable dispute in the lower courts over whether the Second Amendment allows the government to ban arms that are in common use by law-abiding citizens.

This case presents a well-established and long-running dispute under this Court's Second Amendment caselaw: When is it permissible for a state to ban certain types of firearms? In opposing certiorari, Maryland has argued that this dispute is just beginning to take shape following this Court's decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022), and that additional time is necessary to allow "parties and the courts [to] develop the legal arguments associated with *Bruen*'s application to assault weapons bans." BIO 31. Nothing could be further from the truth.

At bottom, the question presented here is whether the Second Amendment permits the government to ban firearms that are in common use by law-abiding citizens. That is not a new question following *Bruen* but rather one that has been actively contested since *Heller*. And many respected jurists, including members of this Court, have recognized that the answer is no under a straightforward application of *Heller*. *See, e.g.*, *Caetano v. Massachusetts*, 577 U.S. 411, 420 (2016) (Alito, J., concurring in judgment); *Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from denial of certiorari); *Hanson v. District of Columbia*, 120 F.4th 223, 251 (D.C. Cir. 2024) (Walker, J., dissenting); *Bianchi v. Brown*, 111 F.4th 438, 483 (4th Cir. 2024) (Richardson, J., dissenting); *Duncan v. Bonta*, 19 F.4th 1087,

1140 (9th Cir. 2021) (Bumatay, J., dissenting), *cert. granted, judgment vacated*, 142 S. Ct. 2895 (2022); *Heller v. District of Columbia*, 670 F.3d 1244, 1287 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (*"Heller II*").

Unfortunately, one thing the cited opinions have in common in addition to faithfully following *Heller* is their failure to command a majority of the court in question. Remarkably, *every* circuit to confront the question has (somehow) held that whatever the test for protected arms should be, it should not be the common use test prescribed by *Heller* and confirmed by *Bruen*. To be sure, some of these courts relied on the intermediate-scrutiny test rejected by *Bruen*, but many have not. In casting about for some way to sustain bans on common arms, courts have concluded that arms can be banned if they are (in the court's estimation) "particularly capable of unprecedented lethality," "ill-suited and disproportionate to self-defense," or "predominantly useful in military service." *See respectively*, *Hanson*, 120 F.4th at 239; *Bianchi*, 111 F.4th at 461; and *Bevis v. City of Naperville*, 85 F.4th 1175, 1194 (7th Cir. 2023). They also have posited that a ban may be sustained if it (again, in the court's estimation) does not "meaningfully burden" self-defense while meeting a "need to protect against the greater dangers posed by some weapons." *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 438, 49 (1st Cir. 2024).

The en banc Fourth Circuit's opinions in this case illustrate the stark divide that exists over the implications of *Heller*. Judge Wilkinson, writing for a majority of the court, rejected the notion that "a weapon's common use is conclusive evidence that it cannot be

banned." Pet.App. 43a. Judge Richardson in dissent, joined by Judges Niemeyer, Agee, Quattlebaum, and Rushing, on the other hand, concluded that arms that are "in common use by law-abiding citizens for lawful purposes … cannot be prohibited consistent with the Second Amendment." *Id.* at 133a. The debate over whether common arms can be banned has persisted in the circuits since *Heller*, and this Court's intervention is required to resolve it. There is nothing to gain by waiting to see whether additional jurists adopt *Heller*'s common use test or instead come up with ever-more-creative ways to avoid it.

II. *Heller* clearly teaches that arms in common use by law-abiding citizens cannot be banned.

The durability of the dispute over how to assess arms bans is, itself, reason enough to grant certiorari in this case. That the lower courts have not coalesced around a single view on this issue strongly suggests that, without this Court's intervention, the issue will not be resolved on its own. But intervention is particularly important because, in the ongoing debate below, the side that to date has always prevailed is *also* the side that is flouting this Court's clear teaching in *Heller*. This error results in an ongoing infringement of the fundamental right to keep and bear arms in the states that have made the most popular rifle in America illegal. It also has created a doctrinal mess with far-reaching effects as courts do violence to the *Bruen* analytical framework to justify what should be unjustifiable.

Heller itself demands that any ban on a type of arm that is "in common use" be held unconstitutional.

As Judge Walker recently explained in dissent in *Hanson*, although many circuit courts appear to understand *Heller* to "simply hold that the Second Amendment is an individual right, then add a lot of dicta, and then finally hold that D.C. cannot ban handguns," in fact, *Heller* had four 'increasingly specific holdings" that built on each other and should govern courts in resolving challenges to bans on types of arms. 120 F.4th at 260 (Walker, J., dissenting). Those holdings were, in order:

> 1) There is, in general, an individual right to keep and bear arms;
>
> 2) Exceptions to that right depend on the history and tradition of gun regulations;
>
> 3) There is no history and tradition of banning arms in common use for lawful purposes; and
>
> 4) Handguns cannot be categorically banned *precisely because* they are in common use for lawful purposes.

Id. Following *Heller*, the courts of appeals largely accepted and understood the first and the last of these holdings, but it took *Bruen* for them to finally accept the second. Granting review of this case is necessary to make them understand the third. Maryland's brief in opposition, which, like the courts of appeals, refuses to take "common use" seriously, amply demonstrates that fact.

Maryland, like circuits that have consistently gotten this issue wrong, disputes that "common use" was the reason *why Heller* held handguns were protected and could not be banned. Although Maryland readily

admits that *Heller* said that "dangerous and unusual weapons" could be banned, it claims also that "this Court has not stated the inverse, i.e., that a weapon automatically is protected so long as it is 'in common use.' " BIO 24. This objection is difficult to understand, given that earlier in the same paragraph where this argument appears, Maryland quotes *Bruen* stating that "the Second Amendment protects only the carrying of weapons that are those 'in common use at the time.' " *Id.* (quoting *Bruen*, 597 U.S. at 47). Maryland offers no way around the clear import of this language. And the quote Maryland includes in its opposition is not alone; there is no shortage of statements in both *Heller* and *Bruen* that definitively establish that an arm in common use is protected *because of that fact*. For example, *Bruen* concluded that no further analysis was required with respect to the type of arm at issue because the parties did not dispute that "handguns are weapons 'in common use' today for self-defense." *Bruen*, 597 U.S. at 32. That conclusion only makes sense if common use definitively establishes constitutional protection. *See also Hanson*, 120 F.4th at 259–60 (Walker, J., dissenting) (collecting additional examples from *Heller* and *Bruen*).

Maryland next objects that the common use standard "cannot be squared with this Court's observation, in … *Heller*, that 'weapons that are most useful in military service—M-16 rifles and the like—may be banned.' " BIO 24 (quoting *Heller*, 554 U.S. at 627). But there is no inconsistency here, since *Heller* itself explained, in that very same paragraph, that such arms were not "in common use" but rather were "highly unusual in society at large." 554 U.S. at 627; *see also* Pet. 20–21.

And contrary to Maryland and the Fourth Circuit's next objection, applying the "common use" standard does not lead to "absurd consequences," Pet.App. 44a–46a, because the protected status of a type of arms "depend[s] on the aggregate commercial choices of the American people and how those choices happen to intersect with the speed of regulation." BIO 24. Those two things are not disconnected, and it makes perfect sense—in light of an animating purpose of the Second Amendment to advance individual self-defense—to ensure that Americans everywhere, even in jurisdictions hostile to that right, enjoy the ability to use the arms that have been judged by their fellow Americans as suitable for that and other lawful purposes. What *would* be absurd is permitting Maryland to ban the most popular rifle in America, over the consistent instruction from this Court for the last 16 years, that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table," *Heller*, 554 U.S. at 636, including, specifically, banning common firearms.

On the other hand, refusing to recognize that *Heller*'s statements that arms in common use are protected and cannot be banned has led to negative doctrinal developments. Indeed, the popularity of the invalid interest balancing regime that developed in the wake of *Heller* can partially be explained by courts refusing to accept that *Heller* meant what it said about arms "in common use." *See, e.g., Worman v. Healey*, 922 F.3d 26, 36–37 (1st Cir. 2019), *abrogated by Bruen*, 597 U.S. at 19 & n.4. Following *Bruen*, the skewing of Second Amendment doctrine has continued, it has just been forced into other avenues. For example, as we explained in the Petition, several courts,

including the Fourth Circuit below, have distorted *Heller*'s discussion of M-16 rifles to suggest that, contrary to the text of the Amendment itself, arms can be banned *because of*, not *despite* their utility to the military. *See* Pet. 20–21 (discussing similar decisions in *Ocean State Tactical*, 95 F.4th at 48–49, and *Bevis*, 85 F.4th at 1194). Indeed, *Bevis* went so far as to hold that such firearms are not even "arms" within the *plain text* of the Second Amendment, *see* 85 F.4th at 1193–94, despite *Heller* demonstrating that even under the most restrictive Founding-era conception of the term, "all firearms constituted 'arms.' " *See* 554 U.S. at 581. Something has gone awry when a court's analysis ends with the conclusion that semiautomatic rifles are not even "arms."

And since the circuit courts uniformly have rejected any historical principle that is drawn sufficiently narrowly to protect arms in common use, the courts have purported to find all manner of dubious "principles" in the historical record that directly conflict with *Heller* and *Bruen* in various ways, including:

- That arms may be banned because of their utility for military purposes. *Bevis*, 85 F.4th at 1201. This principle is directly contrary to the prefatory clause of the Second Amendment. While *Heller* denied that the prefatory clause defines the scope of the Second Amendment right, it explained that "[l]ogic demands that there be a link between the stated purpose and the command" and rejected the claim that "the Second Amendment right is completely detached from the prefatory clause." *Heller*, 554 U.S. at 577, 627; *contra Bevis*, 85 F.4th at 1188 ("For many years, both the Supreme Court and

scholars thought there was a relation between the prefatory clause, … and the operative clause …. But in *Heller* the Supreme Court severed that connection.”). It would have been wholly illogical for the Founders to codify a right meant to facilitate protection “against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers,” *Heller*, 554 U.S. at 667, that allowed instruments to be banned *because* they are useful for those purposes. To the contrary, a common arm that is useful for military purposes illustrates how the operative clause advances the purposes announced in the prefatory clause.

- That arms may be banned if they are “excessively dangerous” when misused by criminals. Pet.App.69a–70a. This is directly contrary to *Heller*, which held that handguns are protected because they are in common use while giving no weight to the fact that handguns are “the overwhelmingly favorite weapon of armed criminals[.]” *See* 554 U.S. at 682 (Breyer, J., dissenting). While the Second Amendment permits “a variety of tools for combating” criminal firearm violence, banning common arms is not one of them. *See id.* at 636.

Though it is of secondary importance to the fact that this historical principle is, itself, illegitimate, it is also worth noting that on its own terms the principle is a poor fit for semiautomatic rifles like the AR-15. Rifles of any kind are used in crime rarely, and if “constrained to use [Maryland’s] rhetoric, … *handguns* are the

quintessential 'assault weapons' in today's society[.]" *Heller II*, 670 F.3d at 1290 (Kavanaugh, J., dissenting). In trying to argue otherwise, Maryland relies on a discredited study by Charles DiMaggio, *see* BIO 3 n.1, that, as we explained the last two times Maryland cited this study to this Court, classified all semiautomatic firearms—*including handguns*—as "assault rifles." *See* Reply in Supp. of Certiorari at 6 n.2, *Bianchi v. Brown*, No. 23-863 (U.S. Apr. 25, 2024); Reply in Supp. of Certiorari at 8, *Bianchi v. Frosh*, No. 21-902 (U.S. Apr. 29, 2022).

- That arms may be banned if a court is convinced adequate means for self-defense remain available which the state has not chosen to ban. *See Ocean State Tactical*, 95 F.4th at 44–45. But *Heller* was clear that banning one type of firearm cannot be justified on the basis that "possession of other firearms … is allowed." 554 U.S. at 629. And *Bruen* prohibits smuggling interest-balancing into the analysis "under the guise of an analogical inquiry." 597 U.S. at 29 n.7.

As these examples demonstrate, the efforts by the courts of appeals to find a workaround to the common use test are having a substantial distorting effect on Second Amendment jurisprudence. This Court's correction is required to ensure compliance with this Court's precedents and the proper development of Second Amendment caselaw.

III. This case is an ideal vehicle to resolve this dispute.

Though Maryland argues that this case is not a clean vehicle, it fails to raise any meaningful impediment to review. Its objection that the issue would benefit from further percolation, *see* BIO 30, has been addressed at length above, and is meritless. Maryland also suggests that this case is a poor vehicle because "[e]ven if the Court were to grant certiorari and reverse … a further remand would still be necessary" to decide factual questions under the "common use" test. *Id*. at 28. There is nothing to this objection. Even if true, that would not be a reason to deny certiorari. It is a commonplace occurrence for this Court to establish a legal rule and remand for the lower courts to apply that rule in the first instance. *See, e.g.*, *Trump v. United States*, 603 U.S. 593, 624–25 (2024); *Slack Techs., LLC v. Pirani*, 598 U.S. 759, 770 (2023). But that is not invariably the case, and such a remand would not be required here. It is "beyond debate" that semiautomatic rifles like those banned by Maryland are in common use. *See Kolbe v. Hogan*, 849 F.3d 114, 156 (4th Cir. 2016) (en banc) (Traxler, J., dissenting), *abrogated by Bruen*, 597 U.S. at 19; *see also* Pet. 7–10. Indeed, the class of rifles that Maryland bans includes "the most popular rifle in American history," *Duncan v. Becerra*, 970 F.3d 1133, 1148 (9th Cir. 2020), *reh'g en banc granted, op. vacated*, 988 F.3d 1209 (9th Cir. 2021), and *on reh'g en banc sub nom. Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021), *cert. granted, judgment vacated*, 142 S. Ct. 2895 (2022), and like other popular rifles in our Nation's history, "at least one article in our National Constitution must be blotted out, before the complete right to [them] can in any way be

impeached," *see Heller*, 554 U.S. at 609 (quoting The Crime Against Kansas, May 19–20, 1856, *in* AMERICAN SPEECHES: POLITICAL ORATORY FROM THE REVOLUTION TO THE CIVIL WAR 553, 606–07 (T. Widmer ed. 2006)).

CONCLUSION

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

Respectfully submitted,

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