No. 17-127

In the Supreme Court of the United States

STEPHEN V. KOLBE, ET AL.,

Petitioners,

v.

LAWRENCE J. HOGAN, GOVERNOR OF THE STATE 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 *AMICI CURIAE* STATE OF WEST VIRGINIA AND 20 OTHER STATES IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Fourth Circuit inappropriately limited the scope of the Second Amendment right to keep and bear arms by upholding a ban on certain firearms typically possessed by law-abiding citizens for lawful purposes like self-defense, based merely on a finding that those firearms would be most useful in military service.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE* [1]

Amici curiae—the States of West Virginia, Alabama, Arkansas, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, Nevada, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Wisconsin and Wyoming—have an interest in protecting the fundamental rights secured for their citizens by the Bill of Rights and the Fourteenth Amendment, including the Second Amendment right to keep and bear arms. *Amici* also have an interest in ensuring that their individual state-level enactments safeguarding such rights are protected from preemption by federal laws that would violate the Second Amendment.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court described individual self-defense as "the central component" of the right to bear arms, *id.* at 599, and thus held that the Second Amendment protects an "individual right to possess and carry weapons in case of confrontation." *Id.* at 592; see also *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010) (holding that the individual right to bear arms "is fully applicable to the States."). As this Court explained in *Heller*—and has recently reiterated—the text of 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." *Heller*, 554 U.S. at 582; see also *Caetano v.*

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[1] Pursuant to Supreme Court Rule 37.2(a), *amici* have timely notified counsel of record of their intent to file an *amicus* brief in support of Petitioners.

Massachusetts, --- U.S. ---, 136 S. Ct. 1027 (2016) (per curiam) (quoting *Heller*). While *Heller* itself indicated that certain "dangerous and unusual" firearms fall outside the ambit of Second Amendment protection, see *Heller*, 554 U.S. at 625 (excluding "weapons not typically possessed by law-abiding citiens for lawful purposes, such as short-barreled shotguns"), the class of firearms and magazines banned by Maryland are in "common use" for "lawful purposes" and thus fall squarely within the swath of protected arms recognized in *Heller* and *Caetano*. Recognizing this, most States—including all 21 *amici* States—have specifically preempted municipalities from instituting bans similar to Maryland's.

Amici States have a strong interest in this case because narrow judicial constructions of the Second Amendment threaten the rights of their citizens and cast doubt on the scope of States' reserved powers to protect those rights through state law. If this Court does not interevene, lower courts will continute to read *Heller* narrowly and constrain the scope of the rights secured by the Second Amendment. Furthermore, each case that upholds a ban of this sort increases the likelihood that a federal ban on this same class of firearms and magazines would be upheld, which would threaten the laws and policy prerogatives of *amici* States.

SUMMARY OF ARGUMENT

This Court's intervention is needed to vindicate citizens' rights under the Second Amendment and provide guidance for lower courts and the States concerning the appropriate scope of this Court's decision in *Heller*.

This Court has explained that the individual right to bear arms for self-defense extends to weapons "in common use at the time for lawful purposes" and those "typically possessed by law-abiding citizens for lawful purposes." *Heller*, 554 U.S. at 624–25 & 627 (citing *United States v. Miller*, 307 U.S. 174, 179 (1939)). Moreover, *Heller* specifically held unconstitutional a statute that, like the Maryland statute at issue here, "amounts to a prohibition of an entire class of arms" commonly used for self-defense. *Id.* at 628. Nevertheless, lower federal courts have repeatedly construed *Heller* narrowly and affirmed the constitutionality of similar bans. Accordingly, certiorari is warranted—for at least two reasons—to ensure that the Second Amendment rights articulated in *Heller* do not ring hollow.

First, the Fourth Circuit adopted a novel standard that would significantly reduce the types of common firearms protected by the Second Amendment, in direct conflict with one of *Heller's* central holdings. Although *Heller* plainly held that the right to keep and bear arms extends to firearms that are "in common use" for "lawful purposes," the Fourth Circuit held that "weapons most useful in military service" are "outside the ambit of the Second Amendment." *Kolbe v. Hogan*, 849 F.3d 114, 136 (4th Cir. 2017) (en

banc). This standard, derived from a single out-of-context sentence in *Heller*, cannot be reconciled with the remainder of the opinion or the standard articulated by this Court.

If permitted to stand, the Fourth Circuit's test would replace the objective "common use" test with a subjective judicial examination into whether particular arms are better suited for military or civilian use. This policy-oriented evaluation of a weapon's utility in military service should be left to members of the armed forces and other policy experts—not judges—and will inevitably result in a reduction of the types of common arms that law-abiding citizens may possess for use in self-defense. This Court should grant certiorari, reverse the Fourth Circuit, and send a clear message to the lower federal courts that the standards set forth in *Heller* must be faithfully applied.

Second, the increasing number of lower court decisions narrowing and even contradicting *Heller* is creating a jurisprudential trend that threatens the policies of *amici* States. Possession of the firearms and magazines banned by Maryland is not only permitted in most States, but is often affirmatively protected by state laws preempting the imposition of such a ban by municipalities. If this Court declines to intervene to provide clarity to the lower courts, Congress could be emboldened to override these state laws with a federal ban on these firearms—as it has done once already. This Court's involvement is needed to reaffirm *Heller* and ensure that state efforts to protect the Second Amendment rights of their citizens will not be undone by federal action.

REASONS FOR GRANTING THE PETITION

I. The Fourth Circuit's Novel Second Amendment Test Conflicts With The Standard Announced In *Heller* And Would Allow Bans Of Firearms Commonly Used For Self-Defense.

A. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court engaged in its first detailed examination of the scope of the Second Amendment right to keep and bear arms. Based on an extensive examination of the Amendment's text, history, and precedent, this Court concluded that the Amendment protects an "individual right to possess and carry weapons in case of confrontation." 554 U.S. at 592. Essential to this determination was the Court's conclusion that an individual's right to self-defense was not a "subsidiary interest" of the right secured by the Amendment, but rather "the *central component*." *Id.* at 599 (emphasis in original). Thus, a regulation which materially burdens this right—such as the statute in *Heller* which was, in effect, a complete prohibition on the useful possession of a handgun—is constitutionally impermissible. See *id.* at 629–30, 635–36.

In addition to holding that the Second Amendment secures an individual right to keep and bear arms, the Court addressed the question of what "types of weapons" fall within the scope of the right. *Id.* at 624–26. Relying on one of its few prior Second Amendment precedents, *United States v. Miller*, 307 U.S. 174 (1939), the Court explained that, in light of the Amendment's prefatory clause, there was a constitutional entitlement to keep and bear any

weapon that was "in common use" for "lawful purposes like self-defense." *Heller*, 554 U.S. at 624–25. The Court went on to explain that *Miller*'s holding that the Amendment protected weapons "in common use at the time" was consistent with the historical tradition of permitting regulation of (and even a complete prohibition against) the carrying of "dangerous and unusual weapons." *Id.* at 627. Notably, the *Heller* Court expressly rejected the adoption of a standard or interpretation of *Miller* that turned on whether a weapon was "useful in warfare," *id.* at 624–25, a position this Court recently reaffirmed in *Caetano*, --- U.S. ---, 136 S. Ct. at 1028.

The *Heller* Court did say that some weapons that are "most useful in military service," such as the "M-16 rifle[]," could be banned without running afoul of the Second Amendment. *Heller*, 554 U.S. at 627. However, the Court's prounouncement to that effect was little more than a reference to its earlier acknowledgement that the National Firearms Act's restrictions on machineguns (that is, firearms capable of fully automatic fire) were not constitutionally problematic. See *id.* at 624. It is abundantly clear, when read in the proper context, that "M-16 rifles and the like" are susceptible to regulation not because they are "most useful in military service" but rather because they are capable of fully automatic fire[2] *and thus* are not "in common use" for a "lawful purpose," such as the defense of self and home. Cf. *Haynes v. United States*, 390 U.S. 85, 87 (1968) (describing "machine guns and other automatic firearms" as

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[2] See *Kolbe v. Hogan*, 849 F.3d 114, 136 (4th Cir. 2017) (en banc) ("an M16 rifle is capable of fully automatic fire").

"weapons used principally by persons engaged in unlawful activities"); see also *United States v. One Palmetto State Armory PA-15 Machinegun*, 822 F.3d 136, 142 (3d Cir. 2016) (collecting authorities).[3]

B. In the decision below, the Fourth Circuit seized upon the aforementioned dicta in *Heller* (concerning M-16 rifles) to conclude that "weapons that are most useful in military service" are "outside the ambit of the Second Amendment." *Kolbe v. Hogan*, 849 F.3d 114, 136 (4th Cir. 2017) (en banc); see also *id.* at 136 n. 10. Relying on this mischaracterization, the Fourth Circuit declared that the firearms and large-capacity magazines banned by Maryland are "unquestionably most useful in military service" and that regardless of their "other potential uses—including self-defense," it was "compelled by *Heller* to recognize that those weapons and magazines are not constitutionally protected." *Id.* at 137.

The Fourth Circuit's standard is breathtaking for both its novelty and its disregard for this Court's jurisprudence. No other federal courts of appeals—even those that have upheld bans analogous to Maryland's—have adopted the guise that *Heller* categorically excluded any weapon that is "most

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[3] See also, *e.g.*, *Hollis v. Lynch*, 827 F.3d 436, 451 (5th Cir. 2016) ("Machineguns are dangerous and unusual and therefore not in common use. They do not receive Second Amendment protection . . . ."); *United States v. Henry*, 688 F.3d 637, 640 (9th Cir. 2012) ("machine guns are highly 'dangerous and unusual weapons' that are not 'typically possessed by law-abiding citizens for lawful purposes.'") (quoting *Heller*); *United States v. Fincher*, 538 F.3d 868, 874 (8th Cir. 2008) (similar); *United States v. Jennings*, 195 F.3d 795, 799 n.4 (5th Cir. 1999) (similar).

useful in military service" from the protection of the Second Amendment.[4] More importantly, as noted above, *Heller* expressly rejected the idea that the scope of the Second Amendment was linked to a weapon's military utility. 554 U.S. at 624–25; see also *Caetano*, --- U.S. ---, 136 S. Ct. at 1028 ("*Heller* rejected the proposition that only those weapons useful in warfare are protected.") (internal quotation marks omitted). Of course, many weapons that are "most useful in military service"—artillery peices, flamethrowers, and hand grenades for instance, cf. *Staples v. United States*, 511 U.S. 600, 611–12 (1994)[5]—may be lawfully regulated or their posession banned altogether. These weapons, however, are susceptible to regulation not because of their usefulness in a military setting but rather because such armaments are not commonly possessed by law-

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[4] Cf. *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 256 (2d Cir. 2015) (recognizing that despite *Heller's* passing reference to the M-16 as a "weapon that could be banned without implicating the Second Amendment," the correct analytical question is whether that weapon is "dangerous and unusual in the hands of law abiding civilians"); *Friedman v. City of Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015) ("We think it better to ask whether a regulation bans weapons that were common at the time of ratification or those that have some reasonable relationship to the preservation or efficiency of a well regulated militia . . . .") (internal citations omitted); *Fyock v. Sunnyvale*, 779 F.3d 991, 998 (9th Cir. 2015) (recognizing that because they were not "dangerous and unusual" high-capacity magazines were within the scope of the protection secured by the Second Amendment).

[5] See also, *e.g.*, *Jennings*, 195 F.3d at 799 n.4 (listing various weapons declared by Congress to be "primarily weapons of war [that] have no appropriate sporting use or use for personal protection.")

abiding citizens for a lawful purpose (and are therefore "dangerous and unusual").

Of note, not all weapons with signifigant utility in a military context qualify as "dangerous and unusual." The United States Army has issued handguns to its soldiers throughout its nearly two-and-a-half century existence, see Matthew Moss, *The 240-Year Evolution of the Army Sidearm*, POPULAR MECHANICS (May 25, 2017), available at http://www.popularmechanics.com/military/weapons/a26625/us-military-handguns/ ; David Maccar, *A Brief History of U.S. Army Sidearms*, RANGE365.COM (February 3, 2017), available at http://www.range365.com/history-us-army-sidearms, and yet, as the result in *Heller* demonstrates, the fact that handguns are staple military arms does not place them outside the scope of the protection of the Second Amendment. Indeed, under the standard set forth by the Fourth Circuit, law-abiding citizens could lose the right to possess a myriad of weapons commonly used for self-defense because those weapons are also employed by the military.

Simply put, the novel standard applied by the Fourth Circuit below is irreconcilable with *Heller* and *Caetano*. As such, certiorari should be granted to resolve the conflict between this Court's precedents and the Fourth Circuit's erroneous ruling.

II. This Case Presents An Ideal Vehicle For This Court To Resolve Confusion In The Lower Courts About The Appropriate Scope Of *Heller*

A. Certiorari is also appropriate for a second reason. In the near decade since *Heller* was decided, lower federal courts have repeatedly misread the decision and issued opinions narrowing its scope. Despite the accumulation of precedent undermining the principles espoused in *Heller*, this Court has to date declined to review any of these wayward opinions. The Court's refusal to intervene has led to decisions like the one below, which is unmoored from the principles articulated in *Heller*. This case presents an ideal opportunity for the Court to reaffirm its commitment to the principles established in *Heller*, stem the tide of misguided lower court decisions, and provide clarity that will allow lower courts to apply Second Amendment principles more faithfully.

1. The Fourth Circuit's decision is merely the most recent salvo in a barrage of lower court decisions taking aim at one or more of *Heller*'s central holdings.

For example, despite *Heller*'s express holding that the Second Amendment secures an individual's right to "possess and carry weapons in case of confrontation," 554 U.S. at 592, and the opinion's lengthy discussion of historical sources contemplating the carrying of weapons outside the home, see, *e.g.*, *id.* at 601 (discussing Georgia's law *requiring* "men who qualified for militia duty . . . to carry arms to public places of worship") (emphasis added) (internal citation omitted); see also *id.* at 585–86, 602, 628–30, several federal courts of appeals have either

specifically held that the right recognized in *Heller* does not extend to public places, see *Powell v. Tompkins*, 783 F.3d 332, 348 (1st Cir. 2015); *Hightower v. City of Boston*, 693 F.3d 61, 72 (1st Cir. 2012), or expressed doubt that such a right exists, *Peruta v. Cty. of San Diego*, 824 F.3d 919, 927 (9th Cir. 2016); *Drake v. Filko*, 724 F.3d 426, 430 (3d. Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012); *United States v. Masciandaro*¸ 638 F.3d 458, 475 (4th Cir. 2011).

Courts reaching this conclusion have relied on the fact that the statute in *Heller* involved an effective ban on handguns inside an individual's home, and thus contend that the logic employed therein need not be extended to other circumstances or situtations. Yet nothing in *Heller* suggests that the opinion should be confined to its specific facts. Cf. *Wrenn v. D.C.*, 864 F. 3d. 650, 2017 WL 3138111, at *6 (D.C. Cir. July 25, 2017) ("Reading the [Second] Amendment, *applying Heller I's reasoning*, and crediting key early sources, we conclude: the individual right to carry common firearms beyond the home for self-defense . . . falls within the core of the Second Amendment's protections.") (emphasis added); see also *Moore v. Madigan*, 702 F.3d 933, 937 (7th Cir. 2012) ("To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*."). To the contrary, the *Heller* Court stated that the home is "where the need for defense of self, family, and property *is most acute*," not that it was the only location in which an individual possessed "the inherent right of self-defense [that is] central to the Second Amendment

. . . ." *Heller*, 554 U.S. at 628 (emphasis added). Had this Court intended to limit the protection secured by the Second Amendment to the home, it would have simply said as much.

2. The lower federal courts have also ignored *Heller*'s instruction that a categorical ban on a particular class of firearm cannot be saved by the mere fact that "the possession of other firearms . . . is allowed." 554 U.S. at 629. Noting *Heller*'s description of handguns as "the quintessential self-defense weapon," *ibid.*, these courts have narrowly read *Heller's* non-substitution principle to apply only to an outright ban on *handguns*.

Thus, the D.C. Circuit held that a ban on semi-automatic rifles—analgous to the ban at issue in this case—"do[es] not impose a substantial burden upon" the Second Amendment because it does not "prevent a person from keeping a suitable and commonly used weapon for protection in the home or for hunting, whether a handgun or a non-automatic long gun." *Heller v. D.C.* ("Heller II"), 670 F.3d 1244, 1262 (D.C. Cir. 2011). More recently, the Seventh Circuit held that a ban on semi-automatic rifles bearing certain characteristics—a statute virtually identical to the Maryland ban at issue here—was constitutional because "allowing the use of most long guns plus pistols and revolvers . . . gives householders adequate means of defense." *Friedman v. City of Highland Park*, 784 F.3d 406, 411 (7th Cir. 2015). Several district courts, including the district court in this case, have employed similar reasoning. *Kolbe v. O'Malley*, 42 F. Supp. 3d 768, 790 (D. Md. 2014) (Maryland's ban does not "seriously impact" the Second Amendment

because it prohibit possession of handgun or "prevent an individual from keeping a suitable weapon for protection in the home"); *Shew v. Malloy*, 994 F. Supp. 2d 234, 247 (D. Conn. 2014) (upholding a ban on semi-automatic rifles in part because "[t]he challenged legislation provides alternate access to similar firearms") *aff'd in part, rev'd in part sub nom*. *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015). These decisions ignore *Heller's* unequivocal holding that the protection provided by the Second Amendment extends "prima facie . . . to all instruments that constitute bearable arms . . . ." 554 U.S. at 582. *Heller's* remark that handguns are the "quintessential self-defense weapon" was a commentary on their ubiquity and reflects the Court's recognition of how serious a burden a handgun ban imposes on the right to self-defense. It should not be read as a restriction on the applicablility of Second Amendment principles to other classes of firearms.

3. One court—the Ninth Circuit—has seemingly ignored *Heller*'s holding that it violates the Second Amendment to prohibit rendering a weapon ready for immediate self-defense. *Heller* held unconstitutional a "requirement . . . that firearms in the home be rendered and kept inoperable at all times" because that requirement "makes it impossible for citizens to use them for the core lawful purpose of self-defense." 554 U.S. at 630. The Court explained that the Second Amendment protects a right to "render[] a[] lawful firearm in the home operable for the purpose of immediate self-defense." *Id.* at 635.

Despite this clear command, the Ninth Circuit upheld "a flat prohibition on keeping unsecured handguns in the home," *Jackson v. City and Cnty. of San Francisco*, 746 F.3d 953, 962 (9th Cir. 2014) finding that a statute which required firearms not being actively carried on a homeowner's person to be "stored in a locked container or disabled with a trigger lock," *id.* at 958, did not qualify as a "substantial burden on [a] Second Amendment right," *id.* at 965. The Ninth Circuit determined that the law—which, but for allowance for weapons carried on one's person, was virtually identical to the statute struck down in *Heller*—did not "impose the sort of severe burden" on an individual's ability to engage in self-defense that would abridge the Second Amendment. *Id.* at 964.[6] The *Jackson* court did not explain how this conclusion could be reconciled with the *Heller* Court's statement that the Second Amendment protects the right to render a firearm "operable for the purpose of *immediate* self-defense," 554 U.S. at 635 (emphasis added), nor did it address the fact that laws which require a firearm to be rendered inoperable make self-defense practically "impossible" in a number of circumstances, *id.* at 630.

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[6] The *Jackson* court recognized that "there are times when carrying a weapon on the person is extremely impractical, such as when sleeping or bathing," and thus, that it was an unavoidable reality that the statute "requires . . . handguns be kept in locked storage or disabled with a trigger lock" on a regular basis. 746 F.3d at 963–64. Nevertheless, the Court concluded the statute "does not impose . . . [a] severe burden" on an individual's Second Amendment right because "it burdens only the manner in which persons may exercise" that right. *Id.* (internal quotation marks omitted).

4. Finally, lower federal courts have repeatedly ignored *Heller*'s instruction that outright bans on an entire class of weapons commonly used for self-defense "fail constitutional muster" under "any of the standards of scrutiny that [this Court has] applied to enumerated constitutional rights." *Heller*, 554 U.S. at 628–29. In *Heller*, this Court struck down what was effectively a handgun ban without consideration of the proffered interest underlying the ban or an assessment of the fit and tailoring of the ban to that government's stated interest. *Ibid.* This Court explained that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635.

But several lower courts have narrowly construed this language, choosing instead to apply various levels of scrutiny—usually intermediate—to uphold bans prohibiting the possession of other types or classes of firearms. See *Heller II*, 670 F.3d at 1261–63 (intermediate scrutiny); *Cuomo*, 804 F.3d at 260 (same); *Fyock v. Sunnyvale*, 779 F.3d 991, 999 (9th Cir. 2015) (same); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (same); see also *Wiese v. Becerra*, --- F. Supp.3d. ---, 2017 WL 2813218, at *3 (E.D. Cal. June 29, 2017) (same); *San Francisco Veteran Police Officers Ass'n v. City & Cnty. of San Francisco*, 18 F. Supp. 3d 997, 1003 (N.D. Cal. 2014) (same); cf. *Highland Park*, 784 F.3d at 410 (declining to "decide what 'level' of scrutiny applies" and instead employed a multi-pronged evaluative framework including "whether a regulation bans weapons that were common at the time of ratification . . . and whether law-abiding citizens retain adequate means

of self-defense"). Such decisions stand the logic and reasoning of *Heller* on its head. Rather than an announcement of generally applicable principles, these courts read *Heller* as having carved out a special, heightened level of protection for handguns and a lower standard applicable to all other firearms.

III. The Decision Below And Similar Decisions Threaten The Laws And Policy Preferences Of *Amici* States.

Certiorari is also warranted because these cases are creating a jurisprudence that threatens the enacted policy preferences of most States. Possession of the class of firearms and magazines prohibited by Maryland is not only legal in most jurisdictions, most States have also reinforced that legal status by preempting municipal efforts to ban them. Because the United States Congress previously enacted a ban on these weapons, each case that upholds an analagous ban threatens state policy preferences by suggesting that a renewed federal ban would be constitutional. This Court should intercede to safegauard the expressed preference of the majority of States concerning this class of firearms.

A. Most States Protect The Commonly Used Weapons Banned By Maryland.

Maryland's ban, the Firearm Saftey Act of 2013, prohibits the possession, sale, transfer, or receipt of a class of weapons referred to as "assault long gun[s]"—semiautomatic rifles that possess various criteria. *Kolbe*, 849 F.3d at 122. Any semi-automatic rifle with an "overall length of less than 29 inches," or a "fixed magazine with the capacity to accept more than 10

rounds," or the ability to accept a detachable magazine in conjunction with two of three other specific features (a folding stock, a grenade or flare launcher, or a flash suppressor), and any semi-automatic shotgun with a folding stock or revolving cylinder, is covered by the ban. *Ibid.* Maryland also bans certain firearms by name, including the AR-15, the Bushmaster semi-auto rifle, and the AK-47, along with any "copies" of those weapons, regardless of the identity of their manufacturer. *Id.* at 121–22

The type and class of firearms banned by Maryland are among the most popular in the United States. The record below indicates that in 2013 (when the ban was enacted) there were at least 8 million semi-automatic rifles in circulation in the United States that are covered by Maryland's ban. *Id.* at 128; see also *Kolbe v. Hogan*, 813 F.3d 160, 174 (4th Cir. 2017) (panel decision) ("Between 1990 and 2012, more than 8 million AR- and AK-platform semi-automatic rifles alone were manufactured in or imported into the United States. In 2012, semi-automatic sporting rifles accounted for twenty percent of all retail firearms sales."). Widespread possession of this popular type of rifle is not a new phenomenon. As this Court noted more than two decades ago, semi-automatic rifles, including those of the kind banned by Maryland, "traditionally have been widely accepted as lawful possessions." *Staples*, 511 U.S. at 612.

Magazines capable of holding more than ten rounds are even more popular than the banned rifles—the record indicates that 75 million magazines, 46% of all magazines owned, fall into that category. *Kolbe*, 849 F.3d at 129. The latter number is hardly

surprising, as the *en banc* Fourth Circuit recognized that "magazines with a capacity of between ten and twenty rounds have been on the civilian market for more than a hundred years." *Ibid*.

State-level bans similar to Maryland's are rare. Only seven other States and the District of Columbia have any type of ban on the possession of semi-automatic rifles or handguns. See Cal. Penal Code § 30605; Conn. Gen. Stat. §§ 53-202a–53-202o; D.C. Code § 7-2502.02; Haw. Rev. Stat. § 134.4; Mass Gen. Laws ch. 140, §§ 121, 131M; Minn. Stat. § 624.713; N.J. Stat. § 2C:39-1w, 5; N.Y. Penal Law § 265.00, 265.02. Five of these States and the District of Columbia have outright bans of certain weapons based on a list, semi-automatic firing capability coupled with a list of features, or both. Cal. Penal Code §§ 30605, 30510; Conn. Gen. Stat. §§ 53-202a–53-202o; D.C. Code §§ 7-2502.01, -.02; Mass. Gen. Laws ch. 140, §§ 121, 131m; N.J. Stat. § 2C:39-1(w); N.Y. Penal Law § 265.00. One State has a more limited ban on some semi-automatic weapons. See Haw. Rev. Stat. § 134-1, -8 (ban on "assault pistols" defined as semi-automatic pistols that accept detachable magazines and have certain other features).

The same is true of bans on magazine capacity. Only six other States and the District of Columbia have similar bans. See Cal. Penal Code § 16740; Colo. Rev. Stat. § 18-12-301; Conn. Gen. Stat. § 53-202w; D.C. Code Ann. § 7-2506.01(b); Haw. Rev. Stat. § 134-8(c); Mass. Gen. Laws ch. 140, §§ 121, 131M; N.J. Stat. § 2C:39-1y; N.Y. Penal Law §§ 265.00(23), 265.37. Two of those States, Colorado and New Jersey, limit

magazine capacity to no more than fifteen rounds. Colo. Rev. Stat. § 18-12-301; N.J. Stat. § 2C:39-1y. Hawaii prohibits magazines with a capacity greater than ten that can be used in a pistol. Haw. Rev. Stat. § 134-8(c). Other state statutes prohibit magazine capacity greater than ten rounds (with a few delineated exceptions). Cal Penal Code § 16740; Conn. Gen. Stat. § 53-202w; D.C. Code Ann. § 7-2506.01(b); Md. Code Ann., Crim. Law § 4-305. The State of New York has a total ban on magazines capable of accepting more than ten rounds. N.Y. Penal Law §§ 265.00(23), 265.36.

By contrast, forty States have reinforced their citizens' right to possess these commonly owned weapons by preempting municipal restrictions on such weapons. These forty States have passed statutes and/or constitutional provisions that preempt municipal enactments prohibiting the possession of semi-automatic rifles and magazines similar to those banned by Maryland.[7]

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[7] *See* Ala. Code § 13A-11-61.3(c); Alaska Stat. § 29.35.145; Ariz. Rev. Stat. § 13-3108; Ark. Code § 14-16-504(b)(1)(A); Del. Code tit. 9, § 330(c); *id*. tit. 22, § 111; Fla. Stat. § 790.33; Ga. Code § 16-11-173; Idaho Code § 18-3302J; 430 Ill. Comp. Stat. 65/13.1(c); Ind. Code § 35-47-11.1-2; Iowa Code § 724.28; 2015 Kan. Sess. Laws Ch. 93; Ky. Rev. Stat. § 65.870; La. Rev. Stat. § 40:1796; Me. Rev. Stat. tit. 25, § 2011; Mich. Comp. Laws § 123.1102; Minn. Stat. § 471.633; Miss. Code § 45-9-51; Mo. Rev. Stat. § 21.750; Mont. Code § 45-8-351; Neb. Rev. Stat. § 17-556; Nev. Rev. Stat. § 268.418; N.H. Rev. Stat. § 159:26; N.M. Const. art. II, § 6; N.C. Gen. Stat. § 14-409.40; N.D. Cent. Code § 62.1-01-03; Ohio Rev. Code § 9.68; 2015 Okla. Sess. Law Serv. Ch. 241; Or. Rev. Stat. § 166.170; 18 Pa. Stat. and Cons. Stat. Ann. § 6120; R.I. Gen. Laws § 11-47-58; S.C. Code § 23-31-510; S.D. Codified Laws § 7-18A-36; Tenn. Code § 39-17-1314; Tex. Loc. Gov't Code

B. Narrow Construction Of The Second Amendment Threatens State-Level Protection.

The Fourth Circuit's decision adds to an increasing number of cases that suggest a federal ban on these types of semi-automatic rifles and/or magazines capable of holding more than ten rounds—preempting all of these state protections—could be constitutional. A federal statute would override the policy preference of the overwhelming majority of States to allow their citizens to lawfully posess these weapons. See *supra* Part III.A. And it would undermine the protection provided by the forty States that have laws foreclosing municipal bans of the types of weapons banned in Maryland. This Court should not permit the confusion engendered by the lower courts over the meaning of *Heller* to threaten these States' policy choices and the Second Amendment rights of their citizens.

Concern about a federal ban is not idle speculation. The federal government has in the past imposed a national ban similar to the ban at issue here. In 1994, Congress enacted a federal ban on "semiautomatic assault weapons," which covered semi-automatic rifles with the ability to accept a detachable magazine and two of the following features: a folding or telescoping stock, a pistol grip that protrudes conspicuously beneath the action of the weapon, a bayonet mount, a flash suppressor or threaded barrel, and a grenade launcher. 18 U.S.C.

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§ 229.001; Utah Code § 76-10-500; Vt. Stat. tit. 24, § 2295; Wash. Rev. Code § 9.41.290; W. Va. Code § 8-12-5a; Wis. Stat. § 66.0409; Wyo. Stat. § 6-8-401.

§§ 921, 922 (1994). The ban also included certain firearms prohibited by name, including the AR-15. *Id*. § 921(a)(30)(A) (1994). And, similar to Maryland's ban, the law also banned "large capacity ammunition feeding device[s]," defined as magazines that accept more than ten rounds of ammunition. 18 U.S.C. §§ 921(a)(31), 922(w)(1) (1994). The law was upheld against challenges raised under the Commerce Clause, *Navegar, Inc. v. United States*, 192 F.3d 1050, 1054-65 (D.C. Cir. 1999) and the Equal Protection Clause, *Olympic Arms v. Buckles*, 301 F.3d 384, 388-90 (6th Cir. 2002). But the law expired before the decision in *Heller* and was never challenged on Second Amendment grounds.

Since the 1994 law expired, numerous attempts have been made to reinstate the law or a similar ban. Even before the federal ban was set to expire in 2004, California Senator Diane Feinstein introduced the Assault Weapons Ban Reauthorization Act of 2003, which would have repealed the sunset date on the 1994 ban and prohibited the importation of magazines capable of holding more than ten rounds. The Assault Weapons Ban Reauthorization Act of 2003, S. 1034, 108th Cong. §§ 2, 3(a)(2) (2003). Similar, if not identical, legislation was proposed in both chambers throughout 2004 and 2005. See*, e.g.*, Assault Weapons Ban Reauthorization Act of 2005, S. 620, 109th Cong. § 2 (2005) (reinstating the 1994 assault weapons ban); To extend the sunset on the assault weapons ban for 10 years, H.R. 3831, 108th Cong. (2004) (same); To reinstate the repealed criminal provisions relating to assault weapons and large capacity ammunition feeding devices, H.R. 5099, 108th Cong. (2004) (same); Assault Weapons Ban Reauthorization Act of 2004, S.

2109, 108th Cong. § 2 (2004) (providing a ten-year extension of the ban).

The attempts to impose a national ban of commonly used semi-automatic rifles did not stop with this Court's decision in *Heller* in 2008. The same month this Court decided *Heller*, legislation was introduced in the U.S. House of Representatives by Illinois Congressman Mark Kirk to reinstitute a ban nearly identical to the 1994 one. Assault Weapons Ban Reauthorization Act of 2008, H.R. 6257, 110th Cong. (2008). In 2013, Senator Feinstein introduced The Assault Weapons Ban of 2013, which would have banned all semi-automatic rifles able to accept a detachable magazine with one of several characteristics, including a pistol grip, a forward grip, or a barrel shroud. S. 150, 113th Cong. (2013). That proposed legislation also would have prohibited semi-automatic rifles with fixed magazines capable of accepting more than ten rounds of ammunition. *Ibid*. Most recently, in 2015, Rhode Island Congressman David Cicilline introduced The Assault Weapons Ban of 2015, which, like its predecessors, would regulate the possession, transfer, and manufacture of semi-automatic rifles possessing various features (a pistol grip, a telescoping or detachable stock, a barrel shroud, or a threaded barrel) and magazines capable of holding more than ten rounds. H.R. 4269, 114th Cong. (2015).

These efforts to impose a federal ban similar to Maryland's highlight the need for this Court's involvement. Granting certiorari and reversing the Fourth Circuit would provide clarity not only to the lower courts, but would also make clear to Congress

that a federal attempt to disrupt the regulatory framework adopted by the overwhelming majority of States would be unconstitutional.

* * *

The rights secured by the Second Amendment are no less deserving of protection than any of the other fundamental rights enshrined in the Bill of Rights. "The Constitution does not rank certain rights above others, and . . . this Court should [not] impose such a hierarchy by selectively enforcing its preferred rights." *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., dissenting from denial of certiorari). As Justice Thomas has recently remarked, this Court's "refusal to review decision[s] that flout[] . . . our Second Amendment precedents stands in marked contrast to the Court's willingness to summarily reverse courts that disregard our other constitutional decisions." *Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from denial of certiorari). This case presents an opportunity for this Court to reverse this trend and afford the Second Amendment the same jurisprudential respect granted to its sister amendments.

CONCLUSION

The petition for certiorari should be granted.

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