No. 17-127

In The
Supreme Court of the United States

STEPHEN V. KOLBE, ET AL.,

Petitioners,

v.

LAWRENCE J. HOGAN, JR., GOVERNOR, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR PETITIONERS

JOHN PARKER SWEENEY
Counsel of Record
T. SKY WOODWARD
JAMES WALLACE PORTER, III
MARC A. NARDONE
BRADLEY ARANT BOULT CUMMINGS LLP
1615 L Street, NW, Suite 1350
Washington, DC 20036
(202) 393-7150
jsweeney@bradley.com

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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REPLY BRIEF

The Fourth Circuit admitted that it was breaking from the analyses and conclusions of other Courts of Appeals that had considered similar bans, expressly declining to "answer all th[e] difficult questions" raised by *District of Columbia v. Heller*, 554 U.S. 570 (2008), and addressed by the other lower courts, and adopting a novel test. Appendix to Petition ("App.") at 45. Something has gone awry when a court adopts a test for determining the scope of the Second Amendment that would have found muskets unprotected at the founding. Yet, that is precisely what the Fourth Circuit has done in this case, seeing the faulty reasoning of other Courts of Appeals and raising the stakes with perhaps the most far-reaching and troubling rationale yet employed to uphold a ban on the most popular rifles in the country. It is necessary for this Court to reiterate what it has said before: the law-abiding, responsible citizens of this Nation are guaranteed the right to possess and use common firearms for the defense of themselves, their families, and their homes. The Maryland law at issue in this case and the Fourth Circuit decision upholding it are fundamentally irreconcilable with this simple proposition.

The Fourth Circuit's opinion is the third distinct path followed by Courts of Appeals that have considered similar bans. Only the Fourth Circuit, however, concluded that the Second Amendment does not even apply. This conclusion only obtained because the Fourth Circuit rejected the "in common use" test set forth in *Heller*, disingenuously claiming discovery of an

alternate test for determining the contours of the Second Amendment elsewhere in the language of *Heller*. The Fourth Circuit's erroneous test is the latest excuse offered by the various Courts of Appeals for avoiding *Heller* and relegating the Second Amendment to second-class status.

Taken literally, this novel test would exclude virtually all firearms from the Second Amendment. The Fourth Circuit's approach is an outlier and shows contempt for the choices of the American people by approving a prohibition of the most popular rifles and magazines sold in America today – precisely the opposite result obtained by this Court in *Heller*.

There is no reason to defer consideration of the important question presented, as Respondents suggest. Further inattention by this Court can only result in continued dilution of Second Amendment rights as each lower court takes its turn artificially constraining the mandate of *Heller*. Review is necessary to ensure that all citizens are given the full protection of their fundamental rights.

I. Respondents focus only on the Fourth Circuit's alternative holding because the novel "useful in warfare" test is an indefensible departure from this Court's Second Amendment precedent and fundamental rights jurisprudence.

The Fourth Circuit expressly rejected the core holding of *Heller* regarding what firearms are protected by the Second Amendment. It then twisted an aside in *Heller* to subvert the fundamental right the Court had recognized. Such open disregard for the teachings of this Court cannot be tolerated. *See Caetano v. Massachusetts*, 136 S. Ct. 1027, 1028 (2016). The Fourth Circuit's opinion is a doctrinal split from the approaches of other Circuits, reflecting an implicit admission that the misguided analyses of other Courts of Appeals cannot be reconciled with this Court's holdings. Unfortunately, the Fourth Circuit crafted an even more incorrect test that represents a jumping off point to justify standardless judicial approval of incursions on the Second Amendment right.

In creating its novel test and applying it to exclude from Second Amendment protection any firearms and magazines "useful in military service," the Fourth Circuit admitted it was departing from other Circuits. App.44. Respondents focus largely on the Fourth Circuit's alternative analysis to suggest there is nothing to review here because the Fourth Circuit's "useful in military service" test – which presently is controlling law in the Fourth Circuit narrowing the scope of the

Second Amendment – is indefensible. This important matter warrants this Court's review.

The Fourth Circuit's test begs the very question it purports to answer, credulously accepting the governmental rationale without regard to the straightforward application of the *Heller* test:

> The irony is that millions of law-abiding Americans *actually use* these versatile guns, while there do not seem to be any military forces that routinely carry an AR-15 or other semiautomatic sporting rifles as an officially-issued service weapon. . . . Whatever the *potential* military usefulness of these weapons, millions of American citizens *actually* use them for sporting purposes and possess them to defend themselves, their families and their homes. Indeed, plaintiffs' evidence suggests that "[t]he semi-automatic AR15 carbine is likely the most ergonomic, safe, readily available and effective firearm for civilian self-defense."

App.100 (Traxler, J., dissenting) (emphasis and alteration in original) (citation omitted). Respondents do not address at all the obvious problems with the Fourth Circuit's test.

This new test is wholly arbitrary. And, once firearms are deemed "weapons of war," there are no constitutional safeguards against their prohibition. Application of the Fourth Circuit's "useful in military service" analysis would conclude that: (1) most if not all rifles and pistols, and even shotguns and revolvers,

are not protected; (2) the capacity of any detachable magazine can be restricted without any limiting principle; (3) detachable magazines could be banned in their entirety; and (4) other limits may be placed on the Second Amendment based on nothing more than a determination by a legislature or a court that the firearms in question would be useful to the military. The Fourth Circuit distorted *Heller* to destroy the very right *Heller* described and preserved. That the framers enacting the Second Amendment did not intend the Fourth Circuit's interpretation is patently obvious: under the Fourth Circuit's test, Congress could have outlawed muskets as "useful in military service." This would eviscerate the Second Amendment. It is telling that Respondents have neither contested any of this, nor attempted to defend the Fourth Circuit's new test.

The future course under such standardless review is plain to see. First will come prohibition of so-called "assault weapons and large capacity magazines." Then it will be all semiautomatic rifles and pistols. Then it will be detachable magazines. And so on. The courts will have become the case-by-case arbiters of whether citizens "retain adequate means of self-defense" (App.44) (internal quotation marks and citation omitted), and this Court's landmark protection of the people's choice of firearms will be relegated to the dustbin of constitutional history. This is the exact path proffered by the dissenters but rejected by the Court in *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and even more recently in *Caetano*.

A serious application of the Fourth Circuit's "useful in warfare" test would exclude from Second Amendment protection as "useful in military service" nearly all firearms, including the handguns this Court held to be protected in *Heller*. The Fourth Circuit based its conclusion that the firearms and magazines at issue are not protected by the Second Amendment on its statement that "the banned assault weapons are designed to kill or disable the enemy on the battlefield." App.48 (internal quotation marks, alterations, and citation omitted). Of course, almost all firearms have that capacity, just as they are designed to stop the criminal intruder in the home. And, as Petitioners have demonstrated, nearly every kind of firearm has, at one point, been found useful by the military for something. *See* App.98-101 (Traxler, J., dissenting).

To see the fatal flaws in the Fourth Circuit's test, this Court need look no further than the semiautomatic handgun – the "quintessential self-defense weapon." *Heller*, 554 U.S. at 629. Nearly every sidearm in every modern military in the world is a semiautomatic handgun. These firearms are designed and issued to be useful in military service. Under the Fourth Circuit's reasoning, all semiautomatic handguns would be outside of the Second Amendment's protection. Revolvers would fare no better, as they were the standard military equipment of yesteryear. Thus, the Fourth Circuit's test would exclude all popular handguns from Second Amendment protection, disregarding both *Heller* and *Caetano*, 136 S. Ct. at 1028 (affirming that the "Second Amendment 'extends . . . to

. . . arms . . . that were not in existence at the time of the founding.'") (quotation marks and citation omitted) (alterations in original).

Not surprisingly, Respondents approvingly quote Judge Wilkinson's concurring opinion that "if 'these weapons are outside the legislative compass, then virtually all weapons will be.'" (Respondents' Brief in Opposition to Petition for Writ of Certiorari ("Opposition") at 8.) Yet, by holding firearms useful in military service to be outside the Second Amendment, the Fourth Circuit has relegated review of bans on common firearms to "rational basis," which this Court forbade (*Heller*, 554 U.S. at 628 n.27), achieving what Judge Wilkinson has long advocated: restoration of total legislative power over the fundamental right to keep and bear arms.[1]

This Court recognized the core right of the Second Amendment in *Heller*: law-abiding, responsible citizens have a fundamental right to keep and bear arms that are in common use for lawful purposes. In the Fourth Circuit, however, law-abiding, responsible citizens have the right to keep and bear only those arms that are not "designed to kill or disable." App.48 (internal quotation marks, alterations, and citations omitted). It is difficult to fathom how a citizen could defend hearth and home without an arm that is designed to stop a criminal intruder. Yet, unlike any other Circuit,

[1] *See* Hon. J. Harvie Wilkinson, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 Va. L. Rev. 253, 254 (2009) (characterizing *Heller* as "a failure to respect legislative judgments[,] and a rejection of the principles of federalism").

that is what the Fourth Circuit will permit a government to mandate.

Respondents' argument that this Court should not grant certiorari because, in its view, the Fourth Circuit obtained the correct result, regardless of the path it took to arrive there, misapprehends both the role of this Court and the reasons compelling review here. The decision below is not just incorrect in its outcome; the Fourth Circuit has brazenly broken both from this Court's Second Amendment precedent and from the doctrinal approach of the other Courts of Appeals.

Respondents try to gloss over all these glaring facts because the Second, Seventh, and D.C. Circuits also upheld similar bans, albeit after either holding or assuming they fell within the scope of the Second Amendment. *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015); *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011). But the split among the Circuit Courts on the scope of the Second Amendment is obvious: three Circuits have considered challenges to similar bans by applying the Second Amendment, and only the Fourth Circuit has determined that the firearms and magazines at issue are not protected by the Second Amendment. There can be no greater doctrinal split than when the scope of a fundamental right is determined by application of different tests that are contradictory of each other, and such a split calls out for this Court's intervention. *See* Sup. Ct. R. 10(a) (identifying as appropriate for certiorari cases in which "a United States court of appeals

has entered a decision in conflict with the decision of another United States court of appeals on the same important matter"); *see also Ohio v. Am. Express Co.*, 838 F.3d 179 (2d Cir. 2016), *cert. granted*, ___ S. Ct. ___, 2017 WL 2444673 (Oct. 16, 2017) (No. 16-1454) (certiorari granted over the Government's objections that the petition was not ripe for review because the lower court's decision, even if erroneous, was an outlier, no other court had applied its reasoning, and thus this Court should have awaited further percolation among the lower courts).

This Court may grant certiorari to resolve doctrinal splits or differences in the lower courts' interpretations of federal law. When reviewing petitions, the Court considers not just whether the Courts of Appeals differ "on the same important matter," Sup. Ct. R. 10(a), but also whether the Court of Appeals below "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). This Court has thrice reviewed lower court decisions involving bans of common arms. Surely, conflicting approaches among the Courts of Appeals regarding the standards for evaluating a firearms ban is an important matter warranting review under Rule 10(a), regardless of whether the lower courts reached the same conclusion. Moreover, where, as here, the lower court has rejected this Court's test in favor of one of its own making, the decision is reviewable under Rule 10(c).

If Respondents' argument – that the ends justify the means – carries the day and the Fourth Circuit's

decision escapes review, further erosion of fundamental rights beyond those of the Second Amendment is inevitable. The tests courts employ to evaluate constitutional challenges are not merely incidental to the process. They determine the scope of the rights themselves. This Court cannot allow lower courts to simply "opt-out" of applying established constitutional tests to fundamental rights.

Respondents cannot be correct that the Fourth Circuit's opinion applying a novel test to exclude the most popular semiautomatic rifles and ammunition magazines from constitutional protection need not be reviewed simply because other Circuits upheld similar bans. If that were true, none of the standards set forth by this Court would matter; all that would matter is the outcome of the case. This is not, and cannot be, the way fundamental rights are safeguarded by this Court. If those rights are to be more than hollow promises, subjected to different treatment across the country or even disregarded outright, this Court should grant review.

II. Respondents' "wait and see" argument must fail because fundamental rights will continue to be eroded absent this Court's review.

Respondents also argue that this Court should not grant certiorari because there are other cases involving similar challenges pending in district courts. Opposition at 4. That Respondents would even suggest such

a course of action simply underscores that the Fourth Circuit has created an indefensible standard that will subvert the Second Amendment. Respondents just as well might have argued that this Court should "wait and see" so that additional lower courts can employ the utterly standardless "useful in military service" test. The Fourth Circuit's opinion represents the point of no return where Second Amendment protections for any class of arms may be concerned: either lower courts will adhere to *Heller*, or they will follow the path being blazed by the Fourth Circuit, an outcome that can only be stopped by this Court's intervention now.

Accordingly, review of this case will stop the continued erosion of this Court's decisions in *Heller*, *McDonald*, and *Caetano*. The lower courts have invalidated very few laws challenged under the Second Amendment, often diluting this Court's teachings to achieve the desired result. Before now, however, none had brazenly distorted this Court's precedent to hold the Nation's most popular rifles and magazines fall outside the Second Amendment under a test that literally would exclude every firearm from constitutional protection. If this opinion is permitted to stand, it will embolden courts and governments to do what this Court ostensibly forbade in *McDonald*: treat the Second Amendment as a second-class right. *McDonald*, 561 U.S. at 780.

Only this Court's review can repair the irreconcilable splits from this Court's precedent and among the Courts of Appeals as to the scope of the Second Amendment itself. Any delay in addressing the important

question presented by this case will further deprive Petitioners and all law-abiding Marylanders of their fundamental right to keep and bear arms. Moreover, the unlimited reach of the Fourth Circuit's outlier test adds urgency here as it inevitably will be used to truncate this and other liberties. This Court should grant certiorari to confirm that the Second Amendment must be treated with the same dignity and deference afforded all fundamental individual rights.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

JOHN PARKER SWEENEY
Counsel of Record
T. SKY WOODWARD
JAMES WALLACE PORTER, III
MARC A. NARDONE
BRADLEY ARANT BOULT CUMMINGS LLP
1615 L Street, NW, Suite 1350
Washington, DC 20036
(202) 393-7150
jsweeney@bradley.com

Counsel for Petitioners

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