

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1255

DOMINIC BIANCHI, an individual and resident of Baltimore County; DAVID SNOPE, an individual and resident of Baltimore County; MICAH SCHAEFER, an individual and resident of Anne Arundel County; FIELD TRADERS LLC, A resident of Anne Arundel County; FIREARMS POLICY COALITION, INC.; SECOND AMENDMENT FOUNDATION; CITIZENS COMMITTEE FOR THE RIGHT TO KEEP AND BEAR ARMS

Plaintiffs - Appellants

v.

ANTHONY G. BROWN, in his official capacity as Attorney General of Maryland; COL. WOODROW W. JONES, III, in his official capacity as Secretary of State Police of Maryland; R. JAY FISHER, in his official capacity as Sheriff of Baltimore County, Maryland; EVERETT L. SESKER, in his official capacity as Sheriff of Anne Arundel County, Maryland

Defendants - Appellees

JOHN CUTONILLI

Amicus Supporting Appellants

and

GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE; BRADY CENTER TO PREVENT GUN VIOLENCE; MARCH FOR OUR LIVES; EVERYTOWN FOR GUN SAFETY

Amici Supporting Appellees.

Appeal from the United States District Court for the District of Maryland at Baltimore.
James K. Bredar, Senior District Judge. (1:20-cv-03495-JKB)

Argued: March 20, 2024

Decided: August 6, 2024

Before DIAZ, Chief Judge, and WILKINSON, NIEMEYER, KING, GREGORY, AGEE, WYNN, THACKER, HARRIS, RICHARDSON, QUATTLEBAUM, RUSHING, HEYTENS, BENJAMIN and BERNER, Circuit Judges.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Chief Judge Diaz, Judge King, Judge Wynn, Judge Thacker, Judge Harris, Judge Heytens, Judge Benjamin, and Judge Berner joined. Chief Judge Diaz wrote a concurring opinion, in which Judge King, Judge Wynn, Judge Thacker, Judge Benjamin, and Judge Berner joined. Judge Gregory wrote an opinion concurring in the judgment. Judge Richardson wrote a dissenting opinion, in which Judge Niemeyer, Judge Agee, Judge Quattlebaum, and Judge Rushing joined.

ARGUED: Peter A. Patterson, COOPER & KIRK, PLLC, Washington, D.C., for Appellants. Robert A. Scott, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellees. **ON BRIEF:** Raymond M. DiGuiseppe, THE DIGUISEPPE LAW FIRM, P.C., Southport, North Carolina; Adam Kraut, FIREARMS POLICY COALITION, Sacramento, California; David H. Thompson, Tiernan B. Kane, COOPER & KIRK, PLLC, Washington, D.C., for Appellants. Brian E. Frosh, Attorney General, Ryan R. Dietrich, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, for Baltimore, Maryland, for Appellees. John Cutonilli, Garret Park, Maryland, for Amicus John Cutonilli. Esther Sanchez-Gomez, Leigh Rome, William T. Rome, GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE, San Francisco, California, for Amicus Giffords Law Center to Prevent Gun Violence. Douglas N. Letter, Shira Lauren Feldman, BRADY CENTER TO PREVENT GUN VIOLENCE, Washington, D.C., for Amicus Brady Center to Prevent Gun Violence. Ciara Wren Malone, MARCH FOR OUR LIVES, New York, New York, for Amicus March for Our Lives. Eric B. Bruce, Jennifer Loeb, Washington, D.C., Aaron R. Marcu, Brandt Henslee, Yulia Dernovsky, Daniel Hodgkinson, Susannah Benjamin, Taylor Jachman, FRESHFIELDS BRUCKHAUS DERINGER US LLP, New York, New York, for Amici Giffords Law Center to Prevent Gun Violence, Brady Center to Prevent Gun Violence, and March for Our Lives. Janet Carter, William J. Taylor, Jr., Priyanka Gupta Sen, EVERYTOWN LAW, New York, New York, for Amicus Everytown for Gun Safety.

WILKINSON, Circuit Judge:

The elected representatives of the people of Maryland enacted the Firearms Safety Act of 2013 in the wake of mass shootings across the country and a plague of gun violence in the state. This case is about whether the Act’s general prohibition on the sale and possession of certain military-style “assault weapons,” including the AR-15, the AK-47, and the Barrett .50 caliber sniper rifle, is unconstitutional under the Second Amendment.

We considered this issue as an en banc court in *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (en banc), where we held that Maryland’s regulation of these assault weapons is consistent with the Second Amendment. However, in *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022), the Supreme Court clarified how courts are to resolve Second Amendment challenges and rejected part of our approach in *Kolbe*.

With the respectful consideration and benefit of *Bruen*, we now uphold the judgment below. The assault weapons at issue fall outside the ambit of protection offered by the Second Amendment because, in essence, they are military-style weapons designed for sustained combat operations that are ill-suited and disproportionate to the need for self-defense. Moreover, the Maryland law fits comfortably within our nation’s tradition of firearms regulation. It is but another example of a state regulating excessively dangerous weapons once their incompatibility with a lawful and safe society becomes apparent, while nonetheless preserving avenues for armed self-defense.

For these reasons, we decline to wield the Constitution to declare that military-style armaments which have become primary instruments of mass killing and terrorist attacks in the United States are beyond the reach of our nation’s democratic processes. In so holding,

we offer no view on how a state should regulate firearms. Nor do we do anything to impose Maryland's regulations upon other states. We do hold, however, that Maryland was well within its constitutional prerogative to legislate as it did. We therefore reject the challenges of appellants and affirm the judgment of the district court.

Our friends in dissent would rule the Maryland statute unconstitutional. They would go so far as to uphold a facial challenge to the enactment, meaning that there is no conceivable weapon, no matter how dangerous, to which the Act's proscriptions can validly be applied. In so doing, they reject the centuries of common law that infused accommodation in the rights our founding generation recognized. And in creating a near absolute Second Amendment right in a near vacuum, the dissent strikes a profound blow to the basic obligation of government to ensure the safety of the governed. Arms upon arms would be permitted in what can only be described as a stampede toward the disablement of our democracy in these most dangerous of times. All this we shall explain.

The Supreme Court remanded this case for reconsideration in light of *Bruen*, a task which we shall, with great respect, perform. We conclude that *Bruen* did not mandate an abandonment of our faith in self-governance, nor did it leave the balance struck throughout our history of firearms regulation behind.

I.

Maryland law prohibits any person in the state from selling, purchasing, receiving, transporting, transferring, or possessing an "assault weapon," subject to limited exceptions. Md. Code, Crim. Law § 4-303. A violator of this statute faces up to three years' imprisonment. *Id.* § 4-306. Maryland law enforcement officers are authorized to seize and

dispose of weapons sold, purchased, received, transported, transferred, or possessed in violation of the law. *Id.* § 4-304.

The statute defines “assault weapon” as “(1) an assault long gun; (2) an assault pistol; or (3) a copycat weapon.” *Id.* § 4-301(d). The term “assault long gun,” in turn, encompasses more than forty-five enumerated long guns “or their copies, regardless of which company produced and manufactured” the firearm. *Id.* § 4-301(b); *see* Md. Code, Pub. Safety § 5-101(r)(2). These proscribed guns include an assortment of military-style rifles and shotguns capable of semiautomatic fire, such as the AK-47, almost all models of the AR-15, the SPAS-12, and the Barrett .50 caliber sniper rifle. *See* Md. Code, Pub. Safety § 5-101(r)(2). The term “assault pistol” encompasses more than fifteen enumerated firearms and their copies. These include the TEC-9 and semiautomatic variants of the MAC-10, MP5K, UZI, and other military-style submachine guns. Md. Code, Crim. Law § 4-301(c).

“Copycat weapon” is defined as a firearm that is not an assault long gun or assault pistol yet is covered by at least one of the following six categories:

(i) a semiautomatic centerfire rifle that can accept a detachable magazine and has any two of the following:

1. a folding stock;
2. a grenade launcher or flare launcher; or
3. a flash suppressor;

(ii) a semiautomatic centerfire rifle that has a fixed magazine with the capacity to accept more than 10 rounds;

(iii) a semiautomatic centerfire rifle that has an overall length of less than 29 inches;

(iv) a semiautomatic pistol with a fixed magazine that can accept more than 10 rounds;

(v) a semiautomatic shotgun that has a folding stock; or

(vi) a shotgun with a revolving cylinder.

Id. § 4-301(h).

Appellants are three Maryland residents who allege that they are legally eligible to possess and acquire firearms, three nonprofit gun rights organizations to which the residents belong, and a licensed firearms dealer based in Maryland. On November 13, 2020, appellants filed a complaint under 42 U.S.C. § 1983 in the U.S. District Court for the District of Maryland against the then-Attorney General of Maryland and other state law enforcement officials. Appellants contended that these officials' enforcement of Maryland's assault weapons regulations was unconstitutional under the Second Amendment's right to keep and bear arms as applied to the states through the Fourteenth Amendment. They sought a declaratory judgment that the regulations prevented them from exercising their right to keep and bear arms, as well as an injunction to prohibit appellees from enforcing the statute.

In their complaint, however, appellants "acknowledge[d] that the result they seek is contrary to *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017)." J.A. 6. In *Kolbe*, we upheld against a constitutional challenge the very same Maryland statute at issue here insofar as it applied to "assault long guns and those copycat weapons that are rifles and shotguns." *Kolbe*, 849 F.3d at 122 n.2. Our en banc opinion rested on two distinct grounds. We first

concluded that the assault weapons at issue were “not constitutionally protected arms.” *Id.* at 130 (emphasis omitted). We then found that, even assuming the Second Amendment reached such weapons, the Maryland regulations survived intermediate scrutiny. *Id.*

In the instant case, appellees answered the complaint by citing *Kolbe* and arguing that the suit should be dismissed for failure to state a claim. The district court agreed and dismissed the case on March 3, 2021. It noted that *Kolbe* controlled and agreed with appellants’ concession that the court “ha[d] no discretion but to dismiss [their] complaint.” J.A. 42. Appellants timely appealed. Their brief focused on the statute’s regulation of semiautomatic assault rifles, as opposed to the parts of the statute targeting semiautomatic assault pistols and shotguns.

We affirmed the district court in a per curiam opinion on September 14, 2021. We too noted that appellants had conceded their argument was “squarely foreclosed” by *Kolbe*, and we observed that a panel of our court is “not authorized to reconsider an en banc holding.” *Bianchi v. Frosh*, 858 F. App’x 645, 646 (4th Cir. 2021) (internal quotation marks omitted).

Appellants petitioned the Supreme Court for writ of certiorari on December 16, 2021, arguing that our en banc decision in *Kolbe* should be overturned. *See* Petition for Writ of Certiorari, *Bianchi v. Frosh*, 142 S. Ct. 2898 (2022) (mem.) (No. 21-902). Appellees responded at the Court’s request. *See id.*

On June 23, 2022, before ruling on the cert petition, the Supreme Court decided *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022). In *Bruen*, the Court disavowed as “one step too many” the two-step framework that our court used in *Kolbe*

and that other federal circuit courts had nearly universally employed to assess Second Amendment claims in the wake of *District of Columbia v. Heller*, 554 U.S. 570 (2008). *Bruen*, 597 U.S. at 19. Although “[s]tep one of the predominant framework”—which was “rooted in the Second Amendment’s text, as informed by history”—was “broadly consistent with *Heller*,” the Court emphasized that the “means-end scrutiny” at the second step was improper. *Id.* Because “the Second Amendment . . . codified a *pre-existing* right,” courts were not to engage in interest balancing to determine whether a challenged regulation was constitutionally permissible. *Id.* at 20 (quoting *Heller*, 554 U.S. at 592). Instead, we were tasked with discerning the historical scope of the right and parsing whether the challenged regulation was consistent with it. *Id.* at 22–24.

A week after *Bruen* was decided, the Supreme Court granted appellants’ petition for writ of certiorari, vacated the judgment, and remanded the case for further consideration in light of *Bruen*. See *Bianchi v. Frosh*, 142 S. Ct. at 2898–99. We ordered the parties to provide supplemental briefing, and a panel of this court heard oral argument on December 6, 2022. Before an opinion issued, however, our court voted to rehear the case en banc. We received additional supplemental briefing from the parties, and heard oral argument as a full court on March 20, 2024. Now, with the benefit of *Bruen*, we can proceed to decide this case.¹

¹ We thank our friend Judge Richardson for his dissenting opinion. The procedural history to which he alludes, see Dissenting Op. at 87 n.2, reflects nothing more than the good-faith efforts of every member of our court to reach a well-reasoned decision in a challenging set of cases.

II.

The Second Amendment instructs, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II. This single sentence provides us with a lofty command, but little concrete guidance. In the past two decades, the Supreme Court has stepped in to provide this guidance, offering a methodological framework by which to structure our inquiry.

The development of this framework began with *District of Columbia v. Heller*, 554 U.S. 570 (2008). In *Heller*, the Supreme Court held that the Second Amendment safeguards the right to possess a firearm within one’s home for self-defense. *Id.* at 635. To reach that conclusion, the Court distilled the Second Amendment into its constituent parts, engaged in linguistic and historical analysis to interpret the original meaning of each, and determined that the Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation.” *Id.* at 592. The Court recognized that the Amendment “codified a *pre-existing* right” to keep and bear arms, *id.*, which, at the time of the nation’s founding, was understood by Americans to be a “right of self-preservation,” *id.* at 595 (quoting 2 *Blackstone’s Commentaries: With Notes of Reference* 145 n.42 (St. George Tucker ed. 1803) [hereinafter Tucker’s Blackstone]). The Court therefore found that “self-defense” is “the *central component* of the right.” *Id.* at 599.

In rejecting the “argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment,” the Court in *Heller* stated that “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.” *Id.* at 582. The Court clarified this statement later in the opinion, where it emphasized that “[l]ike most rights, the right secured by the Second Amendment is not unlimited.” *Id.* at 626.

There, the Court explained that the Second Amendment does not guarantee “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Id.* Indeed, the Court found it would be “startling” to read the Second Amendment such that “the National Firearms Act’s restrictions on machineguns . . . might be unconstitutional.” *Id.* at 624. Thus, the Court acknowledged that it was not in serious dispute that “weapons that are most useful in military service—M-16 rifles and the like—may be banned.” *Id.* at 627.

The Court recognized an additional limitation on the types of arms that the Second Amendment protects. It interpreted the holding of a previous Second Amendment decision, *United States v. Miller*, 307 U.S. 174 (1939), to stand for the proposition “that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.” *Heller*, 554 U.S. at 625. In other words, “dangerous and unusual weapons” that are not “in common use” can be prohibited. *Id.* at 627.

In the wake of *Heller*’s recognition of the individual right to keep and bear arms and its limitations, circuit courts across the nation—including ours—interpreted *Heller* to permit a means-end approach for assessing the constitutionality of firearms regulations. *See, e.g., Kolbe*, 849 F.3d at 133; *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 254 & n.49 (2d Cir. 2015); *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng’rs*, 788 F.3d

1318, 1322 (11th Cir. 2015). In evaluating such regulations against Second Amendment challenges, a court would first inquire “whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee.” *Kolbe*, 849 F.3d at 133. If the challenged law did so, the court would then apply either intermediate or strict scrutiny, “depend[ing] on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.” *Id.*

As this approach percolated in the lower courts, the Supreme Court’s subsequent Second Amendment opinions did little to alter the status quo. In *McDonald v. City of Chicago*, the Court held that “the Second Amendment right is fully applicable to the States,” but otherwise endorsed *Heller* as is. 561 U.S. 742, 791 (2010). And in *Caetano v. Massachusetts*, a per curiam Court reaffirmed two aspects of *Heller*: that “the Second Amendment extends . . . to . . . arms . . . that were not in existence at the time of the founding”; and that the Second Amendment may protect arms beyond “weapons useful in warfare.” 577 U.S. 411, 412 (2016) (internal quotation marks omitted) (quoting *Heller*, 554 U.S. at 582).

Then came *Bruen*. Rejecting the means-end approach of the lower courts, the *Bruen* Court set out a two-step methodology oriented towards text, history, and tradition. Under this approach, a court first looks to the text of the Second Amendment to see if it encompasses the desired conduct at issue. 597 U.S. at 24. If the text does not extend to the desired conduct, that conduct falls outside the ambit of the Second Amendment, and the government may regulate it. But if a court finds that the text *does* encapsulate the desired conduct, the analysis moves to the second step, where the burden shifts to the government

to “justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.” *Id.* Only if such consistency is shown can a court conclude that the regulation is constitutionally permissible. *Id.*

The Court in *Bruen* found that the New York regulation at issue, which required an individual to “demonstrate a special need for self-protection distinguishable from that of the general community” before he could carry a handgun outside of his home, did not satisfy this history-and-tradition test. *Id.* at 70. The Court first determined that the plaintiffs’ “proposed course of conduct—carrying handguns publicly for self-defense” readily fell within the plain text of the Second Amendment. *Id.* at 32. Thus, the burden shifted to New York to show that its regulation was “consistent with this Nation’s historical tradition of firearm regulation.” *Id.* at 33–34.

After examining multiple historical regulations on the public carry of weapons, the *Bruen* Court determined that none of them was sufficiently analogous to the regulation at issue. *See id.* at 38–70. Specifically, the Court held that the New York regulation was unconstitutional because, “[a]part from a few late-19th-century outlier jurisdictions, American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense,” nor have these governments “required law-abiding, responsible citizens to demonstrate a special need . . . in order to carry arms in public.” *Id.* at 70 (internal quotation marks omitted).

In so holding, the *Bruen* Court was clear that it was “apply[ing]” the “test that [it] set forth in *Heller*.” *Id.* at 26. It reiterated that “the right secured by the Second Amendment is not unlimited,” and, as such, it is “not a right to keep and carry any weapon whatsoever

in any manner whatsoever and for whatever purpose.” *Id.* at 21 (quoting *Heller*, 554 U.S. at 626). Justice Alito further elaborated on this point in his concurrence, explaining that the majority’s “holding decides nothing . . . about the kinds of weapons that people may possess. Nor have we disturbed anything that we said in *Heller* or *McDonald* . . . about restrictions that may be imposed on the possession or carrying of guns.” *Id.* at 72 (Alito, J., concurring).

III.

With this background in mind, we proceed to our analysis of the assault weapons regulations at issue. We hold that the covered firearms are not within the scope of the constitutional right to keep and bear arms for self-defense, and thus Maryland’s regulation of them can peaceably coexist with the Second Amendment. Moreover, even if the text of the Second Amendment were read to encompass the covered firearms, the statutory provisions at issue would nonetheless be constitutional. Our nation has a strong tradition of regulating excessively dangerous weapons once it becomes clear that they are exacting an inordinate toll on public safety and societal wellbeing.

This conclusion that the Maryland regulation is consistent with the Constitution is not some sort of edict to the rest of the states, obligating them to follow suit. States may take a variety of approaches to address the nation’s mass shooting crisis beyond the regulation of firearms, such as expanding mental health services or bolstering law enforcement’s capacity to respond. We make no comment on the effectiveness of these or any other measures. We simply recognize that Maryland acted well within the scope of its own police powers in responding to the demands of its own citizens. Nothing in our opinion

foists the values of Maryland upon, say, South Carolina, or those of South Carolina upon Maryland. We choose to honor the worthy virtues of federalism and democracy, not to stifle them. To do otherwise would unduly impede the workings of legislative bodies across our country as they struggle to meet the challenges of today and tomorrow.

A.

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. 597 U.S. at 24. 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. *See Biden v. Nebraska*, 600 U.S. 477, 511 (2023) (Barrett, J., concurring) (“To strip a word from its context is to strip that word of its meaning.”). *Heller* and *Bruen* confirmed the importance of reading the Amendment in context by repeatedly emphasizing that “it has always been widely understood that the Second Amendment . . . codified a *pre-existing* right.” *Bruen*, 597 U.S. at 20 (quoting *Heller*, 554 U.S. at 592); *see also United States v. Price*, No. 22-4609, slip op. at 8–12 (4th Cir. Aug. 6, 2024) (majority opinion). In other words, the Second Amendment codified “the right to keep and bear arms”: a specific entitlement with a particular meaning in the ratifying public’s consciousness, with baked-in prerogatives and qualifications alike. *See Bruen*, 597 U.S. at 21 (“[L]ike most rights, the right secured by the Second Amendment is not unlimited.” (quoting *Heller*, 554 U.S. at 626)).

This understanding of the text of the Second Amendment is consistent with the way we read other constitutional provisions. Take the First Amendment. *See id.* at 24–25

(analogizing the Court’s Second Amendment framework to “how we protect other constitutional rights” like “the freedom of speech in the First Amendment”). That provision establishes that “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I. Reading the text devoid of its historical context, one might conclude that the Constitution prohibits governmental restrictions on libel, incitement, true threats, fighting words, or falsely shouting fire in a crowded theater. Such activity is, after all, “speech.” But effective constitutional interpretation requires a recognition that the First Amendment was enacted against a backdrop of laws and societal understandings that circumscribed these types of communications because they did not advance the underlying purposes that the right to free speech was codified to protect. *See United States v. Rahimi*, 144 S. Ct. 1889, 1911–12 (2024) (Kavanaugh, J., concurring); *Heller*, 554 U.S. at 595 (“[W]e do not read the First Amendment to protect the right of citizens to speak for *any purpose*.”); *Bruen*, 597 U.S. at 15 (same) (citing U.S. Const. amend. I). Thus, inherent in the Speech Clause is the limitation that certain types of activity that fall within a literal reading of the word “speech” are not protected by the free speech right enshrined in the First Amendment.

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. *See Bruen*, 597 U.S. at 25 (endorsing “reliance on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing* right”). What we must do under *Bruen*, then, is assess the historical scope of the right to keep and bear arms to determine whether the text of the Second Amendment encompasses the right to possess the

assault weapons at issue. *See Price*, No. 22-4609, slip op. at 12–13 (majority opinion) (“[W]e can *only* properly apply step one of the *Bruen* framework by looking to the historical scope of the Second Amendment right.”).

B.

This was the question we earlier faced as an en banc court in *Kolbe*. Our primary holding in that case was that the assault weapons regulated by the statute were not within the scope of the Second Amendment. 849 F.3d at 136. Specifically, we resolved the case by finding that the covered weapons were “‘like’ ‘M-16 rifles’, i.e., ‘weapons that are most useful in military service,’ and thus outside the ambit of the Second Amendment.” *Id.* (quoting *Heller*, 554 U.S. at 627). It was only after “we affirm[ed] the district court’s award of summary judgment in favor of the State” on those grounds that we turned to finding, “[i]n the alternative,” that the assault weapons regulations survived intermediate scrutiny. *Id.* at 137–38.

It is true that *Kolbe* was decided before *Bruen*. But contrary to appellants’ claims, *Bruen* did not abrogate *Kolbe*’s entire holding. While the Court in *Bruen* held that the means-end balancing we conducted in our secondary, alternative analysis was “one step too many,” it did not disturb our principal holding that the covered assault weapons were outside the ambit of the individual right to keep and bear arms. *Bruen*, 597 U.S. at 19. The Court was careful to note that only “the Courts of Appeals’ second step” was “inconsistent with *Heller*’s historical approach and its rejection of means-end scrutiny.” *Id.* at 24. On the other hand, when it came to our primary approach, the *Bruen* Court did not reject this type of analysis, finding that it was “broadly consistent with *Heller*.” *Id.* at 19; *see also Hanson*

v. District of Columbia, 671 F. Supp. 3d 1, 8 (D.D.C. 2023) (“*Bruen* did not disturb the analysis Courts of Appeals conducted under the first step of their framework.”). We therefore respectfully reaffirm the conclusion we reached in *Kolbe* that the covered weapons “are not constitutionally protected arms.” 849 F.3d at 130 (emphasis omitted).

C.

The validity of this conclusion becomes clear when viewed in light of the purpose of the individual right to keep and bear arms. *Heller* established that “the *central component*” of the individual right codified by the Second Amendment was “self-defense.” 554 U.S. at 599; *see also Bruen*, 597 U.S. at 32; *McDonald*, 561 U.S. at 767. The common-law right to self-defense, in turn, was understood by the founding generation to mean the right of “a citizen to ‘repel force by force’ when ‘the intervention of society in his behalf, may be too late to prevent an injury.’” *Heller*, 554 U.S. at 595 (quoting 2 Tucker’s *Blackstone* 145) (internal alteration omitted). The pre-existing right codified by the Second Amendment is thus about amplifying the power of individual citizens to project force greater than they can muster with their own bodies so that they may protect themselves when government cannot.

Limitations on this right to self-defense have been recognized in common law since before our nation’s founding. One involves the necessity of imminence. A citizen cannot launch a preemptive assault against another when he faces solely the possibility of some threat hours or days away, or when he is seeking revenge for a harm already wrought by another. *See* 4 William Blackstone, *Commentaries of the Laws of England* 184 (1769) [hereinafter *Blackstone*] (“This right of natural defence does not imply a right of attacking:

for, instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice.”). Rather, force may only be used in self-defense when reasonably necessary. *See id.* (stating “the right of preventive defence” may only be exercised “when certain and immediate suffering would be the consequence of waiting for the assistance of the law”). A second limitation circumscribes who can be the object of force used in self-defense. A citizen generally cannot use force against an innocent bystander to protect himself from an assailant, such as by turning the bystander into a human shield. *See id.* at 30 “[T]hough a man be violently assaulted, and hath no other possible means of escaping death, but by killing an innocent person; this fear and force shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent.”). Yet another limitation is on the amount of force that may be used. Deadly force, for example, generally may not be used except against a person who poses an impending threat of death or serious bodily harm. *See id.* at 185 (“The party assaulted must therefore flee . . . as far as the fierceness of the assault will permit him: for it may be so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then in his defence he may kill his assailant instantly.”).

The above limitations and qualifications do not undermine the importance of self-defense when one’s person is imperiled. And the exact scope of the self-defense right has ebbed and flowed over time and across jurisdictions. *Compare id.* (requiring where possible a defender flee before using deadly force), *with* Tex. Penal Code § 9.31 (permitting a defender to stand his ground). But meaningful limits on the right have always existed. Our legal tradition has never seriously contemplated that a citizen may employ

force against another whenever he chooses upon mere speculation that such person poses a prospective threat.

As these limitations on the right to self-defense demonstrate, there are societal interests that can prevail over the right to protect oneself with force. The imminence requirement, for example, ensures that the justice system, not the individual, is the preferred user of force to restrain unlawful action when that system has the time and capacity to act. *See* 4 Blackstone 184. And restrictions on how much force may be employed, and against whom force may be used, clarify that it is not just the rights to life and liberty of the defender that matter, but also those of other members of society. Else, how could we have any society at all?

These limitations inform the historical backdrop of the right ultimately enshrined in our Constitution: to keep and bear arms for the purpose of self-defense. Just as the right to self-defense had limitations at the time of the founding, so too did the right to keep and bear arms that enabled it. As the Supreme Court recognized in *Heller*, the Second Amendment “is the very *product* of an interest balancing by the people.” 554 U.S. at 635. In crafting the Amendment, the Framers aimed to safeguard the right to individual self-preservation while recognizing appropriate limitations—including those already inherent in the common-law right to self-defense—that permitted the maintenance of an amicable and orderly society. Thus, courts are “not [to] read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation.” *Id.* at 595.

One qualification recognized by *Heller* is on *who* can keep and bear arms: there are “longstanding prohibitions on the possession of firearms by felons and the mentally ill.”

Id. at 626. While these individuals maintain a right to self-preservation, society has concluded that the danger that they will misuse their armament-amplified power is too great to permit possession. *See Rahimi*, 144 S. Ct. at 1896–97; *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting) (“History is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns.”). Another limitation involves *where* arms can be carried: “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings” are permissible. *Heller*, 554 U.S. at 626; *accord Bruen*, 597 U.S. at 30. Again, citizens in these places have no less of a right to protect themselves. But our society has deemed that giving people the capacity to use large amounts of force at a moment’s notice in a sensitive place is not worth the danger that they will unlawfully deploy such force against innocent civilians or public figures there. These limitations, ultimately, reflect a careful balancing of interests between individual self-defense and public protection from excessive danger that existed within the meaning of the phrase “the right to keep and bear arms” when the Second Amendment was ratified.

For our purposes, the most relevant limitation that emerged from this consideration of individual and societal interests is upon *what* arms may be kept and carried. As recognized in *Heller*, “the Second Amendment right . . . extends only to certain types of weapons”; it is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” 554 U.S. at 623, 626. Arms typically used by average citizens for self-defense are generally within the ambit of the Second Amendment, presumably because these arms had proven over time to effectively amplify an individual’s

power to protect himself without empowering him to singlehandedly reign terror upon a community. *See id.* at 624–25. But other weapons—variously referred to as “dangerous or unusual,” *e.g.*, 4 Blackstone 148, or “dangerous and unusual,” *e.g.*, *Heller*, 554 U.S. at 627; *State v. Langford*, 10 N.C. 381, 383 (1824)—could be banned without infringing upon the right to bear arms, *see Heller*, 554 U.S. at 627; *Bruen*, 597 U.S. at 47; 4 Blackstone 148–49; *Langford*, 10 N.C. at 383–84. Such excessively dangerous arms were not reasonably related or proportional to the end of self-defense—but rather were better suited for offensive criminal or military purposes—and were thus understood to fall outside the reach of the right. *See Heller*, 554 U.S. at 627; *Nat’l Ass’n for Gun Rts. v. Lamont*, 685 F. Supp. 3d 63, 102–03 (D. Conn. 2023).

This dichotomy between these two types of arms is reflected in the concrete examples of exempted arms that the Supreme Court offered us in *Heller*. A corollary to “the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons,’” 554 U.S. at 627, is that “the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns,” *id.* at 625. Further, the Court recognized that “weapons that are most useful in military service,” such as “M-16 rifles and the like,” can be “banned.” *Id.* at 627. The *Heller* Court placed such weapons of crime and war in explicit contradistinction to the handgun, “the quintessential self-defense weapon,” which it emphasized was squarely within the ambit of the Second Amendment. *Id.* at 629.

What brings all the weapons beyond the scope of the Second Amendment together, and what separates them from the handgun, is their ability to inflict damage on a scale or

in a manner disproportionate to the end of personal protection. As such, they are weapons most suitable for criminal or military use. For instance, Congress began regulating sawed-off shotguns and short-barreled rifles after they became infamously associated with “notorious Prohibition-era gangsters like Bonnie Parker and Clyde Barrow.” *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 47 (1st Cir. 2024). These firearms “are more easily concealable than long-barreled rifles but have more destructive power than traditional handguns,” making them particularly desirable to malefactors and crooks. U.S. Dep’t of Just., *Justice Department Announces New Rule to Address Stabilizing Braces, Accessories Used to Convert Pistols into Short-Barreled Rifles* (Jan. 13, 2023); *see also Carson v. State*, 247 S.E.2d 68, 73 (Ga. 1978) (upholding ban on sawed-off shotguns and noting they “are of a size such as can easily be concealed and which are adapted to and commonly used for criminal purposes”); *State v. LaChapelle*, 451 N.W.2d 689, 691 (Neb. 1990) (holding states may regulate sawed-off shotguns as “a weapon which is used almost exclusively for a criminal purpose”). And the M16 was adopted by the U.S. Army as the standard-issue infantry rifle “due to its phenomenal lethality and reliability, as well as its increased ability to penetrate helmets and body armor.” *Lamont*, 685 F. Supp. 3d at 101 (internal quotation marks omitted); *see also Kolbe*, 849 F.3d at 124.

We also recognize that the Supreme Court, in the handful of Second Amendment cases that it has decided, has not yet had the opportunity to clarify the full array of weaponry that falls outside the ambit of the Second Amendment. For instance, consider arms that disable an adversary over time, such as those that release slow-acting poison. An umbrella gun that fires a ricin-laced pellet, while a bearable arm, is utterly ineffective at

countering imminent threats for which the right to self-defense exists because it takes hours for ricin to have a debilitating effect. *See Ricin and The Umbrella Murder*, CNN (Oct. 23, 2003); Ctrs. for Disease Control and Prevention, *Questions and Answers About Ricin* (Apr. 4, 2018). Additionally, some bearable arms deliver force so excessive for self-defense that no reasonable person could posit that the Constitution guarantees civilian access to them. *See, e.g., Bevis v. City of Naperville*, 85 F.4th 1175, 1198 (7th Cir. 2023) (“Everyone can also agree, we hope, that a nuclear weapon such as the . . . 51-pound W54 warhead, can be reserved for the military, even though it is light enough for one person to carry.”), *cert. denied sub nom. Harrel v. Raoul*, No. 23-1010, 2024 WL 3259606 (U.S. July 2, 2024); *see also Heller*, 554 U.S. at 627.

As should be clear, these are not the modern equivalents of weapons that were commonly possessed and employed for self-preservation by your shopkeeper, or your butcher, or your blacksmith up the road in colonial America—the disarmament of whom the Second Amendment was ratified to prevent. *See Heller*, 554 U.S. at 598–99. The Second Amendment, with its “central component” of “individual self-defense,” is not concerned with ensuring citizens have access to military-grade or gangster-style weapons. *Bruen*, 597 U.S. at 29 (emphasis omitted). In short, then, while the Second Amendment jealously safeguards the right to possess weapons that are most appropriate and typically used for self-defense, it emphatically does not stretch to encompass excessively dangerous weapons ill-suited and disproportionate to such a purpose.

Our friends in dissent argue that there is not simply a right to individual self-defense but to “collective” self-defense. Dissenting Op. at 103–04. This view has several problems.

One, it contradicts both the purpose and language of *Heller* and *Bruen* quoted in the preceding paragraph. The second problem is one of self-contradiction. The dissent announces a right to “communal self-defense” and then proceeds directly to disregard the community’s judgment as expressed in the Maryland statute as to how communal self-defense can be most effectively safeguarded. The third problem is the dissent’s conversion of a right of self-defense to a right to possess arms whose uses on offense are all too prominent and apparent. Either alone or in combination these hurdles underscore the danger of expanding appellants’ right far beyond the careful exposition of the Second Amendment that *Heller* and *Bruen* articulated.

D.

Having elucidated our understanding of the Second Amendment’s text in its historical context, we turn to the Maryland regulations under challenge in the present case. Our analysis confirms that the covered weapons are not within the ambit of the “right to keep and bear arms” as codified within the plain text of the Second Amendment.

As an initial matter, we note that appellants have brought a facial challenge to the assault weapons regulations. The Supreme Court has instructed that facial challenges are “disfavored” because they “often rest on speculation,” “short circuit the democratic process,” and “run contrary to the fundamental principle of judicial restraint.” *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450–51 (2008). A facial challenge is “the ‘most difficult challenge to mount successfully.’” *Rahimi*, 144 S. Ct. at 1898 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)); see also *id.* at 1907 (Gorsuch, J., concurring). “To succeed in a typical facial attack, [appellants] would have to establish

‘that no set of circumstances exists under which [the statute at issue] would be valid,’ or that the statute lacks any ‘plainly legitimate sweep.’” *United States v. Stevens*, 559 U.S. 460, 472 (2010) (quoting *Salerno*, 481 U.S. at 745; *Washington v. Glucksberg*, 521 U.S. 702, 740 n.7 (1997) (Stevens, J., concurring in judgments)).

Appellants have not met this high bar. Many of the firearms regulated by the Maryland statute are “dangerous and unusual weapons” that are not “in common use today for self-defense.” *Bruen*, 597 U.S. at 21, 32 (internal quotation marks omitted). Rather, they are weapons “most useful in military service” with firepower far exceeding the needs of the typical self-defense situation. *Heller*, 554 U.S. at 627. These weapons therefore do not fit within the Second Amendment’s ambit and thus “may be banned.” *Id.*

Consider, for example, the Barrett .50 caliber semiautomatic sniper rifle, one of the forty-five covered long guns. *See* Md. Code, Pub. Safety § 5-101(r)(2)(ix). This rifle fires bullets powerful enough to “to disable or destroy military targets such as armored personnel carriers, radar dishes, communications vehicles, missiles, aircraft, bulk fuel and ammunition storage sites.” Am. Bar Ass’n, Bar Ass’n of S.F. Special Comm. on Gun Violence, *Restriction of Sale of .50 Caliber Sniper Weapons* (Aug. 7, 2005). Heralded as “[t]he most powerful sniper rifle in the U.S. military,” the Barrett .50 cal. “is capable of long range destruction of military targets at distances exceeding a mile . . . with the power of a rocket or mortar but with the precision of a sniper rifle.” *Id.*; Caleb Larson, *Barrett M82: The U.S. Military’s Most Powerful Sniper Rifle*, Real Clear Defense (Nov. 30, 2020). This extraordinary combination of power and precision has helped Mexican cartels outgun police, with the Barrett rifle becoming “a very symbolic weapon in the narco world” that

“shows you’re on the top of the game.” Diego Oré and Drazen Jorgic, *‘Weapon of War’: The U.S. Rifle Loved by Drug Cartels and Feared by Mexican Police*, Reuters (Aug. 6, 2021).

Appellants made no effort to present evidence that this sniper rifle is “in common use today for self-defense” and not a “dangerous and unusual” weapon outside of the Second Amendment’s ambit. *Bruen*, 597 U.S. at 21, 32. How could they? Common sense dictates that restricting the possession of this type of weapon is consistent with the original meaning of the Second Amendment as elucidated in *Heller* and *Bruen*. With its very limited ability to serve the defensive needs of the average citizen yet its extraordinary capability to advance the offensive purposes of criminals, terrorists, and soldiers, the Barrett .50 caliber sniper rifle is exactly the type of firearm that is “most useful in military service” and “may be banned” consistent with the Second Amendment. *Heller*, 554 U.S. at 627.

Nor do appellants seek to overcome this barrier with respect to many other long guns regulated by the statute, such as the Striker-12 and other street sweeper shotguns. *See* Md. Code, Pub. Safety § 5-101(r)(2)(xxxviii)-(xxxix). These shotguns each have a twelve-round revolving cylinder most useful for riot control and military combat, and their possession has been highly restricted by the federal government under the National Firearms Act for over three decades. *See* ATF Rul. 94-2 (regulating Striker-12 and street sweeper shotguns under the “destructive device” provision of 26 U.S.C. § 5845(f)(2)); *United States v. White*, 2017 WL 11528245, at *3 (W.D. Mo. Oct. 13, 2017). Perhaps recognizing the steep uphill climb that such an argument would face, appellants did not

devote even a page of their complaint or briefing to posit how these specific prohibitions are unconstitutional.

In short, appellants have failed to show that each firearm regulated by the Maryland statute is within the ambit of the Second Amendment. And so the broad relief their facial challenge seeks is not ours to grant.

E.

We do recognize, however, that the parties thoroughly briefed the issue of whether the Second Amendment protects a citizen's ability to purchase and possess an AR-15, which appellants refer to as the "paradigmatic semiautomatic rifle targeted by 'assault weapons' laws." Appellants' Suppl. Opening Br. 25. This is also the question we primarily considered at our en banc oral argument. Because it has been fully briefed and considered after a remand from the Supreme Court, we find the question of whether the AR-15 is within the ambit of the Second Amendment appropriate to address here. Not to address it would be to bypass the very heart of the dispute in this proceeding.

1.

The intertwined origins of the AR-15 and its military version, the M16, show that these weapons were intended for offensive combat applications rather than individual self-defense. *See Lamont*, 685 F. Supp. 3d at 101. In the late 1950s, the U.S. Army was seeking an improved infantry weapon. General Willard G. Wyman called upon firearms manufacturers to develop a lightweight yet lethal combat rifle that would penetrate a steel helmet at 500 yards. *See* Dallas T. Durham, *The M-16: Tradition, Innovation, and Controversy*, U.S. Army Command & Gen. Staff Coll. (2021). Armalite Corporation

responded by developing the AR-15, which originally was a selective-fire rifle with both semiautomatic and automatic firing capability. *See Lamont*, 685 F. Supp. 3d at 74.

The AR-15 quickly gained popularity with the U.S. military, which, by the end of 1963, had purchased over 100,000 AR-15s and had begun to combat test them in Vietnam. O.P. Bruno et al., *M16 Rifle Sys.: Reliability and Quality Assurance Eval.*, U.S. Army Materiel Command Aberdeen Rsrch. and Dev. Ctr., at App. II-1–II-2 (July 1968). Early testing “discovered that a 7- or even 5-man squad armed with AR-15s could do as well or better in hit-and-kill potential . . . than the traditional 11-man squad armed with M14 rifles,” the U.S. military’s standard-issue rifle during the late 1950s. *See Kolbe*, 849 F.3d at 124. Further testing by the military and CIA concluded that the AR-15 was “superior in virtually all respects to the – a. M-1 rifle, b. M-1 and M-2 Carbines, c. Thompson Sub-machine gun and d. Browning Automatic rifle.” Advanced Rsch. Projects Agency, *Field Test Rep., AR-15 Armalite Rifle* (Aug. 20, 1962). The AR-15 also became popular in Vietnam, where the military found that it was a “more desirable weapon” than any of the alternative military rifles, carbines, or submachineguns. Advanced Rsch. Projects Agency, *Rep. of Task No. 13A, Test of Armalite Rifle, AR-15*, at 4 (July 31, 1962). The military designated the AR-15 rifle the “M16” and adopted it as the standard-issue infantry rifle in the late 1960s. *See M16 Rifle Sys.*, at App. II-4; Encyc. Britannica, *M16 Rifle* (July 15, 2024).

During this same period, Colt, which had obtained the trademark and patents for the AR-15 from Armalite, created a semiautomatic version of the rifle for the civilian market. *See Lamont*, 685 F. Supp. 3d at 74. In 1977, the patents to the AR-15 expired, and a number

of manufacturers started selling semiautomatic rifles built on the AR-15 platform. *See* Emily Witt, *How the AR-15 Became an American Brand*, *New Yorker* (Sept. 27, 2023); Greg Myre, *A Brief History of the AR-15*, *Nat'l Pub. Radio* (Feb. 28, 2018).

The civilian versions of the AR-15 have not strayed far from the rifle's military origin. The AR-15 continues to use the same internal piston firing system and the same ammunition as the M16. *See Bevis*, 85 F.4th at 1195–96 & n.9; *Adams Arms, Inc. v. Sig Sauer, Inc.*, 2010 WL 3119777, at *1 (M.D. Fla. Aug. 2, 2010). Its bullets leave the muzzle at a similar velocity of around 3000 feet per second, have a similar effective area target range of up to 875 yards, and deliver a similar amount of kinetic energy upon impact. *See Bevis*, 85 F.4th at 1196. Contemporary versions of the AR-15 and M16 have both incorporated additional combat-functional features. These include a flash suppressor that conceals the shooter's position and facilitates night combat operations, and a pistol grip that enables fast reloading and accuracy during sustained firing. *See Kolbe*, 849 F.3d at 125; *Lamont*, 685 F. Supp. 3d at 75; *Rupp v. Bonta*, 2024 WL 1142061, at *12 (C.D. Cal. Mar. 15, 2024). Most versions of the AR-15, like the M16, use detachable 20-round or 30-round magazines that increase the weapon's effective rate of fire and are most useful in prolonged firefights with enemy combatants. *See N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 990 F. Supp. 2d 349, 365 (W.D.N.Y. 2013). Both weapons are also compatible with up to 100-round magazines. *See Kolbe*, 849 F.3d at 125. Other combat-functional features that the AR-15 and M16 share include a threaded barrel for the affixing of a flash suppressor, recoil compensator, or silencer; a barrel shroud to protect the shooter's hands from excessive heat during sustained firing; and a rail integration system for the mounting of

sights, scopes, slings, flashlights, lasers, foregrips, bipods, bayonets, and under-barrel grenade launchers or shotguns. *See id.* at 137; U.S. Army FM 3-22.9, at 2-7 (Aug. 12, 2008).

The firepower of the AR-15 and M16 is a key component of their “phenomenal lethality.” *Lamont*, 685 F. Supp. 3d at 101. Built to generate “maximum wound effect” and to pierce helmets and body armor, *id.* at 100, AR-15 bullets discharge at around “three times the velocity of a typical handgun,” *Rupp*, 2024 WL 1142061, at *11. These higher velocity rounds “hit fast and penetrate deep into the body,” creating severe damage. *Bevis v. City of Naperville*, 657 F. Supp. 3d 1052, 1073 (N.D. Ill. 2023). When a bullet fired from an AR-15 impacts human tissue, it typically “yaws” or turns sideways. *Del. State Sportsmen’s Ass’n v. Del. Dep’t of Safety & Homeland Sec.*, 664 F. Supp. 3d 584, 599 (D. Del. 2023). As it passes through the body, the rotated bullet creates a large, “temporary cavity” or “blast wave” that can be “up to 11-12.5 times larger than the bullet itself,” *id.* (internal quotation marks omitted)—an effect known as “cavitation,” *Capen v. Campbell*, 2023 WL 8851005, at *15 (D. Mass. Dec. 21, 2023). So, while a “typical 9mm [bullet] wound to the liver” from a commonly used handgun like the Glock 19 “will produce a pathway of tissue destruction in the order of one inch to two inches,” an AR-15 wound “will literally pulverize the liver, perhaps best described as dropping a watermelon onto concrete.” *Id.* (internal alterations omitted). The “catastrophic” damage caused by AR-15 rounds means that the injuries they leave in their wake—such as “multiple organs shattered,” bones “exploded,” and “soft tissue absolutely destroyed”—“often cannot be repaired” by trauma surgeons. *Del. State Sportsmen’s Ass’n*, 664 F. Supp. 3d at 599–600

(internal quotation marks omitted); *see also Kolbe*, 849 F.3d at 124; N. Kirkpatrick et al., *The Blast Effect: This Is How Bullets from an AR-15 Blow the Body Apart*, Wash. Post (Mar. 27, 2023).

Another key aspect of the destructiveness of the AR-15 and M16 is their pairing of high muzzle velocity with a comparative lack of recoil. AR-15s can fire rounds “in rapid succession on a precise target, even while standing or moving, because a shooter’s position is relatively unaffected by the recoil of each shot.” *Capen*, 2023 WL 8851005, at *15. This lower recoil makes the AR-15 “uniquely dangerous” compared to other high-powered rifles, which tend to have greater recoil that “necessarily disrupts follow-on shots.” *Id.*

The primary difference between the M16 and AR-15—the M16’s capacity for automatic fire, burst fire, or both, depending on the model—pales in significance compared to the plethora of combat-functional features that makes the two weapons so similar. The U.S. Army Field Manual instructs that semiautomatic fire is “[t]he most important firing technique during fast-moving, modern combat” because it “is the most accurate technique of placing a large volume of fire on . . . multiple, or moving targets.” U.S. Army FM 3-22.9, at 7-8 (Aug. 12, 2008); *see also Rupp*, 2024 WL 1142061, at *10. Indeed, a decorated former U.S. Navy SEAL stated that he “[n]ever once fired full auto in combat” during a decade of special operations combat deployments, including the 2011 Osama Bin Laden raid. @mchooyah, Twitter (Oct. 3, 2017, 5:04 PM), <https://perma.cc/7JXA-YK97>. Moreover, the AR-15’s rate of fire can “be easily converted to . . . mimic military-grade machine guns” with devices like bump stocks, trigger cranks, and binary triggers. *Bevis*, 657 F. Supp. 3d at 1074; *see also Del. State Sportsmen’s Ass’n*, 664 F. Supp. 3d at 600. In

Garland v. Cargill, the Court recently emphasized that “[s]hooters have devised techniques for firing semiautomatic firearms at rates approaching those of some machine guns.” 602 U.S. 406, 411 (2024); *see also id.* at 429 (Alito, J., concurring) (“[A] semiautomatic rifle with a bump stock can have the same lethal effect as a machinegun.”). Additionally, nothing in *Cargill* evinced any affirmative endorsement of bump stocks. The case rested on a close reading of statutory text and regulatory deviation from it, which is not before us here. *See id.* at 415 (majority opinion).

Between its firepower, accuracy, and modifiability, the “net effect” of the AR-15’s “military combat features is a capability for lethality.” *Kolbe*, 849 F.3d at 144. All this is a far cry from any notion of civilian self-defense.

2.

Illicit uses of the AR-15 have demonstrated just how much destruction the weapon can cause in the wrong hands. When used for criminal purposes, the AR-15 and other assault rifles “result in more numerous wounds, more serious wounds, and more victims.” *Id.* at 140 (quoting *Cuomo*, 804 F.3d at 262). AR-15s are disproportionately used in mass shootings: one recent examination found that although AR-platform rifles constituted about 5% of the firearms in the United States, they were used in 25% of mass shootings. *Rupp*, 2024 WL 1142061, at *11. Moreover, in a grim testament to the gun’s deadliness, mass shootings are over 60% more deadly when an AR-15 or similar assault rifle is used. *See id.* (“[O]ver the past ten years, there have been 12.9 fatalities per shooting when an assault rifle is used in a mass shooting, as opposed to 7.8 fatalities per shooting where an assault rifle is not used.”). Four of every five “mass shootings that resulted in more than 24 deaths

involved the use of assault rifles,” *id.*, as did every single mass shooting involving more than 40 deaths, *see* The Violence Project, *Mass Shooter Database* (database updated Jan. 2024). In short, the AR-15 and other assault rifles are the preferred weapons for those bent on wreaking death and destruction upon innocent civilians.

Their utility for mass killing has made the AR-15 and similar assault rifles the most popular arms for terrorist attacks in the United States. The perpetrator of the Pulse nightclub shooting—which was “the deadliest terrorist attack in the United States since September 11, 2001”—used an assault rifle similar to the AR-15 that is covered by the “copycat weapon” provision of Maryland’s assault weapons regulation. *See* Frank Straub et al., *Rescue, Response, and Resilience*, U.S. Dep’t of Just. Cmty. Oriented Policing Servs., at 1, 7 (2017). With his rifle in hand, the ISIS-aligned perpetrator walked into the Orlando nightclub and fired approximately 200 rounds in five minutes. *Id.* at 18, 23–24. Despite a police detective being on scene who called in the shooting as soon as it began, and despite the SWAT team arriving six minutes later, the terrorist was able to shoot 102 innocent people, killing 49 of them. *Id.* at x, 77. Police found so many people lying shot and bleeding on the dance floor that one officer—in a desperate attempt to triage casualties and save lives—shouted, “if you’re alive, raise your hand.” *Id.* at 22. Another responding officer who had served three combat tours in the U.S. military described his experience in the nightclub: “I was a platoon sergeant again. I stepped out of being a cop and back into being a platoon sergeant. We were in a war zone.” *Id.* at 21.

Indeed, AR-15 or AK-47 type assault rifles covered by the Maryland regulations have been used in every major terrorist attack on U.S. soil in the past decade: the 2015 San

Bernardino office attack (14 victims killed, 24 injured), the 2016 Pulse nightclub shooting (49 victims killed, 58 injured), the 2018 Pittsburgh synagogue shooting (11 victims killed, 6 injured), the 2019 El Paso Walmart shooting (23 victims killed, 22 injured), and the 2022 Buffalo supermarket shooting (10 victims killed, 3 injured). *See id.* at vii, 7; U.S. Dep’t of Just. Cmty. Oriented Policing Servs., *Bringing Calm to Chaos: A Critical Incident Rev. of the San Bernardino Pub. Safety Response*, at xiii, 39 (2016); Campbell Robertson et al., *11 Killed in Synagogue Massacre; Suspect Charged With 29 Counts*, N.Y. Times (Oct. 27, 2018); Kayla McCormick & Phil Helsel, *El Paso Walmart Mass Shooter Sentenced to 90 Consecutive Life Terms*, NBC News (July 7, 2023); Emily Mae Czachor, *Gunman in Buffalo Supermarket Shooting Pleads Guilty*, CBS News (Nov. 28, 2022). As modern information technologies have increasingly shifted the terrorism threat towards “lone offenders” who are often driven to extremism “by a mix of conspiracy theories; personalized grievances; and enduring racial, ethnic, religious, and anti-government ideologies,” AR-15s will likely remain a crucial instrument of terrorism in the United States so long as they are widely available. U.S. Dep’t of Homeland Sec., *Homeland Threat Assessment 2024* at v, 3 (Sept. 14, 2023).

In addition to being the weapons of choice for mass killing and terrorism, AR-15s and similar assault rifles are “uniquely dangerous to law enforcement.” *Capen*, 2023 WL 8851005, at *13. These firearms place law enforcement officers “at particular risk” because “their high firepower” causes their bullets to readily penetrate police body armor. *Heller v. District of Columbia*, 670 F.3d 1244, 1263 (D.C. Cir. 2011); *see also Del. State Sportsmen’s Ass’n*, 664 F. Supp. 3d at 600; *Lamont*, 685 F. Supp. 3d at 98–99. AR-15s also

“allow criminals to effectively engage law enforcement officers from great distances,” giving them a “military-style advantage.” *Kolbe*, 849 F.3d at 127.

The impact of these dangers is starkly displayed in the statistics of slain law enforcement officers. Despite the relative rarity of assault weapons, studies have estimated that they have been used to gun down between 13% to 20% of those officers killed in the line of duty. *See Lamont*, 685 F. Supp. 3d at 99. Moreover, assault rifles have been used in the deadliest recent attacks on law enforcement officers, such as the 2016 killing of five Dallas police officers and the 2024 murder of four officers, including three U.S. Marshals task force members, in Charlotte. *See Sopan Deb et al., 8 Officers Are Shot, 4 Fatally, While Serving Warrant in Charlotte*, N.Y. Times (Apr. 29, 2024).

As criminals and terrorists have increasingly turned to AR-15s and similar assault rifles, there have been “multiple incidents in which [they] outgun police.” *Del. State Sportsmen’s Ass’n*, 664 F. Supp. 3d at 600. One of these instances was again the Pulse nightclub terrorist attack. The detective who was on scene when the shooting began “recognized that his Sig Sauer P226 9mm handgun . . . was no match for the .223 caliber rifle being fired inside the club and moved to a position that afforded him more cover in the parking lot.” *See Frank Straub et al., Rescue, Response, and Resilience*, at 16. The first police officers on scene at the Uvalde, Texas elementary school shooting that left 19 students and two teachers dead similarly “concluded they were outgunned[, a]nd that they could die” after identifying the shooter’s gun as an “AR,” and thus “opted to wait for the arrival of a Border Patrol SWAT team . . . based more than 60 miles away.” Zach Despart, “*He Has a Battle Rifle*”: *Police Feared Uvalde Gunman’s AR-15*, Tex. Tribune (Mar. 20,

2023). Time after time, the sheer power of AR-15 style rifles has contributed to hesitation by police in confronting mass shooters, exacerbating the bloodshed and trauma that result. *See, e.g.*, Mirna Alsharif and David K. Li, *Parkland Shooting Verdict: School Security Officer Scot Peterson Acquitted Over Failure to Confront Gunman*, NBC News (June 29, 2023); Faith Karimi & Chris Boyette, *Las Vegas Police Fires an Officer Who ‘Froze’ in Hotel Hallway During 2017 Massacre*, CNN (July 4, 2019).

3.

We have described the AR-15’s capacities in abundant detail to demonstrate just how far outside the animating purposes of the Second Amendment this weapon lies. While we know that the AR-15 thrives in combat, mass murder, and overpowering police, appellants have failed to demonstrate that the weapon is suitable for self-defense. This is likely because such a showing would be difficult to make. Indeed, many of the weapon’s combat-functional features make it ill-suited for the vast majority of self-defense situations in which civilians find themselves.

To wit: the heightened firepower of AR-15s “pose[s] a serious risk of ‘overpenetration’—that is, [bullets] passing through their intended target and impacting a point beyond it.” *Capen*, 2023 WL 8851005, at *15. For example, AR-15 rounds “can pass through most construction materials, even at ranges of 350 yards,” thereby threatening the lives of “bystanders, family members, or other innocent persons well outside the intended target area.” *Id.*; *see also Kolbe*, 849 F.3d at 127 (“[R]ounds from assault weapons have the ability to easily penetrate most materials used in standard home construction, car doors, and similar materials.”). Overpenetration poses a grave risk in the home—“where the need

for defense of self, family, and property is most acute,” *Heller*, 554 U.S. at 628—because firing an AR-15 in close quarters will often put the safety of cohabitants and neighbors in jeopardy, *see Worman v. Healey*, 922 F.3d 26, 37 (1st Cir. 2019).

The large magazines that are integral to the AR-15’s effectiveness in combat and mass murder are also ill-suited for typical self-defense scenarios. As the First Circuit has noted, “civilian self-defense rarely—if ever—calls for the rapid and uninterrupted discharge of many shots.” *Ocean State Tactical*, 95 F.4th at 45. Indeed, “most homeowners only use two to three rounds of ammunition in self-defense,” *Ass’n of N.J. Rifle & Pistol Clubs v. Att’y Gen. N.J.*, 910 F.3d 106, 121 n.25 (3d Cir. 2018), with one study finding that when citizens fire shots in self-defense, they fire an average of two shots and, 97% of the time, fire five shots or fewer, *Lamont*, 685 F. Supp. 3d at 96; *see also Kolbe*, 849 F.3d at 127; *Worman*, 922 F.3d at 37; *Hanson*, 671 F. Supp. 3d at 14–16.

The AR-15 also does not have any of the advantages that the Supreme Court identified in *Heller* as establishing the handgun as the “quintessential self-defense weapon . . . for home defense.” 554 U.S. at 629. Compared to a handgun, the AR-15 is heavier, longer, harder to maneuver in tight quarters, less readily accessible in an emergency, and more difficult to operate with one hand. *See id.*; *see also Capen*, 2023 WL 8851005, at *15.

Outside the home, the AR-15 has even less utility for self-defense. It is significantly less concealable than a handgun and much more difficult to carry while conducting daily activities. *See Capen*, 2023 WL 8851005, at *15. When shot in cities, towns, or other densely populated areas where armed confrontations most often occur, the AR-15 presents

at least as great a risk as it does in the home of harming innocent bystanders due to overpenetration. *See id.*; *Kolbe*, 849 F.3d at 127; *Worman*, 922 F.3d at 37. Moreover, public carry of an AR-15 in modern-day America may well “spread[] ‘fear’ or ‘terror’ among the people” due to its frequent and devastating use in mass shootings of innocent civilians—an effect that our common-law tradition has long regarded as incompatible with lawful carry for self-defense. *Bruen*, 597 U.S. at 50.

In sum, the AR-15—with its military origination, combat-functional features, and extraordinary lethality—has “the same basic characteristics, functionality, capabilities, and potential for injury as the” M16. *Capen*, 2023 WL 8851005, at *14. And its all too frequent use in terrorism, mass killing, and police murder shows that the AR-15 offers firepower ill-suited and disproportionate to fulfilling the Second Amendment’s purpose of armed self-defense. Therefore, just like the M16, the AR-15 is “most useful in military service” and “may be banned” consistent with the Second Amendment. *Id.*

F.

Appellants take umbrage with our method of analysis, contending that “arms that are ‘in common use today’ are constitutionally protected and cannot be banned.” Appellants’ Suppl. Opening Br. 2 (quoting *Bruen*, 597 U.S. at 47). According to their reading of *Heller* and *Bruen*, the covered assault rifles are “unquestionably arms within the meaning of the Second Amendment” because they are “‘instruments that constitute bearable arms.’” *Id.* at 18 (quoting *Heller*, 554 U.S. at 582). Therefore, say appellants, the possession of the covered rifles cannot be prohibited because they are “in common use,” with “millions of law-abiding citizens choos[ing] to possess” them, and thus “by definition

will not fit into” the “historical tradition of prohibiting the carrying of dangerous and unusual weapons” acknowledged in *Heller* and *Bruen*. *Id.* at 19, 27 (internal quotation marks omitted). Under this view, so long as enough law-abiding citizens own a type of firearm, that type of firearm cannot be prohibited.

As an initial matter, this argument misreads *Heller* and *Bruen*. In those cases the Supreme Court did not posit that a weapon’s common use is conclusive evidence that it cannot be banned. Rather, the Court instructed that “the Second Amendment protects *only* the carrying of weapons that are those ‘in common use at the time,’ as opposed to those that ‘are highly unusual in society at large.’” *Bruen*, 597 U.S. at 47 (quoting *Heller*, 554 U.S. at 627) (emphasis added). In other words, weapons that are *not* in common use can safely be said to be *outside* the ambit of the Second Amendment. But the logic does not work in reverse. Just because a weapon happens to be in common use does not guarantee that it falls within the scope of the right to keep and bear arms.

Appellants’ argument also does not resolve the difficulties in determining which weapons would pass its ill-conceived popularity test. Appellants posit that a weapon need only be in common use today for lawful purposes, but *Bruen* implies that a weapon must be “in common use today for self-defense” to be within the ambit of the Second Amendment. 597 U.S. at 32 (internal quotation marks omitted); *see Bevis*, 85 F.4th at 1192; *Price*, No. 22-4609, slip op. at 19–20 (majority opinion). Appellants contend that mere possession of a firearm by a requisite quantity of Americans is sufficient, but the Court’s choice of the phrase *common use* instead of *common possession* suggests that only instances of “active employment” of the weapon should count, and perhaps only active

employment in self-defense. *See, e.g., Bailey v. United States*, 516 U.S. 137, 143–45 (1995). Appellants further contend that all semiautomatic rifles should be categorized as the same type of firearm when conducting a common use inquiry, and thereby disregard the exponential differences in firepower between a small-bore rimfire rifle and a .50 caliber sniper rifle. What is more, appellants do not provide a clear threshold for the number of firearms they believe must be possessed to be in common use. *Cf. United States v. Berger*, 2024 WL 449247, at *7 (E.D. Pa. Feb. 6, 2024) (“[A]pproximately 740,000 machineguns [were] registered with the Bureau of Alcohol, Tobacco, Firearms and Explosives as of May 2021.”).

Most importantly, appellants’ proposed common use inquiry leads to absurd consequences because it totally detaches the Second Amendment’s right to keep and bear arms from its purpose of individual self-defense. We have noted that certain bearable arms—such as the M16, the short-barreled shotgun, the ricin pellet-firing umbrella gun, and the W54 nuclear warhead—are not protected by the Second Amendment. But under appellants’ common use inquiry, any one of these or similarly dangerous weapons could gain constitutional protection merely because it becomes popular before the government can sufficiently regulate it. Appellants admitted as much when they conceded at oral argument that the government could not prohibit possession of a “machine gun,” a “bazooka,” or “any firearm” so long as the weapon was “in common use.” Oral Argument at 14:00–14:58, *Bianchi v. Brown*, No. 21-1255 (4th Cir. 2024).

Such a trivial counting exercise makes a mockery of the careful interest balancing between individual self-defense and societal order that our legal tradition has carved into

the heart of the right to keep and bear arms. It also ignores the reality that weapons may well proliferate before lawmakers comprehend that they are ill-suited or disproportionate to self-defense. Indeed, dangerousness and unusualness need not be static concepts. That would foreclose the ability of legislators to assess these characteristics and to enhance their knowledge through observation and experience. We cannot reasonably expect our representatives to be fortune tellers, anticipating the score of dangers posed by advances in weapons technology. This is particularly true as the pace of weapons manufacturing and distribution has continued to accelerate in recent years. *See, e.g., What Is a Ghost Gun?*, CBS News (Apr. 11, 2022). We decline to hold that arms manufacturers can secure constitutional immunity for their products so long as they distribute a sufficient quantity before legislatures can react. A constitutional right with a “meaning . . . fixed according to the understandings of those who ratified it” cannot be read to expand or contract based on nothing more than contemporary market trends. *Bruen*, 597 U.S. at 28.

Bruen’s admonition that the right to keep and bear arms extends only to those weapons “‘in common use’ today for self-defense” reflects the fact that the Second Amendment protects only those weapons that are typically possessed by average Americans for the purpose of self-preservation and are not ill-suited and disproportionate to achieving that end. 597 U.S. at 32, 47; *see also Lamont*, 685 F. Supp. 3d at 71. As

demonstrated above, the AR-15 is a combat rifle that is both ill-suited and disproportionate to self-defense. It thereby lies outside the scope of the Second Amendment.²

IV.

In *Bruen*, the Supreme Court emphasized the importance of using history and tradition in determining whether a firearms regulation is permissible under the Second Amendment. *See* 597 U.S. at 25 (stressing that “reliance on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing* right—is, in our view, more legitimate, and more administrable” than means-end scrutiny); *id.* at 17 (noting that “[o]nly 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” (internal quotation marks omitted)). Out of respect for the Supreme Court’s order remanding this case after *Bruen*, we think it appropriate to reckon with the tradition of weapons regulation in this country and assess whether the Maryland statute is

² Because appellants have not shown that the AR-15 or any of the other assault weapons at issue are within the scope of the Second Amendment, there is no need to remand the case to the district court for further proceedings. Neither party preferred a remand, and for good reason. As appellants themselves argued, remand “is neither necessary nor appropriate” because, to decide this case, we “need only consult ‘legislative facts’ . . . [those] ‘that bear on the justification for legislation, as distinct from’ adjudicative facts, which are facts ‘concerning the conduct of parties in a particular case.’” Appellants’ Suppl. Opening Br. 33 (quoting *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012)). Our thorough review of such legislative facts has made plain that the covered assault weapons are not within the protection of the Second Amendment. To return the case to the district court for further proceedings would accomplish nothing other than to leave the Maryland law in limbo while the litigation yo-yos along a perpetual string of remands and appeals. The Supreme Court acknowledged as much by concluding that a case-specific factual record was unnecessary to decide *Bruen*. *See* 597 U.S. at 11. The Court has done its job in *Bruen*, and the Maryland legislature has done its job in enacting the statute. Now it is time that we do ours.

harmonious with it. In light of that analysis, we find that the Maryland regulation is readily “consistent with this Nation’s historical tradition of firearm regulation.” *Bruen*, 597 U.S. at 34.

The statute is one of many in a storied tradition of legislatures perceiving threats posed by excessively dangerous weapons and regulating commensurately. Indeed, the arc of weapons regulation in our nation has mimicked a call and response composition, in which society laments the harm certain excessively dangerous weapons are wreaking, and the state, pursuant to its police power, legislates in kind. The Maryland statute is but another example of this constructive, indeed indispensable, dialogue.

A.

Under *Bruen*, we must engage in “reasoning by analogy” to “determin[e] whether a historical regulation is a proper analogue for a distinctly modern firearm regulation.” 597 U.S. at 28–29. To do so, we consider “whether [the] modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified.” *Id.* at 29. The analogue need not be “a historical *twin*,” but must be “a well-established and representative historical *analogue*.” *Id.* at 30. Thus, “even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster.” *Id.*

Second Amendment analysis is heavily historical, and to bypass an inquiry into history here would be an inexplicable omission. The Court in *United States v. Rahimi* reaffirmed *Bruen*’s approach to history. As Chief Justice Roberts wrote for the *Rahimi* majority, “The law must comport with the principles underlying the Second Amendment,

but it need not be a ‘dead ringer’ or a ‘historical twin.’” *Rahimi*, 144 S. Ct. at 1898 (quoting *Bruen*, 597 U.S. at 30); *see also id.* at 1907 (Gorsuch, J., concurring) (“To prevail, the government need not show that the current law is a ‘dead ringer’ for some historical analogue.” (quoting *Bruen*, 597 U.S. at 30)); *id.* at 1904–05 (Sotomayor, J., joined by Kagan, J., concurring) (noting that “the Court rejects [a] rigid approach to the historical inquiry” and that a “shared principle” between the old and new laws “is sufficient”).

The use of history is thus important not just to remain consistent with the drafters’ understanding but also to acquaint Americans with the glories and flaws of our own history and founding generation. It is vital to appreciate that while history may fix the date on which certain events occur, the understanding of history is not frozen in time. *See id.* at 1897 (majority opinion) (explaining that *Heller* and *Bruen* “were not meant to suggest a law trapped in amber”). This understanding deepens as new sources become available and new insights are advanced. Such ongoing learning compels consultation with the historical record, without at the same time using history as a set of minute instructions or a “straightjacket.” *Bruen*, 597 U.S. at 30. This is what we think Justice Barrett meant when she recently wrote that “[h]istorical regulations reveal a principle, not a mold.” *Rahimi*, 144 S. Ct. at 1925 (Barrett, J., concurring). We take it as such here. This use of history does not update the Constitution, but rather enriches our view of the Framers’ understanding of it.

Bruen further instructs that “when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged

regulation is inconsistent with the Second Amendment.” 597 U.S. at 26. But if a case “implicat[es] unprecedented societal concerns or dramatic technological changes,” courts may need to take “a more nuanced approach.” *Id.* at 27.

B.

This case calls for such a nuanced approach. The ripples of fear reverberating throughout our nation in the wake of the horrific mass shootings in, for example, Las Vegas, Orlando, Blacksburg, Sandy Hook, Sutherland Springs, El Paso, Uvalde, Lewiston, Parkland, San Bernardino, Binghamton, Fort Hood, Thousand Oaks, Virginia Beach, Washington, D.C., Aurora, Monterey Park, Pittsburgh, Geneva County, Boulder, Buffalo, Covina, Dayton, Red Lake, Roseburg, San Jose, Santa Fe, Allen, Charleston, Indianapolis, Manchester, Omaha, and Plano—each of which occurred in the 21st century and resulted in at least nine fatalities—stem from a crisis unheard of and likely unimaginable at the founding. *See* The Violence Project, *Mass Shooter Database* (database updated Jan. 2024).

Certainly it would have been shocking to the Framers to witness the mass shootings of our day, to see children’s bodies “stacked up . . . like cordwood” on the floor of a church in Sutherland Springs, Texas; to hear a Parkland, Florida high school student describe her classroom as a “war zone” with “blood everywhere”; to be at a movie in Aurora, Colorado when suddenly gunfire erupted, leaving “bodies” strewn and “blood on seats, blood on the wall, blood on the emergency exit door”; to run past “shoes scattered, blood in the street, bodies in the street” while bullets blazed through the sky in Dayton, Ohio; to watch law enforcement officers encounter “a pile of dead children” in Sandy Hook, Connecticut; to stand next to one of those officers as he tried to count the dead children, but “kept getting

confused,” as his “mind would not count beyond the low teens.” Silvia Foster-Frau et al., *Terror on Repeat: A Rare Look at the Devastation Caused by AR-15 Shootings*, Wash. Post (Nov. 16, 2023).

What did our forebears have by way of comparison, when they were drafting the Second and Fourteenth Amendments? Nothing even close. “[T]here is no known occurrence of a mass shooting resulting in double-digit fatalities from the Nation’s founding in 1776 until . . . 1949.” *Oregon Firearms Fed’n, Inc. v. Brown*, 644 F. Supp. 3d 782, 803 (D. Ore. 2022). Yet, in modern mass shootings involving assault weapons, the death toll is often in the dozens.

Rapid advancements in gun technology are a central cause of this mass carnage. “[W]hile mass murder has been a fact of life in the United States since the mid-nineteenth century, it was a group activity through the nineteenth century because of the limits of existing technologies.” *Lamont*, 685 F. Supp. 3d at 105 (internal quotation marks omitted). Back then, “[t]he only way to kill a large number of people was to rally like-minded neighbors and go on a rampage” using the firearms and melee weapons available at the time. *Id.* These weapons were “certainly lethal but did not provide individuals or small groups of people the means to inflict mass casualties on their own.” *Id.*

In sharp contrast, AR-15s and the like are designed to empower an individual soldier to kill as many people in as little time as possible, as we demonstrated above. It took only 32 seconds for a lone shooter to murder nine people and shoot 17 others in Dayton, Ohio. Emily Shapiro, *26 Shot in 32 Seconds: New Details, Videos Released in Dayton Mass Shooting*, ABC News (Aug. 13, 2019). It took about two minutes for a single shooter to

kill ten people and injure three at a supermarket in Buffalo, New York. N. Kirkpatrick et al., *The Blast Effect: This Is How Bullets from an AR-15 Blow the Body Apart*, Wash. Post (Mar. 27, 2023). It took less than three minutes for a married couple to murder 14 people and injure 24 at an office in San Bernardino, California. *Id.*

These are not our forebears' arms, and these are not our forebears' calamities. We thus take the instruction of *Bruen* to engage in a "more nuanced approach" to address these "unprecedented societal concerns." 597 U.S. at 27.

C.

Upon canvassing the historical record of arms regulations, and relying with gratitude on the careful work of professional historians, what we deduce is this: legislatures, since the time of our founding, have responded to the most urgent and visible threats posed by excessively harmful arms with responsive and proportional legislation. They have devised well-tailored solutions to the most salient issues plaguing their communities, while nonetheless protecting the core right of their citizens to defend themselves with arms in pressing circumstances. When a weapon's potential for widespread criminal abuse or unreasonable capacity to inflict casualties became apparent to lawmakers, they did not hesitate to regulate in response. We hold that the Maryland statute fits comfortably within this venerable tradition.

On the cusp of the Revolutionary War, firearms were a common fixture in the American home, but they were not used often in homicides. Randolph Roth, *Why Guns Are and Aren't the Problem: The Relationship Between Guns and Homicide in American History*, in *A Right to Bear Arms? The Contested Role of History in Contemporary Debates*

on the Second Amendment 116 (Jennifer Tucker et al. eds., 2019). And this small slice of homicides committed with firearms was cut from a relatively small pie, as interpersonal violence among colonists and early Americans rarely resulted in death. *See id.*; *Baird v. Bonta*, 2023 WL 9050959, at *31 (E.D. Cal. Dec. 29, 2023).

The reason firearms were so infrequently used in homicides in the 18th century was because they had limited utility for such a purpose. Many early Americans owned a musket or a fowling piece, but these weapons were prone to misfiring and needed to be reloaded after each shot, a time-consuming process that required acumen and experience. Roth, *Why Guns Are and Aren't the Problem*, at 116–17; Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 Yale L.J. 99, 153 (2023). Keeping firearms preemptively loaded was difficult, as the gunpowder of the day readily absorbed moisture and could corrode the gun's metal barrel and firing mechanism. Roth, *Why Guns Are and Aren't the Problem*, at 117; *Baird*, 2023 WL 9050959, at *31. “Guns thus generally were not kept or carried loaded in 1791.” Blocher & Ruben, *Originalism-by-Analogy*, 133 Yale L.J. at 153. Early Americans instead engaged in impromptu fights with their hands and feet, or used melee weapons such as “whips, sticks, hoes, shovels, axes, [or] knives.” Roth, *Why Guns Are and Aren't the Problem*, at 117. Pre-Revolution, then, there was little regulation of firearms in America, as they were seldom used in “homicides that grew out of the tensions of daily life.” *Id.*

One exception to this early lack of regulation was the restriction on gunpowder. Aggregation of gunpowder concerned colonists as large amounts of the substance “could kill many people at once if ignited.” *Ocean State Tactical*, 95 F.4th at 49. In response to

this danger—which resulted from the accumulation of firepower disproportionate to the lawful purpose of individual self-defense—a handful of American cities and states restricted the quantity of gunpowder that an individual could possess.³

During the 19th century, the nation saw a surge in interpersonal violence. Starting in the South and then sprawling northward, eastward, and westward, homicide rates swelled. *See* Randolph Roth, *American Homicide* 180, 199–201, 299–302, 337 (2009). The proportion of killings committed with firearms increased as well. *See* Randolph Roth, *American Homicide Supplemental Volume: Weapons Figures*, Figures 25, 29, 34, 38 (2009); Roth, *Why Guns Are and Aren't the Problem*, at 122.

Improvements in weapons technology contributed to this rise in interpersonal violence. In the mid-19th century, gunmakers like Samuel Colt greatly improved the designs of percussion-cap repeating pistols, and “breech-loading revolvers, shotguns, and rifles” became widely available to consumers. Roth, *Why Guns Are and Aren't the Problem*, at 121; *see also* Brian DeLay, *The Myth of Continuity in American Gun Culture*, 113 *Calif. L. Rev.* (forthcoming 2025) (manuscript at 41, 44). Repeating pistols and most breech-loading guns could fire multiple rounds without reloading. Roth, *Why Guns Are and Aren't the Problem*, at 120–21; DeLay, *The Myth of Continuity*, at 41, 44. Breech-

³ *See, e.g.*, 1784 N.Y. Laws 627 (mitigating “Danger Arising from the Pernicious Practice of Lodging Gun Powder” in New York City by limiting the amount of gunpowder in one place to 28 pounds, separated into four canisters); Act of Dec. 6, 1783, chap. 1059, 11 Pa. Stat. 209; 1786 N.H. Laws 383–84; An Act Relative to the Keeping Gun-Powder in the Town of Providence, 1798–1813 R.I. Pub. Laws 85, § 2; 1801 Mass. Acts 507; 1806 Ky. Acts 122 § 3; 1811 N.J. Laws 300, § 1. We appreciate the good work of the Duke Center for Firearms Law in building its Repository of Historical Gun Laws.

loading guns could also be kept loaded with minimal risk of corrosion and were more accurate than their flintlock and percussion-lock predecessors. See Roth, *Why Guns Are and Aren't the Problem*, at 121; Robert J. Spitzer, *Understanding Gun Law History After Bruen: Moving Forward by Looking Back*, 51 Fordham Urb. L.J. 57, 81–82 (2023). “Americans scrambled to buy” these weapons, which were “ideal for killing in the heat of the moment.” Roth, *Why Guns Are and Aren't the Problem*, at 121. Once people got their hands on these guns, “they kept them everywhere: in their homes, in their wagons, in saddle bags, purses, and pockets.” *Id.* As a result, civilians had easy access to more portable and precise firearms than ever before.

Knives, too, advanced in lethality. Designed for the express purpose of fighting, dirks and Bowie knives generally had longer blades than ordinary knives, crossguards to protect users' hands, and clip points that made it easier to stab an opponent. See Declaration of Prof. Randolph Roth at 19, *Nat'l Ass'n for Gun Rts. v. Lamont*, 685 F. Supp. 3d 63 (D. Conn. Aug. 3, 2023) [hereinafter Roth Declaration]; David B. Kopel et al., *Knives and the Second Amendment*, 47 U. Mich. J.L. Reform 167, 180 (2013). Bowie knives “were widely used in fights and duels, especially at a time when single-shot pistols were often unreliable and inaccurate.” Spitzer, *Understanding Gun Law History*, 51 Fordham Urb. L.J. at 89. As the Supreme Court of Texas explained, “The gun or pistol may miss its aim, and when discharged, its dangerous character is lost, or diminished at least,” but “[t]he bowie-knife differs from these in its device and design; it is the instrument of almost certain death.” *Cockrum v. State*, 24 Tex. 394, 402 (1859).

The country set out to do something about the surge in homicides that had been driven, in part, by the development of these more effective arms. Citizens and lawmakers alike recognized that deadly yet concealable weapons—especially pistols, revolvers, and fighting knives—were the primary culprits in a large proportion of the homicides and assaults of the day. In 1834, for instance, the grand jurors of Jasper County, Georgia, denounced the lack of restrictions on concealable weapons. Roth, *American Homicide*, at 218–19. They told their lawmakers that it was “common” practice among the more violently inclined to “arm themselves with Pistols, dirks knives sticks & spears under the specious pretence of protecting themselves,” which resulted in the “stabbing shooting & murdering so many of our citizens.” *Id.*

When confronted with these “public safety concerns over the increase in gun violence and the proliferation of concealable weapons,” legislatures responded in kind. They passed restrictions on carry, and, in some cases, outright bans on the possession of certain more dangerous weapons. See DeLay, *The Myth of Continuity*, at 41, 52. Indeed, over the course of the 19th century and into the early 20th century, nearly every single state would either regulate the carry of certain firearms or place severe restrictions on their possession.⁴

⁴ Act of Feb. 1, 1839, No. 77, 1838 Ala. Laws 67; An Act to Define and Publish Crimes in the District of Alaska, ch. 429, § 114, 117, 30 Stat. 1253, 1270 (1899); Act of Mar. 18, 1889, No. 13, § 1, 1889 Ariz. Sess. Laws 16; Ark. Stat. Rev. ch. XLIV, § 13 (1837); Act of Apr. 16, 1850, ch. 99, § 127, 1850 Cal. Stat. 229, 245; Act of Aug. 14, 1862, 1862 Colo. Sess. Law 56; Act of June 2, 1923, ch. 252, § 3, 1923 Conn. Pub. Acts 3707, 3707; Del. Rev. Code tit. 15, ch. 97, § 13 (1852); Act of Nov. 18, 1858, § 1, *The Laws of the Corporation of the City of Washington* 418 (William B. Webb, ed., 1868); *A Digest of* (Continued)

the Laws of the State of Florida 403 (James F. McClellan, ed., 1881); Act of Dec. 25, 1837, 1837 Ga. Laws 90; Act of Mar. 19, 1913, No. 22, 1913 Haw. Sess. Laws 25; Act of Feb. 17, 1909, H.B. No. 62, 1909 Idaho Sess. Laws 6; Act of Apr. 16, 1881, § 4, 1881 Ill. Laws 73, 74; Act of Apr. 19, 1913, ch. 297, 1913 Iowa Acts 307; Act of Jan. 14, 1820, ch. XXIII, 1819 Ind. Acts 39; Act of March 4, 1881, ch. XXXVII, § 23, 1881 Kan. Sess. Laws 79, 92; Act of Mar. 25, 1813, 1812 La. Acts 172; Me. Stat. Rev. tit. XII, ch. 169, § 16 (1840); Act of Feb. 26, 1872, ch. 42, 1872 Md. Laws 56; Act of May 31, 1887, No. 129, 1887 Mich. Pub. Acts 144; Minn. Penal Code § 334 (1889); Act of Feb. 28, 1878, ch. XLVI, 1878 Miss. Laws 175; Act of Mar. 5, 1883, 1883 Mo. Laws 76; Act of Jan. 11, 1865, 1864 Mont. Laws 355; An Act to Adopt and Establish a Criminal Code for the Territory of Nebraska, ch. 1, § 135, 1858 Neb. Laws 41, 69; Act of Jan. 14, 1853, 1852 N.M. Laws 67; Act of Mar. 27, 1891, ch. 105, § 209, 1891 N.Y. Laws 127, 176–77; N.D. Rev. Code § 7313 (1895); Act of Mar. 18, 1859, 1859 Ohio Laws 56; Penal Code of the Territory of Oklahoma, ch. XXV, art. 39, § 20, 1890 Okla. Sess. Laws 412, 476; Act of Dec. 22, 1853, ch. XVI, § 17, 1853 Or. Laws 184, 220; Act of Apr. 8, 1851, No. 239, § 4, 1851 Pa. Laws 381, 382; Act of May 3, 1893, ch. 1180, 1893 R.I. Pub. Laws 231; Act of Dec. 24, 1880, No. 362, § 1, 1880 S.C. Acts 447; S.D. Rev. Penal Code § 471 (1903); Act of Oct. 19, 1821, ch. XIII, 1821 Tenn. Pub. Acts 15; Act of Apr. 12, 1871, ch. XXXIV, § 1, 1871 Tex. Gen. Laws 25 (1st Sess.); Wash. Rev. Code § 929 (1881); W. Va. Code ch. CXLVIII, § 7 (1870); Wis. Stat. Rev. tit. XXVII, ch. 175, § 18 (1858); Wyo. Stat. ch. XXXV, § 127 (1876). Some 19th-century laws also banned the sale or exchange of certain arms, including most pistols. *See, e.g.*, Act of Apr. 1, 1881, ch. XCVI, § 3, 1881 Ark. Acts 191, 192; Act of Mar. 17, 1879, ch. XCVI, 1879 Tenn. Pub. Acts 135. These Acts have been carefully laid forth in Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 *Law & Contemp. Probs.* 55, 62 nn.34, 36, 63 n.48, 64 n.49 (2017).

In addition to regulating firearms, legislatures targeted excessively dangerous weapons such as Bowie knives,⁵ dirks,⁶ sword canes,⁷ metal knuckles,⁸ slungshots,⁹ and

⁵ See, e.g., Act of Jan. 27, 1838, ch. CXXXVII, 1837 Tenn. Pub. Acts 200 (forbidding sale or transfer of “any Bowie knife or knives, or Arkansas tooth picks, or any knife or weapon that shall in form, shape, or size resemble a Bowie knife or any Arkansasaw tooth pick”); Act of Feb. 1, 1839, No. 77, § 1, 1838 Ala. Laws 67, 67 (outlawing concealed carry of “any species of fire arms, or any bowie knife, Arkansasaw [sic] tooth-pick, or any other knife of the like kind, dirk, or any other deadly weapon”); Act of Feb. 28, 1878, ch. XLVI, § 1, 1878 Miss. Laws 175, 175 (prohibiting concealed carry of “any bowie knife, pistol, brass knuckles, slung shot or other deadly weapon of like kind or description” with a self-defense exception); Act of Jan. 30, 1889, ch. 37, 1889 Tex. Gen. Laws 33 (outlawing open and concealed carry of “any pistol, dirk, dagger, slung-shot, sword-cane, spear, or knuckles made of any metal or any hard substance, bowie-knife, or any other kind of knife manufactured or sold for purposes of offense or defense”). A full survey of laws regulating Bowie knives is available in Section V(B) of David B. Kopel & Joseph G. S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. Legis. 223, 298–328 (2024).

⁶ Dirks are “fighting knives” that “come in a variety of sizes and shapes.” Kopel & Greenlee, *The History of Bans*, at 328. See *id.* at 328–35 for a full range of dirk legislation from the 19th century. Laws ranged from complete bans on carry; to bans on open and concealed carry in certain locations and with bad intent; to bans on only concealed carry.

⁷ A sword cane is a “sword concealed in a walking stick.” Kopel & Greenlee, *The History of Bans*, at 289. For a list of sword cane regulations from the 19th century, see *id.* at 335–38. These included outright sales bans, bans on carry, and prohibitions on brandishing in a threatening manner unless in self-defense.

⁸ Metal knuckles are “devices attached to one’s second through fifth fingers to make the fist a more powerful weapon,” often made of brass. Kopel & Greenlee, *The History of Bans*, at 359. Like with other excessively dangerous weapons, restrictions included bans on sales and manufacture, as well as restrictions on carry and brandishing. See *id.* at 360–64.

⁹ A slungshot comprises a weight fastened to the end of a chain or rope that can be swung around to apply blunt force to an opponent. Kopel & Greenlee, *The History of Bans*, at 344. Restrictions on slungshots were more severe and widespread than restrictions on other excessively dangerous weapons, as more states banned the sale and possession of slungshots than of any other weapon. *Id.* at 346–47, 351. Other states regulated manner of carry and forbade brandishing. See *id.* at 347–50.

sand clubs.¹⁰ See Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 *Law & Contemp. Probs.* 55, 62–68 (2017). These weapons were particularly suitable for fighting and “popular[] with street criminals.” David B. Kopel & Joseph G. S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 *J. Legis.* 223, 345 (2024). Those who carried clubs, for instance, were called “devils and lurking highwaymen.” Spitzer, *Understanding Gun Law History*, 51 *Fordham Urb. L.J.* at 96. Slungshots, too, “were a regular part of criminal weaponry,” and “gangsters could be merciless in their use.” *Id.* at 97. Laws addressing these weapons ranged from outright bans on their manufacture, sale, and possession; to enhanced criminal penalties for those who used the weapons to commit crimes; to prohibitions on both open and concealed carry. See *supra* nn.4–9. At least three-quarters of states also enacted brandishing laws,¹¹ which generally barred “exhibit[ing]” these dangerous weapons “in a rude, angry or threatening manner.”¹² A number of these regulations did, however, make exceptions for those who

¹⁰ A sand club “is a small bag of sand attached to a short handle” that was often used by law enforcement officers and criminals. Kopel & Greenlee, *The History of Bans*, at 355–56. States and localities enacted numerous restrictions on sand clubs, including categorical bans on their manufacture and sale and bans on concealed carry. See *id.* at 356–57.

¹¹ Spitzer, *Understanding Gun Law History*, 51 *Fordham Urb. L.J.* at 99.

¹² *E.g.*, Act of Sept. 30, 1867, § 1, 1867 *Ariz. Sess. Laws* 21, 21; see also Act of Mar. 13, 1875, ch. XVII, § 1, 1875 *Ind. Acts* 62 (Spec. Sess.).

could demonstrate they had carried or brandished the weapon in reasonable anticipation of being attacked.¹³

A handful of state supreme courts found these statutory regulations on especially dangerous weapons to be consistent with the right to keep and bear arms. In *Aymette v. State*, the Supreme Court of Tennessee sustained the conviction of a man who illegally concealed a Bowie knife under his clothes, emphasizing that “[t]he Legislature . . . ha[s] a right to prohibit the wearing or keeping weapons dangerous to the peace and safety of the citizens.” 21 Tenn. 154, 159 (1840). The state law was justified, in the court’s view, as it existed “to preserve the public peace, and protect our citizens from the terror which a wanton and unusual exhibition of arms might produce, or their lives from being endangered by desperadoes with concealed arms.” *Id.*; see also *Haynes v. Tennessee*, 24 Tenn. 120, 122 (1844) (upholding conviction of concealed carrying of a “Mexican pirate-knife” and noting that “[t]he design of the statute was to prohibit the wearing of bowie-knives, and others of a similar description, which the experience of the country had proven to be extremely dangerous and destructive to human life; the carrying of which by truculent and evil-disposed persons but too often ended in assassination”); *Cockrum*, 24 Tex. at 402–03

¹³ See, e.g., 1880–1881 Ala. Laws 38, ch. 44 (banning concealed carry of bowie knives, pistols, and air guns, but allowing “evidence, that the defendant has good reason to apprehend an attack [to] be admitted . . . in justification of the offense”); 1871 Tex. Gen. Laws 25, ch. 34 (banning all carry of “any pistol, dirk, dagger, slung-shot, sword-cane, spear, brass-knuckles, [or] bowie knife,” with an exception for “immediate and pressing” fear of unlawful attack); 1877 Mo. Laws 240 (forbidding the exhibit of “deadly weapon[s] in a rude, angry, or threatening manner, not in the necessary defence of his family, person, or property”). These and a variety of other laws with similar exceptions are documented in Kopel & Greenlee, *The History of Bans*, at 287–368.

(upholding penalty enhancement for homicides committed with a Bowie knife after noting that the it was “an exceeding[ly] destructive weapon” and “the most deadly of all weapons in common use”).

In sum, then, 18th and 19th century legislatures “passed laws in a number of states that restricted the use or ownership of certain types of weapons,” once it “became obvious that those weapons . . . were being used in crime by people who carried them concealed on their persons and were thus contributing to rising crime rates.” Roth Declaration at 20. These legislatures—in balancing individual rights and public peacekeeping—permitted individuals to defend themselves with firearms, while ridding the public sphere of excessively dangerous and easily concealable weapons that were primarily to blame for an increase in violent deaths.

At the end of the 19th century, a different type of homicide began to emerge: mass murder spurred by the commercial availability of weaponry that empowered individuals to kill many people quickly. Dynamite, invented in 1866, was one such example. *Lamont*, 685 F. Supp. 3d at 109. Because it was rather cheap yet very destructive, it was favored by violent activists and anarchists and was employed in a number of infamous bombings between 1919 and 1920, including “the murder of 38 people and the wounding of 143 in an attack on Wall Street, 36 dynamite bombs mailed to justice officials, newspaper editors, and businessmen (including John D. Rockefeller), and a failed attempt to kill Attorney General A. Mitchell Palmer and his family.” Roth Declaration at 38–39.

Another weapon that surfaced during the turn of the century was the semiautomatic firearm, which became available to consumers in the 1890s. DeLay, *The Myth of*

Continuity, at 49. Colt began marketing increasingly effective semiautomatic pistols, culminating in the release of the M1911. *Id.* at 51. Fully automatic weapons quickly followed, with the Thompson submachine gun being patented in 1920. Spitzer, *Understanding Gun Law History*, 51 *Fordham Urb. L.J.* at 61. While the “Tommy gun” was initially created for use in World War I as “purely a military weapon,” it arrived on the battlefield too late to gain any real traction during that conflict. *Id.* (quoting William J. Helmer, *The Gun That Made the Twenties Roar* 75 (1st ed. 1969)). The Tommy gun was marketed to civilians and police forces with little success, in part due to its expense and lack of controllability. *Id.* at 61–62; Roth Declaration at 38. It instead became popular during the interwar period “with criminals, especially bootleggers.” Kopel & Greenlee, *The History of Bans*, at 287 n.490; Spitzer, *Gun Law History*, 80 *Law & Contemp. Probs.* at 68; Helmer, *The Gun That Made the Twenties Roar*, at 126 (“As a criminal’s weapon, the Tommygun was an unqualified success. As a police weapon, it was such a flop that many law-enforcement officials wished sincerely that it had never come off the drawing board.”). Other military firearms that had been developed for World War I, such as the Browning Automatic Rifle, similarly “found favor among criminals and gangsters in the 1920s and early 1930s.” Spitzer, *Understanding Gun Law History*, 51 *Fordham Urb. L.J.* at 63.

The upshot was that early 20th-century criminals gained access to weapons with firepower not seen before in civilian life. Some models of the Tommy gun could “go through a 100-round drum magazine in four seconds.” *Id.* at 61. The Browning Automatic Rifle was a heavy machine gun that could fire up to ten rounds per second. *See id.* at 63. Moreover, these firearms’ detachable magazines “empowered individual shooters to inflict

far more damage on more people than had been possible with earlier technologies.” DeLay, *The Myth of Continuity*, at 52. When the guns were used, “they exacted a devastating toll and garnered extensive national attention,” becoming inextricably linked to notorious crimes including the St. Valentine’s Day Massacre (seven gang members and associates killed) and the Kansas City Massacre (four law enforcement officers and one prisoner killed). Spitzer, *Understanding Gun Law History*, 51 *Fordham Urb. L.J.* at 63; Roth Declaration at 39; Encyc. Britannica, *St. Valentine’s Day Massacre* (Feb. 7, 2024); Fed. Bureau of Investigation, *Kansas City Massacre and “Pretty Boy” Floyd* (last visited May 12, 2024). These national tragedies put pressure on government to do something about machine guns.

Once again, legislatures responded. And though they enacted regulations in a later century than the ratification of the Second and Fourteenth Amendments, the tide of legislative responses to technological advances in weaponry has persisted throughout our history. So, while we acknowledge that “post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text,” we see these 20th-century enactments as steps trod along a well-worn path. *Bruen*, 597 U.S. at 36. These later-in-time regulations remain relevant in tracing the broader and consistent story of our nation’s regulation of excessively dangerous weaponry.

The Federal Explosives Act of 1917 regulated possession of dynamite and a wide array of other explosives—regulations that were later expanded by the Organized Crime Control Act of 1970. Pub. L. 65-68, 40 Stat. 385 (1917); Pub. L. 91-452, 84 Stat. 922

(1970). As for semiautomatic and automatic weapons, a great number of jurisdictions took action. At least 29 states enacted anti-machine-gun laws between 1925 and 1934,¹⁴ and ten states restricted semiautomatic weapons between 1927 and 1934.¹⁵ At the federal level, Congress banned possession in the District of Columbia of “any firearm which shoots automatically or semiautomatically more than twelve shots without reloading.” Pub. L. No.

¹⁴ See Act of July 29, 1927, ch. 552, 1927 Cal. Stat. 938; Act of Feb. 25, 1931, ch. 249, 37 Del. Laws 813; Act of July 8, 1932, Pub. L. No. 72-275, 47 Stat. 650, 651–52 (D.C.); An Act to Regulate the Hunting of Wild Deer etc., ch. 6621, § 8, 1913 Fla. Laws 116, 117; Act of June 6, 1933, ch. 16111, § 1, 1933 Fla. Laws 623, 623; Act of Apr. 27, 1933, No. 26, § 7, 1933 Haw. Sess. Laws 35, 38–39 (Spec. Sess.); Act of July 2, 1931, S.B. No. 18, 1931 Ill. Laws 452; Act of Mar. 9, 1927, ch. 156, 1927 Ind. Acts 469; Act of Apr. 19, ch. 234, 1927 Iowa Acts 201; Act of Nov. 28, 1933, ch. 62, 1933 Kan. Sess. Laws 76 (Spec. Sess.); Act of July 7, 1932, No. 80, 1932 La. Acts 336; Act of Apr. 27, 1927, ch. 326, 1927 Mass. Acts 413; Act of June 2, 1927, No. 372, § 3–4, 1927 Mich. Pub. Acts 887, 888–89; Act of Apr. 10, 1933, ch. 190, 1933 Minn. Laws 231; Act of June 1, 1929, H.B. No. 498, 1929 Mo. Laws 170; Act of Apr. 29, 1929, ch. 190, 1929 Neb. Laws 673; Act of Mar. 19, 1927, ch. 95, 1927 N.J. Laws 180; Act of Apr. 15, 1931, ch. 435, 1931 N.Y. Laws 1033; Act of Mar. 9, 1931, ch. 178, 1931 N.D. Laws 305; Act of Apr. 8, 1933, No. 64, 1933 Ohio Laws 189; Act of Mar. 10, 1933, ch. 315, 1933 Or. Laws 488; Act of Apr. 25, 1929, No. 329, 1929 Pa. Laws 777; Act of Apr. 22, 1927, ch. 1052, 1927 R.I. Pub. Laws 256; Act of Mar. 2, 1934, No. 731, 1934 S.C. Acts 1288; Uniform Machine Gun Act, ch. 206, 1933 S.D. Sess. Laws 245; Act of Oct. 25, 1933, ch. 82, 1933 Tex. Gen. Laws 219 (1st Called Sess.); Act of Mar. 22, 1923, No. 130, § 1, 1923 Vt. Acts & Resolves 127; Act of Mar. 7, 1934, ch. 96, 1934 Va. Acts 137; Act of Mar. 6, 1933, ch. 64, 1933 Wash. Sess. Laws 335; Act of June 5, 1925, ch. 3, 1925 W. Va. Acts 24, 30–32 (1st Extraordinary Sess.); Act of May 28, 1929, ch. 132, 1928–1929 Wis. Sess. Laws 157. These laws are compiled in Spitzer, *Understanding Gun Law History*, 51 Fordham Urb. L.J. at 64 n.38.

¹⁵ Act of Apr. 27, 1927, ch. 326, 1927 Mass. Acts 413; Act of June 2, 1927, No. 372, 1927 Mich. Pub. Acts 887, 888–89; Act of Apr. 10, 1933, ch. 190, § 1(a)–(b), 1933 Minn. Laws 231, 232; Act of Apr. 8, 1933, No. 64, 1933 Ohio Laws 189; Act of Apr. 22, 1927, ch. 1052, 1927 R.I. Pub. Laws 256; Uniform Machine Gun Act, ch. 206, 1933 S.D. Sess. Laws 245; Act of Mar. 7, 1934, ch. 96, 1934 Va. Acts 137; Act of July 2, 1931, S.B. No. 18, 1931 Ill. Laws 452; Act of July 7, 1932, No. 80, 1932 La. Acts 336; Act of Mar. 2, 1934, No. 731, 1934 S.C. Acts 1288. We thank Spitzer, *Gun Law History*, 80 Law & Contemp. Probs. at 68, 70–71, for this compilation.

72-275, 47 Stat. 650 (1932). The National Rifle Association endorsed the ban, announcing its “desire [that] this legislation be enacted for the District of Columbia, in which case it can then be used as a guide throughout the States of the Union.” S. Rep. No. 72-575, at 4–6 (1932). Two years later, Congress enacted the National Firearms Act of 1934, which severely curtailed the civilian possession and general circulation of automatic weapons, as well as sawed-off shotguns, short-barreled rifles, and silencers. Pub. L. No. 73-474, 48 Stat. 1236 (1934). As Judge Wynn’s fine opinion in *United States v. Price* explained, and as the Supreme Court recognized in *Miller* and *Heller*, such regulation accorded with the historical understanding of the scope of the Second Amendment right. No. 22-4609, slip op. at 9–11 (majority opinion).

Over the course of the 20th century, the dangers posed by semiautomatic weapons began to manifest more potently as “a new generation of more expensive and more deadly guns[] entered the criminal market.” Spitzer, *Understanding Gun Law History*, 51 *Fordham Urb. L.J.* at 102. In the mid-to-late 20th century, a profound uptick in crime occurred. Law enforcement at the time lamented that “[t]he ready availability of and easy access to assault weapons by criminals has increased . . . dramatically”—a particular problem given that standard-issue police weapons were “no match against a criminal armed with a semi-automatic assault weapon.” H.R. Rep. No. 103-489, at 13–14 (1994). Simultaneously, the nation’s mass shooting crisis was beginning to emerge, with a 1989 killing of five schoolchildren in Stockton, California prompting public outcry about assault rifles. *See* Charles Mohr, *U.S. Bans Imports of Assault Rifles in Shift by Bush*, *N.Y. Times* (Mar. 15, 1989). In response, President George H.W. Bush temporarily banned the import of assault

rifles in 1989, and California became the first state to restrict the possession of assault weapons that same year. *See id.* As the excessively dangerous nature of these weapons became apparent, Congress enacted a ten-year ban on assault weapons and large-capacity magazines in 1994. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994). Once again, citizens had called for something to be done about the illicit use of excessively dangerous arms, and their elected representatives responded. *See DeLay, The Myth of Continuity*, at 55 (“Technological changes provoking social concerns that lead to public safety legislation. That is the nation’s tradition of firearms regulation.”).

* * *

Taking a long view of this history, a definable arc of technological innovation and corresponding arms regulation begins to emerge. Whether these laws and regulations were wise or effective is surely a matter of debate. The point is, however, that legislatures were not disabled constitutionally from enacting them. Spurred often by the demands of the military for use in international armed conflict, weapons became progressively sophisticated and capable of inflicting enormous offensive harm. Arms, for example, were far more advanced at the end of The Great War and World War II than they were at the start of those conflicts. Once introduced to stop an oncoming battlefield foe, firearms frequently transitioned to civilian use and became capable of inflicting greater harms in a lessened time period. The Cold War and contemporary competition between great powers have not diminished arms competition. To the contrary, if the pace of innovation today is any indication, this is just the beginning.

Throughout this history lies a strong tradition of regulating those weapons that were invented for offensive purposes and were ultimately proven to pose exceptional dangers to innocent civilians. In documenting the course of weapons regulations, we see states and localities responding to the calls of their citizens to *do something* about the horrors wrought by excessively dangerous weapons, while preserving the core right of armed self-defense. When violence surged in the public square, states and localities responded by regulating the manner of carry; forbidding brandishing; and banning the sale, manufacture, and possession of weapons that were particularly useful for offensive and criminal purposes. And as some modern firearms became capable of inflicting mass horrors, government did not hesitate to circumscribe their possession while leaving intact the right to own weapons more suitable to the Second Amendment's purpose of personal protection.

The Maryland statute at issue is yet another chapter in this chronicle. It only regulates weapons that are ill-suited for and disproportionate to the objective of self-defense, while honoring the right of Americans to possess arms more compatible with the Second Amendment's purpose. The legislation is a direct response to the calls of citizens who fear it is only a matter of time before mass violence will afflict their communities absent government intervention. In heeding their outcry, Maryland is in the company of centuries of state governments that have done the same.

The Supreme Court has made clear that the Second Amendment is an integral component of the Bill of Rights. But as our nation's history has shown, it is "neither a regulatory straightjacket nor a regulatory blank check." *Bruen*, 597 U.S. at 30. The Amendment has not disabled the ability of representative democracy to respond to an

urgent public safety crisis. To disregard this tradition today—when mass slaughters multiply and the innovation of weaponry proceeds apace—could imperil both the perception and reality of well-being in our nation. We therefore hold that Maryland’s regulation of assault weapons is fully consistent with our nation’s long and dynamic tradition of regulating excessively dangerous weapons whose demonstrable threat to public safety led legislatures to heed their constituents’ calls for help.

V.

When our Founders bravely coalesced around that revolutionary piece of parchment, quill pens in hand, they certainly sought to protect the citizenry’s inherent liberties from the often oppressive hand of government. At the same time, though, our Founders organized their fellow countrymen into a civilized society with an elected government, which necessarily entailed the ceding of unadulterated freedom for the nation’s common good. *See* John Locke, *Two Treatises of Government* (1689). Much as the branch of a willow offers a gentle bend so that the wind may blow and the birds may nest, so too did our predecessors craft a political community in which rights must sometimes bend to better accommodate the rights of others.

One way in which our nation agreed to temper our individual liberties was by accepting that the pre-existing rights codified within our Constitution came with inherent qualifications crafted through centuries of common law. The Second Amendment was no exception. The right to keep and bear arms must be read within the context of how the Framers conducted this balancing of individual rights with societal prerogatives when they enacted the Second Amendment. Far from disturbing this basic balance, *Heller* and *Bruen*

reaffirmed it, making clear that lower courts are duty bound to apply the terms of the balance enshrined in the Constitution's text, not to dictate such terms themselves. The language of entitlement is qualified by the language of limitation in those opinions, and we are bound to respect both.

The founding generation's understanding that the Second Amendment codified a right that is less than absolute is all the more important today, when modern armaments are increasingly used for crimes so mean and vile that it is difficult even to read about them. Imagine, then, *living* through these recent tragedies. Imagine the sense of loss that afflicts not only the moment, but the lifetimes of those families and friends affected. And then imagine that you mobilize and lobby your representatives to pass preventative legislation, only to be told by a court that your Constitution renders you powerless to save others from your family's fate. The Second Amendment, as elucidated by *Heller* and *Bruen*, does not require courts to turn their backs to democratic cries—to pile hopelessness on top of grief. We shudder to imagine the hubris with which a court would disable representative government at the very moment that lethal technologies are proceeding at an accelerated and indeed unprecedented pace. In 79 A.D., the Roman Emperor Vespasian proclaimed, “Woe is me, I think I am becoming a god.” *Oxford Concise Dictionary of Quotations* 386 (Susan Ratcliffe ed., 6th ed. 2011). The Supreme Court, in alluding to the balance struck by our own founding generation, has avoided a judicial environment where Vespasian would fit right in.

The Framers recognized they could not foresee all the dangers that novel weaponry would someday pose, or the circumstances that would invoke the basic power of

government to protect the governed. Maryland is a testament to their prescience, though other states with other characteristics and other approaches to this problem may be as well. We have before us nothing more or less than a challenge to one state's regulation of assault weapons. Following *Heller* and *Bruen*, we hold that the Maryland statute is plainly a constitutional enactment.

VI.

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

DIAZ, Chief Judge, with whom Judges KING, WYNN, THACKER, BENJAMIN, and BERNER join, concurring:

In the wake of one of this country’s most horrific mass shootings, Maryland’s legislature acted. Using the considerable police power afforded to it by our Constitution, and heeding the pleas for action of its constituents, the State banned the type of weapon (and similar weapons) that had been used to gun down twenty children and six staff members at Sandy Hook Elementary School.

Judge Wilkinson’s masterful and eloquent opinion for the majority (which I join in full) explains why Maryland’s ban “peaceably coexist[s]” with the Second Amendment’s text, Majority Op. at 13, adheres to our Nation’s “strong tradition of regulating excessively dangerous weapons,” *id.*, and satisfies well-understood notions of federalism meant to be abridged only sparingly and with good reason. I write briefly to comment on how this case lays *Bruen*’s challenges bare.

As my colleagues have explained, *Bruen* “[r]eject[ed] the means-end approach” many lower courts had used after *Heller* in favor of a “two-step methodology oriented towards text, history, and tradition.”¹ Majority Op. at 11; *see also* Dissenting Op. at 109–10. First, a court “looks to the text of the Second Amendment to see if it encompasses the desired conduct at issue.” Majority Op. at 11 (citing *Bruen*, 597 U.S. at 24). If it doesn’t, then we all go home. But if it does, then “the analysis moves to the second step, where the

¹ *Bruen* appears to have rejected the post-*Heller* two-step test as “one step too many,” *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 19 (2022), only to replace it with another two-step test.

burden shifts to the government to “justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.”” *Id.* at 11–12 (quoting *Bruen*, 597 U.S. at 24). Easy enough.

Except that it hasn’t been. *Bruen* has proven to be a labyrinth for lower courts, including our own,² with only the one-dimensional history-and-tradition test as a compass. Questions abound at the framework’s two steps, so that “courts, operating in good faith, are struggling at [each] stage of the *Bruen* inquiry.”³ Others have well summarized many of these consequential gaps, so I won’t belabor them here.⁴ But courts, tasked with sifting through the sands of time, are asking for help. And the Supreme Court’s recent attempt to decipher the *Bruen* standard in *United States v. Rahimi*, 144 S. Ct. 1889 (2024), offered little instruction or clarity about how to answer these persistent (and often, dispositive) questions.

Look no further for a front row seat to this confusion than the principal opinions authored today. Each was written by a thoughtful colleague, who engaged in an exhaustive

² See, e.g., *United States v. Price*, No. 22-4609, slip op. at 39 (Quattlebaum, J., concurring) (acknowledging a “puzzle” in whether courts assess a firearm’s “common use”—a “limit to the Second Amendment[’s]” protection—“at *Bruen*’s first or second step”).

³ *United States v. Daniels*, 77 F.4th 337, 358 (5th Cir. 2023) (Higginson, J., concurring), cert. granted, judgment vacated, No. 23-376, 2024 WL 3259662 (U.S. July 2, 2024).

⁴ See, e.g., *id.*; see also *Rahimi*, 144 S. Ct. at 1926–30 (Jackson, J., concurring).

sweep of history, only to reach diametrically opposed conclusions about what that history means.

I think my friend Judge Wilkinson has the far better of the argument. His robust textual analysis and nuanced historical survey each offer—at least in this case—“a way to bring discipline to the increasingly erratic and unprincipled body of law that is emerging after *Bruen*.” *Id.* at 1929 (Jackson, J., concurring) (cleaned up).

But if courts are to apply and replicate precedent consistently, then either the *Bruen* framework is failing, or we are. And if the cacophony of decisions we’ve seen post-*Bruen* is any indication,⁵ then confusion isn’t simply a bug of the framework—it’s a feature, even if unintended. Hewing true to our oaths, we’ve done our best to apply *Bruen* faithfully, but the law shouldn’t work like this.

Particularly so given the horrific consequences. Gun violence generally is, and mass shootings specifically are, on the rise.⁶ In fact, gun violence is seen by at least some experts as an epidemic.⁷ Technological advances in guns have moved them ever farther from the

⁵ See, e.g., Jacob D. Charles, *The Dead Hands of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 *Duke L.J.* 67, 129–45 (2023) (describing common obstacles courts face in implementing *Bruen* and the “divergent conclusions” those courts have reached).

⁶ John Gramlich, *What the data says about gun deaths in the U.S.*, Pew Research Center (Apr. 26, 2023), <https://www.pewresearch.org/short-reads/2023/04/26/what-the-data-says-about-gun-deaths-in-the-u-s/> [<https://perma.cc/U8B8-KGWR>]; see also The Violence Project, *Mass Shooter Database* (database updated Jan. 2024).

⁷ Ellen Barry, *Surgeon General Declares Gun Violence a Public Health Crisis*, *N.Y. Times* (June 24, 2024); see also *Firearm Violence in the United States*, Johns Hopkins Bloomberg School of Public Health, Center for Gun Violence Solutions, (Continued)

Second Amendment’s revolutionary-era musket to something unrecognizably faster, more accessible, and more lethal.⁸ One such weapon, whose popularity seemingly knows no bounds, is the AR-15.

The court’s principal opinions describe the AR-15’s history, its popularity, its firepower, its destructiveness, its lawful uses, and its unlawful ones. They illustrate, quite persuasively, why the AR-15 has become the chosen weapon of mass shooters and terrorists. *See, e.g.*, Dissenting Op. at 164–65 (describing the AR-15’s superiority to a handgun and other rifles because of its balance of force, accuracy, controlled recoil, and maneuverability); *see also id.* at 165 (“The AR-15’s perceived superiority is aided by many features that make it wieldable for people of all ages and sizes.”). “Indeed,” as Judge Wilkinson explains, the “AR-15 or AK-47 type assault rifles covered by the Maryland regulations have been used in every major terrorist attack on U.S. soil in the past decade.” Majority Op. at 33–34 (recounting terrorist incidents in San Bernadino, Orlando, Pittsburgh, El Paso, and Buffalo).⁹

<https://publichealth.jhu.edu/center-for-gun-violence-solutions/research-reports/firearm-violence-in-the-united-states> [<https://perma.cc/U9LL-U3MS>] (last accessed July 19, 2024).

⁸ A gun owner might say that more advanced weapons may better serve self-defense ends. It’s a fair point, and is exactly why history alone cannot and should not dictate the outcome in a case such as this, and why the legislature, as here, can balance competing public safety and self-defense interests in a democratic forum.

⁹ We saw the cycle repeat itself on Saturday, July 13, when a former President of the United States, at a crowded campaign event and protected by the Secret Service, was nearly assassinated by an AR-15. Tragically, one man was killed, and two others were (Continued)

The “history-only” view of my dissenting colleagues, while cleaving to all of *Bruen*’s strictures and none of its oxygen, would dismiss these public safety concerns of today as untethered to the discernible legislative footprints of 250 years ago.¹⁰ In their mind, because the modern regulation addressing those public safety concerns has cosmetic differences with its historical precursor, or imposes a slightly different burden, the legislature is helpless to act.¹¹

That cannot be. Why even have a ballot box when our laws are fossilized in a history book? That’s no way to foster a democracy, but it’s an effective way to paralyze one.

Of course, the Court doesn’t require “a law trapped in amber,” *Rahimi*, 144 S. Ct. at 1897, demanding only a historical “principle, not a mold,” *id.* at 1925 (Barrett, J., concurring). Whatever those instructions mean on the ground, Maryland has responded to current public safety concerns, consistent with historical principles supporting the regulation of dangerous weapons.

critically wounded. *The Assassination Attempt Against Donald Trump*, N.Y. Times (July 14, 2024).

¹⁰ My dissenting colleagues insist that the Second Amendment’s mandate is “absolute” and “unequivocal.” Dissenting Op. at 85. That may describe their approach to modern firearms regulation, but it’s not the one dictated in *Bruen*. 597 U.S. at 21 (“Like most rights, the right secured by the Second Amendment is not unlimited.” (quoting *Dist. of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (decapitalization removed))). The Second Amendment isn’t a second-class right, but neither is it sacrosanct.

¹¹ And if the retort is that a state may act in other ways to protect its citizens, the dissent’s author struck down just such an attempt—a handgun licensing regime passed by the Maryland legislature. *Maryland Shall Issue, Inc. v. Moore*, 86 F.4th 1038, 1040 (4th Cir. 2023), *reh’g en banc granted*, No. 21-2017(L), 2024 WL 124290 (4th Cir. Jan. 11, 2024).

Although we “offer no view,” Majority Op. at 4, on whether Maryland’s legislative approach is the right one, we do conclude that its representatives acted with both its constituents, *and* our country’s history, in proper view.

* * * *

At a June 12 high school graduation in Newtown, Connecticut, twenty names were called, though no student crossed the stage.¹² They had never left their first-grade classrooms. All because of one man, six minutes, and an AR-15. This chilling episode (and many like it) should give us pause.¹³ It gave the people of Maryland pause and propelled its legislature to act.

It is neither a “trope[.]” nor “hyperbole,” Dissenting Op. at 166, to recite truthfully the carnage wrought by such weapons. And we refuse today to shackle Maryland’s representatives as they work in good faith to stop the bloodshed.

History should guide. The Constitution should anchor. But neither should drown us.

¹² Claire Fahy, *Sandy Hook Victims are Remembered on Day They Would Have Graduated*, N.Y. Times (June 13, 2024).

¹³ The majority describes similar such massacres that required even less time to exact a devastating toll. *See* Majority Op. at 46–47 (detailing that a lone shooter needed only thirty-two seconds to murder nine people and injure seventeen in Dayton, Ohio, and that another needed only two minutes to kill ten people and injure three in Buffalo, New York).

GREGORY, Circuit Judge, concurring in the judgment:

In the interim between the Supreme Court’s decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1 (2022), our Circuit assessed Second Amendment challenges under a two-part framework that considered the history of the Second Amendment right as well as the government’s interests in protecting its citizens. *Kolbe v. Hogan*, 849 F.3d 114, 133 (4th Cir. 2017), abrogated in part by *Bruen*, 597 U.S. 1. In *Bruen*, the Supreme Court rejected the latter portion of that framework as “one step too many,” and held that the government may not justify a firearms regulation on the basis that it promotes an important interest. *Bruen*, 597 U.S. at 17. Rather, the Court said, a regulation can survive a Second Amendment challenge only if the government can demonstrate that the challenged regulation is consistent with our country’s historical tradition of firearm regulation. *Id.*

As I read it, that binding precedent instructs that we refrain from balancing the right guaranteed by the Second Amendment against the general governmental interests of safety and order, and instead confine our analysis to history and tradition. *Id.* at 17, 19. Because I believe the majority did not adhere to that instruction, I cannot join the majority’s opinion. But because Maryland’s statute is relevantly similar to historic weapons prohibitions, I concur in the judgment.

I.

My colleagues in the majority suggest that, under *Bruen*, the plain text of the Second Amendment limits its purview to weapons “in common use today for self-defense.” Majority

Op. at 39, 41. In their estimation, only “those weapons that are typically possessed by average Americans for the purpose of self-preservation and are not ill-suited and disproportionate to achieving that end” are entitled to constitutional protection. *Id.* at 41.

At the other end of the spectrum, my colleagues in the dissent read *Bruen* much more broadly and posit that any weapon in common use for lawful purposes is necessarily not dangerous and unusual at step two, and is, therefore, automatically protected by the Second Amendment. Dissenting Op. at 144. Based on that interpretation, the dissent maintains that because millions of people across the country own the semiautomatic rifles challenged here, the Constitution prohibits Maryland from banning those weapons. *Id.* at 153.

I disagree with both positions. I do not read *Bruen* to define “arms” as narrowly as the majority does or to otherwise cabin the Second Amendment right to effectively cover only handguns and the like. Nor do I share in the dissent’s view that under *Bruen* a legislature may only prohibit weapons that are not in common use for lawful purposes and particularly useful for criminal activity. Dissenting Op. at 145. Rather, as I see it, Supreme Court precedent and the historical tradition require courts to examine a firearm with regard to more than its utility for self-defense or lawless behavior in determining whether the weapon is dangerous and unusual.

The Supreme Court has not yet defined the purview or instructed on the proper placement of the dangerous and unusual analysis. In that vacuum, courts have struggled to interpret the scope of the constitutional right to bear arms as informed by *Bruen* and other Supreme Court precedent. *Bruen* itself bears much of the responsibility for that

Herculean exercise. In determining that New York could not prohibit possession of handguns under the tradition of prohibiting dangerous and unusual weapons the Supreme Court explained:

Whatever the likelihood that handguns were considered “dangerous and unusual” during the colonial period, they are indisputably in “common use” for self-defense today. They are, in fact, “the quintessential self-defense weapon.” Thus, even if these colonial laws prohibited the carrying of handguns because they were considered “dangerous and unusual weapons” in the 1690s, they provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today.

Bruen, 597 U.S. at 47. As a threshold matter, the Supreme Court’s conclusion, as expressed in that portion of the opinion, must be read with the understanding that (1) the statute at issue in *Bruen* prohibited most New Yorkers from possessing any firearm, and (2) the Supreme Court had previously recognized handguns as the “quintessential self-defense weapon.” *See id.* at 47; *see also Heller*, 554 U.S. at 629 (stating that “the American people have considered the handgun to be the quintessential self-defense weapon).

With that context in mind, I understand the Supreme Court’s statement as simply clarifying that if the Second Amendment is to have any teeth, firearms regulations cannot completely prohibit citizens from possessing handguns generally, which New York’s statute effectively did. Nothing in that quote, elsewhere in *Bruen*, or in any other precedential Second Amendment case forecloses the conclusion that a class of firearms in common use can be prohibited because they are dangerous and unusual, or that a person may possess a weapon that is not in common use for self-defense.

Rather, I interpret the Supreme Court’s precedent to date as establishing that the Second Amendment presumptively protects all bearable arms, but history supports

regulation of arms that are dangerous and unusual, *including but not limited to*, those arms not presently in common use. *See Heller*, 554 U.S. at 582 (explaining that 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.”); *id.* at 627 (recognizing that the historical tradition of prohibiting “dangerous and unusual” weapons “fairly support[s]” excluding weapons “not in common use at the time” from Second Amendment protection); *see also Bruen*, 597 U.S. at 21.

Under that interpretation, a statute that prohibits possession of a weapon in common use for a lawful purpose is not per se unconstitutional. Similarly, a statute that regulates weapons not in common use for self-defense does not automatically fall outside of the Second Amendment’s protection. Our analysis therefore does not necessarily begin and end with determining whether the weapon or weapons covered under a challenged statute are in common use—be it for lawful purposes or self-defense—as my colleagues suggest. Majority Op. at 39, 41; Dissenting Op. at 145–46, 153. Rather, whether a weapon is in common use is but one factor that we must consider in the Second Amendment analysis.

II.

As the dissent notes, data indicates that AR-style semiautomatic rifles represented 20% of all firearms sold in 2020, that at least 16 million Americans owned a semiautomatic rifle at some point, and that over 50% of semiautomatic rifle owners indicated that they own the weapon for self-defense, hunting, or another lawful purpose. Dissenting Op. at 149–50. That data suggests that these arms are widely circulated and possessed by millions

of people throughout the nation for lawful purposes, including self-defense. Our Court also acknowledged the popularity of AR-15s and similar semiautomatic rifles years ago in *Kolbe*, and that popularity has only increased since. *See Kolbe*, 849 F.3d at 128–29 (acknowledging that “[t]he plaintiffs’ evidence reflect[ed] that, since it was first marketed to the public in 1963, ‘[t]he AR-15 has become the most popular civilian rifle design in America and is made in many variations by many companies’”). Given those facts, it is clear that semiautomatic rifles are in common use for lawful purposes today.

* * *

I pause to note that despite “reaffirm[ing] the conclusion we reached in *Kolbe* that [semiautomatic rifles covered under Maryland’s statute] are not constitutionally protected arms,” presumably at step one, the majority conducted a *Bruen* step two analysis during which it assessed whether semiautomatic rifles can be prohibited as dangerous and unusual. In that analysis, the majority took liberty to extensively discuss mass shootings and other criminal uses of semiautomatic rifles of the type covered under Maryland’s statute. *See e.g. Majority Op.* at 32–36, 45–47. The majority also referred to “a strong tradition of regulating those weapons that were invented for offensive purposes and were ultimately proven to pose exceptional dangers to innocent civilians.” *Id.* at 62.

Elsewhere, the majority claimed that “our society has deemed that giving people the capacity to use large amounts of force at a moment’s notice in a sensitive place is not worth the danger that they will unlawfully deploy such force against innocent civilians or public figures there.” *Id.* at 20. According to the majority, those limitations, “reflect a careful balancing of interests between individual self-defense and public protection from excessive

danger that existed within the meaning of the phrase the right to keep and bear arms” when the Second Amendment was ratified. *Id.* The majority again mentioned the “careful interest balancing between individual self-defense and societal order” immediately before discussing its view of “dangerousness and unusualness” later in its opinion. *Id.* at 40–41.

In my view, the majority’s analysis is comprised of the very sort of means-end scrutiny that *Bruen* explicitly forbids courts from applying in the Second Amendment context. *Bruen*, 597 U.S. at 19; *see also id.* at 29 n.7 (stating that the step two analysis does not give courts license to “engage in independent means-end scrutiny under the guise of an analogical inquiry . . . Analogical reasoning requires judges to apply faithfully the balance struck by the founding generation to modern circumstances . . . It is not an invitation to revise that balance through means-end scrutiny”). Indeed, as one of our sister circuits recently put it, “*Bruen* makes clear that the question whether a burden is comparably justified cannot be answered by pointing to the gravity of the harms the legislation was designed to avert and the appropriateness of the mechanism they adopt.” *Bevis v. City of Naperville, Illinois*, 85 F.4th 1175, 1200 (7th Cir. 2023) (internal quotation and citation omitted), *cert. denied sub nom. Harrel v. Raoul*, 144 S. Ct. 2491 (2024).

That said, we cannot ignore the horrific tragedies the majority highlights in its opinion. Over the past two decades, our nation has in fact suffered at the hands of those who elected to inflict turmoil on innocent victims, communities, and our society overall. Unfortunately, our nation’s citizens are faced with the fear that we, or our loved ones, may be harmed while shopping for groceries, enjoying outside entertainment, taking a class, attending a religious service, or otherwise engaging in what should be a safe activity. I am

sympathetic to the very troubling realities on which the majority sheds light. However, I believe that binding precedent prohibits us from considering those tragedies, or a legislature’s interest in limiting or preventing them, when assessing the validity of a statute that implicates the Second Amendment.

To me, *Bruen* dictates that, despite the concerns plaguing society, in determining whether Maryland’s statute is constitutional, we must limit our consideration to history and tradition to determine whether the government has demonstrated that Maryland’s statute is analogous to a historic weapons prohibition. *Bruen*, 597 U.S. at 19 (stating that Supreme Court precedent “do[es] not support applying means-end scrutiny in the Second Amendment context”); *see also id.* at 22 (recognizing that the Court has “rejected the application of any judge-empowering interest-balancing inquiry that asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests”). Against that backdrop, I now proceed to the step two analysis.

III.

Under *Bruen*, if a statute regulates conduct covered by the Second Amendment, the government must justify the challenged statute at step two by proving that it “comport[s] with the principles underlying the Second Amendment.” *United States v. Rahimi*, 144 S. Ct. 1889, 1898 (2024) (citing *Bruen*, 597 U.S. at 30). Notably, the government is not required to identify a historical prohibition that is a “dead ringer” or a “historical twin” to survive a Second Amendment challenge. *Id.* Rather, the government need only

demonstrate that its prohibition “is consistent with the principles that underpin our regulatory tradition.” *Id.*

How and why the challenged statute burdens the Second Amendment right are significant considerations in determining whether the law is “relevantly similar” to a historical analogue though they are not the only factors a court may consider in its assessment. *Id.*; *see also id.* (“Why and how the regulation burdens the right are central to this inquiry.”); *Bruen*, 597 U.S. at 29 (stating that the Court was not undertaking to “provide an exhaustive survey of the features that render regulations relevantly similar under the Second Amendment” but that Supreme Court precedent directs us to consider “how and why” the regulation burdens the right).

Although our Court disagrees about much regarding the parameters of the Second Amendment right and analysis, we all seem to agree that there is a historical tradition in our nation of prohibiting dangerous and unusual weapons based on characteristics and functions that caused the lawmakers of those times to classify them as dangerous and unusual when compared to other weapons. Majority Op 20–21, 41; Dissenting Op. at 144. In first recognizing that tradition, Justice Scalia cited several sources* documenting “affray

* *See* 4 Blackstone 148–149 (1769) (“The offense of riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the statute of Northampton, 2 Edw. III. c. 3. upon pain of forfeiture of the arms, and imprisonment during the king’s pleasure: in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armor.”); 3 B. Wilson, Works of the Honourable James Wilson 79 (1804) (“[T]here may be an affray, where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner, as will naturally diffuse a terrour among the people.”); J. Dunlap, The New–York Justice 8 (1815) (“It is likewise said to be an
(Continued)

laws” and laws prohibiting “riding or going armed” with dangerous and unusual weapons. *Heller*, 554 U.S. at 627. Notably, and contrary to the dissent’s focus on the term “carrying,” Justice Scalia recognized protecting only weapons in common use as an “important limitation on the right to *keep* and *carry* arms.” *Id.* (emphasis added). In my view, those laws demonstrate that our nation has always permitted legislation regulating certain aspects of the way in which an individual chooses to exercise his Second Amendment right. In other words, although we all have the right to bear arms, a legislature may prohibit us from exercising that right in a manner that could cause harm to or terror in others. Thus, at minimum, the government could meet its burden in this case by analogizing the manner

affray, at common law, for a man to arm himself with dangerous and unusual weapons, in such manner as will naturally cause terror to the people.”); C. Humphreys, *A Compendium of the Common Law in Force in Kentucky* 482 (1822) (“Riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the people of the land which is punishable by forfeiture of the arms, and fine and imprisonment. But here it should be remembered, that in this country the constitution guaranties to all persons the right to bear arms; then it can only be a crime to exercise this right in such a manner, as to terrify the people unnecessarily.”); 1 W. Russell, *A Treatise on Crimes and Indictable Misdemeanors* 271 (1826) (“[I]t seems certain that in some cases there may be an affray where there is no actual violence; as where persons arm themselves with dangerous and unusual weapons in such a manner as will naturally cause a terror to the people; which is said to have been always an offence at common law and is strictly prohibited by several statutes.”); H. Stephen, *Summary of the Criminal Law* 48 (1840) (“Riding or going armed with dangerous or unusual weapons . . . is a misdemeanor punishable with forfeiture of the arms and imprisonment during the king’s pleasure”); E. Lewis, *An Abridgment of the Criminal Law of the United States* 64 (1847) (“[W]here persons openly arm themselves with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people. Which is said to have always been an offence at common law, an affray may be committed without actual violence.”); F. Wharton, *A Treatise on the Criminal Law of the United States* 726 (1852) (“[T]here may be an affray where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people which is said to have been always an offence at common law, and is strictly prohibited by the statute.”).

and reasoning that underscores Maryland's statute to historical prohibitions of dangerous and unusual weapons for reasons unrelated to their common use. But the dissent disagrees that such an analogy would satisfy the government's burden.

According to the dissent, in order to justify the challenged statute under the historical tradition of regulating dangerous and unusual weapons, the government must prove that semiautomatic rifles are not typically possessed by law-abiding citizens for lawful purposes. Dissenting Op. at 144. That test is too narrow in that it equates common use (which it seems to define based on the prevalence of the firearms in the public domain) with usualness and cabins the Second Amendment analysis to determining whether a weapon is in common use based on its utility for lawful and lawless purposes. I do not believe that the Court's precedents support such a limitation.

In fact, the Supreme Court has never said (or even implied) that weapons in common use are necessarily not dangerous and unusual, that "not in common use" and "dangerous and unusual" are synonymous, or that legislation that covers a weapon in common use is per se unconstitutional. The Court has, however, said that according the protections of the "right to keep and carry arms" only to those weapons "in common use at the time" is "fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Heller*, 554 U.S. at 627; *Bruen*, 597 U.S. at 21. That guidance indicates that those weapons not in common use may be banned under the tradition of prohibiting the carrying of dangerous and unusual weapons. But it does not shield weapons in common use from scrutiny concerning their dangerousness and unusualness. Thus, while a weapon not in common use is deemed dangerous and unusual, it does not follow that a weapon in

common use is not dangerous and unusual. Instead, “not in common use” is one criteria that may be used to ban a weapon under the “dangerous and unusual” umbrella.

So what else falls under the umbrella? Given that neither the Supreme Court’s precedents nor history clarify how we should interpret “dangerous and unusual” in connection with the Second Amendment, I look to the ordinary meaning of the words at the time the Second Amendment was ratified for guidance.

The 1773 edition of Samuel Johnson’s dictionary defined “dangerous” as “Hazardous; perilous; full of danger,” and defined “unusual” as “Not common; not frequent; rare.” Dangerous, 1 Dictionary of the English Language 106 (4th ed.) (reprinted 1978); Unusual, 1 Dictionary of the English Language 106 (4th ed.) (reprinted 1978). Notably, nothing in these definitions directs our attention to the legality of the object to which they refer, nor to the destruction in the wake of its usage. Rather, both individually and collectively, dangerous and unusual, are used to describe the object to which they refer, in its entirety and considering its characteristics. I see no reason why these words should not be interpreted in connection with the Second Amendment in a manner consistent with their ordinary meanings at the time the Amendment was ratified.

Moreover, it “would be a startling reading,” *see Heller*, 554 U.S. at 624, of those definitions to assume that they do not apply to the object in its entirety—including its characteristics, features, and functions. A firearm may therefore be dangerous for reasons other than its suitability for unlawful purposes, such as its firing capability; or unusual for reasons other than its rarity or numerosity as a whole, such as the object’s rare potency, potentiality, or other unique function. And a legislature may ban a weapon equipped with

functions that render it dangerous and unusual, irrespective of how many people own it. That is exactly what the Maryland legislature elected to do here.

Maryland’s statute bans AR-15s and other semiautomatic rifles with characteristics that make them excessively dangerous and highly unusual in society. We previously considered the lethality of these sorts of weapons in *Kolbe* where we noted that the weapons have “features designed to achieve their principal purpose—killing or disabling the enemy.” *Kolbe*, 849 F.3d at 125 (internal quotations omitted). There, we recognized that these weapons could shoot a large number of rounds at far distances at a high rate of speed, are often capable of accepting large-capacity magazines, and use rounds that can pierce body armor and most materials. *Id.* at 125, 127. We also determined that many of the features of these weapons increase their utility for lethality. *Id.* at 137. We said:

flash suppressors, barrel shrouds, folding and telescoping stocks, pistol grips, grenade launchers, night sights, and the ability to accept bayonets and large-capacity magazines serve specific, combat-functional ends . . . the net effect of [which] is a capability for lethality—more wounds, more serious, in more victims—far beyond that of other firearms in general, including other semiautomatic guns.

Id. We further noted that, despite only being a semiautomatic weapon (which requires repeated trigger engagement), the AR-15’s rate of fire enables it to empty a thirty-round magazine in as little as five seconds. *Id.* at 136.

The Seventh Circuit recently discussed the AR-15’s characteristics in assessing challenges to an Illinois statute that prohibits weapons like those at issue here. *Bevis*, 85 F.4th at 1175. According to that court, the AR-15 has a semiautomatic rate of 300 rounds per minute, an effective range (distance a bullet will travel with accuracy) of 602 to 875

yards, a muzzle velocity (speed a bullet travels when fired) of 2800 to 3100 feet per second and delivers the kinetic energy (energy transferred to the target on impact) of 1220 to 1350 foot-pounds. *Id.* at 1196. In layman's terms, the AR-15 can hit a target several hundred yards away in seconds and cause massive damage on impact. Additionally, given the weapon's features and the distance it can fire with accuracy, a shooter using this type of weapon may be undetectable. The ability of these weapons to cause grave damage, from a great distance, without detection make them dangerous and unusual in society at large. Maryland's ban is therefore consistent with the principles that underlie our nation's historical tradition of prohibiting dangerous and unusual weapons.

IV.

As courts continue to grapple with *Bruen*, unfortunately in the midst of successive tragedies, we will no doubt see the boundaries of the historical tradition of regulating dangerous and unusual weapons being defined. At this juncture, I would simply hold that Maryland's ban on certain semiautomatic rifles falls within the boundaries of our nation's historical tradition of regulating dangerous and unusual weapons, wherever those boundaries may ultimately lie. I therefore concur in the judgment.