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Legal Sidebar

Divided En Banc Federal Appeals Court Rejects Second Amendment Challenge to Maryland's Ban on "Assault Weapons"

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In 2017, the en banc U.S. Court of Appeals for the Fourth Circuit held that a Maryland ban on certain firearms defined as "assault weapons" was consistent with the Second Amendment. In 2022, the Supreme Court in *New York State Rifle & Pistol Association v. Bruen* announced a history-based test for assessing whether a firearm law complies with the Second Amendment. On August 6, 2024, in *Bianchi v. Brown*, the en banc Fourth Circuit applied *Bruen*'s methodology to reaffirm, by a 10-to-5 vote, that Maryland's assault weapon ban aligns with the Second Amendment. The court determined that (1) the Second Amendment's protections do not reach assault weapons because "they are military-style weapons designed for sustained combat operations that are ill-suited and disproportionate to the need for self-defense," and (2) the nation's historical tradition supports the regulation of exceptionally dangerous weapons.

This Sidebar addresses the Fourth Circuit's decision in *Bianchi*. It begins by outlining the Maryland law at issue. It then sketches the applicable Second Amendment doctrine, particularly the analytical framework set forth in *Bruen*. It next summarizes the majority, concurring, and dissenting opinions in *Bianchi*. It concludes by offering considerations for Congress.

Maryland's Assault Weapon Ban

Maryland enacted the Firearm Safety Act in 2013. As relevant here, the law generally prohibits any person in the state from selling, purchasing, receiving, transporting, transferring, or possessing an "assault weapon." Maryland defines an "assault weapon" as "(1) an assault long gun; (2) an assault pistol; or (3) a copycat weapon." AK-47s and certain AR-15s are among the firearms that qualify as assault weapons for purposes of the Maryland statute. Maryland's assault weapon ban was built on a now-expired federal counterpart and grounded in concerns about mass shootings.

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Second Amendment Jurisprudence

The Second Amendment provides, "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." In 2008, the Supreme Court in *District of Columbia v. Heller* held that the Second Amendment protects an individual right for "law-abiding, responsible citizens" to possess arms for a "lawful purpose," especially self-defense in the home. The Court indicated that the right is not unlimited, writing that "dangerous and unusual weapons" and those that are not "in common use" may be prohibited. Two years later, in *McDonald v. City of Chicago*, the Court recognized that the Second Amendment right is "fundamental," meaning that federal as well as state and local governments are bound by this constitutional provision.

In 2022, the Supreme Court in *Bruen* clarified that the Second Amendment right is not restricted to the home and instead extends to at least some public places where confrontation may occur and thus where self-defense may be needed. The Court instructed lower courts to view Second Amendment challenges through the dual lenses of text and history. The Court described the operative test as follows: "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, . . . the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."

In 2024, the Supreme Court in *United States v. Rahimi* emphasized that the scope of the Second Amendment is not limited to those laws that "precisely match its historical precursors" or that are "identical" to laws from 1791, as if the Second Amendment were "trapped in amber." The Court explained that under *Bruen* a reviewing court must assess whether a challenged law is "relevantly similar" to laws from the country's regulatory tradition, with the "central" consideration of this inquiry being "why and how" the challenged law burdens the Second Amendment right.

Fourth Circuit Ruling: *Bianchi v. Brown*

Background

In 2013, a group of plaintiffs filed suit in federal court, alleging that the Maryland assault weapon ban violated the Second Amendment. In assessing the constitutionality of the provision, the federal district court applied a standard known as intermediate scrutiny, requiring the law to be "reasonably adapted to a substantial government interest." The court determined that the ban was constitutional under this standard, as it reasonably advanced the government's substantial interest in ensuring public safety "by removing weapons that cause greater harm when used."

After a three-judge panel of the Fourth Circuit initially reversed the district court, the en banc Fourth Circuit upheld the ban in 2017. The full court pointed to language in *Heller*—that weapons "most useful in military service," such as M-16s, "may be banned"—to hold that the Maryland ban covers a class of weapons that lie outside of Second Amendment protection. The court added that, even if these weapons fell within the ambit of the Second Amendment, intermediate scrutiny would apply and the ban would pass muster under that standard. The Supreme Court denied the plaintiffs' request for review.

In 2020, a group of plaintiffs again challenged Maryland's ban as violative of the Second Amendment. In 2021, the district court ruled for Maryland, and the same year a panel of the Fourth Circuit affirmed. While the plaintiffs' petition for a writ of certiorari to the Supreme Court was pending, the Court in 2022 decided *Bruen*. The Supreme Court subsequently remanded the case to the Fourth Circuit to allow the court to consider the challenge in light of *Bruen*. The Fourth Circuit voted to hear the case en banc.

Majority Opinion

The majority opinion authored by Judge Wilkinson framed the question before the court as whether Maryland'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." The majority recognized that "[t]his was the question we earlier faced as an en banc court" in 2017, and analyzed whether the Supreme Court's subsequent *Bruen* decision "disturb[ed] our principal holding that the covered assault weapons were outside the ambit of the individual right to keep and bear arms."

With respect to the standard of review that would apply to the challenge to Maryland's ban, the majority acknowledged that *Bruen* had rejected the use of intermediate scrutiny in Second Amendment cases—which had been used by the Fourth Circuit and other courts in the aftermath of *Heller*—in favor of a history-based test. Applying that test, the majority largely adopted the reasoning of its 2017 decision, reaffirming that the weapons covered by Maryland's law are military-style weapons that are not within the scope of the Second Amendment. The majority referenced language in *Heller* that weapons most useful for military service and weapons that are "dangerous and unusual" may be prohibited. Here, the majority determined that the banned weapons are not protected by the Second Amendment because they are "excessively dangerous" military-grade firearms that can "inflict damage on a scale or in a manner disproportionate to" the Second Amendment's central focus of personal protection, making them "most suitable" in this respect to criminal, military, or offensive uses. AR-15s are properly among the prohibited weapons, the court said, because they are akin to the M-16 in terms of their shared military origins, combat-functional features, and lethality, characteristics that the court concluded are a "far cry from any notion of self-defense."

The majority went on to indicate that, even if the banned weapons fell within the Second Amendment, there is a "strong" historical tradition of restricting the use and possession of weapons exceptionally dangerous to civilians. The Court observed that legislatures in the 18th and 19th centuries regulated pistols, bowie knives, brass knuckles, and sand clubs, among other weapons, thus "ridding the public sphere of excessively dangerous and easily concealable weapons that were primarily to blame for an increase in violent deaths." The majority concluded that "[t]he Maryland statute at issue is yet another chapter in this chronicle."

Concurring and Dissenting Opinions

Six judges joined the majority opinion in full but wrote separately to highlight the "confusion" that lower courts are experiencing in applying *Bruen*. The judges characterized *Bruen* as a "labyrinth," admitting that "questions abound" about *Bruen* such that courts "are struggling at each stage of the *Bruen* inquiry." More broadly, the six judges cautioned that overemphasizing the importance of historical analogues may "fossilize" modern legislative attempts and "paralyze" democratic efforts. Another judge concurred in the judgment and wrote separately for himself. While he agreed with the majority that sufficient historical support existed for Maryland's ban, he contended that the majority was wrong to focus solely on whether the regulated firearms were in common use for self-defense and the dissent similarly was misguided in probing whether the relevant firearms were in common use for any lawful purpose.

Five judges in dissent would have held that Maryland's ban cannot stand under the Second Amendment. With respect to Second Amendment coverage of the arms at issue, the dissent charged that there was no basis for the majority to anchor the scope of protected arms to those that are best-suited for self-defense or to assess whether arms are "exceptionally dangerous," as opposed to those that are "dangerous *and* unusual." The dissent also disagreed that the nation's historical tradition of firearm regulation supported prohibiting the weapons at issue. The dissent canvassed British common law and early American practice

to assert that "dangerous and unusual" weapons do not include weapons that were commonly used for lawful purposes.

Considerations for Congress

A federal ban on certain "semiautomatic assault weapons," included as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (1994), expired in 2004. Some Members of Congress subsequently have introduced bills, including the "Assault Weapons Ban of 2023," that would prohibit the use or possession of certain semi-automatic weapons such as the AR-15. Judicial evaluations of similar state bans, like Maryland's, under the Second Amendment may provide an indication of how a federal ban could fare in the courts.

The parties challenging the Maryland ban filed a petition asking the Supreme Court to review the en banc Fourth Circuit's decision in *Bianchi*. It is possible that the *Bianchi* ruling or a future case involving a similar law could be reviewed by the Supreme Court. The disparate views among the Fourth Circuit judges and the description of post-*Bruen* confusion from one of the concurring opinions could point to broader judicial uncertainty that the Supreme Court ultimately may wish to resolve. A decision by the Supreme Court on the constitutionality of a law like Maryland's could further clarify the meaning of the Second Amendment and the extent to which lawmakers may regulate certain categories of firearms.

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