No. 19-423

In The
Supreme Court of the United States

BRIAN KIRK MALPASSO, *et al.*,

Petitioners,

v.

WILLIAM M. PALLOZZI, in his official capacity as Maryland Secretary of State Police,

Respondent.

On Petition For a Writ of Certiorari to The United States Court of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Maryland law does not ban the public carrying of handguns. Instead, it allows a lawful owner of a handgun to wear, carry, or transport the handgun without a permit in a public place in connection with a wide range of activities and with a permit where the applicant has a good and substantial reason, including to provide protection from apprehended danger. Historically, Maryland has granted the overwhelming majority of permit applications based on a claimed good and substantial reason.

The question presented is as follows:

> Is Maryland's permitting scheme consistent with the Second and Fourteenth Amendments?

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioners mischaracterize Maryland law by portraying it as if it provides for a "total ban" on the public carrying of a handgun by the typical handgun owner. It does nothing of the kind. Maryland allows a lawful owner of a handgun to wear, carry, or transport the handgun *without* a permit in a public place in connection with a wide range of activities, including hunting, trapping, target shooting, formal or informal target practice, sport-shooting events, firearms- and hunter-safety classes, and organized military activities. *With* a permit, it allows the wearing, carrying, or transporting of a handgun in public places by a lawful owner who has a good and substantial reason for doing so, including to provide protection from apprehended danger.

Although petitioners made no record in the district court, publicly available data shows that, historically, Maryland's Department of State Police has granted more than 90 percent of applications seeking a permit to publicly wear, carry, or transport a handgun for protection against apprehended danger. What petitioners really seek from this Court is a ruling that they have an *absolute* right to carry a handgun in public. But that result would be contrary to precedent, for this Court has held that "the right [secured by the Second Amendment] [is] not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose," *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008), and the Court has further observed

that "the majority of the 19th century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues," *id*.

Not only does petitioners' desired outcome run counter to this Court's precedent, the purported circuit split they identify is illusory. Maryland's law is unlike the laws struck down by the Seventh and District of Columbia Circuits because, unlike those laws, which effectively banned the public carrying of handguns by typical citizens, Maryland's law permits those who need to carry handguns for self-defense to obtain a permit allowing them to publicly wear, carry, and transport a handgun. On the other hand, the legal analyses undertaken by the Seventh and District of Columbia Circuits in those cases did not differ from the way the Fourth Circuit and other circuits have analyzed Second Amendment challenges. In analyzing Maryland's statutory and regulatory scheme, the Fourth Circuit applied the same standard used by other circuits to evaluate a state scheme regulating—rather than banning—public wearing, carrying, or transporting of handguns: an intermediate level of means-end scrutiny. *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir.), *cert. denied*, 571 U.S. 952 (2013).

STATEMENT

Maryland's Handgun Permit Law

Marylanders who are otherwise qualified to own a handgun may possess, wear, carry, and transport handguns[1] for any purpose in their homes, at their businesses, and on any property that they own, all without a special permit authorizing them to wear, carry, or transport a handgun. Md. Code Ann., Crim. Law § 4-203(b)(6) (LexisNexis Supp. 2019). Without a permit, Marylanders may carry handguns in public for a wide variety of activities, including hunting, trapping, target shooting, formal or informal target practice, sport-shooting events, certain firearms- and hunter-safety classes, and organized military activities. Md. Code Ann., Crim. Law §§ 4-203(b)(3) – (7) (LexisNexis Supp. 2019). Maryland law requires a permit to wear and carry a handgun in public places for purposes unconnected to these specified activities. Crim. Law § 4-203(a), (b)(2) (LexisNexis Supp. 2019). This special permit requirement applies only to handguns, not rifles, shotguns, or other "long guns." *Id.*

Adults who have not been convicted of disqualifying offenses are eligible to obtain a wear, carry permit if they meet certain requirements, including, as relevant here, a requirement that they have a "good and

[1] A "handgun" is a "pistol, revolver, or other firearm capable of being concealed on the person," Md. Code Ann., Crim. Law § 4-203(c)(1) (LexisNexis Supp. 2019), which includes "a short-barreled shotgun and a short-barreled rifle," *id.*, § 4-203(c)(2), but not an antique firearm or long-barreled rifle or shotgun, *id.* § 4-203(c)(3).

substantial reason to wear, carry, or transport a handgun, such as a finding that the permit is necessary as a reasonable precaution against apprehended danger." Md. Code Ann., Pub. Safety § 5-306(a) (LexisNexis 2018). The Maryland Department of State Police's Handgun Permit Unit, which processes permit applications, has identified four non-exclusive categories of "good and substantial reason" (1) for certain business activities; (2) for regulated occupations, such as security guards; (3) for "assumed-risk" professions, such as judges, prosecutors, public defenders, police officers, and correctional officers; and (4) for personal protection/self-defense against "apprehended danger." *Woollard*, 712 F.3d at 869-70.

In accordance with guidance provided by Maryland's appellate courts, the Department evaluates applications that identify "personal protection" as the applicant's good and substantial reason by applying an objective standard to assess whether there is "apprehended danger" to the applicant. This requires more than a "vague threat" or a "general fear of living in a dangerous society." *Id.* at 870. In determining whether the applicant faces danger, the Department applies an objective test that "takes the applicant's entire situation into account." *Id.* Among the non-exclusive factors considered in evaluating a real or presumed threat are (1) its recency or likelihood; (2) whether it can be verified; (3) whether it is particular to the applicant, as opposed to the average citizen; (4) if presumed, the basis for the presumption; and (5) the length of time since the initial threat occurred. *Id.* (citing *Scherr v.*

Handgun Permit Review Bd., 163 Md. App. 417, 437-38 (2005)).

For years 2007 through 2011, the Department approved 93.7 percent of the 23,189 original and renewal permit applications submitted. Maryland State Police, Annual Report (2012), at 49, *available at* https://mdsp.maryland.gov/Document%20Downloads/2012%20Annual%20Report%20FINAL.pdf (last visited Nov. 21, 2019). For years 2012 through 2014, the Department received 17,889 original and renewal permit applications and approved 93.6 percent. Maryland State Police, Annual Report (2014), at 78, https://mdsp.maryland.gov/Document%20Downloads/2014%20Annual%20Report.pdf (last visited Nov. 21, 2019).[2]

An applicant who is denied a permit may request an informal review by the Secretary of State Police or may immediately appeal the denial to the Handgun Permit Review Board, an independent board appointed by the Governor, Md. Code Ann., Pub. Safety §§ 5-301, 5-311, 5-312 (LexisNexis 2018 & Supp. 2019), which from 1993 to 2013 reversed approximately 38 percent of the denials appealed to it. *Woollard* Fourth Cir. J.A. 43. An applicant who loses an appeal before the Board may seek further administrative review and then judicial review in the State's courts. Md. Code Ann., Pub. Safety § 5-312(e) (LexisNexis Supp. 2019).

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[2] Plaintiffs have not alleged that there is any evidence that the grant rate has diminished since *Woollard.*

The 2013 Decision in *Woollard*

In *Woollard v. Gallagher*, the Fourth Circuit reversed the 2012 decision of the United States District Court for the District of Maryland, which struck down Maryland's statute as violative of the Second and Fourteenth Amendments. In reversing the district court, the Fourth Circuit upheld Maryland's permitting scheme as consistent with this Court's holdings in *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and the Fourth Circuit's own precedents applying those decisions. Rejecting the *Woollard* plaintiffs' Second Amendment challenge, the Fourth Circuit applied the two-pronged inquiry adopted by most courts after *Heller*: (1) does the challenged law impose a burden on conduct falling within the scope of the Second Amendment's guarantee; and, if so (2) does it satisfy the applicable level of means-end scrutiny.[3] *Woollard*, 712 F.3d at 874-78. Determining that the case could be

[3] *See, e.g.*, *Gould v. Morgan*, 907 F.3d 659, 673 (1st Cir. 2018), *petition for cert. filed* (U.S. Apr. 1, 2019) (No. 18-1272); *Bonidy v. United States Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 1486 (2016); *Jackson v. City of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2799 (2015); *Kachalsky v. County of Westchester*, 701 F.3d 81, 88-93 (2d Cir. 2012), *cert. denied*, 569 U.S. 918 (2013); *National Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012), *cert. denied*, 571 U.S. 1196 (2014); *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011) ("*Heller II*"); *Ezell v. City of Chicago*, 651 F.3d 684, 701-04 (7th Cir. 2011); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010), *cert. denied*, 563 U.S. 990 (2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010), *cert. denied*, 562 U.S. 1158 (2011).

resolved by addressing only the second question, the Fourth Circuit assumed, without deciding, that the good-and-substantial-reason requirement burdens conduct falling within the scope of the Second Amendment's protection. *Id.* at 874.

Consistent with *Heller*, the Fourth Circuit deemed Maryland's law to address conduct falling outside the core right that the Second Amendment "elevates above all other interests": the "'right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" *Id.* at 874 (quoting *Heller*, 554 U.S. at 634-35). Because Maryland's good-and-substantial-reason requirement operates only outside one's home—and, indeed, outside one's business and other property, and outside and apart from hunting, sport shooting, target shooting, organized military activities, and many other activities for which permits are not required—the Fourth Circuit applied intermediate scrutiny, as have other courts addressing protected conduct that falls outside the core Second Amendment right to defend hearth and home.[4] *Id.* Under this test, the State bears the burden of demonstrating that there is a "'reasonable fit' between the good-and-substantial-reason requirement

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[4] *See, e.g.*, *Kachalsky*, 701 F.3d at 96-97; *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), *cert. denied sub nom. Drake v. Jeregian*, 572 U.S. 1100 (2014); *Heller II*, 670 F.3d at 1257-58; *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011), *cert. denied*, 565 U.S. 1204 (2012); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011), *cert. denied*, 565 U.S. 1058 (2011); *Marzzarella*, 614 F.3d at 97; *Reese*, 627 F.3d at 802; *United States v. Skoien*, 614 F.3d 638, 641-42 (7th Cir. 2010) (*en banc*), *cert. denied*, 562 U.S. 1303 (2011).

and the government objectives of protecting public safety and preventing crime." *Id.* at 878.[5]

In applying this standard, the Fourth Circuit first noted the narrow scope of Maryland's permitting scheme, which exempts not only the wearing, carrying, and transporting of handguns within one's home and business but also in many public places and in connection with certain public activities. *Id.* at 879. With that scope in mind, the court examined the record evidence that the good-and-substantial-reason requirement protects citizens and inhibits crime in numerous ways, including by decreasing the availability of handguns to criminals via theft; lessening the risk that routine confrontations will turn deadly; and diminishing the opportunities for everyday police encounters with citizens to escalate into high-risk situations. *Id.* at 879-81. The court emphasized that the Maryland scheme accomplished these public safety aims while ensuring that individuals who need handguns for self-protection "can arm themselves in public places where Maryland's various permit exceptions do not apply." *Id.* at 880.

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[5] Maryland's public policy objectives appear in codified legislative findings about the increase in handgun violence, the inadequacy of existing laws to address that violence, and the conclusion that "additional regulations on the wearing, carrying, and transporting of handguns are necessary to preserve the peace and tranquility of the State and to protect the rights and liberties of the public." Md. Code Ann., Crim. Law § 4-202 (LexisNexis 2012).

After reviewing the evidentiary record, the Fourth Circuit concluded that the State had "demonstrated that the good-and-substantial-reason requirement advances the objectives of protecting public safety and preventing crime." *Id.* at 879. Thus, the court concluded that Maryland had carried its burden of demonstrating the required fit between the good-and-substantial-reason requirement and the State's objectives of protecting public safety and preventing crime. *Id.* at 881. The court distinguished the law before it from the "flat ban" on public carrying struck down by the Seventh Circuit in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), without identifying any disagreement with the Seventh Circuit's decision. *Woollard*, 712 F.3d at 881 n.10.

Factual and Procedural History

On April 12, 2018, the plaintiffs brought this action in the United States District Court for the District of Maryland against the Secretary of the Maryland Department of State Police. Their one-count complaint alleged a claim under 42 U.S.C. § 1983 based on violations of the Second and Fourteenth Amendments. *Malpasso* Fourth Cir. J.A. 6. According to his complaint, Mr. Malpasso applied for and was denied a permit on the basis that he did not have a "good and substantial reason" to wear, carry, or transport a handgun, *Malpasso* J.A. 12 ¶¶ 23, 24; the association plaintiff claimed at least one member who was denied a permit for the same reason, *id.* J.A. 13 ¶ 26.

Mischaracterizing Maryland's permitting scheme as amounting to a "flat ban" on wear, carry permits for "typical law abiding citizens," *id.* J.A. 14 ¶ 31, plaintiffs sought (1) a declaration that Maryland's good-and-substantial-reason requirement violates the Second and Fourteenth Amendments; (2) an injunction prohibiting the Department from denying wear, carry permits on the basis of that requirement; (3) an injunction prohibiting the Department from enforcing the laws establishing and defining that requirement; and (4) an order directing the Department to issue a wear, carry permit to Mr. Malpasso and members of the Maryland State Rifle and Pistol Association, Inc.

Because controlling Fourth Circuit precedent foreclosed plaintiffs' claims, the Department moved to dismiss the complaint for failure to state a claim, *id.* J.A. 4, and on October 15, 2018, the district court granted the motion to dismiss, *id.* J.A. 4, 37-39. Relying entirely on *Woollard*, the Fourth Circuit affirmed the judgment in an unpublished decision. Pet. App. 2a.

REASONS FOR DENYING REVIEW

I. Federal Appellate Courts Are Not Divided on Whether a State May Reasonably Regulate the Public Wearing, Carrying, and Transporting of Handguns.

A. The Courts of Appeals Have Struck Down Total Bans but Have Upheld Reasonable Regulatory Schemes Like That of Maryland.

Although petitioners claim a conflict between the decisions of Seventh and District of Columbia Circuits on the one hand, and the First, Second, Third, and Fourth Circuits on the other, the former decisions addressed effective total bans on public carrying while the latter decisions addressed permitting schemes for public carrying of concealed and concealable weapons, like handguns.

Unlike Maryland's scheme, which allows the public carrying of handguns, the schemes struck down by the Seventh Circuit in *Moore* and the District of Columbia Circuit in *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017), imposed absolute bans on the public carrying of handguns for self-protection.

In *Moore*, the Seventh Circuit struck down an Illinois ban on public carrying of all firearms, not just handguns; with a similar ban in Washington, D.C., the Illinois law shared the distinction of being the most restrictive such law in the country. 702 F.3d at 940. The Illinois law did not allow for the issuance of *any* permits for self-defense. In striking it down, the Seventh

Circuit did not indicate any disagreement with the Second Circuit's prior decision in *Kachalsky v. Westchester County*, which had upheld New York's open carry permitting scheme. New York's scheme required that an applicant demonstrate "proper cause" to obtain a permit to carry a concealed handgun in public. Indeed, the Seventh Circuit emphasized how much stricter the Illinois law was when compared to New York's permitting scheme (itself stricter than Maryland's). *Moore*, 702 F.3d at 940-41. The Seventh Circuit emphasized that Illinois was "the *only* state that maintains a flat ban on carrying ready-to-use guns outside the home" and that its decision was based not on "degrees of scrutiny, but on Illinois's failure to justify the most restrictive gun law of any of the 50 states." *Id.* at 940-41. *See also Young v. Hawaii*, 896 F.3d 1044, 1070 (9th Cir. 2018) (noting, in invalidating Hawaii permitting scheme for concealed carry licenses, that "no concealed carry license has ever been granted by the County"), *reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019).

Nor does the Fourth Circuit's decision conflict with the later decision of the District of Columbia Circuit in *Wrenn*, because there, too, the court of appeals addressed a highly restrictive permitting scheme that the court viewed as akin to a total ban on the issuance of wear, carry permits for handguns to be used for the purpose of self-defense. *Wrenn*, 864 F.3d at 664-65 (interpreting D.C. law to provide a "total ban on carrying . . . by ordinarily situated individuals covered by the Amendment").

Unlike the schemes at issue in *Moore* and *Wrenn*, under Maryland's scheme, most applicants who apply for a permit to carry a handgun for self-defense are granted permits that allow them to publicly wear, carry, or transport a handgun for self-protection. Because Maryland reasonably regulates, and does not ban, the public carrying of handguns, the decision of the Fourth Circuit in *Woollard* does not conflict in any meaningful way with either the decision of the Seventh Circuit in *Moore* or that of the District of Columbia Circuit in *Wrenn*.

B. In Evaluating Permitting Schemes Imposing Reasonable Restrictions on Public Carrying, the Courts of Appeals Have Applied Intermediate-Level Scrutiny.

In analyzing Maryland's statutory and regulatory scheme, the Fourth Circuit applied the same standard used by other circuits to evaluate a state scheme regulating—rather than banning—public wearing, carrying, or transporting of handguns: intermediate-level scrutiny. *Woollard*, 712 F.3d at 876; *see* cases above in footnote 3. Under that test, the State bears the burden of demonstrating that there is a "'reasonable fit' between the good-and-substantial-reason requirement and the government objectives of protecting public safety and preventing crime." *Id.* at 880 (quoting *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010)).

In *Moore*, the Seventh Circuit did not apply any standard of scrutiny because the court found that Illinois had failed to justify its law imposing an absolute ban on public carrying of handguns. 702 F.3d at 940-42. But the court implied that it would be prepared to apply a sliding-scale standard of scrutiny in Second Amendment cases pegged to the level of burden on Second Amendment rights imposed by the law at issue. *Id.* at 939-40. The court did not indicate any disagreement with the Second Circuit's decision in *Kachalsky* but emphasized how much stricter the Illinois law banning public carrying was than New York's permitting scheme. 702 F.3d at 940-41. The Seventh Circuit stressed that Illinois was "the *only* state that maintains a flat ban on carrying ready-to-use guns outside the home" and that its decision was based not on "degrees of scrutiny, but on Illinois's failure to justify the most restrictive gun law of any of the 50 states." *Id.*

Similarly, in *Woollard*, the Fourth Circuit noted with approval the Seventh Circuit's decision in *Moore* and observed that the striking of Illinois's "wholesale ban on the public carrying of firearms . . . underscored" the difference between Illinois's approach and the moderate approaches of permitting schemes like those in New York and Maryland. *Woollard*, 712 F.3d at 881 n.10.

Petitioners wrongly identify a conflict among these decisions. Just as there is no suggestion in the Seventh Circuit's discussion of *Kachalsky* that it would have reached a different outcome, there is no indication in the Fourth Circuit's discussion of *Moore* that the court

would have reached a different outcome in that case. And in *Heller II*, the District of Columbia Circuit used the two-step framework and intermediate-level scrutiny in upholding the District's laws regarding assault weapons and large-capacity magazines. 670 F.3d at 1252-55, 1260-64; *see Schrader v. Holder*, 704 F.3d 980, 988-91 (D.C. Cir. 2013) (applying intermediate scrutiny to law banning certain convicted offenders from possessing a firearm).

II. This Case Is a Poor Vehicle for Deciding the Scope of the Second Amendment Right to Bear Arms Outside the Home.

A. This Case Is a Poor Vehicle Because the Fourth Circuit Assumed That the Second Amendment Applies to Conduct Outside the Home.

Most of the petition is devoted to argument that the Second Amendment applies outside the home, based on text, history, and tradition. Pet. 13-25. But in *Woollard*, the Fourth Circuit did not hold to the contrary. Instead, the court assumed that Second Amendment rights were implicated by Maryland's statutory scheme and then proceeded to the second stage of the analysis, where it applied intermediate-level means-end scrutiny.

Thus, the question addressed by the Fourth Circuit in *Woollard*, as relevant to the Maryland permitting statute under review, was not whether the Second Amendment applies to conduct outside the home, or even whether it applies to the wearing, carrying, or

transporting of handguns outside the home for self-defense, but whether Second Amendment rights are unconstitutionally burdened by a statute (1) that applies only outside one's own property; only to handguns; and not in connection with enumerated activities such as hunting, target shooting, and sport shooting; (2) that allows wearing, carrying, or transporting of handguns in public for self-defense as long as the applicant can provide a showing that it is needed for that purpose; and (3) under which most applications for permits based on a need for self-protection are granted.

Because the Fourth Circuit assumed that the Second Amendment applies to conduct outside the home, and that the Maryland statute therefore implicated Second Amendment rights, this case provides a poor vehicle for examining and deciding whether the Second Amendment applies outside the home. In evaluating Maryland's law in *Woollard*, the Fourth Circuit assumed that it does and then applied the appropriate level of means-end scrutiny to uphold Maryland's reasonable regulatory scheme.

B. This Case Is a Poor Vehicle Because It Contains No Evidentiary Record.

The 2012 record in *Woollard* and publicly available information show that, as of 2014, *Maryland granted most applications*—more than 93% of those original and renewal permits submitted between 2007 and 2014. Petitioners here made no effort in the district court below to show either that the application grant

rate has declined since 2014 or that Maryland's scheme no longer serves the compelling interests of public safety and crime prevention established in *Woollard*.

III. The Decision Below Is Consistent with this Court's Decisions in *Heller* and *McDonald*.

There is no conflict between the decision of the Fourth Circuit and this Court's decisions in *Heller* and *McDonald*, both of which concerned laws that banned the possession of handguns, including in the home for the purpose of self-defense.

A. *Heller* Did Not Recognize a General, Absolute Right to Carry Arms in Public.

In both *Heller* and *McDonald*, this Court identified the home as a place where Second Amendment rights require especially strong protection. *Heller*, 554 U.S. at 628; *McDonald*, 561 U.S. at 767-68 (plurality op.). Yet, in both cases, this Court made clear that the Second Amendment permits reasonable regulation of firearms both inside and outside the home. *Heller*, 554 U.S. at 626-27; *McDonald*, 561 U.S. at 785 (plurality op.).

In *Heller*, the Court reviewed a District of Columbia law that imposed a "complete prohibition" on the possession of handguns in the home, "where the need for defense of self, family, and property is most acute." 554 U.S. at 629. After engaging in a lengthy textual and historical analysis of the Second Amendment, the Court concluded that (1) the right established by the

amendment was a pre-existing right, *id.* at 592; (2) this right is an individual right, not dependent on militia service, *id.*; and (3) "whatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home," *id.* at 635. Maryland law expressly protects this right by allowing individuals qualified to own a firearm to possess, carry, and transport handguns within, among other places, their homes. Md. Code Ann., Crim. Law § 4-203(b)(6) (LexisNexis Supp. 2019).

Although this Court declined to speculate about other conduct that might fall *within* the protection of the Second Amendment, *Heller*, 554 U.S. at 635, the Court observed that, notwithstanding the amendment's unconditional language, "the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. Indeed, the Court provided examples of types of laws that it presumed would fall outside the protection of the amendment.

First, the Court observed that a majority of nineteenth-century courts had upheld the constitutionality of complete prohibitions on the carry of concealed weapons. *See id.*; *see also Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897) ("[T]he right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed arms.").

Second, the Court identified as "presumptively lawful regulatory measures": (i) longstanding bans on "the

possession of firearms by felons and the mentally ill"; (ii) bans on "the carrying of firearms in sensitive places such as schools and government buildings"; and (iii) "laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626-27 & n.26.

Third, the Court recognized that the right was limited to weapons "in common use at the time." *Id.* at 627.

The Court's list, which contained only "examples" of presumptively lawful regulations, did "not purport to be exhaustive." *Id.* at 627 n.26. Two years later, in *McDonald*, the Court promised that " 'state and local experimentation with reasonable firearms regulation will continue under the Second Amendment.' " 561 U.S. at 785 (quoting Brief of State of Texas, *et al.* as *Amici Curiae* at 23).

B. The Public Carrying of Firearms Has Long Been Subject to Regulation.

1. The Public Carrying of Firearms Was Subject to Regulation from at Least the Fourteenth Century Through the Founding of the Republic.

Maryland's law has deep historical roots. It resembles laws regulating or prohibiting the carrying of concealed and concealable weapons in both the United States and England. *See Heller*, 554 U.S. at 626-27, 635 (recognizing "longstanding" regulations on public possession and carrying of handguns as constitutional under the Second Amendment); *id.* at 626 (noting that "the majority of the 19th century courts to consider the

question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues"); *Drake*, 724 F.3d at 432-34 (describing New Jersey's requirement that applicants demonstrate a "justifiable need" to publicly carry a handgun for self-defense "as a 'presumptively lawful,' 'longstanding' regulation"); *Kachalsky*, 701 F.3d at 84 ("New York's efforts in regulating the possession and use of firearms predate the Constitution."); *id.* at 91 ("New York's [proper cause] restriction on firearm possession in public has a number of close and longstanding cousins."); *Heller II*, 670 F.3d at 1253-54 (describing handgun registration laws as "longstanding" and "presumptively lawful").

The long history of significant restrictions on the public carrying of firearms in the interest of public safety, including limits and bans on easily concealable firearms, demonstrates that the pre-existing *right* was not generally understood to extend to the public carrying of easily concealable firearms. Restrictions on the public carrying of arms in England date back to at least 1328 and the Statute of Northampton, which provided that, except while on the king's business, no man was permitted to "go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere, upon pain to forfeit their Armour to the King, and their Bodies to Prison at the King's pleasure." 2 Edw. 3, 258 ch. 3 (1328) (Eng.); *see also* 3 Edward Coke, *Institutes of the Laws of England* 160 (E. & R. Brooke 1797).

The Statute of Northampton remained in place through the time of the Framers. 4 William Blackstone, *Commentaries on the Laws of England* 148-49 (Clarendon Press 1769). Edward Coke's treatise recognized the ongoing validity of the statute and discussed the case of Sir Thomas Figett, who "went armed under his garments, as well in the palace," and was convicted and imprisoned for violating the Statute of Northampton, notwithstanding his defense that he had gone armed for "[s]afeguard of his life." 3 Coke, *Institutes* at 161-62.

Versions of the Statute of Northampton were also incorporated into the laws of Massachusetts, North Carolina, and Virginia. *See* 1 *Blackstone's Commentaries* 146 n.5, 149 n.14 (St. George Tucker ed. 1803) (referencing Virginia's adoption of the statute at 1794 Va. Laws ch. 21); Patrick Charles, *Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1, 32 n.166 (2012).

American colonies and, subsequently, states also adopted other laws restricting the public carrying of weapons, especially concealable weapons. For example, in 1686, New Jersey passed a law providing that "no person . . . shall presume privately to wear any pocket pistol, skeines, stilladers, daggers or dirks, or other unusual or unlawful weapons within this Province," and that no planter other than a government officer, soldier, or foreign traveler passing peacefully through "shall ride or go armed with sword, pistol, or dagger." An Act against wearing Swords, &c., *reprinted in The Grants, Concessions & Original Constitutions of the*

Province of New Jersey 289-90 (Aaron Leaming & Jacob Spicer eds., Lawbook Exch. 2002). A 1794 Massachusetts law required any person who went "armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property," to find sureties for keeping the peace upon complaint by any person having reasonable cause to fear an injury or breach of the peace. 1794 Mass. Laws ch. 134, § 16. Similar statutes were enacted in Maine, the District of Columbia, Wisconsin, Pennsylvania, Minnesota, and Michigan.[6]

2. The Public Carrying of Firearms Continued to Be Regulated After the Second Amendment Was Ratified and Through Adoption of the Fourteenth Amendment.

The early nineteenth century saw a proliferation of easily concealable weapons, including handguns that had become both more common, more dangerous, and more of a threat to public safety. *See* Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* 138-41 (2006).

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[6] Revised Statutes of the State of Maine 709 (Hallowell: Glazier, Masters & Smith 1847) (citing 1821 Me. Laws ch. 76, § 1); Revised Code of the District of Columbia, 1857, 570 (A.O.P. Nicholson 1857); Revised Statutes of the State of Wisconsin 985 (W.B. Keen, Chicago 1858); Digest of the Laws of Pennsylvania, 376 (Kay & Brother 1873); General Statutes of the State of Minnesota 930 (West 1881); 2 General Statutes of the State of Michigan 2282 (Callaghan & Co. 1883).

Beginning in 1813, state legislatures reacted, initially with laws generally banning the concealed carrying of such weapons. *Id.* at 141.[7] As public safety concerns increased, states enacted statutes generally banning the concealed and open carrying of such weapons.

For example, in 1882,[8] West Virginia made it a misdemeanor to carry, either openly or concealed, "any revolver or other pistol, dirk, bowie-knife, razor, slung shot, billy, metalic or other false knuckles, or any other dangerous or deadly weapon of like kind or character." 1882 W. Va. Laws ch. 135. Notably, the statute excepted "keeping or carrying" such weapons in one's home and also provided an affirmative defense to prosecution upon a showing that the individual was quiet, peaceable, of good character and standing, *and* that at the time he was carrying "he had good cause to believe, and did believe, that he was in danger of death or great bodily harm at the hands of another person." *Id.* West Virginia's highest court, upholding the constitutionality of that state's statute, held that having been threatened with violence was not enough to invoke the "good

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[7] *See, e.g.*, 1813 Ky. Laws 100, 100, Act of Feb. 3, 1813 ch. 59, § 1; 1813 La. Laws 172, Act of Mar. 25, 1813; 1820 Ind. Laws 39, Act of Jan. 14, 1820 ch. 23; 1837 Ark. Laws 280; 1838 Va. Laws 76, Act of Feb. 2, 1838 ch. 101; 1839 Ala. Laws 67, Act of Feb. 1, 1839 no. 77.

[8] *See McDonald*¸ 561 U.S. at 776-77 (plurality op.) (relying on evidence and cases from the years surrounding ratification of the Fourteenth Amendment to aid in interpreting the nature of the Second Amendment right); *Heller*, 554 U.S. at 629 (relying on cases from this period as bearing on the scope of the Second Amendment).

cause" exception. *State v. Workman*, 14 S.E. 9, 12 (W. Va. 1891).

Similarly, in 1871, Texas made it a misdemeanor for any person to carry certain concealable weapons, including "any pistol." Tex. Act of Apr. 12, 1871 ch. 34, § 1. The Texas law also had exceptions for carrying weapons in one's home or business and provided an affirmative defense based on a showing that the defendant had "reasonable grounds for fearing an unlawful attack on his person" that was "immediate and pressing." *Id.*; *see State v. Duke*, 42 Tex. 455, 456 (1874) (quoting text of statute). In rejecting a constitutional challenge, the Supreme Court of Texas held that the statute "undertakes to regulate the place where, and the circumstances under which, a pistol may be carried; and in doing so, it appears to have respected the right to carry a pistol openly when needed for self-defense or in the public service, and the right to have one at the home or place of business." *Id.* at 459. The same statute was upheld in *English v. State*, 35 Tex. 473 (1871), a case cited in *Heller* as supporting the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" 554 U.S. at 627.

Other nineteenth-century courts also upheld the constitutionality of complete bans on the concealed and open carrying of easily concealable weapons. For example, in *Andrews v. State*, also cited in *Heller*, 554 U.S. at 629, the Supreme Court of Tennessee upheld a complete ban on the carrying of a "belt or pocket pistol." 50 Tenn. 165, 171, 186-87 (1871). The court invalidated a similar ban on the carrying of revolvers, not

because a restriction on public carrying would be impermissible but because the ban applied to an individual's carrying of a weapon "about his own home, or on his own premises," or traveling to a repair shop, or shooting a rabid dog in the street. *Id.* at 187; *see also Fife v. State*, 31 Ark. 455, 461 (1876) (upholding constitutionality of a law criminalizing "carrying a pistol as a weapon"); *but see Nunn v. State*, 1 Ga. 243, 251 (1846) (upholding ban on concealed, but not open, carrying); *State v. Reid*, 1 Ala. 612, 616-17, 619 (1840) (upholding ban on concealed carrying where statute permitted open carrying and suggesting ban on open carrying would be unconstitutional).

Many states with nineteenth-century concealed-carry bans similarly recognized exceptions for an objectively reasonable need for personal protection. *See, e.g.*, *McGuirk v. State*, 64 Miss. 209, 212 (1886) (upholding conviction for concealed carrying of a pistol where defendant could not demonstrate he was "threatened in such manner as to afford good and sufficient reason to apprehend an attack"); *Chatteaux v. State*, 52 Ala. 388, 390-91 (1875) (affirming conviction for carrying a concealed pistol even though earlier the same day, in a different location, the individual had "good reason to apprehend an attack"). Likewise, Maryland's 1894 ban on the concealed carrying of certain easily concealable weapons provided an exception for weapons carried as a "reasonable precaution against apprehended danger." 1894 Md. Laws ch. 547. That same language is included in the challenged statute as an example of a good and substantial reason.

With the rise of regulatory schemes, states began adopting statutes requiring individuals to obtain permits to carry easily concealable firearms in public. Regulatory regimes that authorized permits to be issued to wear and carry handguns, and that required a demonstration of "good cause," date back nearly a century. *See Drake*, 724 F.3d at 432-34 (describing New Jersey's requirement that applicants demonstrate a "justifiable need" to publicly carry a handgun for self-defense "as a 'presumptively lawful,' 'longstanding' regulation"), *aff'g Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 830 (D.N.J. 2012) (tracing adoption of need requirement in New Jersey law back to at least 1924 and "proper cause" requirement in New York law back to at least 1919).

C. The Maryland Statute Satisfies the Applicable Level of Scrutiny.

Maryland's permitting scheme for public carrying of handguns differs from the laws at issue in *Heller* and *McDonald* in at least five important respects. Maryland's permit law (1) does not regulate the possession, wearing, carrying, or transporting of any firearms within an individual's home, business, or other property; (2) does not regulate the possession, wearing, carrying, or transporting in public of any firearms other than easily concealable firearms; (3) does not apply to the possession, wearing, carrying, or transporting of handguns in many public places, including in connection with hunting, trapping, a target shoot, formal or informal target practice, a sport shooting event,

certain firearms and hunter safety classes, or an organized military activity, Crim. Law § 4-203(b)(4) (LexisNexis Supp. 2019); (4) allows individuals to obtain a permit to wear, carry, and transport handguns in other public spaces with a good and substantial reason, including for personal protection; and (5) as explained above, is akin to longstanding laws regulating or prohibiting the carrying of concealed and concealable weapons.

Although petitioners argue, in effect, that *no* standard of scrutiny should apply to regulations that impose *any* burden on Second Amendment rights because, in their view, all such regulations are per se unconstitutional, Pet. 25, that argument is not supported by *Heller* and *McDonald*, where this Court made clear that the Second Amendment does not protect "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 554 U.S. at 626; 561 U.S. at 786.

In those cases, this Court identified a non-exhaustive list of "presumptively lawful" regulatory measures that included absolute bans on possession of all firearms by certain classes of individuals and in certain places, as well as the concealed carrying of all firearms. 554 U.S. at 626; 561 U.S. at 786. Thus, *Heller* and *McDonald* signaled that states may impose reasonable regulations on possessing and publicly carrying handguns. Although *Heller* rejected the use of rational basis scrutiny to evaluate those types of regulations, as well as the interest-balancing approach suggested by the dissent in that case, the Court did not foreclose

applying heightened levels of scrutiny to laws challenged as burdening the Second Amendment right to bear arms. 554 U.S. at 628 n.27, 634-35.

Since *Heller*, most courts of appeals to have considered Second Amendment challenges have concluded that the appropriate level of scrutiny will depend on whether the regulation being analyzed burdens the core right or an aspect of the right outside the core. *See generally* cases cited above in footnote 2. These courts have been guided in identifying the core Second Amendment right by *Heller's* description of the right the Second Amendment "elevates above all other interests": "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." 554 U.S. at 635. Thus, where the burden falls outside that core right, courts have applied intermediate-level scrutiny, as the Fourth Circuit did in *Woollard*.

In that case, the Fourth Circuit appropriately identified the burden as the government's, considered the evidence submitted, concluded that the State's interest in public safety and reducing violence was compelling, and found that the State had carried its burden of proving the required fit between the law and its compelling state interests. *Woollard*, 712 F.3d at 879-81. The court made that decision based on a full record, which it found "clearly demonstrated" that Maryland's good-and-substantial-reason requirement advanced the State's compelling objectives of "protecting public safety and preventing crime." *Id.* at 879.

Compelling interests of public safety and prevention of crime have long led states to regulate the public

carrying of concealed and easily concealable weapons, like handguns. Here, petitioners provided the lower courts with no factual record or legal basis for overturning the Fourth Circuit's 2013 conclusion in *Woollard*, which assumed that the regulated conduct falls within the scope of the Second Amendment and then concluded that Maryland law satisfies the appropriate level of means-end scrutiny for laws regulating the carrying of concealable weapons outside the home. That is, Maryland's scheme is based on compelling interests of public safety and crime prevention, does not ban public carrying of handguns, and grants most applications for permits based on a need for self-protection.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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