No. _____

In the
Supreme Court of the United States

BRIAN KIRK MALPASSO and MARYLAND STATE RIFLE AND PISTOL ASSOCIATION, INC.,

Petitioners,

v.

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

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Maryland prohibits its typical, law-abiding citizens from carrying a firearm outside the home without a permit, and provides permits only to those who can demonstrate, among other requirements, a "good and substantial reason" for carrying a firearm. In *District of Columbia v. Heller*, this Court held that the Second Amendment protects "the individual right to possess and carry weapons in case of confrontation," 554 U.S. 570, 592 (2008), and in *McDonald v. City of Chicago*, the Court held that this right "is fully applicable to the States," 561 U.S. 742, 750 (2010). Since then, numerous courts of appeals have confronted, and have squarely divided on, the question of whether the Second Amendment allows the government to deprive typical, law-abiding citizens of all means of carrying a handgun for self-defense. This circuit split is open and acknowledged, and it is squarely presented by this case, in which the Fourth Circuit affirmed the constitutionality of a Maryland regime that prohibits law-abiding individuals from carrying a handgun unless they can demonstrate some particularized "good and substantial reason" that distinguishes them from the body of "the people" protected by the Second Amendment. The time has come for this Court to resolve this critical constitutional question and to restore to citizens of Maryland and the handful of other states that prohibit the carrying of handguns the fundamental rights that the Second Amendment guarantees the people.

The question presented is:

Whether the Second Amendment allows the government to prohibit typical, law-abiding citizens

from carrying handguns outside the home for self-defense in any manner.

PARTIES TO THE PROCEEDINGS

Petitioners are Brian Malpasso and Maryland State Rifle and Pistol Association, Inc. They were plaintiffs in the district court and plaintiffs-appellants in the court of appeals.

Respondent is William M. Pallozzi, sued in his official capacity as Secretary of the Maryland State Police. He was the defendant in the district court and defendant-appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners state as follows:

Petitioner Maryland State Rifle and Pistol Association, Inc. has no parent corporation and no publicly held company owns 10 percent or more of its stock. Petitioner Malpasso is an individual.

RELATED CASES

Malpasso v. Pallozzi, No. 1:18-cv-01064-ELH, U.S. District Court for the District of Maryland. Judgment entered October 16, 2018.

Malpasso v. Pallozzi, No. 18-2377, United States Court of Appeals for the Fourth Circuit. Judgment entered April 29, 2019.

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Perhaps the single most important unresolved Second Amendment question after this Court's landmark decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), is whether the Second Amendment secures an individual right to bear arms for self-defense outside the home. The text, history, and tradition of the amendment and this Court's decisions interpreting it compel the conclusion that it does. As this Court held in *Heller*, the "right of the people to keep and bear Arms" enshrines and protects at its core "the individual right to possess and carry weapons in case of confrontation." 554 U.S. at 592. That holding is plainly inconsistent with a law that flatly prohibits typical, law-abiding citizens from carrying a handgun for self-defense outside the home unless they can demonstrate that they have a particularized "good and substantial reason" that distinguishes them from the body of "the people" protected by the Second Amendment.

Despite the wealth of authority demonstrating that the Second Amendment guarantees a right not just to keep arms, but also to bear them outside the home for self-defense, several courts of appeals continue to resist that conclusion, leaving the law in a state of chaos and the fundamental right to carry a firearm dependent on where one lives. The D.C. Circuit has seen these "good cause" regimes for what they are—"necessarily a total ban on most D.C. residents' right to carry a gun"—and joined the Seventh Circuit in concluding that the government may not prohibit typical, law-abiding citizens from

carrying handguns for self-defense. *See Wrenn v. District of Columbia*, 864 F.3d 650, 666 (D.C. Cir. 2017); *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012). But the Fourth Circuit has upheld Maryland's materially identical regime, on the oxymoronic reasoning that even assuming the Second Amendment protects a right to carry a firearm outside the home, it does not prohibit a state from refusing to allow typical, law-abiding citizens—in other words, the very "people" that the Second Amendment protects—from exercising that right. *See Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013).

Unfortunately, the Fourth Circuit is not alone in that view. The First, Second, and Third Circuits have also upheld permitting regimes under which law-abiding citizens have no right to carry firearms for self-defense outside the home, unless they make a showing that they have an especially good cause to exercise a right guaranteed to all "the people." *See Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018), *petition for cert. filed* (U.S. Apr. 1, 2019) (No. 18-1272); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013). These decisions stand in clear conflict with the D.C. Circuit's *Wrenn* decision and the Seventh Circuit's *Moore* decision. The circuits are thus in open and acknowledged division on whether laws that deny typical, law-abiding citizens any ability to carry a handgun for self-defense violate the Second Amendment. This Court should grant certiorari, resolve this untenable circuit split, and restore to all "the people" protected by the Second Amendment the right to keep *and* bear arms.

OPINIONS BELOW

The court of appeals' order affirming the district court's dismissal of the case is not reported in the Federal Reporter but is available at 767 F. App'x 525 and reproduced at App.1a. The district court's opinion is not reported in the Federal Supplement but is reproduced at App.4a.

JURISDICTION

The court of appeals issued its judgment on April 29, 2019. On July 15, 2019, the Chief Justice extended the time for filing a petition to and including September 26, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Second and Fourteenth Amendments to the United States Constitution and relevant portions of the Maryland Code and Maryland Regulations are reproduced at App.7a-30a.

STATEMENT OF THE CASE

A. Factual Background

Maryland forbids its citizens to "wear, carry, or transport a handgun" outside the home, "whether concealed or open," without a permit to do so. Md. Code Ann., Crim. Law § 4-203(a)(1)(i), (b)(2), (c); *see also* Md. Code Ann., Pub. Safety § 5-303.

When evaluating an application for a permit to carry a handgun, Maryland considers several criteria. In addition to satisfying a number of objective criteria that are not challenged here (including minimum age, clean background check, and a safety training course),

the applicant must demonstrate a "good and 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).

Maryland has issued regulations making clear that the general desire to carry a handgun for self-defense does not suffice to make this showing. Instead, an applicant seeking a permit to carry a handgun for "[p]ersonal [p]rotection" must identify something that differentiates him or herself from typical, law-abiding citizens, such as "documented evidence of recent threats, robberies, and/or assaults, supported by official police reports or notarized statements from witnesses." App.48a (Licensing Division Application Instructions). Maryland courts likewise have made clear that an applicant must supply evidence of a concrete risk that sets him apart from "an average person" who would like to carry a firearm because he "lives in a dangerous society." *Scherr v. Handgun Permit Review Bd.*, 880 A.2d 1137, 1148 (Md. Ct. Spec. App. 2005); *see also, e.g.*, *Snowden v. Handgun Permit Review Bd.*, 413 A.2d 295, 298 (Md. Ct. Spec. App. 1980) (living in a high-crime neighborhood or being subject to "vague threat[s]" is not "good and substantial reason"). In short, only by demonstrating that he is *not* the typical, law-abiding citizen who wishes to carry a handgun for self-defense may an individual satisfy Maryland's "good and substantial reason" test. As a practical matter, then, most Maryland citizens are forbidden to carry handguns.

Petitioner Malpasso applied for a permit to carry a handgun on January 7, 2018, and his application was denied on March 23, 2018. App.39a. Malpasso met all of Maryland's objective criteria for a carry permit. App.39a. But because he did not provide evidence of any concrete, present threat to his safety that differentiates himself from other typical, law-abiding citizens, he was deemed to lack a "good and substantial reason" to carry a handgun outside his home. App.39a.

Petitioner Maryland State Rifle and Pistol Association is a group organized to defend the right of Maryland residents to keep and bear arms, with thousands of members who reside in Maryland. Many of its members would carry handguns if permitted to do so, but are prohibited from doing so because they cannot satisfy Maryland's "good and substantial reason" test. App.39a

B. Procedural History

Petitioners brought suit to challenge the constitutionality under the Second Amendment of Maryland's ban on carrying handguns outside the home without a special showing of a good and substantial reason. App.40a-41a. Both the district court and the Fourth Circuit held that petitioners' claim was foreclosed by the Fourth Circuit's earlier decision in *Woollard v. Gallagher*, 712 F.3d 865, 879 (4th Cir. 2013). App. 3a, 6a.

Like this case, *Woollard* involved a Second Amendment challenge to Maryland's "good and substantial reason" requirement. The plaintiff in that case had initially been granted a permit to carry a handgun after showing that his son-in-law presented

a threat to his personal safety and the personal safety of his family. *Woollard*, 712 F.3d at 871. But seven years later, Maryland refused to renew his carry permit on the ground that he no longer satisfied the "good and substantial reason" test. *Id.* Concluding that Maryland's statute impinged on the "core" right protected by the Second Amendment as described in *Heller*, the district court held Maryland's "good and substantial reason" regime unconstitutional. As the court explained, the regime is, at bottom, nothing more than "a rationing system." *Woollard v. Sheridan*, 863 F. Supp. 2d 462, 474-75 (D. Md. 2012). "It aims, as [the state] concede[d], simply to reduce the total number of firearms carried outside of the home by limiting the privilege to those who can demonstrate 'good reason' beyond a general desire for self-defense." *Id.* at 474-75. That, the court concluded, the state cannot do.

The court of appeals reversed. *Woollard*, 712 F.3d at 874-75. The court "refrain[ed] from any assessment of whether Maryland's good-and-substantial-reason requirement for obtaining a handgun permit implicates Second Amendment protections," and instead assumed for the sake of argument that some "limited" right to carry a firearm outside the home exists, and that Maryland's "good reason" restriction infringes upon it. *Id.* at 876. The court of appeals also assumed that "laws that burden [any] right to keep and bear arms outside of the home" warrant only intermediate scrutiny. *Id.* (quoting *United States v. Masciandaro*, 638 F.3d 458, 467 (4th Cir. 2011) (holding that a national park firearm ban survives intermediate scrutiny)). The court of appeals then upheld Maryland's "good and substantial reason"

restriction under intermediate scrutiny, reasoning that "[t]he State has clearly demonstrated that the good-and-substantial-reason requirement advances the objectives of protecting public safety and preventing crime because it reduces the number of handguns carried in public." *Id.* at 879.

REASONS FOR GRANTING THE PETITION

As this Court made clear in *Heller*, and again in *McDonald*, the Second Amendment, at its core, guarantees a right to keep and bear a firearm for self-defense. That right, no less than the threats that might precipitate a need to act in self-defense, necessarily extends beyond the four walls of one's home. That conclusion is compelled by the text and structure of the Second Amendment, by the history of the right it protects, and by any fair reading of *Heller*.

Consistent with that understanding, the vast majority of states protect the right of their citizens to carry handguns outside the home for self-defense. But a small minority persist in denying that right to typical, law-abiding citizens, instead reserving it to only a small subset of individuals who can demonstrate that they have a particularized *need* to exercise the right that the Second Amendment guarantees to all "the people." The lower courts are in open and acknowledged disagreement over the constitutionality of these so-called "good cause" requirements, with the First, Second, Third, and Fourth Circuits having blessed them, but the D.C. and Seventh Circuits having held unconstitutional laws that preclude typical, law-abiding citizens from carrying handguns for self-defense. And the division goes even deeper than that, as many of the decisions

have been divided. In short, millions of law-abiding Americans are presently being denied what most states and many jurists recognize is a fundamental constitutional right. This Court should grant certiorari, resolve this untenable circuit split, and restore to *all* "the people" protected by the Second Amendment the right to keep *and* bear arms.

I. This Court Should Resolve The Open And Acknowledged Circuit Split On Whether The Second Amendment Protects A Right To Carry A Handgun Outside The Home.

The text, the well-documented history of the right to bear arms in England and America, and this Court's decisions in *Heller* and *McDonald* make clear that the Second Amendment protects not only the right to keep arms inside the home, but also the right to bear them outside the home. *See* Part II, *infra*. Nevertheless, lower courts remain deeply divided over whether laws that prohibit typical, law-abiding citizens from carrying handguns outside the home can be reconciled with the individual and fundamental right to keep and bear arms. That circuit split is open and acknowledged, and it readily warrants this Court's review.

1. In the roughly ten years since this Court's decision in *Heller*, two courts of appeals—the Seventh Circuit and the D.C. Circuit—have correctly concluded that the Second Amendment protects the right of citizens to carry firearms outside the home. *See Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012); *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017). Two panels of the Ninth Circuit have reached the same conclusion, only to have each decision vacated by

an en banc panel. *See Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1167 (9th Cir. 2014), *vacated, rev'd on reh'g en banc*, 824 F.3d 919, 942 (9th Cir. 2016); *Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018), *vacated, reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019).[1] In each of these cases, as here, the challenged regulation severely restricted citizens from being armed outside the home.

The laws at issue in *Wrenn*, *Young*, and *Peruta* in particular were materially indistinguishable from Maryland's "good and substantial reason" regime. In *Wrenn*, the D.C. Circuit considered the District of Columbia's law prohibiting law-abiding citizens from carrying a handgun outside the home unless they showed "a special need for self-defense." 864 F.3d at 67. In *Young*, the Ninth Circuit considered the state of Hawaii's restriction of handgun carry permits to those who could show "reason to fear injury to the applicant's person or property." 896 F.3d at 1048. And in *Peruta*, the Ninth Circuit considered California's requirement that a law-abiding citizen show "good cause" to obtain a carry permit. 742 F.3d at 1148. Each of these laws, like Maryland's, conditioned a carry permit on a special showing of cause.

These decisions, along with *Moore*, share two important things in common. *First*, they took seriously the admonitions of *Heller* and *McDonald* that the Second Amendment's guarantee is, at its core,

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[1] The *Young* case has been stayed by the en banc court pending this Court's resolution of *New York State Rifle & Pistol Association v. City of New York*, No. 18-280 (U.S.). *See* Feb. 14, 2019 Order, *Young v. Hawaii*, No. 12-17808 (ECF No. 209).

a right to self-defense. *See Heller*, 554 U.S. at 630; *McDonald*, 561 U.S. at 749-50. Any proper application of *Heller* and *McDonald* must flow from this central assumption. Consequently, these courts concluded that the Second Amendment applies outside the home because the need for self-defense inevitably arises there. *See Moore*, 702 F.3d at 942 ("[A] right to carry firearms in public may promote self-defense."); *Young*, 896 F.3d at 1074 ("[T]he Second Amendment does protect a right to carry a firearm in public for self-defense."); *Wrenn*, 864 F.3d at 667 ("At the Second Amendment's core lies the right of responsible citizens to carry firearms for personal self-defense beyond the home.").

Second, these decisions gave substantial weight to the history of the right to bear arms—precisely as *Heller* instructed. *See* 554 U.S. at 605. Both *Wrenn* and the *Young* panel decision dedicated considerable discussion to the origin of the right and provided thorough analyses of the relevant legal treatises and nineteenth century case law. *See Wrenn*, 864 F.3d at 658-61; *Young*, 896 F.3d at 1053-68. And *Moore* rejected Illinois's request "to repudiate [the Supreme] Court's historical analysis," which, the court explained, implied "that the constitutional right of armed self-defense is broader than the right to have a gun in one's home." 702 F.3d at 935; *see also id.* at 936-37 (evaluating the historical right to bear arms in medieval and early-modern England).

2. In stark contrast to these decisions, the First, Second, Third, and Fourth Circuits have all either refused to recognize the Second Amendment's applicability outside the home or declined to give it

any meaningful force. *See Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013).

In *Gould*, the First Circuit considered a Massachusetts law that requires a law-abiding citizen to "demonstrate a 'proper purpose' for carrying a firearm" to receive a license to carry. 907 F.3d at 663. In *Kachalsky*, the Second Circuit considered a similar New York law requiring a showing of "proper cause" to obtain a permit to carry a handgun. 701 F.3d at 86. In *Drake*, the Third Circuit considered a New Jersey law requiring a handgun permit applicant to show "a justifiable need to carry a handgun." 724 F.3d at 428 (quotation marks omitted). And in *Woollard,* the Fourth Circuit confronted the same Maryland law at issue here, conditioning eligibility for a handgun permit on showing a "good and substantial reason" to carry. 712 F.3d at 868. While *Moore*, *Wrenn*, and *Young* embraced *Heller*, these decisions defied it, relying on an exceedingly begrudging reading of this Court's opinion to uphold regimes that deny to typical, law-abiding citizens the right to bear arms outside the home.

First, each of these decisions misconstrued the foundation of the Second Amendment. The court in *Gould*, for example, claimed that "the core right protected by the Second Amendment is—as *Heller* described it—'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" *Gould*, 907 F.3d at 672 (quoting *Heller*, 554 U.S. at 635). While *Heller* did, of course, hold that a citizen

had the right to keep a firearm in the home, the Court made clear that "the core lawful purpose" of the right is self-defense—regardless of where such need arises. *Heller*, 554 U.S. at 630. *Kachalsky, Drake*, and *Woollard* make the same mistake. *See Kachalsky*, 701 F.3d at 94 ("*Heller* explains that the 'core' protection of the Second Amendment is the 'right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" (quoting *Heller*, 554 U.S. at 634-35)); *Drake*, 724 F.3d at 431 ("[W]e decline to definitively declare that the individual right to bear arms for the purpose of self-defense extends beyond the home, the 'core' of the right as identified by *Heller*."); *Woollard*, 712 F.3d at 874 ("*Heller*, however, was principally concerned with the 'core protection' of the Second Amendment: 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" (quoting *Heller*, 554 U.S. at 634-35)).

Second, the First, Second, Third, and Fourth Circuits declined to undertake any meaningful analysis of the history surrounding the right to bear arms. Indeed, the Third Circuit in *Drake* openly declared that it was "not inclined to address [text, history, tradition and precedent] by engaging in a round of full-blown historical analysis," and instead just summarily declared that "[h]istory and tradition do not speak with one voice." 724 F.3d at 431 (quoting *Kachalsky*, 701 F.3d at 91). The Second Circuit likewise would not deign to engage in the historical analysis that *Heller* requires, instead declaring (contrary to *Heller* itself) that the "history and tradition" of "the meaning of the Amendment" is "highly ambiguous." *Kachalsky*, 701 F.3d at 91. And the Fourth Circuit in *Woollard* did not even

acknowledge that a historical inquiry was part of *Heller*'s analysis; instead, the court held that Maryland's carry regime withstood scrutiny without so much as considering the scope of the right. *See* 712 F.3d at 874-76. While the First Circuit at least admitted that history matters, it summarily dismissed the very same nineteenth century cases on which *Heller* itself relied, *see infra* Part II.C, as reflecting merely "practices in one region of the country." *Gould*, 907 F.3d at 670.

3. As these decisions reflect, lower courts are deeply and intractably divided on the question of whether the Second Amendment protects a right to bear arms outside the home for self-defense. While multiple courts have concluded that the answer is yes, and that laws that deny that right to typical, law-abiding citizens are therefore unconstitutional under any mode of scrutiny, several circuits have persisted in the view that the government may deny the very people protected by the Second Amendment any means of carrying a handgun for self-defense. This circuit split is clear, it is acknowledged, and it is not going away. Only this Court can resolve this critical constitutional question.

II. Maryland's "Good And Substantial Reason" Regime Plainly Violates The Second Amendment.

This Court's review is all the more critical because most of lower courts that have considered the question presented have gotten it wrong, with the consequence that millions of Americans are being denied a textually guaranteed right. Text, history, and tradition readily confirm that the Second Amendment

protects a right to carry a firearm outside the home for self-defense. That right belongs, moreover, to all "the people" protected by the Second Amendment, not just to some subset of the people that the state deems sufficiently in need of the protections the amendment affords. Regimes like Maryland's "good and substantial reason" regime are therefore unconstitutional no matter what mode of scrutiny applies, for the government may not ration to a select few what the Constitution guarantees to all.

A. The Text, Structure, and Purpose of the Second Amendment Confirm That the Right to Bear Arms Extends Beyond the Home.

The Second Amendment provides that "[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. Critically, this Court already has held that the text protects two separate rights: the right to "keep" arms and the right to "bear" them. *See Heller*, 554 U.S. at 591 ("keep and bear arms" is not a "term of art" with a "unitary meaning"). Under *Heller*'s construction, to "keep arms" means to "have weapons." *Id.* at 582. To "bear arms" means to "carry" weapons for "confrontation"—*e.g.*, to "wear, bear, or carry" firearms "upon the person or in the clothing or in a pocket, for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another person." *Id.* at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

The term "bear" is most naturally read to encompass the carrying of a weapon beyond the walls of one's residence, as "[t]he prospect of confrontation is … not limited to one's dwelling." *Young v. Hawaii,* 896 F.3d 1044, 1052 (9th Cir. 2018), *vacated, reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019); *see Moore*, 702 F.3d at 937 ("[A] Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower."). To say otherwise—to confine the right to the home—cannot be reconciled with the Second Amendment's "central component": individual self-defense. *Id*. at 1069; *see also, e.g., Wrenn*, 864 F.3d at 657 ("After all, the Amendment's 'core lawful purpose' is self-defense, and the need for that might arise beyond as well as within the home.") (citation omitted); *Moore*, 702 F.3d at 941 ("[T]he interest in self-protection is as great outside as inside the home."); *accord Heller*, 554 U.S. at 679 (Stevens, J., dissenting) ("[T]he need to defend oneself may suddenly arise in a host of locations outside the home."). Indeed, "[t]o speak of 'bearing' arms within one's home would at all times have been an awkward usage." *Moore*, 702 F.3d at 936; *see Grace v. District of Columbia*, 187 F. Supp. 3d 124, 135 (D.D.C. 2016) ("[R]eading the Second Amendment right to 'bear' arms as applying only in the home is forced or awkward at best, and more likely is counter-textual."), vacated on other grounds, *Wrenn*, 864 F.3d at 663-64. It is far "more natural to view the Amendment's core as including a law-abiding citizen's right to carry common firearms for self-defense beyond the home." *Wrenn*, 864 F.3d at 657.

Confining the right to "bear arms" to the home not only would be nonsensical, but would render the right largely duplicative of the separately protected right to "keep" arms. That would contradict the basic principle that no "clause in the constitution is intended to be without effect." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174, 2 L. Ed. 60 (1803). "The addition of a separate right to 'bear' arms, beyond keeping them, should therefore protect something more than mere carrying incidental to keeping arms." *Young*, 896 F.3d at 1052-53, citing Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America 271 (1880) ("[T]o bear arms implies something more than the mere keeping."). And "[u]nderstanding 'bear' to protect at least some level of carrying in anticipation of conflict outside of the home provides the necessary gap between 'keep' and 'bear' to avoid rendering the latter guarantee as mere surplusage." *Young*, 896 F.3d at 1053. In short, the most natural reading of the right to bear arms encompasses carrying a firearm outside the home. Tellingly, not a single court of appeals to date has embraced a different interpretation of "bear."

The amendment's structure reinforces the conclusion that the Second Amendment protects a right to carry a firearm outside the home. As this Court explained, the Second Amendment's prefatory clause—"[a] well regulated Militia, being necessary to the security of a free State"—performs a "clarifying function" with respect to the meaning of the operative clause. *Heller*, 554 U.S. at 577-78. Here, the prefatory clause's reference to "the Militia" clarifies that the operative clause's protection of the right to "bear Arms" encompasses a right that extends beyond the

home. Militia service, of course, necessarily includes bearing arms outside the home. The Revolutionary War was not won with muskets left at home; nor were the Minutemen notorious for their need to return home before being ready for action. And all the members of this Court in *Heller* agreed that the right to bear arms was codified at least in part to ensure the viability of the militia. *See id.* at 599; *id.* at 637 (Stevens, J., dissenting). The Court thus unanimously agreed that one critical aspect of the right to bear arms extends beyond the home.

B. The History of the Second Amendment Confirms That the Right to Bear Arms Extends Beyond the Home.

The "historical background" of the Second Amendment "strongly confirm[s]" that the right to bear arms extends beyond the home. *Heller*, 554 U.S. at 592. The Second Amendment traces its roots back to England, where Blackstone described "the right of having and using arms for self-preservation and defence," 1 William Blackstone, *Commentaries* 136, 140 (1765), as "one of the fundamental rights of Englishmen." *Heller*, 554 U.S. at 594. The "fundamental" right to use arms for "self-preservation and defence" necessarily included the right to carry firearms outside the home because, as discussed, the need for self-defense necessarily arose outside the home. Indeed, English authorities made clear that "the killing of a Wrong-doer … may be justified … where a Man kills one who assaults him *in the Highway* to rob or murder him." 1 William Hawkins, *A Treatise of the Pleas of the Crown* 71 (1762)

(emphasis added); *see also* 1 Matthew Hale, *Historia Placitorum Coronae* 481 (Sollom Emlyn ed. 1736) ("If a thief assaults a true man *either abroad or in his house* to rob or kill him, the true man … may kill the assailant, and it is not felony." (emphasis added)).

The need to carry for self-defense beyond the home was even greater in early America, which was largely frontier country with myriad dangers. *Moore*, 702 F.3d at 936. As St. George Tucker explained in his American version of Blackstone's Commentaries, "[i]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than a European fine gentleman without his sword by his side." 5 St. George Tucker, *Blackstone's Commentaries*, app, n.B (1803).

Tucker's observation regarding the ubiquity of arms borne outside the home is confirmed by accounts from prominent figures of the time. Many of the Founding Fathers, including George Washington, Thomas Jefferson, and John Adams carried firearms in public and spoke in favor of the right to do so—a clear indication that the right to bear arms was not limited to the home. *See Grace*, 187 F. Supp. 3d. at 137. And in many parts of early America, the public carrying of arms was not only permitted, but *mandated*. *See* Nicholas J. Johnson, et. al., *Firearms Law and the Second Amendment* 106 (2012) ("[A]bout half the colonies had laws requiring arms-carrying in certain circumstances."). "[I]t is unquestionable that the public carrying of firearms was widespread during the Colonial and Founding Eras." *Grace*, 187 F. Supp.3d. at 136. The right to armed self-defense was

considered by men of the era to be the "true palladium of liberty," 1 Tucker, *Blackstone's Commentaries*, app, n.D, and "was by the time of the founding understood to be an individual right protecting against both *public* and private violence," *Heller*, 554 U.S. at 594 (emphasis added).

Early American judicial authorities confirm that the Second Amendment was understood to include the right to bear arms outside the home in some manner. The decision of the Kentucky Court of Appeals in *Bliss v. Commonwealth*, 12 Ky. 90 (1822), is particularly instructive given its proximity to the founding. *See* Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L.Rev. 1343, 1360 (2009). In fact, both Thomas Jefferson and John Adams were still alive when it issued. The court in that case struck down a statute banning generally the concealed carrying of weapons, holding that the act violated Kentucky's analog to the Second Amendment. *See Bliss*, 12 Ky. at 93. In so doing, the *Bliss* court assumed that Kentucky's constitution codified a preexisting right which "had then no limits short of the moral power of the citizens to exercise it, and it in fact consisted in nothing else but in *the liberty of the citizens to bear arms*." *Id.* at 92 (emphasis added).

Eleven years later, in *Simpson v. State*, 13 Tenn. 356, 361 (1833), Tennessee's highest court held that the State's constitution prevented a citizen from being indicted simply for being armed in public; instead, the State had to prove that a defendant had committed acts of physical violence to sustain a charge against him. *See id.* at 361-62. As the court explained, Tennessee's constitution guaranteed "an express

power ... secured to all the free citizens of the state to keep and bear arms for their defence, without any qualification whatever as to their kind or nature." *Id.* at 360.

The Supreme Court of Alabama in *State v. Reid*, 1 Ala. 612 (1840), upheld the conviction of a man prosecuted under a statute forbidding the concealed carrying of firearms. In contrast to the approach taken in *Bliss*, the court determined that the Alabama constitution permitted the legislature "to enact laws in regard to the manner in which arms shall be borne ... as may be dictated by the safety of the people and the advancement of public morals." *Id.* at 616. Even so, however, the court made clear that the legislature's power to regulate the manner in which firearms may be carried did not include the power to ban carrying a firearm entirely: "A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional." *Id.* at 616-17.

The Georgia Supreme Court expressed the same sentiment in *Nunn v. State*, 1 Ga. 243 (1846), when it reversed the conviction of a man under a statute making it a misdemeanor to carry a pistol openly or concealed. The court explained that the statute, as applied to the concealed carrying of firearms, was "valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and

void." *Id.* at 251. This Court considered *Nunn* particularly helpful in *Heller*, noting that it "perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause." 554 U.S. at 612.

Finally, in *State v. Chandler*, 5 La. Ann. 489 (1850), the Louisiana Supreme Court echoed the reasoning of the Georgia and Alabama high courts. The court refused to invalidate a concealed carry prohibition because it "interfered with no man's right to carry arms ... 'in full open view,' which places men upon an equality. This is the right guaranteed by the Constitution of the United States." *Id.* at 490.

As these cases make clear, nineteenth century jurists decided case after case on the premise that the right to bear arms, as codified in the Second Amendment and numerous state analogs, guaranteed a right to carry a weapon outside the home for self-defense. *See* Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 Am. U. L. Rev. 585, 590 (2012). Every one of those cases could have been dispatched quickly and many of them would have been decided the other way if the Second Amendment right did not extend beyond the home. *Heller* relied on these cases as persuasive in surveying the contours of the Second Amendment to determine whether the Constitution guarantees a right to possess firearms in the home. *See Heller*, 554 U.S. at 585 n.9, 610-14, 629, 688. These authorities are even more compelling evidence that the right to carry—the specific topic with which they dealt—was not confined to the home.

To be sure, there are decisions from the nineteenth century that rejected an individual right to carry arms outside the home. *See, e.g.*, *State v. Buzzard*, 4 Ark. 18 (1842). The few cases that reached such a conclusion, however, either have been "sapped of authority by *Heller*" because they "assumed that the [Second] Amendment was only about militias and not personal self-defense," *Wrenn*, 864 F.3d at 658, or, in one instance, concerned the interpretation of a state Second Amendment analog that expressly allowed for the broad regulation of the carrying of firearms, *see State v. Duke*, 42 Tex. 455, 458 (1874). The overwhelming weight of historical authority thus compels the conclusion that the fundamental right to bear arms was understood to guarantee a right to carry firearms outside of the home. Under *Heller*, "history matters, and here it favors the plaintiffs." *Wrenn*, 864 F.3d at 658.

C. The Reasoning of *Heller* Strongly Supports the Conclusion That the Second Amendment Protects a Right to Carry Outside the Home.

In upholding Maryland's oppressive carry regime, the Fourth Circuit distorted the holding of *Heller*. While the specific issue before this Court in *Heller* concerned the possession of a firearm in the home, the reasoning of *Heller* was in no way so limited. As this Court explained, "the inherent right of self-defense has been central to the Second Amendment right." *Heller*, 554 U.S. at 628; *see also id.* at 599 ("[S]elf-defense ... was the *central component* of the right."); *McDonald*, 561 U.S. at 749-50 ("the Second Amendment protects the right to keep and bear arms

for the purpose of self-defense"). *Heller* thus began with the proposition that the Second Amendment protects a right to self-defense; the Court then applied that understanding of the right to the specific regulation at issue—a general prohibition on possessing handguns in the home. *See Heller*, 554 U.S. at 575.

That law proved unconstitutional, the Court explained, because it made "it impossible for citizens to use them for the core lawful purpose of self-defense." *Id.* at 630. But while the Court observed that "the need for defense of self, family, and property is *most* acute" in the home, *id.* at 628 (emphasis added), that hardly compels the conclusion that "it is not acute outside the home," *Moore*, 702 F.3d at 935. Indeed, nothing in *Heller* suggests that its logic terminates at the threshold. To the contrary, if *Heller* is to be taken at its word that the Second Amendment protects a right to self-defense, then the right to bear arms is necessarily implicated by regulations that restrict the ability of one to carry a weapon outside the home, as the need for self-defense frequently arises outside the home.

Moreover, several portions of *Heller* make sense only on the understanding that the right is not home-bound. For instance, the Court noted that "nothing in our opinion should be taken to cast doubt on ... laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Heller*, 554 U.S. at 626. That caveat makes sense only if the Second Amendment applies outside the home. The Court also likened D.C.'s handgun ban to the "severe restriction[s]" on the carrying of firearms that had

been struck down in *Nunn* and *Andrews*. *See id.* at 629. Describing those as among the most extreme restrictions on Second Amendment rights would make no sense if the amendment did not extend outside the home at all.

This Court's decision in *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016), likewise makes sense only on the assumption that there is a right to bear arms outside the home. In a *per curiam* opinion, the Court reversed a decision of the Massachusetts Supreme Judicial Court upholding the conviction of a woman found in possession outside the home of a stun gun she was carrying to defend herself from an abusive boyfriend. *Id.* at 1027-28; id. at 1028 (Alito, J., concurring). The Supreme Judicial Court failed to faithfully follow *Heller*, this Court explained, when it insisted that the Second Amendment protected only weapons that were in common usage at the time of its ratification and were in use by the military. *See id.* at 1027-28. But if the Second Amendment had no application outside the home, the defense asserted in *Caetano*—that the Second Amendment protects the carrying of stun guns—would have been frivolous.

In sum, this Court's opinions explicating the meaning of the right to keep and bear arms are unequivocal: The Second Amendment, at its core, guaranties a right to self-defense. *See, e.g.*, *McDonald*, 561 U.S. at 749-50. "[I]nterpreting the Second Amendment to extend outside the home is merely a commonsense application of the legal principle established in *Heller* and reiterated in *McDonald* ...." *Drake*, 724 F.3d at 446 (Hardiman, J., dissenting). Any construction of the Second Amendment that

denies a right to carry a firearm outside the home is inconsistent with this Court's jurisprudence.

* * *

Because the Second Amendment protects a right to bear arms outside the home for self-defense, regimes like Maryland's "good and substantial reason" regime are categorically unconstitutional. Such laws flatly deny to typical, law-abiding citizens like Petitioner Malpasso a right that the Second Amendment protects. Indeed, by requiring a permit applicant to submit evidence differentiating him or herself from the body of "the people" guaranteed a right by the Second Amendment, the Maryland regime is antithetical to the constitutional right. Just as with D.C.'s handgun ban in *Heller*, then, these regimes fail under any mode of constitutional scrutiny. Simply put, the government may not ration what the Constitution guarantees to all.

III. The Question Presented Is Exceptionally Important.

There is no Second Amendment question more pressing than whether the fundamental right that the amendment guarantees is confined to the home. While the vast majority of states have correctly concluded that it is not, and strongly protect the right of their citizens to carry firearms, a minority of jurisdictions stubbornly refuse to follow suit. Yet that minority includes some of the nation's most populous cities and states located in federal circuits that have neglected the teaching of *Heller* and *McDonald*, thus depriving tens of millions of citizens of a right guaranteed by the Constitution. That situation is untenable. The exercise of a fundamental right

expressly guaranteed by the Constitution to all "the people" cannot be made to turn on where someone lives, any more than it can be made to turn on how "good and substantial" a reason someone has for wanting to exercise it.

Making matters worse, the refusal of some lower courts to meaningfully engage in the textual and historical analysis that *Heller* requires is not confined to cases involving the right to bear arms outside the home. Time and again, courts have effectively replaced *Heller*'s textually and historically grounded analysis with a loose form of "interest-balancing" in which the state always wins. *See, e.g.*, *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. New Jersey*, 910 F.3d 106 (3d Cir. 2018); *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017); *N.Y. State Rifle and Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015); *Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185 (5th Cir. 2012); *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011).

While this application of heightened-scrutiny-in-name-only to the Second Amendment is common, that does not make it correct. Only this Court has the power to restore rigor to Second Amendment analysis, and the need is as great now as it was in *Heller*. The Court should grant certiorari to resolve this persistent circuit split and to restore to all of "the people"

protected by the Second Amendment the fundamental and individual right that it guarantees.[2]

CONCLUSION

For the foregoing reasons, the Court should grant certiorari.

Respectfully submitted,

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[2] This same question is presented in the pending petition in *Rogers v. Grewal*, No. 18-824. Should the Court grant the petition in Rogers, it should hold this petition pending resolution of *Rogers* on the merits.