No. 19-423

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

BRIEF OF AMICUS CURIAE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITIONERS

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November 18, 2019

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INTEREST OF THE AMICUS

Founded in 1871, the National Rifle Association of America, Inc. ("NRA") is the Nation's oldest civil-rights organization and foremost defender of Second Amendment rights.[1] Since its founding, the NRA's membership has grown to include more than five million law-abiding, responsible citizens; its education, training, and safety programs have reached millions more. The NRA is the country's leading provider of firearm marksmanship and safety training for civilians and law-enforcement officers, and its self-defense seminars have aided more than 120,000 would-be victims of crime. The NRA has a compelling interest in this case because its outcome will affect the fundamental, enumerated rights of NRA members to carry (i.e., bear) a handgun, the quintessential self-defense weapon, outside their homes for self-defense.

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[1] Amicus provided notice and obtained consent from the parties to file this amicus curiae brief more than 10 days before its filing. No party or its counsel authored this brief in whole or in part. No party, counsel, or any other person except the NRA and its counsel contributed to the cost of preparing or submitting this brief.

SUMMARY OF THE ARGUMENT

This Court should grant review to resolve the open and acknowledged conflict in the lower courts over whether the Second Amendment allows the government to prohibit law-abiding, responsible citizens from carrying handguns for self-defense outside the home. This case presents an ideal vehicle for resolving that conflict, as the petition for a writ of certiorari sets forth. It also provides an excellent opportunity for this Court to resolve a related circuit conflict over how to analyze these laws. While the Seventh and D.C. Circuits have faithfully analyzed the text, history, and tradition of the Second Amendment when deciding whether laws prohibiting law-abiding, responsible citizens from carrying handguns for self-defense outside the home are constitutional, the First, Second, Third, and Fourth Circuits have not.

This doctrinal split is important because it has proven outcome determinative. The Seventh and D.C. Circuits struck down these laws by concluding that they are inconsistent with the text, history, and tradition of the Second Amendment as well as this Court's precedent. The First, Second, Third, and Fourth Circuits, meanwhile, ignored and downplayed the Second Amendment's text, history, and tradition to uphold these laws under a weak form of intermediate scrutiny. Americans who justly rely upon the Bill of Rights deserve better than this unjust, ad hoc wandering by the lower courts.

This Court should grant the petition to confirm that the text, history, and tradition analysis applies to all Second Amendment challenges and that this

analysis compels the conclusion that law-abiding, responsible citizens have a right to carry a handgun for self-defense outside the home. That is the only way to curtail the lower courts' continued misapplication of this Court's Second Amendment precedent.

ARGUMENT

I. This Court was clear: laws infringing on the fundamental right to keep and bear arms must be assessed under the Second Amendment's text, history, and tradition.

This Court has provided a clear standard for analyzing Second Amendment challenges: laws that are not sufficiently rooted in the text, history, and tradition of the Second Amendment are unconstitutional because they are inconsistent with the right of law-abiding, responsible citizens to keep and bear arms for lawful purposes, such as self-defense. This Court established this standard a decade ago in *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008). Two years later, in *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 767–68 (2010), this Court memorialized this standard as the only proper framework for evaluating the constitutionality of firearm restrictions. And in *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1027–28 (2016), this Court reiterated that this standard may not be disregarded by the lower courts.

This Court has also rejected interest balancing as a method to resolve Second Amendment challenges. In *Heller*, this Court stated that "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not

future legislatures or (yes) even future judges think that scope too broad." 554 U.S. at 634–35. Indeed, "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id*. at 634 (emphasis in original). Because the Second Amendment "is the very *product* of an interest balancing by the people" at the time of its enactment, it "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id*. at 635 (emphasis in original). *McDonald* likewise "rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing." 561 U.S. at 785 (citing *Heller*, 554 U.S. at 633–35); *see also Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."). *Caetano* demonstrated that interest balancing has no place in a proper Second Amendment analysis by foregoing it entirely. 136 S. Ct. at 1027–1028.

II. Despite this clarity, a circuit split exists over how to analyze laws that prohibit law-abiding, responsible citizens from carrying arms for self-defense outside the home.

In addition to the circuit split over whether the Second Amendment permits the government to prohibit law-abiding, responsible citizens from

carrying handguns for self-defense outside the home, there is a related circuit split over the proper approach a court should take when analyzing that question. The Seventh and D.C. Circuits correctly held that the Second Amendment forbids the government from prohibiting law-abiding, responsible citizens from carrying arms for self-defense 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 reached the same conclusion, but en banc panels vacated both decisions. *See Peruta v. Cty. of San Diego*, 742 F.3d 1144 (9th Cir. 2014), *vacated, rev'd on reh'g en banc*, 824 F.3d 919 (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). The First, Second, Third, and Fourth Circuits, meanwhile, have held differently. *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).

The split among the circuits is not limited to their holdings; the circuits are doctrinally split over how to analyze laws that infringe the Second Amendment. The Seventh and D.C. Circuits' holdings, as well as the *Peruta* and *Young* panel decisions, faithfully followed this Court's instruction: they assessed laws prohibiting law-abiding, responsible citizens from carrying arms for self-defense outside the home under the Second Amendment's text,

history, and tradition.[2] *See Moore*, 702 F.3d at 942; *Wrenn*, 864 F.3d at 667–68; *Young*, 896 F.3d at 1048; *Peruta*, 742 F.3d at 1148. The D.C. Circuit in *Wrenn* and the *Young* panel dedicated considerable discussion to the origin of the right to keep and bear arms, citing relevant legal treatises and nineteenth-century case law before concluding that the Second Amendment protects the right to carry arms outside the home. *See Wrenn*, 864 F.3d at 658–61; *Young*, 896 F.3d at 1053-68. And in *Moore*, the Seventh Circuit extensively reviewed the text, history, and tradition of the right to keep and bear arms before concluding 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 935–37. *Moore* also rejected Illinois's request "to repudiate [the Supreme] Court's historical analysis." *Id*.

After assessing the Second Amendment's text, history, and tradition, the Seventh and D.C. Circuits and the *Peruta* and *Young* panels ruled that the right to carry arms outside the home lies at the core of the Second Amendment's protections. Each held that laws infringing on the exercise of this right are unconstitutional because they are inconsistent with the Second Amendment's text, history, and tradition. These analyses and conclusions reflect the clarity that this Court provided for the Second Amendment more than a decade ago.

The First, Second, Third, and Fourth Circuits' holdings reflect the opposite. Contrary to this Court's

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[2] The laws at issue in the D.C. Circuit and *Young* panel were materially indistinguishable from Maryland's "good and substantial reason" regime at issue in this case.

instruction, these circuits opted to follow their own, contradictory approach toward the rights guaranteed by the Second Amendment. *Gould*, 907 F.3d at 670; *Kachalsky*, 701 F.3d at 89; *Drake*, 724 F.3d at 431; *Woollard*, 712 F.3d at 874–76. To achieve their desired end, these circuits ignored and downplayed the Second Amendment's text, history, and tradition in their assessments of laws that prohibit carrying arms outside the home. *Id*. According to these circuits, unless the individual can demonstrate a reason for doing so beyond a general desire for self-defense ("good reason" restrictions), the right to *bear* arms does not exist. In lieu of a meaningful analysis, each court simply declared that some lesser form of the Second Amendment right applies to bearing arms than to keeping them. *Id*.

For instance, the Second and Third Circuits in *Kochalsky* and *Drake* declared that they were "not inclined to address [text, history, tradition and precedent] by engaging in a round of full-blown historical analysis," and casually dismissed that required approach because "'history and tradition do not speak with one voice.'" *Drake*, 724 F.3d at 431 (quoting *Kachalsky*, 701 F.3d at 91). Similarly, the Fourth Circuit in *Woollard* "refrain[ed] from any assessment of whether Maryland's 'good reason' requirement for obtaining a handgun permit implicates Second Amendment protections." 712 F.3d at 876. And while the First Circuit in *Gould* offered a brief nod to the importance of history, it perfunctorily dismissed the historical citations on which *Heller* relied as the "practices in one region of the country." 907 F.3d at 669.

As if *Heller* and *McDonald* had not rejected interest balancing as a method to resolve Second Amendment challenges, the First, Second, Third, and Fourth Circuits used an interest balancing test that they called intermediate scrutiny to assess "good reason" restrictions. *Gould*, 907 F.3d at 670; *Kachalsky*, 701 F.3d at 96; *Drake*, 724 F.3d at 431; *Woollard*, 712 F.3d at 874–76. The Second Circuit did nothing more than echo New York's circular conclusion that carrying handguns must be inherently dangerous to rule that "a reasonable method for combating these dangers [i]s to limit handgun possession in public to those showing proper cause." *Kachalsky*, 701 F.3d at 97. Likewise, the Fourth Circuit held that Maryland's "good reason" restriction only needed to survive intermediate scrutiny "because it reduces the number of handguns carried in public." *Woollard*, 712 F.3d at 879. In each instance, the court ignored this Court's precedent to drive the analysis into their desired conclusion.

The First and Third Circuits upheld "good reason" restrictions in like fashion. *See Gould*, 907 F.3d at 675 (citing *Woollard*, 712 F.3d at 879–80); *Drake*, 724 F.3d at 439. These analyses were particularly egregious because any law that reduces the exercise of a right to achieve its purposes is "patently unconstitutional." *See, e.g.*, *Saenz v. Roe*, 526 U.S. 489, 499 n. 11 (1999) ("If a law has no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it is patently unconstitutional.") (internal quotations omitted); *Murdock v. Com. of Pa.*, 319 U.S. 105, 110–11 (1943) (the state may not enact a law for the purpose of reducing the exercise of a constitutional

right); *see also Grace v. District of Columbia*, 187 F. Supp. 3d 124, 148 (D.D.C. 2016), *aff'd sub nom. Wrenn v. District of Columbia*, 864 F.3d 650.

Based on their refusal to assess the Second Amendment's text, history, and tradition and their use of an interest balancing test, each court wrongly upheld laws prohibiting law-abiding, responsible citizens from carrying arms outside the home. *Gould*, 907 F.3d at 674; *Kachalsky*, 701 F.3d at 99; *Drake*, 724 F.3d at 439–40; *Woollard*, 712 F.3d at 882. Each court's incorrect holding followed its refusal to apply the correct standard articulated by this Court more than a decade ago.

III. Fractured holdings will persist among the circuits until this Court reaffirms that laws prohibiting law-abiding, responsible citizens from carrying arms outside the home must be assessed under the Second Amendment's text, history, and tradition.

The doctrinal split among the circuits has proven outcome determinative. Circuits that faithfully apply the correct standard reach the correct result, while circuits that shirk the correct standard reach the incorrect result. This is untenable. The Second Amendment's text, history, and tradition confirm a fundamental guarantee: the right of law-abiding, responsible citizens to defend themselves outside the home. *See* Petition for Writ of Certiorari, *Malpasso v. Pallozzi*, No. 19-423 (Sept. 23, 2019), at pages 13–25; *see also* Joyce Lee Malcolm, *The Right to Carry Your Gun: A Snapshot History*, Forthcoming; George Mason Legal Studies Research Paper No. LS 19-18, at pp. 1–26 (Sept. 19, 2019) ("The right of self-

defense does not stop at the domestic doorstep. . . . We are here, therefore, to address this latest, in a string of denials of a clear constitutional right, this time of the right to bear a gun outside the home. Back we must go through the history of firearms use and regulation in England, its transition to colonial America and the intent of the Second Amendment.").[3]

Laws prohibiting the exercise of this fundamental right are inconsistent with the Second Amendment and patently unconstitutional. Because the Second Amendment's text, history, and tradition are so conclusive on this point, the only way to uphold "good reason" restrictions is to disregard what is conclusive in favor of a different and more favored conclusion. That is exactly what the First, Second, Third, and Fourth Circuits did. Section II, *infra*. Review is warranted because the Fourth Circuit's decision and the decisions in the First, Second, and Third Circuits conflict with *Heller*. U.S. Sup. Ct. R. 10(c).

The circuits' doctrinal split is having real-world consequences. Because the First, Second, Third, and Fourth Circuits have refused to faithfully apply this Court's Second Amendment precedent to uphold "good reason" restrictions, tens of millions of law-abiding, responsible Americans are prohibited from exercising their fundamental right to carry arms outside their homes for self-defense in violation of the Second Amendment. These prohibitions unconstitutionally restrict the rights of law-abiding citizens in some of our largest and most dangerous metropolitan areas (Boston, New York City, Philadelphia, Baltimore, and

[3] Available at https://ssrn.com/abstract=3456940.

Newark). *See* Crime in the United States by Metropolitan Statistical Area, *FBI* (2017).[4] American citizens' freedom to effectively defend themselves by carrying a handgun is not limited to their homes. The freedom is a fundamental, constitutional right guaranteed to all "the people" that cannot be allowed to depend upon the politics of the jurisdiction in which the citizen resides.

The time has come for this Court to definitively answer whether the Second Amendment protects the right of law-abiding, responsible citizens to carry a handgun for self-defense outside the home, and, in doing so, end the contemptuous disregard shown by a handful circuits to this Court's Second Amendment teachings. This case presents a perfect opportunity for this Court to correct the constitutional course against "a distressing trend: the treatment of the Second Amendment as a disfavored right." *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., dissenting from the denial of certiorari). This Court should resolve that trend by confirming that laws prohibiting law-abiding, responsible citizens from carrying arms outside the home must be assessed under the Second Amendment's text, history, and tradition, and that this analysis compels the conclusion that those laws are unconstitutional.

CONCLUSION

This Court should grant the petition to ensure that this Court's clear and consistent Second Amendment teachings are faithfully applied by the

[4] Available at https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/table-6.

lower federal courts in the context of carrying arms for self-defense in case of confrontation outside the home and to ensure that the constitutional rights of Maryland—and all American—citizens are protected.

Respectfully submitted,

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