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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

Respondent offers no persuasive reason to decline resolving the acknowledged conflict over the exceptionally important question whether the Second Amendment allows the government to prohibit typical, law-abiding citizens from carrying handguns outside the home for self-defense. The First, Second, Third, and Fourth Circuits have upheld permitting regimes under which law-abiding citizens have no right to carry handguns for self-defense outside the home without a special showing of "good cause." The D.C. Circuit has struck down a materially indistinguishable regime, joining the Seventh Circuit in concluding that the government may not prohibit typical, law-abiding citizens from carrying handguns for self-defense. Respondent's efforts to wish away this conflict or suggest that this case does not implicate it are misguided. There is an open and acknowledged conflict, it is not going away, this case squarely implicates it, and there is no reason for the Court to wait any longer to resolve it.

The decision below is also manifestly wrong. In *District of Columbia v. Heller*, this Court made clear that the "core lawful purpose" of the Second Amendment is "self-defense." 554 U.S. 570, 630 (2008); *see also McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 768 (2010). The need to defend oneself is hardly limited to the home; that is why the Framers enshrined a right not only to "keep" arms, but also to "bear" them. The Fourth Circuit's view that responsible citizens' ability to carry firearms outside the home is a privilege, to be granted at the state's discretion to those chosen few who can differentiate

themselves from the vast majority of "the people" protected by the Second Amendment by demonstrating an especially acute need to exercise their constitutional right, cannot be squared with the text of the Amendment, the history and tradition of the right, or this Court's precedent interpreting it. The Court should grant certiorari and reverse.

I. This Court Should Resolve The Deep And Consequential Disagreement Among The Lower Courts.

The 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. While multiple courts have concluded that the Second Amendment guarantees ordinary Americans the ability to carry handguns outside the home for self-defense, several circuits persist in the view that the government may deny the vast majority of "the people" protected by that right any means of exercising it. *See* Pet.8-13. The disagreement will not be resolved absent this Court's intervention.

Respondent's arguments that either there is no circuit conflict or this case does not implicate it are profoundly misguided. Respondent contends that the regimes invalidated in *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017), and *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), "imposed absolute bans on the public carrying of handguns for self-protection," whereas Maryland's regime "allows the public carrying of handguns." Opp.11. That is wrong as both a matter of fact and practical effect.

To start, Maryland's carry regime is materially indistinguishable from the D.C. regime at issue in *Wrenn*. Before issuing a carry permit, Maryland requires, among other things, that the applicant 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." Pet.App.18a-19a. And Maryland's regulations make clear that a general desire to carry a handgun for self-defense is not enough to satisfy that showing. Pet.App.48a. The D.C. regime at issue in *Wrenn* likewise required residents to demonstrate a "good reason to fear injury to [their] person or property" or "any other proper reason for carrying a pistol." *Wrenn*, 864 F.3d at 655 (quoting D.C. Code §22-4506(a)-(b)). On both sides of Western Avenue (and Eastern and Southern Avenues), ordinary citizens with ordinary concerns about safety could not carry firearms for self-defense. The only difference is that the D.C. Circuit rejected the restrictions as unconstitutional in *Wrenn*, while the decision below upheld them.

The Hawaii and California regimes that Ninth Circuit panels held unconstitutional in *Young* and *Peruta* (only to have their decisions vacated en banc) are no different. *See Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018), *vacated, reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019); *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 (9th Cir. 2016). *Young* involved 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 *Peruta* involved 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, just like Maryland's, conditions a carry permit on a special showing of cause, making it effectively impossible for the typical, law-abiding resident to lawfully carry a handgun for self-defense outside the home.

To be sure, the regime at issue in *Moore* openly banned the carrying of handguns, rather than effectively banning it through a good-cause regime. 702 F.3d at 942. But it matters little to the ordinary citizen whether her home state bans all carry by ordinary citizens categorically or only as a practical matter. What matters is whether the typical, law-abiding person can exercise the core Second Amendment rights guaranteed to "the people." And a good cause regime prevents her from doing so just as much as a flat ban does.

Respondent insists that "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." Opp.11, 13. That is both misleading and ultimately beside the point. First and foremost, respondent does not and cannot deny that petitioner Malpasso and any similarly situated Maryland State Rifle and Pistol Association member cannot obtain a carry permit because the general desire to carry a handgun for self-defense does not qualify as the requisite "good and substantial reason." Pet.App.18a. Whether other applicants who seek to carry handguns for reasons that the state deems "better" are granted permits does

not make the regime any less unconstitutional as to petitioners.

At any rate, respondent fails to provide the critical information of who has applied for permits or why they sought them. *See* Opp.5. That Maryland may generously grant permits to former police officers, for instance, says nothing about approval of permit applications for ordinary citizens like Malpasso. It also says nothing about the many ordinary citizens who never apply because they know they cannot satisfy the state's "good and substantial reason" restriction. Pet.App.18a. Likewise, respondent does not identify the *nature* of the licenses issued. Maryland has broad discretion to "limit the geographic area, circumstance, or times of the day, week, month, or year in which a permit is effective." Pet.App.20a. Issuing a permit allowing a security guard to carry a weapon only at his place of employment and only while on duty, again says nothing about the availability of permits to "the people" at large.

In all events, even if Maryland demanded that applicants make only a modest showing that they have more need to exercise their constitutional right than an ordinary individual, that would not cure the fundamental problem. The Second Amendment enshrines the *right* of "the people" to keep or bear arms. Exercising that right should not be a matter of legislative grace or restricted to a subset of "the people" with an unusual need to exercise it. And the Court should be especially loath to relegate a constitutional right to legislative grace when the very legislature entrusted with protecting it has indicated an intention to make its regime even *more* restrictive.

See Pamela Wood, "With new members and an end looming, Maryland's Handgun Permit Review Board rejects more appeals," *Baltimore Sun* (July 29, 2019), https://bit.ly/37rjgh9.

In reality, Second Amendment rights are imperiled in Maryland, but not in the District and elsewhere. There is simply no denying either the deep, persistent conflict over the question presented or the fact that the decision below squarely implicates it.

II. The Fourth Circuit Misconstrued The Scope Of The Right.

The Fourth Circuit is on the wrong side of this deep and persistent split. Text, history, and tradition all confirm that ordinary citizens possess a right to carry handguns outside the home for self-defense.

1. *Heller* held that the Second Amendment protects "the individual right to possess and carry weapons in case of confrontation." 554 U.S. at 592. And it explained that the term "bear," as used in the text of Amendment, means to "wear" or to "carry … 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)). Because "conflict with another person" typically occurs outside of the four walls of one's home, the right to bear arms necessarily includes a right to carry a handgun outside the home. *See Wrenn*, 864 F.3d at 657; *Moore*, 702 F.3d at 941. Indeed, there would have been no need for the historical restrictions

on the carry of handguns in "sensitive places," *Heller*, 554 U.S. at 626, if the right were confined to the home.

Respondent claims that the Fourth Circuit remained faithful to *Heller* because it "assumed that Second Amendment rights were implicated by Maryland's statutory scheme." Opp.15; *see Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013). But what the court "assume[d]"—and what respondent defends—is not the right enshrined by the Second Amendment. According to the Fourth Circuit, "*Heller* … 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.'" *Id.* at 874 (quoting *Heller*, 554 U.S. at 634-35). Respondent likewise insists that the "core" right articulated by *Heller* is limited to the confines of one's home. Opp.7 (quoting *Woollard*, 712 F.3d at 874). The Second and Third Circuits have taken the same misguided approach. *See Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012) ("*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 v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013) ("[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*.").

That is not a plausible reading of this Court's opinion. While *Heller* held that a citizen has a right to keep a firearm in the home, because that was the particular right denied in that case, the Court

identified "the core lawful purpose" of the right as "self-defense." *Heller*, 554 U.S. at 630; *see Wrenn*, 864 F.3d at 657. Period. Respondent's contrary claim would detach the Second Amendment right from its very foundation.

2. Respondent is also wrong that "Maryland's law has deep historical roots." Opp.19. The history of the Second Amendment, much of it surveyed and relied upon in *Heller*, confirms that the right to bear arms extends beyond the home. *See* Pet.17-21. Respondent's contrary claim relies almost exclusively on a misinterpretation of the 1328 Statute of Northampton and its progeny. But neither the text nor historical understanding of that law can bear respondent's interpretation. Nor do respondent's other historical sources—surety laws and a few state court decisions—support the proposition that the right to bear arms is limited to the home.

First, respondent's interpretation of Northampton and the inferences it draws from the statute's progeny are flat wrong. Northampton prohibited all but the king's servants and ministers from bringing "force in affray of the peace." Statute of Northampton 1328, 2 Edw. 3 c. 3 (Eng.). As early sources confirm, "affray" meant "a public offence *to the terror of the King's subjects*, and so called because it affrighteth and maketh men afraid, and is enquirable in a *leet* as a common nuisance." *State v. Huntly*, 25 N.C. 418, 421 (N.C. 1843) (emphasis added). The act of carrying alone thus did not constitute a crime.

Prominent commentators in the centuries following the statute expressly disavowed respondent's interpretation. As one eighteenth-

century scholar explained, "no wearing of arms is within the meaning of this statute, unless it be accompanied with such circumstances as are apt to terrify the people." 1 William Hawkins, *A Treatise of the Pleas of the Crown*, ch. 63, §9, at 136 (1716). Blackstone concurred, noting that Northampton banned only the carrying of "dangerous and unusual weapons." *Heller*, 554 U.S. at 627 (citing 4 Blackstone 148-149 (1769)).

English courts were in accord. In *Rex v. Knight*, Chief Justice Holt explained that "the meaning of [Northampton] was to punish people who go armed *to terrify the King's subjects*." 87 Eng. Rep. 75-76 & 90 Eng. Rep. 330 (K.B. 1686) (emphasis added); *see Rex v. Smith*, 2 Ir. R. 190 (K.B. 1914) ("the statutable misdemeanor is to ride or go armed *without lawful occasion in terrorem populi*"). As a later court explained, Northampton did not infringe upon an Englishman's liberty to carry a weapon for self-defense: "A man has a clear right to protect himself when he is going singly or in a small party upon the road where he is travelling or going for the ordinary purposes of business." *Rex v. Dewhurst*, 1 State Trials, N.S. 529, 601-02 (1820).

By the Declaration of Rights in 1689, the Second Amendment's forerunner, it was clear that the peaceable carrying of arms for defense was not only lawful, but a natural right. *See* 1 Wm. & Mary, sess. 2, ch. 2. Blackstone explained that "public allowance" for Englishmen to carry arms emanated from "the natural right of resistance and self-preservation." 1 Blackstone, *Commentaries* 139 (1765). It was only the carrying of a "dangerous" and "unusual" weapon that

became "a crime against the public peace, by terrifying the good people of the land." 4 Blackstone 148.

This understanding persisted following the founding. James Wilson opined that Northampton banned only the carrying of "'dangerous and unusual weapons, in such a manner, as will naturally diffuse a terrour among the people.'" *Wrenn*, 864 F.3d 660 (quoting James Wilson, *The Works of the Honourable James Wilson* 79 (1804)). Respondent, in suggesting otherwise, cites a number of early state laws. *See* Opp.21-22. But these laws confirm that carry restrictions extended only to the carrying of weapons that caused terror. For example, Virginia prohibited citizens from "rid[ing] armed by night []or by day, in fair or markets, or in other places, *in terror of the Country*," 1786 Va. Laws 33, ch. 21 (emphasis added), while Massachusetts punished those who went "armed offensively, *to the fear or terror of the good citizens of this Commonwealth*," 1795 Mass. Laws 436, ch. 2 (emphasis added).

Respondent's reliance on surety laws fares no better, for these laws did not create anything like a "good cause" regime. *See* Opp.22. Take, for instance, the eighteenth-century Massachusetts surety statute that respondent selectively quotes. That statute actually reads:

> If any person shall go armed ... ***without reasonable cause to fear an assault or other injury***, or violence to his person, or to his family or property, he ***may, on complaint of any person having reasonable cause to fear an injury, or breach of peace, be***

> ***required to find sureties for keeping the peace***, for a term not exceeding six months, with the right of appealing as before provided.

1794 Mass. Laws ch. 134, §16 (emphasis added). By its plain terms, the law did not require any special justification for typical, law-abiding citizens to carry weapons. It instead created a regime under which individuals could *continue* to carry weapons by paying a bond *even if* another citizen had "reasonable cause to fear an assault or other injury." *Id.* In other words, under the statute, *even those who caused others to fear* were permitted to carry weapons.

The same is true of the other surety statutes respondent invokes. *See* Opp.22 & n.6. These laws in no way resemble Maryland's regime, under which fear for one's life represents a limited exemption to a general ban on the carrying of handguns outside the home.

Finally, respondent's cherry-picked nineteenth century carry regimes demonstrate at most that a few states felt at liberty to restrict *concealed* carry—not the carrying of weapons entirely. *See Nunn v. State*, 1 Ga. 243, 251 (1846); *State v. Reid*, 1 Ala. 612, 616-17, 619 (1840); *McGuirk v. State*, 1 So. 103, 103 (Miss. 1887); *Chatteaux v. State*, 52 Ala. 388, 390 (1875). Indeed, in *Andrews v. State*, the court invalidated a statute that forbade openly carrying a pistol "publicly or privately, without regard to time or place, or circumstances." 50 Tenn. 165, 187 (1871).[1] These

[1] The few decisions that approved of both concealed and open carry restrictions were based on the flawed premise, expressly

cases plainly do not stand for the proposition that the right to bear arms is confined to the home or justify Maryland's prohibition on *all* forms of carry, "whether concealed or open," Pet.App.7a.

* * *

In sum, text, history, and tradition of the Second Amendment all point in the same direction, making clear that the First, Second, Third, and Fourth Circuits are wrong and the D.C. and Seventh Circuits are right. There is no reason for this Court to wait any longer to resolve this circuit conflict, and to restore to all "the people" their Second Amendment right to carry a handgun outside the home for self-defense.

CONCLUSION

The Court should grant the petition.

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rejected by *Heller*, that the right to bear arms exists solely to serve the common defense of the state. *See State v. Workman*, 14 S.E. 9, 11 (W. Va. 1891); *English v. State*, 35 Tex. 473, 477 (1871).

Respectfully submitted,

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