No. 10-1207

In the Supreme Court of the United States

CHARLES F. WILLIAMS, JR.,
PETITIONER

v.

STATE OF MARYLAND,
RESPONDENT

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT

NATHANIEL P. JOHNSON
Attorney
Counsel of Record for Respondent

University of California, Berkeley
School of Law
Berkeley, CA 94720
natej12@berkeley.edu
785-312-4740

QUESTION PRESENTED

Whether peaceably carrying or transporting a registered handgun outside the home is beyond the scope of "the right . . . bear arms" protected by the Second Amendment to the United States Constitution.

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STATEMENT OF THE CASE

Over the past century, Maryland has constructed a carefully calibrated system of handgun regulation to address gun violence. This case concerns the constitutionality of one of those laws, Section 4-203 of the Criminal Law Article, Maryland Code (2002).

Section 4-203 generally prohibits publicly wearing, carrying, or transporting a handgun "to preserve the peace and tranquility of the State and to protect the rights and liberties of the public." *See* Md. Code Ann., Crim. Law § 4-202(5) (2002). It continues a long tradition of categorical prohibitions on publicly carrying handguns in Maryland. The State first prohibited carrying concealed weapons in public in 1886, 1886 Md. Laws ch. 375, to "prevent[] injury or death to unsuspecting members of the public" and protect the carriers from having a weapon "that could be used in the heat of passion." *Anderson v. State*, 614 A.2d 963, 965 (Md. 1992).

In 1972, the General Assembly extended the prohibition to open carriage of handguns. Facing a rising tide of handgun violence, the Maryland legislature enacted a "blanket prohibition" on carrying handguns in public. *State v. Crawford*, 521 A.2d 1193, 1198 (Md. 1987); Md. Code Art. 27, § 36B(b)–(c) (1972). The law criminalizing both open and concealed carry was inspired by the General Assembly's "recognition that there had been a dramatic increase in the number of crimes perpetrated with handguns and a concomitant increase in the number of deaths and injuries." *Crawford*, 521 A.2d at 1198. Indeed, "[t]he overriding purpose

of the total legislation was to control the use or carriage of handguns." *State v. Crist*, 367 A.2d 61, 65 (Md. 1976).

The current version of the law, Section 4-203(a), prohibits carrying a handgun in public, "whether concealed or open," unless exempted by the statute. Md. Code Ann., Crim. Law § 4-203(a) (2002). The exceptions are numerous. *Id.* § 4-203(b). The law does not extend to the home or one's place of business. *Id.* §§ 4-203(b)(6)–(7). It does not include law enforcement personnel, hunters, sport shooters, or collectors. *Id.* §§ 4-203(b)(1), (4)–(5), (8). And the prohibition makes obvious exceptions for transporting a handgun from a "place of legal purchase or sale" to a home or place of business, or from home to a hunting area, shooting range, or safety class. *Id.* §§ 4-203(b)(3)–(4).

For everyone else, Maryland has created a permit system. *Id.* § 4-203(b)(2); Md. Code Ann., Pub. Safety §§ 5-301–5-314 (2003). To receive a permit, the applicant cannot have been imprisoned for more than a year, been convicted of any crime involving a controlled substance, or "exhibited a propensity for violence or instability." Pub. Safety §§ 5-306(a)(2)–(3), (5)(i). The applicant cannot presently be an addict or alcoholic. *Id.* § 5-306(a)(4).

The applicant must also have "good and substantial reason" for a permit, such as "a reasonable precaution against apprehended danger." *Id.* § 5-306(a)(5)(ii). When someone truly faces danger and needs to carry a handgun in public for self-defense, Maryland lets them do so. The permitting scheme is not onerous. In fact, from 2007 to 2011, roughly 90 percent of permits were granted. *See* Md. Dep't of

State Police, *2011 Annual Report* 49 (2011) (noting 8,761 of the 9,730 applications filed from 2007 to 2011 were approved).

The law serves an essential public safety function. Maryland still faces horrifying levels of handgun violence. As the Maryland Attorney General recently pointed out, over the past five years in the city of Baltimore, fifty-one children under the age of eighteen have been killed by firearms, mostly handguns. Douglas F. Gansler, *Keep the Focus on Handguns in Maryland*, Baltimore Sun, Jan. 14, 2013, http://articles.baltimoresun.com/2013-01-14/news/bs-ed-guns-gansler-20130114_1_handgun-laws-gun-violence-young-people. These numbers would undoubtedly be "even higher if our state did not regulate the public carrying of handguns." *Id.* Section 4-203 is an indispensable tool in Maryland's battle with handgun violence.

The Petitioner, Charles F. Williams, Jr., was convicted pursuant to Section 4-203(a)(1)(i) for unlawful possession of a handgun in public. (R. at 6.) On October 1, 2007, Maryland police officers observed the Petitioner going through his backpack at a bus stop. (R. at 10.) When the Petitioner proceeded to hide something in the bushes behind the bus stop, the officers made contact and "asked him what he was doing." (R. at 10–11.) Petitioner admitted to the hidden handgun and was taken into custody. (R. at 11.)

At his bench trial, Petitioner argued that he purchased the handgun for self-defense. (R. at 11.) This argument was made to no avail. Even if Petitioner had a valid self-defense claim, which gave him sufficient reason to claim a permit for

carrying a handgun in public, he did not even apply for one. (R. at 15.) Without a permit, Petitioner violated Maryland's prohibition on carrying handguns in public without a lawful purpose. For this violation, he was sentenced to three years' incarceration, with two years suspended. (R. at 11.)

Petitioner appealed. He sought to have his conviction overturned because Maryland's handgun regulation scheme, particularly Section 4-203, allegedly violates the Second Amendment's right to bear arms. (R. at 7.) The Maryland Court of Special Appeals did not agree and affirmed Petitioner's conviction. *Williams v. State*, 982 A.2d 1168 (Md. Ct. App. 2009). And though the Maryland Court of Appeals granted his subsequent petition for certiorari, it also upheld the conviction. (R. at 7–8.) After dissecting this Court's recent decisions in *Heller v. District of Columbia*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), the Court of Appeals determined that the Second Amendment right to bear arms was limited to the home. *See* (R. at 15–23.).

Upon exhausting the Maryland appellate process, Petitioner sought a writ of certiorari in this Court. Certiorari was granted for the limited question: "Whether peaceably carrying or transporting a registered handgun outside the home is outside the scope of the 'right of the people to . . . bear arms" protected by the Second Amendment to the United States Constitution." (R. at 3.)

SUMMARY OF THE ARGUMENT

Maryland's handgun regulation scheme does not infringe the Second Amendment right to bear arms articulated by this Court in *Heller* and *McDonald*. *See Heller*, 554 U.S. at 636; *McDonald*, 130 S. Ct. at 3050. Following *Heller*, there is no longer any doubt that the right to bear arms is an individual right independent of collective militia service. *Heller*, 554 U.S. at 636. Moreover, the Second Amendment forbids States from banning citizens from keeping and using handguns in the home for self-defense. *McDonald*, 130 S. Ct. at 3050. But the right to bear arms is not an inexorable command from the founding generation that Maryland may not regulate its citizens carrying handguns in public places. The Second Amendment provides Maryland considerable room to regulate handguns beyond the home.

Section 4-203, which prohibits publicly carrying handguns without proper permitting, does not violate the right to bear arms. Most fundamentally, the right to carry a handgun in public places is beyond the scope of the Second Amendment. The Amendment only embodies rights that are venerable, widely understood, or fundamental to American liberty. *See McDonald*, 130 S. Ct. at 3036. Because it is a pre-existing right, the right to bear arms is subject to well-recognized exceptions understood by the founding generation. *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897). A careful analysis of the Second Amendment's text, history, and precedent reveals that the State's power to prohibit handguns in public is a well-recognized

exception to the right to bear arms. Maryland's laws simply do not infringe any part of the pre-existing right.

Even if Section 4-203 burdens some right within the scope of the Second Amendment, Maryland is constitutionally justified in imposing that burden. *Heller* described the right to possess and use handguns in the home for self-defense as the core of the Second Amendment. The right to carry handguns in public is far removed from this core individual right. Public carriage of handguns represents an immensely complicated public safety issue that falls squarely within the purview of Maryland's police powers. To show proper deference to the State's institutional competence to regulate public firearms, this Court should only subject Section 4-203 to intermediate, rather than strict, scrutiny. Maryland's law should pass constitutional muster so long as Section 4-203 is substantially related to an important government interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

Section 4-203 undoubtedly survives intermediate scrutiny. The law is justified by the compelling State interests in public safety and crime prevention. And it effectively furthers those compelling interests by limiting public carriage of handguns to citizens that demonstrate a real need for self-defense. Section 4-203 would likely survive even the strictest scrutiny. There is simply no alternative to Maryland's permitting scheme that would adequately account for public safety.

Maryland has a fundamental obligation to protect the public from threats to its safety. When someone carries a handgun outside the home, they pose an

undeniable risk to public safety. The Second Amendment does not relieve Maryland of its duties to provide safety in this complicated public environment. It does not force the State to stand idly by as its citizens suffer from waves of handgun violence. Respondents urge this Court to affirm the Court of Appeals of Maryland decision and uphold Petitioner's conviction for unlawfully carrying a handgun in public.

ARGUMENT

I. THE RIGHT TO CARRY A HANDGUN IN PUBLIC IS BEYOND THE SCOPE OF THE SECOND AMENDMENT.

Heller was a watershed decision in Second Amendment jurisprudence. The Court decided that the right to bear arms is an individual right, not merely a collective one dependent on militia service, and that the Amendment protects the right to possess and use a handgun in the home in self-defense. *Heller*, 554 U.S. at 636. The District of Columbia law totally banning handgun possession in the home, as well as the requirement that any lawful firearm be rendered inoperable, unquestionably infringed the Second Amendment. *Id.* at 628–29. Self-defense has always been "central to the Second Amendment right." *Id.* at 628. And "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban." *Id.* at 629. No matter the level of scrutiny applied to the District's intrusion on the right to bear arms, the law "would fail constitutional muster." *Id.*

McDonald reaffirmed *Heller*'s central holdings, but applied the Second Amendment to the States. *McDonald*, 130 S. Ct. at 3050. Though Chicago had laws like the District of Columbia's, which banned possession of handguns in the home, the city argued the laws should survive constitutional scrutiny because the Second

Amendment does not apply to the States. *Id.* at 3026. The *McDonald* plurality disagreed. *Heller* made clear the right to use handguns for self-defense in the home was a right "deeply rooted in the Nation's history and tradition." *Id.* at 3036. Because fundamental American rights "appl[y] equally to the Federal Government and the States," Chicago's law infringed the Second Amendment. *Id.* at 3050.

Both *Heller* and *McDonald* limited their explication of the Second Amendment to the narrow right to keep and use a handgun in the home for self-defense. The Court emphatically dispelled the notion developed by some commentators that "self-defense has to take place wherever [a] person happens to be." *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1515 (2009). The right to bear arms "is not unlimited." *Heller*, 554 U.S. at 626. Throughout its history, "commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* As *McDonald* put it, the Second Amendment "does not imperil every law regulating firearms." *McDonald*, 130 S. Ct. at 3047.

Following *Heller* and *McDonald*, the thorny issue facing elected officials is what policy options are taken "off the table" by the Second Amendment. *Heller*, 554 U.S. at 636. To provide stability for elected officials, this Court should take the opportunity to define the scope of the right to bear arms protected by the Second Amendment. As in *Heller* and *McDonald*, the meaning of the Second Amendment

cannot be gleaned from a cursory glance at its text. The Amendment "embod[ies] certain guarantees and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case." *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897). The right to bear arms is a "*pre-existing* right" that can only be defined by a thorough examination of the Second Amendment's text, the history of the right, and Court precedent interpreting the right. *Heller*, 554 U.S. at 592.

The Second Amendment does not enshrine every interest thought relevant to the right to bear arms. It only "codified venerable, widely understood liberties," *id.* at 605, that are "fundamental to *our* scheme of ordered liberty," *McDonald*, 130 S. Ct. at 3036 (quoting *Duncan v. Louisiana* 391 U.S. 145, 149 (1968)), or "deeply rooted in this Nation's history and tradition," *id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). To situate the right to publicly carry handguns within the Second Amendment, Petitioner must unequivocally the text, history, and precedent of the Amendment demonstrate the right to carry is fundamental to American liberty. This Petitioner simply cannot do.

A. The Text of the Second Amendment Takes Disarmament Off The Table, But Allows Maryland to Ban Handguns in Public.

Heller instructs that analysis of the Second Amendment should begin with its text: "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. *See Heller*, 554 U.S. at 576. By carefully considering both essential

clauses of the Amendment, it becomes clear the right to bear arms protects personal security by prohibiting governments from disarming the people. But the text does not eviscerate the State's obligation to provide public safety. The Second Amendment is not a command from the founding generation that Maryland must allow handguns in public places.

The Second Amendment is "naturally divided into two parts: its prefatory clause and its operative clause." *Id.* at 577. The prefatory clause—in this case, "A well regulated Militia, being necessary to the security of a free State"—describes the purpose of the operative clause—"the right of the people to keep and bear Arms, shall not be infringed." *Id.* While the Second Amendment's statement of purpose cannot circumscribe the clear meaning of its operative clause, "[l]ogic demands that there be a link between the stated purpose and the command." *Id.* The "requirement of logical connection" means that any interpretation of the operative clause must be "consistent with the announced purpose." *Id.* at 577–78.

Whether the right to bear arms includes the right to carry handguns outside the home is not clear from the text. Granted, the operative provision does not impose any explicit limitations on the right to bear arms. At times, *Heller* and *McDonald* use similar sweeping language. *Heller* wrote that the textual elements of the Second Amendment "guarantee the individual right to possess and carry weapons in case of confrontation." *Id.* at 592. Taken to an extreme, *Heller* could be read to extend the right to bear arms to any public or private confrontation because self-defense is "the central component of the right itself." *Id.* at 599.

But if the right to bear arms unambiguously conferred the right to carry handguns anywhere, *Heller* would not have held that right to bear arms "is not unlimited." *Id.* at 626. *Heller* itself was limited to the holding that the Second Amendment protects the right to keep and bear handguns in the case of confrontation in the home. *See McDonald*, 130 S. Ct. at 3050. The Court emphasized that "we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation." *Heller*, 554 U.S. at 595. The Second Amendment obviously elevates protection of defensive confrontations over offensive ones. *See McDonald*, 130 S. Ct. at 3036. And *McDonald* "repeat[ed] [*Heller*'s] assurances" that the State may categorically prohibit possession of handguns by felons and the mentally ill, as well as carriage of handguns in "sensitive places such as schools and government buildings." *Id.* at 3047.

The important question following *Heller* is what other sorts of confrontation fall within the scope of the operative provision's right to bear arms. More specifically, for this case, does the operative provision protect the right to carry handguns beyond the home? According to *Heller*, the logical connection between the prefatory clause and the operative provision should be used to answer questions about the Second Amendment. Like the word "Arms," which only includes "in common use" to "further[] the purpose announced in the preface," *id.* at 624–25, the operative term "bear" requires some logical connection to the preface. *See also United States v. Miller*, 307 U.S. 174, 178 (1939) (Second Amendment "Arms" must

have "some reasonable relationship to the preservation or efficiency of a well regulated militia . . . [such] that its use could contribute to the common defense.").

Based on its preface, the Second Amendment was codified "to prevent elimination of the militia." *Heller*, 554 U.S. at 599. Yet *Heller* makes clear that the right to bear arms is not limited to militia service; most Americans unquestionably thought the right "even more important to self-defense and hunting." *Id.* Instead of simply guaranteeing the right to militia service, the Second Amendment hedges against the tyrannical threat a national army might pose to the people by protecting the right of citizens to have and use certain weapons at certain times. As the founding generation was well aware, tyrants eliminated the militia "not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents." *Id.* at 598. To protect the "security of a Free state" from a tyrannical military threat, the right to keep and bear arms was codified in the Constitution. *Id.* at 599.

With the preface in mind, the required logical connection between the prefatory clause and the operative clause can come into focus. The Second Amendment protects citizens from total disarmament in the interest of security. The right to keep and bear arms, whether for militia service, self-defense, or hunting, was thought essential to personal security when "the intervention of society . . . may be too late to prevent an injury." *Id.* at 595 (quoting 1 William Blackstone, Commentaries 145, 146 n.42 (1765) (St. George Tucker ed. 1803). To guarantee the people had weapons sufficient to overcome threats to their personal

security, the Second Amendment was codified to prevent governments from completely disarming the people. *See Presser v. Illinois*, 116 U.S. 252, 265 (1886) ("[T]he states cannot, even laying the constitutional provision in question out of view, *prohibit* the people from keeping and bearing arms . . . .") (emphasis added). When the State cannot be expected to provide for personal security through public safety measures, such as defense of every home at all times, the Second Amendment protects the right to have and use certain weapons in that setting. *Cf. Heller*, 554 U.S. at 628.

Based on the "requirement of logical connection" between the prologue and command, so long as Maryland does not disarm the people in situations when it cannot provide security, it does not run afoul of the Second Amendment. *See id.* at 577–78. But the requisite logical connection between the preface and the operative provision disappears when the Second Amendment is stretched beyond a prohibition on disarming the people to include an unconditional right to carry handguns in public. Taking the operative provision at its word, without any consideration of the preface, would encompass a right to carry and use weapons for self-defense in any potential confrontation, no matter the public's interest in safety. There is simply no expectation in the American legal system that the State cannot provide for public safety beyond the home.

Further, in American society, citizens "necessarily part[] with some rights or privileges which, as an individual not affected by his relations to others, he might retain." *Munn v. Illinois*, 94 U.S. 113, 124 (1877). Maryland's police power does not

cover "rights which are purely and exclusively private, but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another." *Id.* Instead of vigilante justice, our scheme of ordered liberty depends on fundamental trust in the State to guarantee safety in public places. Indeed, "this is the very essence of government." *Id.* Petitioner's illogical view of the Second Amendment would needlessly sublimate Maryland's near-sacred police powers to the uncertain fears of a small number of citizens.

After putting these elements together, there can be no doubt the Second Amendment only includes the right to possess and use handguns when the State cannot be expected to provide security. In this way, "self-defense is the central component" of the Second Amendment, *Heller*, 554 U.S. at 599, and the Amendment includes the right to have and use a handgun in the home, *id* at 636. But the Second Amendment certainly does not extend to carrying handguns in public for self-defense, where the State is obligated to ensure public safety. Indeed, "[t]his meaning is strongly confirmed by the historical background of the Second Amendment." *Id.* at 592. The founding generation was concerned that the federal government would take away the people's weapons, not regulate them. The Second Amendment simply does not command Maryland to let its citizens carry handguns in public places.

B. History Confirms that the State's Obligation to Public Safety Creates a Well-Recognized Exception to the Right to Bear Arms.

A detailed analysis of the historical right to bear arms confirms the view that the Constitution codified a limited right that protects citizens from disarmament by the government. Though citizens are often allowed to carry handguns in public, nothing in the historical record demonstrates a fundamental, venerable, or widely understood right to publicly carry handguns. The history of the Second Amendment demonstrates that so long as governments do not disarm the people, the right to bear arms must bow to the government's obligation to provide public safety.

Because the Second Amendment codified a pre-existing right, the Amendment's history is integral to understanding its meaning. *See Heller*, 554 U.S. at 592. Two basic types of evidence are relevant to a historical analysis of the Second Amendment: authorities describing the right as understood by the founding generation, *id.*; and, to a lesser extent, American legal sources describing the right after its codification, *id.* at 605. In this case, the relevant historical sources agree that the power of States to prohibit handguns in public is a "well-recognized exception[]" to the right to bear arms. *Robertson*, 165 U.S. at 281.

1. The founding generation understood the right to bear arms does not protect citizens carrying handguns in public from state interference.

The first step of this historical inquiry examines how "our English ancestors" understood the right to keep and bear arms. *Id.* Blackstone, "'the preeminent authority on English law for the founding generation,' cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen." *Heller*, 554 U.S.

at 593–94 (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)) (citing 1 Blackstone 136, 139–40). He described the right as one of "resistance and self-preservation" or "self-preservation and defence." 1 Blackstone 139–40. Naturally, then, the right to keep and bear arms in the home for self-defense was unconditional. Blackstone explained that an English citizen's home was their castle, which afforded them broad powers to defend themselves, their family, and their property in the home. *See* 4 Blackstone 223 (1769). Given the English conception of the home-as-castle, *Heller*'s conclusion that the Second Amendment protects the right to possess and use a handgun in the home for self-defense is inescapable.

But once one ventured beyond the home in ancestral England, the right to keep and bear arms changed dramatically. Unlike the right to arms in the home, England has an exceptionally long history of prohibiting arms in public. The 1328 Statute of Northampton provided that no man could "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." 2 Edw. III, c. 3 (1328). The statute is unambiguous. No one was allowed to carry arms in public, no matter whether the arms were concealed or open, or carried during the day or night. By its supreme terms, the Statute of Northampton prohibited carrying arms in public as early as 1328.

Blackstone agreed. According to Blackstone, the Statute of Northampton prohibited carrying any dangerous weapon and threatened imprisonment for any violator. He wrote that "[t]he offense of riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people

of the land; and is particularly prohibited by the Statute of Northampton, upon pain of forfeiture of the arms, and imprisonment during the king's pleasure . . . ." 4 Blackstone 148–49.

This understanding of English law was shared by contemporary authorities. Sir Edward Coke described the case of Sir Thomas Figett, who was arrested after he "went armed under his garments, as well as in the palace, as before the justice of the kings bench." Edward Coke, *Institutes of the Laws of England* 161–62 (1797). Though Sir Figett argued "for doubt of danger, and safeguard of his life, he went so armed," he nonetheless had to forfeit his arms and faced imprisonment. *Id.* at 162. Robert Gardiner's *The Compleat Constable* explicitly included guns in the category of dangerous weapons prohibited by the Statute of Northampton. *See* Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: Historical Versus Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1, 23–24 (2012) (citing Robert Gardiner, *The Compleat Constable* 18–19 (3d ed. 1707)). Gardiner explained that a British constable could arrest any person wearing or carrying guns in a public place. *Id.* at 24. The only exceptions were for law enforcement officials. *Id.*

The narrow right to bear arms was also embodied by official acts of government other than the Statute of Northampton. For example, "In the 21st Year of King Edward the Third, a Proclamation Issued, that no Person should bear any Arms within London, and the suburbs." J. Brydall, *Privilegia Magnatud apud Anglos* 14 (1704), *cited in Heller* , 554 U.S. at 587 n.10. Another "Act" was a "Prohibition . . . of having, keeping, bearing, or wearing any Arms or Warlike

Weapons . . . .” 3 Geo., 34, § 3, *in* 7 Eng. Stat. at Large 126 (1748), *cited in Heller*, 554 U.S. at 587 n.10.

American colonists understood that States could prohibit citizens from carrying firearms in public without running afoul of the fundamental English right to bear arms. Leading American scholars during the Nation’s founding turned to the Statute of Northampton for guidance on firearms regulation. Massachusetts, North Carolina, and Virginia incorporated the Statute of Northampton wholesale into their criminal laws after adoption of the Constitution. *See* Charles, *supra*, at 31–33. As the Massachusetts Supreme Court explained, “the right to keep fire arms . . . does not protect him who uses them for annoyance or destruction.” *Commonwealth v. Blanding*, 20 Mass. 304, 313–14 (1825). Thomas Jefferson even wanted to explicitly contain the right to bear arms to the home. He proposed an unsuccessful Second Amendment analogue for Virginia that read: “No freeman shall ever be debarred the use of arms [within his own lands or tenements].” 1 The Papers of Thomas Jefferson 344 (J. Boyd ed. 1950). The founding generation clearly understood that the right to keep and bear arms was subject to the State’s obligation to ensure public safety. Because the Second Amendment codified a pre-existing right, it could not be thought to include an unconditional right to carry handguns in public.

2. Post-enactment history of the Second Amendment reaffirms the narrow nature of the right to bear arms.

The founding generation’s conception of the right to bear arms is entirely consistent with legal sources interpreting the text in the period following enactment

of the Constitution. Though these historical sources are not nearly as important to understanding the Second Amendment, this "sort of inquiry is a critical tool of constitutional interpretation." *Heller*, 554 U.S. at 605. *Heller* points the post-enactment historical inquiry toward post-ratification commentary, pre-Civil War laws, post-Civil War legislation, and post-Civil War commentators. *Id.* Unsurprisingly, these post-enactment sources all recognize that the right to bear arms prohibited the government from disarming the people, but in no way support the view that an unconditional right to carry handguns in public is fundamental.

Commentary on the Second Amendment shortly after its enactment is consistently concerned with disarmament. St. George Tucker wrote the "true palladium of liberty" means "[w]herever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, *prohibited*, liberty, if not already annihilated, is on the brink of destruction." 1 Blackstone App. 300. (St. George Tucker ed. 1803) (emphasis added). William Rawle, an influential lawyer and former member of the Pennsylvania legislature, wrote that "[n]o clause in the constitution could by any rule of construction be conceived to give to congress a power to *disarm* the people." William Rawle, A View of the Constitution of the United States of America 121–22 (1825) (emphasis added). Joseph Story, when describing the Second Amendment, explained that tyrants succeed "by disarming the people, and making it an offence to keep arms." Joseph Story, A Familiar Exposition of the Constitution of the United States § 450 (1865).

Case law and statutes from the States before the Civil War track the analysis of contemporary commentators. In 1829, the Supreme Court of Michigan highlighted the limits on the right to bear arms: "[T]his privilege cannot be construed into the right in him who keeps a gun to destroy his neighbor. No rights are intended to be granted by the constitution for an unlawful or unjustifiable purpose." *United States v. Sheldon* (Mi. 1829), *in* 5 Transactions of the Supreme Court of the Territory of Michigan, 337, 346 (W. Blume ed. 1940). Four states once banned carrying pistols or similar weapons in public, concealed or open. *See* 1881 Ark. Acts 191–92; 1876 Wyo. Terr. Comp. Laws 352; 1870 Tenn. Acts 28; 1871 Tex. Gen. Laws 25. The statutes in Arkansas, Texas, and Tennessee withstood constitutional challenges. *See Fife v. State*, 31 Ark. 455 (1876); *English v. State*, 35 Tex. 473 (1871); *Andrews v. State*, 50 Tenn. 165, 178 (1871) (Story, J.). Some state courts held the right to openly carry firearms was protected by the Second Amendment, but also decided the State could prohibit carrying concealed weapons. *See Nunn v. State*, 1 Ga. 243, 251 (1846); *State v. Chandler*, 5 La. Ann. 489, 490 (1850). *See also Aymette v. State*, 21 Tenn. 154 (1840) (holding Tennessee could ban carrying concealed weapons).

Post-Civil War lawmakers emphasized the Second Amendment protects citizens from total disarmament by the government. As *Heller* explained, "Blacks were routinely disarmed by Southern States after the Civil War." *Heller*, 554 U.S. at 614. Members of Congress were concerned that Kentucky "prohibit[ed] the colored man from bearing arms . . . . Thus, the right of the people to keep and bear

arms as provided in the Constitution is *infringed*." H.R. Exec. Doc. No. 70, 39th Cong., 1st Sess., 233, 236 (1866). An opponent of the Freedmen's Bureau Act declared the founding generation was "for every man bearing his arms about him and keeping them in his house, his castle, for his own defense." Cong. Globe, 39th Cong., 1st Sess., 361, 371 (1866) (Sen. Davis).

This narrow interpretation of the right to bear arms was shared by post-Civil War commentators. Thomas Cooley explained the right to "bear arms implies something more than mere keeping . . . it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order." Thomas Cooley, General Principles of Constitutional Law 271 (1880). Others agreed that the right to bear arms is circumscribed by concerns about public safety. Under the Amendment, "[f]reedom, not license, is secured; the fair use, not the libelous abuse, is protected." J. Pomeroy, An Introduction to the Constitutional Law of the United States 153 (1868).

History undoubtedly holds examples of commentators describing the right to bear arms in unconditional terms. Yet the themes of the Second Amendment are undeniably clear, even from this brief examination of the historical record. The right to bear arms prevents governments from disarming the people in the interest of personal security. It has never been thought to forbid regulations of handguns in public places. Since at least 1328, sovereign governments have banned firearms in public places. At the very least, the history of the right to bear arms proves the right to carry handguns in public is not venerable, widely-understood, or

fundamental. *Mcdonald*, 130 S. Ct. at 3036. Instead, the power of the State to prohibit carrying handguns in public creates a well-recognized exception to the right to bear arms codified in the Second Amendment. *Robertson*, 165 U.S. at 281.

C. Forcing the Right to Publicly Carry Handguns Into the Second Amendment Is Inconsistent With Precedent.

Heller explained the last step in defining the Second Amendment is to "ask whether any of our precedents forecloses the conclusions we have reached about the meaning of the Second Amendment." *Heller*, 554 U.S. at 619. Precedent is not especially useful in Second Amendment jurisprudence because the "matter has been for so long judicially unresolved." *Id.* at 625. But precedent still has its place. An interpretation of the Second Amendment cannot be inconsistent with this Court's precedent. *Id.* at 619.

The right to carry handguns in public is inconsistent with precedent for two reasons. First, the "presumptively lawful," "longstanding prohibitions" on the possession of firearms identified in *Heller* practically eliminate any claim to a right to publicly carry handguns. *Id.* at 626–27 & n.26. Under *Heller*, Maryland may, for example, forbid handguns in schools. *Id.* at 626. That prohibition likely extends to the school's playgrounds, parking lots, and other property. And if a State may ban handguns on school grounds, it can ban them within some distance of the school as well. *Cf.* 18 U.S.C. § 922(q)(2)(A) (2006). *Heller* also declared Maryland can prohibit handguns from government buildings. *Heller*, 554 U.S. at 626. The list now includes courthouses, post offices, libraries, and public universities among others. *Heller* was also satisfied with bans on handguns in "sensitive places." *Id.* This likely includes

places of worship, *see e.g.*, *GeorgiaCarry.Org v. Georgia*, 687 F.3d 1244 (11th Cir. 2011), and any place where alcohol is sold, *see Moore v. Madigan*, 702 F.3d 933, 948 (7th Cir. 2012) (Williams, J., dissenting). The consequent patchwork of handgun prohibitions functionally eliminates any meaningful right to self-defense in public places. Maryland already has the authority to *de facto* prohibit handguns in public. Placing the right to publicly carry handguns beyond the scope of the Second Amendment is a far easier way to reach *Heller*'s endgame than building the law through litigation on each regulation on public carriage.

Second, this Court's explicit statements of law foreclose the possibility of a right to carry handguns in public. In *Heller*, the Court explained "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." *Heller*, 554 U.S. at 626. Over one hundred years previously, the *Robertson* Court declared "the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons." *Robertson*, 165 U.S. at 281–82.

This Court's language is crystal clear: state and local prohibitions on carrying concealed weapons do not infringe the Second Amendment. Unless Petitioners are asking this Court to overrule century-old precedent that was recently reaffirmed, the sole question remaining for Petitioners is whether the Amendment protects the right to *openly* carry handguns. Not only has Petitioner failed to challenge Section 4-203 on these grounds—Williams, after all, initially tried to hide his handgun from the Maryland Officers (R. at 10–11.) —the Second Amendment cannot possibly

support a bifurcated reading that includes openly carrying handguns but ignores concealed carry.

The only sensible interpretation of the Second Amendment places both open and concealed carry beyond the scope of the right to bear arms. Notably, a bifurcated approach ignores reality. To align with precedent, such an approach would protect the antiquated right to openly carry firearms, but allow prohibitions on concealed carry, which is "the most common way in which people exercise their right to bear arms," Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 Stan. L. Rev. 1, 45 (2012) (quotation omitted). The American appetite for concealed carry makes eminent sense: "[O]penly carrying a firearm might plausibly be thought to violate the ancient common law prohibition against 'terrifying the good people of the land' by going about with dangerous and unusual weapons." Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. Rev. 1343, 1361–62 (2009). Yet, because openly carrying handguns in public is not even common, let alone fundamental to American liberty, the Second Amendment cannot include the right to openly carry handguns. *See McDonald*, 130 S. Ct. at 3036.

Moreover, parsing the Second Amendment for increasingly fine-grained distinctions will wreak needless havoc on elected officials attempting to curb waves of gun violence in their States and cities. On the basis of this Court's clear holdings from the late nineteenth century through the early twenty-first, elected officials have carefully crafted gun control laws that account for the predominance of concealed carry, as well as social disapproval for openly carrying firearms. Given

the grave public safety concerns at the heart of Section 4-203, there is no justification for interfering with these efforts. At the very least, Petitioners face an extraordinarily high burden to prove the right to carry handguns, openly or otherwise, is so central to the Second Amendment that the Nation's preferred system of gun control deserves to be flipped on its head by the judiciary.

D. Section 4-203 Does Not Infringe a Right Within the Scope of the Second Amendment.

Maryland's general prohibition on carrying handguns in public places does not infringe the right to bear arms codified in the Second Amendment. As demonstrated by the Amendment's text, history, and accompanying precedent, the right to bear arms forbids States from disarming the people. In many ways, handguns are fundamental to personal security, such as self-defense in the home. But the same security concerns do not justify carrying handguns in public. The Second Amendment wisely codified a right to bear arms subject to the well-recognized exception that Maryland may regulate public carriage of handguns.

Section 4-203 does not disarm Maryland citizens and it respects their interest in personal security. *See* Md. Code Ann., Crim. Law § 4-203(a) (2002). The law is nothing like the absolute prohibitions struck down in *Heller* and *McDonald*. Exceptions exist for possessing and using a handgun in one's home or place of business. *Id.* §§ 4-203(b)(6)–(7). Maryland allows citizens to hunt and practice shooting. *Id.* §§ 4-203(b)(4)–(5). The permit system even allows citizens who demonstrate a real need for self-defense to carry handguns in public. *Id.* § 4-203(b)(2). Section 4-203 embodies a delicate balance between public and private

interests that Maryland has been developing for over a century. The text, history, and precedent of the Second Amendment fail to demonstrate Maryland ran afoul of any venerable right to bear arms when doing so.

II. SECTION 4-203 SHOULD SURVIVE CONSTITUTIONAL SCRUTINY BECAUSE THE LAW IS SUBSTANTIALLY RELATED TO ACHIEVING COMPELLING GOVERNMENT INTERESTS.

If Section 4-203 burdens some right protected by the Second Amendment, it still passes constitutional muster. *Heller* repeatedly emphasized that the "core" of the Second Amendment is the right to possess and use handguns in the home for self-defense. *Heller*, 554 U.S. at 634. Unlike the laws struck down in *Heller* and *McDonald*, Section 4-203 operates at the margins of the right to bear arms. It regulates the carriage of handguns in public, where the intersection of personal security interests and the State's obligation to public safety is far more complex than in the home.

This Court should demonstrate proper deference to Maryland's institutional competence to regulate handguns beyond the home. To do so, it should only subject Section 4-203 to intermediate scrutiny. Though some form of heightened scrutiny is required to analyze the right to bear arms, strict scrutiny is wholly inappropriate. The right to carry handguns in public is not a core Second Amendment right and the Maryland General Assembly is owed substantial deference in the context of firearms regulation. Under intermediate scrutiny, Section 4-203 is not an unconstitutional burden on the right to bear arms. Rather, it undeniably "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

A. Section 4-203 Should Be Analyzed With Intermediate Scrutiny Because It Does Not Burden A Core Second Amendment Right.

Section 4-203 does not burden the "core" right protected by the Second Amendment: the right to keep and bear arms in the home for self-defense. *Heller*, 554 U.S. at 634. Though *Heller* requires some heightened scrutiny for laws that burden the Second Amendment, strict scrutiny should not apply here. Maryland's law requiring a permit to carry a handgun in public, which operates at the margins of the right to bear arms, should be subject to intermediate scrutiny. Under intermediate scrutiny, Section 4-203 does not offend the Second Amendment so long as it is substantially related to achieving an important government interest.

Assuming Section 4-203 intrudes on the Second Amendment, *Heller* made clear that some form of heightened scrutiny is appropriate. *Id.* at 629 n.7. Rational basis review was ruled out because it "would be redundant with the separate constitutional prohibition on irrational laws." *Id.* But *Heller* did not have an opportunity to decide what kind of heightened scrutiny should govern the Second Amendment. As the Court explained, "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban," *id.* at 629, which would be unconstitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights," *id.* at 628. The *McDonald* Court imported this logic to strike down a Chicago law that prohibited handguns in the home. *McDonald*, 130 S. Ct. at 3050. The scathing language from those opinions suggests that no governmental interest is compelling enough to justify an absolute bans on handguns in the home, a kind of review resembling strict scrutiny.

The Maryland regulatory scheme is nothing like the extreme laws at issue in *Heller* and *McDonald*. Section 4-203 does not intrude on the home. Md. Code Ann., Crim. Law § 4-203(b)(7) (2002). Consequently, it does not infringe on the "core" Second Amendment "right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 634–35. While Section 4-203 does not permit anyone to carry a handgun whenever and wherever they would like, it is tame compared to the prohibitions at issue in *Heller* and *McDonald*. By limiting itself to the margins of the Second Amendment, Maryland's handgun regulations should be subject to lesser scrutiny than those laws.

The difference between the core of the Second Amendment and its margins is decisive for the scrutiny analysis. *Cf. Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001) ("The first step . . . is to identify with some precision the scope of the constitutional right at issue."). Home is "where the need for defense of self, family, and property is most acute." *Heller*, 554 U.S. at 628. In contrast, the State is expected to provide public safety, and thus personal security, in public places. This basic distinction between personal security and public safety explains why Maryland may not ban handguns in the home, but retains the option to categorically ban firearms in certain public places. *Id.* at 626–27 & n.26.

The special character of the home is a regular feature of individual rights jurisprudence. For example, the broad power of the State to regulate obscenity "simply does not extend to mere possession by the individual in the privacy of his own home." *Stanley v. Georgia*, 394 U.S. 557, 568 (1969). This Court has also

emphasized that State efforts to regulate private sexual conduct between consenting adults is particularly suspect in the home because "[i]n our tradition the state is not omnipresent in the home." *Lawrence v. Texas*, 539 U.S. 558, 562 (2003). And this Court's Fourth Amendment cases demonstrate the home is "held safe from prying government eyes." *Kyllo v. United States*, 553 U.S. 27, 37 (2001). The right to privacy itself is closely connected to "the sanctity of man's home and the privacies of life." *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

Moreover, regulation of the right to keep and bear arms "has always been more robust than of other enumerated rights." *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 100 (2d Cir. 2012). The First Amendment does not allow States to stop felons or the mentally ill from speaking on particular topics or exercising religious freedom. *Cf. Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (invalidating state law requiring profits from books authored by criminals be distributed to crime victims). Nor does it allow States to completely prohibit speech in public schools. *Tinker v. Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503, 506 (1969). The same cannot be said for the Second Amendment. *See Heller*, 554 U.S. at 627 n.26 (identifying laws banning possession of handguns by felons or the mentally ill, or in public schools as "presumptively lawful").

Given the incredible variability of legitimate regulations of the right to bear arms in public, intermediate scrutiny is the only logical type of review for Maryland's law. Forcing strict scrutiny upon any law that burdens an interest intersecting with the Second Amendment would deny State policymakers "a variety

of tools for combating the problem" of handgun violence. *Id.* at 636. Strict scrutiny might be appropriate for laws infringing the core of the Second Amendment, but not for laws regulating carrying guns in public. Indeed, this differential approach has dominated the federal Courts of Appeals.[1]

Application of intermediate scrutiny to protect non-core rights is consistent with judicial experience analyzing other enumerated rights. First Amendment scrutiny is paradigmatic. Under the First Amendment, content-based restrictions on noncommercial speech are subject to strict scrutiny. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000). But regulations on commercial speech are only examined with intermediate scrutiny. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995) ("We have always been careful to distinguish commercial speech from speech at the First Amendment's core."); *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989) (applying intermediate scrutiny to

[1] *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 93–94 (2d Cir. 2012) (applying intermediate scrutiny to New York's "proper cause" requirement for permits to carry handguns outside the home); *Heller v. District of Columbia*, 670 F.3d 1244, 1261–64 (D.C. Cir. 2011) (applying intermediate scrutiny to prohibition on possession of magazines with a capacity of more than ten rounds of ammunition); *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (applying intermediate scrutiny to 18 U.S.C. § 922(g)(9), which prohibits the possession of firearms by a person convicted of a misdemeanor crime of domestic violence); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (applying intermediate scrutiny to 36 C.F.R. § 2.4(b), which prohibits "carrying or possessing a loaded weapon in a motor vehicle" within national park areas); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (applying intermediate scrutiny to 18 U.S.C. § 922(k), which prohibits the possession of firearms with obliterated serial numbers); *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010) (applying intermediate scrutiny to 18 U.S.C. § 922(g)(8), which prohibits possession of firearms while subject to a domestic protection order; *United States v. Skoien*, 614 F.3d 638, 641–42 (7th Cir. 2010) (applying form of intermediate scrutiny to 18 U.S.C. §922(g)(9)).

commercial speech because of its "subordinate position in the scale of First Amendment values"); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (applying intermediate scrutiny to content-neutral time, place, and manner restrictions on speech).

B. Section 4-203 Satisfies Intermediate Scrutiny Because It Effectively Promotes Maryland's Compelling Interests in Public Safety and Crime Prevention.

Like intermediate scrutiny of restrictions on noncommercial speech, Section 4-203 should survive Petitioner's Second Amendment challenge if the law is substantially related to achievement of an important government interest. *See Ward*, 491 U.S. at 798–800. Unlike strict scrutiny, which requires a "compelling" State interest and a "narrowly tailored" regulation, intermediate scrutiny provides Maryland some flexibility. *See Playboy Entm't Grp., Inc.*, 529 U.S. at 813. Most notably—because Maryland's interest in public safety is not only "important," but undeniably "compelling"—intermediate scrutiny "is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799. A court may not render Maryland's law invalid simply because some alternative seems less restrictive to the court. *Id.* at 800. "The validity of such regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests." *United States v. Albertini*, 472 U.S. 675, 689 (1985).

There is no question that Maryland's interests in public safety and crime prevention are substantial and compelling. *See e.g.*, *Schenck v. Pro Choice Network*,

519 U.S. 357, 376 (1997) (describing the "significant governmental interest in public safety"); *Schall v. Martin*, 467 U.S. 253, 264 (1984) ("The 'legitimate and compelling' state interest in protecting the community from crime cannot be doubted.") (citations omitted); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 300 (1981) ("Protection of the health and safety of the public is a paramount governmental interest . . . ."). *Cf. United States v. Salerno*, 481 U.S. 739, 745 (1987) (commenting on "Federal Government's compelling interests in public safety"). The only remaining issue is whether Section 4-203 is substantially related to ensuring publicly safety or preventing crime.

During this assessment, "substantial deference to the predictive judgments of [the legislature]" is warranted. *Turner Broad Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997). This Court has long granted deference to legislative findings on matters beyond court competence. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 330–31 n.12 (1985) (Legislative "findings are of course entitled to a great deal of deference, inasmuch as [the legislature] is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue."). In the arena of firearm regulation, the legislature is "far better equipped than the judiciary" to make value-laden judgments necessary to combat the risks of public handgun violence. *Turner Broad Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994).

To guarantee proper deference to legislative bodies, the role of the courts applying intermediate scrutiny is "to assure that, in formulating its judgments, [Maryland] has drawn reasonable inferences based on substantial evidence." *Id.* at

666. Section 4-203 does not have to be this Court's perfect solution to handgun violence. Rather, "[p]roper respect for a coordinate branch of government requires that we strike down [legislation] only if the lack of constitutional authority to pass [the] act in question is clearly demonstrated." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2579 (2012) (citations omitted).

In passing Section 4-203, Maryland made the eminently reasonable decision that regulating handgun possession in public would promote public safety and prevent crime. The State first decided to generally prohibit carrying handguns, whether openly or concealed, over four decades ago. The General Assembly decided "that if a citizen is apprehensive of impending danger, his recourse is not to immediately arm himself, but instead seek help from the State—by applying for a permit to carry a gun or, of course, by contacting the police for protection." *State v. Crawford*, 521 A.2d 1193, 1199 (Md. 1987). Maryland is not alone: forty-eight States require citizens to acquire a permit to carry handguns in public. *See* U.S. Government Accountability Office, *Gun Control: States' Laws and Requirements for Concealed Carry Permit Vary Across Nation* 3 n.7 (2012), http://www.gao.gov/assets/600/592552.pdf. Only one state, Vermont, allows citizens to carry handguns without a permit. *Id.*

Though the law substantially protects public safety, it does not overburden the right to bear arms in the name of that compelling government interest. Maryland has not banned handgun possession. Indeed, "[i]t is clear that [Section 4-203] is designed to discourage and punish the possession of handguns on the streets

and public ways." *Crawford*, 521 A.2d at 1199. Citizens can keep and bear handguns in their home or business, or in public for law enforcement, hunting, or target practice. *See generally* Md. Code Ann., Crim. Law § 4-203(b) (2002). Maryland even allows citizens to carry handguns in public so long as they first acquire a permit from the State. *Id.* § 4-203(b)(2); Md. Code Ann., Pub. Safety §§ 5-301–5-314 (2003). Maryland decided that the best answer to rising handgun violence was to reduce the number of handguns in public places by restricting carriage to citizens who have a "good and substantial reason" for doing so. Crim. Law § 4-203(b)(2).

Maryland's decision to generally prohibit citizens from carrying handguns is certainly subject to criticism. Some studies cast doubt on the effectiveness of permitting schemes like that established in Maryland. *See e.g.*, Mark V. Tushnet, *Out of Range: Why the Constitution Can't End the Battle Over Guns* 110–11 (2007). Violent crime can happen at any time, no matter what public safety measures Maryland implements. One court has accused Section 4-203 of doing "no more to combat [threats to public safety] than would a law indiscriminately limiting the issuance of a permit to every tenth applicant." *Woollard v. Sheridan*, 863 F. Supp. 2d 462, 474 (D. Md. 2012). But none of these concerns comes close to justifying judicial intervention to strike down Section 4-203.

The weight of social scientific evidence demonstrates that widespread access to handguns in public increases likelihood that felonies result in death and fundamentally alter the nature of public spaces. *See e.g.*, Franklin E. Zimring, *Firearms, Violence, and the Potential Impact of Firearms Control*, 32 J. L. Med. &

Ethics 34 (2004) (collecting studies that show guns are roughly five times more deadly than knives when used as an attack weapon). When handguns make their way into public places, the risk of injury or death extends to any citizen who happens to be in the vicinity. *Cf.* David Hemenway & Deborah Azrael, *The Relative Frequency of Offensive and Defensive Gun Uses: Results from a National Survey*, 15 Violence & Victims 257, 271 (2000) (noting that guns are used "far more often to kill and wound innocent victims than to kill and wound criminals"). While violent crime may happen in public without warning, Maryland reasonably decided this risk did not outweigh the threat to public safety posed by allowing citizens to unconditionally carry handguns in public. Even if the question were close, it is not the Court's duty to weigh the conflicting evidence according to its own policy values. That responsibility lies with the Maryland General Assembly.

Section 4-203 is exceedingly similar to New York's laws regulating handguns in public recently upheld by the Second Circuit. *See Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012) In New York, citizens are required to demonstrate "proper cause" to State officials before receiving a permit to carry handguns in public. *Id.* at 86. To establish proper cause, applicants "must demonstrate a special need for self-defense distinguishable from that of the general community or of persons engaged in the same profession." *Id.* (citations omitted). Plaintiffs brought suit after their permit applications were denied, alleging the proper cause requirement unconstitutionally burdened the right to bear arms. *Id.* at 88. The Second Circuit was unconvinced. Employing intermediate scrutiny, the

court decided the New York law was "*substantially related* to the state's important public safety interest." *Id.* at 98.

Like the New York proper cause requirement, Section 4-203 significantly furthers Maryland's compelling interest in public safety. Maryland does not absolutely forbid handguns in public, but it also does not allow anyone to carry handguns in public at any time. Instead, Maryland "took a more moderate approach . . . [and] reasonably concluded that only individuals having a bona fide reason to possess handguns should be allowed to introduce them in the public sphere." *Id.* at 98–99. This approach does not amount to an indiscriminate attempt to limit the public carriage of handguns. *See Woollard*, 863 F. Supp. 2d at 474. Maryland tried to accommodate various self-defense interests when it passed Section 4-203 and included a permitting system.

Maryland undoubtedly made a reasonable decision to implement Section 4-203 to address its concerns with public handgun violence. The State would not be able to achieve public safety as "effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). Even though this Court may view other options as less restrictive on the right to bear arms, Maryland's law survives scrutiny. "[U]nder our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). The power to pass judgment sits with the Maryland General Assembly, and its judgment was more than reasonable.

C. Section 4-203 Is Narrowly Tailored To Achieve Maryland's Compelling Interests and Should Survive Strict Scrutiny.

Though intermediate scrutiny is most appropriate to analyze Section 4-203, Maryland's handgun regulations would also survive strict scrutiny. Because Maryland's interests in providing public safety and preventing crime are compelling, and thus pass the first test of strict scrutiny, the sole question for Petitioner is whether Section 4-203 is "narrowly tailored" to achieve those interests. *Ward*, 491 U.S. at 798. To be narrowly tailored, Maryland's law must be the "least restrictive or least intrusive means" of serving the State's compelling interests. *Id.*

Under strict scrutiny, the burden is on Petitioners to prove "a less restrictive alternative is readily available." *Boos v. Barry*, 485 U.S. 312, 329 (1988). But it is unclear what other means would be less intrusive on the right to carry handguns in public. Perhaps Maryland could not regulate citizens carrying handguns in public at all, though that stance would entirely abdicate the State's obligation to guarantee public safety and contradict *Heller*'s assurance that some categorical prohibitions are "presumptively lawful." *Heller*, 554 U.S. at 626–627 & n.26. And perhaps Maryland could limit its regulations to the longstanding prohibitions identified by *Heller*, though the patchwork of resulting prohibitions on public handgun carriage would create more headaches for citizens than a single permitting scheme.

Regardless, none of these alternatives "is readily available." *Boos*, 482 U.S. at 329. Maryland has constructed its handgun regulation scheme with over a century of experience. Instead of enacting draconian measures, the State took seriously its citizens' interest in carrying handguns in public places. Section 4-203 does not

forbid handguns in public, it merely requires a permit. Md. Code Ann., Crim. Law § 4-203(b)(2) (2002). Petitioners cannot offer any realistic alternative to this regulatory scheme. Maryland's delicate accommodation of personal and public interests in security should thus survive the strictest scrutiny.

CONCLUSION

Petitioners have failed to demonstrate that the right to carry handguns in public is a fundamental right codified in the Second Amendment or that Section 4-203 impermissibly burdens the right to bear arms by requiring a permit to publicly carry handguns. Accordingly, Respondents ask this Court to affirm the Court of Appeals of Maryland decision upholding Petitioner's conviction for unlawfully carrying a handgun in public.

Dated: February 11, 2013

Respectfully submitted,

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NATHANIEL P. JOHNSON
Counsel for Respondents