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 PETITIONER

MICA D. SIMPSON
Attorney
Counsel of Record for Petitioner

University of California, Berkeley
School of Law
Berkeley, CA 94720
micasimpson@berkeley.edu
(206) 915-6082

QUESTION PRESENTED

Whether the peaceable carrying of a handgun outside the home by a law-abiding citizen is protected by the Second Amendment to the United States Constitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Legislation

Other Authorities

STATEMENT OF THE CASE

I. Factual Background

On August 15 of 2007, Petitioner Charles F. Williams, Jr. ("Mr. Williams" or "Petitioner"), an ordinary, law-abiding citizen of the State of Maryland, successfully completed the Maryland State Police application to purchase a handgun. (R. at 11). With the requisite training certificate in hand, Mr. Williams purchased a Glock handgun from the family-owned and operated Realco Gun Shop in Forestville, Maryland. (R. at 11). Because Mr. Williams believed that Maryland's statutory scheme made applying for a Handgun Carry Permit a fruitless endeavor for the ordinary citizen, he purchased the handgun without applying for a permit. (R. at 15). Mr. Williams purchased the handgun for personal protection. (R. at 11).

Several weeks later, Mr. Williams stored his handgun at the home of his girlfriend while he was at work. (R. at 11). At the end of Mr. Williams' work day, he stopped at his girlfriend's home to pick up the handgun. (R. at 11). During his commute home, Mr. Williams used the extra time he had while waiting at a bus stop to organize the belongings in his backpack. (R. at 10). While he was doing so, he placed his handgun in the brush. (R. at 10).

Police Officer Molake with the Prince George's County Police Department witnessed Mr. Williams place something in the brush, and approached him to inquire as to what he was doing. (R. at 10). After a brief exchange, Mr. Williams informed Officer Molake that what he had placed beside him was his handgun. (R. at 10). Officer Molake then recovered the handgun and attached magazine. (R. at

11). Mr. Williams readily gave a written statement admitting to possession of the handgun. (R. at 11). He was taken into custody immediately. (R. at 11).

Mr. Williams was found guilty in the Maryland Circuit Court, Prince George's County, of "wearing, carrying, or transporting" a handgun in violation of Section 4-203(a)(1)(i) of Maryland's Criminal Law Articles. (R. at 11). He was sentenced to a total of three years incarceration, with two years suspended. (R. at 11).

Mr. Williams appealed his conviction to the Maryland Court of Special Appeals, claiming that the handgun prohibition in Section 4-203 infringed upon his Second Amendment right to keep and bear arms. (R. at 7). The Court of Special Appeals affirmed Mr. Williams' conviction, determining that the Second Amendment is not applicable to the States, and that, were the Second Amendment to apply to Maryland, it would not invalidate Section 4-203, because Section 4-203(b)(6) expressly permits wearing, carrying, or transporting a handgun in one's residence.[1] (R. at 12).

Mr. Williams filed a petition for a writ of certiorari in the Court of Appeals of Maryland, which the court granted. (R. at 7). The Court of Appeals again affirmed Mr. Williams' conviction, holding that Section 4-203(a)(1)(i) was outside the scope of the Second Amendment and that, regardless, Mr. Williams lacked standing to

[1] The decisions in the Circuit Court and the Court of Special Appeals were rendered prior to this Court's decision in *McDonald v. City of Chicago*,130 S.Ct. 3020 (2010), which made the Second Amendment applicable to the States via the Fourteenth Amendment.

challenge the constitutionality of the statute due to the fact that he failed to file an application for a handgun permit in advance of purchasing his handgun. (R. at 7). In reaching its holding, the Court of Appeals interpreted this Court's holdings in *Heller* and *McDonald* as applying solely to bans upon the possession of firearms within the four walls of the home, and, by implication, found that the exemption in Section 4-203 allowing for home possession took the ban outside the scope of the Second Amendment. (R. at 23-24).

This Court granted a writ of certiorari to address the sole issue of whether peaceably carrying or transporting a registered handgun outside the home is outside the scope of the "right of the people to keep and bear arms" protected by the Second Amendment. (R. at 3).

II. Legal Background: *Heller* and *McDonald*

The Second Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. Until recently, most courts and scholars were of the opinion that the Second Amendment does not guarantee a personal right to bear arms to individuals, but, rather, "establishes only a collective right, a right on the part of the states, to maintain well-regulated militias." *See* Richard A. Allen, *What Arms? A Textualist's View of the Second Amendment*, 18 GEO. MASON U. CIV. RTS. L.J. 191, 195 (2008) (collecting cases). Additionally, this Court has traditionally restricted the force of the Second Amendment by holding that it operates only as a limitation on the federal government, not the states. *See,*

e.g., United States v. Cruikshank, 92 U. S. 542 (1875); *Presser v. Illinois*, 116 U.S. 252 (1886); *Miller v. Texas*, 153 U.S. 535 (1894).

Two recent decisions of this Court, however, have liberalized the interpretation of the Second Amendment right of the people to keep and bear arms to affirm the extension of that right to individual citizens, non-collectively, for the purpose of self-defense. *See Dist. of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010).

In *District of Columbia v. Heller*, decided in 2008, a 5-4 majority of this Court held that the Second Amendment protects an individual's right to keep and bear arms for the purpose of self-defense. 554 U.S. at 635. The District of Columbia statutory scheme at issue in *Heller* effectively prohibited the possession of handguns by making it a crime to carry an unregistered firearm, and prohibiting outright the registration of handguns. *Id.* at 574-75. The Respondent in *Heller* challenged the above statute on Second Amendment grounds, seeking to enjoin the city from enforcing the ban on the registration of handguns insofar as it prohibited the use of "functional firearms within the home." *Id.* at 576.

The majority opinion in *Heller*, written by Justice Scalia and joined by Chief Justice Roberts and Justices Thomas, Kennedy, and Alito, struck down the ban, holding that the Second Amendment guarantees the individual right to keep and bear arms for the purpose of self-defense – a right that this Court recognized as being "the first law of nature." *Id.* at 606, 635. In reaching this holding, this Court reasoned that the plain text of the Second Amendment, historical tradition, as well

as the legislative history surrounding its ratification as part of the Bill of Rights, all indicated that the Framers intended the Second Amendment to codify the pre-existing right of the individual to bear arms for personal protection. *Id.* at 590-95.

This Court noted that, in regulating gun ownership, "the Constitution . . . necessarily takes certain policy choices off the table," despite the important considerations involved, such as the prevention of gun violence. *Id.* at 636. In the words of Justice Scalia, "it is not the role of this Court to pronounce the Second Amendment extinct." *Id.*

Despite resolving an elementary question of Second Amendment jurisprudence, *Heller* left many important questions on the table with respect to the nature and scope of the Second Amendment. Most importantly, courts addressing Second Amendment challenges to gun regulation after *Heller* were faced with the unanswered question of whether the Second Amendment is properly "incorporated" against the states through the Fourteenth Amendment's Due Process Clause. The invalidation of the District of Columbia's handgun ban in *Heller,* therefore, set the stage for this Court's second chief pronouncement upon Second Amendment liberties in *McDonald v. City of Chicago*. 130 S. Ct. at 3020.

In *McDonald*, decided in 2010, a four-justice plurality of this Court addressed a handgun ban similar to that at issue in *Heller*. 130 S. Ct. at 3026. The sole issue in the case was whether the individual right to keep and bear arms recognized by the Second Amendment was "incorporated" against state governments by the Fourteenth Amendment. *Id. McDonald* answered this question in the affirmative,

holding that the Second Amendment is fully incorporated to the states. *Id.* The plaintiffs in *McDonald* were residents of high-crime neighborhoods in the city of Chicago who desired to possess handguns for self-defense. *Id.* at 3026. The plaintiffs charged that the local ordinances at issue banning handgun possession violated both the Second and Fourteenth Amendments. *Id.* at 3027.

In assessing whether to incorporate the Second Amendment, the plurality inquired whether the Second Amendment guarantee "is fundamental to our scheme of ordered liberty and justice." *Id.* at 3034. A majority found that it was "clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." *Id.* at 3042. In so finding, *McDonald* relied upon, in addition to *Heller*, a host of historical sources including the English common law, post-Civil War Black Codes, and state constitutional guarantees of the right to bear arms, all establishing that "self-defense is a basic right" and that "the right to keep and bear arms was highly valued" for this purpose. *Id.* at 3036-3038. Accordingly, a majority of this Court agreed that the Second Amendment right to keep and bear arms for the purpose of self-defense is a fundamental constitutional right protected by the Fourteenth Amendment. *Id.* at 3050.

Heller and *McDonald* are this Court's sole modern substantive pronouncements on the Second Amendment.

SUMMARY OF THE ARGUMENT

The Second Amendment protects "the right of the people to keep and bear arms." U.S. Const. amend. II.

The plain text of the Second Amendment, coupled with this Court's broad interpretation of the Second Amendment in *Heller* and *McDonald*, establish that the right of the people to bear arms encompasses the carrying of a handgun outside the home by an ordinary, law-abiding citizen for the purpose of self-defense. As such, § 4-203 of the Maryland Criminal Law Article is within the scope of the Second Amendment.

The text of the Second Amendment explicitly and unambiguously guarantees the right of the people to "bear" arms, a term which this Court interpreted as meaning to "carry" arms in preparation for confrontation. Because this definition can only be logically interpreted as applying outside the home, it would do violence to the plain text of the Second Amendment to interpret the Amendment's protections as applying solely within the home. Likewise, nothing in the text of the Second Amendment restricts its ambit to the interior of the home, and it would transcend sound judicial discretion to read into the Second Amendment a limitation so transformative and elemental where the Framers did not so provide.

Moreover, the language and logic of this Court's opinions in *Heller* and *McDonald* further establish that the right to bear arms extends beyond the walls of the home. First, *McDonald* endorsed a broad conceptualization of *Heller*, one protecting the right of self-defense against both public and private violence. Second,

Heller unambiguously held that the Second Amendment encompasses the right of the ordinary citizen to use a weapon for hunting, an activity which, by its very nature, cannot occur within the home. Third, *Heller* and *McDonald* indirectly recognized the right to bear arms outside the home by discussing limitations upon that right. Finally, *Heller* and *McDonald* relied upon a series of historical sources that affirmed the open and public use of firearms, further establishing that Second Amendment protections extend beyond the home.

Together, the text of the Second Amendment, read in conjunction with *Heller* and *McDonald*, establishes that the right of the people to bear arms is not confined to the home, and, accordingly, that § 4-203 of the Maryland Criminal Law Article is within the scope of the Second Amendment.

The State's statutory scheme unconstitutionally restricts the Petitioner's exercise of his Second Amendment right to bear arms. Because *McDonald* recognized that the right to bear arms is a fundamental right, and because this Court has repeatedly indicated that the Second Amendment is entitled to protection comparable to other provisions of the Bill of Rights, the validity of § 4-203 should be subject to strict scrutiny. Even under intermediate review, however, § 4-203 fails to pass constitutional muster, as it is not substantially related to any important governmental objective. Specifically, in terms of to whom § 4-203 applies, to what types of firearms it applies, as well as to what geography it encompasses, § 4-203 is not substantially related to the State's legitimate governmental objectives in promoting public safety. Moreover, because the State requires an individual to

demonstrate a "good and substantial reason" for the issuance of a permit, the State effectively precludes the ordinary, law-abiding citizen from carrying a handgun outside the home. As such, the State's permitting scheme, in conjunction with the State's handgun ban in § 4-203, unlawfully burdens the Petitioner's Second Amendment rights.

Finally, the State's permitting scheme constitutes an unlawful prior restraint on the exercise of the Petitioner's fundamental right to bear arms due to the fact that, first, the permitting scheme allows permit decisions to be made on a wholly discretionary basis and, second, fails to set a reasonable time limit within which a final decision must be made by licensing officials as to whether an applicant has met the required criteria.

For the foregoing reasons, the Petitioner submits that the decision of the Court of Appeals should be reversed.

ARGUMENT

I. THE SECOND AMENDMENT PROTECTS THE PEACEABLE CARRYING OF A HANDGUN OUTSIDE THE HOME BY AN ORDINARY, LAW-ABIDING CITIZEN

The Second Amendment to the United States Constitution, ratified in 1791 as part of the Bill of Rights, guarantees "the right of the people to keep and bear arms." U.S. Const. amend. II. In addressing challenges raised to statutes infringing upon the right of the people to bear arms under the Second Amendment, courts have generally interpreted *Heller* as establishing a two-step inquiry. *See, e.g., United States v. Chester,* 628 F.3d 673, 680 (2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *Ezell v. City of Chicago*, 651 F.3d 684, 701 (7th Cir. 2011). First, the court inquires as to "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *Chester*, 628 F.3d at 680 (quoting *Marzzarella,* 614 F.3d at 89). In answering this question, courts consider "whether the conduct at issue was understood to be within the scope of the right at the time of ratification" of the Second Amendment. *Id.* If the court finds that the challenged law burdens conduct falling within the scope of the Second Amendment, then the court evaluates the law under the appropriate level of "means-end" scrutiny. *Id.*

Here, the plain text and history of the Second Amendment, coupled with this Court's interpretation of the Second Amendment in *Heller* and *McDonald*, establish that the Second Amendment encompasses the carrying of weapons outside the home

in self-defense. Accordingly, § 4-203 of the Maryland Criminal Law Article is within the scope of the Second Amendment. *See* Md. Code Ann., Crim. Law § 4-203; (A-1).

A. The Plain Text of the Second Amendment Protects the Right to Bear Arms Outside the Home for the Purpose of Self-Defense

The Second Amendment provides that "the right of the people to keep and bear arms, shall not be infringed." U.S. Const. amend. II. Inherent in the Second Amendment's literal language, particularly as it was historically understood at the time of the Amendment's ratification, is the fundamental right of the people to possess weapons for self-defense outside of the home. First, the Second Amendment explicitly vests the people with the right to "bear" arms, a phrase logically interpreted as the carrying of weapons in preparation for confrontation. Second, the Amendment's text does not cabin within the home the right of the people to bear arms, and it would transcend this Court's discretion to read into the Amendment such a limitation where the drafters of the Bill of Rights did not so provide.

i. Because to "Bear Arms" Means to "Carry" Them in Preparation for Confrontation, the Second Amendment Contemplates the Carrying of Weapons Outside the Home

The text of the Second Amendment explicitly and unambiguously guarantees the right of the people to "keep," *as well as* "bear" arms. U.S. Const. amend. II. This Court recognized in *Heller* that, at the time of the ratification of the Bill of Rights in 1791, the common law was well versed as to the meaning of these terms. 554 U.S. at 584. The term "keep arms" was equivalent to "having" or "possessing" arms, as one

would do within the home. *See id.* at 582 (citing William Blackstone, 4 Commentaries on the Laws of England 55 (1769).

With respect to the phrase "bear," by contrast, *Heller* concluded that the phrase to "bear arms" means to "carry" them "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." 554 U.S. at 584 (quoting Black's Law Dictionary 214 (6th ed.1998)). This definition is logically interpreted as applying outside the confines of the home. *See* Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (i): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 AM. U. L. REV. 585, 613 (2012) (stating that "it verges on the superfluous to note that this passage supports the interpretation that the Second Amendment protects a right to carry a handgun outside the home . . . the passage is essentially an announcement of that interpretation").

Specifically, the reference to the "carrying" of a weapon on an individual's person in preparation for confrontation with another implies the possession of that weapon in an environment outside of an individual's home, wherein one would be unlikely to "carry" a weapon. In other words, it would be illogical to read the Second Amendment as guaranteeing only the right to "carry" a weapon "in a pocket" within and around the home for the purpose of being "ready for offensive or defensive action . . . with another person," also located within the home. *See* Michael C. Dorf, *Does Heller Protect A Right to Carry Guns Outside the Home?*, 59 SYRACUSE L. REV. 225, 227 (2008) (noting that "it would be odd to attribute to the founding generation

the hidden intent to protect a right to carry weapons from place to place but only within the confines of their houses, from the drawing room to the parlor, say"). Such a reading would do violence to the literal text of the Second Amendment.

Moreover, the conjunctive "and" tying the twin interests "keep" and "bear" together indicates that the Framers intended that the people possess the right to do *something more* than keep or possess firearms within their home. Instead, under the plain language of the Second Amendment, as interpreted by this Court in *Heller*, the scope of the right to bear arms must extend beyond the home.

ii. The Second Amendment's Text Does Not Limit the Right of the People to Bear Arms to the Interior of the Home

Nothing in the text of the Second Amendment restricts its ambit to the space within the four walls of the home. It would transcend sound judicial discretion to read into the Second Amendment a limitation so transformative and elemental where the Framers did not so provide. *See Caminetti v. United States*, 242 U.S. 470, 485 (1917) (stating that "it is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms").

Where the Framers did intend for certain Bill of Rights provisions to apply solely to the home, they said so. The Third Amendment, for example, references the quartering of soldiers in "houses." U.S. Const. amend. III. Likewise, the Fourth Amendment protects the home from unreasonable searches and seizures. U.S. Const. amend. IV. The Second Amendment, by contrast, makes no reference to the

home – or any other region or place. U.S. Const. amend. II. This Court has repeatedly indicated that such statutory silence may be pregnant with meaning, especially when that silence stands in contrast with associated statutes where that silence is broken, as is the case here. *See, e.g., United States v. Bestfoods*, 524 U.S. 51, 62 (1998) ("against this venerable common-law backdrop, the congressional silence is audible"); *Meyer v. Holley*, 537 U.S. 280, 287 (2003) (contrasting statutory silence in one statute with explicit departures in other laws). Accordingly, that the Framers spelled out the scope of both the Third and Fourth Amendments, referencing the home in particular, but declined to do so with respect to the Second Amendment, indicates that the Framers did not intend the Second Amendment to be so limited. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (noting that "courts must presume that a legislature says . . . what it means and means . . . what it says").

Admittedly, this Court has carved out special protections for the home when addressing other provisions of the Bill of Rights, which do not specifically reference the home. *See, e.g., Stanley v. Georgia*, 394 U.S. 557, 571 (1969) (holding that even obscene materials not otherwise protected by the First Amendment may be viewed in one's home); *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (holding that right to privacy under Due Process Clause includes right to engage in consensual sexual activity within the home). Where this Court has so restricted the scope of these protections, however, it has done so where the right at issue is plainly injurious when exercised in public, yet benign when exercised in the privacy of the home. *See*

Dorf, 59 SYRACUSE L. REV. at 232-33 (reasoning that "obscenity and sexual activity lose their protected status in public because they cause harm in public - they offend the sensibilities of others, including minors - that they do not . . . in private).

The fundamental right to possess arms for the purpose of self-defense is not in accord with the above cases, however, as the core of the right to bear arms – the protection of self – is not itself injurious when exercised in public. Empirical research also indicates that the blanket restriction of the necessary corollary of the right to defend one's self outside the home – namely the possession of handguns – does not necessarily improve public safety. *See* Robert A. Hahn et al., *Firearms Laws and the Reduction of Violence: A Systematic Review*, 28 AM. J. PREVENTIVE MED. 40, 59 (2005) (finding that "based on findings from national law assessments, cross-national comparisons, and index studies, evidence is insufficient to determine whether the degree or intensity of firearms regulation is associated with decreased (or increased) violence"). Moreover, the exercise of the right of self-defense is not fundamentally different when exercised in public or within the home. *See* Dorf, 59 SYRACUSE L. REV. at 229 (explaining how "just as the Court in *Heller* conjures the image of the homeowner needing to reach for the handgun in her night table to stop [a] rapist, . . . we can readily imagine a future case conjuring up the late-shift worker walking home through a deserted alley").

Thus, it would exceed this Court's discretion to read into the text of the Second Amendment a limitation restricting the Amendment's reach to the home where such a reading would run in direct conflict with the Amendment's plain text

and where the Amendment's core right of self-defense is equally benign and necessary whether exercised in private or public. As such, the State's handgun ban in § 4-203 falls within the scope of the Second Amendment. *See* Md. Code Ann., Crim. Law § 4-203; (A-1).

B. The Language and Logic of *Heller* and *McDonald* Extend the Right to Bear Arms for Self-Defense Outside the Walls of the Home

In *Heller*, this Court recognized that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense in one's home. 554 U.S. at 636. While *Heller* addressed in its most narrow form the "core" of the Second Amendment – namely an individual's right to possess arms within the confines of the home – *Heller's* language and reasoning, coupled with *McDonald's* affirmation of *Heller's* broad recognition of the Second Amendment right to protect oneself against public and private violence, precludes unreasonable government interference with an individual's right to bear arms in general, including outside that individual's home. *Id.* As a result, § 4-203 falls within the scope of the Second Amendment. *See* Md. Code Ann., Crim. Law § 4-203; (A-1).

i. *McDonald* Affirmed *Heller's* Broad Recognition of the Second Amendment Right to Protect Oneself Against Public and Private Violence

In *Heller*, this Court found that the Second Amendment includes "the right to 'protect [oneself] against both *public* and private violence,' thus extending the right [to bear arms] in some form to wherever a person could become exposed to public or private violence," or, in other words, beyond the home. *See United States v.*

Masciandaro, 638 F.3d 458, 467 (4th Cir.2011) (Niemeyer, J., concurring) (quoting *Heller,* 554 U.S. at 594) (emphasis added).

Such an understanding flows logically from the fact that "self-defense has to take place wherever a person happens to be." 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). With respect to many crimes, in fact, the need for self-defense is greater *outside* the home. *See id.* at 1518 (stating that "two-thirds of all rapes and sexual assaults, for instance, happen outside the victim's home . . . the percentages are even greater for robberies and assaults"). In keeping with this most basic understanding of the nature of self-defense, the common law does not restrict the right of self-defense in criminal and civil cases within the boundaries of the home. *See generally* Model Penal Code § 3.04 (Use of Force in Self-Protection); Restatement (Second) of Torts § 65 (1965) (Self-Defense By Force Threatening Death Or Serious Bodily Harm). To do so would run counter to what this Court called "the first law of nature." 554 U.S. at 606.

In *McDonald*, this Court affirmed a broad interpretation of the right to bear arms as recognized in *Heller*. Specifically, this Court stated that "[in *Heller*], we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense." 130 S. Ct. at 3026. *McDonald* did not qualify or cabin *Heller* in any respect. To the contrary, *McDonald* re-affirmed *Heller's* reliance upon a host of historical sources conceptualizing the right to bear arms as extending to the public sphere. *See id.* at 3036-43. In this respect, *McDonald* in fact expanded

upon *Heller's* foundations. *See id.* at 3042 (citing, for example, founding-era state constitutions, of which some recognize a public right to bear arms). That *McDonald* reaffirmed *Heller's* broad conception of the right to bear arms for self-defense as extending into the public sphere further establishes that § 4-203 falls within the purview of the Second Amendment. *See* Md. Code Ann., Crim. Law § 4-203; (A-1).

ii. *Heller* Held That the Second Amendment Encompasses the Right of the Ordinary Citizen to Use a Weapon for Hunting, an Activity Which, By Nature, Cannot Occur Within the Home

In *Heller*, this Court framed the inquiry it addressed as follows:

> The Second Amendment plainly does not protect the right to use a gun to rob a bank; it is equally clear that it *does* encompass the right to use weapons for certain military purposes. Whether it also protects the right to possess and use guns for nonmilitary purposes *like hunting and personal self-defense* is the question presented by this case. The text of the Amendment, its history, and our decision in *United States v. Miller . . .* provide a clear answer to that question. *Heller*, 554 U.S. at 636-37 (emphasis added).

As this Court responded to the above inquiry in the affirmative, *Heller's* holding plainly encompasses the use of firearms for hunting, an activity which, by its very nature, cannot occur inside the home. *Id.* In addition to the above passage, *Heller's* repeated reference to the carrying of weapons for hunting purposes makes abundantly clear the fact that this Court understood the Second Amendment as including hunting rights. *See id.* at 599 (stating that "the prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right . . . Americans most undoubtedly thought it even more important for self-defense and hunting"); *see also* Dorf, 59 SYRACUSE L. REV. at 227 (stating that

"it is hard to imagine that . . . Justice Scalia imagined the frontiersman encountering 'the beast of the forest' . . . only in his home"). The Third Circuit recognized the above in dicta in *Marzzarella*, stating that "certainly, to some degree, [the Second Amendment] must protect the right of law-abiding citizens to possess firearms for other, as-yet-undefined, lawful purposes," and referencing hunting and militia activities. *Marzzarella*, 614 F.3d at 92. Therefore, this Court's most basic holding in *Heller* establishes that the carrying of weapons outside the home is protected by the Second Amendment and that, accordingly, § 4-203 is within its scope. *See* Md. Code Ann., Crim. Law § 4-203; (A-2).

iii. *Heller* and *McDonald* Indirectly Recognized the Right to Bear Arms Outside the Home by Cabining That Right

In *Heller*, this Court explicitly recognized "longstanding prohibitions" on the possession of firearms in "sensitive places" outside of the home such as schools and government buildings. 554 U.S. at 626. In recognizing these prohibitions, *Heller* presupposed that the Second Amendment extended beyond the home. *Id.* In other words, if the Amendment afforded no right to the public possession of firearms, there would be no need for *Heller* to delineate certain qualifications and limitations upon that right. *See* Dorf, 59 SYRACUSE L. REV. at 228 (recognizing that "if it were possible for government to ban all firearms possession outside the home, there would be little point in singling out 'sensitive places'"). This Court's assertion that the list of permissible regulations it offered was not intended to be exhaustive by no means indicates that this Court viewed a total ban upon the carrying of handguns,

as is the case here, lawful. *Heller*, 554 U.S. at 627. Instead, it is more likely that "Justice Scalia meant to leave open the possibility that additional public places – such as airports – could be deemed sensitive." Dorf, 59 SYRACUSE L. REV. at 228.

Moreover, this Court's own description of its holding in *Heller* implies that the right to bear arms extends beyond the home. *See* 554 U.S. at 628. Specifically, this Court stated that its holding applies to the home, where the need "for defense of self, family, and property is *most acute*." *Id.* (emphasis added). In so stating, this Court suggested that "some form of the right applies where that need is not '*most acute*.'" *Masciandaro*, 638 F.3d at 468 (Niemeyer, J., concurring). This same proposition finds ample support in *McDonald*, wherein this Court characterized *Heller* as holding that "the Second Amendment protects a personal right to keep and bear arms for lawful purposes, *most notably* for self-defense within the home." 130 S. Ct. at 3044 (emphasis added).

While *Heller* did emphasize the primacy of the right to bear arms in defense of the home, in doing so it by no means excluded the realm outside the home from any protection whatsoever. *See* 554 U.S. at 628. In fact, the functional advantages of the use of handguns that this Court relied upon and validated in *Heller* apply with equal force outside the home. *See* O'Shea, 61 AM. U. L. REV. at 614.

Accordingly, *Heller's* discussion of limitations upon the Second Amendment right to bear arms further establishes that § 4-203 falls within the scope of the Second Amendment. *See* Md. Code Ann., Crim. Law § 4-203; (A-1).

iv. The Historical Sources Relied Upon by *Heller* and *McDonald* Recognized and Valued the Right of the Individual to Bear Arms Outside the Home

In reaching its holding in *Heller*, this Court relied upon a series of historical sources affirming the open and public use of firearms.

For example, in discussing the Second Amendment's guarantee of the right to possess firearms for the purpose of self defense, *Heller* relied upon multiple cases which had struck down bans on carrying pistols openly. *See* 554 U.S. at 611-15. These cases include, for example, *Nunn v. State*, 1 Ga. 243, 251 (1846), wherein the Georgia Supreme Court construed the Second Amendment as protecting the "natural right of self-defense" and therefore struck down a ban on carrying pistols openly, and *State v. Chandler*, 5 La. Ann. 489, 490 (1850), wherein the Louisiana Supreme Court likewise held that citizens had a right to carry arms outside of the home. *Id.* at 612-13. In addition, *Heller* cited the case of *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822), where the Kentucky Court of Appeals held unconstitutional a statute prohibiting the concealed carry of weapons on the ground that it violated the right of the people to bear arms. *Id.* at 585. The Kentucky court understood the right to bear arms as encompassing the right to "wear" a weapon outside the home in preparation for confrontation. *Id.* That a majority of courts interpreting state constitutional guarantees of the right to bear arms prior to the Second Amendment concluded that citizens were constitutionally entitled to carry weapons outside the home, and that *Heller* cited these cases with approval, further establishes that

Heller understood the right to bear arms as extending beyond the home. *See* O'Shea, 61 AM. U. L. REV. at 623 (collecting cases).

Likewise, *Heller* sought guidance from influential constitutional commentators of the Antebellum period, all of whom viewed the right to bear arms as encompassing the right to self-defense beyond the home. *See* 554 U.S. at 593-96 (citing commentary of St. George Tucker, William Rawle, and Joseph Story). The commentary of St. George Tucker, author of the American edition of Blackstone's Commentaries on the Law of England, which this Court cited with approval, is illustrative. *Id.* at 595. St. George Tucker "viewed the American right to arms as an individual right importantly concerned with self-defense, and one that encompassed the public carrying of firearms." O'Shea, 61 AM. U. L. REV. at 637 (citing William Blackstone, 1 Commentaries on the Laws of England 300 (St. George Tucker, ed., Philadelphia 1803)).

Thus, *Heller's* reliance upon these and other sources forming the Second Amendment's historical tradition makes abundantly clear that *Heller* understood the right to keep and bear arms as encompassing the right to self-defense outside the home, and, accordingly, that § 4-203 is within the scope of the Second Amendment. *See* Md. Code Ann., Crim. Law § 4-203; (A-1).

II. THE STATE'S STATUTORY SCHEME UNCONSTITUTIONALLY RESTRICTS THE PETITIONER'S RIGHT TO BEAR ARMS

Because § 4-203 of the Maryland Criminal Law Article touches upon the Petitioner's fundamental right to bear arms, this Court must evaluate the statute

under the appropriate level of means-end scrutiny. The Petitioner submits that the validity of § 4-203 should be subject to strict scrutiny because, first, this Court recognized in *McDonald* that the right to bear arms is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment, and, second, this Court repeatedly indicated in both *Heller* and *McDonald* that the Second Amendment is entitled to comparable protection to other provisions of the Bill of Rights, in particular the First Amendment. Even under the lesser standard of intermediate review, however, § 4-203 fails to pass constitutional muster, as it is not substantially related to any important governmental objective. As such, the decision of the Maryland Court of Appeals must be reversed.

A. Laws Restricting the Fundamental Right of the People to Bear Arms Should be Subject to Strict Scrutiny

In both *Heller* and *McDonald* this Court left open the level of scrutiny applicable to review a law that burdens the right of the people to bear arms under the Second Amendment. *See Heller*, 554 U.S. at 634-36 (discussing the dissent's criticism that the majority did not set a standard of review); *McDonald*, 130 S. Ct. at 3050 (rejecting Justice Breyer's proposed interest-balancing test in *Heller* but declining to adopt standard).

Writing for the majority in *Heller*, Justice Scalia declined to identify the standard this Court used to find the statute at issue unconstitutional. The majority did explicitly reject rational basis review, however, reasoning that "if all that was required to overcome the right to keep and bear arms was a rational basis, the

Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." 554 U.S. at 629. For similar reasons, the majority rejected the "interest-balancing inquiry" advocated by Justice Breyer in dissent, noting that "a constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all"). *Id.* at 634. Subsequent to *Heller*, courts and commentators have disagreed as to the appropriate standard of review to apply in the Second Amendment context. *Compare* Calvin Massey, *Second Amendment Decision Rules*, 60 HASTINGS L.J. 1431, 1442-43 (2009) (regulation must advance a compelling governmental interest) *with* Jason T. Anderson, *Second Amendment Standards of Review: What the Supreme Court Left Unanswered in District of Columbia v. Heller*, 82 S. CAL. L. REV. 547, 577-87 (2009) (intermediate review); *compare Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009) (strict scrutiny), *opinion summarily vacated*, 611 F.3d 1015 (9th Cir. 2010) *with Chester*, 628 F.3d at 682-83 (intermediate review).

While not directly addressing the issue, however, both *Heller* and *McDonald* indicate that strict scrutiny, subject to categorical exclusions, should govern the right of the people to bear arms under the Second Amendment.

i. In View of the Fundamental Nature of the Right to Bear Arms Recognized in *McDonald*, At Least Some Restrictions Upon its Exercise Must be Subject to Strict Scrutiny

In *McDonald*, this Court held that the right to keep and bear arms is a fundamental right, and is therefore protected from infringement by the states by

the Fourteenth Amendment. 130 S. Ct. at 3036. Traditionally, this Court has held that legislation interfering with the exercise of a fundamental right will only withstand constitutional muster where that legislation is "narrowly tailored" to achieve a "compelling government interest." *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 105 S. Ct. 3249, 3254 (1985) (holding that strict scrutiny is due when state laws impinge on personal rights protected by the Constitution).

In fact, this Court has applied strict scrutiny in every other instance in which it has addressed the constitutionality of laws burdening provisions of the Bill of Rights previously incorporated to the states. *See Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 659 (1994) (First Amendment); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 633 (1989) (Fourth Amendment); *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227 (1995) (Fifth Amendment); *Globe Newspaper Co. v. Super. Ct. for Norfolk Cnty.*, 457 U.S. 596, 606-607 (1982) (Sixth Amendment); *United States v. Salerno*, 481 U.S. 739, 754 (1987) (Eighth Amendment).

Likewise, both *Heller* and *McDonald* repeatedly likened the right to bear arms under the Second Amendment to other situations where this Court has applied strict scrutiny. *See Heller*, 554 U.S. at 582 (stating that "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right"); *id.* at 629 (stating that "obviously, the [rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms");

McDonald, 130 S. Ct. at 3043 (categorizing Second Amendment with First and Fourth). *McDonald*, in fact, established that the Second Amendment is entitled to no lesser protection that the First, restrictions upon which are subject to strict scrutiny. *See* 130 S. Ct. at 3043 (rejecting the view that the Second Amendment should be "singled out for special – and specially unfair – treatment").

Therefore, because this Court found in *McDonald* a fundamental right in the Second Amendment to bear arms for the purpose of self-defense and that this right may not be singled out for specially unfair treatment, its holding establishes that laws restricting Second Amendment rights should be subject to strict scrutiny.

ii. *Heller*'s Validation of Certain "Longstanding" Restrictions on the Fundamental Right to Bear Arms Indicates That Strict Scrutiny, Subject to Categorical Exclusions, Is the Appropriate Level of Review

This Court recognized in *Heller* that, "like most rights, the right secured by the Second Amendment is not unlimited." 554 U.S. at 626. Instead, this Court recognized several limitations upon the right to bear arms, including, for example, "longstanding prohibitions on the possession of firearms," as well as restrictions upon the type of weapon protected. *Id.* at 626-27.

The above discussion therefore establishes that some "longstanding prohibitions" limiting the right to bear arms will not be subject to strict scrutiny. *Id.* Among this illustrative list, however, this Court made no mention of prohibitions on one of the most basic rights enshrined in the Second Amendment – that of the people to carry arms in defense of their person. *Id.* This silence speaks volumes. If

this Court intended to include within its list of permissible restrictions the basic right of the law-abiding citizen to carry a weapon, it surely would have said so. Instead, when this Court spoke of "longstanding prohibitions," it referenced categories of individuals (the mentally ill, for example), and types of weapons (those not in common use). *Id.*

This Court's discussion of the above limitations in *Heller*, read in conjunction with *McDonald's* mandate that the Second Amendment be vested with no lesser protection than its counterparts in other Bill of Rights provisions, indicate that most restrictions upon the right to bear arms, apart from those longstanding prohibitions already accepted in our society, must be narrowly tailored to promote a compelling government interest. As the following discussion demonstrates, § 4-203 and its accompanying permitting requirements do not meet even the lower standard of intermediate review.

B. The State's Statutory Scheme Plainly Violates the Second Amendment Even Under Intermediate Review

Despite our position that § 4-203 of the Maryland Criminal Law Article and its accompanying permitting requirements infringe upon the fundamental right of the people to bear arms and should therefore be subject to strict scrutiny, the Petitioner submits that the State's statutory scheme fails to pass constitutional muster even under the lesser standard of intermediate review. *See* Md. Code Ann., Crim. Law § 4-203; (A-1); Md. Code Ann., Pub. Safety § 5-301 *et. seq.;* (A-2).

To withstand intermediate review, a statute must be substantially related to an important governmental objective. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Public safety and crime prevention are undoubtedly important governmental interests inherent in the state's police power. *See Schall v. Martin,* 467 U.S. 253, 264 (1984) (stating that "the legitimate and compelling state interest in protecting the community from crime cannot be doubted"). The only question that remains, therefore, is whether § 4-203 of the Maryland Criminal Law Article is substantially related to these interests.

i. Section 4-203 is Not Substantially Related to the State's Interest in Promoting Public Safety

In terms of the class of persons to whom it applies, the types of weapons it bans, as well as the locations within its purview, § 4-203 is not substantially related to promote any of the above governmental objectives. *See* Md. Code Ann., Crim. Law § 4-203; (A-1).

First, the interest of the State in limiting violence from firearm ownership is primarily a function of who possesses the firearm. With respect to the class of persons to whom § 4-203 applies, the statute instates a blanket firearm ban upon *all persons*, while excepting only narrow categories of individuals, including those to whom a permit has been issued. *Id.* As is outlined below, the State's permitting requirements effectively prohibit the ordinary, law-abiding citizen from obtaining a handgun permit. *See* Md. Code Ann., Pub. Safety § 5-301 *et. seq.*; (A-2). Therefore, because § 4-203 broadly applies to all individuals – including the ordinary citizen to

whom no tendency of violence attaches – it is not substantially related to promoting the State's interest in public safety. *See* Md. Code Ann., Crim. Law § 4-203; (A-1).

Second, the State's interest in limiting firearm violence is also a function of the type of firearm subject to regulation. The broad prohibition of § 4-203 bans all handguns, including the semi-automatic Glock pistol the Petitioner sought to carry for self-defense. *Id.* Notably, *Heller* recognized that the type of weapons that are protected by the Second Amendment are those "in common use at the time," including handguns. 554 U.S. at 624. The State has not, however, tailored its statute so as to apply solely to those weapons more likely to threaten public safety in the hands of the wrong person, namely assault rifles, other automatic weapons, or high-capacity magazines. *See* Md. Code Ann., Crim. Law § 4-203; (A-1). Had it done so, the State may have served its interest in limiting the threat to public safety that stems from the use of firearms, while at the same time preserved the fundamental right of the people to bear arms in common use that lend themselves to self-defense, rather than violent crimes.

Finally, the State's interest in limiting firearm violence is a function of the location of the firearm. Maryland's blanket handgun prohibition in § 4-203 applies to all locations, be they public or private, except any real estate or place of business owned by the individual carrying the handgun. *Id.* Effectively, therefore, § 4-203 bans guns in public. *Id. Heller* recognized that certain "sensitive places," including, for example, schools and government buildings, lend themselves to such blanket handgun prohibitions. 554 U.S. at 626. These locations evidently present the

heaviest public safety threat from gun violence of our time. Section § 4-203 is not substantially related, however, to promoting Maryland's interest in protecting the public safety at these locations. *See* Md. Code Ann., Crim. Law § 4-203; (A-1); *see also Woollard v. Sheridan*, 863 F. Supp. 2d 462, 474 (D. Md. 2012) (noting that statutory scheme "does not ban handguns from places where the possibility of mayhem is most acute, such as schools, churches, government buildings, protest gatherings, or establishments that serve alcohol. It does not attempt to reduce accidents, as would a requirement that all permit applicants complete a safety course"). Instead, the State's ban applies across the board, and, as a result, is not substantially related to the State's important public safety objectives. *See* Md. Code Ann., Crim. Law § 4-203; (A-1).

Thus, in terms of to whom § 4-203 applies, to what types of firearms it applies, as well as to what geography it encompasses, § 4-203 is not substantially related to the State's governmental objectives in promoting public safety. *Id.*

The Petitioner does not dispute that the Second Amendment's guarantee of the right of the people to bear arms presents a peculiar challenge for State governments seeking to protect their populations from the harm that can result from the unlawful use of handguns. As the court reasoned in *Wollard*, however, "those who drafted and ratified the Second Amendment surely knew that the right they were enshrining carried a risk of misuse, and states have considerable latitude to channel the exercise of the right in ways that will minimize that risk. States may not, however, seek to reduce the danger by means of widespread curtailment of the

right itself." 863 F. Supp. 2d at 475. This Court in fact recognized that "the right to keep and bear arms . . . is not the only constitutional right that has controversial public safety implications." *McDonald*, 130 S. Ct. at 3045.

As grave as the public safety implications of handgun violence are, however, the State may not, without violating the Second Amendment, eliminate handguns altogether. The State might have legitimately adopted reasonable time, place and manner restrictions on handgun usage, yet, in this case, it declined to do so, opting instead to instate a blanket ban. Indeed, as this Court stated in *Carey v. Brown*, "even the most legitimate goal may not be advanced in a constitutionally impermissible manner." 447 U.S. 455, 465 (1980).

ii. The State's Requirement That Applicants for a Handgun Carry Permit Demonstrate a "Good and Substantial Reason" for the Issuance of a Permit Prevents the Ordinary, Law-Abiding Citizen From Lawfully Obtaining a Firearm

While the Maryland Secretary of the State Police is required to issue handgun permits, in order to do so it must, among other conditions, make a determination that the applicant "has good and substantial reason to wear, carry, or transport a handgun." Md. Code Ann., Pub. Safety § 5–306(a)(5)(ii); (A-2).[2] Because the State requires an individual to demonstrate a "good and substantial reason" for

[2] In deciding whether the applicant has satisfied these criteria, the Permit Unit takes various factors into account, including "the reasons given by the applicant as to whether those reasons are good and substantial," "whether the applicant has any alternative available to him for protection other than a handgun permit," and "whether the permit is necessary as a reasonable precaution for the applicant against apprehended danger." Md.Code Regs. 29.03.02.04; (A-3).

the issuance of a permit, the State effectively precludes the ordinary, law-abiding citizen from carrying a handgun outside the home, and therefore, the State's permitting scheme, when read in conjunction with the State's handgun ban in § 4-203, unlawfully burdens the Petitioner's Second Amendment rights. Md. Code Ann., Pub. Safety § 5-301 *et. seq.*; (A-2); Md. Code Ann., Crim. Law § 4-203; (A-1).

In addressing a challenge raised to the constitutionality of this permitting scheme in *Woollard v. Sheridan*, the United States District Court for the District of Maryland found that the Public Safety Code violated the Second Amendment, holding that "a citizen may not be required to offer a 'good and substantial reason' why he should be permitted to exercise his rights. The right's existence is all the reason he needs." 863 F. Supp. 2d at 475. The court correctly noted that "the requirement that a permit applicant demonstrate 'good and substantial reason' to carry a handgun does not, for example, advance the interest of public safety by ensuring that guns are kept out of the hands of those adjudged most likely to misuse them." *Id.* at 474. Rather, the District Court found that the permitting scheme amounted to a "rationing system," designed "simply to reduce the total number of firearms carried outside of the home by limiting the privilege to those who can demonstrate 'good reason' beyond a general desire for self-defense." *Id.*

In rejecting the threats to public safety that the statute was purportedly designed to mitigate, the court noted that "while each possibility presents an unquestionable threat to public safety, the challenged regulation does no more to combat them than would a law indiscriminately limiting the issuance of a permit to

every tenth applicant. The solution, then, is not tailored to the problem it is intended to solve." *Id.* at 474.

Therefore, because § 4-203 applies to all persons, including ordinary, law-abiding citizens, and because the State's permitting standards do not remedy this defect, the State's statutory scheme infringes upon the Petitioner's Second Amendment rights, and, as such, the decision of the lower court must be reversed.

The State could, consistent with the Second Amendment, tailor its permitting system so as to preclude individuals such as felons, persons having a history of mental illness, persons having a history of domestic violence, or persons failing a requisite background check, from owning firearms. In doing so, the State's interests in public safety and crime prevention would be fulfilled, as classes of individuals more likely to cause harm would be duly precluded from carrying a handgun, while the ordinary, law-abiding citizen who seeks to possess a firearm solely for the purpose of self-defense would not be barred from doing so. Because the State has chosen the opposite course, however, instating a blanket ban which does not exempt the ordinary citizen, it has run afoul of the Second Amendment.

iii. Proposed Legislation Indicates That the State Recognizes the Constitutional Defects in its Permitting Scheme

The State of Maryland has evidently recognized the defects in its statutory scheme. Legislation proposed before the Maryland House of Representatives on January 21, 2013 proposes to repeal the requirement that the Secretary find that a permit applicant demonstrate "good and substantial reason" to wear, carry or

transport a handgun before issuing a permit to that individual. *See* H.B. 211, 433rd Gen. Assemb. (Md. 2013).

In addition, the proposed legislation seeks to prohibit the Secretary from issuing a handgun permit to persons with certain mental health disorders, illegal aliens, as well as persons who have a pending charge for a felony or misdemeanor for which a prison sentence may be imposed. *Id.* While this proposed legislation does not carry the force of law, it is indicative of the fact that the State recognizes the overly broad nature of its handgun ban and is currently seeking to better tailor the ban to the actual danger that handgun violence presents to public safety. *Id.*

III. THE STATE'S PERMITTING SCHEME CONSTITUTES AN UNLAWFUL PRIOR RESTRAINT ON THE EXERCISE OF THE PETITIONER'S FUNDAMENTAL RIGHT TO BEAR ARMS

The State's imposition of a prior restraint on the Petitioner's exercise of his fundamental right to bear arms in the form of wholly discretionary permitting requirements is in direct violation of the Second Amendment.

Any law that makes "freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958). In order to pass constitutional muster, a law subjecting constitutional freedoms to the prior restraint of a license or permit must be based upon "narrow, objective, and definite standards." *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 151 (1969). Because of this exacting standard, this

Court has repeatedly emphasized that prior restraints, at least in the First Amendment context, are presumptively unconstitutional. *See, e.g., Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (stating that "any system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity"); *see also Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971); *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175 (1968).

Here, the State requires its licensing officials to make the subjective determination of whether an applicant has "good and substantial reason" for the issuance of a handgun permit in rendering its decision, thereby allowing permit decisions to be made on a wholly discretionary basis, in violation of the Petitioner's Second Amendment rights. The State's failure to set a reasonable time limit within which a final decision must be made by licensing officials as to whether an applicant has met the required criteria constitutes an additional violation of the Petitioner's Second Amendment rights.

A. The State's Requirement That Applicants Demonstrate a "Good and Substantial Reason" for the Issuance of a Handgun Permit Vests Unbridled Discretion in the State's Licensing Official

A long line of precedent of this Court establishes that a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes an unlawful prior restraint. *See, e.g., Staub*, 355 U.S. at 321-322; *Shuttlesworth*, 394 U.S. at 150; *Cox v. Louisiana*, 379 U.S. 536 (1965); *Kunz v. New*

York, 340 U.S. 290, 294 (1951); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Saia v. New York*, 334 U.S. 558 (1948).

In *Shuttlesworth v. City of Birmingham*, for example, this Court held that a municipality may not empower its licensing officials to withhold the permission to speak, assemble, picket, or parade according to their own opinions regarding the potential effect of the parade activity on the "welfare, decency, or morals" of the community. 394 U.S. at 150. The Birmingham ordinance at issue required that, in deciding whether to grant a permit, members of the City Commission were to be guided by their own ideas of "public welfare, peace, safety, health, decency, good order, morals or convenience." *Id.* at 150. In holding that the ordinance was an unconstitutional prior restraint on the exercise of free speech, this Court stated that, in order to be valid, a licensing scheme must not rely upon "broad criteria," allowing licensing officials to "roam essentially at will." *Id.* at 153. Instead, the discretion of licensing officials "must be exercised with uniformity of method of treatment upon the facts of each application." *Id.* at 154.

While *Shuttlesworth* and its companion cases all addressed controversies originating under the First Amendment, their language indicates that their reasoning carries force beyond this limited context. In *Staub*, for example, this Court referred to the "*freedoms* which the Constitution guarantees," implying that its holding extended beyond the context of free speech. *Staub*, 355 U.S. at 322 (emphasis added). Likewise, in *Nebraska Press Association v. Stuart*, this Court referred to prior restraints on speech and publication being "least tolerable,"

indicating that prior restraints in other contexts, here the Second Amendment, may also be intolerable, albeit less so than in the First Amendment context. 427 U.S. 539, 559 (1976).

Moreover, this Court, as well as other courts and commentators, have repeatedly looked to First Amendment jurisprudence for guidance in addressing issues arising under the thin landscape of the Second Amendment, indicating the strong kinship between the two. *See, e.g., Heller*, 554 U.S. at 582 (analogizing Second Amendment to First); *Marzzarella*, 614 F.3d at 97 (recognizing First Amendment as "useful tool" in interpreting the Second); *Chester*, 628 F.3d at 678 (looking to First Amendment for guidance in developing Second Amendment standard of review); Anderson, 82 S. CAL. L. REV. at 548 (arguing that First Amendment informs standard of review in Second Amendment context).

The State's permitting requirements make the exercise of the Petitioner's Second Amendment rights contingent upon the uncontrolled will of an official, and, as such, constitute an unlawful prior restraint on the Petitioner's fundamental right to bear arms. Like in *Shuttlesworth*, where the ordinance at issue allowed officials to rely upon "broad criteria" such as "their own ideas of public welfare, peace, [and] safety," the State's statutory scheme vests officials with unbridled discretion to make the subjective determination of whether an applicant has a "good and substantial reason" for the issuance of a permit. *See* 394 U.S. at 150-53; Md. Code Ann., Pub. Safety § 5-306; (A-2).

The State charges the Handgun Permit Unit with making the discretionary judgment of whether the reasons given by the applicant are "good and substantial." Md. Code Ann., Pub. Safety § 5-306; (A-2); Md.Code Regs. 29.03.02.04(G); (A-3). In making this determination, the State's regulations fix no "narrow, objective and definite" criteria, as this Court required in *Shuttlesworth*, but instead authorizes its officials to rely upon such broad and subjective considerations as information received from personal references or the occupation of the applicant. *Shuttlesworth*, 394 U.S. at 151; Md.Code Regs. 29.03.02.04(B), (J); (A-3). Thus, like in *Shuttlesworth,* where officials made determinations based upon their intuitions about morals and community standards, the Permit Unit may decide the fitness of an individual to possess a firearm based upon the impressions of licensing officials as to that individual's morals or position within the community. *See Shuttlesworth*, 394 U.S. at 152-54; Md.Code Regs. 29.03.02.04 (A)-(J); (A-3). Under this hazy scheme, it is impossible that "the discretion of licensing officials . . . be exercised with uniformity of method of treatment upon the facts of each application." *Shuttlesworth*, 394 U.S. at 154.

That Maryland's permitting scheme does, insofar as it requires a "good and substantial reason" for a law-abiding citizen to carry a firearm outside the home, fail to set forth sufficiently narrow and distinct criteria upon which licensing officials must rely is evidenced by the fact that this requirement has spawned litigation in the lower courts. *See, e.g., Scherr v. Handgun Permit Review Bd.*, 163

Md. App. 417, 435 (2005); *Snowden v. Handgun Permit Review Bd.*, 45 Md. App. 464, 469 (1980).

B. The Public Safety Code Does Not Provide a Reasonable Time Period During Which the Decision to Issue a Handgun Carry Permit Must be Made

The failure to place limitations on the time within which a licensing authority must make a determination is a species of unbridled discretion. *See Freedman v. Maryland*, 380 U.S. 51, 57 (1965) (failure to confine licensing decision time "contains the same vice as a statute delegating excessive administrative discretion"). Where a licensing scheme creates a "risk of delay," such that every application of the scheme creates an impermissible risk that an individual's constitutional rights may be burdened, the scheme is invalid. *Id.* at 55.

In *FW/PBS, Inc. v. City of Dallas*, for example, this Court held that a Dallas ordinance requiring licensing in connection with the operation of sexually-oriented businesses was an unconstitutional prior restraint on the licensees' First Amendment rights where the ordinance failed to set a time limit within which the licensing authority must act. 493 U.S. 215, 229 (1990). Although the Dallas ordinance at issue required the chief of police to approve the issuance of a license within 30 days after receipt of an application, it conditioned such approval upon authorization by other municipal inspection agencies, and failed to set forth time limits within which those inspections must occur. *Id.* at 227. Because this scheme allowed for the "indefinite postponement of the issuance of a license," this Court allowed the licensees' facial challenge. *Id.*

Like in *FW/PBS*, Maryland's permitting scheme vests licensing officials with unbridled discretion by failing to establish a time frame to limit the time in which the Handgun Permit Review Board must act. *See* Md. Code Ann., Pub. Safety § 5-312. While Maryland's statutory scheme, like the Dallas ordinance at issue in *FW/PBS*, provides for an initial statutory review period, the statute sets no limit upon the length of time which the Board may consider the record and additional evidence before rendering its decision. *Id*; *FW/PBS*, 493 U.S. at 225-27. As such, the scheme at issue here, like the Dallas ordinance, allows for the indefinite postponement of the issuance of a license, and constitutes an unlawful prior restraint on the exercise of the Petitioner's Second Amendment rights. *Id.*

It would seem that the State has recognized this constitutional defect in its permitting scheme, as legislation currently pending before the Maryland Legislature proposes to require that the Secretary of State Police issue handgun permits within a set number of days. *See* H.B. 211, 433rd Gen. Assemb. (Md. 2013).

CONCLUSION

For the foregoing reasons, as well as those that may be advanced upon hearing of this matter, Petitioner respectfully requests that this Honorable Court REVERSE the decision of the Court of Appeals.

Respectfully submitted,

Mica D. Simpson

APPENDIX 1

Maryland Criminal Law Article
§ 4-203. Wearing, carrying, or transporting handgun

Prohibited

(a) (1) Except as provided in subsection (b) of this section, a person may not:

(i) wear, carry, or transport a handgun, whether concealed or open, on or about the person;

(ii) wear, carry, or knowingly transport a handgun, whether concealed or open, in a vehicle traveling on a road or parking lot generally used by the public, highway, waterway, or airway of the State;

(iii) violate item (i) or (ii) of this paragraph while on public school property in the State; or

(iv) violate item (i) or (ii) of this paragraph with the deliberate purpose of injuring or killing another person.

(2) There is a rebuttable presumption that a person who transports a handgun under paragraph (1)(ii) of this subsection transports the handgun knowingly.

Exceptions

(b) This section does not prohibit:

(1) the wearing, carrying, or transporting of a handgun by a person who is on active assignment engaged in law enforcement, is authorized at the time and under the circumstances to wear, carry, or transport the handgun as part of the person's official equipment, and is:

(i) a law enforcement official of the United States, the State, or a county or city of the State;

(ii) a member of the armed forces of the United States or of the National Guard on duty or traveling to or from duty;

(iii) a law enforcement official of another state or subdivision of another state temporarily in this State on official business;

(iv) a correctional officer or warden of a correctional facility in the State;

(v) a sheriff or full-time assistant or deputy sheriff of the State; or

(vi) a temporary or part-time sheriff's deputy;

(2) the wearing, carrying, or transporting of a handgun by a person to whom a permit to wear, carry, or transport the handgun has been issued under Title 5, Subtitle 3 of the Public Safety Article;

(3) the carrying of a handgun on the person or in a vehicle while the person is transporting the handgun to or from the place of legal purchase or sale, or to or from a bona fide repair shop, or between bona fide residences of the person, or between the bona fide residence and place of business of the person, if the business is operated and owned substantially by the person if each handgun is unloaded and carried in an enclosed case or an enclosed holster;

(4) the wearing, carrying, or transporting by a person of a handgun used in connection with an organized military activity, a target shoot, formal or informal target practice, sport shooting event, hunting, a Department of Natural Resources-sponsored firearms and hunter safety class, trapping, or a dog obedience training class or show, while the person is engaged in, on the way to, or returning from that activity if each handgun is unloaded and carried in an enclosed case or an enclosed holster;

(5) the moving by a bona fide gun collector of part or all of the collector's gun collection from place to place for public or private exhibition if each handgun is unloaded and carried in an enclosed case or an enclosed holster;

(6) the wearing, carrying, or transporting of a handgun by a person on real estate that the person owns or leases or where the person resides or within the confines of a business establishment that the person owns or leases;

(7) the wearing, carrying, or transporting of a handgun by a supervisory employee:

(i) in the course of employment;

(ii) within the confines of the business establishment in which the supervisory employee is employed; and

(iii) when so authorized by the owner or manager of the business establishment; x

(8) the carrying or transporting of a signal pistol or other visual distress signal approved by the United States Coast Guard in a vessel on the waterways of the State or, if the signal pistol or other visual distress signal is unloaded and carried in an enclosed case, in a vehicle; or

(9) the wearing, carrying, or transporting of a handgun by a person who is carrying a court order requiring the surrender of the handgun, if:

(i) the handgun is unloaded;

(ii) the person has notified the law enforcement unit, barracks, or station that the handgun is being transported in accordance with the court order; and

(iii) the person transports the handgun directly to the law enforcement unit, barracks, or station.

APPENDIX II

Maryland Public Safety Article
§ 5-306. Qualifications for permit

In general

(a) Subject to subsection (b) of this section, the Secretary shall issue a permit within a reasonable time to a person who the Secretary finds:

(1) is an adult;

(2) (i) has not been convicted of a felony or of a misdemeanor for which a sentence of imprisonment for more than 1 year has been imposed; or

(ii) if convicted of a crime described in item (i) of this item, has been pardoned or has been granted relief under 18 U.S.C. § 925(c);

(3) has not been convicted of a crime involving the possession, use, or distribution of a controlled dangerous substance;

(4) is not presently an alcoholic, addict, or habitual user of a controlled dangerous substance unless the habitual use of the controlled dangerous substance is under legitimate medical direction; and

(5) based on an investigation:

(i) has not exhibited a propensity for violence or instability that may reasonably render the person's possession of a handgun a danger to the person or to another; and

(ii) has 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.

Applicant under age of 30 years

(b) An applicant under the age of 30 years is qualified only if the Secretary finds that the applicant has not been:

(1) committed to a detention, training, or correctional institution for juveniles for longer than 1 year after an adjudication of delinquency by a juvenile court; or

(2) adjudicated delinquent by a juvenile court for:

(i) an act that would be a crime of violence if committed by an adult;

(ii) an act that would be a felony in this State if committed by an adult; or

(iii) an act that would be a misdemeanor in this State that carries a statutory penalty of more than 2 years if committed by an adult

APPENDIX 3

Code of Maryland Regulations
Title 29, Chapter 02, Criteria for Issuance of Permit

In making a determination as to whether a permit will be issued to the applicant, the following areas will be a part of every investigation and will be considered in determining whether a permit will be issued:

A. Verification of the information supplied by the applicant in the application;

B. Occupation or profession of the applicant;

C. Geographical area of residence and employment of the applicant;

D. Criminal record of applicant, including any juvenile record for an applicant younger than 30 years old, as specifically outlined in Public Safety Article, §5-306(b), Annotated Code of Maryland;

E. Medical history of applicant as it may pertain to the applicant's fitness to wear, carry, or transport a handgun;

F. Psychiatric or psychological background of applicant as it may pertain to the applicant's fitness to wear, carry, or transport a handgun;

G. Reasons given by the applicant as to whether those reasons are good and substantial;

H. Age of applicant;

I. Applicant's use of intoxicating beverages and drugs;

J. Information received from personal references and other persons interviewed;

K. Information received from business or employment references as may be necessary in the discretion of the investigator;

L. Whether the applicant has any alternative available to him for protection other than a handgun permit;

M. Whether the applicant falls within those classes of individuals who do not need permits as outlined in the Handgun Permit Law;

N. The applicant's propensity for violence or instability which could reasonably render his wearing, carrying, or transporting of a handgun a danger to himself or other persons he may come in contact with;

O. Whether the permit is necessary as a reasonable precaution for the applicant against apprehended danger.