No. 10-1207

IN THE

Supreme Court of the United States

CHARLES F. WILLIAMS, JR.,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

On Petition For Writ of Certiorari to the Court of Appeals of Maryland

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a criminal statute that allows possession of a handgun inside the home and, with a permit, outside the home, violate the Second Amendment?

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BRIEF IN OPPOSITION

Respondent, State of Maryland, respectfully requests that this Court deny the petition for writ of certiorari of Petitioner Charles F. Williams, Jr.

STATEMENT OF THE CASE

Statutory Background

Petitioner was convicted of violating Maryland Criminal Law Article, Section 4-203 ("wear/carry statute"). (Pet. App. 2a, 9a, 26a). This statute is not a complete ban on carrying handguns, but rather contains several exceptions, including allowing one to possess a handgun in the home or at a place of business. (Pet. App. 11a-15a). Moreover, the wear/carry statute specifically provides for the wearing, carrying or transporting of a handgun outside the home by a person to whom a permit has been issued under Title 5, Subtitle 3 of the Maryland Public Safety Article ("permitting scheme"). (Pet. App. 12a). The permitting scheme, which the Court of Appeals of Maryland did not address because Petitioner lacked standing to challenge it, sets out requirements for the application for a permit, criminal history records check, and qualifications for the permit. (Pet. App. 14a-15a, n.7).

Factual Background

At approximately 5:00 p.m. on October 1, 2007, Officer Adam Molake of the Prince George's County Police Department, was driving a marked police cruiser on Route 202 near the intersection of the Baltimore-Washington Parkway and Landover Road in

Prince George's County, Maryland, when he observed Petitioner standing behind a bus stop, pulling items out of a book bag. (Pet. App. 7a, 35a, 56a, 59a). Petitioner walked toward the road to observe which direction the officer was headed, then he walked back towards the bushes as Officer Molake made a U-turn. (*Id.*). Officer Molake then observed Petitioner place an object in the bushes. (*Id.*).

Officer Molake parked his car and approached Petitioner. Molake asked Petitioner to have a seat on the curb, and the officer began asking him a few questions. (Pet. App. 7a-8a, 35a, 59a). Molake asked Petitioner why he was behind the bus stop with a bag and where the bag was, to which Petitioner replied that he found the bag on the bus and he went to see what was inside it. (Pet. App. 8a, 35a, 56a, 59a). Officer Molake asked Petitioner what he hid in the bushes, and Petitioner replied, "My gun." (Pet. App. 8a, 35a, 56a, 59a). Molake walked to the bushes where he had observed Petitioner, and the officer retrieved the handgun, a black Glock with 15 rounds in the magazine. (Pet. App. 8a, 35a, 56a, 59a).

Petitioner gave a written statement after being given his *Miranda* rights by Officer Santa Cruz, admitting to possessing the handgun and placing it in the bushes where the police subsequently located it. (Pet. App. 8a-9a, 35a, 59a-60a). It is undisputed that Petitioner did not file an application for a handgun permit. (Pet. 38, 41 n.19).

Proceedings Below

On April 1, 2008, Petitioner was charged with a carrying a handgun in violation of the Maryland

wear/carry statute. (Pet. App. 75a-76a). Prior to trial, Petitioner filed a motion to dismiss the handgun charge, claiming that the Maryland wear/carry statute and Maryland's permitting scheme were unconstitutional infringements upon his Second Amendment right. At a bench trial in the Circuit Court for Prince George's County, Maryland on October 6, 2008, Petitioner pled not guilty on an agreed statement of facts, and also renewed his original motion to dismiss based on his constitutional challenge to the handgun laws. (Pet. App. 7a-9a, 51a-55a, 58a-63a). The court denied Petitioner's motion to dismiss, and found Petitioner guilty of violating the wear/carry statute. (Pet. App. 9a-10a, 67a-69a). On the same day, Petitioner was sentenced to three years' imprisonment, with all but one year suspended, and three years of supervised probation. (Pet. App. 9a-10a, 71a).

The Maryland Court of Special Appeals affirmed Petitioner's conviction. *Williams v. State*, 188 Md. App. 691, 982 A.2d 1168 (2009); (Pet. App. 3a, 49a). The Court of Special Appeals, in a decision pre-dating this Court's holding in *McDonald v. City of Chicago, Ill.,* 130 S.Ct. 3020 (2010), determined that the Second Amendment was not applicable to the States and that, were the Second Amendment to apply in Maryland, "it would not invalidate the statute at issue here," because the wear/carry statute expressly allows wearing, carrying, or transporting a handgun in one's residence, thereby preserving the right "to keep and bear arms in the home for the purpose of immediate self defense." *Williams*, 188 Md. App. at 699, 982 A.2d at 1172; (Pet. App. 43a).

Petitioner sought and was granted discretionary

review in the Maryland Court of Appeals. (Pet. App. 3a). That court affirmed Petitioner's conviction, holding that, because Maryland's wear/carry statute expressly contained an exception allowing possession of a handgun in the home, "the statutory scheme embodied . . . [is] outside the scope of the Second Amendment, as articulated in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald*[.]" *Williams v. State*, 417 Md. 479, 10 A.3d 1167 (2011); (Pet. App. 4a, 26a). The court also addressed Petitioner's argument regarding the Maryland permitting scheme. *Williams*, 417 Md. at 488 n.7, 10 A.3d at 1173 n.7; (Pet. App. 14a-15a, n.7, 25a). The court noted that Petitioner acknowledged that he had "not filed an application for a permit to carry a handgun," but that he nevertheless maintained that, as a result of the regulatory scheme, "any such application would have been denied." *Williams*, 417 Md. at 488 n.7, 10 A.3d at 1173 n.7; (Pet. App. 14a-15a, n.7, 25a). The Court of Appeals found that Petitioner lacked standing to challenge the State's permitting scheme by failing to file an application for a handgun permit. *Williams*, 417 Md. at 482, 10 A.3d at 1169; (Pet. App. 4a-5a).

REASONS FOR DENYING THE PETITION

It has been only three years since this Court announced, in *Heller*, an individual right to bear arms under the Second Amendment and just one year since the Court extended that right to the States in *McDonald*. In the wake of *Heller* and *McDonald*, state courts and lower federal courts are just beginning to address the myriad issues arising out of Second

Amendment claims. Among the critical issues facing the courts are the scope of the Second Amendment and the appropriate level of scrutiny to apply in a Second Amendment claim. Many of these cases involve civil challenges to state permitting regulations in which a factual record is being developed and the entire spectrum of Second Amendment issues is being fully examined.

In contrast, this criminal case, which commenced prior to this Court's ruling in *McDonald*, presents none of the critical issues and suffers from a poorly developed record. Moreover, the core issue presented in this petition — that the Maryland permitting scheme unfairly restricted Petitioner's right to carry a handgun — was never addressed by the Maryland Court of Appeals and is not properly raised in this case. Petitioner is thus left with a facial challenge to Maryland's wear/carry statute, and that law allows one to possess a handgun in the home and, with a permit, to carry a handgun on the street. It is Petitioner's failure to avail himself of the permitting scheme that renders this case a poor vehicle to address the questions raised in this petition.

At best, Petitioner's claim is that the lower court misread this Court's statements in *Heller* and *McDonald* regarding the scope of the Second Amendment. Yet, this Court's "power is to correct wrong judgments, not to revise opinions." *Camreta v. Greene*, 131 S.Ct. 2020, 2037 (2011) (Kennedy, J. Dissenting) (quoting *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945)). The judgment here was that Maryland's wear/carry statute is not unconstitutional, *i.e.,* the Second Amendment does not bar a state from requiring residents to obtain a permit before carrying

handguns outside the home. Not surprisingly, no lower court has held to the contrary. Thus, Petitioner has failed to demonstrate that the judgment of the Court of Appeals of Maryland is in conflict with this Court's precedents or those of any other court.

In view of the fact that the lower courts are just beginning to examine Second Amendment claims in light of *Heller* and *McDonald*, this Court should let these issues percolate in the lower courts and await a more appropriate vehicle for review. For these reasons, certiorari in this case is unwarranted.

I.

An adequate and independent state ground bars review of Petitioner's challenge to the Maryland permitting scheme.

Petitioner does not disagree that the right to bear arms may be regulated. (Pet. 16-17) (discussing *Heller* and stating that *Heller* "made clear that there is indeed a right to bear arms and that it may be regulated"). In addition, Petitioner admits that he did not seek a permit to carry a handgun. (*Id.* at 6). Nevertheless, he contends that the Maryland wear/carry statute is unconstitutional because "any request for a permit by him would be denied." (*Id.* at 41). The Maryland Court of Appeals, relying on its own precedents, held that Petitioner had no standing to raise this claim because he failed to seek a permit. *Williams*, 417 Md. at 488 n.7, 10 A.2d at 1173 n.7 (Pet. App. 14a-15a n.7, 25a). The court's holding that Petitioner lacked standing to challenge Maryland's

permitting scheme is an adequate and independent state ground and, by itself, is a basis for this Court to deny certiorari review. *See Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983) (reiterating that Court "will not review judgments of state courts that rest upon adequate and independent state grounds" because "if same judgment would be rendered by state court after [Court] corrected its views of federal laws . . . [the Court's] review could amount to nothing more than an advisory opinion") (quoting *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945)).

Despite his broad attack against Maryland's permitting scheme, (Pet. 7-9, 27-33, 38-43), the only ground that Petitioner may validly present is a facial challenge to the constitutionality of Maryland's wear/carry statute. Petitioner stands convicted only of violating the wear/carry statute. He was never denied, nor even applied for, a handgun permit under Maryland's permitting scheme. By failing to avail himself of Maryland's permitting law, Petitioner has no standing to challenge that law. Regardless of how simple or burdensome Maryland's permitting scheme may be, it is an issue that was not addressed by the lower courts and for which there is no record or evidence.

The simple fact is that Maryland's wear/carry statute, on its face, protects the right of an individual to possess a handgun in the home and, with a permit, to carry a handgun on the street. Petitioner does not even attempt to explain how the mere existence of a permitting requirement can violate the Second Amendment. Rather, his petition's entire focus is on the purported strictness of the Maryland permitting scheme, which, he claims, makes him "like other

ordinary, law-abiding Marylanders, . . . flatly ineligible to obtain a handgun permit for purposes of personal protection." (Pet. 30-31). Whether this factual assertion is correct, and whether, if it is, it states a valid Second Amendment claim, is now outside the scope of this case. All that is left is a claim that Petitioner virtually concedes must fail. This Court's limited resources should not be expended on such a case.

In an effort to excuse his failure to apply for a permit, Petitioner claims that this Court "has made it clear in various contexts that litigants are not required to perform a futile act." (Pet. 42). Petitioner's reliance upon a "doctrine of futility" to excuse his failure is misguided. In the cases he relies upon, this Court did not hold that a failure to secure a permit, when one is required, may be overlooked because an application for a permit *may have been denied*. Rather, these cases are distinguishable. For example, in *Palazzolo v. Rhode Island*, 533 U.S. 606, 625-26 (2001), an application was filed and denied, and the issue was whether further applications were necessary to create standing. Similarly, in *Bach v. Pataki*, 408 F.3d 75 (2d Cir. 2005), *cert. denied*, 546 U.S. 1174 (2006), an application was unnecessary because the plaintiff was statutorily ineligible to receive the permit. *Id.*

In contrast, Maryland's permitting scheme does not present a per se barrier to Petitioner receiving a permit. He is not statutorily ineligible to apply for a permit and there is an administrative body with the authority to grant one. Yet, Petitioner has not filed a single application, and there is no evidence in the record that filing a permit application would have been a futile act.

Even if one were to ignore the Maryland Court of Appeals' standing holding, it would be premature for this Court to address Petitioner's broader claim that Maryland's refusal to give permits to "ordinary law-abiding Marylanders" violates the Second Amendment. Petitioner has not developed any evidentiary support in this record for this claim. *See Babbitt v. Farm Workers*, 442 U.S. 289, 300 (1979) (stating that "[e]ven though a challenged statute is sure to work the injury alleged, . . . adjudication might be postponed until 'a better factual record might be available'" but declining to wait in the extraordinary circumstances of an election matter). Under these circumstances, Petitioner's failure to seek a permit should not be excused and is fatal to his claim that he has standing to challenge the constitutionality of Maryland's permitting scheme. This Court should deny the pending petition for writ of certiorari.

II.

The judgment of the Maryland Court of Appeals does not conflict with this Court's precedents with respect to the application of the Second Amendment.

Given that there was a facially fair and available mechanism for obtaining a handgun permit, Maryland's wear/carry statute is not in conflict with this Court's holdings in *Heller* and *McDonald*. Nothing in either of those cases leads to the conclusion that requiring a permit to carry a handgun outside the home is categorically unconstitutional. Indeed, both cases indicate that such regulation is a perfectly

legitimate exercise of the state's police powers. *See Heller*, 554 U.S. at 627 n.26 (providing certain illustrative examples of "presumptively lawful regulatory measures[,]" this Court noted that its "list [did] not purport to be exhaustive"); *McDonald*, 130 S.Ct. at 3047 (explaining that "incorporation [of Second Amendment rights] does not imperil every law regulating firearms," and that "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment") (citations omitted).

Accordingly, Petitioner is left to argue that this case warrants review based solely on the Court of Appeals' holding as to the scope of the Second Amendment. This issue is currently being addressed in courts throughout the country where the records are being fully developed and courts are undergoing a careful textual and historical analysis.[1] This case contains none of that factual development. There will be far better cases through which this Court can examine this issue.

For example, in *Ezell v. City of Chicago*, No. 10-3525 U.S. App. LEXIS 14108 (7th Cir. July 6, 2011), the Seventh Circuit recently examined a Second Amendment challenge to a Chicago ordinance banning firing ranges within city limits, but nevertheless requiring an hour of range training in order to obtain a firearm permit. That court's Second Amendment analysis called for a two-part test: first, a threshold

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[1] Petitioner overstates the uniformity in lower court decisions on the issue of scope. (Pet. 10, 33-38). As Petitioner acknowledges, "[a] few courts have held or assumed post-*Heller* that the Second Amendment may apply outside the home[.]" (Pet. 37).

inquiry as to the textual and historical meaning of the Second Amendment to determine if the government can establish that the restriction at issue falls outside the scope of the Second Amendment; and, second, if it does not, whether the government can establish a strong public-interest justification for its restriction. (Slip op. at 16-17).

The Seventh Circuit's scope analysis, following this Court's analysis in *Heller* and *McDonald*, examined the historical foundations for the "publicly understood" scope of the Second Amendment at the time of its ratification, as well as the ratification of the Fourteenth Amendment, to determine if the restriction at issue fell within the scope of the Second Amendment. The court also engaged in a lengthy discussion regarding the appropriate level of scrutiny required to determine the government's justification for its restrictions. There, the court adopted a heightened level of scrutiny, beyond intermediate scrutiny, that requires the City to "establish a close fit between the range ban and the actual public interests it serves, and also that the public's interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights." (Slip op. at 61).

Ezell thus demonstrates the close relationship between scope and scrutiny. As many courts have found, the level of scrutiny to be applied will depend on the nature of the handgun restriction at issue. For instance, total bans on possessing a firearm within the home, like the laws struck down in the District of Columbia and Chicago, go to the very core of the Second Amendment protection and may warrant heightened scrutiny. On the other hand, laws such as Maryland's wear/carry statute, which protects the

right to possess a handgun within the home and allows for the right to carry with a permit, would likely be addressed under some other level of scrutiny. Again, none of these issues were developed in this case. This Court will have other and better opportunities to address the relationship between scope and scrutiny, with the benefit of a full historical and textual analysis of the Second Amendment.

III.

This case is a poor vehicle for consideration of the many unanswered questions concerning the application of the Second Amendment.

Because *Heller* was "this Court's first in-depth examination of the Second Amendment," the Court acknowledged that the opinion did not clarify the "many applications of the right to keep and bear arms." *Heller*, 554 U.S. at 635. Consequently, and not surprisingly, in the wake of *Heller* and *McDonald*, litigation over state and federal laws regulating firearms has increased exponentially, raising questions that the Court in *Heller* acknowledged would need to be addressed as the landscape of the Second Amendment evolved. Again, however, this case does not present the Court with the opportunity to clarify the issues that currently surround the many applications of the Second Amendment. *Id.*

Courts across the country are wrestling with whether the Second Amendment prohibits banning the possession of handguns by certain classifications of

persons.[2] In other cases, courts are addressing laws that ban the possession of handguns on public property and the possession of certain kinds of handguns, even in the home.[3] Still other cases consider statutes that ban the carrying of handguns on college campuses, the possession of a firearm in a "place of worship," and the possession of a firearm "during declared states of emergency."[4]

Also pending are challenges to statutes regulating, but not banning, the possession of handguns outside the home. The plaintiffs in these cases, unlike Petitioner, have filed civil suits claiming that theregulatory measures effectively ban them from

[2] *See e.g.*, *United States v. Booker*, No. 09-1810, 2011 U.S. App. LEXIS 8925 (1st Cir. May 2, 2011) (banning possession of handguns by felons); *Lundborg v. Maui County*, 2010 U.S. Dist. LEXIS 126304 (D. Haw. Nov. 30, 2010) (same); *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (banning possession of handguns by felons, even in the home); *United States v. Reese*, 627 F.3d 792, 794 (10th Cir. 2010) (banning possession of a handgun by a person against whom a protective order has been issued).

[3] *See e.g.*, *Nordyke v. King*, No. 07-1563, 2011 U.S. App. LEXIS 8906 (9th Cir. May 2, 2011) (county property); *Hall v. Garcia*, No. C 10-03799 RS, 2011 U.S. Dist. LEXIS 34081 (N.D. Cal. Mar. 17, 2011) (in a school zone); *United States v. Masciandaro*, 638 F.3d 458, 459 (4th Cir. 2011) (in a vehicle in a national park area); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (possession of a firearm with an obliterated serial number), *cert. denied*, 131 S. Ct. 958 (2011).

[4] *See e.g.*, *DiGiacinto v. Rector and Visitors of George Mason University*, 704 S.E.2d 365 (Va. 2011) (on campus); *GeorgiaCarry.Org, Inc. v. Georgia*, No. 5:10-CV-302, 2011 U.S. Dist. LEXIS 6370 (M.D. Ga. Jan. 24, 2011) (in church); *Bateman v. Perdue*, No. 5:10-CV-265-H, 2011 U.S. Dist. LEXIS 34791, *3-4 (E.D.N.C. Mar. 31, 2011) (during declared state of emergency).

lawfully possessing a handgun outside their home.

For instance, reminiscent of Maryland's wear/carry statute, "California law generally prohibits individuals from carrying a concealed firearm in public" but an individual may obtain a permit to carry a firearm for self-defense purposes. And, in *Richards v. County of Yolo*, No. 2:09-CV-01235, 2011 U.S. Dist. LEXIS 51906, *2-4 (E.D. Cal. May 13, 2011), Richards has challenged the county's interpretation of its statutory authority which "leaves it to the sheriff's discretion to issue a license . . . to residents within [the] [c]ounty."[5] Similarly, in *Peruta v. County of San Diego*, 758 F. Supp. 2d 1106 (S.D. Cal. 2010), the plaintiffs are challenging whether regulations, which state that upon good cause shown, the "sheriff of a county . . . may issue" a "concealed carry [permit]," infringe upon their Second Amendment rights because the sheriff has determined that "an assertion of self-defense is insufficient to demonstrate 'good cause.'" *Id.* at 1113, 1115.

Indeed, even in Maryland, the permitting scheme is currently being challenged in federal court. *See Woollard v. Sheridan,* No. JFM-10-2068, 2010 U.S. Dist. LEXIS 137031 (D. Md. Dec. 29, 2010). There, the

[5] While *Peruta* is pending in the Ninth Circuit, many of these cases have not yet reached the intermediate appellate courts. *See e.g. Osterweil v. Bartlett*, No. 1:09-CV-825, 2011 U.S. Dist. LEXIS 54196 (N.D.N.Y May 20, 2011) (state law limiting permits to New York residents or persons employed in New York); *Peterson v. LaCabe*, No. 10-CV-00059, 2011 U.S. Dist. LEXIS 23070, at *3 (D. Colo. Mar. 8, 2011) (it is "general[ly]. . . unlawful to carry a concealed firearm in . . . Colorado without a license"); *Mishaga v. Monken*, 753 F. Supp. 2d 750 (C.D. Ill. 2010) (must have an Illinois driver's license).

plaintiff — who applied for and was denied a wear/carry permit — has filed a civil complaint alleging that the Maryland permitting scheme is unconstitutional because it requires him to demonstrate that he "has [a] good and substantial reason" for concluding that carrying a handgun "is necessary as a reasonable precaution against apprehended danger." *Id. See also* Md. Code Ann., Pub. Safety § 5-306

Perhaps the most critical question, but one not addressed by the Maryland Court of Appeals in this case, is the appropriate level of scrutiny to be applied to governmental restrictions that implicate the Second Amendment. In the absence of an articulated standard for Second Amendment challenges, courts are divided on the issue of which level of scrutiny is appropriate.

For example, in *United States v. Masciandaro*, 638 F.3d at 460, the Fourth Circuit Court of Appeals concluded that a challenge to the constitutionality of a statute "implicat[ing] the Second Amendment . . . is assessed under the intermediate scrutiny standard." In *United States v. Engstrum*, 609 F. Supp. 2d 1227 (D. Utah 2009), however, the court applied a strict scrutiny analysis to a statute that prohibits possession of a firearm following a domestic violence conviction. On the other end of the spectrum, the Alaska intermediate appellate court applied a "rational basis" standard to a felon-in-possession statute. *See Lapitre v. State*, 233 P.3d 1125, 1128 (Alaska App. 2010). Two courts have even suggested that Second Amendment challenges "can trigger more than one particular standard of scrutiny[.]" *People v. Mimes*, No. 1-08-2747, 2011 Ill. App. LEXIS 644, at *42 (1st Dist. June

20, 2011); *Ezell*, No. 10-3525 U.S. App. LEXIS 14108 (7th Cir. July 6, 2011) (analogizing Second Amendment challenges to First Amendment challenges and advocating tiered standard of review).

Any of these cases seemingly would present a better vehicle for consideration of the issues surrounding the Second Amendment than would this case. Many of these are lawsuits that benefit from civil discovery rules where records are being fully developed. Likewise, the courts in those cases are considering the historical context of the statutes challenged, as well as the standard of scrutiny to be applied.

The Maryland Court of Appeals engaged in none of this analysis. Thus, the issues raised by Petitioner, if addressed by this Court, will not answer, and more importantly, will not provide the analytical framework for addressing the many and varied "applications of the right to keep and bear arms," *Heller*, 554 U.S. at 635, that abound in the lower federal courts and state courts across this country.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that the petition for writ of certiorari filed herein be denied.

Respectfully submitted,

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