No. 13-42

In The
Supreme Court of the United States

RAYMOND WOOLLARD, ET AL.,

Petitioners,

v.

DENIS GALLAGHER, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Second Amendment to the United States Constitution prohibits the State of Maryland from requiring a permit applicant to provide a good and substantial reason for carrying a handgun in public places for purposes other than in connection with hunting, target and sport shooting, organized military activities, and other statutorily-enumerated purposes for which no permit is required.

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STATEMENT

1. Marylanders who are otherwise qualified to own a firearm may possess, wear, carry, and transport handguns for any purpose in their homes, at their businesses, and on any property they own, all without a permit. Md. Code Ann., Criminal Law ("CR") § 4-203(b)(6). Marylanders also may carry handguns in public, without a permit, in connection with a wide range of statutorily-enumerated activities, including hunting, trapping, target shooting, formal or informal target practice, sport shooting events, certain firearms and hunter safety classes, and organized military activities. CR § 4-203(b)(3)-(7). Maryland law generally requires a permit to wear and carry a handgun in public places for purposes unconnected to these specified activities. CR § 4-203(a), (b)(2). This permit requirement applies only to handguns, not rifles, shotguns, or other "long guns."

Adults who have not been convicted of disqualifying offenses are eligible to obtain a permit to wear and carry handguns in public if they meet certain requirements, including, as relevant here, a requirement that they have a "good and substantial reason to wear, carry, or transport a handgun, such as a finding that the permit is necessary as a reasonable precaution against apprehended danger." Md. Code Ann., Public Safety ("PS") § 5-306(a) (the "Permit Statute"). The Handgun Permit Unit within the Maryland State Police ("MSP"), which processes permit applications, has identified four non-exclusive categories of "good and substantial reason": for certain

business activities; for regulated professions, such as security guards; for "assumed risk" professions, such as judges, police officers, and prosecutors; and for personal protection/self-defense. Pet. App. 9a-10a. In accordance with guidance provided by Maryland's appellate courts, MSP evaluates applications that identify "personal protection" as the applicant's good and substantial reason by applying an objective standard to assess whether there is "apprehended danger" to the applicant, which requires more than a "vague threat" or a "general fear of living in a dangerous society." Pet. App. 10a. MSP considers a number of specific factors in making this assessment, but treats those factors as non-exhaustive and "takes the applicant's entire situation into account" when determining whether a good and substantial reason exists. Pet. App. 10a-11a.

From 2007 through 2011, MSP received 23,189 original and renewal permit applications, and issued 21,724 original and renewal permits, for an approval rate of 93.7%. MSP, 2011 Annual Report (2012) at 49, *available at* http://www.mdsp.org/Downloads.aspx.[1]

[1] Petitioners' emphasis on the fact that a smaller percentage of Marylanders hold permits than do residents of other neighboring States, most of which have substantially more rural populations, is misguided. That an individual does not have a permit does not mean that individual was prevented by the State from obtaining a permit. Moreover, petitioners' claim that the good-and-substantial-reason requirement operates effectively as a ban on public carry of handguns is proved erroneous by the case of Mr. Woollard himself, who was twice issued a three-year permit despite never having been threatened in any way

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An applicant who is denied a permit may request an informal review by the Secretary of State Police or may immediately appeal the denial to the Handgun Permit Review Board, an independent board appointed by the Governor, PS §§ 5-301, 5-311, 5-312, which has reversed approximately 38% of the denials that have been appealed to it over the last 20 years. An applicant whose appeal to the Handgun Permit Review Board is unsuccessful may seek further review in the Maryland State courts. PS § 5-312(e)(1).

2. Petitioner Raymond Woollard applied for and was granted a permit in 2003, following a violent confrontation that occurred in his home in December 2002 when his son-in-law broke into Mr. Woollard's house. During that incident, Mr. Woollard pulled a shotgun on his unarmed son-in-law, but his son-in-law wrested the gun away. Pet. App. 12a-13a. The son-in-law did not threaten to shoot Mr. Woollard or anyone else in the house, but did threaten to commit suicide. In 2006, when the original permit expired, Mr. Woollard applied for and received a renewal permit. Pet. App. 13a. In 2009, when the renewal expired, Mr. Woollard applied for a second renewal, but that request was denied. Pet. App. 13a. The Handgun Permit Review Board upheld the denial on the basis that Mr. Woollard had failed to identify any threats of any kind since the December 2002 incident, and any threats at any time outside of his home,

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outside of his home and despite his being the source of the gun that was involved in the incident that occurred at his home.

where he was already allowed to carry a handgun. Pet. App. 13a-14a.

3. After this Court issued its decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), holding that the Second Amendment codified an individual right to keep and bear arms that rendered unconstitutional the ban on possession of handguns in the home that was at issue in that case, and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), holding that the Second Amendment right was made applicable to the States by the Fourteenth Amendment to the United States Constitution, petitioners brought this action in the United States District Court for the District of Maryland seeking an injunction prohibiting enforcement of the good-and-substantial-reason requirement as well as an order directing the issuance of a permit to Mr. Woollard. Petitioners, making claims under 42 U.S.C. § 1983, asserted that Maryland's good-and-substantial-reason requirement violates the Second Amendment and the Equal Protection Clause of the Fourteenth Amendment.

On March 2, 2012, the district court granted summary judgment to petitioners. After first determining that "the right to bear arms is not limited to the home," based on its adoption of the analysis of a concurring opinion in *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011), the district court, purporting to apply intermediate scrutiny, held that the good-and-substantial-reason requirement was too broad to be constitutional. Pet. App. 76a. The district

court identified measures it believed would have been more narrowly tailored to address at least certain aspects of what it agreed were compelling State interests in public safety and crime prevention, and concluded that Maryland's law was not "reasonably adapted" to the State's interests. Pet. App. 76a-77a.

4. On March 21, 2013, the United States Court of Appeals for the Fourth Circuit reversed. The court of appeals first reviewed this Court's holdings in *Heller* and *McDonald*, as well as the Fourth Circuit's own precedents applying those decisions. Pet. App. 19a-25a. The court of appeals then applied the two-pronged inquiry adopted by most courts to have addressed Second Amendment challenges after *Heller*: (1) does the challenged law impose a burden on conduct falling within the scope of the Second Amendment's guarantee; and, if so (2) does it satisfy the applicable level of scrutiny. Pet. App. 21a-22a.[2] Determining that the case could be resolved by addressing only the second question, the Fourth Circuit proceeded to assume, without deciding, that

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[2] *See*, *e.g.*, *Kachalsky v. County of Westchester*, 701 F.3d 81, 88-93 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (Apr. 15, 2013); *National Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012), *petition for cert. filed*, No. 13-137 (U.S. July 31, 2013); *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011) ("*Heller II*"); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 2476 (2011); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 958 (2011).

the good-and-substantial-reason requirement burdens conduct falling within the scope of the Second Amendment's protection. Pet. App. 24a. Thus, contrary to the argument of petitioners, the opinion of the court of appeals does not even imply, much less conclude, that the Second Amendment is cabined to the home. To the contrary, the court of appeals assumed that it is not.

In identifying the applicable level of scrutiny, the court of appeals joined the majority of other circuits to have addressed the issue by applying intermediate scrutiny in reviewing laws that burden conduct that is protected by the Second Amendment, but that is outside of the core right that the Second Amendment "elevates above all other interests," the "'right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" Pet. App. 19a-20a (quoting *Heller*, 554 U.S. at 634-35).[3] Because Maryland's good-and-substantial-reason requirement operates exclusively outside of one's home – and, indeed, outside of one's business and other property, and outside of hunting, sport shooting, target shooting, organized military

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[3] *See also*, *e.g.*, *Kachalsky*, 701 F.3d at 96-97; *Drake v. Filko*, ___ F.3d ___, 2013 U.S. App. LEXIS 15635, at *25-*26 (3d Cir. July 31, 2013); *Heller II*, 670 F.3d at 1257-58; *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 1538 (2012); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 756 (2011); *Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010); *Reese*, 627 F.3d at 802; *United States v. Skoien*, 614 F.3d 638, 641-42 (7th Cir. 2010) (*en banc*), *cert. denied*, 131 S. Ct. 1674 (2011).

activities, and many other activities for which permits are not required – the court of appeals applied intermediate scrutiny. Pet. App. 25a. Under that test, the court of appeals held, the State bears the burden of demonstrating that there is a "'reasonable fit' between the good-and-substantial reason requirement and the government objectives of protecting public safety and preventing crime." Pet. App. 30a-31a.[4]

In applying this standard, the court of appeals first noted the narrow scope of Maryland's permit scheme, which not only exempts the wear, carry, and transport of handguns within one's home and business, but also in many public places and in connection with certain public activities. Pet. App. 31a-32a. With the scope of the requirement in mind, the court examined evidence presented by the State – most of which was uncontested on the summary judgment record below – that the good-and-substantial-reason requirement protects citizens and inhibits crime in numerous ways, including by decreasing the availability of handguns to criminals via theft, lessening the risk that basic confrontations will turn deadly,

[4] Maryland's objectives in enacting the Permit Statute appear in codified legislative findings about the increase in handgun violence, the inadequacy of then-existing laws to address that violence, and the conclusion that "additional regulations on the wearing, carrying, and transporting of handguns are necessary to preserve the peace and tranquility of the State and to protect the rights and liberties of the public." CR § 4-202.

and reducing escalations of routine police encounters with citizens into high-risk situations. Pet. App. 32a-35a. The court of appeals emphasized that this was accomplished while, at the same time, ensuring that persons in need of handguns for self-protection "'can arm themselves in public places where Maryland's various permit exceptions do not apply.'" Pet. App. 35a.

Thus, the court concluded that Maryland carried its burden of demonstrating the required fit between the good-and-substantial-reason requirement and the State's objectives of protecting public safety and preventing crime. Pet. App. 35a-36a. The duty of the courts, the court of appeals stated, is not to impose legislative policy, but to "ensure that the legislature's policy choice substantially serves a significant governmental interest." Pet. App. 38a. Thus, the court held, the district court had erred in applying what was, in effect, strict scrutiny in striking down Maryland's law, which the district court faulted for not being the narrowest of all possible policy choices and for not single-handedly solving Maryland's handgun violence problems. Pet. App. 38a-40a.

In reaching its conclusions, the court of appeals noted its agreement with the decision of the United States Court of Appeals for the Second Circuit, which upheld a similar, but more restrictive, statute in *Kachalsky*. Pet. App. 36a. The court of appeals also distinguished the law before it from the "flat ban" on public carry struck down in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), without identifying any

disagreement with the Seventh Circuit's decision. Pet. App. 36a-37a n.10.

REASONS FOR DENYING THE PETITION

The petition presents no question that warrants this Court's review. The decision of the court of appeals does not conflict with the decisions of this Court in *Heller* and *McDonald* or the decision of any other United States court of appeals or state court of last resort.

Petitioners' claim that such conflicts exist rests on a mistaken understanding of the decision below and the law under review. The primary issue petitioners suggest this Court take this case to address – whether the Second Amendment applies outside the home at all – was not even decided by the court of appeals, which held that the Permit Statute would satisfy intermediate scrutiny even assuming it regulates conduct within the scope of the Second Amendment. Moreover, the law at issue does not ban the carry of handguns outside the home, deny individuals the use of handguns for self-defense, or limit individuals' carrying of non-handgun firearms anywhere. Instead, subject to numerous exceptions where a permit is not required, the law regulates the wear and carry of handguns in public areas by requiring issuance of permits to individuals who, along with other qualifications not challenged here, have a good-and-substantial reason to wear and carry a handgun

in those public areas, including for personal protection. The court of appeals' decision upholding Maryland's law is consistent with the decisions of each of the handful of other courts to have reviewed similar laws, with the sole exception of the district court decision it reversed, and with the decisions of other courts that have struck down substantially more restrictive laws.

I. The Decision of the Court of Appeals Is Consistent with this Court's Decisions in *Heller* and *McDonald*.

There is no conflict between the decision of the court of appeals and this Court's decisions in *Heller* and *McDonald*, both of which concerned laws that banned the possession of handguns, including in the home for the purpose of self-defense. In both cases, while not limiting Second Amendment protections to the home, this Court identified the home as a place where Second Amendment rights require especially strong protection. *Heller*, 554 U.S. at 628; *McDonald*, 130 S. Ct. at 3036 (plurality op.). And in both cases, this Court made clear that the Second Amendment permits reasonable regulation of firearms. *Heller*, 554 U.S. at 626-27; *McDonald*, 130 S. Ct. at 3047 (plurality op.).

Maryland's law is substantially different from the laws at issue in *Heller* and *McDonald* in numerous respects. Maryland's permit law: (1) does not regulate the wear and carry of any firearms within an

individual's home, own business, or other property;[5] (2) does not regulate the wear and carry in public of any firearms other than handguns; (3) does not apply to the wear and carry of handguns in many public places, including in connection with hunting, trapping, a target shoot, formal or informal target practice, a sport shooting event, certain firearms and hunter safety classes, or an organized military activity, CR § 4-203(b)(4); (4) allows individuals to obtain a permit to wear and carry handguns in other public spaces with a good-and-substantial reason, including for personal protection; and (5) has long historical roots, resembling laws regulating or prohibiting the carrying of concealed and concealable weapons in both the United States and England.

Thus, contrary to petitioners' arguments, the "scope" question presented to the court of appeals, as relevant to the statute under review, was not whether the Second Amendment applies to conduct outside the home at all, or even whether it applies to the wear and carry of handguns outside the home for self-defense, but whether the Second Amendment is burdened by a statute that expressly applies only outside of one's own property; only to handguns; not in connection with enumerated activities such as

[5] In May 2013, Maryland's Governor signed into law new legislation that imposes registration and licensing requirements applicable to the purchase of all handguns, effective October 1, 2013. Those requirements are not part of Maryland's Permit Statute and are not at issue in this action.

hunting, target shooting, and sport shooting; and that expressly allows carry of handguns in public for self-defense as long as the applicant can provide a showing it is needed for that purpose. However, the court of appeals declined to answer this "scope" question in light of its conclusion that the case could be resolved on other grounds.[6]

In an effort to identify a non-existent conflict, petitioners also err in their description of the court of appeals' adoption and application of the intermediate scrutiny test. Petitioners initially err in arguing, in effect, that no standard of scrutiny should apply to regulations that burden Second Amendment rights. Pet. 22-23. In *Heller* and *McDonald*, this Court made

[6] Although the court of appeals did not address the long historical lineage of laws regulating public carry in light of its decision that doing so was unnecessary to the resolution of the case, the history of laws restricting the public carry of weapons traces at least as far back as the fourteenth-century Statute of Northampton, 2 Edw. III, c. 3 (1328) (Eng.), which prohibited individuals from going or riding while armed, and the 1689 English Bill of Rights, 1 W. & M. c. 2, § 7, in 3 Eng. Stat. at Large 441 (1689), which conditioned the right of protestants to "have arms for their defense" on whether they were "allowed by law." The Statute of Northampton, in particular, was included in Blackstone's Commentaries, 4 William Blackstone, *Commentaries on the Laws of England* 148-49 (Clarendon Press 1769). Moreover, laws banning the carry of all concealable weapons, either openly or concealed, except in circumstances in which there was an objective need for self-defense, were enacted in the late 19th century in a number of states, *see*, *e.g.*, 1882 W. Va. Acts, ch. 135; Tex. Act of Apr. 12, 1871, ch. 34, § 1, and upheld against constitutional challenges, *see*, *e.g.*, *State v. Workman*, 14 S.E. 9 (W. Va. 1891); *State v. Duke*, 42 Tex. 455 (1874).

clear that the Second Amendment does not protect "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 554 U.S. at 626; 130 S. Ct. at 3047. This Court also identified a non-exhaustive list of "presumptively lawful" regulatory measures that included absolute bans on possession of all firearms by certain classes of individuals and on the concealed carry of all firearms. 554 U.S. at 626; 130 S. Ct. at 3047. The question left open by *Heller* and *McDonald* is thus not whether any regulations that may have an impact on carrying firearms are permissible, but how to determine which are permissible and which are not.

In *Heller*, this Court clearly foreclosed the use of rational basis scrutiny, as well as the interest-balancing approach suggested by the dissent, but did not otherwise specify the level of scrutiny to be applied to laws challenged as burdening the Second Amendment right. 554 U.S. at 628 n.27, 634-35. Most courts of appeals to have considered Second Amendment challenges since *Heller* have looked to First Amendment jurisprudence in holding that the level of scrutiny will vary based on whether the intrusion being analyzed burdens the core right, or an aspect of the right outside of the core. *See generally* cases cited in footnote 3 above. Those courts generally have been guided in identifying the core Second Amendment right by this Court's description in *Heller* of the right the Second Amendment "elevates above all other interests": "the right of law-abiding, responsible citizens to use arms in defense of hearth and home."

554 U.S. at 635. Thus, where the burden falls outside of that core right, courts have applied intermediate scrutiny, as the court of appeals did here.

Petitioners also argue incorrectly that the court of appeals failed to apply properly the intermediate scrutiny test and, instead, effectively applied rational basis to uphold the good-and-substantial-reason requirement. To the contrary, the court of appeals appropriately identified the burden as the government's, considered the evidence submitted, concluded that the State's interest in public safety and the reduction of violence was compelling, and concluded the State had carried its burden of proving the required fit between the law and its interest. Pet. App. 30a-36a. Contrary to petitioners' position, this level of heightened scrutiny does not require a rejection of all legislative judgments in favor of a court's own policy judgment or that of the plaintiffs, nor does it require a court to reject uncontested evidence that the plaintiffs do not like. The court of appeals put the State to its burden, and determined that the State had satisfied that burden.

II. The Decision of the Court of Appeals Is Consistent with the Decisions of Other Circuit Courts.

The court of appeals' decision conforms with the decision of the United States Court of Appeals for the Second Circuit in *Kachalsky,* which upheld a permit scheme in New York that is stricter than Maryland's,

as to which this Court denied a petition for writ of certiorari in April of this year. The decision below is also in conformance with the outcome of the decision of the United States Court of Appeals for the Third Circuit in *Drake v. Filko*, ___ F.3d ___, 2013 U.S. App. LEXIS 15635 (3d Cir. July 31, 2013), upholding the constitutionality of the requirement in New Jersey's permit law that applicants demonstrate a "justifiable" need to carry a handgun in public.[7]

Nor is there any conflict between the decision below and the decision of the United States Court of Appeals for the Seventh Circuit in *Moore*. In *Moore*, the Seventh Circuit struck down an Illinois ban on public carrying of all firearms, not just handguns, that, along with a similar ban in Washington, D.C., was the most restrictive such law in the country. 702 F.3d at 940. The Illinois law was an absolute ban that

[7] Unlike the decision below and the Second Circuit's decision in *Kachalsky*, the Third Circuit concluded that New Jersey's permit law fell outside the scope of the Second Amendment because it constituted a longstanding and, therefore, presumptively lawful regulation. *Drake*, 2013 U.S. App. LEXIS 15635, at *22-*23. That decision does not present an actual conflict with the decision below for two reasons. First, both courts concluded that the respective permit schemes were constitutional even if they burdened conduct protected by the Second Amendment. Pet. App. 40a; *Drake*, 2013 U.S. App. LEXIS 15635, at *23-*24; *cf. Kachalsky*, 701 F.3d at 101. Second, although the Fourth Circuit assumed that the Second Amendment protects conduct regulated by Maryland's permit statute, it did not decide that issue. Any perceived conflict between the Third Circuit's decision in *Drake* and the Seventh Circuit's holding in *Moore* does not involve the Fourth Circuit's decision in this case.

did not allow for the issuance of any permits for self-defense.

Although petitioners claim a conflict between the decisions of the court of appeals and the Second Circuit's decision in *Kachalsky*, on the one hand, and the Seventh Circuit's decision in *Moore*, on the other, the decisions themselves demonstrate otherwise. In *Moore*, the Seventh Circuit did not indicate any disagreement with the earlier outcome of *Kachalsky*. Although noting a "reservation" about the Second Circuit's suggestion that the scope of the Second Amendment right might be greater within the home than outside of it, the *Moore* court primarily emphasized how much stricter the Illinois law was than New York's permit scheme (which is stricter than Maryland's). 702 F.3d 933, 940-41. The Seventh Circuit emphasized that Illinois was "the *only* state that maintains a flat ban on carrying ready-to-use guns outside the home" and that its decision was based not on "degrees of scrutiny, but on Illinois's failure to justify the most restrictive gun law of any of the 50 states." *Id.* at 940-41.[8]

[8] Contrary to petitioners' contention that the Seventh Circuit implicitly rejected the application in the Second Amendment context of standards of scrutiny formulated by this Court in the context of adjudicating other constitutional rights, Pet. 20-22, the Seventh Circuit did not do so. Indeed, without identifying the particular standard that might have been applicable in that case, the Seventh Circuit engaged in a discussion clearly implying that it would be prepared to apply a sliding-scale standard of scrutiny in such cases depending on the degree to

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Similarly, the court of appeals noted with approval the Seventh Circuit's decision in *Moore*, stating that its striking of Illinois's "wholesale ban on the public carrying of firearms . . . underscored" the difference between Illinois's approach and the moderate approaches of permit schemes like those in New York and Maryland. Pet. App. at 36a-37a n.10. Just as there is no indication in the Seventh Circuit's discussion of the *Kachalsky* decision that it would have reached a different outcome in that case, there is no indication in the discussion of the *Moore* decision by the court of appeals that it would have reached a different outcome in that case. Petitioners' attempt to identify a conflict among these decisions – purportedly because the Seventh Circuit *held* that the Second Amendment right identified in *Heller* applies outside the home, whereas the Second and Fourth Circuits merely *assumed*, without actually deciding, that that it does so – is mistaken.

The decision below is also consistent with decisions of federal district courts in the Ninth Circuit, currently on appeal, upholding the constitutionality under the Second Amendment of a California statute requiring an applicant to show "good cause" for issuance of a license to carry a handgun in public, as well as a Hawaii statute requiring such applicants to

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which Second Amendment rights are burdened. 702 F.3d at 939-40. The Seventh Circuit did not apply any standard of scrutiny in *Moore* because it found that Illinois had failed entirely to justify its law. *Id.* at 940-42.

demonstrate exceptional reason to fear injury to the applicant's person or property. *Peruta v. County of San Diego*, 758 F. Supp. 2d 1106, 1110, 1121 (S.D. Cal. 2010), *appeal argued*, No. 10-56971 (9th Cir. Dec. 6, 2012), ECF No. 107; Order, *Baker v. Kealoha*, No. 11-cv-528 (D. Haw. Apr. 30, 2012), ECF No. 51, *appeal argued*, No. 12-16258 (9th Cir. Dec. 6, 2012), ECF No. 42.

III. The Decision of the Court of Appeals Is Consistent with the Decisions of Other Courts on Prior-Restraint Doctrine.

Petitioners mistakenly assert a conflict between the decision below and various state supreme courts regarding the application of First Amendment prior-restraint doctrine in the Second Amendment context. Pet. 29-34. In fact, every court to have addressed their prior-restraint argument in the Second Amendment context has rejected it, and the state court decisions they cite are inapposite. The prior restraint doctrine, developed in the unique context of First Amendment cases, holds that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969); *see also City of Lakewood v. Plain Dealer Co.*, 486 U.S. 750, 759 (1988) (describing prior restraints as licensing laws granting officials "substantial power to discriminate

based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers").

Every court to have confronted petitioners' prior-restraint argument has rejected it. *See*, *e.g.*, Pet. App. 41a n.11; *Drake*, 2013 U.S. App. 15635, at *24-*25; *Hightower v. City of Boston*, 693 F.3d 61, 80-81 (1st Cir. 2012); *Kachalsky v. Cacace*, 817 F. Supp. 2d 235, 267 n.32 (S.D.N.Y. 2011), *aff'd,* 701 F.3d 81 (2d Cir. 2012). Even judges who have otherwise accepted petitioners' Second Amendment arguments have readily rejected their attempt to apply prior-restraint doctrine in this context. *E.g.*, *Drake*, 2013 U.S. App. LEXIS 15635, at *77-*78 n.17 (Hardiman, dissenting); Pet. App. 70a-75a. Moreover, both lower courts in this case not only rejected the conceptual application of prior-restraint doctrine in Second Amendment cases, but held that Maryland's statute would not run afoul of prior-restraint principles even if they did apply. Pet. App. 41a n.11 (petitioners' prior-restraint argument would fail because it is premised on the uncorroborated assertion that the good-and-substantial-reason requirement vests the State with unbridled and absolute power); Pet. App. 72a ("Even if a prior restraint inquiry were appropriate, the Court rejects Woollard's assertion that Maryland's permitting scheme vests officials with unbridled discretion as regards its application."); *see also Drake*, 2013 U.S. App. LEXIS 15635, at *24-*25 (reaching same conclusion with respect to New Jersey's permit statute).

Nor do the state court cases on which petitioners rely support their argument. The Michigan Supreme

Court in *People v. Zerillo* (cited at Pet. 30) concluded that Michigan's Constitution was violated by a statutory provision that, unlike Maryland's, conferred unfettered discretion on a county official in firearm licensing. 189 N.W. 927, 928 (Mich. 1922). The Rhode Island Supreme Court in *Mosby v. Devine* (cited at Pet. 30-31) upheld two handgun-licensing provisions under the Rhode Island Constitution, but then stated in dicta that it would not have approved a permitting system committed to the "unfettered discretion of an executive agency," "unreviewable" by any court. 851 A.2d 1031, 1048, 1050 (R.I. 2004).[9] These decisions did not purport to, and did not, apply prior restraint doctrine, a concept not even mentioned in either decision. Instead, those courts applied a broader doctrine recognizing that unchecked discretion may work arbitrary deprivations of due process rights. *See*, *e.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 53, 60-61 (1998) (holding anti-loitering ordinance giving police officers "absolute discretion" to enforce law violated due process, but rejecting overbreadth challenge because statute did not "prohibit speech"). This case, as the district court and court of appeals agreed,

[9] The Indiana intermediate appellate court's decision in *Schubert v. DeBard* (cited at Pet. 31-32) is even further removed from the concept of prior restraint, as the basis for the court's decision in that case was not unfettered discretion or an absence of court review, but whether the standard employed was permissible at all under the Indiana constitution. 398 N.E.2d 1339, 1341 (Ind. Ct. App. 1980). The court held it was not.

presents nothing resembling such "unchecked discretion." Pet. App. 8a-11a, 41a n.11; 72a-75a.

Moreover, even if prior-restraint doctrine were applicable, Maryland's good-and-substantial-reason requirement would satisfy the requirements of that doctrine. As the district court and the Fourth Circuit held, Maryland's good-and-substantial-reason requirement does not confer unbridled discretion on licensing officials, but instead establishes an objective standard applied uniformly by the Maryland State Police, guided by Maryland appellate decisions, with subsequent review by the Handgun Permit Review Board and state courts. Pet. App. 8a-11a, 41a n.11; 72a-75a. Thus, even if there were any conflict regarding the applicability of prior-restraint doctrine under the Second Amendment, its resolution would have no bearing on the outcome of this case, and does not provide a basis for granting a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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