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

BRIEF OF *AMICUS CURIAE* CATO INSTITUTE IN SUPPORT OF PETITIONERS

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001

C. KEVIN MARSHALL
Counsel of Record
JAMES M. BURNHAM
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939
ckmarshall@jonesday.com

Counsel for Amicus Curiae *Cato Institute*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. The Decision Below Hinges On The Novel Premise That Governments May Condition The Exercise Of A Fundamental Right On One's Proving A Special Need To Exercise It 4

A. Constitutional rights are not limited to persons who demonstrate to the government a particularized need to exercise them 4

B. The Fourth Circuit's decision limits the Second Amendment right to persons who demonstrate a particularized need for its protections 10

II. The Fourth Circuit Has Joined Other Circuits That, At Odds With *Heller*, *McDonald*, And The Nature Of Fundamental Rights, Invert The Second Amendment 13

A. In the absence of guidance from this Court, many lower courts have relegated the Second Amendment to a diluted, deferential form of "intermediate scrutiny" review 14

TABLE OF CONTENTS
(continued)

Page

B. Other courts, particularly the Seventh Circuit, have protected the Second Amendment right more robustly 17

III. The Narrow Question Presented Here Provides An Excellent Vehicle To Establish A Simple Baseline Protection of The Second Amendment Right 21

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

CASES

Bailey v. United States,
133 S. Ct. 1031 (2013) 8

Bonidy v. U.S. Postal Service,
No. 10-cv-02408, 2013 WL 3448130
(D. Colo. July 9, 2013) 19, 20

Branzburg v. Hayes,
408 U.S. 665 (1972) 2

Brigham City v. Stuart,
547 U.S. 398 (2006) 7

Brown v. Entertainment Merchants Association,
131 S. Ct. 2729 (2011) 6

Burdick v. Takushi,
504 U.S. 428 (1992) 10

Cantwell v. Connecticut,
310 U.S. 296 (1940) 9

District of Columbia v. Heller,
554 U.S. 570 (2008) ..... *passim*

Dolan v. City of Tigard,
512 U.S. 374 (1994) 10

Drake v. Filko,
No. 12-1150, _F.3d_, 2013 WL 3927735
(3d Cir. July 31, 2013) ..... *passim*

Ezell v. City of Chicago,
651 F.3d 684 (7th Cir. 2011) 17, 18, 19

Fisher v. University of Texas at Austin,
133 S. Ct. 2411 (2013) 9

TABLE OF AUTHORITIES
(continued)

Page(s)

Freedman v. Maryland,
380 U.S. 51 (1965)..... 9

Gowder v. City of Chicago,
No. 11 C 1304, 2012 WL 2325826
(N.D. Ill. June 19, 2012) 20

Heller v. District of Columbia,
670 F.3d 1244 (D.C. Cir. 2011)..... 16, 20, 21

Kachalsky v. Westchester County,
701 F.3d 81 (2d Cir. 2012) .....*passim*

Ker v. California,
374 U.S. 23 (1963)..... 7

Kwong v. Bloomberg,
_ F.3d _, 2013 WL 3388446
(2d Cir. July 9, 2013) 16

Lavine v. Milne,
424 U.S. 577 (1976)..... 10

McDonald v. City of Chicago,
130 S. Ct. 3020 (2010).....*passim*

Michigan v. Tyler,
436 U.S. 499 (1978)..... 7

Moore v. Madigan,
702 F.3d 933 (7th Cir. 2012) 11, 13, 19

Murdock v. Pennsylvania,
319 U.S. 105 (1943)..... 9

Planned Parenthood of Southeastern Pennsylvania v. Casey,
505 U.S. 833 (1992)..... 8

Schneider v. New Jersey,
308 U.S. 147 (1939)..... 7

TABLE OF AUTHORITIES
(continued)

Page(s)

Schrader v. Holder,
704 F.3d 980 (D.C. Cir. 2013) 17

Snyder v. Phelps,
131 S. Ct. 1207 (2011) 5, 6

Texas v. Johnson,
491 U.S. 397 (1989) 6, 7

United States v. Masciandaro,
638 F.3d 458 (4th Cir. 2011) 4

United States v. Playboy Entertainment Group, Inc.,
529 U.S. 803 (2000) 9

United States v. Santana,
427 U.S. 38 (1976) 7

STATUTES

Md. Code Ann., Pub. Safety § 5-306 ..... 1, 10

OTHER AUTHORITIES

Black's Law Dictionary (8th ed. 2004) 5

STATEMENT OF INTEREST[1]

Established in 1977, the Cato Institute is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences and publishes books, studies, and the annual Cato Supreme Court Review. This case is of central concern to Cato because it involves the natural right to armed self-defense, which the Constitution protects through the Second and Fourteenth Amendments.

SUMMARY OF ARGUMENT

Five years ago, this Court held that the Second Amendment protects the "individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). In the decision below, however, the Fourth Circuit upheld a pre-*Heller* Maryland statute that prohibits individuals from receiving a permit to "wear, carry, or transport a handgun" unless they first prove to the government that they have a "good and substantial reason" to exercise this individual right. Md. Code Ann., Pub. Safety § 5-306(a)(5)(ii). Maryland is one of a minority of States in which "the general desire to defend one's self or property is insufficient for the permit to issue," and a citizen instead "must show a

---

[1] No party or counsel for a party authored or contributed monetarily to the preparation or submission of any portion of this brief. Counsel of record for all parties received notice of the Cato Institute's intention to file this brief more than 10 days before it was due, and all parties have consented to its filing.

special need for self-defense distinguishable from that of the population at large." *Drake v. Filko*, No. 12-1150, _F.3d_, 2013 WL 3927735, at *11 (3d Cir. July 31, 2013) (Hardiman, J., dissenting) (collecting laws and citing Fourth Circuit's decision).

The novelty and dubiousness of allowing a government to limit a fundamental constitutional right to those who can demonstrate a *special need* to exercise it—beyond the need of any citizen—would be plain if the Fourth Circuit's decision involved any right other than the one this Court recognized in *Heller*. *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3043 (2010) (plurality) (Second Amendment may not be "singled out for special—and specially unfavorable—treatment."). The purpose of a constitutional right is to establish by the highest law that individuals are *entitled* to act in certain ways if they wish, and thereby protect such conduct against legislators' prejudices and shifting fads.

As this Court has emphasized, if "[a] constitutional guarantee [is] subject to future judges' assessments of its usefulness," then it "is no constitutional guarantee at all." *Heller*, 554 U.S. at 634. All the more is that true if the "constitutional guarantee" is subject to *political branches'* assessments that it *is not useful in the ordinary course*. For "[t]he very enumeration of the right takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* That is why "one has an undoubted right to read and proclaim the First Amendment in the classroom or in a park"—without having to provide a "good and substantial reason" for such reading and proclaiming. *Branzburg v. Hayes*, 408 U.S. 665, 719

(1972) (Douglas, J. dissenting). As the District Court below simply summarized: "The right's existence is all the reason he needs." App. 79a.

The Second Amendment, like the First, is of course not without limits, as this Court confirmed in *Heller* and reaffirmed in *McDonald*. Some possession and carrying of arms will be outside the scope of the Second Amendment, much as obscenity and private defamation fall outside the First. And some possession and carrying that is within the scope of the arms right will be validly subject to restrictions, akin to "time, place, and manner" rules, which are justified by a governmental interest that is distinct from suppressing "too much" exercise of a constitutional right. As Petitioners and the District Court below conceded, such restrictions may include licensing.

What a government *cannot* do, however, is categorically deprive its citizens of their Second Amendment right unless and until they demonstrate a substantial, specialized need to exercise it. Yet that inversion of the right is *precisely* what the Fourth Circuit has blessed, expressly following a similar decision of the Second Circuit, while spurning a decision of the Seventh.

By granting the Petition, to confirm what should be the obvious point that such presumptive deprivations conflict with the Second Amendment's nature as a fundamental constitutional right, this Court could take a small but critical step toward answering the rising chorus of lower courts lamenting—or perhaps celebrating—the lack of guidance in applying *Heller* with respect to the carrying of weapons. *See, e.g.*, *Drake*, 2013 WL

3927735, at *2 ("Outside of the home, however, we encounter the 'vast terra incognita' recognized by the Fourth Circuit."); *Kachalsky v. Westchester Cnty.*, 701 F.3d 81, 88 (2d Cir. 2012) ("*Heller* . . . raises more questions than it answers."); *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) ("The whole matter [of an arms right beyond the home] strikes us as a vast *terra incognita* . . . ."). And the Court could do so without wading into complex questions about the outer reaches of the Second Amendment; without opining on—much less calling into question—the permissibility of restrictions on the exercise of the right (including any other conditions on the granting of licenses); and without resolving fraught questions regarding standards of review and levels of scrutiny. That is because, if the Second Amendment actually protects "the individual right to possess and carry weapons in case of confrontation," then Maryland's prove-it-to-use-it regime must be unconstitutional. *Heller*, 554 U.S. at 592.

ARGUMENT

I. The Decision Below Hinges On The Novel Premise That Governments May Condition The Exercise Of A Fundamental Right On One's Proving A Special Need To Exercise It.

A. Constitutional rights are not limited to persons who demonstrate to the government a particularized need to exercise them.

The existence of constitutional rights is not contingent on the ability of individuals to persuade the government that they are entitled to exercise those rights. Forcing citizens to obtain permission before exercising a constitutional right runs counter

to the very concept of a "right." The word means "[s]omething that is due to a person by . . . legal *guarantee*." Black's Law Dictionary, at 1347 (8th ed. 2004) (emphasis added). Thus, *if* a constitutional right exists, then holders of that right have a sufficient reason to exercise it, *simply by the fact of the right's existence*, subject only to appropriate governmental regulations, which *the government* must justify. *Heller*, speaking generally of constitutional rights, emphatically recognized this rudimentary point: "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634. This principle is evident in numerous constitutional contexts:

1. In the First Amendment context, would-be speakers are not first required to demonstrate their need to speak (or to assemble or petition). No matter how harmful the speech, this Court has never questioned the "need" of a particular speaker to engage in it. If speech is within the First Amendment—*i.e.*, not obscene, defamatory, etc.—then the speaker is *presumptively entitled* to speak.

This Court's recent jurisprudence confirms as much. For instance, just two years ago, this Court reviewed another case from Maryland, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011). The Court held that the First Amendment protected a demonstration by protestors at the funeral of a marine killed in combat, during which the protestors waved placards bearing offensive comments and personal slurs. *Id.* at 1220. At no point in its analysis did the Court even

suggest—much less hold—that it was relevant whether the Westboro Baptists had a "good and substantial" need to use Matthew Shepherd's funeral as a platform for political protest. That was, of course, because their speech would have been protected *regardless* of how "good" their reason for engaging in it. All that mattered was whether the speech fell within the First Amendment and whether it was being undertaken at a location where the protesters "had the right to be." *Id.* at 1218.

Indeed, the Court does not inquire about a speaker's "need" to speak even where his speech inflicts clear and substantial harm on others. That was true in *Snyder*, and was likewise true in *Brown v. Entertainment Merchants Association*, 131 S. Ct. 2729 (2011). There, the Court explained that "new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated." *Id.* at 2734. The Court therefore held that the First Amendment invalidated California's restriction on violent video games. It reached that holding without even gesturing at whether video-game makers had a "good and substantial" need to produce violent games, or whether individual children had a "good and substantial" need to possess such games. Quite the contrary; the Court described its task as "only to say whether or not such works [fall outside the First Amendment] . . . and if not, whether the regulation of such works is justified by . . . a compelling state interest." *Id.* at 2741

Nor is this a recent development. Back in *Texas v. Johnson*, 491 U.S. 397 (1989), for instance, this Court specifically rejected the contention that prohibiting

flag burning was permissible because nobody *needed* to burn flags. The dissent suggested that flag burning could be banned because it "convey[s] nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways." *Id.* at 416 n.11. This Court rejected that suggestion, noting that it had "summarily" rejected arguments that allowing some methods of communication justified prohibiting others. *Id.* (quoting *Spence v. State of Wash.*, 418 U.S. 405, 411 n.4 (1974)); *see also, e.g.*, *Schneider v. New Jersey*, 308 U.S. 147, 157 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.").

2. So, too, for the Fourth Amendment. "It is a 'basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable.'" *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (citation omitted). The default rule therefore is that searches and seizures inside a home require a warrant. *A fortiori*, a State could not pass a statute giving its agents blanket authorization to conduct searches of all homes, except those whose residents had proven a particularized, "good and substantial" need for privacy.

The Fourth Amendment, like the First, of course has exceptions. *See, e.g.*, *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (responding to fire); *Ker v. California*, 374 U.S. 23, 40, (1963) (plurality) (destruction of evidence is imminent); *United States v. Santana*, 427 U.S. 38, 42-43 (1976) ("hot pursuit" of a fleeing suspect). But each of these exceptions is a carve-out

from the general default rule requiring a warrant—that is, a default in favor of the right—and none turns on a particular individual's need for Fourth Amendment protections, much less his proof of such need. This Court has never countenanced a regime that divests individuals of the Fourth Amendment unless and until they prove a particularized need for its protections. Just this past Term, the Court limited police authority to detain people incident to executing a search warrant, without requiring an inquiry into whether the relevant individuals have a "special need" to be free from such detention. *See Bailey v. United States*, 133 S. Ct. 1031, 1043 (2013).

3. Other fundamental rights are similar. For instance, it is inconceivable under this Court's precedent that an individual's entitlement to obtain an abortion could turn on her proving a particularized need for the procedure. Such a precondition would fly in the face of this Court's recognition, as made clear in the plurality opinion in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), "of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State." *Id.* at 846.

While *Casey* noted "the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health," *id.*, it made clear that state power to restrict the procedure existed only outside the scope of the underlying right. *See id.* at 870 ("We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy."). This Court has never

suggested, however, that that "right of the woman to choose" could be made contingent on a weighing of the particular factual circumstances of the woman so choosing.

4. Just as the Constitution's protection of a constitutional right does not depend on a particular individual's need for the right, this Court has never approved of imposing on individuals the burden to justify exercising their rights. For instance, the government cannot require filmmakers to prove that their films constitute protected speech before those films are released. *See Freedman v. Maryland*, 380 U.S. 51, 58 (1965) ("[T]he burden of proving that the film is unprotected expression must rest on the censor."). As the Court long ago explained, "to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution." *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940); *see also Murdock v. Pennsylvania*, 319 U.S. 105, 112-13 (1943) ("A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution.").

This Court thus consistently places the burden of justifying an intrusion on constitutional rights upon the intruding government, rather imposing on the individual who desires the protection of the right the burden of justifying that protection. *See, e.g.*, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419-20 (2013) (racial classifications); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000)

(freedom of speech); *Burdick v. Takushi*, 504 U.S. 428, 439 (1992) (right to vote); *Dolan v. City of Tigard*, 512 U.S. 374, 391 n.8 (1994) (unconstitutional conditions). Who bears the burden matters, because it directly affects the substantive protection given to the underlying right: "Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application." *Lavine v. Milne*, 424 U.S. 577, 585 (1976).

B. The Fourth Circuit's decision limits the Second Amendment right to persons who demonstrate a particularized need for its protections.

1. The Fourth Circuit's opinion departs from this well-worn understanding. If the right "to possess and carry weapons in case of confrontation," *Heller*, 554 U.S. at 592, really exists, then the straightforward analysis applicable to other constitutional rights should preclude Maryland from banning the carrying of weapons in case of confrontation for everyone who cannot demonstrate a "good and substantial reason" for such carrying, Md. Code Ann., Pub. Safety § 5-306(a)(5)(ii).

The District Court's opinion demonstrates why this is so. As that court explained, "the regulation at issue is a rationing system," which "aims, as Defendants concede, 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." App. 77a. And "[a] law that burdens the exercise of an enumerated constitutional right by simply making that right more difficult to exercise

cannot be considered 'reasonably adapted' to a government interest, no matter how substantial that interest may be." *Id.* at 78a. That is, of course, the point of this Court's decisions outlined above. As the District Court concluded: "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." *Id.* at 79a.

The Fourth Circuit, for its part, readily recognized that the purpose of Maryland's law was to reduce the number of firearms possessed by the public and, in turn, reduce the public's exercise of its Second Amendment rights. *See id.* at 26a-28a. It then held that Maryland's law was justified *because of*—rather than *in spite of*—the fact that Maryland has successfully suppressed its citizens' exercise of their constitutional right. "The State has clearly demonstrated that the good-and-substantial-reason requirement advances the objectives of protecting public safety and preventing crime *because it reduces the number of handguns carried in public*." *Id.* at 32a (emphasis added). That mode of analysis—in which the government's desire to circumscribe a constitutional right justifies burdening that right—is the nullification of the constitutional right.

The Seventh Circuit's opinion in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), illustrates the error. As *Moore* explained in the context of a New York law substantively identical to Maryland's: "This is the *inverse* of laws that forbid dangerous persons to have handguns; New York places the burden on the applicant to show that he needs a handgun to ward off dangerous persons." *Id.* at 941

(emphasis added). *See also Kachalsky*, 701 F.3d at 98 (approving of New York's limitation of the Second Amendment to those with "an actual reason" or a "bona fide reason" to exercise their rights). Unlike a law or regulation that imposes a restriction or exclusion—*e.g.*, no guns for violent felons, or no guns for the mentally ill—the Maryland statute's default is that *nobody* may carry a gun *except* those who fall *within* Maryland's carve-out for individuals whom it permits to exercise their Second Amendment rights. That mode of analysis impermissibly inverts the purpose and effect of a constitutional right.

2. The Fourth Circuit's mode of analyzing Second Amendment claims is, moreover, self-immolating. According to the opinion, gun regulations are justified by the (always present) state interest in curtailing gun violence. Those regulations will then be deemed sufficiently tailored if they succeed in eliminating the exercise of Second Amendment rights by "reduc[ing] the number of handguns carried in public." App. 32a; *see also Drake*, 2013 WL 3927735 at *9 ("New Jersey legislators [ ] have made a policy judgment that the state can best protect public safety by allowing only those qualified individuals who can demonstrate a 'justifiable need' to carry a handgun to do so."). Indeed, the Fourth Circuit even congratulates Maryland for "ensur[ing] that those persons in palpable need of self-protection can arm themselves in public places." App. 35a. But Maryland's picking-and-choosing *confirms* the unconstitutionality of its regime. The right to "possess and carry weapons in case of confrontation," *Heller*, 554 U.S. at 592, is not reserved for individuals with a "palpable need" to do so. It is, rather, a *general* constitutional right available to *all*

law-abiding individuals. Maryland's "limitation" to certain individuals is no defense. It is an indictment.

In short, governments cannot presumptively divest all of their residents of constitutional rights. This Court has already once rejected singling out the Second Amendment for such disfavor. *See McDonald*, 130 S. Ct. at 3043. It apparently must do so again.

II. The Fourth Circuit Has Joined Other Circuits That, At Odds With *Heller*, *McDonald*, And The Nature Of Fundamental Rights, Invert The Second Amendment.

In the decision below, the Fourth Circuit followed the Second Circuit in "inver[ting]" the Second Amendment. *Moore*, 702 F.3d at 941. Both courts upheld laws that required special showings of need before *anyone* could exercise a constitutional right, as opposed to prohibitions existing within lacunae to the right. *See id.* The Fourth Circuit's decision thus exploits and exacerbates the doctrinal confusion that has reigned since *Heller*. The confusion has led to many courts'—with the primary exception of the Seventh Circuit—paying little more than lip service to *Heller* and *McDonald* and applying scrutiny that is intermediate in theory, but permissive in fact.

Petitioners comprehensively demonstrate the divergence in lower courts' application of the Second Amendment. *See* Cert. Pet. at 17-34. Some courts have essentially limited *Heller* to its facts, while others have given it a more muscular construction. But even beyond divergent outcomes, there is broad methodological disagreement concerning the fundamental issue of how to approach questions involving the Second Amendment, which has led to

widespread confusion and, in some instances, toothless protection of the Second Amendment right.

A. In the absence of guidance from this Court, many lower courts have relegated the Second Amendment to a diluted, deferential form of "intermediate scrutiny" review.

The Fourth Circuit, in the case at issue here, adopted intermediate scrutiny in name, but in fact meekly deferred to the legislature and police. This approach, which is not unique to that court, often includes placing the burden on the challenger rather than the government, at least in practice, and—in what amounts to the same thing—employing a presumption of constitutionality even for regulations that directly burden activity within the scope of the Second Amendment right.

1. The court below applied a prior Fourth Circuit case holding "that intermediate scrutiny applies 'to laws that burden any right to keep and bear arms outside of the home.'" App. 25a. The court therefore began "with the issue of whether the governmental interest asserted by the State constitutes a 'substantial' one." *Id.* The court then reviewed some relatively generic statistics regarding the prevalence of violent crime in Maryland, and, without parsing those statistics in any meaningful way, held that "we can easily appreciate Maryland's impetus to enact measures aimed at protecting public safety and preventing crime, and we readily conclude that such objectives are substantial governmental interests." *Id.* at 28a.

The court then turned to narrow tailoring, which it characterized as asking "whether the good-and-substantial-reason requirement, as applied to

Appellee Woollard, is 'reasonably adapted' to Maryland's significant interests." *Id.* at 30a. The court held that Maryland had made this showing by providing evidence that its statute succeeded in preventing people from exercising their right to carry weapons in case of confrontation. As the court explained, "[t]he State has clearly demonstrated that the good-and-substantial-reason requirement advances the objectives of protecting public safety and preventing crime because it reduces the number of handguns carried in public." *Id.* at 32a.

2. The Second Circuit took a similar approach in *Kachalsky*. There, the court held that "intermediate scrutiny is appropriate in this case," such that the challenged "requirement passes constitutional muster if it is substantially related to the achievement of an important governmental interest." *Kachalsky*, 701 F.3d at 96. But rather than require the State of New York to prove that its blanket restriction on carrying firearms—a restriction interchangeable with the one at issue here—was specifically tailored to advancing important governmental interests, the Second Circuit effectively applied rational-basis review.

For example, the court explained that "[a] perfect fit between the means and the governmental objective is not required," such that New York's assessment of "the risks and benefits of handgun possession and shaping a licensing scheme to maximize the competing public-policy objectives" was "precisely the type of discretionary judgment that officials in the legislative and executive branches of state government regularly make." *Id.* at 98-99. In addition to deferring to legislative discretion, the

Second Circuit embraced a "'general reticence to invalidate the acts of our elected leaders.'" *Id.* at 100 (quoting *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012)). The Second Circuit thus gave far more deference to state legislative judgments than intermediate scrutiny typically provides. *See also, e.g.*, *Drake*, 2013 WL 3927735, at *8 (upholding a similar restriction on the basis of an unsubstantiated inference "that given the obviously dangerous and deadly nature of handguns, requiring a showing of particularized need for a permit to carry one publicly serves the State's interests in public safety"); *Kwong v. Bloomberg*, _ F.3d _, 2013 WL 3388446, at *7 (2d Cir. July 9, 2013) (based on New York's "substantial, indeed compelling, governmental interests in public safety and crime prevention," a substantial gun-licensing fee "easily survives 'intermediate scrutiny'").

3. The D.C. Circuit in *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) ("*Heller II*"), took a similar tack. There, the court purported to be applying "intermediate scrutiny" in evaluating restrictions on the purchase of certain types of firearms and ammunition magazines. But in reality, its review was permissive. Rather than scrutinize the tightness of the means-ends fit between the District's regulations and the District's regulatory interest, the court simply noted that there was some evidence showing that the bans were "likely" to promote the District's interests. *Id.* at 1262-64. It then concluded that the regulations therefore passed constitutional muster. *Id.* at 1264.

More recently, the D.C. Circuit barely hesitated in brushing aside the overbreadth of a federal ban on

firearms for all common-law misdemeanants. *See Schrader v. Holder*, 704 F.3d 980 (D.C. Cir. 2013). The court acknowledged that "*some* common-law misdemeanants . . . may well present no . . . risk" of future violence, yet the court did not require the government to justify its imprecision. *Id.* at 990-91.

4. Many of the decisions in this category further lighten the load of "intermediate scrutiny" by placing the burden of proving an entitlement to Second Amendment protection on the person invoking the Amendment. The D.C. Circuit in *Schrader*, for example, in upholding a ban on possession by those convicted of common-law misdemeanors, explained: "[A]lthough the category of common-law misdemeanors has since been narrowed through codification, *plaintiffs have offered no evidence* that individuals convicted of such offenses pose an insignificant risk of future armed violence." *Id.* at 990 (emphasis added). Such burden-inversion would not be tolerated with respect to any other constitutional right.

B. Other courts, particularly the Seventh Circuit, have protected the Second Amendment right more robustly.

1. The Seventh Circuit has expounded the most robust method of analyzing Second Amendment claims. *See*, *e.g.*, *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011). The *Ezell* ruling developed a two-step analysis for Second Amendment questions that the court rooted in *Heller*, which it saw as providing "general direction" for analysis by employing an "instructive" "decision method." *Id.* at 700.

"First, the threshold inquiry in some Second Amendment cases will be a 'scope' question: Is the restricted activity protected by the Second Amendment in the first place?" *Id.* at 701. This foundational inquiry, which was the basic question in *Heller* itself, "requires a textual and historical inquiry into original meaning." *Id.* At this step, the question is primarily whether the government can clearly establish, based on history and legal tradition, that a regulated activity is categorically unprotected—much as this Court has concluded under the First Amendment regarding some categories of speech. *Id.* at 702-03; *see id.* at 704-06 (analyzing history bearing on firing ranges).

If the government fails to make that showing, then the second step of the Second Amendment analysis is an "inquiry into the strength of the government's justification for restricting or regulating the exercise of Second Amendment rights." *Ezell*, 651 F.3d at 703. Again, as with the First Amendment, "the rigor of this judicial review will depend on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right." *Id.*

Some regulations—like Maryland's—completely or effectively ban conduct the Second Amendment protects. Under *Ezell*, these sorts of restrictions will be unconstitutional, much like the categorical handgun bans in *Heller* and *McDonald*. *Id.*

Otherwise, the Seventh Circuit applies heightened review akin to intermediate scrutiny. For "a severe burden on the core Second Amendment right of armed self-defense," the government must provide "an extremely strong public-interest justification and a close fit between the government's means and its

end." *Id.* at 708. For "laws restricting activity lying closer to the margins of the Second Amendment right" and "laws that merely regulate rather than restrict," however, "modest burdens on the right may be more easily justified." *Id.*

Finally, the Seventh Circuit emphasized that, in all events, the government "bears the burden of justifying its action under" the applicable standard of review. *Id.* at 706; *see also id.* at 703 (inquiry is "into the strength of the government's justification"). As with the First Amendment, meeting this burden requires the government to "supply actual, reliable evidence" to justify its public-safety claims for a regulation. *Id.* at 709.

The Seventh Circuit recently reaffirmed this rigorous analysis in *Moore.* There, the court refused to "ignore the implication" of this Court's historical analysis in *Heller* "that the constitutional right of armed self-defense is broader than the right to have a gun in one's home." 702 F.3d at 935. It explained that "*Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one's home, as when it says that the amendment 'guarantee[s] the individual right to possess and carry weapons in case of confrontation,'" and noted that "[c]onfrontations are not limited to the home." *Id.* at 935-36 (quoting 554 U.S. at 592). Therefore, the court held, "[t]o confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*." *Id.* at 937; *see also Bonidy v. U.S. Postal Service*, No. 10-cv-02408, 2013 WL 3448130, at *3 (D. Colo. July 9, 2013) (agreeing with the Seventh Circuit's "common-sense view that armed self-defense

is important outside the home"); *id.* at *6 ("[O]penly carrying a firearm outside the home is a liberty protected by the Second Amendment.").

2. Another methodology that has been proposed for assessing Second Amendment claims is, essentially, a historical-analogical approach. Under this framework, courts would decide modern cases by reference to historical practice, particularly at or near the Founding, and seek to analogize modern regulations (such as the licensing law at issue here) to what was considered acceptable (or not) then. This methodology is perhaps best articulated by Judge Kavanaugh in his *Heller II* dissent. *See also Gowder v. City of Chicago*, No. 11 C 1304, 2012 WL 2325826, at *8-10 (N.D. Ill. June 19, 2012) (evaluating a Chicago gun ordinance using Judge Kavanaugh's historically based approach).

There, Judge Kavanaugh explained that "*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny." *Heller II*, 670 F.3d at 1271. To assess the "scope of the right," courts must look to "historical justification," as well as "tradition (that is, post-ratification history) . . . because 'examination of a variety of legal and other sources to determine the public understanding of a legal text in the period after its enactment or ratification' is a 'critical tool of constitutional interpretation.'" *Id.* at 1272. This analysis likewise applies in assessing the permissibility of a particular regulation. *See id.* ("The Court stated that analysis of whether other gun regulations are permissible must be based on their 'historical justifications.'").

Judge Kavanaugh gave two specific rationales for his approach. First, such a methodology gives governments "*more* flexibility and power to impose gun regulations," because "history and tradition show that a variety of gun regulations have co-existed with the Second Amendment right and are consistent with that right, as the Court said in *Heller*," whereas "if courts applied strict scrutiny, then presumably very few gun regulations would be upheld." *Id.* at 1274. And further, this approach enables the Constitution to adapt to new circumstances through "reason[ing] by analogy from history and tradition." *Id.* at 1275. In sum, "[t]he constitutional principles do not change (absent amendment), but the relevant principles must be faithfully applied . . . to modern situations that were unknown to the Constitution's Framers." *Id.*

III. The Narrow Question Presented Here Provides An Excellent Vehicle To Establish A Simple Baseline Protection of The Second Amendment Right.

This case provides an excellent vehicle for the Court to begin to resolve the confusion over the scope of the Second Amendment. The Court, by granting the Petition and deciding this case, could establish the simple rule that governments may not categorically prohibit average Americans from "possess[ing] and carry[ing] weapons in case of confrontation" for ordinary purposes. *Heller*, 554 U.S. at 592. The Court in doing so could leave broader, more complex questions about the Second Amendment right for another day and for more fruitful development below in light of the Court's guidance and reaffirmation of *Heller*.

1. The Question Presented is simple and straightforward. It merely asks this Court to affirm the truism that the existence of a constitutional right presumptively entitles individuals to engage in protected conduct, without first obtaining the government's blessing.

The Fourth Circuit's rule, which is substantively identical to the Second Circuit's holding in *Kachalsky* and the Third Circuit's recent decision in *Drake*, is effectively that anything short of a complete ban on carrying a weapon outside the home is constitutionally permissible. *See, e.g.*, App. 36a & n.10. That cannot be right, under *Heller* or common sense.

This Court could and should simply reject these extreme positions with a narrow holding rejecting the Fourth Circuit's inversion of the normal operation of constitutional rights. *Heller* already explained that there is "no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach." *Heller*, 554 U.S. at 634. Just as the Court "would not apply an 'interest-balancing' approach to the prohibition of a peaceful neo-Nazi march through Skokie," *id.* at 634-35, requiring marchers to establish a special need to march, the Fourth Circuit should not have done so here—particularly not balancing in the scales of legislatures and executive officials.

2. The narrowness of the Question Presented by the Fourth Circuit's decision also enables the Court to invalidate Maryland's sweeping prohibition without wading into deeper waters of the Second Amendment, regarding its scope, permissible restrictions more generally, or levels of scrutiny.

Because the Maryland statute is unconstitutional under a straightforward application of *Heller* and background principles of constitutional law (principles that *Heller* itself reiterated), the Court could reject it without delving into the nitty-gritty details of what gun regulations would or would not be permissible.

Thus, the sorts of presumptively lawful regulations that this Court mentioned in *Heller* would not be implicated, as the District Court recognized and explained: A holding such as that suggested above would not disturb regulations that keep guns "out of the hands of those adjudged most likely to misuse them, such as criminals or the mentally ill," would not upset bans on "handguns from places where the possibility of mayhem is most acute," and would not upend regulations that "reduce accidents." App. 76a-77a (quotation omitted). Governments would not, as a result of such a holding, have any less latitude in regulating "what" guns are available (*e.g.*, by limiting possession to the safest weaponry and ammunition); "who" may possess weapons (*e.g.*, by excluding the mentally ill or actually dangerous); "where" weapons may be possessed (*e.g.*, not in "sensitive" places); or "how" guns may be possessed (*e.g.*, only after completion of a safety course or background check). All that would change is that this Court would put the Second Amendment on an equal footing with its constitutional neighbors.

CONCLUSION

For the forgoing reasons, *amicus* supports Petitioners' petition for certiorari, and respectfully requests that the petition be granted.

Respectfully submitted,

ILYA SHAPIRO
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, D.C. 20001

C. KEVIN MARSHALL
Counsel of Record
JAMES M. BURNHAM
JONES DAY
51 Louisiana Ave., N.W.
Washington, D.C. 20001
(202) 879-3939
ckmarshall@jonesday.com

August 12, 2013

Counsel for Amicus Curiae *Cato Institute*