No. 10-11212

IN THE SUPREME COURT OF THE UNITED STATES

SEAN MASCIANDARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 36 C.F.R. 2.4(b), which prohibits "[c]arrying or possessing a loaded weapon in a motor vehicle, vessel or other mode of transportation" on National Park Service land, violates the Second Amendment as applied in this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 638 F.3d 458. The opinion of the district court (Pet. App. 18a-34a) is reported at 648 F. Supp. 2d 779. The opinion of the magistrate judge (Pet. App. 35a-42a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 2011. The petition for a writ of certiorari was filed on June 22, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial before a magistrate judge in the United States District Court for the Eastern District of Virginia, petitioner was convicted of possessing a loaded weapon in a motor vehicle on National Park Service (NPS) land, in violation of 36 C.F.R. 2.4(b). He was fined $150. The district court and the court of appeals affirmed. Pet. App. 1a-17a.[1]

1. On the morning of June 5, 2008, a United States Park Police officer patrolling Daingerfield Island -- an area of NPS land near Alexandria, Virginia -- noticed a car parked illegally. The officer approached the car and saw petitioner sleeping inside it. He awoke petitioner and asked for his driver's license. While petitioner was retrieving his license, the officer spotted a large knife protruding from under the driver's seat. The officer asked petitioner whether he had any other weapons, and petitioner said that he had a loaded handgun. The officer arrested petitioner, searched the car, and found a loaded nine-millimeter semiautomatic handgun. Pet. App. 3a, 20a-21a.

2. Petitioner was charged with possessing a loaded weapon in a motor vehicle on NPS land, in violation of 36 C.F.R. 2.4(b). Petitioner moved to dismiss the charge, arguing that Section 2.4(b)

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[1] Petitioner was also convicted of failing to comply with a traffic-control device (a parking sign), in violation of 36 C.F.R. 4.12, and was fined $50. Pet. App. 3a-4a, 21a-22a. He did not appeal that conviction. Id. at 22a.

violated the Second Amendment. Exercising jurisdiction over the petty-offense charge under 18 U.S.C. 3401, a magistrate judge in the Eastern District of Virginia rejected petitioner's Second Amendment claim, denied his motions to dismiss, and found him guilty. Pet. App. 35a-42a.

In December 2008, while petitioner's case was pending before the magistrate judge, the Secretary of the Interior published the final version of a regulation amending 36 C.F.R. 2.4. 73 Fed. Reg. 74,971-74,972. Section 2.4(h), which took effect in January 2009, effectively modifies Section 2.4(b) by allowing a non-prohibited person to possess a loaded, operable firearm on NPS land wherever it is legal to do so under state law. Specifically, Section 2.4(h) provides:

> Notwithstanding any other provision in this Chapter, a person may possess, carry, and transport concealed, loaded, and operable firearms within a national park area in accordance with the laws of the state in which the national park area, or that portion thereof, is located, except as otherwise prohibited by applicable Federal law.

Ibid.

3. Petitioner appealed to the district court under 18 U.S.C. 3402, renewing his Second Amendment challenge to Section 2.4(b) and arguing in the alternative that his conviction should be reversed in light of Section 2.4(h). The district court affirmed. Pet. App. 18a-34a.

In March 2009, while petitioner's appeal was pending in the district court, the United States District Court for the District

of Columbia enjoined enforcement of Section 2.4(h) on the ground that the Department of Interior had not conducted the required environmental-impact analysis. Brady Campaign to Prevent Gun Violence v. Salazar, 612 F. Supp. 2d 1. Soon thereafter, however, Congress passed the Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act), Pub. L. No. 111-24, 123 Stat. 1734, which included a provision that, much like Section 2.4(h), effectively superseded Section 2.4(b) in most cases by allowing a non-prohibited person to possess a loaded, operable firearm on NPS land wherever legal to do so under state law. Id. § 512(b), 123 Stat. 1765 (16 U.S.C. 1a-7b(b) (Supp. III 2009)). The new provision, which took effect in February 2010, provides:

> The Secretary of the Interior shall not promulgate or enforce any regulation that prohibits an individual from possessing a firearm including an assembled or functional firearm in any unit of the National Park System or the National Wildlife Refuge System if--
>
> (1) the individual is not otherwise prohibited by law from possessing the firearm; and
>
> (2) the possession of the firearm is in compliance with the law of the State in which the unit of the National Park System or the National Wildlife Refuge System is located.

Ibid.

4. The court of appeals affirmed. Pet. App. 1a-17a.

a. Petitioner argued that his conviction was invalid under 36 C.F.R. 2.4(h) and the Credit CARD Act. The court of appeals rejected that contention, relying on United States v. Hark, 320

U.S. 531 (1944), which held that "revocation of [a] regulation [does] not prevent indictment and conviction for violation of its provisions at a time when it remained in force," id. at 536, as well as the general savings statute, 1 U.S.C. 109, which provides that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide." Pet. App. 5a-7a.

The court of appeals then rejected petitioner's claim that 36 C.F.R. 2.4(b) violated the Second Amendment as construed in District of Columbia v. Heller, 554 U.S. 570 (2008). The court acknowledged Heller's conclusion that the Amendment guarantees an "individual right to possess and carry weapons in case of confrontation," Pet. App. 8a (quoting Heller, 554 U.S. at 592), but pointed out that Heller's "undisputed core holding," id. at 16a, was that individuals have a "fundamental right to possess firearms for self-defense within the home," id. at 9a. The court deemed it "unnecessary to explore in this case the question of whether and to what extent the Second Amendment right recognized in Heller applies outside the home," id. at 16a, because, "assum[ing] arguendo" that it does apply outside the home, Section 2.4(b) would withstand the relevant standard of scrutiny, id. at 16a-17a.

Specifically, while assuming both that strict scrutiny would apply to "any law that would burden the 'fundamental,' core right

of self-defense in the home by a law-abiding citizen" (Pet. App. 12a) and that the Second Amendment right also applies outside the home (id. at 13a), the court of appeals "conclude[d] that a lesser showing is necessary with respect to laws that burden the right to keep and bear arms" outside the home than in the in-home context addressed in Heller (ibid.). The court observed that, "as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense." Id. at 12a. Accordingly, the court held "that 36 C.F.R. § 2.4(b) [would] survive [petitioner's] as-applied challenge if it satisfie[d] intermediate scrutiny -- i.e., if the government [could] demonstrate that § 2.4(b) is reasonably adapted to a substantial governmental interest." Pet. App. 13a.

The court of appeals held that Section 2.4(b) met that standard. Pet. App. 14a-15a. It observed that Daingerfield Island is a government-controlled area "where large numbers of people, including children, congregate for recreation," and that the government had "a substantial interest in providing for the[ir] safety." Ibid. Noting that the Constitution gives the government "plenary power" to "protect the public from danger on federal lands under the Property Clause," id. at 15a (internal quotation marks omitted) (citing U.S. Const. Art. IV, § 3, Cl. 2), the court determined that Section 2.4(b)'s "narrow prohibition" on possessing only "loaded firearms, and only then within * * * motor

vehicles" was sufficiently tailored to that interest, because "[l]oaded firearms are surely more dangerous than unloaded firearms," and because "a loaded weapon becomes even more dangerous" "when concealed within a motor vehicle," ibid.

b. Judge Niemeyer wrote separately to express his view that "a plausible reading of Heller" suggests that the Second Amendment protects "a constitutional right to possess a loaded handgun for self-defense outside the home," "at least in some form." Pet. App. 9a. He would have "address[ed]" that issue directly rather than "presum[ing] the existence of the * * * right" outside the home, as the court did. Id. at 10a n.*. But he also agreed with the court's rejection of petitioner's claim "under the intermediate scrutiny standard" in the circumstances of this case. Id. at 10a-11a n.*.

ARGUMENT

Petitioner renews his contention (Pet. 9-29) that 36 C.F.R. 2.4(b), as applied to this case, violates the Second Amendment. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court, any other court of appeals, or any state court of last resort. In any event, the question of Section 2.4(b)'s validity has little prospective importance now that the Credit CARD Act, 16 U.S.C. 1a-7b(b) (Supp. III 2009) has effectively superseded the regulation in most cases. Further review is not warranted.

1. The Second Amendment to the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In District of Columbia v. Heller, 554 U.S. 570 (2008), this Court concluded that the Second Amendment protects an individual right of "law-abiding, responsible citizens to use arms in defense of hearth and home." Id. at 635. The Court held unconstitutional two District of Columbia statutes to the extent that they totally banned handgun possession in the home and required all other firearms within the home to be kept inoperable. Ibid. The Court "declin[ed] to establish a level of scrutiny for evaluating Second Amendment restrictions," id. at 634, concluding that "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home" a handgun kept by a law-abiding citizen "for protection of [his] home and family would fail constitutional muster," id. at 628-629 (internal quotation marks and footnote omitted).

As the court of appeals recognized, Heller in no way undermines the validity of Section 2.4(b). Unlike the statutes at issue in Heller, Section 2.4(b) applies only in national parks, only to "loaded firearms, and only then within * * * motor vehicles." Pet. App. 15a. It is therefore "analogous to the litany of state concealed carry prohibitions specifically identified as valid in Heller," and it "leaves largely intact the

right to 'possess and carry weapons in case of confrontation.'" Ibid. (quoting Heller, 554 U.S. at 592). The court therefore correctly concluded that it is "reasonably adapted to [the] substantial governmental interest" in public safety and satisfies Second Amendment scrutiny. Ibid.

2. The decision of the court of appeals does not conflict with any decision of this Court, any other federal court of appeals, or any state court of last resort. Petitioner does not appear to contend otherwise. See Pet. 17-29. Amicus curiae the Second Amendment Foundation argues that the decision conflicts with Heller, with United States v. Miller, 307 U.S. 174 (1939), and with the Seventh Circuit's decision in Ezell v. City of Chicago, No. 10-3525, 2011 WL 2623511 (July 6, 2011), all of which, in amicus's view, "indicate[] that the Second Amendment has operative relevance" outside the home. Second Amend. Found. Amicus Br. 4; see id. at 4-9, 14-20. Even if that were true, however, the court of appeals in this case did not hold otherwise. Instead, the court assumed that the Second Amendment right does apply outside the home and concluded that Section 2.4(b) -- a provision that Heller, Miller, and Ezell did not address -- nevertheless withstands scrutiny.

When applying heightened scrutiny to Chicago's ban on firing ranges, the Seventh Circuit in Ezell used a slightly different verbal formulation than did the court of appeals in this case when

evaluating Section 2.4(b). Compare Ezell, 2011 WL 2623511, at *17 ("[T]he City bears the burden of establishing a strong public-interest justification for its ban on range training" and of showing "a close fit between the range ban and the actual public interests it serves."), with Pet. App. 13a (requiring the government to "demonstrate that § 2.4(b) is reasonably adapted to a substantial governmental interest"). But it is not clear that the standards differ in substance, and in any event neither petitioner nor amicus explains why the same formulation of heightened scrutiny would have to apply to the two very different types of restrictions at issue in Ezell and in this case, let alone every firearm restriction having some application beyond the home.

3. Petitioner urges the Court to decide (Pet. 9-21) the abstract question whether the core right identified in Heller -- that is, the individual right of "law-abiding, responsible citizens to use arms in defense of hearth and home," 554 U.S. at 635 -- should extend outside the home as well. This case presents no occasion to decide that issue.

a. The court of appeals "assume[d] arguendo," Pet. App. 17a, that the individual right of a law-abiding citizen "to possess and carry weapons in case of confrontation," id. at 8a (quoting Heller, 554 U.S. at 592), applies outside the home. The court thus reviewed Section 2.4(b) under an intermediate-scrutiny standard. Id. at 12a-15a. Petitioner contends (Pet. 12) that the court

should have affirmatively "recognize[d] a constitutional right outside the home." But he does not argue that the court mistakenly concluded that the right recognized in Heller does not apply outside the home. Nor could he make such an argument, because the court held no such thing. Had it done so, it necessarily would have reviewed Section 2.4(b) under the rational-basis standard that applies to all laws, rather than intermediate scrutiny under the Second Amendment. See Heller, 554 U.S. at 628 n.27.

Petitioner cites an array of federal and state cases that have applied varying standards of review to many different firearm restrictions that apply in a wide range of contexts (Pet. 22-29), but none of the cases holds that anything stricter than intermediate scrutiny should apply to regulations that limit firearms possession outside the home. Nor does petitioner attempt independently to justify applying strict scrutiny to such regulations. In other words, even if this Court were to grant certiorari and hold that the Second Amendment guarantees an individual right of a law-abiding citizen to possess and carry a firearm outside the home, petitioner does not explain why the Court would apply a stricter standard of review than the one the court of appeals applied in upholding Section 2.4(b).[2]

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[2] Petitioner suggests (Pet. 13) that, although the court of appeals purported to apply intermediate scrutiny, it effectively applied a "balancing test" of the sort Heller rejected. See 554 U.S. at 634-635. But when the court evaluated whether Section 2.4(b) was sufficiently tailored to the government's "substantial

Petitioner argues (Pet. 12-13) that the court of appeals' "avoidance of the question of whether the constitutional right to keep and bear a firearm for self-defense exists outside of the home" deprived him of guidance about "the scope of his Second Amendment right" going forward. But to the extent that petitioner seeks such guidance for the future, his request is in tension with the longstanding prohibition against the issuance of advisory opinions. And in light of the bedrock principles of judicial restraint to avoid a constitutional question "in advance of the necessity of deciding it" and to decline to "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied," Ashwander v. TVA, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring), the court of appeals acted well within its discretion in declining to decide the abstract question of just how far the Second Amendment extends outside the home, Pet. App. 10a n.* (Niemeyer, J., writing separately). That is particularly true when the proper resolution of petitioner's claim did not require addressing underlying issues with such broad

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interest in providing for the safety of individuals who visit and make use of the national parks," Pet. App. 14a, it did not claim to be "balancing" interests, id. at 14a-15a. And this Court should not lightly assume that the court of appeals implicitly watered down the standard of review, when the court repeatedly and explicitly stated that the relevant standard was "intermediate scrutiny." Id. at 3a, 11a-15a. Cf. Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 386 (2008) ("An appellate court should not presume that a district court intended an incorrect legal result when the order is equally susceptible of a correct reading.").

ramifications. Cf. NASA v. Nelson, 131 S. Ct. 746, 751 (2011) (assuming, without deciding, that the Constitution protects a privacy interest against "disclosure of personal matters," but holding that the government's interests at issue overcame any such interest).

Indeed, this Court undertook much the same approach in Heller itself when "declining to establish a level of scrutiny for evaluating Second Amendment restrictions," 554 U.S. at 634, because the District of Columbia statutes at issue would have failed under any heightened standard, id. at 628-629. The Court observed that "there will be time enough" in future cases to clarify the full scope and outer bounds of the Second Amendment. Id. at 635. That observation applies with full force to the question whether and to what extent "the constitutional right to keep and bear a firearm for self-defense exists outside of the home." Pet. 12. Petitioner's amicus recognizes as much in pointing out (Second Amend. Found. Amicus Br. 22) that "[o]ther cases might also provide this Court good opportunities to resolve the issue."[3]

Petitioner suggests (Pet. 21) that lower courts "will continue to limit the Second Amendment right to self-defense in the home" until this Court affirmatively extends its scope. Even if that

[3] One petition noted by amicus (at 25) was Williams v. Maryland, No. 10-1207 (filed Apr. 5, 2011), which presented the question whether peaceably carrying a registered firearm outside the home, without a permit, fell outside the scope of the Second Amendment. On October 3, 2011, this Court denied certiorari.

were so, it would not preclude this Court from addressing the broad question, after full consideration by the lower courts, in a case (unlike this one) where its resolution would be outcome-determinative. And petitioner is mistaken in any event, because the Seventh Circuit has held that some firearms restrictions with application outside the home may be subject to heightened scrutiny under some circumstances. Ezell, 2011 WL 2623511, at *17 (Chicago's ban on firing ranges subject to heightened scrutiny).

b. Moreover, contrary to petitioner's assertion (Pet. 10), this case does not "cleanly present[] the question of whether a Second Amendment right to self-defense exists outside the home." Section 2.4(b) does not apply generally to conduct in public places, but applies only to NPS land. As the court of appeals pointed out, the Constitution's Property Clause gives Congress the authority to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3, Cl. 2; see Pet. App. 15a. The breadth of Congress's authority to regulate firearms possession in national parks and on other federal land must be assessed in light of the Property Clause's sweep. See Utah Div. of State Lands v. United States, 482 U.S. 193, 201 (1987) (Congress's power under the Property Clause is "plenary"); see also United States v. Dorosan, 350 Fed. Appx. 874, 875 (5th Cir. 2009) (per curiam) (upholding, against a Second Amendment challenge, a regulation prohibiting

possession of firearms on United States Postal Service property, in part because of the government's "constitutional authority as the property owner" under the Property Clause), cert. denied, 130 S. Ct. 1714 (2010).

In addition, when this Court in Heller pointed out that "the right secured by the Second Amendment is not unlimited," 554 U.S. at 626, it identified several "presumptively lawful" regulations of that right, id. at 627 & n.26, including "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," id. at 626. Although the court of appeals found it unnecessary to decide the issue, national parks -- heavily traveled, government-controlled areas where "large numbers of people, including children, congregate for recreation," Pet. App. 15a -- can readily be described as "sensitive places" within the meaning of Heller. At a minimum, they implicate specific public-safety interests, and their "circumstances justify reasonable measures to secure public safety." Ibid. This case would therefore be a poor vehicle in which to address whether and to what extent the Second Amendment right applies "outside the home" generally (Pet. i), as opposed to whether and how the right may be regulated in national parks specifically.

4. Finally, this case is unworthy of review for the independent reason that Section 2.4(b) no longer has any significant prospective force because the Credit CARD Act, 16

U.S.C. 1a-7b(b) (Supp. III 2009), has effectively superseded it in most cases. That statute forecloses the government from "promulgat[ing] or enforc[ing] any regulation that prohibits an individual from possessing a * * * functional firearm" on NPS land where the individual is not an otherwise prohibited person (see, e.g., 18 U.S.C. 922(g)), and the individual's possession of the firearm complies with state law. Petitioner says (Pet. 6 n.3) that because "Section 2.4(b) has never been formally repealed," "the government could enforce it against other individuals." But under the plain language of Section 1a-7b(b), the government could not enforce the regulation against individuals who meet the statute's requirements. In other words, where a law-abiding citizen possesses a firearm on NPS land located in a State that permits him to do so, the government cannot prosecute him under Section 2.4(b). And as petitioner (Pet. 15-16) and his amicus (Second Amend. Found. Amicus Br. 22-23) point out, only Illinois and the District of Columbia categorically prohibit law-abiding citizens from carrying handguns outside the home. Accordingly, the question of Section 2.4(b)'s validity lacks sufficient prospective significance to warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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