No. 10-1207

In the Supreme Court of the United States

CHARLES F. WILLIAMS, JR.,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The State contends that the "core issue" presented by the Petition is "that the Maryland permitting scheme unfairly restricted Petitioner's right to carry a handgun . . . ." Opp. At 5. That contention is misplaced. The core issue in this case is whether the Maryland Court of Appeals erred by holding that the Second Amendment does not apply outside the home. In so holding, the Court clearly stated its rationale: "It is the exception permitting home possession in Section 4-203(b)(6) that takes the statutory scheme embodied in Section 4-203 outside of the scope of the Second Amendment, as articulated in *Heller* and *McDonald*."[1] *Williams v. State*, 417 Md. 479, 10 A.3d 1167, 1178 (2011). It is from this fundamental constitutional error, which conflicts with the text of the Second Amendment and this Court's precedents, that Petitioner's conviction flows.

The Second Amendment provides that "the right of *the people* to keep and *bear arms*, shall not be infringed." The Maryland court holds that there is no Second Amendment right to *bear arms* (that is, to wear or carry arms for purposes of confrontation or self-defense). *See* Part I below, and Pet. at 12-23. Any state-granted, discretionary privilege to carry a handgun in Maryland is restricted to a tiny minority

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[1] *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010).

of favored individuals, and by law is not available to the ordinary citizens who make up *the people*.

The State asserts that this case presents "none of the critical issues" being considered by lower courts after *Heller* and *McDonald*. Opp. at 5. To the contrary, this case presents perhaps the most critical issue of all: are the words "bear arms" devoid of meaning, thereby limiting the Second Amendment to the right to "keep arms" within the four walls of one's dwelling? If so, it is an extraordinarily constricted constitutional right, that bears little resemblance to the robust right clearly envisioned by the Framers and exercised throughout American history. Yet numerous lower court decisions after *Heller* have refused to recognize the right to bear arms outside the home.

The State of Maryland and at least one federal Court of Appeals have stated that they will not recognize that constitutional right unless directed to do so by this Court. The Maryland court declared that if the right to keep and bear arms extends beyond the home, "the Supreme Court . . . will need to say so more plainly." *Williams*, 10 A.3d at 1177. Yet Maryland now opposes this Court even considering the issue. The Fourth Circuit also refused to recognize that right, observing: "On the question of *Heller*'s applicability outside the home environment, we think it prudent to await direction from the Court itself . . . ." *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011), *petition for cert. filed*, No. 10-11212 (June 24,

2011).

The State's characterization of the Maryland statute as one that "allows possession of a handgun inside the home and, with a permit, outside the home" misstates the nature and effect of the statute. Opp. at i. Section 4-203(a)(1)(i) of the Maryland Code, Criminal Law article, flatly forbids a person to "wear, carry, or transport a handgun, whether concealed or open, on or about the person . . . ." The statute contains some narrow exceptions, including a highly restrictive carry permit process. Maryland case law specifically affirms that permits will not be issued to any individual whose need for protection is "that of an ordinary citizen." *See* Pet. at 28-30. As a result, nearly all of the people of Maryland are prohibited from exercising the right to bear a handgun for self-defense outside the home. Pet. at 31-32.

I. THE DECISION OF THE MARYLAND COURT DIRECTLY CONFLICTS WITH *HELLER* AND *McDONALD*, AND PRESENTS AN IMPORTANT FEDERAL QUESTION THAT SHOULD BE SETTLED BY THIS COURT

Heller addressed the meaning of both "the people" and "bear arms." It reaffirmed that "the people" as used in the First, Second, Fourth, Ninth, and Tenth Amendments "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this

country to be considered part of that community." *Heller,* 554 U.S. at 580 (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)). The term "'the people' . . . unambiguously refers to all members of the political community, not an unspecified subset." *Id*.

Heller analyzed the term "bear arms" as follows: "At the time of the founding, as now, to 'bear' meant to 'carry.' . . . When used with 'arms,' however, the term has a meaning that refers to carrying for a particular purpose – confrontation." *Heller*, 554 U.S. at 584. The term includes to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed . . . ." *Id*. (citation omitted). *Heller* "held that the Second Amendment protects the right to keep *and bear arms for the purpose of self-defense* . . . ." *McDonald*, 130 S.Ct. at 3026 (emphasis added). *See* Pet. at 12-14 (right to "bear arms" in Second Amendment); Pet. at 14-18 (discussion of bearing arms in *Heller*); Pet. at 19-23 (discussion of bearing arms in *McDonald*).

But the Maryland court decided that any form of bearing arms outside the home is categorically unprotected under the Second Amendment, just as obscenity, defamation, and fraud are categorically unprotected under the First Amendment.

When confronted with this plain conflict with *Heller* and *McDonald*, the State now shifts its ground,

and contends instead that "[n]othing in either of those cases leads to the conclusion that requiring a permit to carry a handgun outside the home is categorically unconstitutional." Opp. at 9. But that is not the issue. The issue is whether the state's total ban applicable to the general populace on bearing handguns is within the scope of the Second Amendment.

The State contends that because there was an "available mechanism for obtaining a handgun permit" no conflict exists with *Heller* and *McDonald*. Opp. at 9. The availability of permits to a narrow class does not alter the critical error in the Court's holding that the people of Maryland have no Second Amendment right to bear arms outside their homes. The Maryland court did not hold that the carry statute and permitting process withstood constitutional scrutiny. It held that there will be no scrutiny at all.

Carry permits are *not* available to ordinary citizens in Maryland. Pet. at 27-33. The State's entire Opposition turns on the supposition that Mr. Williams could have obtained a permit. The unacknowledged elephant in the kitchen is that, by law, he could not. Maryland case law specifically confirms that a permit will not be issued for a person whose need for protection is "that of an *ordinary citizen*." *Scherr v. Handgun Permit Review Board*, 880 A.2d 1137, 1142 (Md. Ct. Spec. App. 2005) (emphasis added). *See* Pet. at 29-30. Instead, to obtain a permit for self-defense, police reports and/or affidavits of actual assaults,

threats, or robberies committed against the applicant must be submitted with the application. Pet. at 28-30. Extremely few ordinary citizens will be able to document prior assaults, threats, and robberies against them in that manner. Furthermore, the Maryland courts have denied permits in cases even where applicants *were* able to demonstrate threats against them (*Snowden v. Handgun Permit Review Board*, 413 A.2d 295 (Md. Ct. Spec. App. 1980) or past break-ins at their residence (*Onderdonk v. Handgun Permit Review Board*, 407 A.2d 763 (Md. Ct. Spec. App. 1979). Pet. at 30.

The State of Maryland issues less than one permit for every 1,000 Maryland residents each year, and almost all of those are issued to government officials, law enforcement retirees, or individuals with a special occupational need. The number of permits issued for personal protection is infinitesimal. Pet. at 31-32.

There is thus a direct conflict between the Maryland court's decision and *Heller* and *McDonald*. Numerous lower court decisions have also unconstitutionally limited the Second Amendment to the home. Pet. at 33-37. A split has also recently developed among the Circuits regarding whether Second Amendment rights exist outside the home. *Compare Masciandaro*, 638 F.3d at 475 (refusal by the Fourth Circuit to recognize right outside the home) *with Ezell v. City of Chicago*, No. 10-3525, 2011 WL

2623511, at *19-20 (7th Cir. July 6, 2011) (prohibitions against shooting ranges, and against possession of handguns outside the home to engage in range training, violate Second Amendment).

II. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO RESOLVE THE ISSUE OF WHETHER THE SECOND AMENDMENT APPLIES OUTSIDE THE HOME

The State calls this case a "poor vehicle" to consider the "many unanswered questions" regarding application of the Second Amendment. Opp. at 12. But Petitioner is not requesting that this Court consider "many unanswered questions," just that it decide a single, very basic one: whether "the right of the people to . . . bear arms" is extinct, as pronounced by some lower courts. *See Heller*, 554 U.S. at 636.

This is a straightforward case that presents only one issue: whether the scope of the Second Amendment extends outside the home. The Maryland court expressly decided that it does not. *Williams*, 10 A.3d 1178. The facts are not disputed. Petitioner is a law-abiding citizen who properly registered his handgun and underwent background checks and training. Pet. at 5-6. His only "crime" was carrying his firearm to transport it from his girlfriend's residence to his own residence, Pet. at 6, which Maryland law prohibits.

The State contends that "It is Petitioner's failure to avail himself of the permitting scheme that renders this case a poor vehicle to address the questions raised in this petition." Opp. at 5. There are two flaws in this assertion. First, like nearly all Marylanders, Petitioner was ineligible for a permit under the state's statute as interpreted by the Maryland courts. Instead, when he peaceably attempted to transport his firearm, he was arrested, charged, and convicted. Second, the only question raised in the Petition – despite the State's effort to recast it – is whether the act of carrying or transporting a firearm outside the home (without an unobtainable permit) is "outside of the scope of the Second Amendment." *Williams*, 10 A.3d at 1169, 1178.

The Seventh Circuit in *Ezell* described the "scope" question as follows:

> Is the restricted activity protected by the Second Amendment in the first place? . . . The answer requires a textual and historical inquiry into original meaning. [quotation from *Heller* omitted]; *McDonald*, 130 S.Ct. at 3047 ("[T]he scope of the Second Amendment right" is determined by textual and historical inquiry, not interest-balancing.).

Ezell at *12.

In other words, the scope of the Second Amendment is purely a question of constitutional interpretation. Contrary to the State's contention, no elaborate record is necessary to decide that issue, and Petitioner notes that the Maryland Court of Appeals decided it on this record. After merits briefing, this Court will be fully able to decide it, too.

The State points to a smorgasbord of lower court cases that it contends may be appropriate for consideration by this Court. Opp. at 13-14. Most do not involve such a fundamental issue as whether the Second Amendment applies outside the home. The State's preference for civil challenges against various regulatory restrictions is also misplaced. *Id.* In civil declaratory judgment actions, issues such as standing and ripeness may frustrate review. Despite the State's curious assertions to the contrary, there is no such obstacle in this case, where Petitioner unquestionably has standing to challenge the constitutionality of the statutory scheme under which he was criminally convicted. *See* Part III, below.

In criminal prosecutions under restrictive regimes such as Maryland's, countless persons such as Petitioner are being convicted of crimes, serving time in prison, and losing their civil rights because lower courts have misapprehended the scope of the Second Amendment by limiting it to the home. This fundamental issue in Second Amendment jurisprudence urgently needs clarification.

The fact that Maryland's restrictive permitting scheme was "never addressed by the Maryland Court of Appeals" – other than its determination that the Second Amendment does not apply – is no reason to refuse review. Opp. at 5. Petitioner vigorously presented his constitutional arguments to that Court. He could not control how the Court decided them. It is precisely the *failure* of that Court to scrutinize Maryland's statutory carry scheme under the Second Amendment that this Petition seeks to rectify.

III. PETITIONER'S ALLEGED LACK OF STANDING TO CHALLENGE THE CONSTITUTIONALITY OF HIS OWN CONVICTION IS NOT AN INDEPENDENT STATE GROUND BARRING REVIEW BY THIS COURT

The assertion that the Maryland court's decision rests on an "adequate and independent state ground" of lack of standing borders on the frivolous. Opp. at 6. "The decisions of this Court have uniformly held that the failure to apply for a license under an ordinance which on its face violates the Constitution does not preclude review in this Court of a judgment of conviction under such an ordinance." *Staub v. City of Baxley*, 355 U.S. 313, 319 (1958).[2]

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[2] *Staub*, *id.* at 322, also has lessons for the merits of this case:

In so holding, this Court rejected the very argument Maryland makes here, the purported "nonfederal ground[]" that "appellant lacked standing to attack the constitutionality of the ordinance because she made no attempt to secure a permit under it." *Id*. It also repudiated that argument in a case in which Maryland was a party and in which the defendant was even eligible for the permit: "One who might have had a license for the asking may . . . call into question the whole scheme of licensing when he is prosecuted for failure to procure it." *Freedman v. State of Maryland*, 380 U.S. 51, 56 (1965) (citation omitted).[3]

> It is settled . . . that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.

Petitioner does not assert that all firearms permit schemes violate the Second Amendment. But the vast majority of states freely allow open carry, concealed carry, or both, either without a permit or under a "shall issue" permit system. Pet. at 41 n.19. Maryland is an outlier regarding the severity of restrictions and the discretion of state officials.

[3] In prosecutions for engaging in a specified activity without a license, constitutional challenges to the licensing statutes are also routinely permitted outside the First Amendment context without any suggestion that the defendant

The above rules clearly apply here, and there are additional reasons why standing is a non-issue. First, Williams has standing to challenge the statutory scheme under which he was convicted of a felony. The implicit contention that a criminal prosecution and conviction, with impending incarceration, is not a "case or controversy" strains credulity.[4]

Second, Williams has standing under the three well-established principles of injury, causation, and redressability enunciated in countless decisions by this Court. Pet. at 38-42.

Third, the Court of Appeals cited only two cases, without discussion, in connection with the alleged lack of standing, and neither case was remotely applicable. Pet. at 39 n.17.

Fourth, the statute made it a criminal offense to

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must first apply for a license and be turned down. *See, e.g., United States v. Boone*, 108 F.3d 1380 (7th Cir. 1997) (Commerce Clause challenge to criminal statute requiring firearms dealers to be licensed).

[4]Petitioner has not brought a *civil pre-enforcement* challenge to the permitting scheme, where he would be required to show some separate injury or threat of injury to have standing. Such challenges to criminal statutes are sometimes permitted because an individual "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979). Here, Petitioner was prosecuted and convicted.

"wear, carry or transport a handgun, whether concealed or open, on or about the person . . . . " § 4-203(a)(1)(i). No exception applied to Mr. Williams, and he did not claim that one applied. It is *the State* that has tried to *save* the constitutionality of the statute by asserting that the complete ban on carrying imposed by § 4-203(a)(1)(i) is mitigated by a "fair and available" permit process. Opp. at 9. It defies logic to assert that the State can rely on the permitting scheme, but that Petitioner, who was convicted of carrying a handgun without a permit, lacks standing to address it.

Fifth, as shown above, Williams could not have obtained a permit under Maryland law. The State has not even alleged in its Opposition that Mr. Williams was eligible for a permit due to documented assaults, threats, or robberies as Maryland requires.

Finally, even if there was no "standing" to challenge the permit statute and regulations, that is not an independent and adequate ground to support Mr. Williams' *conviction*. He was convicted of violating § 4-203(a)(1)(i). He admitted he possessed the firearm outside his home. He did not have a carry permit or meet any other exception. That is sufficient for conviction, and no other ground will support a conviction.

An alleged lack of standing to challenge the permit statute and regulations on Second Amendment grounds does not independently *support a finding of*

guilt under § 4-203(a)(1)(i). It is simply a spurious attempt to avoid consideration of Mr. Williams' constitutional claims. It is also irrelevant, because the Maryland court held that the Second Amendment does not apply outside the home. Under that holding, a constitutional challenge to the permitting scheme cannot even be mounted, because the conduct for which a permit is relevant is "outside the scope" of the Second Amendment.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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