No. 16-1517

IN THE
Supreme Court of the United States

JAMES HAMILTON,
Petitioner,
v.
WILLIAM L. PALLOZZI AND BRIAN E. FROSH,
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 PETITIONER

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QUESTION PRESENTED

Should a state's prerogative to define crimes and criminal penalties mean that it can likewise restrict Second Amendment rights without judicial review? Stated another way, is a law-abiding, non-violent individual who has been denied the right to keep and bear arms completely foreclosed from bringing an as-applied challenge to a law generally barring possession of firearms by felons?

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INTEREST OF *AMICUS CURIAE*[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 helps 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*. Cato filed *amicus* briefs in both *District of Columbia v. Heller* and *McDonald v. Chicago*, and in subsequent cases seeking the Court's review of the scope of the right to keep and bear arms. This case concerns Cato because it involves the natural right to armed self-defense, as protected through the Second and Fourteenth Amendments.

SUMMARY OF ARGUMENT

This Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008) established that the Second Amendment safeguards an individual right to keep and bear arms. Two years later, *McDonald v. City of Chicago*, 561 U.S. 742 (2010), ensured that the right to keep and bear arms is also protected against state infringement. After nearly 10 years, however, the lower courts are still confused about the scope and meaning of the Second Amendment. Without this Court's direction, they are quick to limit

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[1] No party or counsel for a party authored or contributed monetarily to the preparation or submission of any portion of this brief. Counsels of record for all parties were given timely notice of *amicus'* intent to file this brief and gave consent.

Second Amendment rights and slow to encourage the defense of these rights. This case presents a narrow, yet significant, opportunity to explain how *Heller* and *McDonald* should be applied in the context of as-applied challenges to felon-in-possession laws.

ARGUMENT

THE COURT SHOULD CLARIFY THAT STATES DO NOT HAVE UNFETTERED DISCRETION TO LIMIT THE SCOPE OF THE SECOND AMENDMENT BY MERELY CHANGING THEIR CRIMINAL LAWS

A. Lacking Guidance, Lower Courts Unduly Restrict Challenges to Abridgements of Second Amendment Rights

As this case shows, courts are divided and struggling with the application of felon-in-possession laws. While the *Heller* Court held that such restrictions are "presumptively lawful," 554 U.S. at 626-27 & n.26, there is still no guideline for how lower courts should apply this presumption, or how it can be overcome. This has led to stark differences in lower-court jurisprudence.

Some courts, including the Fourth Circuit here, have deferred to state legislatures in defining who is allowed to exercise Second Amendment rights. This is unacceptable under any constitutional theory. By allowing state law to be the arbiter of those stopped from owning firearms, the Fourth Circuit allows Maryland to define the scope of a constitutional right. It can do so only by ignoring *Heller*.

Other courts, including the Third, Seventh, Eighth, and D.C. Circuits, have understood that

felons may—at the very least—challenge the presumptive constitutionality of these restrictions. The Seventh Circuit in particular has held that the presumptive constitutionality of such firearm restrictions "by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge." *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010).

Amicus has previously informed the Court of lower courts' confusion regarding the Second Amendment in the wake of *Heller*. See Br. of Amicus Curiae Cato Institute in Support of the Petition for Writ of Certiorari at 13, *Kachalsky v. Cacace*, 133 S. Ct. 1806 (2013) (No. 12-845); Br. of Amicus Curiae Cato Institute in Support of Petitioners at 3, *Woollard v. Gallagher*, 134 S. Ct. 422 (2013) (No. 13-42). These concerns are magnified here, where the court below ruled that a person cannot even bring an as-applied challenge to a law that burdens his exercise of a constitutional right.

After all, no other right has been so left to fend for itself in the lower courts. The Court has not hesitated to seize opportunities to ensure the protection of other constitutional rights—recognizing historically based categorical rules, developing comprehensive methodologies, and announcing robust standards. The Court's clarification is necessary and urgent here because the decision below not only misread *Heller*, but displayed a fundamental misunderstanding of the nature of constitutional rights. It also deepened the circuit split on the jurisprudential standards to apply when interpreting the right to keep and bear arms.

By restricting as-applied challenges to felon-in-possession statutes, the Fourth Circuit has given the right to keep and bear arms a second-class status compared to other constitutional rights. Even though courts can still, under *Heller*, presume that such restrictions are constitutionally valid, they must employ a true "presumption," meaning it is capable of being overcome based on how that law is applied in specific circumstances. A restriction that is not capable of being defeated is not "presumptively lawful," it's absolutely and inviolably lawful.

After all, almost by definition, constitutionalizing a right means that state laws cannot entirely define the scope of that right. The Constitution protects individuals against legislators' prejudices and shifting fads. As the Court said in *Heller*, "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." 554 U.S. at 634. Given that states have broad discretion to determine what crimes are felonies—*see*, *e.g.*, *Binderup v. Att'y Gen.*, 836 F.3d 336, 351 (3d Cir. 2016)) ("A crime's maximum possible punishment is 'purely a matter of legislative prerogative,' subject only to 'constitutional prohibitions on irrational laws.'" (citing *Rummel v. Estelle*, 445 U.S. 263, 274 (1980); *Heller*, 554 U.S. at 628 n.27))—then, under the Fourth Circuit's reasoning, states are limited by only the most baseline constitutional standard—non-irrationality—in denying people their Second Amendment rights. Taken far enough, states could deny large portions of their citizens the right to keep and bear arms without any remedy. The affected individuals, unable to bring even an as-applied challenge, would have to

lay down and take it. Judge Bea took this reasoning to its logical conclusion:

> Why not all misdemeanors? Why not minor infractions? Could Congress find someone once cited for disorderly conduct to be "not law-abiding" and therefore to have forfeited his core Second Amendment right? . . . Why should we not accept every congressional determination for who is or is not "law-abiding" and "responsible" for Second Amendment purposes?

United States v. Chovan, 735 F.3d 1127, 1148 (9th Cir. 2013) (Bea, J., concurring).

Moreover, historically the rationale for disarming felons has focused on actually dangerous people, not whoever the legislature decides will be punished by over a year in prison. As Judge Hardiman correctly observed in his *Binderup* concurrence, bans on felons possessing firearms are intended for felons who are "dangerous, violent, or irresponsible with firearms". *Binderup* 836 F.3d at 377 (Hardiman, J., concurring). Certainly, the petitioner here is far from a violent criminal. A decade-old, non-violent, non-firearm-related felony for which he received a suspended sentence is no reason to distrust his ability to responsibly keep and bear a firearm. Non-violent offenders should be able to state the merits of their claims in court, and, if warranted by their personal situations, have their rights restored.

If states were given such latitude over First Amendment claims, the Court would not stand for it. Neither should it accept such constitutional evisceration here.

B. This Case Presents a Narrow Yet Significant Opportunity to Explain How *Heller* and *McDonald* Should Be Applied

Petitioner are not asking for a massive expansion of the rights articulated in *Heller* and *McDonald*. He is not asking for any expansion at all. Instead he asks for a clarification of *Heller* and *McDonald* and a simple affirmation that those cases meant something. If, after *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), state legislatures had begun defining "fighting words" however they wished and, in the process, severely undermined speech rights, the Court would have swiftly corrected the misinterpretation and reaffirmed *Chaplinsky*'s narrow scope. To do so would not have been to expand *Chaplinsky*, but to reaffirm and clarify it.

Heller and *McDonald* will be severely undermined if legislatures are allowed to deny fundamental rights without judicial oversight. This case provides an excellent vehicle for reining in both legislatures and lower courts. The question presented by the petitioner is narrow and straightforward, and touches on important, foundational issues regarding the proper scope and analysis of the right to keep and bear arms.

This Court has been presented with an excellent opportunity to reassert its commitment to protecting constitutional rights by explaining that no government may condition the exercise of a fundamental right on arbitrary legislative or executive discretion. Judicial oversight is and has always been critical to the defense of our most essential rights. This value must be clearly and emphatically defended, especially in this case.

If this Court's affirmation in *McDonald* that "the Second Amendment should [not] be singled out for special—and specially unfavorable—treatment," 561 U.S. at 745-46, is to have any weight with the lower courts, the Court must not neglect the persistent confusion regarding that constitutional provision. Reviewing the lower court's jurisprudential blunder would be a superb way to demonstrate the Court's commitment to the preservation of the Second Amendment as a fundamental right. This case presents a simple and clean vehicle for doing so.

CONCLUSION

The Court has a unique opportunity to repair the damage that misguided lower-court rulings have inflicted upon the right to keep and bear arms. This is a chance to re-assert the principles of *Heller* and categorically declare that the scope of the Second Amendment must be defined by the judiciary, not the legislature or agents of any state. The Court should therefore grant the petition.

Respectfully submitted,

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