No. 12-1437

In the United States Court of Appeals
for the Fourth Circuit

RAYMOND WOOLLARD, *ET AL.*,
Plaintiffs-Appellees,
v.
DENIS GALLAGHER, *ET AL.*
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Maryland

Brief *Amicus Curiae* of Gun Owners Foundation, Gun Owners of America, Inc., Virginia Gun Owners Coalition, Virginia Citizens Defense League, Inc., U.S. Justice Foundation, and Conservative Legal Defense and Education Fund In Support of Plaintiffs-Appellees and Affirmance

---

GARY G. KREEP
U.S. JUSTICE FOUNDATION
932 D Street, Suite 2
Ramona, CA 92065
(760) 788-6624
Counsel for *Amicus Curiae*
U.S. Justice Foundation

WILLIAM J. OLSON*
HERBERT W. TITUS
JOHN S. MILES
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Avenue W., Suite 4
Vienna, Virginia 22180-5615
(703) 356-5070

*Attorney of Record
August 6, 2012

Counsel for *Amici Curiae*

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 12-1437 Caption: Woollard, et al. v. Gallagher, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Gun Owners Foundation, Gun Owners of America, Inc., Virginia Gun Owners Coalition, Virginia Citizens Defense League, Inc., U.S. Justice Foundation, and Conservative Legal Defense and Education Fund
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ William J. Olson Date: August 6, 2012

Counsel for: Gun Owners Foundation, et al.

CERTIFICATE OF SERVICE

****

I certify that on August 6, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ William J. Olson
(signature)

August 6, 2012
(date)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES. iii

INTEREST OF *AMICI CURIAE*. 1

STATEMENT OF THE CASE. 3

ARGUMENT

I. MARYLAND PROVIDES NO ANALYSIS OF THE TEXT OF THE SECOND AMENDMENT AND MISREPRESENTS THE APPLICABILITY OF ENGLISH HISTORICAL ANTECEDENTS. 4

A. Maryland's Argument Is Predicated on the Erroneous Assertion that the Second Amendment Codified the English Right to Keep and Bear Arms. 5

B. Maryland Would Have this Court Measure the Constitutionality of Its Firearm Carry Law by English Standards, Not by American Ones. 11

II. MARYLAND'S ARGUMENT RESTS ON A MISLEADING OVERVIEW OF THE HELLER DECISION. 13

A. Early Concealed Weapon Decisions Are Inapplicable. 14

B. Heller's Reference to Presumptively Lawful Regulatory Measures Begins, rather than Ends, Constitutional Analysis. 15

C. The Standard for Protected "Arms" Is Not "Weapons in Common Use" during the Founding Era. 17

III. BOTH HELLER AND MCDONALD PRECLUDE LOWER COURTS FROM USING JUDICIAL BALANCING. 18

IV. HELLER REQUIRES THAT REVIEWING COURTS IDENTIFY AND APPLY THE SECOND AMENDMENT WITH THE SCOPE INTENDED BY THE FOUNDERS. 23

A. Heller Requires Reviewing Courts to Seek Out the Authorial Intent of the Framers of the Second Amendment. 23

B. The Maryland Statute Infringes on the Right to Keep and Bear Arms. 28

CONCLUSION. 30

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page

CONSTITUTION

U.S. Constitution, Second Amendment. 3, 4, 5, 6

CASES

Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867). 12

District of Columbia v. Heller, 554 U.S. 570 (2008). . . . . 13, *passim*

Hague v. CIO, 307 U.S. 496, 515 (1939). 30

Heller v. District of Columbia, 670 F.3d 1244 (D.C. Cir. 2011).. . . . 20, 21, 22

Holmes v. Jennison, 39 U.S. (14 Peters) 540 (1840). 4

Marbury v. Madison, 5 U.S. 137 (1803) 25, 30

McDonald v. City of Chicago, 130 S. Ct. 3020 (2010). . . . . 12, *passim*

Muskrat v. United States, 219 U.S. 346 (1911).. 16

Ogden v. Saunders, 25 U.S. 213 (1827). 16

Parker v. District of Columbia, 478 F.3d 370 (D.C. Cir. 2007). 17

United States v. Chester, 628 F.3d 673 (4th Cir. 2010). 21

United States v. Masciandaro, 638 F.3d 458 (4th Cir. 2011).. 21

United States v. Skoien, 614 F.3d 638 (7th Cir. 2010) (*en banc*). 20

United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). 8

MISCELLANEOUS

District of Columbia v. Heller Oral Argument (Mar. 18, 2008). 19

J.H. Ely, Democracy and Distrust (Harvard Univ. Press: Cambridge 1980). 23, 25, 26, 28

S. Halbrook, A Right to Bear Arms (Greenwood, NY: 1989).. . . . . 7, 13

E.D. Hirsch, Validity in Interpretation (Yale University Press, 1967). 25

L. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (Oxford Press: 2004). 6, 7

F. Lieber, Legal and Political Hermeneutics (1839). 25

G. Robertson, The Tyrannicide Brief (Random House: 2005).. . . . . 6, 9

Sources of Our Liberties (R. Perry and J. Cooper, eds., American Bar Foundation: 1972). 5, 6, 7, 9

J. Story, Rules of Constitutional Interpretation (1833). 24

J.G. Sutherland, Statutes and Statutory Construction, Callaghan and Company (1891). 24, 25

Eugene Volohk, "Implementing the Right to keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda," 56 U.C.L.A. L. REV. 1443 (2009) 21, 22

D. Young, The Founders View of the Right to Bear Arms (Golden Oak Books: 2007). 10

INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners Foundation ("GOF"), **U.S. Justice Foundation** ("USJF"), and **Conservative Legal Defense and Education Fund** ("CLDEF") are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"), and involved in educating the public on important policy issues. **Gun Owners of America, Inc.** ("GOA"), **Virginia Gun Owners Coalition** ("VGOC") and **Virginia Citizens Defense League, Inc.** ("VCDL") are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Each was established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research, and to inform and educate the public on important issues of national concern, and the construction of state and federal constitutions and statutes, and questions related to human and civil rights secured by law.

---

[1] No party's counsel authored this brief, and no party, party's counsel, or person other than the *amici curiae* contributed money to the preparation or submission of this brief. *Amici* requested and received the consent of the parties to the filing of this brief *amicus curiae*, pursuant to Rule 29(a), Federal Rules of Appellate Procedure.

GOF, GOA, and CLDEF filed *amicus* briefs in the U.S. Supreme Court in District of Columbia v. Heller[2] and McDonald v. Chicago.[3] Additionally, GOF and GOA filed an *amicus* brief in the U.S. Court of Appeals for the Seventh Circuit in United States v. Skoien.[4] GOF, GOA, VCDL, and CLDEF filed an *amicus* brief in the U.S. Supreme Court in support of a Petition for Certiorari in Skoien v. United States,[5] and also in Heller v. District of Columbia ("Heller II").[6]

---

[2] U.S. Supreme Court, No. 07-290, Brief *Amicus Curiae* of Gun Owners of America, *et al.*, (Feb. 11, 2008) http://lawandfreedom.com/site/constitutional/DCvAmicus.pdf.

[3] U.S. Supreme Court, No. 08-1521, Brief *Amicus Curiae* of Gun Owners of America and Gun Owners Foundation in Support of Petition for Writ of Certiorari (July 6, 2009) http://lawandfreedom.com/site/firearms/NRA%26McDonald_Amicus.pdf and Brief *Amicus Curiae* of Gun Owners of America, *et al.* (Nov. 23, 2009) http://lawandfreedom.com/site/firearms/McDonald_Amicus.pdf.

[4] USCA 7th Cir., No. 08-3770, Brief *Amicus Curiae* of Gun Owners Foundation and Gun Owners of America (Apr. 2, 2010) http://lawandfreedom.com/site/firearms/Skoien_amicus.pdf.

[5] U.S. Supreme Court, No. 10-7005, Brief *Amicus Curiae* of Gun Owners Foundation, *et al.* (Nov. 15, 2010) http://lawandfreedom.com/site/firearms/SkoienAmicusSC.pdf.

[6] USCA DC, No. 10-7036, Brief *Amicus Curiae* of Gun Owners of America, *et al.* (July 30, 2010) http://lawandfreedom.com/site/firearms/HellerII_Amicus.pdf.

STATEMENT OF THE CASE

This case involves a challenge to the constitutionality of the State of Maryland's handgun permit statute and regulatory scheme. Woollard v. Marcus Brown, 2012 U.S. Dist. LEXIS 28498 (D. Md. Mar. 2, 2012), p. *1. Maryland "prohibits the carrying of a handgun outside the home, openly or concealed, without a permit." *Id.*, pp. *2-3. Maryland requires an applicant for a license to carry a handgun to demonstrate that he has "good and substantial reason" to carry a handgun. The Secretary of the Maryland State Police, acting through the Handgun Permit Unit, may deny a license if he determines that the applicant has not met that standard. Persons denied a permit may appeal the decision to the Maryland Handgun Permit Review Board.

Plaintiff Woollard previously had been granted a handgun carry permit. Unable to produce evidence of a current threat, Woollard's request for a renewal of the permit was denied. *Id.*, p. *5. Woollard and an association of gun owners, Second Amendment Foundation, challenged the Maryland license requirement, arguing that the "good and substantial reason" requirement violates the Second Amendment right to "keep and bear arms." The district court found the "Maryland's requirement … is insufficiently tailored to the State's interest in

public safety and crime prevention" and "impermissibly infringes the right to keep and bear arms, guaranteed by the Second Amendment." *Id.*, p. *38. Subsequently, the district court denied a stay pending appeal. Woollard v. Marcus Brown, 2012 U.S. Dist. LEXIS 102782 (Jul. 23, 2012), p. *11. This Court granted a motion for stay pending appeal on August 1, 2012.

ARGUMENT

I. MARYLAND PROVIDES NO ANALYSIS OF THE TEXT OF THE SECOND AMENDMENT AND MISREPRESENTS THE APPLICABILITY OF ENGLISH HISTORICAL ANTECEDENTS.

Although Maryland begins its brief faithfully quoting the text of the Second Amendment (Appellants' Br., p. 12), it never again discusses that text in its 46-page Argument. Maryland apparently believes that this Court's interpretation and application of the Second Amendment to the Maryland statute can be accomplished without discussion or analysis of the constitutional text. Maryland advances no reason why standard techniques of constitutional construction should not be employed to derive meaning from the Second Amendment's actual language[7] for application to the Maryland statute in question.

---

[7] *See*, *e.g.*, Holmes v. Jennison, 39 U.S. 14 (Peters) 540 (1840) ("In expounding the Constitution, every word must have its due force and appropriate meaning….").

A. Maryland's Argument Is Predicated on the Erroneous Assertion that the Second Amendment Codified the English Right to Keep and Bear Arms.

Maryland's only effort to infer meaning from the text of the Second Amendment is found in its analysis of the Amendment's historical antecedents. In support of its position that the right to keep and bear arms for self defense is confined to one's home or place of business, except as permitted by the state, Maryland asserts that the right as stated in the 1689 English Bill of Rights "was the foundation of the pre-existing right that was codified in the Second Amendment." Brief of Appellants, p. 20.[8] This claim, made without any effort to demonstrate either textual harmony or historical continuity, is flatly untrue.

The two texts are dramatically different in five distinct ways. The 1689 English Bill of Rights, "asserting the ancient rights and liberties" of Englishmen, declares "[t]hat the **subjects,** which are **protestants, may** have arms for their **defense**, **suitable** to their **conditions,** and as **allowed by law."** English Bill of Rights, reprinted in Sources of Our Liberties ("Sources"), p. 246 (R. Perry and J. Cooper, eds., American Bar Foundation: 1972) (emphasis added). The 1791 American Bill of Rights declares that a "**well-regulated militia** being **necessary**

---

[8] *See also* repeated assertions of such codification, *id.*, pp. 21, 25, 31.

to the security of a **free state**, the **right** of the **people** to keep and bear arms **shall not be infringed.**" U.S. Constitution, Second Amendment (emphasis added).

1. In America, Government Is Subject to the People, Not Vice Versa.

According to the English document, whatever rights that Englishmen had, they enjoyed those rights as "**subjects**" of the realm. As subjects, the English owed allegiance to "a sovereign" — first to the king,[9] and gradually to Parliament in the 18th and 19th centuries. *See* L. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review, pp. 18-19 (Oxford Press: 2004). James Madison explained that "[i]n the United States," however, "the case is altogether different"[10]:

> The **people**, not the government, possess the absolute **sovereignty**.... Hence in the United States, the great and essential rights of the people are secured against legislative as well as executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. [*Id.* (emphasis added).]

---

[9] *See* G. Robertson, The Tyrannicide Brief, pp. 25-26 (Random House: 2005).

[10] J. Madison, "Report on the Virginia Resolutions," reprinted in Sources," p. 426.

Because the right to keep and bear arms in America originated in the people, the government is accountable to the people, not the other way around, as was the case in Great Britain. L. Kramer, The People Themselves, pp. 7, 24-31.

2. In America, All "The People" Have the Right to Arms.

The English Bill of Rights only secured the right of "Protestants" to bear arms, having been fashioned to address a specific grievance against James II, who had "caus[ed] several good subjects, being protestants, to be disarmed, when papists were both armed and employed, contrary to law." *See* 1689 Bill of Rights, reprinted in Sources, p. 245. The guarantee, then, applied only to Protestants, not Catholics. Indeed, following the elevation of the Protestants William and Mary to the throne, "[t]he arms of some Catholics were confiscated" in Maryland,[11] following an historical pattern in that colony where "[e]ach group sought political domination, which often entailed disarming members of the group not in power." *Id.*, p. 59. While this conflict between the two religious groups continued to flare up, by the late 18th century as the American "revolution approached, patriots upheld the ideal that **all** the people, Protestant and Catholic alike, should keep and bear arms." *Id.*, pp. 60-61.

---

[11] S. Halbrook, A Right to Bear Arms, p. 60 (Greenwood, NY: 1989).

Thus, the Second Amendment extends to all "persons who are part of [the] national community." *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990).

3. The Purpose of the American Right Is to Preserve a Free State.

The right secured by the English Bill of Rights was expressly for the "defense" of members of the Protestant community which would include defense of oneself and defense of others in that community. Although such right of self-defense and defense of others is related to the preservation of liberty generally, the English statement of rights is not explicit on that point. The Second Amendment, however, is quite clear, laying the foundational objective for the right to keep and bear arms to be its "necessity to the security of a free state."

This difference between the English and the American statements of the right of the people in relationship to the sovereignty of the civil order is profound and unmistakable. The Preamble of the English Bill of Rights rests upon the principle that civil sovereignty is in the people's representatives in Parliament assembled (the "lords … and commons"), whereas the Preambles to both the Declaration of Independence ("one people") and the U.S. Constitution ("We the people") rests upon the principle that civil sovereignty resides in the People, not

in their elected representatives in Congress assembled. *Compare* the English Bill of Rights in Sources at 245 *with* the Declaration in Sources at 319 and in the Constitution in Sources at 408. As stated in the Declaration, the American People took up arms against a tyrannical English king and Parliament to secure their liberties, because it was "the right of the people … to throw off [a despotic] government and to provide new guards for their future security."[12] *See* Declaration of Independence in Sources at 319. Based upon the authority of the people "to alter or to abolish" any government that has become "destructive" to the lives, liberties, and properties of the people, the Second Amendment right of self-defense is one aspect of people's right to resist tyranny.

4. In America, the Scope of the Right is Governed by Political Necessity.

Because the text of the English right to keep and bear arms is limited to defense of self or of one's community, the right is measured by its "suitab[ility] to [one's] conditions." Thus, the English version of the right is relative to a person's external circumstances, such as population density, risk of harm, community wealth, time of day, etc. In contrast, the American right is fixed,

---

[12] This claim of right was not foreign to English legal history, having been made in support of the aborted Puritan Revolution in England in the 17th century. *See* Robertson, The Tyrannicide Brief, pp. 191-94.

having been found "necessary to the security of a free State," and not subject to assessment by civil authorities of each individual's personal need for self-protection. Thus, under the Second Amendment, regulations governing firearms must be tailored to the Amendment's unchanging objective to facilitate a "well-regulated militia" composed of volunteers who are self-governed, well-trained, and appropriately equipped to resist government tyranny to preserve a free state. *See* D. Young, The Founders View of the Right to Bear Arms, pp. 43-50 (Golden Oak Books: 2007).

5. In America, the Right to Keep and Bear Arms Is Inherent.

The English right is permissive, *i.e.*, "as allowed by law." Thus, a person has no inherent right to keep and bear arms, but only a privilege as it may be defined from time to time by the discretionary power of a legislature. Thus, all of England — cities and towns, factories and farmlands, schools and churches, businesses and homes — are "gun free zones," except as permitted ("allowed") by statute, or by judicially recognized custom. The United States of America is just the opposite. Guns are ubiquitous, and gun-free zones the exception because the American right pre-exists the State as a God-given, inalienable, and immutable right. Thus, the Second Amendment declares that the right to keep

and bear arms "shall not be infringed," whereas the English statement of the right extends only as far as the legislature allows.

B. Maryland Would Have this Court Measure the Constitutionality of Its Firearm Carry Law by English Standards, Not by American Ones.

At issue in this appeal is whether a Maryland statute — which requires an otherwise qualified person to demonstrate that he "has good and substantial reason to wear, carry, or transport a handgun" in places otherwise than those designated by the State before he may carry such firearm — violates the Second Amendment. Appellants' Br., pp. 4-6. By placing such a burden on a person — who is admittedly otherwise law-abiding — Maryland disregards the Second Amendment principle of the inherent necessity of a well-regulated militia to secure a free state. It is not for Maryland to determine whether a person who is otherwise qualified has "good and substantial reason" to carry a protected firearm. To allow the State to decide whether there is such a reason would arrogate to the State the power to determine what the Second Amendment has already settled — that a People, "ready, willing and able" to serve in a "well-regulated militia," have the inherent right, granted not by the State, but by nature

to possess the wherewithal to discourage, but if necessary, protect the nation from a tyrannical usurpation of power.

The Maryland statute, however, presumes that it is for the State government of Maryland to decide where, how, and if an American citizen may serve his role of being and remaining vigilant for the cause of liberty.[13] By placing the burden of demonstrating "good and substantial reason" on the individual citizen, Maryland has presumed that a state board of civil government officials serve in the English king's or Parliament's role of sovereign protector of the people and their liberties. But the people of Maryland are not the servants of the state; rather, the state is the servant of the people. What Maryland has done is to turn the Second Amendment on its head, subjugating her populace to the dominion of government officials empowered by wide and ill-defined executive discretion.

---

[13] Such a law is an unconstitutional abridgement of a privilege and immunity of United States citizenship. *See* Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867). While four of the five justices in the majority in McDonald opted for atextual incorporation of the Second Amendment to the states through the Fourteenth Amendment's Due Process Clause, Justice Thomas concurred only on the basis of the Privileges and Immunity Clause. *See* McDonald, 130 S.Ct. 3020 (2010) at 3058-88 (Thomas, J., concurring). *Accord Amicus* Brief of GOF, *et al.*, in McDonald, pp. 6-22.

Furthermore, Maryland has, under the guise of protecting public safety and the welfare of the people, excepted certain categories of persons from having to demonstrate "good and substantial reasons." Two of the four categories are either persons highly regulated by the state, such as security guards and armored car personnel, or employees of the state, such as police officers, judges, and prosecutors. Such a practice to discriminate in favor of persons who are part of the current government establishment, or who are licensed by members of that establishment, is patterned after the discredited historic tradition of ensuring that the only persons armed are those who are faithfully serving the current ruling authorities, and is reminiscent of the disarming of rival political factions in Maryland, which was decidedly rejected by the Maryland people during the time of the American war for independence. *See* Halbrook, A Right to Bear Arms, pp. 59-66.

II. MARYLAND'S ARGUMENT RESTS ON A MISLEADING OVERVIEW OF THE HELLER DECISION.

Maryland has cherry-picked the Heller[14] opinion for snippets of language, analyzing them apart from the history and primacy of the Second Amendment text.

---

[14] District of Columbia v. Heller, 554 U.S. 570 (2008).

A. Early Concealed Weapon Decisions Are Inapplicable.

Maryland has relied upon Heller to support its "observ[ation] that a majority of nineteenth-century courts had upheld the constitutionality of complete prohibitions on the carry of concealed weapons." Appellants' Br., p. 13. But Maryland has failed to note that this statement immediately followed Justice Scalia's twin statements that (i) "[f]or most of our history, the Bill of Rights was not thought applicable to the States, and the Federal Government did not significantly regulate the possession of firearms by law-abiding citizens" and (ii) "[f]or most of our history the question [of the invalidity of Second Amendment-based objections to firearms regulations] did not present itself." Heller, 554 U.S. 570 at 626. Since the Second Amendment was not judicially determined to support an "individual" right until Heller was decided in 2008, and not determined to be applicable to the states until McDonald[15] was decided in 2010, Maryland's statements about decisions of 19th century courts have no bearing whatsoever on the resolution of this case. Any implication that the issue of concealed carry was addressed dismissively by Heller would be terribly misleading.

---

[15] McDonald v. City of Chicago, 130 S. Ct. 3020 (2010).

B. Heller's Reference to Presumptively Lawful Regulatory Measures Begins, rather than Ends, Constitutional Analysis.

Maryland also has relied on portions of the Heller Court's statement about "presumptively lawful regulatory measures" as supporting the constitutionality of Maryland's law. *See* Appellants' Br., p. 13. A review of Justice Scalia's entire statement on this issue creates a quite different impression:

> Although we do **not undertake an exhaustive historical analysis** today of the **full scope** of the Second Amendment, **nothing in our opinion** should be taken to cast doubt on longstanding prohibitions on the possession of firearms by **felons and the mentally ill**, or laws forbidding the carrying of firearms in **sensitive places** such as schools and government buildings, or laws imposing conditions and qualifications on the **commercial sale** of arms. [footnote 26: We identify these **presumptively lawful** regulatory measures only as examples; our list does not purport to be exhaustive.] [Heller, 554 U.S. at 626-27 (emphasis added).]

Two conclusions can be drawn from this passage.

First, Justice Scalia was specifying the **scope of the holding** that, although Heller firmly established that the Second Amendment protects an "individual" right, the Court's decision was based on the specific factual issue presented — the District's complete prohibition of handgun possession in the home. This cautionary language indicates that the Court, consistent with the nature of judicial

power, did not issue an advisory opinion establishing the "**full scope**" of the application of the Second Amendment, as that would unfold in subsequent cases and controversies in the ordinary course of litigation. *See* Muskrat v. United States, 219 U.S. 346 (1911).

Second, Justice Scalia's illustrative reference to three categories of laws relating to firearms demonstrates neither that such laws are valid nor likely to be found valid in the future, but only that they were **not being found invalid in Heller**. The Court made clear that even their "longstanding" nature did not immunize these limitations from future judicial scrutiny, as they were only to be considered "presumptively lawful" for the present. Of course, since the beginning of our republic, laws have been presumed constitutional, and the burden is on the party bringing the challenge to show why the law is unconstitutional. *See* Ogden v. Saunders, 25 U.S. 213, 270 (1827). Justice Scalia was not deterred in the slightest by Justice Breyer's concern that the Court was "leaving so many applications of the right to keep and bear arms in doubt," as that was "this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field…." Heller, 554 U.S. 570 at 635. Indeed, the Court expressed a willingness to consider all challenges, to all

firearms regulations: "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us." *Id*. By this language, the Heller court indicated that it expected, when constitutional issues would arise, reviewing courts would faithfully analyze the issues textually and historically using the techniques it modeled with respect to the D.C. statute — a great deal more than simply proclaiming a firearms restriction to be longstanding and therefore "presumptively lawful" as Maryland seems to urge.[16]

C. The Standard for Protected "Arms" Is Not "Weapons in Common Use" during the Founding Era.

Maryland seems to have suggested that Heller limited "the sorts of weapons protected" to be only those "in common use **at the time**." Appellants' Br., p. 13 (emphasis added). Just as the freedom of the press is not limited to colonial era presses, the right to keep and bear arms is not limited to muskets.[17]

---

[16] In no way can Heller be read as "identif[ing], by way of example, a number of types of laws that it presumed would fall *outside* the protection of the amendment" as Maryland asserts. Appellants' Br., p. 13 (italics original).

[17] *See* Parker v. District of Columbia, 478 F.3d 370, 398 (D.C. Cir. 2007) *aff'd sub nom.* Heller, 554 U.S. 570 ("[J]ust as the First Amendment free speech clause covers modern communication devices unknown to the founding generation, e.g., radio and television, and the Fourth Amendment protects telephonic conversation from a 'search,' the Second Amendment protects the

Indeed, in the Court of Appeals decision leading to the Heller decision, Judge Silberman found the "modern handgun … quite improved over its colonial-era predecessor," but nevertheless "a lineal descendant of that founding-era weapon …" under Judge Silberman's "lineal descendant" test, there would be no question that the modern handguns implicated in this case are protected "arms." Moreover, the instant case involves the same handguns protected in Heller. Heller, 554 U.S. 570 at 627-28.

III. BOTH HELLER AND MCDONALD PRECLUDE LOWER COURTS FROM USING JUDICIAL BALANCING.

While the district court below reached the correct result in striking down the Maryland carry statute, it misread Heller with respect to the method of analysis to employ. The district court claimed that "[t]he Heller majority declined to articulate the level of constitutional scrutiny that courts must apply" in Second Amendment cases (2012 U.S. Dist. LEXIS 28498, p. *10). Thus, it concluded that Heller rejected only "rational basis review … and the 'freestanding interest-balancing' approach.…'" *Id*. at 11. Therefore, the district court believed that both intermediate and strict scrutiny were available for use by

---

possession of the modern-day equivalents of the colonial pistol.")

the court. *Id.*, pp. 11-14. Heller offers the lower court no support for this proposition, having rejected all manner of interest balancing tests.

The Supreme Court's first indication of hostility to the application of conventional standards of review to Second Amendment issues came during oral argument in Heller, when Chief Justice Roberts criticized the various tests being proposed for evaluating the constitutionality of firearms laws under the Second Amendment:

> Well, these various phrases under the **different standards** that are proposed, "compelling interest," "significant interest," "narrowly tailored," **none of them appear in the Constitution**; and I wonder why in this case we have to articulate an all-encompassing standard. **Isn't it enough to determine the scope of the existing right** that the Amendment refers to.... [T]hese standards that apply in the First Amendment just kind of developed over the years as sort of **baggage** that the First Amendment picked up. But I don't know why when we are **starting afresh**, we would try to articulate a whole standard.... [District of Columbia v. Heller Oral Argument (Mar. 18, 2008), p. 44, ll. 5-23 (emphasis added).[18]]

Moreover, the Heller decision never employed any judicially developed standard of review. To be sure, the Court did say that the statute in question would fail

---

[18] http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-290.pdf.

under all possible tests. Heller, 554 U.S. 570 at 628-29. But that single statement is no indication that the balancing "baggage that the First Amendment picked up" should be applied to the Second Amendment. Rather, Justice Scalia explained that the "Second Amendment … is the very *product* of an interest balancing by the people…." *Id.*, 554 U.S. 570 at 635 (italics original).

Unquestionably, the intermediate scrutiny and strict scrutiny tests (thought permissible by the district court) are both balancing tests — in the same category of standards criticized by Justice Roberts and Justice Scalia. Both tests require a court to weigh an individual's rights against the state's interests to determine which is more important. To pretend that the Heller Court's rejection of interest balancing was not a rejection of intermediate and strict scrutiny (which are clearly balancing tests) is to strain credulity.

Of course, the approach taken by the district court is far from unique. *See*, *e.g.*, United States v. Skoien, 614 F.3d 638 (7th Cir. 2010) (*en banc*). In fact, these *amici* are aware of only one federal judge who has faithfully followed the direction of the Heller Court. Writing in dissent in Heller v. District of Columbia, 670 F.3d 1244 (D.C. Cir. 2011) ("Heller II"), Judge Kavanaugh explained that "the Supreme Court was not silent about the answer[] to [what]

constitutional test we should employ to assess" Second Amendment cases. *Id.*, p. 1271. Judge Kavanaugh rejected the type of approach taken by this court in United States v. Chester, 628 F.3d 673 (4th Cir. 2010) and United States v. Masciandaro, 638 F.3d 458 (4th Cir. 2011), also taken by the district court below, which permits judges to "re-calibrate the scope of the Second Amendment right based on judicial assessment of whether the law advances a sufficiently compelling or important government interest to override the individual right," whether by "strict or intermediate scrutiny." Heller II, 670 F.3d 1244 at 1271.

As Judge Kavanaugh pointed out, "[i]f the Supreme Court had meant to adopt one of those tests, it could have said so in *Heller*, and measured D.C.'s handgun ban against the relevant standard." *Id.*, p. 1273. The Supreme Court did not simply forget to state which standard of review it was using. As Second Amendment scholar Eugene Volohk has written, this irrefutable fact is demonstrated by the text of Heller:

> Absent [from Heller] is any inquiry into whether the law is necessary to serve a compelling government interest in preventing death and crime, though handgun ban proponents did indeed argue that such bans are necessary to serve those interests and that no less restrictive alterative would do the job. [Eugene Volohk, "Implementing the Right to keep and Bear Arms for Self-Defense: An Analytical Framework and a

> Research Agenda," 56 U.C.L.A. L. REV. 1443, 1463 (2009).]

Since Heller did not even discuss the state interests claimed by the District of Columbia, it clearly could not have been employing intermediate or strict scrutiny. In McDonald, the Court reiterated this holding, stating that judges were not required to "assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments…." McDonald, 130 S.Ct. 3020 at 3050.

Instead, Heller stated categorically that there is a certain class of people, arms, and activities that cannot be infringed, no matter how compelling the interests of the state, and no matter how heavily the balance of equities weighs in the state's favor. This approach derives additional support from the McDonald case, where Justice Scalia's concurrence explained that a categorical approach "depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor." McDonald, 130 S.Ct. 3020 at 3058 (Scalia, J., concurring). Judge Kavanaugh concluded that the test employed by the Heller Court was one of "text, history, and tradition." Heller II, at 1275.

IV. HELLER REQUIRES THAT REVIEWING COURTS IDENTIFY AND APPLY THE SECOND AMENDMENT WITH THE SCOPE INTENDED BY THE FOUNDERS.

A. Heller Requires Reviewing Courts to Seek Out the Authorial Intent of the Framers of the Second Amendment.

If balancing tests are impermissible, the question remains: How are courts to analyze challenges to firearms regulations in the wake of Heller and McDonald? In rejecting use of Justice Breyer's proposed "interest-balancing," Justice Scalia identified the specific issue which reviewing courts must address in considering Second Amendment challenges:

> **Constitutional rights** are enshrined with the **scope they were understood to have when the people adopted them**, whether or not future **legislatures** or (yes) even future **judges** think that scope too broad. [Heller, 554 U.S. 570 at 634 (2008) (emphasis added).]

Both before and after Heller, reviewing courts have been reluctant to adopt the founders' view of the Second Amendment, and therefore have been ineffective guardians of the people's right to keep and bear arms. Writing before Heller, Professor John Hart Ely explained that while "the right of individuals to bear arms" had been "placed beyond the reach of the political process by the Constitution," yet for many years the Second Amendment right was **"'repealed' by judicial construction."** J.H. Ely, Democracy and Distrust, p. 100 (Harvard

Univ. Press: Cambridge 1980) (emphasis added). Heller corrected the central rationalization for this judicial repeal with its clear holding that the Second Amendment protected an individual rather than a collective right. However, the full effect of that critical determination has yet to be felt, largely because courts have: (i) misread Justice Scalia's "presumptively lawful" comment discussed in Section II.B., *supra*, and (ii) abandoned a textual analysis in favor of habitually ubiquitous standards of review unmoored completely from any constitutional text.

As Justice Scalia explained, reviewing courts should hunt to understand the meaning the framers intended the Second Amendment to have — "the scope [it was] understood to have when the people adopted them." Unmistakably, this is a search for what could be termed authorial intent — the traditional method of legal interpretation.[19] J.G. Sutherland explained that "[i]t is the intent of the law that is to be ascertained, and the courts do not substitute their views of what is just or expedient…." J.G. Sutherland, Statutes and Statutory Construction, p. 311 (Callaghan and Company: 1891). Similarly, Professor Francis Lieber's

---

[19] J. Story, Rules of Constitutional Interpretation, § 181 (1833) ("The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties.")

interpretation as "the art of finding out the true sense of any form of words, that is, the sense which their author intended to convey…." F. Lieber, Legal and Political Hermeneutics, p. 11 (1839) (cited in Sutherland, Statutes, p. 311). *See also* E.D. Hirsch, Validity in Interpretation, pp. viii, 1-5 (Yale University Press: 1967).

Of course, a careful search for authorial intent prevents a reviewing court from substituting its own views, and it renders irrelevant Maryland's modern "public safety" arguments. *See, e.g.,* Appellants' Br., pp. 40-51; *see also* McDonald, 3020 at 3045 ("All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category [as the Second Amendment].") It recognizes the sovereignty of the people who participated in ratifying that document, and treats the Constitution with respect and deference as "the great charter by which the sovereign people establish and maintain government, define, distribute and limit its powers. It is the organic and paramount law." Sutherland, Statutes, p. 1. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803). Not only is the Constitution to be paramount, it is to be "permanent," unless amended in the ways prescribed by Article V, not by evolving standards invented by judges. *See* Marbury, 137 at 176.

Moreover, Professor Ely believed that the Second Amendment "cannot responsibly be restricted to less than its language indicates simply because a particular purpose received more attention than others…." *Id.*, p. 94. Making this mistake, the State of Maryland argues that Heller identified the "core right" of the Second Amendment to be "clearly-defined fundamental right to possess firearms for self-defense within the home." Appellants' Br., p. 15. While the Court in Heller made special reference to those facts of the case in its decision,[20] there is no indiction that Justice Scalia was signaling that the scope of the right did not apply elsewhere. Indeed, his reference to the Amendment's "core lawful purpose of self-defense" easily applies both to defense against criminal assault and defense against a tyrannical government. It would be a mistake to read Heller as determining that the "core purpose" of the Second Amendment happened to be co-extensive with the facts of the Heller case.[21]

---

[20] "And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." Heller, 554 U.S. 570 at 635.

[21] Even McDonald did not interpret Heller as finding individual self-defense was "the central component" of the Second Amendment right — but rather that it was "most acute" in the home and that "'citizens must be permitted to use handguns for the core lawful purpose of self-defense'" — never stating that the right applied only in the home. McDonald, 130 S.Ct. 3020 at 3036.

Indeed, the temptation to identify a "core purpose" for the Second Amendment has an unconstitutional side effect — leading courts to employ the all-to-familiar techniques in employing judicially devised balancing and standards of review in the area of the Second Amendment.[22] Impingement on rights within the core purpose is ordinarily subject to strict scrutiny, while the government is given greater latitude to impinge on non-core rights, with such statutes being subject to a lesser standard, such as intermediate scrutiny. Similarly, rights deemed "core" or "fundamental" are subject to strict scrutiny, while lesser or non-fundamental rights are subject to a lesser standard. By inventing core purposes and then invoking these balancing tests, courts have in effect inserted "unreasonably" into the plain unexceptional command that the right to keep and bear arms "shall not be infringed." There are significant problems associated with the use of "standards of review" in all manner of constitutional cases,[23] but such standards certainly should not be used with respect to the Second Amendment, which Professor Ely has reminded us is unique:

---

[22] Woollard v. Gallagher, 2012 U.S. Dist. LEXIS 28498, *10-*14.

[23] *See Amicus* Brief of Capitol Hill Prayer Alert Foundation, *et al.*, (Aug. 2, 2012) in Bipartisan Legal Advisory Group v. Gill, U.S. Supreme Court No. 12-13, pp. 14-26, http://lawandfreedom.com/site/constitutional/DOMA_amicus.pdf.

> The Second Amendment has its own little **preamble**: "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." Thus here, as almost nowhere else, the framers and ratifiers apparently opted against leaving to the future the attribution of purposes, choosing instead explicitly **to legislate the goal in terms of which the provision was to be interpreted**. [*Id.*, p. 95 (emphasis added).]

This unique preamble has multiple components. First, the **objective** of the Second Amendment is first identified — "the security of a "free State." This is followed by the **means** by which that "free State" would be preserved — "the right of the people to keep and bear Arms…." And finally the **sanction** that must be applied to proposals which impair that right of the people — "shall not be infringed." If a "core purpose" must be found, it must be found in the text of the amendment, and is summarized in the goal of the Amendment — the achievement and preservation of a "free state," not in the home self-defense situation presented in Heller.

B. The Maryland Statute Infringes on the Right to Keep and Bear Arms.

Having established the Framers' authorial intent behind the Second Amendment, it remains to apply that purpose in the context of the instant challenge to the Maryland statute. In this case, plaintiff clearly is well within the

class of persons protected by the Second Amendment — a competent, law abiding American citizen. Indeed, Mr. Woollard's eligibility was demonstrated by Maryland when it earlier granted him a concealed carry license. Woollard v. Marcus Brown, 2012 U.S. Dist. LEXIS 28498 (Mar. 2, 2012) p. *5. The weapon that Mr. Woollard wishes to carry within the State of Maryland is a handgun — clearly within the class of "arms" explicitly recognized in Heller. Finally, a court must determine whether the activity at issue involves the protected person "keep[ing] and bear[ing[" a protected arm in some way, including purchasing, obtaining, storing, transporting, and training to proficiency with their arms. Concealed carry of a handgun is a bearing of an arm. This case presents no other issues, such as a challenge to the proprietary authority of governmental agencies to restrict carrying of firearms within "sensitive places" such as a prison or a courthouse.[24]

In sum, the activity in which Mr. Woollard wishes to engage, carrying a handgun concealed and on his person as he goes about his daily life, clearly is within the class of activities protected by the Amendment and within those places

---

[24] The source of the governmental power to regulate open or concealed carry in such places is not derived from the Second Amendment, but, the government, just like a private property owner, enjoys powers of exclusion derived from its rights as the proprietor of a building.

which have been "immemorially … held in trust for the use of the public." *See* Hague v. CIO, 307 U.S. 496, 515 (1939).

For those reasons and those reasons only, the Maryland statute must be struck down as unconstitutional. No matter how "compelling" an interest Maryland believes that it may have in restricting the number of handguns that are in the possession of American citizens within its borders, it has been expressly prohibited from making that "public policy" choice. To allow it to do so would override the constitutional provision drafted by the founders and ratified by the people. It is not up to this court to reconsider that decision through any type of judicially-devised interest balancing test. Rather, this court's sole responsibility is to enforce the constitutional text as embodying the collective will of the sovereign American people. *See* Marbury, 5 U.S. at 176-77.

CONCLUSION

For the reasons stated herein, the decision of the district court below to overturn the Maryland statutory scheme should be affirmed without reference to any judicial balancing or standard of review, but based on the text of the Second Amendment.

Respectfully submitted,

/s/ William J. Olson

WILLIAM J. OLSON*
HERBERT W. TITUS
JOHN S. MILES
JEREMIAH L. MORGAN
ROBERT J. OLSON
WILLIAM J. OLSON, P.C.
370 Maple Avenue W., Suite 4
Vienna, Virginia 22180-5615
(703) 356-5070
wjo@mindspring.com
Counsel for *Amici Curiae*

GARY G. KREEP
U.S. JUSTICE FOUNDATION
932 D Street, Suite 2
Ramona, CA 92065
(760) 788-6624
Counsel for *Amicus Curiae*
U.S. Justice Foundation

*Attorney of Record
August 6, 2012

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief *Amicus Curiae* of Gun Owners Foundation, *et al*., complies with the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, because this brief contains 6,473 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 14.0.0.756 in 14-point CG Times.

/s/ William J. Olson
William J. Olson
Attorney for *Amici Curiae*

Dated: August 6, 2012

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Gun Owners Foundation, *et al.*, in Support of Plaintiffs-Appellees and Affirmance, was made, this 6th day of August 2012, by the Court's Case Management/Electronic Case Files system upon the following attorneys for the parties:

Alan Gura, Esquire
Gura & Possessky, PLLC
101 North Columbus Street
Suite 405
Alexandria, VA 22314

Counsel for Appellees

Matthew J. Fader, Esquire
Office of the Attorney General of Maryland
200 St. Paul Place
Baltimore, MD 21202

Counsel for Appellants

/s/ William J. Olson
William J. Olson
Attorney for *Amici Curiae*