No. 13-42

IN THE

Supreme Court of the United States

RAYMOND WOOLLARD AND
SECOND AMENDMENT FOUNDATION, INC.,

Petitioners,

v.

DENIS GALLAGHER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we are concerned to maintain the protections of the Second Amendment for all Americans.

STATEMENT OF THE CASE

Maryland prohibits citizens from carrying handguns without a permit. Md. Code Ann., Crim. Law § 4-203; Md. Code Ann., Pub. Safety §§ 5-303, 5-308. The first conviction for violating the ban on carrying handguns without a permit is punishable by 30 days to 3 years imprisonment and a fine ranging from $250 to $2500. Md. Code Ann., Crim. Law § 4-203(c)(2)(i).

The Secretary of Maryland's State Police ("MSP") can issue permits to carry handguns if an applicant "has good and substantial reason to wear, carry, or transport a handgun, such as a finding that the permit is necessary as a reasonable precaution against apprehended danger." Md. Code Ann., Pub. Safety § 5-306(a)(5)(ii); Md. Code Regs. 29.03.02.04. Maryland's Handgun Permit Review Board can also issue permits to carry handguns on the same basis. Md. Code Ann., Pub. Safety § 5-312.

But the courts in Maryland have held that under these state laws, an applicant's general interest in self-defense does not satisfy the "good and substantial reason" requirement. *Scherr* v. *Handgun Permit Review Bd.*, 163 Md. App. 417, 438, 880 A.2d 1137, 1148 (Md. App. 2005). Indeed, Maryland's state

Supreme Court does not even recognize that the Second Amendment extends to carrying handguns for self-defense. *Williams* v. *State*, 417 Md. 479, 10 A.3d 1167 (2011).

Maryland authorities rarely find a "good and substantial reason" to issue a permit to carry a handgun. About one-tenth of one percent of Maryland's adult population received permits to carry handguns in 2010.[2] By sharp contrast, in next door Pennsylvania, where the right to bear arms does not require demonstration of special need, licenses to carry handguns are issued to 8.3% of its adult population aged 20 and above.[3] In neighboring Virginia and West Virginia, where the right to bear arms is also not subject to official whim, permits to carry guns are issued to nearly 5% of their adult populations. GAO Report at 76. Moreover, *in all these neighboring states, citizens are free to openly carry handguns without permits,* unlike in Maryland.

Petitioner Raymond Woollard "lives on a farm in a remote part of Baltimore County, Maryland." App.

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[2] See Maryland 2010 Census Data, http://planning.maryland.gov/msdc/census/cen2010/PL94-171/CNTY/18plus/2010_18up_Summary.pdf (last visited August 10, 2013) (adult population 4,420,588); Maryland State Police 2010 Annual Report 37 (2011), available at: http://www.mdsp.org/LinkClick.aspx?fileticket=r2vUnl9RVX8%3d&tabid=429&mid=2452 (last visited August 10, 2013) (4,645 total permits issued).

[3] U.S. Gen. Accounting Office, *States' Laws and Requirements for Concealed Carry Permits Vary Across Nation* 76 (2012) ("GAO Report"), available at http://www.gao.gov/assets/600/592552.pdf (last visited August 10, 2013).

55a. Woollard was the victim of a violent home invasion on Christmas Eve, 2002. App. 55a-56a. Consequently, "Woollard applied for, and was granted, a handgun carry permit" in 2003. App. 56a. His permit was renewed "shortly after [the intruder] was released from prison" in 2006. *Id.*

But when he sought renewal of that permit in 2009, then-MSP Secretary Sheridan denied Woollard's renewal application, on the grounds that "Evidence is needed to support apprehended fear (i.e. – copies of police reports for assaults, threats, harassments, stalking)." App. 101a, 57a, 103a.

An informal review resulted in another denial on July 28, 2009. App. 57a, 105a. Woollard administratively appealed to the Handgun Permit Review Board. App. 57a, 107a-110a.

> The MSP testified [Woollard] was advised that in order for his renewal to be approved he would need to submit documented threats or incidents that had occurred in the last three years. The MSP stated [Woollard] was told to contact them immediately if his situation changed or if he received threats.

App. 109a. Accordingly, Respondents Gallagher, Goldstein, and Thomas affirmed the denial of Woollard's application, finding Woollard "ha[d] not submitted any documentation to verify threats occurring beyond his residence, where he can already legally carry a handgun." App. 57a, 110a. Woollard "ha[d] not demonstrated a good and substantial reason to wear, carry or transport a handgun as a

reasonable precaution against apprehended danger in the State of Maryland." *Id.*

On July 29, 2010, Woollard sued Sheridan and the Handgun Permit Review Board members who had declined to renew his handgun carry permit, in the United States District Court for the District of Maryland. Woollard "aver[red] that, separate and apart from any concern he may have regarding [the intruder], he wishes to wear and carry a handgun for general self-defense." App. 57a. Petitioner SAF, a non-profit organization devoted to advancing Second Amendment rights, joined Woollard as a Plaintiff on its own behalf and on behalf of its membership. App. 53a; Am. Compl., Dist. Ct. Dkt. 19, ¶2. Woollard and SAF further alleged that Maryland's "good and substantial reason" condition on gun rights violates the Second Amendment and the Fourteenth Amendment's Equal Protection Clause.

On March 5, 2012, the District Court granted Petitioners' motion for summary judgment, denied Respondents' motion for summary judgment, and struck down Maryland's "good and substantial reason" condition for a handgun carry permit, Md. Code Ann., Pub. Safety § 5-306(a)(5)(ii), as violating the Second Amendment. The court found that "Woollard has squarely presented the question" of whether the Second Amendment extends beyond the home, "and resolution of his case requires an answer." App. 65a. The court held that the Second Amendment does protect a right to carry a handgun for self-defense outside the home, saying,

> *Heller*'s definition of one of the Amendment's central terms, "bear," further suggests that the right, though it may be subject to limitations, does not stop at one's front door: "To 'bear arms,' as used in the Second Amendment, is to 'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.'"

App. 66a (quoting *Heller*, 554 U.S. at 584 (citation omitted)).

The court further explained,

> A law that burdens the exercise of an enumerated constitutional right by simply making that right more difficult to exercise cannot be considered "reasonably adapted" to a government interest, no matter how substantial that interest may be. Maryland's goal of "minimizing the proliferation of handguns among those who do not have a demonstrated need for them," is not a permissible method of preventing crime or ensuring public safety; it burdens the right too broadly. Those who drafted and ratified the Second Amendment surely knew that the right they were enshrining carried a risk of misuse, and states have considerable latitude to channel the exercise of the right in ways that will minimize that risk. States may not, however, seek to reduce the danger by means of widespread curtailment of the right itself.

App. 78a-79a (citation omitted).

But the Court of Appeals reversed, asserting that *Heller* limited the Second Amendment's "core protection" to the "defense of hearth and home." App. 19a-20a. The court below noted Maryland's substantial interest in reducing its high level of violent crime, App. 26a-27a (which nevertheless persists under its current restrictive handgun regime). The court concluded, "[W]e cannot substitute [contrary] views for the considered judgment of the General Assembly. . . ." regarding how to best address that high level of violent crime. App. 37a-38a. "[I]t is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments." App. 38a (quoting *Kachalsky*, 701 F.3d at 99). The court explained,

> In summary, although we assume that Appellee Woollard's Second Amendment right is burdened by the good-and-substantial-reason requirement, we further conclude that such burden is constitutionally permissible.

App. 40a.

SUMMARY OF ARGUMENT

There is nothing in the language of the Second Amendment, or of this Court's governing, binding precedents in *Heller* and *McDonald*, that limits the Second Amendment to self-defense within the home. To the contrary, the language of both clearly apply to self-defense within the home and without, contrary to the court below.

Moreover, judicial deference to the legislature is not warranted when the legislative restriction infringes on conduct specifically protected by a constitutional right, as *Heller* and *McDonald* found regarding the Second Amendment's right to keep and bear arms.

In addition, the present case does not even involve deference to the legislature, but to the Secretary of Maryland's State Police, and to Maryland's Handgun Permit Review Board, as it is they who determine whether an applicant "has good and substantial reason" for a handgun permit, not the legislature, which did not define these statutory terms any further. It is the Second Amendment that reflects the will of the people, not such judgments of unelected local officials regarding who may exercise the constitutional rights protected by the Second Amendment.

Just as there could be no Constitutional right to abortion, or to freedom of religion, or to freedom of the press, if exercise of these rights required a discretionary permit, the Second Amendment's right to keep and bear arms would be nullified if it can be subject to a discretionary permit as well.

Honest enforcement of the Second Amendment faithful to its text and history is highly desirable, not only because it is good Constitutional law, but also because there is considerable scholarly evidence that more widespread protection of Second Amendment rights sharply increases public safety, and actually *reduces* violent crime, and greater restrictions

actually endanger the public safety and *increase* violent crime.

The decision of the Seventh Circuit in *Moore* v. *Madigan*, 702 F.3d 933 (7th Cir. 2012) is in direct conflict with the decision of the Fourth Circuit below, as the *Moore* court expressly and correctly found, "The Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside." 702 F.3d at 942.

A growing number of federal and state courts recognize that the Second Amendment applies outside the home as well as inside the home, and consequently strike down laws or otherwise limit governmental conduct infringing on the right to bear arms in public settings. The decision of the court below is in conflict with all of these cases as well.

But decisions of other circuits are in conflict with these decisions on whether the Second Amendment applies outside of the home as well as inside. That intractable conflict among the Circuits should be resolved by this Court, in accordance with *Heller* and *McDonald.*

This case presents an exceptional vehicle to clarify the law. In particular, as the District Court below recognized, "Woollard has squarely presented the question" of whether the Second Amendment extends beyond the home, "and resolution of his case requires an answer." App. 65a. That question has been the basis of the noted judicial resistance, which this Court should now resolve.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court Below Rejects and Sharply Restricts *Heller* and Other Precedents.

The Second Amendment states, "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." U.S. Const, Amend. 2. There is nothing in that language at all that limits the right to keep and bear arms to the home, contrary to the court below.

Indeed, while the introductory militia clause does not, as a matter of plain English, in any way limit the remaining language defining the right, the introductory mention of the militia can only mean that the right was not intended to be limited to the home.

In the same way, there is nothing in the language of this Court's ruling in *District of Columbia* v. *Heller*, 554 U.S. 570 (2008) that limits the recognized right to keep and bear arms to the home. To the contrary, *Heller* made clear that the right to "bear arms" means the right to be "armed and ready . . . in case of a conflict with another person." 554 U.S. at 584. *Heller* added that the Second Amendment secures "the individual right to possess and carry weapons in case of confrontation." *Id.* at 592.

These statements from *Heller* clearly protect the right to bear arms outside the home, as well as inside the home, again contrary to the court below. Indeed,

such conflict and confrontation are far more likely to take place outside the home.

While the court below asserted that *Heller* limited the Second Amendment's "core protection" to the "defense of hearth and home," App. 19a-20a, this Court in *Heller* says repeatedly that the "core" interest of the Second Amendment is self-defense, not limited to the home. *Heller* openly states that the Second Amendment's "core lawful purpose [is] self-defense." 554 U.S. at at 630. *Heller* also said "the inherent right of self-defense has been central to the Second Amendment right." *Id.* at 628. *Heller* added, "self-defense . . . was the *central component* of the right itself." *Id.* at 599.

Similarly, *McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010) explained *Heller* as holding "that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense." Nowhere in these statements, or anywhere else in these two binding, governing precedents, can there be found any limitation on the right of self-defense to the home.

As the District Court below also noted, App. 65a-66a, this Court's statements that "the need for defense of self, family, and property is *most acute*" in the home, *Heller*, 554 U.S. at 628 (emphasis added), and that the Second Amendment right is secured "*most notably* for self-defense within the home," *McDonald*, 130 S. Ct. at 3044 (emphasis added), quite clearly indicate that the protections of the Second Amendment also apply outside the home.

Heller also relied on early state constitutional provisions protecting the right to bear arms, 554 U.S. at 584-86, which were applied to carrying handguns in public.[4] It cited early constitutional authorities discussing defensive gun use outside the home. Charles Humphreys, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY 482 (1822) (cited at 554 U.S. at 588 n. 10). And *Heller* discussed time, place and manner restrictions on carrying handguns, which can only be relevant to use of guns for self-defense outside the home. 554 U.S. at 626-27 & n. 26.

Moreover, judicial deference to the legislature is not warranted when the legislative restriction infringes on conduct specifically protected by a constitutional right, as *Heller* and *McDonald* found regarding the Second Amendment's right to keep and bear arms.[5] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) did not involve infringement of a fundamental, enumerated right specifically protected in the Bill of Rights, as *Heller, McDonald,* and the present case do. *NFIB* instead involved the very different question of whether Congress acted within a specific, enumerated grant of legislative power.

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[4] E.g. *State* v. *Reid*, 1 Ala. 612 (1840); *State* v. *Huntly*, 25 N.C. (3 Ired.) 418 (1843); *Simpson* v. *State*, 13 Tenn. 356 (1833); *State* v. *Rosenthal*, 55 A. 610 (Vt. 1903).

[5] The court below used the term "*Heller* right" five times. See App. 16a, 21a, 23a n.5, 24a & n.5. But there is no *Heller* right. There is only a Second Amendment right, which this Court recognized in *Heller*. This Court needs to make that clear, to counter judicial resistance reminiscent of the mass resistance to the Court's civil rights decisions.

In addition, the present case does not even involve deference to the legislature, but to the Secretary of Maryland's State Police, and to Maryland's Handgun Permit Review Board, as it is they who determine whether an applicant "has good and substantial reason" for a handgun permit, not the legislature, which did not define these statutory terms any further. It is the Second Amendment that reflects the will of the people, not such judgments of unelected local officials regarding who may exercise the constitutional rights protected by the Second Amendment.

Suppose a case came before this Court where a state required a permit from a State Medical Review Board for an abortion, available only when the applicant showed a "good and substantial" reason for the abortion. Or a case involving a state requiring a permit from a Religious Liberties Review Board for construction of a new church, or mosque, or synagogue, available only upon a showing of a good and substantial reason for such construction, on the grounds that such religious buildings can be socially divisive. Or a case involving a requirement for a permit to open a new newspaper, available only upon a showing of a good and substantial reason for such an additional newspaper. How easily and quickly would this Court dispose of such infringements of the respective Constitutional rights?

The rights protected by the Second Amendment are entitled to the same degree of protection. This has been recognized by American courts at least for close to 100 years. *People* v. *Zerillo*, 189 N.W. 927, 928 (Mich. 1922) (Michigan's Supreme Court struck down

a state law leaving to a Sheriff's discretion the licensing of handgun possession by immigrants, saying, "The exercise of a right guaranteed by the Constitution cannot be made subject to the will of the sheriff."); *Schubert* v. *DeBard*, 398 N.E.2d 1339, 1341 (Ind. Ct. App. 1980) ([O]fficial lacked "the power and duty to subjectively evaluate an assignment of 'self-defense' as a reason for desiring a license and the ability to grant or deny the license upon the basis of whether the applicant 'needed' to defend himself. Such an approach contravenes the essential nature of the constitutional guarantee. It would supplant a right with a mere administrative privilege which might be withheld simply on the basis that such matters as the use of firearms are better left to the organized military and police forces even where defense of the individual citizen is involved."); *Mosby* v. *Devine*, 851 A.2d 1031, 1050 (R.I. 2004) (Court said it "will not countenance any system of permitting under the Firearms Act that would be committed to the unfettered discretion of an executive agency. . . . One does not need to be an expert in American history to understand the fault inherent in a gun-permitting system that would allow a licensing body carte blanche authority to decide who is worthy of carrying a concealed weapon.").

Such honest enforcement of the Second Amendment faithful to its text and history is highly desirable, not only because it is good Constitutional law. But also because there is considerable scholarly evidence that more widespread protection of Second Amendment rights sharply increases public safety, and actually *reduces* violent crime, and greater restrictions actually endanger the public safety and *increase*

violent crime. The District Court below received this evidence in the record, and could not find evidence to nullify it. App. 51.

In fact, the former Chief Economist of the U.S. Sentencing Commission, John Lott, has demonstrated using the most sophisticated regression analysis that more expansive Second Amendment freedoms further public safety, and more restricted Second Amendment freedoms actually endanger it. John Lott, MORE GUNS, LESS CRIME (3d ed. 2012). His analysis concludes, for example, that shall issue conceal and carry permits reduce the murder rate by roughly 20%. He provides specific examples of lives being saved in the work cited above. His work also shows that after this Court's decision in *Heller*, the murder rate in the District of Columbia dropped precipitously to its lowest level in over 30 years.

II. The Federal Courts of Appeals and State High Courts Are Deeply Split Over The Issues In This Case.

The decision of the Seventh Circuit in *Moore* v. *Madigan*, 702 F.3d 933 (7th Cir. 2012) is in direct conflict with the decision of the Fourth Circuit below. The Seventh Circuit in *Moore* said, "The Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside." 702 F.3d at 942. The court added, "[T]he interest in self-protection is as great outside as inside the home," *id.* at 941, and "To confine the right to be armed to the home is to divorce

the Second Amendment from the right of self-defense described in *Heller* and *McDonald*," *id.* at 937.

The Seventh Circuit in *Moore* directly applied *Heller*, explaining that *Heller* "says that the amendment 'guarantee[s] the individual right to possess and carry weapons in case of confrontation.' 554 U.S. at 592. Confrontations are not limited to the home." 702 F.3d at 936.

A growing number of federal and state courts recognize that the Second Amendment applies outside the home as well as inside the home, and consequently strike down laws or otherwise limit governmental conduct infringing on the right to bear arms in public settings.[6] The decision of the court below is in conflict with all of these cases as well.

But decisions of other circuits are in conflict with these decisions on whether the Second Amendment

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[6] See, *e.g.*, *Ezell* v. *City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) (striking down gun range ban as "a serious encroachment on the right to maintain proficiency in firearm use"); *United States* v. *Weaver*, No. 2:09-CR-00222, 2012 U.S. Dist. LEXIS 29613, at *13 (S.D. W. Va. Mar. 7, 2012) ("the Second Amendment, as historically understood at the time of ratification, was not limited to the home"); *Bateman* v. *Perdue*, 881 F. Supp. 2d 709, 714 (E.D.N.C. 2012) ("[a]lthough considerable uncertainty exists regarding the scope of the Second Amendment right to keep and bear arms, it undoubtedly is not limited to the confines of the home"); *People* v. *Yanna*, 297 Mich. App. 137, 146, 824 N.W.2d 241, 246 (Mich. Ct. App. 2012) ("a total prohibition on the open carrying of a protected arm . . . is unconstitutional"); *In re Brickey*, 70 P. 609 (Idaho 1902).

applies outside of the home as well as inside.[7] That intractable conflict among the Circuits should be resolved by this Court, in accordance with *Heller* and *McDonald.*

III. This Case Presents an Exceptional Vehicle to Clarify the Law.

Woollard is a responsible, law-abiding, crime victim who had a permit to carry handguns in Maryland for many years without incident. He questions only whether he must prove to the police that he has a "good and substantial reason" to exercise the fundamental right to keep and bear arms specifically enumerated in the Constitution, especially where the police have held that the desire to provide self-defense is not such a "good and substantial reason," precisely contrary to this Court's governing precedents.

Amicus Curiae American Civil Rights Union respectfully submits that at least four Circuits are dramatically misreading this Court's binding Second Amendment precedents in *Heller* and *McDonald*, openly following the dissenting opinions rather than the majority opinions in those cases. Indeed, some federal judges have asserted not only that a "proper cause" standard could constitutionally govern a license to exercise the right to keep and bear arms specifically enumerated in the Second Amendment, but that "[i]t should not be difficult to make

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[7] See *Kachalsky* v. *Cacace*, 133 S. Ct. 1806 (2013); *Hightower* v. *City of Boston*, 693 F.3d 61 (1st Cir. 2012); *United States* v. *Greeno*, 679 F.3d 510 (6th Cir. 2012); *United States* v. *Barton*, 633 F.3d 168 (3d Cir. 2011); *United States* v. *Reese*, 627 F.3d 792 (10th Cir. 2010).

reasonable arguments" supporting prohibitions on bearing arms in virtually every describable location visited by people, even "areas around . . . forests. . . ." *Moore* v. *Madigan*, 708 F.3d 901, 904 (7th Cir. 2013) (en banc) (Hamilton, J., dissenting). Considering this high level of judicial resistance, this "fundamental" right might well be largely worthless absent some standards providing it meaningful force.

Moreover, as the District Court below recognized, "Woollard has squarely presented the question" of whether the Second Amendment extends beyond the home, "and resolution of his case requires an answer." App. 65a. That question has been the basis of the noted judicial resistance, which this Court should now resolve.

CONCLUSION

Amicus Curiae American Civil Rights Union respectfully prays that the Court grant the petition.

Respectfully submitted,

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