No. 13-42

IN THE

Supreme Court of the United States

RAYMOND WOOLLARD, *ET AL.*, *Petitioners*,

v.

DENIS GALLAGHER, *ET AL.*, *Respondents*.

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

Brief *Amicus Curiae* of Gun Owners Foundation, Citizens United, U.S. Justice Foundation, Gun Owners of America, Inc., Institute on the Constitution, The Lincoln Institute, Abraham Lincoln Foundation, Conservative Legal Defense and Education Fund, Policy Analysis Center, Downsize DC Foundation, DownsizeDC.org, Virginia Gun Owners Coalition, and Gun Owners of California in Support of Petitioners

MICHAEL BOOS
CITIZENS UNITED
Attorney for Citizens United

MICHAEL CONNELLY
U.S. JUSTICE FOUNDATION
Attorney for U.S. Justice Foundation

**Counsel of Record*
August 12, 2013

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

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INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners Foundation, U.S. Justice Foundation, The Lincoln Institute, Conservative Legal Defense and Education Fund, Policy Analysis Center, and Downsize DC Foundation are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"), and are public charities. Citizens United, Gun Owners of America, Inc., Abraham Lincoln Foundation, DownsizeDC.org, Virginia Gun Owners Coalition, and Gun Owners of California are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization.

These organizations were 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, the construction of state and federal constitutions and statutes related to the rights of citizens, and questions related to human and civil rights secured by law, including the defense of the rights of crime victims, the rights to own and use firearms, and related issues. Each organization has filed many *amicus curiae* briefs in this and other courts.

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Concerning the Second Amendment, various of these *amici* filed *amicus* briefs in the U.S. Supreme Court in District of Columbia v. Heller[2] and McDonald v. Chicago[3]; filed an *amicus* brief in the U.S. Court of Appeals for the Seventh Circuit in United States v. Skoien[4]; filed an *amicus* brief in the U.S. Supreme Court in support of a Petition for Certiorari in Skoien v. United States[5]; and file an *amicus* brief before the U.S. Court of Appeals for the D.C. Circuit in Heller v. District of Columbia ("Heller II").[6]

SUMMARY OF ARGUMENT

The Woollard petition provides the Court with an important opportunity to resolve the recurring question in the lower federal courts as to whether the Second Amendment's right to "bear" arms applies outside the home. Even more compelling, this petition provides an opportunity for the Court to clarify the

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[2] U.S. Supreme Court, No. 07-290, Brief *Amicus Curiae* of Gun Owners of America, *et al.*, (Feb. 11, 2008).

[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) and Brief *Amicus Curiae* of Gun Owners of America, *et al.* (Nov. 23, 2009).

[4] USCA 7th Cir., No. 08-3770, Brief *Amicus Curiae* of Gun Owners Foundation and Gun Owners of America (Apr. 2, 2010).

[5] U.S. Supreme Court, No. 10-7005, Brief *Amicus Curiae* of Gun Owners Foundation, *et al.* (Nov. 15, 2010).

[6] USCA DC, No. 10-7036, Brief *Amicus Curiae* of Gun Owners of America, *et al.* (July 30, 2010).

manner in which the lower courts are obligated to interpret and apply the protections of the Second Amendment to state and federal firearms restrictions under District of Columbia v. Heller and McDonald v. Chicago.

Although the district court and court of appeals below reached different results as to the constitutionality of the Maryland statutory scheme by which Marylanders must demonstrate "good and substantial reason" to obtain a permit to carry a firearm, both courts employed interest-balancing analyses not sanctioned by this Court in either Heller or McDonald. The Fourth Circuit, like five other sister circuits, adopted a "two-part approach," by which a challenged law is upheld even if it violates the Second Amendment — so long as it passes a balancing test demonstrating an overriding interest according to a formula of the court's own choosing.

The Fourth Circuit and other lower federal courts have refused to follow this Court's lead in both Heller and McDonald, adopting the interest balancing approach Justice Breyer articulated in his dissents in Heller and McDonald, instead of applying the categorical approach of the majorities. In the lower federal courts, Judge Kavanaugh of the U.S. Court of Appeals for the District of Columbia stands nearly alone in having authored an opinion faithful to the Heller and McDonald decisions, and that in dissent.

Additionally, this case provides this Court with an opportunity to address the meaning of the "presumptively lawful regulatory measures" in

footnote 26 of Heller. Grounding its opinion in the text of that footnote, the Fourth Circuit ignored the Second Amendment text that gives equal constitutional footing to "bear" and "keep." Having ignored the constitutional text, the Fourth Circuit handed down a decision in conflict with the Seventh Circuit's decision in Moore v. Madigan, which struck down Chicago's ban on carrying a firearm outside the home, as dictated by the Second Amendment principles articulated in the text.

At stake in this petition, then, is whether judges are empowered by the Constitution to substitute their judgment for that of the Founders. As Justice Scalia explained in Heller, "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. at 634. Under the doctrine of judicial review, the courts are duty bound to say what the law is, as the authors of the Constitution intended, not according to the policy preferences of the courts.

ARGUMENT

I. The Question Presented by the Petitioners Insufficiently Reveals the Nature and Importance of the Failure of the Lower Courts to Apply this Court's Decisions in Heller and McDonald.

The Petition for a Writ of Certiorari ("Pet. Cert.") asks this Court to grant certiorari to address the following question:

> Whether state officials violate the Second Amendment by requiring that individuals wishing to exercise their right to carry a handgun for self-defense first prove a "good and substantial reason" for doing so. [Pet. Cert. at i.]

As stated in the Petition, this Court's decision in District of Columbia v. Heller, 554 U.S. 570 (2008) resolved the scope of the right to "keep" arms inside one's home. The Petition now urges that this case become the vehicle for this Court to resolve the scope of the right to "bear" arms outside one's home. As important as the issue stated by petitioners is, the "overriding" issue concerns whether the lower courts have used an improper mode of judicial reasoning in resolving Second Amendment cases. Therefore, while not taking issue with petitioners' configuration of the question presented, that question cannot be truly resolved unless this Court settles the method by which Second Amendment cases are to be analyzed. That is

the area in which the lower federal courts desperately need guidance that only this Court can provide.

In the five years since Heller, and particularly since this Court's decision that "the Second Amendment right is fully applicable to the States" (McDonald v. City of Chicago, 561 U.S. __ , 130 S.Ct. 3020, 3026 (2010)), most lower federal courts have strained to find ways to uphold federal and state firearms restrictions on citizens. While the five-member majority of the Court in Heller embraced the people's right to "keep and bear arms" as memorialized in the Second Amendment, many judges serving on the lower federal courts have exhibited a visceral hostility to firearms, the Second Amendment, and the Heller decision.[7] While issuing decisions which may sound "judicial" to the ear of those trained in modern law school classrooms, these judges have employed an array of techniques to appoint unto themselves the power both to override the Founders' Second Amendment text, and to circumvent this Court's decisions.

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[7] "The fact that courts may be reluctant to recognize the protection of the Second Amendment outside the home says more about the courts than the Second Amendment." United States v. Weaver, No. 2:09-cr-00222, Memorandum Opinion and Order, p. 8 n.7 (S.D.W.Va. Mar. 6, 2012).

II. Neither of the Courts Below Properly Analyzed the Constitutionality of the Maryland Statute under the Second Amendment.

In discussing the district court's opinion below, the Fourth Circuit implicitly adopts the view of Judge Wilkinson in United States v. Masciandaro, 638 F.3d 458, 474 (4th Cir. 2011), that it was "unnecessary to explore ... the question of whether and to what extent the Second Amendment right recognized in *Heller* applies outside the home" — rendering it the prudent and respectful course "to await direction from the [Supreme] Court itself."[8] Woollard v. Gallagher, 712 F.3d 865, 874 (4th Cir. 2013). The reason given by the Masciandaro panel was that "even assuming the *Heller* right extended beyond the home, [the statute there] 'pass[ed] constitutional muster under the [applicable standard of]' intermediate scrutiny." Woollard, 712 F.3d at 872 (citations omitted). Thus, the Fourth Circuit declared that it does not matter if a statute

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[8] In sidestepping the issue presented, the Fourth Circuit violated one of a court's most basic responsibilities, that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. 137, 177 (1803). While this passage from Marbury is most often cited as bestowing a grant of authority on courts, it is also a limit on that authority. When, as here, a case or controversy has properly been put before a court, that court is not free simply to defer to a higher authority, or to invoke "prudential considerations" to avoid deciding a contentious issue. (*See* Gun Owners Foundation, *et al*. *Amicus Curiae* brief, pp. 15-17, in Bond v. United States, 564 U.S. ___ (2011) http://www.lawandfreedom.com/site/constitutional/Bond_Amicus.pdf.)

violates the Second Amendment — but only that the statute passes muster under whatever standard of review the panel chooses to apply.

The analytical method used is explained as a "two-part approach to Second Amendment claims" which the Fourth Circuit had earlier adopted in United States v. Chester, 628 F.3d 673 (4th Cir. 2010), which it says "seems appropriate under *Heller*"[9]:

> [t]he **first question** is "whether the challenged law imposes a burden on conduct falling **within the scope of the Second Amendment's guarantee**." This historical inquiry seeks to determine whether the conduct at issue was understood to be within the scope of the right **at the time of ratification**. If it was not, then the challenged law is valid. If the challenged regulation burdens conduct that was within the scope of the Second Amendment as historically understood, then we move to the **second step** of applying an appropriate form of **means-end scrutiny**. [*Id.* at 680 (emphasis added).]

Remarkably, even when the court finds textually and contextually that the conduct was "within the [protective] scope of the Second Amendment's guarantee," the challenged statute can still be upheld

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[9] The court of appeals identified this two-part approach as having been adopted by the 3rd, 5th, 7th, 10th, and D.C. Circuits. Woollard, at 874.

by the legerdemain of a judicially chosen balancing test wholly foreign to the Second Amendment text.

Although the constitutionality of a challenged law is considered to be the "first question," the court of appeals notes that, under its analytical approach, it may skip over the constitutional text altogether. The court of appeals explains, "we are not obliged to impart a definitive ruling at the first step of the *Chester* inquiry. And indeed, we and other courts of appeals have sometimes deemed it **prudent** to instead resolve *post-Heller* challenges to firearm prohibitions at the second step...." Woollard, 712 F.3d at 875 (emphasis added). Such misplaced "prudence" simply enables federal judges to resolve the constitutionality of a given statute without any consideration of the Second Amendment text whatsoever.

To be sure, the Fourth Circuit's decision below quotes the text of the Second Amendment (*id*. at 874), but only once, never thereafter discussing or applying — much less basing its decision on — that text. Instead, the Woollard court busies itself with what has become the work of federal judges: analysis of different judicial standards of review (intermediate scrutiny, strict scrutiny), including core versus non-core protections, fundamental versus non-fundamental rights, reasonable fit inquiry, overly broad means, and substantial government interests. Of course, none of these concepts originated with the constitutional text, but were superimposed upon it.[10]

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[10] All balancing tests share an ignominious beginning in Korematsu v. United States, 323 U.S. 214, 216 (1944), holding

These standards of review have been the "go to" tools for judges to escape the strictures of the constitutional text, so that they may decide cases according to what is right in their own eyes.[11]

The Fourth Circuit gives this Court's Heller decision slightly more attention than it does the Second Amendment, quoting the Heller court's conclusion that the D.C. law would fail "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights" (Heller, 554 U.S. at 687). But that reference does not support applying standards of scrutiny in its own analysis. The Fourth Circuit joins the list of lower courts which Professor Allen Rostron says "have essentially wound up embracing the sort of interest balancing that Justice Breyer recommended and that Scalia vociferously denounced." A. Rostron, "Justice Breyer's Triumph in the Third Battle over the Second Amendment," 80 GEORGE WASHINGTON L. REV. 703, 757 (Apr. 2012).

The Fourth Circuit also employs the Heller Court's now famous footnote 26 — a clarification of the scope of the holding — to change the issue before the Court to whether the statutory restriction in question was a "presumptively lawful regulatory measure" under the text of the Second Amendment. Woollard, 712 F.3d at

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that an order excluding over 100,000 Japanese-Americans from certain areas of the country was constitutional, passing "the most rigid scrutiny."

[11] "In those days there was no king in Israel: every man did that which was right in his own eyes." Judges 21:25.

874. And, in the end, it dismisses Heller as being largely inapplicable to the facts of this case, claiming Heller was "principally concerned with the 'core protection' of the Second Amendment — 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" Woollard, 712 F.3d at 874.

Although the district court reached the opposite result, striking down the Maryland statutory scheme, its analysis was no more faithful to the constitutional text. First, it employed "intermediate scrutiny" to analyze "non-core Second Amendment protections." Woollard v. Sheridan, 863 F. Supp. 2d 462, 473-74 (D. Md. 2012). 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. *Id*. at 467. It thus found that Heller rejected only "rational basis review ... and the 'freestanding interest-balancing' approach...." *Id*. Therefore, the district court believed that both intermediate and strict scrutiny were available for use by the court. *Id*. at 467-68. Lastly, it concluded that the Maryland statute was an "overly broad means by which it seeks to advance this undoubtedly legitimate end" and "that Maryland's requirement of a 'good and substantial reason' for issuance of a handgun permit is insufficiently tailored to the State's interest in public safety and crime prevention" and thus "impermissibly infringes the right to keep and bear arms." *Id.* at 474, 476. *See also* Woollard, 712 F.3d at 972-73. Such a method of analysis is totally foreign to Heller and McDonald.

III. Both Heller and McDonald Preclude Use of Judicial Balancing to Decide Second Amendment Cases.

This Court signaled hostility to using conventional standards of review to analyze Second Amendment cases even before it wrote its opinion in Heller. During oral argument, 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[12] 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....

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[12] Chief Justice Roberts' observation about a court determining "the scope of the ... right" reflected the proper Second Amendment inquiry — to analyze constitutional text to determine whether the person, arms, and conduct involved are protected or not. The "hearth and home" aspect of Heller reflects not the "core" of the Second Amendment — only the facts of that case. In truth, all protected rights are core rights to someone.

> [District of Columbia v. Heller Oral Argument (Mar. 18, 2008), p. 44, ll. 5-23 (emphasis added).[13]]

Fully consistent with the Chief Justice's expressed concern about importing First Amendment standard of review baggage into the largely pristine area of Second Amendment jurisprudence, the Heller decision never employed any of the judicially developed standards of review. To be sure, the Court did say that the statute in question would fail under all possible tests. Heller, 554 U.S. at 628-29. But that single statement is no support for the proposition 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. at 635 (italics original).

Further, Heller's footnote 26 and associated text have been selectively quoted and badly abused by the lower courts.

> Like most rights, the **right** secured by the Second Amendment is **not unlimited**. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry **any weapon whatsoever** in any manner whatsoever and for whatever purpose.... Although we do not undertake an

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

> 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. 26 [Note 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).]

The conclusion that the scope of the Second Amendment right is "not unlimited" is demonstrated by analysis of its text. For example, one purpose of the militia preamble is to demonstrate that certain persons, such as the mentally ill, would not have a protected right, as they would not be part of a well-regulated militia. The protection of the Second Amendment does not extend to possessing tanks because they do not fit the definition of an "arm." Firearms may be banned from courthouses, not because of the longstanding nature of such restrictions, but because the government has additional property rights as a proprietor of a governmental building to set the rules for its use. All existing restrictions on firearms are "presumptively lawful" — the same status enjoyed by all laws, until

challenged and, if found wanting, struck down[14] — but that is not the same as "conclusively lawful." There is no justification for the Fourth Circuit to latch onto the "presumptively lawful" language, pretending that it anticipates and settles all future challenges to firearms laws.

Indeed, none of the Court's observations about the scope of its decision supports the proposition that principles enunciated were narrowly limited to "hearth and home," and largely inapplicable to any other circumstance. Yet this is how this language has been misused. *See, e.g.*, Moore v. Madigan, 708 F.3d 901 (7th Cir. 2013), *reh'g denied* (Hamilton, J., dissenting).

Moreover, the Heller Court anticipated future challenges to firearms laws:

> [S]ince this case represents this Court's first in-depth examination of the *Second Amendment*, one should not expect it to clarify the entire field.... [T]here will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us. [Heller, 554 U.S. at 635 (italics added).]

Nothing stated in the Court's opinion cautions against the lower federal courts applying the constitutional principles articulated in Heller to guide in considering those future challenges to firearms restrictions. The

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[14] *See* Ogden v. Saunders, 25 U.S. 213, 270 (1827).

Fourth Circuit's conclusion that the Court in Heller was "principally concerned with the 'core protection' of the Second Amendment — 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home'" (Woollard, 712 F.3d at 874) — exhibited a desire to limit the holding in Heller to the facts of that case, so that it fails to provide any meaningful guidance for the federal courts to resolve post-Heller challenges.

It is profoundly unfortunate that some lower federal court decisions have engaged in more analysis as to the meaning of the term "longstanding" found in footnote 26,[15] than any of the words of the Second Amendment. *See, e.g.*, United States v. Skoien, 614 F.3d 638, 640-41 (2010). As Judge Sykes said in dissent, "[t]he court thinks it not ... profitable to parse these passages of *Heller* [footnote 26] as if they contained an answer... but proceeds to parse the passages anyway." *Id*. at 648 (J. Sykes, dissenting).

IV. Other Federal Courts Have Inconsistently Applied this Court's Decisions in Heller and McDonald.

In Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012), Judge Posner sought not to limit, but to apply, Heller

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[15] Here, courts commit a logical fallacy. The words "longstanding prohibition" were never intended to be used as a test of constitutionality. A statute that deals with firearms is not valid simply because it is longstanding. Rather, the statute may be longstanding because it is valid.

and McDonald to the case before him in a straightforward manner.

- When appellees submitted historical evidence at variance with Heller and asked the court to "repudiate the [Heller] Court's analysis," he stated "That we can't do." *Id*. at 935.

- He noted that "[b]oth *Heller* and *McDonald* ... say that 'the need for defense of self, family, and property is most acute in the home' ... but that doesn't mean it is not acute outside the home." *Id*.

- He analyzed the constitutional text and concluded that "[t]he right to 'bear' as distinct from the right to 'keep' arms is unlikely to refer to the home. To speak of 'bearing' arms within one's home would at all times have been an awkward usage. A right to bear arms thus implies a right to carry a loaded gun outside the home." *Id*. at 936.

- He concluded that "[t]he 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." *Id*. at 942.

Nevertheless, despite a sound analytical beginning, and despite reaching a logical result, Judge Posner's opinion was peppered with an analysis of empirical studies offered by governmental defendants to demonstrate their perceived need for their laws, and

his commentary evidenced some bias in favor of most types of firearms restrictions, and a willingness to consider "legislative facts" to override the constitutional text.[16] *Id*. at 937-42.

Just two weeks ago, the Third Circuit continued down the interest-balancing path in upholding New Jersey's public carry permit law in Drake v. Filko, 2013 U.S. App. LEXIS 15635 (3d Cir. July 31, 2013). That law requires a showing, *inter alia*, of "a justifiable need to carry a handgun."[17] Surprisingly, the Third Circuit first determined that New Jersey's law "does not burden conduct within the scope of the Second Amendment's guarantee...."[18] Then, and seemingly unnecessarily, the court decided that the New Jersey law withstood intermediate scrutiny, even though the law "lack[ed] an explicit statement by New Jersey's legislature explaining why it adopted the 'justifiable need' standard." *Id*. at *32, *35.

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[16] Judge Posner gave Illinois 180 days to reconsider its outright ban on carrying firearms, and, on the last day possible, July 9, 2013, that legislature overrode the Governor's veto to enact a new law, arguably mooting the Posner decision, preventing possible review of that decision by this Court.

[17] "Justifiable need" is defined in the New Jersey Administrative Code as: "the urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun." *See* Drake v. Filko at *3.

[18] The dissent explained why this determination was "based on an incorrect reading of *Heller* and *McDonald*." *See* Drake at *51 (Hardiman, J., dissenting).

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.* at 1271 (Kavanaugh, J., dissenting). Judge Kavanaugh rejected the type of approach taken by the Fourth Circuit in United States v. Chester, and United States v. Masciandaro, which he correctly characterized as permitting 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 scrutiny or intermediate scrutiny." *Id.* 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.* at 1273. This 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 — nor permitted — to "assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments...." McDonald, 130 S.Ct. 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. at 3058 (Scalia, J., concurring). Judge Kavanaugh described the test employed by the Heller Court as one of "text, history, and tradition." Heller II, 670 F.3d at 1275.

V. 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 protects 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, and (ii) abandoned a textual analysis in favor of habitually ubiquitous standards of review unmoored completely from any constitutional text. *See* Sections II-IV, *supra*.

As Justice Scalia explained, reviewing courts should seek 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 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).

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.,* Woollard, 712 F.3d at 876-81. 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

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[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.")

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, 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...." Democracy, p. 94. Making this mistake, the Fourth Circuit finds that Heller identified the "core right" of the Second Amendment to be a "clearly-defined fundamental right to possess firearms for self-defense within the home." Woollard, 712 F.3d at 873-74. While the Court in Heller made special reference to those facts of the case in its decision,[20] there is no indication 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

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[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. at 635.

Amendment happened to be co-extensive with the facts of the Heller case.[21]

Indeed, the temptation to identify a "core purpose" for the Second Amendment has an unconstitutional side effect — leading courts to employ all-too-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 interjected "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

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[21] Even McDonald did not interpret Heller as finding that 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.

[22] *See, e.g.*, Woollard v. Sheridan, 863 F. Supp. 2d at 468-69.

[23] *See* *Amicus* Brief of Capitol Hill Prayer Alert Foundation, *et al.* (Aug. 2, 2012) in Bipartisan Legal Advisory Group v. Gill, U.S.

should not be used with respect to the Second Amendment, which Professor Ely has reminded us is unique:

> 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**. [Democracy, p. 95 (emphasis added).]

This unique preamble has multiple components. First, the **objective** of the Second Amendment is 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.

Supreme Court No. 12-13, pp. 14-26; *Amicus* Brief of Downsize DC Foundation, *et al.* (May 13, 2013) in McCutcheon v. FEC, U.S. Supreme Court No. 12-536, pp. 29-39.

CONCLUSION

As explained herein, the Court should analyze the right to carry a firearm outside the home based on the text of the Second Amendment, without reference to judicially created interest-balancing tests. Instead of engaging in interest balancing, this Court should cast off the "baggage" of such tests that has collected around various constitutional rights. This case presents an excellent opportunity for this Court to return to a principled analysis. For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL BOOS
CITIZENS UNITED
1006 Penn. Ave. SE
Washington, DC 20003
Attorney for Citizens United

MICHAEL CONNELLY
U.S. JUSTICE FOUNDATION
932 D Street, Ste. 2
Ramona, CA 92065
Attorney for U.S. Justice Foundation

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