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 OF THE COMMONWEALTH OF VIRGINIA AND THE STATES OF ALABAMA, ARKANSAS, FLORIDA, KANSAS, MAINE, MICHIGAN, NEBRASKA, NEW MEXICO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, WEST VIRGINIA, AND THE COMMONWEALTH OF KENTUCKY AS AMICUS CURIAE IN SUPPORT OF APPELLEES URGING AFFIRMANCE

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STATEMENT OF IDENTITY, INTERESTS, AND AUTHORITY OF AMICI TO FILE

The Commonwealth of Virginia, pursuant to Fed. R. App. P. 29(a), files this Amicus Brief in support of the plaintiffs-appellees' argument that Maryland's "good and substantial reason" requirement for law-abiding citizens to obtain permission to carry a handgun outside the home for self-defense impinges the constitutional rights of its citizens. The Commonwealth and the amici States have an interest in this Court correctly holding that the self-defense interest animating the Second Amendment's individual right to keep and bear arms applies broadly beyond the confines of an individual's home. Because this Court's interpretation of the federal constitutional right will inform the protection afforded the right by parallel provisions in many state constitutions, the amici States urge this Court to interpret the scope of the right and apply a standard of review to its infringement that will recognize the inherent right of all citizens of the United States to lawfully and effectually protect themselves from unlawful violence.

SUMMARY OF ARGUMENT

Raymond Woollard and Second Amendment Foundation, Inc., plaintiffs below and appellees in this Court ("plaintiffs"), challenged Maryland's handgun carry restrictions as abridging their right to bear arms by requiring law-abiding citizens seeking to carry a handgun for self-defense to first demonstrate, to the satisfaction of Maryland officials, a "good and substantial reason" for exercising their right to bear arms. This restraint on law-abiding citizens carrying handguns substantially impinges the natural, inherent right of self-defense. Accordingly, it is the defendants' burden to show, at least, that the restriction is well-crafted to attaining a substantial government interest, without needlessly abridging the rights of citizens. In view of the less-restrictive alternatives available to Maryland to address safety concerns, demonstrated by the experience of a majority of the States who have recognized their citizens' interest in less restrictive regimes, and by empirical research showing that right-to-carry laws do not result in criminal violence, defendants cannot carry their burden to justify Maryland's broad restriction. Hence, the judgment of the district court should be affirmed.

ARGUMENT

Maryland's Prohibition on Law-Abiding Citizens Carrying Handguns for Self-Defense Without First Demonstrating A Necessity Does Not Survive Any Level of Scrutiny More Demanding Than The Rational Basis Test.

More than an Article V majority of the States, 41 at last count, *see* U.S. Const. art. V; John R. Lott, Jr., *What a Balancing Test Will Show For Right-to-Carry Laws*, 71 Md. L. Rev. 1205, 1207 (2012) (hereinafter Lott, *Right-to-Carry*), recognize their citizens' "natural right of defense 'of one's person or house,'" *District of Columbia v. Heller*, 554 U.S. 570, 585 (2008) (citation omitted), by requiring the issuance to all law-abiding citizen applicants of a permit to carry a handgun in public. These "shall issue" permitting regimes generally require only that the applicant demonstrate the character of a law-abiding citizen reasonably proficient in the use of handguns. *See* Clayton E. Cramer & David B. Kopel, *"Shall Issue": The New Wave of Concealed Handgun Permit Laws*, 62 Tenn. L. Rev. 679, 690-91 (1995) (hereinafter Cramer & Kopel, *The New Wave*). Generally, to show that one is law-abiding, a criminal background check is performed to discover past criminal charges and convictions, including some misdemeanors, protective orders, mental incompetency adjudications, and the like. *See, e.g.*, Fla. Stat. §

790.06(2)(a) – (g), (i) – (m), (3), (5)(a) – (e); N.M. Stat. Ann. § 29-19-4; Va. Code Ann. § 18.2-308(D) and (E)(1) – (20). Competency with a handgun may be demonstrated by showing record of completion of any number of designated training or safety courses. *See, e.g.*, Fla. Stat. § 790.06(2)(h)(1) – (7); Va. Code Ann. § 18.2-308(G)(1) – (9). It is estimated that nearly eight million Americans have been issued a permit to carry a handgun in public. *See* Lott, *Right-to-Carry*, *supra* at 1207.

Conversely, the State of Maryland prohibits nearly all law-abiding citizens[1] from publicly "wear[ing], carry[ing], or transport[ing] a handgun, whether concealed or open, on or about the person," or in a vehicle.[2] Md. Code Ann., Crim. Law § 4-203(a)(1)(i) and (ii). Only those

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[1] The Maryland statue exempts from the prohibition certain local, state and federal officers. *See* Md. Code Ann., Crim. Law § 4-203(b)(1).

[2] Maryland law permits its citizens to carry handguns "on real estate that the person owns or leases or where the person resides or within the confines of a business establishment that the person owns or leases," Md. Code Ann., Crim. Law § 4-203(b)(6), or if a "supervisory employee," "within the confines of the business establishment in which the supervisory employee is employed" with the business owner's permission, *id.* § 4-203(b)(7), as well as outside these confines for certain limited purposes unrelated to self-defense. *Id.* § 4-203(b)(3), (4), (5), (8), and (9).

citizens who, among other things, demonstrate that they have a "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" may do so. Md. Code Ann., Pub. Safety § 5-306(a)(5)(ii). This requirement is supplementary to the four, objective qualifications that the Maryland Secretary of State Police enforces, *id.* §§ 5-301(e) and -303; namely, that the citizen is an adult,[3] not a felon, never convicted of drug possession, use, or distribution, and not an alcoholic or controlled substance abuser. *Id.* § 5-306(a)(1) – (4). Having met these qualifications, the Maryland State Police must also find after investigation that the citizen "has not exhibited a propensity for violence or instability" that would render that citizen's public carrying of a handgun a danger. *Id.* § 5-306(a)(5)(i) .

The Maryland State Police Handgun Permit Unit determines whether a good and substantial reason exists and has concluded that such a "reason must 'reflect more than "personal anxiety" and evidence a level of threat beyond that faced by the average citizen.'" Corrected

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[3] Persons under 30 years of age must also be found not to have been committed to a juvenile facility or committed certain crimes as a juvenile. Md. Code Ann., Pub. Safety § 5-306(b)(1) and (2).

Br. of Appellants at 6 (hereinafter "Doc. 23" at 27). In deciding whether a threat provides a sufficient reason for that citizen to carry a handgun for self-defense, the Unit applies a five-part test to the threat, considering the "likelihood of a threat," "whether the threat can be verified," "whether the threat is particular[ized]," and the length of time from which the threat was made. (Doc. 23 at 27-28.) In short, the average, law-abiding Maryland citizen enjoys no legal right to bear a handgun in public for self-defense, but may engage in self-defense with a handgun only with the let and leave of Maryland officials.

This regime violates the plaintiffs' constitutional rights, for even average "citizens must be permitted 'to use [handguns] for the core lawful purpose of self-defense.'" *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3036 (2010) (quoting *Heller*, 554 U.S. at 630). The defendants contend otherwise, claiming that the Constitution does not guarantee individuals any right to "bear arms" outside the home for self-defense and, even if it did, that the state requirement is an appropriate means to further Maryland's "interest in public safety and the reduction of handgun violence." (Doc. 23 at 31-32.) But as the District Court properly held, "the right to bear arms is not limited to the home" and

the "citizen may not be required to offer a 'good and substantial reason' why he should be permitted to exercise his rights. The right's existence is all the reason he needs." *Woollard v. Sheridan*, No. 10-2068, 2012 U.S. Dist. LEXIS 28498, at *21, *34; 2012 WL 695674, at *7, *12 (D. Md. Mar. 2, 2012). The Second Amendment took Maryland's "policy choice[] off the table." *Heller*, 554 U.S. at 636.

A. Maryland's Interest in Preventing Handgun Violence Does Not Justify Such a Broad Restriction.

Unquestionably, the "good and substantial reason" requirement burdens "the core right identified in *Heller*--the right of a law-abiding, responsible citizen to possess and carry a weapon for self-defense." *United States v. Chester*, 628 F.3d 673, 683, 685 (4th Cir. 2010) (emphases omitted) (suggesting that any abridgement of the "core right" would be subject to strict scrutiny). Although strict scrutiny may be the test that the Supreme Court ultimately adopts, *see* Br. of Appellees' at 59-61 (hereinafter "Doc. 58" at 80-82), this restriction is subject, at least, to intermediate scrutiny under which the defendants "bear[] the burden of demonstrating (1) that it has an important governmental 'end' or 'interest' and (2) that the end or interest is substantially served by enforcement of the regulation." *United States v. Carter*, 669 F.3d

411, 417 (4th Cir. 2012); *see United States v. Masciandaro*, 638 F.3d 458, 470, 475 (4th Cir. 2011) (applying intermediate scrutiny to a citizen's claim of right to bear arms in a public park). In doing so, defendants "may not rely upon mere 'anecdote and supposition'" in discharging their burden to show that the claimed ends are substantially served by the "good and substantial reason" requirement. *Carter*, 669 F.3d at 418 (quoting *United States v. Playboy Ent'mt Grp., Inc.*, 529 U.S. 802, 822 (2000)). The requirement, under an intermediate standard, need not be the "least restrictive means" to pass muster. But it may not "substantially burden more" of the exercise of Second Amendment rights "than is necessary to further the government's legitimate interests" or "regulate . . . in such a manner that a substantial portion of the burden on [Second Amendment rights] does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989); *see, e.g.*, *Carter*, 669 F.3d at 418-19.

Defendants claim that Maryland's requirement advances its interests in "public safety and the reduction of handgun violence." (Doc. 23 at 32.) But the State cannot simply prohibit handguns because they are "the quintessential self-defense weapon." *Heller*, 554 U.S. at 629.

Furthermore, the exercise of the right itself cannot be the evil to be remedied. That is, Maryland can claim no legitimate interest in preventing law-abiding citizens from using "handguns for the core lawful purpose of self-defense," nor may it so circumscribe that right to eliminate it for the ordinary citizen. *See McDonald*, 130 S. Ct. at 3026. Maryland's claim is premised on a belief that runs contrary to our system of ordered liberty: that law-abiding citizens may not be trusted to bear arms in defense of themselves and that there is a presumption against their doing so.

In explaining how the requirement supposedly advances legitimate interests, Maryland posits a number of hypothetical dangers not unique to handguns, and not characteristic of law-abiding citizens who lack an elevated "good and substantial reason" to carry. Moreover, each of the concerns may be mitigated by substantially less restrictive requirements that are presently used by other States. The first concern that the requirement is supposed to address is limiting the availability of "the weapon of choice for criminals [acting] outside the home." (Doc. 23 at 64, 68.) Defendants also assert that allowing persons to carry handguns outside the home does not further the self-defense interests of

citizens because, due to the element of surprise, "a potential victim has less of an opportunity to make use of a handgun for self-defense outside the home" and that "assailants outside the home are more likely to be able to wrest handguns away from potential victims who do not have sufficient training to use the handgun effectively for self-defense." (Doc. 23 at 64-65, 69.) Of course, practically eliminating the right of self-defense for most citizens because of a claimed fear that the right might be less effective than in the home is to cry crocodile tears. Moreover, requiring "sufficient training," as all the other States of the Fourth Circuit do, would adequately mitigate these concerns without the wholesale abridgement of the rights of citizens. *See* N.C. Gen. Stat. § 14-415.12(a)(4); S.C. Code Ann. § 23-31-210(5); Va. Code Ann. § 18.2-308(G); W. Va. Code § 61-7-4(d).

Maryland argues that the good and substantial reason requirement results in not issuing "permits to individuals who will use their handguns to commit crimes." (Doc. 23 at 71.) Maryland contends that this is true because statistics show that some portion of the persons who later commit murders will not have previously committed a felony, and thus may have qualified at some point in their lives as

law-abiding. But there is no fit at all between the requirement and the claimed concern because the requirement for an elevated reason to carry does not tend to filter out such persons. And, if it chose, Maryland could, as other states have done, impose additional restrictions that are predictive of future criminality, such as a history of domestic violence, sexual crimes, mental incompetence, or involvement in a criminal gang. *See, e.g.*, Minn. Stat. § 624.714, subd. 2(b); N.M. Stat. Ann. § 29-19-4(A) and (B); N.C. Gen. Stat. § 14-415.12(a)(3), (b)(1) – (11); Va. Code Ann. § 18.2-308(G)(1) – (20); W. Va. Code § 61-7-4(a)(4), (5), (6), (7), and (8).

Defendants also contend that "[t]he good-and-substantial-reason requirement decreases the likelihood that basic confrontations will turn deadly." (Doc. 23 at 67, 68.) It might more logically be supposed that depriving most citizens of the right of self-defense will make it more likely that basic confrontations with the non-law abiding will turn deadly for the law abiding. Furthermore, the policy choice to abridge the right of self-defense for most citizens in most circumstances is foreclosed by the Second Amendment itself.

Defendants posit that the likelihood of accidents is increased by allowing more persons to carry. (Doc. 23 at 70-71.) Again, there is no reason to believe that those law-abiding citizens with a good and substantial reason are less likely to accidentally discharge a firearm than those without, and as defendants implicitly concede, this concern could be addressed by training, as it is in other States.

Defendants offer that the requirement "helps to decrease the availability of handguns to criminals." (Doc. 23 at 68.) The reasoning is that by prohibiting law-abiding citizens from carrying handguns in public, there will be fewer persons who criminals can steal them from. This rationale proves too much as it offers no justification for distinguishing between persons with a "good and substantial reason" and those without, or distinguishing between carriage outside the home or within it, and thus would justify prohibiting all persons from carrying or owning handguns, for anyone could be robbed of them. And the risk is implausible on its face, as unlike "police officers" who are "known to keep guns," criminals are unlikely to know which law-abiding citizens do, making them difficult to target.

Defendants also suggest that the requirement, by limiting "the prevalence of firearms," has the effect of making it less likely that "victims of violent crimes will be killed." (Doc. 23 at 69.) The tortured logic is that criminals with guns are more deadly and anything which reduces the total number of guns is desirable. Again, a blanket dislike of handguns has led to a requirement without a proper fit. The only persons prevented from owning or carrying a handgun by Maryland's requirement are law-abiding citizens. This rule thus does not directly affect "the general availability of guns," but only the availability of handguns used for self-defense.

Lastly, defendants offer that their requirement "reduces interference with the ability of law enforcement to protect public safety." (Doc. 23 at 70.) This result is supposed to follow from the depressing effect the requirement has on the "proliferation of publicly-carried handguns," which is supposed to reduce the number of individuals "who are observed carrying a handgun" by police, which is supposed to lighten the load of "[i]nterdiction efforts" by presenting fewer persons for the police to stop and speak with on suspicion of criminal activity. (Doc. 23 at 70.) Again there is no fit because those

with a "good and substantial reason" present the same concern, which could be addressed for everyone simply by requiring concealed carry by permit holders. *See, e.g.*, S.C. Code Ann. § 16-23-20; S.C. Code Ann. § 23-31-215(A); Tex. Gov't Code § 411.177(a); Tex. Penal Code § 46.035(a).

The effect of requiring a proper fit between the dangers arising from the exercise of a right and a State's response to that danger is to ensure that the right is being appropriately valued and protected by the State. However, in the guise of protecting the public, a State may not simply eliminate that right for most people in most circumstances on the ground that it is the right itself that is the problem. *See Woollard v. Sheridan*, No. 10-2068, 2012 U.S. Dist. LEXIS 28498, at *34; 2012 WL 695674, at *11 (D. Md. Mar. 3, 2012) ("States may not, however, seek to reduce the danger by means of widespread curtailment of the right itself.").

B. Maryland Cannot Show that its Restriction is a Proper One Because a Broad Consensus of the States and Empirical Evidence Demonstrate that Right-to-Carry Laws Do Not Increase Criminal Violence and that Carry Restrictions on Law-Abiding Citizens Do Not Reduce Crime.

Among the States of the Fourth Circuit, Maryland is alone in requiring its law-abiding citizens to satisfy an official that a handgun is

needed to defend themselves in public. Instead of placing this life and death decision in the hands of an unaccountable agency, North Carolina, South Carolina, Virginia, West Virginia, and at least thirty-seven other States leave to the citizen who has been determined to be law-abiding and to possess the requisite proficiency with a handgun the decision whether they will protect themselves. With these rules having been in place for decades in some States, and their effects having been studied since their inception, the social science research demonstrates that public carry of handguns by law-abiding citizens does not increase criminal violence or threaten public safety, but prevents crime and protects the public.

In 1987, the State of Florida adopted what has become the model for handgun carry permit laws: non-discretionary issuance of permits to carry handguns concealed in public upon a showing that the applicant was a law-abiding citizen who possessed the requisite proficiency in the handling of a handgun. *See* Fla. Stat. § 790.06; Cramer & Kopel, *The New Wave*, *supra* at 690-91. Since then, dozens of states have followed suit, licensing millions of law-abiding citizens to carry handguns in public for self-defense on their own initiative. *See* Lott, *Right-to-Carry*,

supra at 1207. Public support for repealing these laws or imposing tighter restrictions, despite recent acts of mass violence involving the use of guns, remains weak. *See* Rasmussen Reports, Gun Control, http://www.rasmussenreports.com/public_content/politics/current_events/gun_control (last visited July 31, 2012).

This broad political consensus against gun control and in favor of self-defense rights is premised upon a view of criminal behavior that both enjoys empirical support and differs markedly from that expressed by Maryland's good and substantial reason requirement and by defendants' defense of it. The political consensus in the States may be summarized as follows: law-abiding citizens, those whose past actions do not suggest future criminality, are not likely to be perpetrators, but victims, of crime. When laws are in place that forbid the keeping and bearing of arms, whether in the home or outside of it, or only in certain places, those citizens will abide by them. However, those who commit acts of violence, whether assault, robbery, burglary, rape, or murder, are unlikely to be deterred from those crimes by an additional law forbidding possessing or carrying their desired weapon or by the knowledge that the police may apprehend them in the attempt or after

the fact. In such cases, the only protection for the citizen is the would-be criminal's knowledge that their victim could be armed and the ability of that victim to act effectively in self-defense. See Cramer & Kopel, *The New Wave*, *supra* at 686 (discussing a National Institute for Justice study of felony prisoners finding that "fifty-six percent of the prisoners said that a criminal would not attack a potential victim who was known to be armed").

This view of criminal behavior is confirmed by scholarly conclusions that a jurisdiction's adoption of right-to-carry laws results in the reduction of violent crime rates. *See* Lott, *Right-to-Carry*, *supra* at 1212-16 (describing the results of "five qualitatively different studies" of laws permitting handgun carry and concluding that "the consensus is the same: right-to-carry laws reduce violent crime"). In a seminal study of the effects of right-to-carry laws, which were then in place in only eighteen states, it was found that following adoption, "murders fell by 7.65 percent, and rapes and aggravated assaults fell by 5 and 7 percent." John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. Legal Stud. 1, 23 (1997). Further studies following the effects of these laws over time indicate

that rates of violent crime experience greater "drops the longer the right-to-carry laws are in effect" and "[t]he greater the percentage of the population with permits." *See* Lott, *Right-to-Carry*, *supra* at 1212.

Sadly, the political and scholarly consensus is also confirmed by the high incidence of violence in jurisdictions that continue to impose onerous restrictions on law-abiding citizens owning or carrying firearms. Take Chicago for example, which both prohibits the possession of firearms anywhere without a permit, *see Gowder v. City of Chicago*, No. 11-C-1304, 2012 U.S. Dist. LEXIS 84359, at *3; 2012 WL 2325826, at *1 (N.D. Ill. June 19, 2012), and is located within the only State that completely bans citizens from carrying or possessing weapons almost anywhere outside their home. *See* 720 Ill. Comp. Stat. 5/24-1(4). Despite all this regulation, the rate of violent crimes has been tragically high for decades and remains so. *See* Mark Konkol & Frank Main, "Chicago under fire: Murders rising despite decline in overall crime," (July 7, 2012), http://www.suntimes.com /news/violence/13574486-505/chicago-under-fire-murders-rising-despite-decline-in-overall-crime.html (noting that for the first six months of

2012, the number of homicides had increased 37 percent from that recorded in the first six months of 2011).

The defendants' suggestion that permit holders will suddenly turn to a life of wanton violence is not borne out by the data either, as demonstrated by the experience of Florida, which issued over 2 million permits from October 1, 1987 to July 31, 2011 and revoked "[o]nly 168 . . . for any type of fire-arms related violation," less than 1 percent, and those violations were mostly for "accidentally carrying concealed handguns into restricted areas." Lott, *Right-to-Carry*, *supra* at 1211; *see also*, (Doc. 58 at 84-86). Nor is there any academic support for the argument that permitting law-abiding citizens to carry handguns in public increases the incidence of "accidental gun deaths or suicides." Lott, *Right-to-Carry*, *supra* at 1206. In sum, Maryland is left with "mere 'anecdote and supposition,'" a wholly inadequate basis on which to justify substantial impairment of fundamental rights. *Carter*, 669 F.3d at 418 (quoting *Playboy Entm't Grp., Inc.*, 529 U.S. at 822).

CONCLUSION

The district court's decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief has been prepared using fourteen point, proportionally spaced, serif typeface: Microsoft Word 2007, Century Schoolbook, 14 point.

2. Exclusive of the table of contents, table of authorities and the certificate of service, this brief contains 3,657 words.

/s/ E. Duncan Getchell, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing BRIEF OF THE COMMONWEALTH OF VIRGINIA AND STATES OF ALABAMA, ARKANSAS, FLORIDA, KANSAS, MAINE, MICHIGAN, NEBRASKA, NEW MEXICO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, WEST VIRGINIA, AND THE COMMONWEALTH OF KENTUCKY AS AMICUS CURIAE IN SUPPORT OF APPELLEES URGING AFFIRMANCE has been filed with the Clerk of the U.S. Court of Appeals for the Fourth Circuit this August 6, 2012, by using the appellate CM/ECF system, which will send notification of said filing to the attorneys of record, who have registered with the Court's CM/ECF system.

I further certify that on this August 6, 2012, I caused the required number of bound copies of the foregoing to be hand-delivered to the Clerk of Court.

/s/ E. Duncan Getchell, Jr.
Solicitor General of Virginia