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 A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF *AMICUS CURIAE* OF ACADEMICS FOR THE SECOND AMENDMENT IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS*

Amicus Academics for the Second Amendment ("A2A"), is a §501(c)(3) tax-exempt organization. Formed in 1992 by law school teachers, A2A's goal is to secure the right to keep and bear arms as a meaningful, individual right. A2A has filed *amicus* briefs in this Court in *United States v. Lopez, District of Columbia v. Heller*, and *McDonald v. Chicago*. It has also published a series of "Open Letters" signed by college and university professors in the NEW YORK TIMES, the NATIONAL REVIEW, REASON, the NEW REPUBLIC, the NATIONAL LAW JOURNAL, and the CHRONICLE OF HIGHER EDUCATION.[1]

ARGUMENT

I. Regulation of the Carrying of Arms: A Historical Summary.

At the time of the Framing, firearms carrying was essentially unregulated. *See generally* Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST.

[1] No counsel for a party authored this brief in whole or in part, nor made a monetary contribution intended to fund the preparation or submission of this brief. The NRA Civil Rights Defense Fund gave financial assistance for the preparation of this brief. *Amicus* is a nonmembership not-for-profit, supported by its membership. If the Court desires, *Amicus* will provide a list. This brief is filed with the written consent of the parties notwithstanding receiving less than 10 days notice.

REV. 139 (2007). The main constraints upon carrying were found in hunting regulations that prohibited carrying firearms while trespassing on the land of another. *See, e.g.*, *The Form of a Patent for Land*, 3 HENING'S [VIRGINIA] STATUTES AT LARGE 323 (1705) (allowing landowner to sue for a penalty); 1800 LAWS OF THE STATE OF NEW JERSEY 19 (same, with note that statute shall not be construed so as to "prevent any person carrying a gun upon the highway"); *An Act to Prevent the Hunting of Deer and Other Wild Beasts*, 6 PA. STATUTES AT LARGE 46 (1761) (forbidding hunting on Indian-owned lands).

North Carolina did enact an analog to the English Statute of Northampton, which in 1328 seemingly banned going armed. 2 Edw.III c. 3. The Statute of Northampton does not appear to have been enforced: the first reported case on it came in 1686, with the court noting the statute was "almost gone in desuetudinem." *Rex v. Sir John Knight*, 90 Eng. Rep. 330 (K.B. 1686). The court construed the statute to require specific intent, *id.*, to "go armed to terrify the King's subjects." *Sir John Knight's Case*, 87 Eng. Rep. 75 (K.B. 1686). *See also* 1 WILLIAM HAWKINS, A TREATISE ON THE PLEAS OF THE CROWN 488 (8th ed. 1824).

Beginning in the early 19th century, State legislatures (almost entirely in the South) began to enact bans on *concealed* carry of weapons. Kentucky enacted the first such law in 1813, followed by Louisiana (1813), Indiana (1820), Georgia (1837), Tennessee (1838), Virginia (1838) and Alabama (1839). CLAYTON E. CRAMER, CONCEALED WEAPON LAWS OF THE EARLY

REPUBLIC 2-3 (1999).[2] In contrast, "Many northern states passed no laws regulating concealed carrying until the 1920s." *Id.* at 4.

The Kentucky measure was motivated by a very specific concern. The State had just adopted an effective anti-dueling measure,[3] and the legislature was concerned that this would result in challenges being replaced by assassinations. One delegate worried that

> [I]f we insert in our constitution a clause such as this [the anti-dueling proviso] we shall compel men to resort to some other means of redressing grievances than the duel – the knife, for instance. . . . If we stop the duel, and insults of this kind are offered . . . something must be done at once to check the other mode of avenging grievances – that of street fighting or assassination.

Id. at 61. The Kentucky statute also became the first law challenged, in *Bliss v. Commonwealth*, 12 Ky. 90 (1822). The Kentucky court struck down the statute, reasoning that no regulation of the right to bear arms

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[2] The statutes involved are conveniently listed at CLAYTON E. CRAMER, *supra*, 143-52.

[3] *Viz.*, a provision requiring all State officials to take an oath that they had never participated in a duel, with the measure placed in the State Constitution so that the legislature could not give dispensations. Those who could not so swear were barred from the legislature, all executive and militia posts, from appointment to the bench, and even from the practice of law. CLAYTON E. CRAMER, *supra*, at 59-60.

was permissible: "whatever constrains the full and complete exercise of that right, although not an entire destruction of it, is forbidden. . . ." *Id.* at 92-93. Nearly three decades later, the Kentucky Constitution was amended to overrule *Bliss*, adding "but the general assembly may pass laws to prevent persons from carrying concealed arms" to the constitutional guarantee.[4] Eugene Volokh at 197. The continuing emphasis on concealment is noteworthy.

The poorly-drafted Georgia statute in its first section forbade anyone "to keep, or have about their person" fighting knives, pistols, dirks, sword canes, spears "&c," and in its fourth section provided that it did not apply to a person "who shall openly wear, externally," the fighting knives or spears. 1837 ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA 90-91 (1838). Possibly by mistake, pistols were omitted from the exception for open carry. The omission eventually generated a legal challenge.

In *Nunn v. State*, 1 Ga. 243 (1846), the defendant had been convicted of carrying a pistol, with no allegation that it was concealed. Georgia then having no right to arms provision in its constitution, the Georgia Supreme Court held that the Second Amendment governed, notwithstanding *Barron v.*

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[4] *See* Eugene Volokh, *State Constitutional Rights To Keep and Bear Arms*, 11 TEX. R. OF LAW & POLITICS 191, 197 (2006).

Baltimore.[5] In a lengthy, if sometimes overwrought, opinion it held that a ban on concealed, but not on open, carry was permissible:

> We are of the opinion, then, that so far as the act of 1837 seeks to suppress the practice of carrying certain weapons *secretly*, that it is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void*. . . .

1 Ga. at 251 [emphasis in original].

The Georgia understanding reflected what was becoming the majority position. Alabama's Supreme Court had upheld, and Louisiana's highest court would soon uphold, their laws, as only restricting one form of bearing arms. *See State v. Reid*, 1 Ala. 612 (1840); *State v. Chandler*, 5 La. App. 489 (1850). The Alabama court added a *caveat*: "A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so

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[5] 32 U.S. 243 (1833). State Supreme Courts were free to do this, since the Judiciary Act of 1789 only provided a limited appellate jurisdiction. If State statutes were challenged as violative of the U.S. Constitution, appeal was allowed only if the "decision is in favour of their validity." *Judiciary Act of 1789* §25. 1 Stat. 73. If the highest court of a State *struck down* one of its laws on Federal grounds, there could be no further appeal.

borne as to render them wholly useless for defense, would be clearly unconstitutional." 1 Ala. at 616-17[6] The Louisiana court thought likewise:

> [The statute] interfered with no man's right to carry arms (to use its words) "in full open view," which places men upon an equality. This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations.

5 La. App. at 490.

The Tennessee court took a somewhat different approach, based on its unusual situation. Its constitution protected the right to bear arms "for the common defense," a provision consciously omitted from the Second Amendment,[7] and its concealed weapons statute applied only to Bowie knives and daggers.

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[6] The court also noted, "we incline to the opinion that the Legislature cannot inhibit the citizen from bearing arms openly, because it authorizes him to bear them for the purposes of defending himself and the State, and it is only when carried openly, that they can be efficiently used for defence." *Id.* at 619. That is to say, the allowed mode of carry was *superior* to the one banned.

[7] JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES (1820), *reprinted as* 1 JOURNAL OF THE SENATE (MARTIN CLAUSSEN, ED. 1977), at 129. ("On motion to amend Article the fifth, by inserting these words, 'for the common defense,' next to the words 'Bear arms,' it passed in the negative.").

The Tennessee Supreme Court held that these knives were not "arms" within its constitutional guarantee. The weapons whose carrying was protected were those "usually used in civilized warfare," not those "usually used in private broils" or "by the robber and assassin." It reasoned that the purpose of the arms right was so that citizens might "protect the public liberty, to keep in awe those who are in power, and to maintain the supremacy of the laws. . . ." and that these needs were not served by concealed carrying of Bowie knives and daggers.[8] *Aymette v. State*, 21 Tenn. 152, 158 (1840).[9]

In sum, the Framing generation knew little of restrictions on carrying of arms; Americans over the following period accepted that concealed carry could be banned, but only if open carrying was permitted.

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[8] The Tennessee approach would be less than viable today: it would allow legislatures to regulate daggers and perhaps small pistols, but not machine guns, hand grenades, and RPGs.

[9] We will leave aside the ruling in *State v. Buzzard*, 4 Ark. 18 (1842), in which the three justices split three ways. The Arkansas Constitution protected the right to bear arms "for the common defense," and Chief Justice Ringo held to a militia-centric view, alternately stating that the ban on concealed carry was a reasonable regulation. Justice Dickinson held to a militia-centric view. Justice Lacey, dissenting, took the position that the guarantee was of a purely individual right, and that the concealed weapons ban violated this. While not overruling *Buzzard*, the Arkansas court later treated the right to arms as an individual right to carry militia-style arms. *See Fife v. State*, 31 Ark. 455 (1876).

The concept of banning, or licensing *all* carrying of arms, open or concealed, is of quite recent vintage. New York's 1911 Sullivan Law is generally considered the first case of strict gun regulation, since it required a permit to possess a handgun. But it required carry permits only for concealed carry, and then only in cities, villages or towns. 1911 N.Y. LAWS ch. 195, §1898, at 443. The provision was re-enacted ten years later. 1921 N.Y. LAWS ch. 297, §5, at 1020.[10]

The same approach is to be found in the Uniform Pistol Act (proposed in 1924)[11] and the Uniform Firearm Acts (proposed on three dates between 1925 and 1930)[12] – concealed carry requires a license, open carry does not. Apart from New York, the few States that broke with this general rule did so in very recent times. The Maryland statute at issue here, insofar

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[10] Tracking the history of the New York regulations is complicated, since eventually the possession permits became subdivided into premises-only permits, and other forms. If the licensing authority did not want to authorize carrying, it simply issued a premises-only permit. Thus the possession permit largely supplanted the function of the concealed carry permit.

[11] REPORT OF THE COMMITTEE ON A UNIFORM ACT TO REGULATE THE SALE AND POSSESSION OF FIREARMS 21 (1924) ("No person shall carry a pistol or revolver concealed in any vehicle or upon his person. . . ."). The licensing authorities, in turn, "shall" issue a concealed carry permit "if it appears that the applicant has good reason to fear an injury to his person or property, or for any other proper purpose, and that he is a suitable person to be so licensed." *Id.*

[12] *E.g.*, THE UNIFORM FIREARMS ACT, DRAFTED BY THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1930).

as it requires permits for all carrying, dates only to 1972. *See* 1972 MD. LAWS ch. 13, §3; *State v. Crawford*, 308 Md. 683, 521 A.2d 1193, 1198 (1987).

II. History Suggests that Discretionary Licensing of Arms-Bearing Results in Arbitrary Issuance, Favoritism, and Abuse.

From the start, it was apparent that ambiguous standards and limitless or nearly limitless discretion created a system that invited favoritism and abuse. Problems with corruption were reported as early as 1920, when a magistrate was found to have signed dozens of otherwise blank permits, which he sold for $2 each. *Says An Ex-Convict Got Pistol Permits*, NEW YORK TIMES, Nov. 10, 1920, at 8. Later, New York Mafioso were successfully obtaining unrestricted concealed carry licenses.[13] In the 1930s, it was reported that "Dutch" Schultz and other mobsters had "had an easy time" getting permits. *Mulrooney Fights "Model" Pistol Bill*, NEW YORK TIMES, March 1, 1933, at 8.

A system which commits decision entirely to official discretion also invites corruption. In 1972, The Knapp Commission Report on Police Corruption reported that, according to applicants and police officers

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[13] DAVID CRITCHLEY, THE ORIGIN OF ORGANIZED CRIME IN AMERICA: THE NEW YORK CITY MAFIA, 1891-1931, at 285 n. 81 (2009); THOMAS A. REPPETTO, AMERICAN MAFIA: A HISTORY OF ITS RISE TO POWER 105 (2004); SID FEDER AND JOACHIM JOESTEN, THE LUCIANO STORY 53-54 (1994).

alike, it was common throughout the city to pay a $100 bribe to the precinct commander to obtain a pistol permit. THE KNAPP COMMISSION REPORT ON POLICE CORRUPTION 188-89 (1973).

The solution was to centralize the pistol permit process. This substituted one problem for another. Permits had been difficult enough to obtain even when bribery gave the issuers a personal incentive. With that removed, licensing authorities had no reason at all to grant permits. In 1978, the NYPD administration decided that they were short of officers to process applications. The solution was to slow down processing; applications now could only be filed by appointment. By March of 1979, the pistol licensing office was making appointments *a year* in advance. *See Federation of New York State Rifle and Pistol Clubs v. McGuire*, 101 Misc. 2d 104, 420 N.Y.S.2d 602 (1979).

Of course, as George Orwell's *Animal Farm* explained, "Some animals are more equal than others." When 40 black and Puerto Rican women sought permits to protect their families against an outbreak of muggings, they were informed "It's the policy of this department not to give out permits for people who want to protect themselves." *40 in Bronx Seek Gun Permits For Protection Against Addicts*, NEW YORK TIMES Sept. 26, 1969, at 31. A different policy applies to the rich and famous: New York City pistol permits have been issued to Donald Trump, Don Imus, Sean Hannity, Howard Stern, Robert De Niro, and others with clout, *Lifestyles Of The Rich And*

Packin': High Profile Celebrities Seeking Gun Permits On the Rise, NEW YORK DAILY NEWS, Sept. 27, 2010,[14] none of whom likely reside in high-crime areas.

The record for customer-friendly service came, however, in the case when Steven Tyler and Joe Perry of the band Aerosmith obtained pistol permits in New York City. While ordinary applicants were waiting a year for an appointment to submit their application, the head of the License Division, Benjamin Petrofsky, cut through the usual red tape for the musicians, by fingerprinting them at Madison Square Garden before one of Aerosmith's shows. Petrofsky received a limo ride and a ticket to the show. Jon Wiederhorn, *Janie's Got A Gun Permit? Aerosmith Flap Lands Cop In Hot Water*, *MTV*, December 19, 2002.[15]

The same experience has been repeated in California. For nineteen years, Los Angeles had the simplest policy: it would not issue permits, no matter how sterling the applicant or demonstrable the need. Between 1974 and 1993, exactly one permit was issued – to its new chief of police, to tide him over until he was certified as a California law enforcement

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[14] Online at http://www.nydailynews.com/ny_local/2010/09/27/2010-09-27_celebrities_seeking_pistol_permits_on_the_rise_in_the_city_lifestyles_of_rich_n_.html; *Madoff Son Of A Gun*, NEW YORK DAILY POST, Dec. 27, 2009; online at http://www.nypost.com/p/news/local/madoff_son_of_gun_LDcUvEw9PXY0rS1oNFfl1J.

[15] Online at http://www.mtv.com/news/articles/1459226/janies-got-gun-permit.jhtml.

officer. *Police Commissioners Change Weapons Policy* LOS ANGELES TIMES, June 30, 1993, at 2.

The County did issue some permits, but in utterly arbitrary fashion. "For many years, campaign contributors to Sheriff Brad Gates enjoyed an almost 100% chance of obtaining a permit to carry a concealed weapon if they applied." *12 Year Gun Permit Cases Nearing Trial*, LOS ANGELES TIMES, Sept. 4, 1990, at 1. Persons whose applications had been rejected invoked the Equal Protection Clause, and a jury awarded them $246,000 in compensatory damages, finding that the sheriff had showed "reckless disregard" for their constitutional rights, opening the door to punitive damages. *Gates Discusses His Court Defeat*, LOS ANGELES TIMES Oct. 3, 1990, at 1. The case ultimately settled for $616,000. *Gates Off Hook in Suit: County to Pay $616,000*, LOS ANGELES TIMES Nov. 17, 1990, at 1.

The practice of favoritism continued under his successor Lee Baca. "In L.A. County, records show, most of the permits go to judges and reserve deputies. But there is another group that seems to have better luck than most in obtaining permits: friends of Lee Baca. Those who've given the sheriff gifts or donated to his campaign are disproportionately represented

on the roster of permit holders." *Sheriff Lee Baca and the Gun-Gift Connection*, LA WEEKLY, Feb, 14, 2013.[16]

In short, the lack of any real criteria for issuance of carry permits has historically resulted in a system where the right to self-protection is based upon celebrity status and political clout, rather than upon need.

CONCLUSION

The concept of requiring a discretionary permit for all firearms carrying, whether open or concealed, is quite a modern occurrence, one utterly foreign to the Framing period, and for that matter the decades which followed. Laws of this type remain a minority position in the United States, and appear to have evolved due to historical quirks. Most began as limits on concealed carry without a permit, with open carry as an unregulated alternative. They were decades later amended to require discretionary permits for all bearing of arms.

The use of discretionary licensing inevitably tempts the licensing authorities to act arbitrarily, and out of favoritism. This case presents the Court with an opportunity to decide whether a fundamental right

[16] Online at: http://www.laweekly.com/2013-02-14/news/sheriff-lee-baca-concealed-weapons-permit/full//. It should be noted that "reserve deputies" are largely themselves patronage positions.

can be subject to licensing which is based on campaign contributions, wedding gifts, or celebrity status.

Respectfully submitted,

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