

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**

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 statement contained in the Petition for a Writ of Certiorari remains accurate.

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INTRODUCTION

On the day Respondents filed their Opposition, making light of Ray Woollard’s concerns about the threat posed by his son-in-law, Kris Abbott,¹ Abbott proved Respondents wrong.

Abbott pushed his wife (Woollard’s daughter) to the ground as she tried to stop him from smashing her car with a piece of angle iron. Abbott then seriously injured his parents with the iron, and ran inside his home. A helicopter transported Abbott’s mother to the University of Maryland Shock Trauma Center, and police descended upon the area in force. The standoff ended when Abbott committed suicide. See Jessica Anderson, *Man dead after barricade was at center of Md. handgun challenge*, BALTIMORE SUN, available at http://articles.baltimoresun.com/2013-09-11/news/bs-md-co-barricade-20130910_1_raymond-woollard-handgun-domestic-dispute (last visited Sept. 21, 2013); additional facts via Petitioner Woollard.

Plainly, the Fourth Circuit here “miscalculated as to Second Amendment rights,” potentially contributing to an “unspeakably tragic act of mayhem,” *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011). Had a responsible citizen on the scene enjoyed the fundamental right to “carry weapons in

¹ Abbott, a drug-abusing burglar who had assaulted police, App. 56a, “broke into Mr. Woollard’s house” “unarmed” and “wrested [Woollard’s] gun away,” BIO 3, but “never . . . threatened [Woollard] in any way outside of his home.” *Id.* 2-3 n.1.

case of confrontation,” *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), Abbott might have paused, or would perhaps have been the only one injured.

These alternative endings are impossible to guess at, but one fact is indisputable: Ray Woollard is a much better judge of his particular “need” for self-protection than are Maryland’s legislature, the police officials who deprived him of his rights, and their “experts” who believe that people everywhere and always are better off defenseless.

Woollard takes little satisfaction reporting that in the end, he was right, and Respondents were wrong, about the danger Abbott posed his immediate family members (and others) on Maryland’s streets. But Abbott did not present Woollard’s sole reason for seeking a permit. App. 57a. Like many Marylanders, Woollard remains concerned, as every day violent crime personally impacts some innocent, law-abiding responsible Maryland adult. Virtually none of these victims could have proven to Respondents a “good and substantial reason,” Md. Code Ann., Pub. Safety § 5-306(a)(5)(ii), to exercise fundamental Second Amendment rights – when doing so might have made a difference.



ARGUMENT

I. Respondents’ Failure To Criminalize Other Activities Is Irrelevant.

Starting with the alternative Question Presented, and on nearly every page thereafter, Respondents pound home the point that they do not forbid people from carrying guns while “hunting, target and sport shooting,” or engaging in “[presumably state-]organized military activities” and other endeavors, BIO i.

But none of these activities could be described as “carrying [arms] for a particular purpose – confrontation,” *Heller*, 554 U.S. at 584, and none directly manifest the Second Amendment’s “core lawful purpose of self-defense.” *Id.* at 630.

Respondents also aver that they do not forbid Marylanders from carrying *long guns* for self-defense, BIO 1, although the claim here relates to *handguns*. See, e.g., App. 12a, 57a (Woollard “wishes to wear and carry a *handgun* for general self-defense”) (emphasis added).

Respondents’ tactic recalls that unsuccessfully employed by the District of Columbia, which sought to present the question of whether its handgun and functional firearms bans were constitutional considering it tolerated possession of non-functional long guns. See Petition, *District of Columbia v. Heller*, No. 07-290 i. This Court rejected the District’s Question Presented, *District of Columbia v. Heller*, 552 U.S.

1035 (2007), and on the merits, rejected the relevance of allowing individuals to possess long guns to disputes concerning handguns. *Heller*, 554 U.S. at 629 (noting handgun carry ban rejected “even though the statute did not restrict the carrying of long guns”) (citation omitted).

This case, like the Second Amendment’s core, is not about hunting but about self-defense. And no one would carry a rifle in downtown Annapolis for personal protection against muggers and rapists. Normal Americans would carry a handgun, “the quintessential self-defense weapon,” *id.* at 629, for that purpose.

Opposing this petition by claiming that recreational shooting activities and long guns remain legal is akin to defending a book ban against First Amendment challenge by averring that flag burning and nude dancing are not impacted. Petitioners appreciate that the State has not (yet) violated their rights in some ways, but seek redress for the substantial core violation that is, in fact, ongoing.

II. The Decision Below Conflicts With This Court’s Precedent.

Respondents assert that the lower court’s decision does not conflict with *Heller* and *McDonald* [*v. City of Chicago*, 130 S. Ct. 3020 (2010)], because “Maryland’s law is substantially different from the laws at issue in *Heller* and *McDonald*.” BIO 10.

Of course *specific laws* differ from case to case; what matters, however, is whether the lower court “decided an important federal question *in a way* that conflicts with relevant decisions of this Court.” Sup. Ct. R. 10(c) (emphasis added). And if this Court truly did not resolve the questions raised here, then plainly, those “important question[s] of federal law . . . should be[] settled by this Court.” *Id.*

This Court’s precedent confirms a *fundamental* right to carry weapons, including handguns, for self-defense. Maryland forbids doing so absent proof of a “good and substantial reason,” meaning, no one enjoys the ability to carry handguns for self-defense as a matter of *right*, never mind one that is “fundamental.”

Respondents’ attempt to evade the obvious fact that Maryland’s law implicates the right to bear arms is incoherent. In one breath, Respondents declare that “whether the Second Amendment applies to conduct outside the home at all, or even whether it applies to [carrying] handguns outside the home for self-defense,” was not before the Court – only “whether the Second Amendment is burdened by a statute that” restricts the carrying of handguns for self-defense outside the home. BIO 10-11.

In other words, whether the right exists and if so, how it may be regulated, was not at issue. The court considered only the question of whether the law burdening the right is unconstitutional. Respondents’ argument contradicts itself.

Similarly, it defies credulity to suppose that the level of scrutiny afforded below is consistent with that becoming a fundamental right. Respondents claim that the lower court “put the State to its burden, and determined that the State had satisfied that burden.” BIO 14. Some burden: “[I]t is the legislature’s job, not ours, to weigh conflicting evidence and make policy judgments.” App. 38a (citation omitted).

If this Court believes that this is an improper way to evaluate laws burdening *fundamental* rights, “it will need to say so more plainly.” *Williams v. Maryland*, 417 Md. 479, 496, 10 A.3d 1167, 1177 (2011). This petition is already one of three pending this term challenging the Second Amendment’s virtual repeal via “intermediate scrutiny.” See *Schrader v. Holder*, No. 12-1443 (filed June 11, 2013); *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 13-137 (filed July 29, 2013). More are coming. *Drake v. Filko*, 2013 U.S. App. LEXIS 15635, 2013 WL 3927735 (3d Cir. July 31, 2013); *Kwong v. Bloomberg*, 723 F.3d 160 (2d Cir. 2013).

At least one of these cases should be heard, so that the Court can instruct recalcitrant government officials and courts that this particular right is, in fact, “*really worth insisting upon*.” *Heller*, 554 U.S. at 634 (emphasis original). At a minimum, this case should be held pending that consideration in other cases.

III. The Decision Below Implicates Three Serious Circuit Conflicts.

First, the court below held that even if the Second Amendment right extends outside the home, it there lies outside the Second Amendment’s “core” and is thus subject to little protection. App. 19a-20a; *Masciandaro*, 638 F.3d at 470-71. Five other circuits apparently agree. Pet. 21 n.12. The Seventh Circuit disagrees, holding that the right “is as important outside the home as inside.” *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012). “Our principal reservation about the Second Circuit’s analysis . . . is its suggestion that the Second Amendment should have much greater scope inside the home than outside. . . .” *Id.* at 941; see also *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) (greater than intermediate “if not quite strict scrutiny” for gun range regulations).

It is difficult to imagine that the lower court would have upheld Maryland’s law had it agreed with the Seventh Circuit that the right is as important outside the home. Would the lower court have upheld a requirement that individuals wishing to possess a handgun *at home* first prove a “good and substantial reason” for doing so? Respondents fail to explain why this plainly significant conflict should remain unresolved.

Second, the Second and Fourth Circuits ostensibly refused to consider whether the Second Amendment right exists outside the home, App. 24a;

Masciandaro, 638 F.3d at 475; *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012). But the Seventh Circuit believed the question was answered by this Court’s precedent, and decided accordingly. *Moore*, 702 F.3d at 935-36 (“*Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one’s home. . . .”). Illinois’ Supreme Court now agrees. *People v. Aguilar*, 2013 IL 112116 at ¶20 (*Heller* and *McDonald* “contain language strongly suggesting if not outright confirming that the second amendment right to keep and bear arms extends beyond the home”).

Contrary to Respondents’ assertion, that conflict has only grown with the Third Circuit’s decision in *Drake*, *supra*, upholding New Jersey’s substantially identical “justifiable need” standard for licensing handgun carrying, N.J.S.A. § 2C:58-4(c).

The Third Circuit held that it “need not” engage in allegedly intermediate scrutiny, because New Jersey’s law “regulates conduct falling outside the scope of the Second Amendment’s guarantee.” *Drake*, 2013 U.S. App. LEXIS 15635 at *23. It expressly *refused* to follow *Kachalsky*’s approach (and that of the Fourth Circuit, below and in *Masciandaro*) of skipping the “scope” inquiry in favor of an exclusive “intermediate scrutiny” approach. *Id.* at *21-*22 n.12. *Drake*’s intermediate scrutiny discussion is dictum, offered because that court believed the issue to be “of critical importance,” not because it was necessary to decide the case. *Id.* at *23.

The courts are thus split regarding the significant question of whether they should consider the Second Amendment's scope before evaluating the constitutionality of gun laws operating outside the home. The Third and Seventh Circuits, along with the Illinois Supreme Court, believe they should, although they disagree as to the question's answer. The Second and Fourth Circuits skip to "intermediate scrutiny" without defining the right's scope.

Third, notwithstanding the lower court's protestations that it assumed the right to bear arms exists outside the home, it is difficult to square that right's existence with a holding that bearing arms is so contrary to public policy that the legislature may prohibit it to all people absent special dispensation. Unlike *Moore*, the decision below and *Kachalsky* do not *truly* accept this fundamental right's existence outside the home.

Accordingly, *Drake* is again relevant. Respondents acknowledged the "perceived conflict" between *Drake*, which expressly (incredibly) held that the Second Amendment is not implicated by regulating one's ability to carry handguns outside the home; and *Moore*, which found carrying guns outside the home a textually-enumerated right. BIO 15 n.7. Presumably that "perception" now extends to *Aguilar* as well. But Respondents pled to be left out of that split. *Id.*

Respondents' argument signals acceptance that the essential *Drake-Moore/Aguilar* split may soon come before this Court, if it is not already presented here. Indeed, following an 8-4 denial of rehearing en banc, *Drake* is headed this way soon. Considering the cases' similarities, at a minimum, this Court might as well grant this petition now, or at least hold this petition pending *Drake's* ultimate outcome.²

IV. Respondents Ascribe To Petitioners Various Strawman Views That Petitioners Have Emphatically Rejected.

Petitioners nowhere claim that “no standard of scrutiny should apply to regulations that burden Second Amendment rights.” BIO 12 (citation omitted). Petitioners have steadfastly claimed a role for means-ends scrutiny in some Second Amendment cases, but suggested other ways to resolve this case, because the state can never have an interest in

² Respondents' denial that some precedents invoked prior restraint *concepts* in securing the right to arms because they did not spell out the words “prior restraint,” BIO 19-20, is specious. At root, the doctrine stands for the basic proposition that government officials lack discretion to decide whether individuals deserve their rights. Denying these cases' relevance because Maryland's “good and substantial reason” requirement allegedly does not afford Respondents unbridled discretion, BIO 21, is an argument for the merits, as is Respondents' dubious suggestion that Maryland's law is historically rooted. BIO 12 n.6. Petitioners would welcome the opportunity to fully address these points.

suppressing a right as inherently undesirable. See, *e.g.*, Pet. 33.

Nor do Petitioners advance the extreme argument that *no* regulations of the fundamental right to carry are permissible, BIO 13, an absolutist view Petitioners repeatedly disavowed. “To be clear,” the lower court plainly acknowledged that this is *not* Petitioners’ position. App. 29a n.7. Petitioners agree the issue here is “how to determine which [regulations] are permissible and which are not.” BIO 13.

Nor do Petitioners “conten[d] that the Seventh Circuit implicitly rejected the application in the Second Amendment context of standards of scrutiny formulated by this Court in the context of adjudicating other constitutional rights.” BIO 16 n.8 (citing Pet. 20-22). The cited pages make no such claim, offering only that the Seventh Circuit rejected – properly – using “‘degrees of scrutiny’ to determine whether [a] right exists in the first place.” Pet. 22 (citing *Moore*, 702 F.3d at 941). Moreover, Petitioners explained that the Seventh Circuit applies First Amendment degrees of scrutiny in Second Amendment cases where it is appropriate to do so, citing two cases where Petitioner SAF pressed that exact claim.

V. Respondents’ Claimed 93.7% Approval Rate Is Irrelevant And Misleading.

Respondents’ purported 93.7% approval rate for handgun carry applications, BIO 2 (citation omitted), is irrelevant. Respondents denied *Petitioner Woollard’s*

renewal for lack of a “good and substantial reason,” which still operates against Petitioner SAF’s members wishing to exercise Second Amendment rights in Maryland. Petitioners do not complain that the requirement is misapplied, but that it is applied at all.

Nonetheless, as Respondents’ “93.7%” claim is offered to minimize the law’s impact, that effort warrants exposure as substantially misleading. It is within judicial notice that Maryland authorities very rarely issue handgun carry permits. Cf. *Bsharah v. United States*, 646 A.2d 993, 996 n.12 (D.C. 1994). Respondents’ startling figure is derived by over-weighting individuals once favored with a permit, and ignoring the “good and substantial reason” requirement’s dissuasive impact.

The first clue that something is amiss in Maryland’s 93.7% rate is that this reflects “original *and renewal* permits.” BIO 2 (emphasis added). The bulk of these are renewal permits. Over Respondents’ time-frame, Maryland officials averaged fewer than 1,753 *original* permits annually. MSP, 2011 Annual Report 49 (2012), available at <http://www.mdsp.org/Downloads.aspx> (last visited Sept. 21, 2013).

As Petitioners noted, a tiny fraction of one percent of Maryland’s adult population is allowed to exercise this fundamental right at all, while neighboring states require no license to carry handguns openly and liberally license concealed handgun carrying. Pet. 6-7. Respondents’ unsupported answer, that “most of” Maryland’s neighbors “have substantially

more rural populations,” BIO 2 n.1, is both irrelevant and factually wrong. *First*, all Americans enjoy Second Amendment rights, which may be more needed in crime-ridden cities than small peaceful towns. *Second*, Pennsylvania (78.66% urban population) and Virginia (75.45%) are not “substantially more rural” than Maryland (87.2%).³ Moreover, various states allowing unlicensed gun carrying and/or some form of gun carrying on a “shall-issue” basis exceed Maryland’s urban population rate, *e.g.*, Rhode Island (90.73%), Florida (91.16%), Arizona (89.81%), and now, Illinois (88.49%). *Id.*

Respondents might counter that the low number of permits issued is solely a function of applications received: if 8.3% of Pennsylvanians have a carry permit, but only 0.3% of Marylanders do, the Second Amendment must be over 27 times more popular north of the Mason-Dixon line.

That difficult assumption can be discarded when observing that Respondents’ “93.7%” approval rate invokes no data beyond 2011. What happened in 2012? See App. 53a-84a.

Original applications soared 25% in the wake of the district court’s March, 2012 ruling – but Respondents stopped disclosing, as in years past, the number of “Permits Issued.” See MSP, 2012 Annual Report

³ See Census Data, available at http://www2.census.gov/geo/ua/PctUrbanRural_State.xls (last visited Sept. 21, 2013) (column F).

Facts and Statistics Addendum 56 (2013), available at <https://www.mdsp.org/Downloads.aspx> (last visited Sept. 21, 2013). Respondents apparently denied the “extra” applications lacking a “good and substantial reason” beyond self-defense this year after the court below reversed the district court.

Handgun carry license applications are burdensome, expensive, and require fingerprinting. Sensible people do not apply unless they have some reason to expect success – hence, the suppressed number of applications in a “good and substantial reason” environment. Instead of spinning this Court a tale about how Maryland supposedly grants 93.7% of applications, Respondents should have related their experience following the district court’s decision – and how many permits they expect to issue should they lose this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

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