UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JOHN W. JACKSON and SECOND AMENDMENT FOUNDATION, INC.,	)	
Plaintiffs,	)	
-against-	)	
GARY KING, in his Official Capacity as Attorney General of the State of New Mexico; and BILL HUBBARD, in his Official Capacity as Director of the Special Investigations Division of the New Mexico Department of Public Safety,	)	Case No. 1:12-CV-421-MCA-RHS
Defendants.	)	

PLAINTIFFS' AMENDED REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The Plaintiffs, JOHN W. JACKSON and SECOND AMENDMENT FOUNDATION, INC., by and through undersigned counsel, and for their Amended Reply to Defendants' Response to their Motion for Preliminary Injunction, asserts as follows:

PRELIMINARY STATEMENT

Defendants admit that the Second Amendment applies to the Plaintiffs. Defendants also concede, albeit somewhat opaquely, that permanent resident aliens such as Jackson and SAF's applicable members are entitled to equal protection of the laws under the Fourteenth Amendment.

However, Defendants then argue Plaintiffs are not entitled to equal protection of the law at issue, wrongly arguing that the prohibition at issue does not implicate the Second Amendment, and then incorrectly asking the Court to use the rational basis test to analyze Plaintiffs' Fourteenth Amendment Equal Protection claim, under which it claims an injunction is not warranted.

In fact, the Second Amendment is impacted by the State's prohibition. This is not just Plaintiffs' argument, but Defendants' as well, though we must look to other jurisdictions to find it. Further, the Plaintiffs as permanent resident aliens are a "suspect class" for Equal Protection purposes, and for both reasons the Defendants' prohibition must meet the burden of strict scrutiny, which it cannot do. Defendants cannot even show a rational basis for its ban, though the actual standard is much higher.

Therefore, Plaintiffs meet the burden for seeking a preliminary injunction against the violation of the Plaintiffs' constitutional rights, even as a "disfavored injunction," and Plaintiffs' Motion should be granted.

ARGUMENT

I. THERE IS A SECOND AMENDMENT RIGHT AT STAKE WHICH MUST BE ANALYZED UNDER STRICT SCRUTINY.

". . . [A] severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end." *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011). Defendants argue there is no Second Amendment right at stake, but the rulings of other Courts, as well as Defendants' own arguments in other forums, show the Second Amendment applies to this case, and therefore strict scrutiny applies to the State's actions.

It is logical that the majority of the cases involving the constitutional rights of lawful aliens have not involved the Second Amendment. Prior to the Supreme Court's decision in *Heller* in 2008, virtually none of the constitutional cases involving *citizens* involved the Second Amendment. Certainly, *Heller* and *McDonald v, City of Chicago*, 130 S.Ct. 3020 (2010), altered the legal landscape as to the analysis, and in many instances the viability, of Second Amendment

claims. That alteration is becoming evident throughout the Court system, including as to permanent resident aliens.

In the last six months, three Courts have held that there is a constitutional right to the public carrying of firearms. In the last few months alone, three federal Courts have specifically held that the Second Amendment confers rights that extend beyond the home. *See Woollard v. Gallagher*, 2012 U.S. Dist. LEXIS 28498 (D.Md, March 2, 2012) (striking down Md. Public Safety Code § 5-306(a)(5)(ii), requiring "good and substantial reason" to carry handgun); *See also United States v. Weaver*, 2012 U.S. Dist. LEXIS 29613 (S.D.W.V., March 7, 2012); *See also Bateman v. Perdue*, 2012 U.S. Dist. LEXIS 47336, at *10-*11 (E.D.N.C. March 29, 2012) ("Although considerable uncertainty exists regarding the scope of the Second Amendment right to keep and bear arms, it undoubtedly is not limited to the confines of the home." (striking down North Carolina's prohibition on the carrying of handguns during declared state emergencies)).

The Supreme Court "read the [Second Amendment's] operative clause to 'guarantee the individual right to possess *and carry* weapons in case of confrontation.'" *United States v. Rene E.*, 583 F.3d 8, 11 (1st Cir. 2009) (quoting *District of Columbia v. Heller*, 554 U.S. xxx, 592 (2008) (italics added)). *See also Weaver*, 2012 U.S. Dist. LEXIS 29613 at *13 (citing *United States v. Carter*, 669 F.3d 411, 415 (4th Cir. 2012) (recognizing *Heller*'s notation that the right to keep and bear arms was understood by the founding generation to encompass "self defense and hunting" as well as militia service); also citing *Heller*, 554 U.S. at 594 (stating that, by the time of the founding, the right to have arms was "fundamental" and "understood to be an individual right protecting against both public and private violence.")). The *Heller* Court additionally mentioned militia membership and hunting as key purposes for the existence of the right to keep and bear arms. See *Heller*, 554 U.S. at 598; *See also United States v. Masciandaro*,

638 F.3d 458, 467-68 (4th Cir. 2011), *cert. den.*, 132 S.Ct. 756 (U.S. Nov. 28, 2011) (Niemeyer, J., writing separately as to Part III.B.).

The *Weaver* Court found entirely persuasive Judge Niemeyer's dissent on *Masciandaro*, particularly for its analysis of the broader holdings of *Heller*, and agreed and adopted Judge Niemeyer's conclusion that "the general preexisting right to keep and bear arms for participation in militias, for self-defense, and for hunting is thus not strictly limited to the home environment but extends in some form to wherever those activities or needs occur . . ." *Weaver*, 2012 U.S. Dist. LEXIS 29613 at *13 (citing *Masciandaro*, 638 F.3d at 468 (Niemeyer, J., writing separately as to Part III.B.)).

In addition, the Seventh Circuit is currently considering the case of *Moore v. Madigan*¸ 12-xxxx, where an Illinois ban on the public carrying of firearms is being challenged as unconstitutional, as Illinois is the last state to prohibit and criminalize all forms of the public carry of firearms.

The Defendants agree with this growing trend, as the State is currently an *amicus* **supporting** Plaintiff SAF in the Fourth Circuit in the appeal of *Woollard v. Gallagher* (*See 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*, *Woollard v. Gallagher*, 12-1437 (". . . 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."). In *Woollard*, the District Court struck down an impermissible "may issue" concealed-

carry permitting scheme which allowed governmental officials to arbitrarily decide whether an concealed carry permit applicant "needed" the permit and giving authority to deny the permit on that basis. The State, as *amicus*, argued: ". . . empirical research show[s] that right-to-carry laws do not result in criminal violence . . . ." *See* p.2 of *Woollard amicus* Brief, attached hereto as Exhibit "A."

In *Woollard*, New Mexico argues: "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." *See* p.9 of *Woollard amicus* Brief. The same principle applies here. Of course, the *amicus* Brief, and the *Woollard* case, only involve citizens, but since the State concedes that resident aliens enjoy Second Amendment rights, that is a distinction without a difference. Since the State argues so forcefully that concealed carry *is* a Second Amendment right in the Fourth Circuit, it should not be allowed to turn around and argue the opposite because it wishes to discriminate against a different group of law-abiding New Mexico residents.

This case is directly on point with the pre-*Heller* and pre-*McDonald* case of *Hetherton v. Sears, Roebuck & Co.*, 652 F.2d 1152 (3d Cir. Del. 1981). In *Hetherton*, the Court stated:

> The essence of Sears' argument is that the § 904 requirement of two freeholder witnesses to the sale of a deadly weapon bears no rational basis to Delaware's legitimate interest in having purchasers positively identified and in deterring ex-felons, such as Fullman, who are not permitted to purchase firearms in Delaware, from buying guns. Hetherton counters that, since Delaware can totally ban the sale of firearms, non-freeholders are not being deprived of a right. Further, he contends the two freeholder requirement is rational in that it results in a more burdensome procedure for the purchase of weapons.
>
> Hetherton's argument that Delaware has created no right to purchase firearms is misconceived. While it may be true that Delaware could ban the sale of all deadly weapons, it does not

> follow that the State, having abrogated its power to effect a total ban, can arbitrarily establish categories of persons who can or cannot buy the weapons. Clearly, Delaware could not limit the sale of firearms to men only or to members of certain religious groups. The question then is whether it is rational for Delaware to limit sales to persons who know two Delaware freeholders and can produce them as witnesses. We think that this question must be answered in the negative. *Hetherton*, 652 F.2d at 1157-1158.

Similarly, New Mexico argues it could prohibit concealed carry, but it does not. "We hold that Article II, Section 6 does not prohibit the carrying of concealed weapons, and the Act does not violate our Constitution." *State ex rel. N.M. Voices for Children, Inc. v. Denko*, 135 N.M. 439, 440 (N.M. 2004). "The Constitution neither forbids nor grants the right to bear arms in a concealed manner. Article II, Section 6 is a statement of neutrality, leaving it to the Legislature to decide whether, and how, to permit and regulate the carrying of concealed weapons." *Id.* at 441. However, the State must still regulate and permit in a constitutional manner. Discriminating against permanent resident aliens does not accomplish this.

This distinguishes this case from *State v. McAdams*, 714 P.2d 1236 (Wy. 1986), wherein the Court specifically stated the state could not ban all carrying but could regulate it to not include concealed carry. *Id.* at 1237. In contrast, New Mexico does not ban concealed carrying. This is by virtue of allowing all qualified citizens who complete the application process to obtain a concealed carry permit.[1] The only difference between the would-be applicant Plaintiffs and the actual applicants under the statute is that Plaintiffs are wrongfully disqualified due to citizenship status.

The Defendants' conduct is unacceptable under *Hetherton*, where a rational basis burden was employed, since there was no rational basis for denying the right to sell firearms to certain

[1] Defendants claim they have instituted a prohibition "with exceptions," but that is purely semantical when any citizen who applies and qualifies will receive a permit.

categories of people. However, this case is not about the sale of firearms, but the denial of the ability to carry concealed firearms for the core fundamental Second Amendment right of self-defense. Since *Hetherton,* the Supreme Court has spoken clearly about the fundamental nature of Second Amendment rights in *Heller* and *McDonald.*

Of course, the State is allowed certain constitutional regulations of the right to carry arms, including the manner of carrying. The two obvious choices are concealed and open carrying. Virtually all states allow concealed carry. A few allow open carry. New Mexico allows both. *See State ex rel. N.M. Voices for Children, Inc. v. Denko*, 135 N.M. 439, 440 (N.M. 2004). As this is how the State legislature has chosen to regulate the manner of exercising the Second Amendment, that regulation must be applied in a constitutionally equal manner to its law-abiding citizens. Further, because the Defendants' prohibition implicates the Second Amendment, strict scrutiny must be applied in evaluating the statute's constitutionality.

The ban neither furthers a compelling State interest (not that one is offered), nor is it the least-restrictive means to reach any such claimed interest. Therefore, the prohibition must be enjoined.

II. STRICT SCUTINY ALSO APPLIES TO THE PLAINTIFFS' EQUAL PROTECTION CHALLENGE.

Defendant argues there is no Fourteenth Amendment violation because there is no Second Amendment right at issue to violate. Since the Defendants have the Second Amendment argument wrong, the Fourteenth Amendment argument is likewise faulty.

While the Defendants concede that permanent resident aliens, such as Jackson and SAF's applicable members, are generally entitled to equal protection of the laws under the Fourteenth Amendment, they argue Plaintiffs are not entitled to equal protection of the law at issue. They make vague references to police power and protecting the public. But these alleged justifications

are not supported by any actual evidence or proof; indeed, it is impossible to justify why permanent resident aliens may carry firearms in their home, on their property, in their vehicle, and openly in public, but why banning them from carrying concealed furthers public safety. Defendants do not even try, claiming that " . . . at the core of the police power is the ability to protect the public from concealed carry of firearms because of the inherent danger that unregulated concealed weapons pose to the public." *See* p.7 of Defendants' Response Brief (citing *State v. Chandler*, 5. La. Ann. 489, 490 (1850)). The argument is outdated in 2012, in a State that protects Second Amendment rights and the equal rights of its residents. New Mexico has decided since 2004 that citizens may carry concealed firearms, and not unregulated. The bearer must obtain a concealed carry license pursuant to NMSA § 29-19-4., and comply with all requirements therein, including completing a firearms training course (*See* NMSA § 29-19-4.A.(10)). The applicant must be fingerprinted and pass a national criminal background check. *See* NMSA § 29-19-5.B.(3); 5.D.

In contrast, it is the open carry of firearms that the legislature has allowed to be unregulated, including for permanent resident aliens. Therefore, whatever vague police power or public safety interest the Defendants are claiming in denying Plaintiffs equal protection, it is disingenuous when the State obviously allows permanent resident aliens all the other types of firearms carrying without police power or public safety concerns. The Defendants offer no reason why permanent resident aliens residing in New Mexico, who are trustworthy to carry firearms in their home, vehicle, on their property, and openly in public places, are a danger to society if allowed to carry concealed.

Therefore, even if Defendants were correct that no fundamental Second Amendment right is at stake, the statute must still be reviewed under strict scrutiny because of the State's

discrimination against a suspect class. ". . . [C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority (*see United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, n. 4 (1938)) for whom such heightened judicial solicitude is appropriate." *Graham v. Richardson*, 403 U.S. 365, 372 (1971). *See also Nyquist v. Mauclet*, 432 U.S. 1 (1977) (discrimination against aliens in state financial assistance for higher education violated failed to meet strict scrutiny burden of Equal Protection Clause).

Though the case law extends well beyond economic rights, despite Defendants' argument to the contrary, Courts have specifically applied the Fourteenth Amendment's Equal Protection Clause to aliens in the context of firearms. Aliens are considered a suspect class, as noted, for example, in *People v. Rappard*, 28 Cal. App. 3d 302, 304 (Cal. App. 2d Dist. 1972). In *Rappard*, an alien was convicted of being in possession of a concealable firearm. He successfully challenged his conviction under the Equal Protection Clause. The Court held: "Since classifications based upon alienage, like those predicated upon nationality or race, are inherently suspect and subject to close judicial scrutiny, we must invoke the following strict standard when reviewing a discriminatory statute based upon alienage: 'Not only must the classification reasonably relate to the purposes of the law, but also the state must bear the burden of establishing that the classification constitutes a necessary means of accomplishing a legitimate state interest, and that the law serves to promote a compelling state interest.'" *Rappard*, 28 Cal. App. 3d at 304.

In striking down the law at issue, the Court wrote: "In short, the classification of the statute -- alienage -- has no reasonable relationship to the threat to public safety which Penal Code section 12021 was ostensibly designed to prevent. Any classification which treats all aliens

as dangerous and all United States citizens as trustworthy rests upon a very questionable basis." *Id.* at 305. While *Rappard* may not bind this Court, it is instructive in its similarities.

A similar result was reached in *State v. Chumphol*, 97 Nev. 440 (Nev. 1981), where the Court stated: "A person does not exhibit a tendency toward crime merely because he or she is a noncitizen. *See Raffaelli v. Committee of Bar Examiners*, 496 P.2d 1264 (Cal. 1972). As the California Supreme Court noted in that case, classification based upon alienage 'is the lingering vestige of a xenophobic attitude which . . . should now be allowed to join those [other] anachronistic classifications among the crumbled pedestals of history.'" *Id.* at 442.

Defendants argue that since they are able to ban concealed carry, they also have the right to grant it to some (citizen-residents) but not others (permanent resident alien-residents). If the "others" in Defendants' argument included the mentally ill, violent felons, or illegal aliens (the rights of none of these being at issue in this case), Defendants' argument may hold water. But the "others" in this case, who Defendants so cavalierly dismiss, are law-abiding residents entitled to constitutional rights, *including* the Fourteenth Amendment's guarantee of equal protection of the laws. While the State may have the prerogative to try and repeal concealed carry through the political process, it may not enact it and then ban it as to a group of law-abiding residents without reason or rationale.

Indeed, there is no justification even offered for this discrimination, not one under rational basis, and certainly not one under strict scrutiny. No logical rationale can even be offered, because: (1.) permanent resident aliens seeking a concealed carry permit would still have to successfully complete and qualify under the statutory application process, and (2.) the State considers permanent resident aliens trustworthy enough to possess and carry firearms in many other contexts.

Plaintiffs testified in their Affidavits they do not wish to always carry firearms openly, and it is obvious that there are situations where someone may wish to have a firearm for protection, yet not advertise that fact. Further, Plaintiffs testify they refrain from carrying concealed due to fear of criminal penalties. They have shown that are suffering discrimination under the law, and that there is no constitutional basis for doing so. The injunction should be granted.

The case of *Sugarmann v. Dougall*, 413 U.S. 634 (1973) does not support Defendants' position at all, and instead supports the legal propositions Plaintiffs are claiming. In *Sugarmann*, plaintiffs challenged a New York City ban on federally-registered resident aliens working in competitive civil service positions. The Court struck the ban down, in part because:

> It is at once apparent, however, that appellants' asserted justification proves both too much and too little. As the above outline of the New York scheme reveals, the State's broad prohibition of the employment of aliens applies to many positions with respect to which the State's proffered justification has little, if any, relationship. At the same time, the prohibition has no application at all to positions that would seem naturally to fall within the State's asserted purpose. Our standard of review of statutes that treat aliens differently from citizens requires a greater degree of precision. *Id.* at 642.

This fits the current situation directly, where one type of firearm possession is banned to aliens while others are open, and with no offered compelling interest as to why. The State argues it may ban concealed carry altogether, which means it may restrict it to whomever it wants, but this is not true either. The Supreme Court " . . . has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Id.* at 644. At most, Defendants can cite *Sugarmann* for the proposition that certain hypothetical state restrictions regarding constitutional functions such as voting and holding high office may meet strict scrutiny, but that is a far cry from the instant situation, and completely inapposite.

Therefore, because the State has chosen to regulate the Second Amendment right of the public carrying of firearms by enacting regulatory schemes of unpermitted open carrying and permitted concealed carrying, the State may not deny this right to certain classes of residents entitled to this constitutional right, such as lawful permanent residents.

III. PLAINTIFFS MEET THE STANDARD FOR A PRELIMINARY INJUNCTION, EVEN A "DISFAVORED" INJUNCTION.

Plaintiffs acknowledge the three categories of "disfavored injunctions" in the Tenth Circuit. *See Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1224 (10th Cir. 2009) ((1) preliminary injunctions altering the status quo, (2) mandatory preliminary injunctions, and (3) preliminary injunctions granting the moving party all the relief it could recover at the conclusion of a full trial on the merits). Defendants claim that Plaintiffs' Motion falls under (1) and (3). However, while the *status quo* would be altered, Plaintiffs assert the analysis must be different in a case such as this, when constitutional rights are being sought on behalf of an entire suspect class of New Mexico residents. Further, Plaintiffs would not be receiving all the relief they seek in the Complaint by an injunction. Plaintiffs seek a declaration that NMSA § 29-19-4.A.(1) is unconstitutional as to them. Though that finding is important to their injunction request, such a declaration is not necessary at this stage to grant the injunction.

However, even if a strong showing of likelihood of success on the merits, and the balance of harms, is required (*See, e.g., Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012)), Plaintiffs have met this burden.

Plaintiffs will not rehash their earlier Memorandum in Support, or the discussion above. Plaintiffs have met each requirement for requesting a preliminary injunction under Tenth Circuit doctrine. "The moving party must show (1) a substantial likelihood that it will ultimately succeed on the merits of its suit; (2) it is likely to be irreparably injured without an injunction; (3)

this threatened harm outweighs the harm a preliminary injunction may pose to the opposing party; and, (4) the injunction, if issued, will not adversely affect the public interest." Flood v. Clearone Communication, Inc., 618 F.2d 1110, 1117 (10th Cir. 2010).

As discussed earlier and above, Plaintiffs have demonstrated a strong likelihood of success on the merits of their claim. The Defendants cannot meet the required burden of strict scrutiny in its defense of NMSA § 29-19-4.A.(1), which discriminates against permanent resident aliens intentionally without either a compelling governmental interest or showing that the discrimination is the least restrictive means of accomplishing whatever interest Defendants claim to have. Even under rational basis scrutiny, the law has no reasonable relation to any legitimate governmental purpose.

As to the irreparable harm requirement, the Defendants point to the situations Plaintiffs are permitted to possess and/or carry a firearm, as if to say "that should be enough for you." But the irreparable harm results from the deprivation of constitutional rights under the Second and Fourteenth Amendments, not just the reduced ability to defend themselves, which is an additional harm produced by the constitutional harm. And for those times when open carry is impractical or not available, the consequences of being prohibited from concealed carry just like citizens can be catastrophic. On both levels, the Defendants' discriminatory prohibition causes irreparable harm.

Plaintiffs also refer to its arguments regarding the lack of legal remedies in their Memorandum of Support.

As to the balance of harms factor, Plaintiffs have demonstrated that the constitutional violations as a result of the illegal, intentional discrimination against Plaintiffs creates harm that far outweighs anything claimed by the Defendants. In fact the Defendants have not pointed to

any harm that comes from allowing permanent resident aliens the equal protection of the concealed carry permit laws, in terms of public safety or otherwise, and the State has forcefully argued a supporting position in the *Woollard amicus* Brief. This is very different from the State's "we can make this a law if we want, and the Courts should accept it" police power argument that ultimately does not allege any harm at all. The State does not suffer harm from following the Constitution. As previously noted, the balance of harms strongly favors Plaintiffs, even if this Court applies the heightened "disfavored injunction" standard.

Finally, Defendants allege Plaintiffs did not address the "public interest benefits" factor, but Plaintiffs noted that the public interest is served by the enforcement of equal protection of the laws, and the respecting of fundamental constitutional rights for all its residents, not to mention the ability of residents to defend themselves. Defendants have offered nothing but "police power" and vague unsupported references to public safety. That is insufficient as a state interest to meet its constitutional burden of strict scrutiny, and it is insufficient to even list as a "public interest" that could possibly outweigh the State's residents enjoying their constitutional rights. Plaintiffs have met this factor as well. In light of the above, Plaintiff have met all the factors for a preliminary injunction, and the Defendants have failed to meet their burden for defending NMSA § 29-19-4.A.(1). The challenged statute is unconstitutional and must be enjoined.

CONCLUSION

New Mexico cannot deny Second and Fourteenth Amendment rights to an entire class of its residents. Plaintiffs respectfully request that the motion for preliminary injunctive relief be granted.

Dated: September 12, 2012

Respectfully submitted,

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CERTIFICATE OF ATTORNEY AND NOTICE OF ELECTRONIC FILING

The undersigned certifies that:

1. On September 12, 2012, the foregoing document was electronically filed with the District Court Clerk *via* CM/ECF filing system;

2. Pursuant to F.R.Civ.P. 5, the undersigned certifies that, to his best information and belief, there are no non-CM/ECF participants in this matter.

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One of the Attorneys for Plaintiffs

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.

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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