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 AMICUS CURIAE BUCKEYE FIREARMS FOUNDATION INC.

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August 6, 2012

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 12-1437 Caption: Woollard et al v. Gallagher et al

Pursuant to FRAP 26.1 and Local Rule 26.1,

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(name of party/amicus)

who is Amicus, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

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If yes, identify entity and nature of interest:

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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ L. Kenneth Hanson III Date: August 5, 2012

Counsel for: Buckeye Firearms Foundation Inc.

CERTIFICATE OF SERVICE

****

I certify that on August 6, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

L. Kenneth Hanson III
(signature)

August 5, 2012
(date)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IDENTITY AND INTEREST OF AMICUS

Amicus Buckeye Firearms Foundation is an IRS 501(C)(3) foundation dedicated to supporting the use of firearms for all lawful purposes. This includes, but is not limited to, the use of firearms in self-defense. Buckeye Firearms Foundation is filing this brief on behalf of hundreds of thousands of Ohio firearm owners. These persons travel throughout the United States on a daily basis, and throughout their travels, these persons are deprived of their Constitutional right to self-defense in states such as Maryland.*

AUTHORITY TO FILE

Pursuant to Rule 29(a), Buckeye Firearms states this brief is filed with the consent of Appellant and Appellee.

*Buckeye Firearms Foundation Inc. would like to acknowledge and thank legal intern Melissa Crocker for her assistance with this brief.

ARGUMENT

The right protected by the Second Amendment to the U.S. Constitution is the right to own and use firearms for the core purpose of self-defense. The right to own and use firearms cannot be considered independent of the scope of the right to self-defense. The right to self-defense clearly exists outside the home based upon history and current precedent. Appellant urges this court reach an *ab absurdo* result – the right to self-defense exists outside the home, but the right to possess the tools ancillary to self-defense does not exist outside the home. Clearly the existence of a right, without the means to exercise the right, is a nullity.

Appellant further urges this court approve a "may issue" licensing scheme when precedent requires that only "shall issue" licensing is constitutional.

The Core Right Protected by the Second Amendment is the Right to Self-Defense

It is critical that any court examining the Second Amendment understands that the right being examined is the right to self-defense. Courts are not examining some abstract right to possess and carry a tool (i.e. a gun); rather, courts are examining the possession of a tool that is critically incidental

to the exercise of the core right to self-defense. Just as the possession of a Bible, Torah or a Koran cannot be examined independent of the First Amendment's protection of the exercise of religion, the Second Amendment's guarantee of the right to carry a firearm cannot be examined merely as the right to possess a tool. The possession of the tool is a critical, necessary component of the exercise of the core right, and the scope of the ability to possess the tool cannot be examined without regard to the scope of the core right.

It is undisputed that the core right protected by the Second Amendment to the United States Constitution is the right to self-defense.

> As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right. District of Columbia et al v. Heller 128 S. Ct. 2783, 2817.
>
> Self-defense is a basic right, recognized by many legal systems from ancient times to the present, and the *Heller* Court held that individual self-defense is 'the central component' of the Second Amendment right. McDonald et al v. Chicago et al 130 S. Ct. 3020, 3023. (Internal citations omitted.)
>
> On the contrary, we stressed that the right was also valued because the possession of firearms was thought to be essential for self-defense. As we put it, self-defense was 'the *central component* of the right itself.' McDonald et al v. Chicago et al 130 S. Ct. 3020, 3048. (Internal citations omitted.)
>
> …this Court held that the Second Amendment protects an individual right to keep and bear arms for the purpose

> of self-defense… McDonald et al v. Chicago et al 130 S. Ct. 3020, 3059.

It is clear from binding precedent that the core of the right protected by the Second Amendment to the U.S. Constitution is the right to self-defense. The right to own and carry firearms is merely an incidental, albeit critical, component of the exercise of the core right. Any examination of the right to own and carry firearms must be done within the context of the right to self-defense. When a court is examining any gun control measure, precedent requires that the court first determine whether the right to self-defense exists in that environment. If the right to self-defense does exist in that environment, then the court must rule that the possession of the tools to exercise that right (i.e. the right to own and carry firearms) exists in that environment.

Maryland Has Historically Recognized the Right to Self-Defense

From the earliest days of statehood, Maryland has recognized the right to self-defense as a core right, subject to restriction only under the most exigent circumstances. In An Historical View of the Government of Maryland, published in 1831, John V. L. McMahon examined the history of the power of the General Assembly of Maryland. It is especially notable that

this "history" was published a mere 55 years after Independence. In examining judicial review of legislative acts, this is what the author had to say:

> In conformity with these principles public acts which transcend the express limits of our constitution and bill of rights are void and will be so pronounced by our courts. These instruments are acknowledged standards to which the courts may bring every exercise of power and in the application of them where is the distinction between acts which conflict with their express declarations and those which are at war with their whole nature and ends. The latter are continually brought into view and considered by the courts in construing and applying the Constitution and Bill of Rights and why may they not also be applied to acts manifestly violating the fundamental and unchangeable principles of natural law. Where natural rights have been recognized by our laws or the decisions of our courts they are surely entitled to all the immunities of such rights. The objection as to their uncertainty then ceases and the courts in protecting them against usurpations do but declare what has been previously admitted that they were not merged in the government. The right of self defence is one of this description. It has been constantly acknowledged and acted upon not in our apprehension as a common law principle but as an admitted natural right and if it were expressly denied by an act of Assembly it would be difficult to maintain that the courts could not protect it even against such a violation.[1] (emphasis added.)

Nearly contemporaneous with Mr. McMahon's history, Maryland Courts were, in fact, recognizing early claims of self-defense outside the home. While many of the cases arising in the 1800s

[1] McMahon, John V. L., AN HISTORICAL VIEW GOVERNMENT OF MARYLAND FROM ITS COLONIZATION TO THE PRESENT DAY, (1831), Publisher name unreadable in original.

turn upon antiquated points of pleading, it is clear the courts did, at a minimum, assume the existence of a cognizable claim of self-defense outside the home. See, for instance, Gaither v. Blower, (Court of Appeals 1857) 11 Maryland Reports 536, in which the court examines claims of self-defense in a field and an orchard.

Modern Maryland State Courts Already Hold the Right to Self-Defense Exists Outside the Home

Appellants contend that courts considering whether "…the Second Amendment Right Identified by the Supreme Court in Heller…" have declined to extend the scope of the Second Amendment outside the home.[2] Amicus respectfully disagrees with this assertion. Such an assertion requires a misstatement of the right identified within Heller, or a willful disregard for all of the component parts of the right so identified.

It is well established, non-controversial, modern case law in Maryland that the right to self-defense exists outside the home.

[2] See, inter alia, Appellants Brief, Argument II (B) and (C).

In State v. Marr (Court of Appeals 2001) 362 Md. 467, the Court of Appeals of Maryland considered a case in which the Defendant claimed to act in self-defense as he approached the rear of a taxicab. As the court stated, "Maryland recognizes two varieties of self-defense – the traditional one, which we have sometimes termed 'perfect' or 'complete' self-defense, and a lesser form, sometimes called 'imperfect' or 'partial' self-defense." State v. Marr (Court of Appeals 2001) 362 Md. 467, 472.

The Marr court then proceeded with a scholarly and thorough examination of Maryland self-defense law. Completely absent from this examination was any consideration of the fact that the Defendant was outside his home. The court did not examine whether the Defendant was inside or outside the home because in Maryland the right to self-defense exists without regard to whether the actor is inside or outside the home.

See also, State v. Faulkner (Court of Appeals 1983) 301 Md. 482 (self-defense outside a bar), State v. Martin (Court of Appeals 1993) 329 Md. 351 (self-defense behind a market), Jones v. State (Court of Appeals 2000) 357 Md. 408 (self-defense outside an amusement park), Guerriero v. State (Court of Appeals 1956) 213 Md. 545 (self-defense outside a store).

Although all of these cases vary with regard to whether the Defendant properly acted in self-defense or not, absent from these cases is any consideration that the right of self-defense did, or did not, exist because the actor was not in his home. The presence, or non-presence, of the actor within the home is immaterial as to whether the right to self-defense exists. Rather, the presence of the actor within the home or outside the home is simply one factor to be considered in whether self-defense can be proven, and not whether the right to self-defense exists.

This Honorable Court Already Holds the Right to Self-Defense Exists Outside the Home

Appellants also contend that "This court has declined to expand the Core Second Amendment right…" outside the home.[3] Amicus again respectfully disagrees with this assertion. Such a reading requires that the core of the Second Amendment either be misstated, or viewed in isolation from its component parts.

[3] See Appellants Brief, Argument II(B).

This court has, in fact, recognized the right of self-defense outside the home.

Similar to the state court examination above, this court itself has recently considered self-defense outside the home and concluded that the right to self-defense exists outside the home. In Morris v. Maryland (1983) 715 F.2d 106, this court looked at a claim of self-defense in a car. Completely missing from the court's opinion is any consideration of whether the right to self-defense exists outside the home – it clearly does. No reading of this court's opinion would lend itself to holding that the right to self-defense doesn't exist outside the home.

Any Gun Control Law That Provides For Discretionary License Issuance is Per Se Unconstitutional – Shall Issue Licensing is Required by the Plain Wording of Heller

Maryland's license system provides for purely discretionary licensing; this is also commonly referred to as a "may issue" license. Issuance of the requested license is entirely within the discretion of a government official, based upon unascertainable standards such as "good and sufficient reason." What is one person's good and sufficient reason in one county/state can be entirely different than in another

county/state, and may, in fact, vary from election to election. Equally repugnant is the fact non-citizens of the state may not enjoy the same rights to self-defense that residents do.

The District Court Memorandum was so succinct and eloquent on this point, that it hazards needless duplication to do anything other than quote the memorandum:

> At the bottom, this case rests on a simple proposition: If the Government wishes to burden a right guaranteed by the Constitution, it may do so provided it can show satisfactory justification and a sufficiently adapted method. The showing, however, is always the Government's to make. A 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.[4]

Shall-issue licenses, based upon objective criteria, such as training and a lack of criminal record, are the only constitutionally permissive licensing schemes, and it is Amicus' position that Heller already so held.

> In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense. **Assuming that Heller is not disqualified from the exercise of Second Amendment rights, the District must permit him to register his handgun and must issue him a license to carry it in**

[4] Trial Court Memorandum, Page 20.

> **the home.** District of Columbia et al v. Heller 128 S. Ct. 2783, 2821-22. (emphasis added.)

It is Amicus' position that any court decision that extends the exercise of Second Amendment rights outside the home is bound by Supreme Court precedent in Heller to find anything but "shall-issue" licensing unconstitutional. Heller is unequivocal on this point: So long as the actor is statutorily eligible to exercise Second Amendment rights (i.e. allowed to own a gun), the licensing scheme must allow the actor to do so.

Analogy is a time-honored method of persuasive argument. If Maryland were requiring citizens to show good and sufficient reason to attend church, since people may already freely worship in their own home . . . If Maryland were requiring citizens to prove need to work at a newspaper, since they have the ability to freely blog their views from home . . . If Maryland were requiring a showing of exigent circumstances to perform political literature campaign "drops," since they could clearly stay home and stuff envelopes instead…

. . . would any court seriously consider "may issue" government licensing of the exercise of these other rights as passing any level of constitutional scrutiny?

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 12-1437 **Caption:** Woollard et al. v. Gallagher et al

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)
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(s) L Kenneth Hanson

Attorney for Buckeye Firearms Foundation Inc.

Dated: August 5, 2012

Certificate of Service

I hereby certify that on August 6, 2012, I filed the foregoing brief with the Clerk of the Court by causing a copy to be electronically filed and served via the appellate CM/ECF system. I also hereby certify that I have caused copies to be delivered to the Court by hand delivery, and caused copies to be served upon the following counsel by First Class Mail:

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