No. 10-11212

In The
Supreme Court of the United States

SEAN MASCIANDARO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF SECOND AMENDMENT FOUNDATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ALAN GURA*
GURA & POSSESSKY, PLLC
101 N. Columbus Street, Suite 405
Alexandria, Virginia 22314
703.835.9085
alan@gurapossessky.com

**Counsel of Record*

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATUTES, AND RULES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Second Amendment Foundation ("SAF"), a tax-exempt organization under § 501(c)(3) of the I.R.C., is a non-profit educational foundation incorporated in 1974 under Washington state law. SAF seeks to preserve the effectiveness of the Second Amendment through educational and legal action programs. SAF has over 650,000 members and supporters residing in every state of the Union. Among SAF's most notable recent cases, *amicus* organized and prevailed in *McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010) and *Ezell* v. *City of Chicago*, 2011 U.S. App. LEXIS 14108 (7th Cir. July 6, 2011).

SAF files this brief to emphasize the importance of clarifying the lower courts' role in implementing the Second Amendment, to advise the Court of a circuit split that has emerged since the Petition's docketing, and to inform the Court as to how the instant case compares with others raising similar issues.

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. The parties have consented to the filing of this brief in letters on file in the Clerk's office. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION

Many cases will soon present this Court with an opportunity to clarify that the Second Amendment, a normal part of the Bill of Rights interpreted according to its original public meaning, applies beyond the threshold of one's home.

Securing Second Amendment rights outside the home is important not only to guarantee the core right of "bearing" arms for self-defense. "[T]he Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees . . . fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 579-80 (1980). Yet governmental actors continue to ban and significantly burden core or ancillary Second Amendment rights, such as the rights to purchase and sell guns, and the right to practice with firearms, arguing that to the extent these activities typically occur outside the home, they lie beyond *District of Columbia* v. *Heller*, 554 U.S. 570 (2008).

As Petitioner describes, lower courts frequently decline to acknowledge the Second Amendment's application outside the home. This Court should not have to re-emphasize what appears to be among the clearest aspects of its recent Second Amendment decisions, but it must do so if the right to keep and bear arms is to retain operative vitality.

SUMMARY OF THE ARGUMENT

1. The lower court's opinion ignored this Court's clear instructions with respect to the scope of the right to bear arms, and declined to utilize the appropriate interpretive methodology for determining the scope of Second Amendment (and other) rights. Critical to this Court's resolution of recent Second Amendment controversies were lengthy discussions of the right's application outside the home. That discussion was not dictum. In any event, this Court also instructed that the Second Amendment is interpreted according to its original public meaning, and supplied that meaning as it relates to the carrying of guns outside the home. The lower court should have heeded those instructions.

2. Even had *Heller* not directly addressed the meaning of "bear arms," it left lower courts clear instructions as to how to approach Second Amendment controversies.

Notwithstanding these instructions, and the lower federal courts' role relative to this Court, the court below invoked what appear to be its own subjective policy preferences in declining jurisdiction. That much of the lower court's decision "so far departed from the accepted and usual course of judicial proceedings," and "sanctioned such a departure by a lower court, so as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

3. Petitioner's assertion that lower courts are uniformly hostile to enforcing the Second Amendment

outside the home has been overtaken by a recent Seventh Circuit decision conflicting with the lower court's approach in this matter in several key respects. The circuit split need not develop further.

4. Although several other pending cases might present the issues as well as this Petition, this Petition nonetheless has high merit relative to other cases that would present the same important questions, and there is no reason for delaying resolution of this critically important issue.

ARGUMENT

I. The Lower Court's Opinion Contravenes This Court's Precedent Specifically Acknowledging The Second Amendment's Application Beyond The Home.

This Court's first foray into Second Amendment law centered around the question of whether individuals had the right to transport a sawed-off shotgun between Claremore, Oklahoma and Siloam Springs, Arkansas – plainly, an activity that took place outside the home. *United States* v. *Miller*, 307 U.S. 174, 175 (1939). Whatever else it might have held, *Miller* indicated that the Second Amendment has operative relevance on the highways.

Nearly seventy years later, this Court held that the Second Amendment's "words and phrases were used in their normal and ordinary as distinguished from technical meaning." *Heller*, 554 U.S. at 576.

Rejecting an argument that the term "bear arms" indicates an exclusively military undertaking, this Court held that "[a]t the time of the founding, as now, to 'bear' meant to 'carry.'" *Heller*, 554 U.S. at 584 (citations omitted).

> To "bear arms," as used in the Second Amendment, is to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Id*. (quoting *Muscarello* v. *United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting); BLACK'S LAW DICTIONARY 214 (6th Ed. 1998)).

Accordingly, this Court repeatedly referred to "the Second Amendment right, protecting only individuals' liberty to keep and carry arms." *Heller*, 554 U.S. at 604; *id.* at 626.

Having defined the Second Amendment's language as including a right to "carry" guns for self-defense, this Court helpfully noted several exceptions that prove the rule. Explaining that this right is "not unlimited," in that there is no right to "carry any weapon whatsoever in any manner whatsoever and for whatever purpose," *Heller*, 554 U.S. at 626 (citations omitted), this Court confirmed that there is a right to carry at least some weapons, in some manner, for some purpose. This Court then listed as "presumptively lawful," *Heller*, 554 U.S. at 627 n.26, "laws forbidding the carrying of firearms in

sensitive places," *id.* at 626, confirming both that such "presumptions" may be overcome in appropriate circumstances, and that carrying bans are not presumptively lawful in non-sensitive places.

Eliminating any doubt that this Court reached the issue of "bearing arms," *Heller* discussed with approval four nineteenth-century right to arms opinions explicating the rule that a manner of carrying guns may be forbidden, but not the entire practice itself. *See Heller*, 554 U.S. at 629 (discussing *Nunn* v. *State*, 1 Ga. 243 (1846); *Andrews* v. *State*, 50 Tenn. 165 (1871), and *State* v. *Reid*, 1 Ala. 612, 616-17 (1840)); 554 U.S. at 613 (citing *State* v. *Chandler*, 5 La. Ann. 489, 490 (1850)).

And beyond securing the bearing of arms for self-defense, this Court extolled other traditional firearms activities typically occurring outside the home. The right was valued "for self-defense *and hunting*." *Heller*, 554 U.S. at 599 (emphasis added). "The settlers' dependence on game for food and economic livelihood, moreover, undoubtedly undergirded . . . state constitutional guarantees [of the right to arms]." *McDonald*, 130 S. Ct. at 3042 n.27. "No doubt, a citizen who keeps a gun or pistol under judicious precautions, *practices in safe places the use of it*, and in due time teaches his sons to do the same, exercises his individual right [to bear arms]." *Heller*, 554 U.S. at 619 (citation omitted) (emphasis added).

Dissenting in *Heller*, Justice Stevens foresaw that the Second Amendment would apply outside the home:

> Given the presumption that most citizens are law abiding, and the reality that the need to defend oneself may suddenly arise in a host of locations outside the home, I fear that the District's policy choice may well be just the first of an unknown number of dominoes to be knocked off the table.

Heller, 554 U.S. at 679-80 (Stevens, J., dissenting).[2]

The Court's extensive discussion of carrying firearms outside the home was not dictum. It is well established that

> When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound . . . the principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law. . . .

Seminole Tribe of Fla. v. *Florida*, 517 U.S. 44, 67 (1996) (citations and internal quotation marks omitted). Thus, a statement that "explains the court's

[2] Justice Stevens offered that "it is . . . clear that [the Second Amendment] *does* encompass the right to use weapons for certain military purposes," *Heller*, 554 U.S. at 636 (Stevens, J., dissenting), presumably, outside the home.

rationale . . . is part of the holding." *United States* v. *Bloom*, 149 F.3d 649, 653 (7th Cir. 1998). In contrast,

> [a] dictum is a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding – that, being peripheral, may not have received the full and careful consideration of the court that uttered it.

Sarnoff v. *Am. Home Prods. Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986).

Considering its need to address the District of Columbia's collectivist interpretation, this Court's conclusion that the right to "bear arms" is the right to "carry weapons in case of confrontation" was essential to its resolution of *Heller*. Accordingly, it is part of *Heller*'s holding. The numerous pages describing how that right would be applied outside the home in different contexts only underscore the fact that the matter received this Court's exhaustive consideration, even if was not literally memorialized in the awarded relief.[3]

---

[3] This Court ordered that the District of Columbia "must issue [Heller] a license to carry [his handgun] in the home." *Heller*, 554 U.S. at 635. But using this language to suggest a home-limitation would be seriously misleading. Heller challenged, among other provisions, former D.C. Code § 22-4504(a) (2008), that had provided that the carrying of handguns inside one's home without a permit constituted a misdemeanor offense. Heller did not seek a permit to carry a handgun in public. *Parker* v. *District of Columbia*, 478 F.3d 370, 400 (D.C. Cir.

(Continued on following page)

Thus, when the lower court offered that "[t]here may or may not be a Second Amendment right in some places beyond the home," and that this Court "will need to say so more plainly" in that event, Pet. App. 16a (citation omitted), it improperly ignored this Court's holding. *Heller*'s discussion of what it means to "bear arms," and how that activity might be regulated, was plain enough. By refusing to acknowledge the right to bear arms, the lower court determined an important question of federal law contrary to this Court's precedent. Sup. Ct. R. 10(c).[4]

II. This Court's Supervisory Powers Must Correct Any Suggestion That The Constitution Contradicts Public Policy, Or Should Not Be Enforced By Lower Courts.

The lower court improperly suggested that *this* Court should become a court of first resort for Second Amendment cases, on the theory that the Amendment secures a net-harmful public policy. These statements warrant response.

2007). The reference to an in-home carry permit merely tracked Heller's prayer for relief. *Heller*, 554 U.S. at 630-31.

[4] Were this Court to conclude that *Heller*'s discourse regarding "bear arms" was merely dictum, the extended discussion of what it means to "bear" arms and how that activity may be regulated at least proves that this is "an important question of federal law that . . . should be, settled by this Court." Sup. Ct. R. 10(c).

A. The Original Meaning Of The Constitution's Language, Not Judges' Views On Social Issues, Should Govern The Outcome Of Constitutional Controversies.

As noted *supra*, this Court repeated in *Heller* its longstanding instructions that constitutional text holds the meaning understood by the American public at the time of the provision's framing. *Heller*, 554 U.S. at 576. This Court also made clear what should *not* be taken into account when interpreting the Constitution:

> The very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.

Heller, 554 U.S. at 634-35. These instructions were reiterated last year, when this Court advised that the task of interpreting the Second Amendment would not "require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise." *McDonald*, 130 S. Ct. at 3050.

Nonetheless, the lower court believed it could sidestep the core Second Amendment question because it assumed that, at least on balance if not absolutely, the Second Amendment harms society: "This is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights." Pet. App. 17a.

The theory is correct, if misapplied. No court should wish to feel responsible for a violent crime that could have been averted or disrupted had the court not "miscalculated as to Second Amendment rights" and left the victim without arms for her defense.

Absent from the lower court's calculation was the profound, fundamental interest in personal self-defense that lies at the Second Amendment's core. Like most people, Petitioner survived his visit to Daingerfield Island. But not everyone does. *See, e.g.* "Homicide on Daingerfield Island," available at http://www.nps.gov/uspp/528homdanis&arr.htm (last visited July 24, 2011) (murder on May 28, 2005); Maria Glod, *Gang Trial Judge Allows Statements*, Washington Post, at B3, Oct. 7, 2003, available at http://www.washingtonpost.com/wp-dyn/articles/A53216-2003Oct6.html (last visited July 24, 2011) (Daingerfield Island murder on September 16, 2001, leading to murder of witness).

The Second Amendment reflects an understanding that on balance, ordinary traveling businesspeople, such as Petitioner, must be able to keep guns for self-defense. The lower court's dispositive assumption that such firearms use must on balance be dangerous substitutes its own values for those ratified into constitutional text, as authoritatively interpreted by this Court. It must be reversed.

B. This Court Is Not A Court Of First Resort In Second Amendment Cases.

Heller's command to lower courts, that they must interpret the Second Amendment's words according to their original meaning without regard to the courts' views on the subject of firearms, is not optional.

> The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty.

Cohens v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

Judge Wilkinson is a noted and highly capable advocate of what he terms "restraint," Pet. App. 17a, and invoking this reasoning, has expressed the view that *Heller* was wrongly decided. J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009).[5] To be sure, Judge Wilkinson's opinion below does concede that courts should determine Second Amendment claims "upon necessity," if "only then by small degree." Pet. App. 16a. But this grudging approach appears incongruent with the fundamental nature of enumerated rights.

Avoiding legitimate Article III controversies in the hope that this Court will decide matters in the first instance is inappropriate. This Court is "one of final review, not of first view," and does not ordinarily "rush to judgment without a lower court opinion." *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) (citation and internal quotation marks omitted). The instruction is often directed at litigants, but it may also properly be addressed to the lower courts. As Judge Niemeyer observed below,

> application of the broader Second Amendment right discussed in *Heller* to factual settings arising outside the home involves

[5] For contrary views, *see* Alan Gura, *Heller and the Triumph of Originalist Judicial Engagement*: *A Response to Judge Harvie Wilkinson*, 56 UCLA L. REV. 1127 (2009); Clark M. Neily III, *The Right to Keep and Bear Arms in the States: Ambiguity, False Modesty, and (Maybe) Another Win for Originalism*, 33 HARVARD J. L. & PUB. POL'Y 185 (2010).

> precisely the kind of "difficult issue[ ]" the Supreme Court prefers to "mature through full consideration by the courts of appeals."

Pet. App. 11a n.* (Niemeyer, J., concurring) (citations omitted).

This Court, of necessity, must maintain a limited docket, and must depend upon the work of the lower courts to develop the law for its review. If a case satisfies Article III's requirements for adjudication before this Court, it also usually satisfies Article III's requirements in the court where it was first presented, and in the court to which appeal was taken. It is neither appropriate, nor practical for individuals asserting their constitutional rights, to hope for a grant of certiorari to obtain the first resolution of legitimate constitutional controversies.

III. The Opinion Below Conflicts With The Seventh Circuit's Recent Opinion In *Ezell* v. *City of Chicago*.

At the time the Petition was filed, "Mr. Masciandaro ha[d] been unable to identify a single state or federal appellate court that has recognized a Second Amendment right outside the home." Pet. at 17.

Two weeks after these words were written, the Seventh Circuit ordered entry of a preliminary injunction against Chicago's complete ban on gun ranges. *Ezell* v. *City of Chicago*, *supra*, 2011 U.S. App. LEXIS 14108. The City had moved to dismiss *Ezell*'s complaint, and in the district court successfully

opposed entry of preliminary injunction, by arguing *inter alia* that the Second Amendment cannot protect gun ranges because its protection extends no further than one's front door. Although the District Court did not adopt that particular argument, the Seventh Circuit's decision now forecloses that approach. "The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective." *Ezell*, 2011 U.S. App. LEXIS 14108 at *48. It is within judicial notice that training and practice with firearms traditionally occurs, and for most people is only possible, outside one's home.

Ezell broke with the lower courts' pattern of summarily declining to enforce Second Amendment rights outside the home because it adopted a correct approach to resolving Second Amendment questions, an approach that differed from that of the Fourth Circuit in two critical respects.

First, although the lower court here favored a default position of abstaining from Second Amendment questions lest enforcing the right harm the public, *Ezell* correctly rejected that assumption. "The judge was evidently concerned about the novelty of Second Amendment litigation and proceeded from a default position in favor of the City. The concern is understandable, but the default position cannot be reconciled with *Heller*." *Ezell*, 2011 U.S. App. LEXIS at *35.

Second, the Seventh Circuit applied a notably higher standard of review than did the court below to address a Second Amendment claim arising outside the home.

The court below adopted what it termed intermediate scrutiny for the exercise of all Second Amendment rights outside the home, to avoid "handcuffing lawmakers' ability to 'prevent[ ] armed mayhem' in public places, and depriving them of 'a variety of tools for combating that problem.'" Pet. App. 12a (citations omitted).[6] Accordingly, the court was satisfied merely in observing that "the government has a substantial interest in providing for the safety of individuals who visit and make use of the national parks," Pet. App. 14a; that "[l]oaded firearms are surely more dangerous than unloaded firearms, as they could fire accidentally or be fired before a potential victim has the opportunity to flee," Pet. App. 15a; and that "because the United States Park Police patrol Daingerfield Island, the Secretary could conclude that the need for armed self-defense is less acute there than in the context of one's home." Pet. App. 16a.

---

[6] Intermediate scrutiny demands that the government make a "strong showing" that the regulation is "substantially related to an important governmental objective." *United States* v. *Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc) (citations omitted). The "justification must be genuine, not hypothesized or invented post hoc in response to litigation." *United States* v. *Virginia*, 518 U.S. 515, 533 (1996).

In contrast, the Seventh Circuit focused on the dispute's nature – *including* the individual interest in self-defense. "[T]he rigor of this judicial review will depend on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right." *Ezell*, 2011 U.S. App. LEXIS at *44 (citations omitted).

> First, 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. Second, laws restricting activity lying closer to the margins of the Second Amendment right, laws that merely regulate rather than restrict, and modest burdens on the right may be more easily justified. How much more easily depends on the relative severity of the burden and its proximity to the core of the right.

Ezell, at *59.

Thus, even though live-fire range practice is activity that typically occurs outside the home, the Seventh Circuit held that "a more rigorous showing than [intermediate scrutiny] should be required, if not quite 'strict scrutiny.'" *Id.* at *60. Indeed, the fact that live-fire practice occurs mostly outside the home apparently had no bearing on the level of scrutiny employed by the Seventh Circuit.

The different levels of scrutiny in these cases manifested starkly different analytical paths. The lower court here all but rubber-stamped a fairly

broad firearms prohibition by invoking police power platitudes and conjecture about armed mayhem being committed by the likes of Petitioner, an otherwise law-abiding self-employed businessperson who keeps a gun nearby while sleeping. The Seventh Circuit approached such arguments in a refreshingly skeptical manner:

> The City maintains that firing ranges create the risk of accidental death or injury and attract thieves wanting to steal firearms. But it produced no evidence to establish that these are realistic concerns, much less that they warrant a total prohibition on firing ranges . . . the City produced no empirical evidence whatsoever and rested its entire defense of the range ban on speculation about accidents and theft.

Ezell, 2011 U.S. App. LEXIS 14108 at *62-*63.

In short, while even intermediate scrutiny holds the promise of rigorous review, at least here, the fact that it is a full step lower than "strict" scrutiny rendered it no different than rational basis review in its application. Standards of review are often seen as outcome-determinative. Would such review as occurred here, however it might be labeled, be applied in all Second Amendment cases addressing circumstances beyond the literal possession of a firearm inside one's home, there will not be much left of the Second Amendment.

The Seventh Circuit's context-based approach would be plainly superior on the facts of this case. For

purposes of constitutional analysis, not all national parks are created equal. That much is acknowledged in the First Amendment context:

> Mount Rushmore does not become a public forum merely by being called a "national park" any more than it would be transformed into a nonpublic forum if it were labeled a "museum." The dispositive question is not what the forum is called, but what purpose it serves, either by tradition or specific designation.

Boardley v. *United States Dept. of Interior*, 615 F.3d 508, 514-15 (D.C. Cir. 2010). It should seem equally obvious that not every portion of every national park would be an equally appropriate place to possess a handgun for self-defense. Daingerfield Island may see relatively many recreational visitors, but crime is not unknown there. Indeed, hiking in some portions of the National Park System unarmed may be positively irresponsible. *See, e.g.* "Border Concerns," available at http://www.nps.gov/orpi/planyourvisit/boarder-concerns.htm (last visited July 24, 2011) (advising visitors to Arizona's Organ Pipe Cactus National Monument that the park lies in a "remote region" hosting drug-smuggling routes along the Mexican border, and notwithstanding advice to call 911 for emergencies, "cell phone service is usually out of range").

The split of authority between the Fourth and Seventh Circuits regarding these important issues warrants review.

IV. Petitioner Is Relatively Well-Positioned To Raise The Second Amendment Question.

The Second Amendment has often proven the adage that hard cases make for bad law. Broad disposition of poor Second Amendment claims may hurt the legitimate rights of peaceful, responsible people whose conduct should be protected.

Prior to its resurrection in *Heller*, a leading cause of the Second Amendment's demise was the fact that in most cases raising a Second Amendment issue, the claimants were often unsympathetic criminal defendants or others raising facially untenable claims. *Miller* and its progeny proved as much. In the post-*Heller* environment, *amicus* strongly believes that the greatest threats to the Second Amendment's vitality continue to be poorly-considered, often extremist positions litigated by people who should know better.

Amicus does not reference the criminal defense bar's duty to provide zealous representation, although such cases will often not produce positive precedent. The problems manifest themselves in myriad other ways, for example, with sweeping Second Amendment complaints alleging vast conspiracies.[7] In the context of this Petition, the most useful example is *Embody* v.

---

[7] *Atkinson* v. *Town of Rockport*, No. 11-cv-11073-NMG (D. Mass. filed June 15, 2011) (474 page pro se third-amended complaint); *Rothery* v. *Blanas*, No. 08-cv-2064-JAM (E.D. Cal. filed Sept. 2, 2008) (78 page, 808 paragraph amended complaint), *appeal pending*, No. 09-16852 (9th Cir. filed Aug. 25, 2009).

Ward, 2011 U.S. Dist. LEXIS 79153 (M.D. Tenn. July 20, 2011), an opinion following the court below here. Although decided on erroneous grounds, *Embody* is commendable for its restraint in light of the facts.

Mr. Embody was temporarily detained by police because, to the alarm of various park visitors, he was walking about in camouflage with an AK-47 pistol slung over his back, the barrel tip of which he had painted orange to disguise as a toy. Regardless of whether any one of these facts are properly the subject of criminal prohibition, their combination was plainly intended to provoke a confrontation with police.[8] Upon verifying that Embody's particular AK-47 was lawfully carried, he was let go.

Having obtained his desired confrontation, Embody sued the police. The court noted that a significant question existed of whether Embody's particular weapon enjoyed constitutional protection, 2011 U.S. Dist. LEXIS 79153 at *30 n.5, but it was easier to dismiss the case because the orange-barreled

[8] At his deposition, Embody could not recall whether he posted, on the internet, "I can't wait for a cop to arrest me because I open-carried a handgun and someone called 9-1-1. It almost happened twice, but no cigar yet. Maybe carrying a PLR-16 or AK pistol will change that." Deposition of Leonard Embody, Oct. 14, 2010, at p. 52, l. 3-8, available at http://blog.andrewwatters.com/blog/cg/depo-kwikrnu.pdf (last visited July 23, 2011).

AK-47 was carried in a park, particularly in light of the Fourth Circuit's precedent in this case.[9]

Just as differences exist among various government-owned properties designated as "parks," so too are there differences between people like Mr. Embody, who actively sought police confrontation, and Petitioner Masciandaro, who slept peacefully in his car with an ordinary gun he keeps for self-defense. The interest in self-defense secured by the Second Amendment may be at its zenith at night in an isolated park. Petitioner, who kept a firearm under normal circumstances, appears relatively well-positioned to test that proposition. Unlike Embody's behavior, Petitioner's actions are typical of the manner in which Americans exercise the right to bear arms, and would provide this Court a better platform upon which to announce a rule of constitutional law for the responsible majority of the people.

Other cases might also provide this Court good opportunities to resolve the issue of bearing arms outside the home. At the "state" level, there remain only two jurisdictions – Illinois and the District of Columbia – whose laws flatly prohibit ordinary citizens from publicly carrying handguns for self-defense, at all times and places, without exception.

---

[9] An AK-47 might be more appropriate along remote drug-smuggling routes than in urban parks. But disguising any gun as a toy is difficult to justify. *Cf. United States* v. *Marzzarella*, 614 F.3d 85 (3d Cir. 2010).

720 Ill. Comp. Stat. §§ 5/24-1, 5/24-1.6; D.C. Code §§ 7-2502.02(a)(4) (limiting handgun registration to home possession), 22-4504(a) (forbidding the carrying of guns without a license that is unavailable).[10] Challenges to Illinois' prohibition on bearing arms were recently filed. *Moore* v. *Madigan*, No. 11-cv-3134-SEM (C.D. Ill. filed May 12, 2011); *Shepard* v. *Madigan*, No. 11-cv-405-WDS (S.D. Ill. filed May 13, 2011).[11]

A case challenging the District of Columbia's prohibition on bearing arms saw no movement since argument was heard January 22, 2010 on cross-dispositive motions, until it was re-assigned to a visiting judge July 18. *Palmer* v. *District of Columbia*, No. 09-cv-1482-FJS (D.D.C. filed Aug. 6, 2009). At a July 22, 2011 status conference, the newly-assigned judge indicated he will make a ruling. Another case awaiting district court decision challenges North Carolina's prohibition on the bearing of arms during declared "states of emergency," when the need for a ready means of self-defense might be greatest. *Bateman* v. *Perdue*, No. 10-265-H (E.D.N.C. filed June 28, 2010).[12]

---

[10] On December 16, 2008, the District of Columbia's government repealed former D.C. Code § 22-4506, which had granted the Chief of Police power to issue handgun carry licenses. The District of Columbia disapproves handgun registration applications for averring intent to bear arms.

[11] *Amicus* is a plaintiff in *Moore*.

[12] *Amicus* is a party in *Palmer* and *Bateman*.

Yet other cases arise from the licensing of the right to carry handguns for self-defense.[13] A small minority of states require that individuals wishing to exercise their *right* to bear arms first prove, to the authorities' satisfaction, a good reason for doing so and/or the applicants' moral character. *Contra Staub* v. *City of Baxley*, 355 U.S. 313, 322 (1958).[14] These provisions have engendered a variety of post-*Heller* challenges. *See, e.g. Woollard* v. *Sheridan*, No. 10-cv-2068-BEL (D. Md. filed July 29, 2010); *Kachalsky* v. *Cacase*, No. 10-cv-5413-CS (S.D.N.Y. filed July 15, 2010); *Richards* v. *County of Yolo*, 2011 U.S. Dist. Ct. LEXIS 51906 (E.D. Cal. May 16, 2011), *appeal pending*, No. 11-16255 (9th Cir. filed May 16, 2011); *Peruta* v. *County of San Diego*, 758 F. Supp. 2d 1106 (S.D.

---

[13] A license generally to carry a handgun, without regard to whether it is carried openly or concealed, may be required when all unlicensed carrying is forbidden. *See, e.g.* Md. Code Ann., Crim. Law § 4-203; Md. Code Ann., Pub. Safety § 5-303. Other states require a license to carry concealed handguns, while either forbidding or leaving largely unregulated the open carrying of handguns. *Compare In re Application of McIntyre*, 552 A.2d 500, 501 n.1 (Del. Super. 1988) (license required only for concealment) *with* Tex. Penal Code § 46.035(a) (permit holder who "intentionally fails to conceal the handgun" commits a misdemeanor).

[14] "[A]n ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."

Cal. 2010), *appeal pending*, No. 10-56971 (9th Cir. filed Dec. 16, 2010); *Hightower* v. *City of Boston*, No. 08-cv-11955-DJC (D. Mass. filed Nov. 24, 2008).[15]

The facts differ from case to case, which also see variation in their legal theories. At least one case purporting to challenge discretionary licensing requirements has already generated a petition for certiorari. *Williams* v. *Maryland*, No. 10-1207 (docketed Apr. 5, 2011). But it is unclear whether this Court could reach the licensing standards issue in that case, arising as it does from a conviction for carrying a handgun without a license.

Of course Williams should not have been required to test Maryland's restrictive handgun licensing scheme in order to file a *civil* challenge to its purported standards. "The Constitution can hardly be thought to deny to one subjected to the restraints of [a licensing law] the right to attack its constitutionality, because he has not yielded to its demands. . . . As the ordinance [providing for unbridled licensing discretion] is void on its face, it was not necessary for appellant to seek a permit under it." *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 756 (1988) (citations omitted). But given the nature of his case, Williams can obtain relief only if the

[15] *Amicus* is a plaintiff in *Woollard*, *Kachalsky*, and *Richards*.

Court is either prepared to hold that the Second Amendment prohibits the licensing of handgun carrying, or instructs the trial court to allow Williams to assert the licensing scheme's illusory nature as a defense.[16]

While many of the cases noted here might provide good platforms for resolving Second Amendment questions relating to the right to carry arms for self-defense, the volume and nature of this litigation also proves that the question is an important one for the Court to resolve. Considering the strength of the instant Petition, further delay in addressing the issue is unnecessary.

[16] In contrast, on July 21, 2011, the district court heard extensive arguments on the parties' cross-dispositive motions in *Woollard*, a challenge to Maryland's discretionary handgun carrying permitting system on behalf of a licensee whose license was not renewed when state officials determined he no longer needed it.

CONCLUSION

For the foregoing reasons, *amicus curiae* Second Amendment Foundation, Inc., respectfully requests that the Court grant the petition for certiorari.

Respectfully submitted,

ALAN GURA*
GURA & POSSESSKY, PLLC
101 N. Columbus Street, Suite 405
Alexandria, VA 22314
703.835.9085
alan@gurapossessky.com

**Counsel of Record*

Counsel for Amicus Curiae