

No. 19-1469

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**In the United States Court of Appeals  
for the Fourth Circuit**

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**MARYLAND SHALL ISSUE, INC., et al.  
Plaintiffs-Appellants,**

v.

**LAWRENCE HOGAN, et al.,  
Defendants-Appellees.**

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**APPEAL FROM JUDGEMENT OF THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF MARYLAND  
HON. ELLEN L. HOLLANDER  
(Case No. 1:16-cv-0331-ELH)**

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**BRIEF OF AMICUS CURIAE THE NATIONAL SHOOTING SPORTS FOUNDATION, INC. IN  
SUPPORT OF PLAINTIFFS-APPELLANTS MARYLAND SHALL ISSUE, INC., ET AL. FILED  
WITH CONSENT OF ALL PARTIES**

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
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Date: July 1, 2019

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Amicus Curiae

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I certify that on July 1, 2019 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:

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July 1, 2019  
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**STATEMENT OF CONSENT**

All parties consented to the filing of this *amicus curiae* brief pursuant to Federal Rule of Appellate Procedure 29(a). No party or party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than *amicus curiae*, its members or its counsel contributed money to fund preparation and submission of this brief.

**INTEREST OF AMICUS CURIAE**

*Amicus curiae* The National Shooting Sports Foundation, Inc. (“NSSF”) is the national trade association for the firearms, ammunition, hunting and shooting sports industry. Formed in 1961, NSSF is a 501(c)(6) tax-exempt Connecticut non-profit trade association with its principal place of business in Newtown, Connecticut. NSSF has a membership of over 8,800 federally licensed firearms manufacturers, distributors and retailers; companies manufacturing, distributing and selling shooting and hunting related goods and services; sportsmen’s organizations; public and private shooting ranges; gun clubs; and publishers. At present, 77 NSSF members are located in the State of Maryland and approximately 600 NSSF members are located in those states within the boundaries of the Fourth Circuit Court of Appeals.

NSSF’s mission is to promote, protect and preserve hunting and the shooting sports by providing trusted leadership in addressing industry challenges; advancing

participation in and understanding of hunting and shooting sports; reaffirming and strengthening its members' commitment to the safe and responsible sale and use of their products; and promoting a political environment that is supportive of America's traditional hunting and shooting heritage, lawful commerce in firearms and ammunition, and Second Amendment freedoms.

NSSF's interest in this case derives principally from the fact that its federally licensed firearms manufacturer, distributor and retail dealer members engage in lawful commerce in firearms and ammunition in Maryland and throughout the United States, which is a constitutionally protected activity under the Second Amendment. The Second Amendment protects individuals, including federally licensed businesses, many of whom are NSSF members, from regulations and statutes infringing upon and burdening the right to keep and bear arms. The Maryland handgun licensing law (enacted as part of the Firearms Safety Act of 2013) impairs the ability of federal firearms licensees in the state of Maryland from engaging in lawful firearms commerce and infringes upon the ability of responsible and law-abiding citizens to exercise their Second Amendment rights. The Second Amendment includes a right to sell firearms because the enumerated right to keep and bear arms necessarily includes a right to purchase or obtain those arms. As such, the determination of whether a state statute improperly infringes upon the exercise of Second Amendment rights is of great importance to NSSF and its

members – especially those dealers who engage in the lawful commerce in firearms and ammunition nationwide. Accordingly, NSSF submits this brief in support of Plaintiffs-Appellants.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

The fundamental, individual Second Amendment right to keep and bear arms is well-established following the United States Supreme Court decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008) [“*Heller*”] and *McDonald v. City of Chicago*, 561 U.S. 742 (2010) [“*McDonald*”]. Less understood, but no less important, is the corresponding Second Amendment right of individuals and lawful businesses to *sell* firearms and ammunition.

Since *Heller* and *McDonald*, however, legislatures and lower courts have sought to chip away at Second Amendment rights using a variety of tactics. One such tactic is to limit the sale of firearms and ammunition in increasingly onerous ways, and to treat the right to sell firearms as something divorced from the right to keep and bear arms (*i.e.* finding laws limiting the sale of firearms are not burdened by the challenged law) and therefore entitled to less protection. It is axiomatic that an individual cannot keep and bear arms if he or she is unable to acquire them. The only logical conclusion is that there is a Second Amendment right to sell firearms and it must be protected as vigorously as the right to keep and bear arms.

Here, Plaintiffs-Appellants challenged the constitutionality of the Handgun License Requirement [“HLR”] in Maryland’s Firearms Safety Act of 2013 [“FSA”]. Rather than engage in this Court’s two-part analysis to evaluate challenges to the Second Amendment, the District Court stopped short and instead wrongly summarily adjudicated the action against Plaintiffs-Appellants finding *none of Plaintiffs-Appellants had standing to even challenge the HLR aspect of the FSA*. The Court should reverse the District Court’s grant of summary judgment in Defendants-Appellees’ favor (i.e. finding Plaintiffs-Appellants have standing to challenge the FSA) and either enter judgment in Plaintiffs-Appellants’ favor on Plaintiffs-Appellants’ cross-motion for summary judgment or, at a minimum, remand the action to the District Court for further proceedings.

## **ARGUMENT**

In the context of the Second Amendment, the District Court recognized a right to sell handguns – even though it characterized the right as not “unfettered.” Joint Appendix [“JA”] 1400. However, as a prerequisite to engaging in the two-part approach to assess challenges restricting Second Amendment rights (*United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010)), challengers such as Plaintiffs-Appellants must have standing to assert their own rights or a third party’s rights. *See generally Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992); *Craig v. Boren*, 429 U.S. 190, 194–95 (1976).

The lower court analyzed whether Atlantic Guns, Inc. had standing to assert a challenge to the HLR based on its own Second Amendment rights or based on the rights of its customers, and looked at both Atlantic Guns' alleged injury as well as the alleged injury to its customers. JA 1399–1405. The District Court focused on Atlantic Guns' alleged economic injury in its standing analysis and found there was no injury sufficient to demonstrate standing. JA 1404–05. However, the HLR prohibits firearm dealers like Atlantic Guns from selling, renting or transferring a handgun to individuals who do not present the required handgun qualification license. Md. Code Ann., Pub. Safety, § 5-117.1(c). In addition, violation of the HLR is punishable by up to five years in jail or a \$10,000 fine and a firearm dealer could have their dealer's license revoked. *Id.* at §§ 5-114(b)(2), 5-144.

Given these penalties, standing may exist for the same reasons the United States Supreme Court found physicians had standing to challenge a Missouri statute criminalizing some of the abortion methods used in providing abortion services. *See Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52 (1976). There, physicians did not have to rely on the abortion rights of patients (under *Roe v. Wade*, 410 U.S. 113 (1973)) to challenge the statute because they asserted “a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.” *Id.* at 62 (citations omitted). This same reasoning applies here to support

standing. For the additional reasons set forth in detail in Plaintiffs-Appellants' opening brief, Atlantic Guns has standing on its own behalf, as well as on behalf of its customers (which in turn leads to Maryland Shall Issue, Inc.'s standing).

Once standing is established, as it should be here, the next step is to determine whether the challenged law passes constitutional muster. The Fourth Circuit, like most other circuit courts, evaluates challenges to laws restricting Second Amendment rights under a two-part approach. *See Chester*, 628 F.3d at 680 (citing *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010)). The first question is "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *See id.* (internal quotation marks omitted). If not, "the challenged law is valid." *Id.*

If the challenged law does impose a burden on protected Second Amendment conduct, the court will then apply "an appropriate form of means-end scrutiny." *Chester*, 628 F.3d at 680. Because "*Heller* left open the level of scrutiny applicable to review a law that burdens conduct protected under the Second Amendment, other than to indicate that rational-basis review would not apply in this context," courts must "select between strict scrutiny and intermediate scrutiny." *Id.* at 682. The courts may "look[ ] to the First Amendment as a guide." *Id.* With respect to a claim made pursuant to the First or the Second Amendment,

“the level of scrutiny we apply depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.” *Id.*

The HLR severely burdens the right to sell firearms as it operates as a complete ban on the sale of handguns to all individuals who do not obtain a handgun qualification license. Given this burden, strict scrutiny is warranted.

#### **A. The Second Amendment Protects the Sale of Firearms.**

The Second Amendment provides, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II. “In the lower federal courts, there is a developing split about whether firearms sellers have Second Amendment rights which the courts are bound to respect.” David B. Kopel, *Does the Second Amendment Protect Firearms Commerce?* 127 HARV. L. REV. F. 230, 230 (2014). Despite this split, it is difficult to conceive after *Heller* and *McDonald* how a right to keep and bear arms does not mandate a corresponding and equal right to sell firearms. Nonetheless, because the right to sell firearms is not expressly set forth in the Second Amendment, state and local governments have, since *Heller* and *McDonald*, attempted to restrict and/or ban firearms commerce (largely through local zoning ordinances), which burdens the right to sell firearms.

As is explained below, the HLR burdens the right of firearms-related businesses like Atlantic Guns to engage in firearms commerce insofar as it

prohibits them from selling handguns to individuals who do not possess the required handgun qualification license. In effect, the HLR operates as a *total ban* on the sale of handguns to individuals who are unable or unwilling to obtain such a license. Because a right to sell firearms exists under the Second Amendment, it must be subjected to constitutional scrutiny.

### **1. Atlantic Guns Has an Independent Right to Sell Firearms Under the Second Amendment.**

Under the Second Amendment, the right to keep and bear arms inescapably includes both the right to purchase *and the right to sell* firearms and ammunition.<sup>1</sup> Without the implicit right to purchase and to sell firearms and ammunition, the Second Amendment would be meaningless. *See Teixeira v. Cty. of Alameda*, 873 F.3d 670, 677-78 (9th Cir. 2017) (en banc) (recognizing the Second Amendment “wouldn’t mean much” without the ability to acquire firearms needed to exercise that right but declining to define the “precise scope of any such acquisition right”)

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<sup>1</sup> Other recognized unarticulated rights under the Second Amendment include a corresponding right to acquire and maintain proficiency in firearm use through target practice at a range. *See Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011) (“*Ezell I*”); *see also Ezell v. City of Chicago*, 846 F.3d 888 (7th Cir. 2017) (“*Ezell II*”). “[T]he right to possess firearms for protection implies a corresponding right to . . . maintain proficiency in their use; the core right wouldn’t mean much without the training and practice that make it effective” or the ability to learn “to handle and use them.” *Ezell I*, 651 F.3d at 704. Using the same two-step inquiry the Fourth Circuit (and others) use, the Seventh Circuit found the zoning regulations at issue in *Ezell I* and *Ezell II* unconstitutional.

(citing *Ill. Ass 'n of Firearms Retailers v. City of Chicago*, 961 F.Supp.2d 928, 930 (N.D. Ill. 2014)), *cert. denied sub nom. Teixeira v. Alameda Cty., Cal.*, 138 S. Ct. 1988 (2018); *see also Marzzarella*, 614 F.3d at 92 n. 8 (noting that “commercial regulations on the sale of firearms do not fall outside the scope of the Second Amendment” under any reading of *Heller*). The Second Amendment must not only protect an individual’s right to purchase a handgun, *but also the right of the licensed firearm dealer to sell handguns*. Otherwise the right to keep and bear arms would, for all intents and purposes, be thwarted. If the Second Amendment did not offer such protection, the government could simply ban all firearms commerce without worry or judicial review. Thus, firearms-related businesses must have Second Amendment rights to engage in firearms commerce.

Yet, in many Second Amendment cases, the right of businesses like Atlantic Guns to conduct firearms commerce is often ignored.<sup>2</sup> And for those courts which have recognized or considered a right to sell, it is described as an ancillary or corollary right.<sup>3</sup> If the right is interpreted as *Heller* and *McDonald* instruct,

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<sup>2</sup> See *United States v. Chafin*, 423 Fed. Appx. 342, 344 (4th Cir. 2011) (finding no historical authority “suggests that, at the time of its ratification, the Second Amendment was understood to protect an individual’s right to sell a firearm.”)

<sup>3</sup> See, e.g., *Teixeira*, 873 F.3d at 677 (en banc) (concluding, “the Second Amendment does not confer a freestanding right, wholly detached from any customer’s ability to acquire firearms, upon a proprietor of a commercial establishment to sell firearms. Commerce in firearms is a necessary prerequisite to keeping and possessing arms for self-defense, but the right of gun users to acquire

however, then the right to engage in firearms commerce is a *separate freestanding right* equivalent to the individual right to keep and bear arms. As such, the right to sell is impermissibly burdened regardless of whether restrictions on firearms-related businesses also impact customer rights to keep and bear arms (though more often than not such restrictions likely will have a negative impact on the customer's rights as well).

From a constitutional standpoint, Atlantic Guns is considered a “person” under the Bill of Rights (*see, e.g., Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342–43 (2010) (finding a corporation is treated as a person for purposes of the First Amendment) and has a right separate and apart from its customers’ rights to keep and bear arms.<sup>4</sup> Atlantic Guns, like other firearm dealers, maintains an inventory of firearms and ammunition to operate its business. When restrictions like the HLR are enacted, it directly impacts Atlantic Guns’ ability to “keep” firearms and engage in lawful commerce in arms. For example, in *Citizens United*,

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firearms legally is not coextensive with the right of a particular proprietor to sell them.”); *Ezell I*, 651 F.3d at 708 (“the right to maintain proficiency in firearm use [is] an important corollary to the meaningful exercise of the core right to possess firearms for self-defense”); *Ezell II*, 846 F.3d at 893 (citing *Ezell I* for the established law that the right to “maintain proficiency in firearm use” is an “important corollary” to the right to possess firearms for self-defense).

<sup>4</sup> Furthermore, Atlantic Guns’ right to conduct firearms commerce can be viewed as an “individual” right because the federal firearms license required for Atlantic Guns to conduct firearms commerce is issued to an individual, who is a “responsible person” for the corporation.

the United States Supreme Court found that political speech did not lose First Amendment protection “simply because its source is a corporation.” *Id.* (quoting *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 784 (1978)). The high court reasoned, “The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the ‘discussion, debate, and the dissemination of information and ideas’ that the First Amendment seeks to foster.” *Id.* (quoting *Pacific Gas & Elec. Co. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1, 8 (1986) (plurality opinion) (quoting *Bellotti*, 435 U.S. at 783)).

Applying the same reasoning here, Atlantic Guns should have the same Second Amendment protection as its customers. By engaging in the lawful commerce in arms, Atlantic Guns contributes to the keeping and bearing of arms the Second Amendment protects much in the same way Citizens United contributed to constitutionally protected political speech.

Maryland’s attempt to limit the right to sell firearms via the FSA and HLR is more subtle than recent laws which attempt to restrict or ban firearms commerce via zoning ordinances. The HLR, by requiring individuals hold a certain license, acts as a total ban on the sale of handguns because a firearm dealer cannot sell to persons without one. This burdens Atlantic Guns’ and other Maryland firearm dealers’ right to sell firearms just as surely as an outright ban or restriction on

where a firearm dealer can locate its business. Such a licensing requirement and corresponding sales limitation would be unacceptable in the context of other constitutional rights not involving firearms. *See infra* at Section A.4.

**2. At a Minimum, the Right to Sell Firearms is Necessary to Effectuate the Individual Right to Keep and Bear Arms.**

As set forth in *Heller* and *McDonald*, the right to keep and bear arms is a fundamental – and enumerated – individual right applicable to state and local governments. *See Heller*, 554 U.S. 570; *see also McDonald*, 561 U.S. 742. Though the circuit courts are far from unanimous in explaining the exact scope of the “core” Second Amendment right, some have found it is limited to self-defense in the home. *See, e.g., Gould v. Morgan*, 907 F.3d 659, 671 (1st Cir. 2018). Without defining limits on the scope of the right, the Supreme Court in *Heller* found it was “most acute” in the home.<sup>5</sup> *Heller*, 554 U.S. at 635. Assuming *arguendo* the “core” Second Amendment right is so limited, there would still be a corollary right to sell firearms and ammunition because the “core” right cannot be

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<sup>5</sup> Of course, where one’s “hearth and home” is located – whether it be in a rural area far from police services or an apartment in a crime-ridden inner city neighborhood – and what firearm is best suited for one’s self-defense needs – including, for example, a revolver, semi-automatic pistol, shotgun or modern sporting rifle – are factors influencing the very personal decision to purchase a particular firearm and a suitable type of ammunition. Yet, where does one turn for guidance about these products and the ability to consummate such a purchase other than federally licensed dealers?

exercised without it. If one has a “core” Second Amendment right to acquire a revolver, pistol, shotgun or modern sporting rifle to protect one’s self, family and private property, how could that right possibly be exercised without the corollary right to sell such firearms to the citizenry? *See generally Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014)

Regardless of the exact scope of the “core” Second Amendment right, it is “fundamental to our scheme of ordered liberty” and should be afforded the same respect as rights guaranteed by the First, Fourth and Fifth Amendments. *See generally McDonald*, 561 U.S. at 767. Nevertheless, Second Amendment rights do *not* receive the same deferential treatment as challenges brought under other amendments. Courts generally read the Second Amendment more narrowly than other amendments and therefore treat it as a disfavored or second class right. *See generally Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Mem.) (Thomas, J., dissenting) (stating, “The Court’s decision to deny certiorari in this case reflects a distressing trend: the treatment of the Second Amendment as a disfavored right.”). “[T]he lower courts are resisting this Court’s decisions in *Heller* and *McDonald* and are failing to protect the Second Amendment to the same extent that they protect other constitutional rights.” *Silvester v. Becerra*, 138 S. Ct. 945, 950–51 (2018) (Mem.) (Thomas, J., dissenting) (noting the Supreme Court has not heard

argument in a Second Amendment case for nearly eight years at the time of his dissent).<sup>6</sup>

This disfavored or second class treatment is especially true of the right to sell firearms. This right is more easily ignored or side-stepped than the right to keep and bear arms because it is not specifically articulated in the amendment. However, certain unarticulated rights are implicit. The Second Amendment – like other amendments in the Bill of Rights – does not explicitly set forth all acts or behavior necessary to exercise enumerated rights.<sup>7</sup> This does not negate the right or lessen its import. For example, in *Jackson*, 746 F.3d at 967, an ordinance was enacted banning the sale of hollow point bullets within the county. The court concluded the sale of ammunition fell within the scope of protected Second Amendment rights. “[T]he right to possess firearms for protection implies a

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<sup>6</sup> As Justices Tallman and Bea observed in their respective dissents in *Teixeira*, those who engage in firearms commerce and their customers are part of a “politically unpopular” and highly regulated group. *Teixeira*, 873 F.3d at 694 (Tallman, J., dissenting), 697 (Bea, J., dissenting).

<sup>7</sup> “[T]he rights of association and of privacy, the right to be presumed innocent, and the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or Bill of Rights. Yet these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees . . . . [F]undamental 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).

corresponding right to obtain the bullets necessary to use them.” *Id.* If the purchase and sale of *ammunition* is within the Second Amendment’s protection, then the purchase and sale of *firearms* must logically be as well.

### **3. History Shows There is a Second Amendment Right to Sell Firearms.**

Historically, “[t]he right to keep and bear arms, necessarily involves the right to purchase them . . .” *Andrews v. State*, 50 Tenn. 165, 178 (1871). “[A]lthough that acquisition right is far from absolute,” the Second Amendment “right must also include the right to acquire a firearm . . .” *Ill. Ass ’n of Firearms Retailers*, 961 F. Supp. 2d at 930; *see also Jackson*, 746 F.3d at 967 (“the right to possess firearms for protection implies a corresponding right’ to obtain the bullets necessary to use them”) (citing *Ezell I*, 651 F.3d at 704). “As with purchasing ammunition and maintaining proficiency in firearms use, the core Second Amendment right to keep and bear arms for self-defense ‘wouldn’t mean much’ without the ability to acquire arms.” *Teixeira*, 873 F.3d at 677 (en banc) (citing *Ezell I*, 651 F.3d at 704). *Heller* recognized (quoting an 1868 treatise on constitutional law) that “to bear arms implies something more than the mere keeping; it implies the learning to handle and use them . . .” *Heller*, 554 U.S. at 617–18. This same reasoning applies to imply the right to purchase firearms and ammunition.

And just as there exists a right to acquire arms and the ammunition they require, there exists an equivalent and corresponding right to sell those items. “Throughout history and to this day the sale of arms is ancillary to the right to bear arms.” *Teixeira*, 873 F.3d at 693–94 (Tallman, J., dissenting) (footnote omitted). “As British subjects, colonial Americans believed that they shared equally in the enjoyment of [the English right to arms], and that the right necessarily extended to commerce in firearms.” *Teixeira v. Cty. of Alameda*, 822 F.3d 1047, 1054 (9th Cir. 2016), *rev’d en banc*, 873 F.3d 670 (9th Cir. 2017). The earlier panel opinion in *Teixeira* went on to explain the right to sell firearms from a historical perspective:

As British subjects, colonial Americans believed that they shared equally in the enjoyment of this guarantee, and that the right necessarily extended to commerce in firearms. Colonial law reflected such an understanding. For instance, in Virginia, all persons had “liberty to sell armes and ammunition to any of his majesties loyall subjects inhabiting this colony.” Laws of Va., Feb., 1676–77, Va. Stat. at Large, 2 Hening 403. It came as a shock, therefore, when the Crown sought to embargo all imports of firearms and ammunition into the colonies. 5 Acts Privy Council 401, *reprinted in Connecticut Courant*, Dec. 19, 1774, at 3. The General Committee of South Carolina declared in response that “by the late prohibition of exporting arms and ammunition from England, it too clearly appears a design of disarming the people of America, in order the more speedily to dragoon and enslave them.” 1 John Drayton, *Memoirs of the American Revolution As Relating to the State of South-Carolina* 166 (1821) (internal quotation marks omitted). Such suspicions were not unwarranted. As war raged in 1777, Colonial Undersecretary William Knox recommended that the Americans, once conquered, be subdued, in part, by prohibiting their means of producing arms: “the Arms of all the People should be taken away ... nor should any Foundery or

manufactury of Arms, Gunpowder, or Warlike Stores, be ever suffered in America, nor should any Gunpowder, Lead, Arms or Ordnance be imported into it without Licence." Leland J. Bellot ed., *William Knox Asks What is Fit to Be Done with America?*, in 1 *Sources of American Independence* 140, 176 (Howard H. Peckham ed., 1978).

In ratifying the Second Amendment, the States sought to codify the English right to keep and to bear arms. *See Heller*, 554 U.S. at 599, 128 S.Ct. 2783. The historical record indicates that Americans continued to believe that such right included the freedom to purchase and to sell weapons. In 1793, Thomas Jefferson noted that "[o]ur citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them.' Thomas Jefferson, 3 *Writings* 558 (H.A. Washington ed., 1853). Indeed, as one commentator of the early Republic pondered, 'What law forbids the veriest pauper, if he can raise a sum sufficient for the purchase of it, from mounting his Gun on his Chimney Piece ...?' *Heller*, 554 U.S. at 583 n. 7 (quoting *Some Considerations on the Game Laws* 54 (1796)).

*Teixeira*, 822 F.3d at 1054–55.

When considering the historical context of the Second Amendment in the late 18th Century, it is important to realize that "Federalists and anti-Federalists alike had linked the preservation of liberty to an armed populace." Robert E. Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125, 136 (1986). As Professor Shalhope explains, during this time period the drafters of the Bill of Rights "firmly believed in two distinct principles: (1) individuals had the right to possess arms to defend themselves and their property;

and (2) states retained the right to maintain militias composed of these individually-armed citizens.” *Id.* at 133. Indeed, there is little quarrel with the notion that arms were ubiquitous in late 18th Century America – whether for self-defense, defense of personal property or hunting to feed one’s family. How, then, did the inhabitants of agrarian America at this time acquire their arms? It was through the many gunsmiths and merchants located throughout the colonies who sold them, for at this time there were but a few companies devoted to the large-scale manufacture of arms.

In the late 18th Century, when 95% of the population of colonial America lived on farms, available firearms largely consisted of “flintlock fowlers” – long guns which served to put food on the table and to protect one’s home and family from marauding Indians and/or enemy soldiers. *See* Tom Grinslade, *Eighteenth Century American Fowlers – the First Guns Made in America*, AM. SOC’Y OF ARMS COLLECTORS BULL. 89:1-9 (Spring 2004). Pockets of firearm manufacturing – gun making shops or small factories – developed in specific areas such as New England, the Hudson Valley and Kentucky, where gunsmiths settled and began producing “fowlers” with distinctive features and characteristics. *Id.*

Unlike modern times, gunsmiths and purveyors of firearms in the late 1700’s were free to engage in commerce in arms with other colonists without restriction. In his extensive historical survey of American firearm laws dating back to colonial

times, which purportedly included a review of over 1,000 laws falling into 20 different categories, such as “brandishing laws,” “gun carry restrictions,” “firing local restrictions,” and “registration and taxation,” Professor Richard Spitzer does not cite a single “firearm sales” law which regulated, barred or licensed sales in the 18th Century (or the 19th Century for that matter). Robert J. Spitzer, *Gun History and Second Amendment Rights*, 80 LAW & CONTEMP. PROBS. 55, 75 (2017). The earliest such law cited was a Georgia law from 1902. *Id.* Thus, the ubiquitous nature of firearms and unregulated commerce in arms in colonial America supports the view that the right to sell firearms – whether freestanding or ancillary – is implicit in the Second Amendment.

#### **4. Other Constitutionally Protected Rights Include Protection for Businesses Providing Related Services.**

As stated above, state and local lawmakers, supported by sympathetic courts, often treat Second Amendment rights, including and especially the right to sell firearms, less favorably than other constitutional rights. But “[t]he Constitution does not rank certain rights above others,” and courts “should [not] impose such a hierarchy by selectively enforcing its preferred rights.” *Peruta*, 137 S. Ct. at 1999 (Thomas, J., dissenting); *see also Jackson v. City & Cty. of San Francisco*, 135 S. Ct. 2799, 2799–2800 (2015) (Mem.) (Thomas, J., dissenting) (“Second Amendment rights are no less protected by our Constitution than other rights enumerated in that document”). No doubt, this kind of substandard treatment

would not be tolerated if rights under the Second Amendment were protected as forcefully as other constitutional rights; indeed, the right to sell firearms (or engage in other firearms related business) would not even be questioned.

In addressing other constitutional challenges, courts frequently strike down restrictions on the sale of goods or the provision of services necessary to exercise those rights. In the First Amendment context, for example, “[l]iberty of circulating is as essential to [freedom of expression] as liberty of publishing; indeed, without the circulation, the publication would be of little value.”” *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 768 (1988) (citing *Ex parte Jackson*, 96 U.S. 727, 733 (1878)); *see also Lovell v. City of Griffin, Ga.*, 303 U.S. 444, 452 (1938). In *Carey v. Population Services International*, 431 U.S. 678, 684–88 (1977), the Supreme Court struck down a New York statute forbidding distribution of non-prescription contraceptives through anyone but a licensed pharmacist as unconstitutional, noting that a “total prohibition against sale of contraceptives” could have “an even more devastating effect upon” the right to choose to beget a child than a direct ban on contraceptives itself would.” The Fifth Circuit struck down a Texas statute prohibiting the promotion or sale of sexual devices because “restricting the ability to purchase an item is tantamount to restricting that item’s use.” *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 740, 743 (5th Cir. 2008). An Eighth Circuit case found an ordinance restricting the sale

of contraceptives and prophylactics was an unconstitutional burden on the right to contraception choice. *See Postscript Enters., Inc. v. Whaley*, 658 F.2d 1249, 1252–53 (8th Cir. 1981)

Despite constitutional protections being provided for services related to an enumerated right, the right to sell firearms has somehow come to receive *less* protection – whether because courts find the conduct is not burdened, is subject to a lesser level of scrutiny, or is not even worthy of the two-part analysis under *Chester* because the alleged injury somehow falls short of providing standing. But as with other protected rights, the Second Amendment right to bear and keep arms becomes meaningless if governments can simply prohibit a citizen/business from exercising that right by preventing the sale of necessary goods or services. Thus, courts have had no trouble finding that other fundamental rights carry with them a coextensive right to engage in such transactions as are necessary to enjoy or exercise such a right. The Second Amendment, including the unenumerated right to sell firearms, should receive similar treatment.

**B. A Form of Heightened Scrutiny Must Be Applied to Evaluate the Handgun License Requirement.**

“Unless the conduct at issue is not protected by the Second Amendment at all, the Government bears the burden of justifying the constitutional validity of the law.” *Chester*, 228 F.3d at 680. There can be no doubt the HLR imposes a burden on the sale of firearms (i.e. conduct falling within the scope of the Second

Amendment's guarantee). Consequently, some form of heightened scrutiny will apply in evaluating the constitutionality of the HLR – whether that review takes place at the summary judgment level or at trial. *Id.* at 680. Rational basis is insufficient. *Heller*, 554 U.S. at 628, n. 27 (“If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.”).

In deciding on the appropriate level of scrutiny, the severity of the burden the HLR places on Second Amendment rights is considered. A severe burden implicating the “core” of the Second Amendment right will be subject to strict scrutiny. *Chester*, 628 F.3d at 682. If the implicated right is not a “core” Second Amendment right, or if the challenged law does not place a substantial burden on exercise of the Second Amendment right, intermediate scrutiny is appropriate. *Id.* at 682–83.

Here, the District Court did not engage in the two-part analysis. However, if this Court reverses the District Court’s grant of summary judgement to Defendants-Appellees, NSSF contends the court is required to evaluate the HLR

under the strict scrutiny standard because the right to sell – whether an independent or corollary right – is a “core” Second Amendment right.<sup>8</sup>

## **CONCLUSION**

Implicit in the right to keep and bear arms is the right to sell arms – otherwise there is no effective way to exercise enumerated Second Amendment rights. While lower courts have tended to treat these rights as “second class rights,” they are fundamental rights – enumerated or not – worthy of the same deference as others in the Bill of Rights.

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<sup>8</sup> To satisfy strict scrutiny, the government must prove that the HLR is “narrowly tailored to achieve a compelling governmental interest.” *See Abrams v. Johnson*, 521 U.S. 74, 82 (1997). Strict scrutiny is thereby “the most demanding test known to constitutional law.” *See City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

Because Maryland's HLR effectively bans the sale of handguns to individuals by requiring individuals obtain special licensing to purchase a handgun, the HLR severely burdens the conduct of firearm dealers like Atlantic Guns and is subject to strict scrutiny.

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**UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**  
**Effective 12/01/2016**

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Party Name The National Shooting Sports Foundation, Inc.

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I HEREBY CERTIFY that on this 1st day of July, 2019, the Brief of Amicus Curiae The National Shooting Sports Foundation, Inc. in Support of Plaintiffs-Appellants Maryland Shall Issue, Inc., et al. Filed With Consent of All Parties was served via electronic delivery to all parties' counsel via the Court's appellate CM/ECF system which will forward copies to counsel of record.

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