In the United States District Court
for the
District of Kansas

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| **United States of America,**<br><br>Plaintiff,<br><br>v.<br><br>**Sir Alvis Jai O'Neal,**<br><br>Defendant. | Case No. 21-cr-40046-TC<br><br>Brief of *Amicus Curiae* Kansas Justice Institute; Certificate of Service. |

**Brief of *Amicus Curiae* Kansas Justice Institute**

Kansas Justice Institute submits the following *amicus* brief.

## 1. Identity and Interest of *Amicus Curiae*

Kansas Justice Institute (KJI) is a nonprofit, *pro bono*, public-interest litigation firm committed to upholding constitutional freedoms, protecting individual liberty, and defending against government overreach and abuse.[1] KJI directly litigates,[2] litigates by letterhead,[3] files *amicus* briefs,[4] and comments on matters of public concern.[5]

KJI's particular interest in *this* case is four-fold. First, it raises an important question involving a fundamental, natural, and individual right—one that has historically been disfavored to

[1] KJI is a Kansas limited liability company whose sole member is Kansas Policy Institute, a nonprofit, non-partisan public policy organization—a think tank—founded in 1996. Neither entity is publicly owned or traded.

[2] *Bunner, et al., v. Beam*, 2019-cv-000785 (Shawnee County); *Modi, et al., v. Kansas State Board of Cosmetology, et al.*, 2020-cv-000595 (Shawnee County); *Taylor, et al., v. Allen, M.D., et al*, 2:20-cv-02238 (D. Kan); *Ricky Dean's, Inc., d/b/a The Sandbar, et al., v. Marcellino, M.D., et al.*, 5:20-cv-04063 (D. Kan).

[3] *See, e.g., Letter from KJI to Osage County Health Department*, (April 21, 2020) (accessible at https://kansasjusticeinstitute.org/first-amendment-sowers/); *Letter from KJI to Clay County Counselor* (July 10, 2020) (accessible at https://kansasjusticeinstitute.org/clay-county-parks-dept/); *Letter from KJI to Riley County Counselor* (Aug. 5, 2020) (accessible at https://kansasjusticeinstitute.org/riley-county-health-dept/); *Letter from KJI to Dickinson County Counselor* (Jan. 21, 2021) (accessible at https://kansasjusticeinstitute.org/religious-liberty/)

[4] *Salgado v. United States*, 140 S. Ct. 2640 (2020), review denied; *Butler v. Shawnee Mission Sch. Dist. Bd. of Educ.*, 502 P.3d 89 (Kan. 2022); *State v. Hayes*, 459 P.3d 213 (Kan. App. 2020), review denied (Sept. 29, 2020); *State v. 1959 Chevrolet Corvette, et al.*, 2017-cv-002347 (Johnson County).

[5] Kansas' Unjust Forfeiture Law Amounts to Policing for Profit, KANSAS CITY STAR (May 21, 2019); Asset Forfeiture Law Needs Reform in Kansas, WICHITA EAGLE (July 6, 2019); Constitution can handle virus challenges, TOPEKA CAPITAL-JOURNAL (March 31, 2020); Constitutional rights more important than ever, TOPEKA CAPITAL-JOURNAL (April 25, 2020).

boot. This case presents an opportunity to begin correcting course. Second, *amicus* believes that restrictions on fundamental and natural rights should be grounded in constitutional text, history, and tradition—not deference to legislative bodies or interest-balancing. Third, medical marijuana programs exist in thirty-seven states, the District of Columbia, and four territories.[6] Kansas has considered enacting its own program, and if it does, this Court's opinion could have long-lasting reverberations for state-law-abiding Kansas firearm owners. After all, under 18 U.S.C. § 922(g)(3), the federal government can prosecute otherwise lawful gun owners who legally use medical marijuana consistent with their state-issued, state-approved, medical marijuana licenses. Fourth, this Court's opinion could inform state court analyses regarding Kansas' Second Amendment analogue, Kansas Constitution Bill of Rights Section 4. *E.g.*, *State v. McKinney*, 481 P.3d 806, 816 (Kan. App. 2021), review denied (June 9, 2021) (Section 4 "should be interpreted as coextensive to the Second Amendment.").

**Analysis**

**2. The United States Supreme Court's Text, History, and Tradition Test.**

The Framers guaranteed individuals the right to keep and bear arms. U.S. Const. amend. II. For its part though, Congress criminalizes the otherwise lawful possession of a firearm by a "user" of marijuana. *See* 18 U.S.C. § 922(g)(3). The issue presented here is *how best* to decide whether the latter violates the former.

Sure enough, most circuit courts deploy a two-step interest-balancing test when analyzing Second Amendment claims, including ours, the Tenth Circuit. *See, e.g., U.S. v. Reese*, 627 F.3d 792 (10th Cir. 2010). But that approach is wrong. Interest-balancing in the Second Amendment context is usually little more than a "two-step rubber-stamping process" that asks, "whether the right is a good idea, places the burden upon the challenger, and affords absolute deference to legislative judgment." Alan Gura, *The Second Amendment as a Normal Right*, 127 Harv. L. Rev. 223, 225 (2014); *see also*, *McDougall v. County of Ventura*, 23 F.4th 1095, 1119 (9th Cir. 2022), reh'g en banc

[6] National Conference of State Legislatures, available here: https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx

granted, opinion vacated, 26 F.4th 1016 (9th Cir. 2022) (VanDyke, J., concurring) (describing interest-balancing framework as "exceptionally malleable and essentially equates to rational basis review.").

Second Amendment interest-balancing "raises numerous concerns," not the least of which is that it "appears to be entirely made up." *Rogers v. Grewal*, 140 S. Ct. 1865, 1867 (2020) (Thomas, J., dissenting from denial of certiorari).

The *results* of interest-balancing are unsurprising. Nearly every Second Amendment claim fails and nearly every limitation on the right to keep and bear arms prevails. There is a better way though: faithfully applying the United States Supreme Court's text, history, and tradition test outlined in *D.C. v. Heller*, 554 U.S. 570 (2008) and re-affirmed in *McDonald v. City of Chicago, Ill.,* 561 U.S. 742 (2010) (plurality opinion).

*Heller* was, of course, the Supreme Court's "first in-depth examination of the Second Amendment," 554 U.S. at 635, and provides lower courts with "*the* roadmap for Second Amendment claims," *Mai v. U.S.*, 974 F.3d 1082, 1086 (9th Cir. 2020) (Bumatay, J., dissenting from denial of rehearing en banc) (emphasis added).

At its core, the *Heller* approach asks whether the challenged, modern-day limitation on the right to keep and bear arms comports with historical and traditional limitations. If not, the challenged limitation is unconstitutional. There is no interest-balancing involved at all.

Then-Judge Kavanaugh applied the Supreme Court's test in *Heller v. D.C.,* 670 F.3d 1244 (D.C. Cir. 2011) (*Heller II*) (Kavanaugh, J., dissenting), concluding "*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny." *Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting). Then-Judge Barrett did much the same in *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting).

Other jurists favor the Supreme Court's text, history, and tradition approach too. *E.g.*, *Tyler v. Hillsdale County Sheriff's Dept.*, 837 F.3d 678, 702 (6th Cir. 2016) (Batchelder, J., concurring in part) (two-step test "fails to give adequate attention to the Second Amendment's

original public meaning[.]"); *Assn. of New Jersey Rifle and Pistol Clubs Inc. v. Atty. Gen. New Jersey*, 974 F.3d 237, 262 (3d Cir. 2020) (en banc) (Matey, J., dissenting) ("serious doubts that" two-step approach "can be squared with *Heller*."); *Mance v. Sessions*, 896 F.3d 390, 394 (5th Cir. 2018) (Elrod, J., dissenting from denial of rehearing en banc) ("Simply put, unless the Supreme Court instructs us otherwise, we should apply a test rooted in the Second Amendment's text and history—as required under *Heller* and *McDonald*—rather than a balancing test like strict or intermediate scrutiny."); *Mai*, 974 F.3d at 1084 (Bumatay, J., dissenting from denial of rehearing en banc); *State v. Christen*, 958 N.W.2d 746, 767 (Wis. 2021), cert. denied, 142 S. Ct. 1131 (2022) (Bradley, J., dissenting) (describing interest-balancing test as "flouting controlling United States Supreme Court precedent"); *State v. Weber*, 168 N.E.3d 468, 497-98 (Ohio 2020), cert. denied, 142 S. Ct. 91 (2021) (Fischer, J., dissenting).

For good reasons. "[O]riginalism in the application of the Constitution" helps "ensure that judges honor the law as adopted by the people's representatives, and offers neutral (nonpolitical, nonpersonal) principles for judges to follow to ascertain its meaning." *See* Neil Gorsuch, *A Republic, If You Can Keep It* 10 (2019) (describing his judicial philosophy); Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 Yale L. J. 852, 930 (2013) ("few rights seem *less* conducive to levels of scrutiny than the right to keep and bear arms.").

The Second Amendment is neither a "second-class right," *McDonald*, 561 U.S. at 780, "nor second rate, nor second tier," *Mance*, 896 F.3d at 396 (Willett, J., dissenting from denial of rehearing en banc), but courts continue treating it that way by applying a malleable, deferential, non-*Heller*-, non-*McDonald*-approved interest-balancing test. That is wrong. The Supreme Court "explicitly rejected the invitation to evaluate Second Amendment challenges under an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other." *Rogers*, 140 S. Ct. at 1867 (Thomas, J., dissenting from denial of certiorari) (cleaned up).

**3. The Supreme Court's Originalist-Textualist Approach to Second Amendment Claims Makes Even More Sense Here Given the Ever-Changing, Often-Contradictory Opinions Regarding Marijuana.**

The right to keep and bear arms is an individual, natural, and fundamental right, deeply rooted in our Nation's history and tradition. *Heller,* 554 U.S. at 595; *McDonald*, 561 U.S. at 778. Protections for fundamental rights do not usually wax or wane based upon polls, statistics, policy preferences or legislative deference—and there is no good reason to start down that path here by engaging in the very type of interest-balancing explicitly rejected in *Heller* and *McDonald*.

Sure enough, this Court is called upon to decide a question involving two controversial and intersecting subjects: firearms and marijuana. But the question is *not* one of policy, or politics, or statistics. If *that* were the metric, it would be excruciatingly difficult to decide just *what should be done*. Take for just one instance, the public's views on marijuana legalization. In 1969, 12% of Americans thought the use of marijuana should be legal.[7] In 2021, 68% favored legalization.[8] Would the fundamental right to keep and bear arms afford *less* protection for marijuana users in 1969 than in 2021? More so in 2021? Of course not.

What about the ever-changing legal landscape surrounding marijuana laws—does it change the Second Amendment calculus? After all, in *Standing Akimbo, LLC v. U.S.*, Justice Thomas described the Federal Government's marijuana approach as a "half-in, half-out regime that simultaneously tolerates and forbids the local use of marijuana. This contradictory and unstable state of affairs strains basic principles of federalism and conceals traps for the unwary." 141 S. Ct. 2236, 2236-37 (2021), reh'g denied, 142 S. Ct. 919 (2021) (Thomas, J., respecting denial of certiorari). Should the United States' modern day "half-in, half-out" approach inform the constitutional analysis?

And what to do with the purported scientific literature. Does a fundamental right become less so because of studies undertaken from one year to the next? The government seemingly thinks so: "ample academic research confirms the connection between drug use and violent crime."

[7] https://news.gallup.com/poll/356939/support-legal-marijuana-holds-record-high.aspx
[8] *Id.*

*Response to Motion to Dismiss* (Doc. 19, page 15) (internal citations and quotations omitted); that "[i]ndividuals who are chronically addicted to marijuana or other controlled substances that are likely to have a substantial influence on their faculties are, without question, presumptively risky people" (*id.*, page 13) (cleaned up); and that "it is widely recognized that a drug addict is unfit to possess firearms" (*id.*).

But literature and studies oftentimes express competing and credible opinions on the other side of the ledger. *See, e.g.,* Richard J. Bonnie & Charles H. Whitebread, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 Va. L. Rev. 971, 1105 (1970) ("no evidence whatsoever that the use of marijuana has a direct relationship to the commission of crime."); *id.* at 1010 (marijuana legislation was "essentially [a] kneejerk response[] uninformed by scientific study or public debate and colored instead by racial bias and sensationalistic myths."); National Commission on Marihuana and Drug Abuse, *Marihuana: a Signal of Misunderstanding* 76 (1972) ("neither informed current professional opinion nor empirical research, ranging from the 1930's to the present, has produced systematic evidence to support the thesis that marihuana use, by itself, either invariably or generally leads to or causes crime, including acts of violence"); Joshua Taylor, *Is Congress's Denial of the Second Amendment Right to Medicinal Marijuana Cardholders Substantially Related to Preventing Gun Violence?*, 45 T. Marshall L. Rev. 75, 91 (2020) (concluding "[r]esearch conducted on marijuana indicated it does not lead to violence."); Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1433, 1465-1467 (2009) (discussing the difficulty in obtaining reliable scientific data that proposed gun laws reduce danger).

So, what to do? The answer should be—of course—to apply the *Heller-McDonald* text, history, and tradition test—not to engage in the very type of interest-balancing explicitly rejected by the United States Supreme Court. Opinions and policies change but constitutional principles do not. The Second Amendment codified a pre-existing right to keep and bear arms and there is no good reason to tether one's constitutional analysis to that which could—and often does—change from one year to the next.

The Supreme Court's text, history, and tradition test reduces judicial subjectivity, *see Heller*, 554 U.S. at 634, promotes clarity and consistency, and avoids applying "vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor." *McDonald*, 561 U.S. at 804 (Scalia, J., concurring).

**4. Conclusion**

The Second Amendment preserves and protects a fundamental and natural right, individually held, to keep and bear arms. Sure enough, Congress *can* limit firearms possession for *some*—but those restrictions are *only* constitutional if they comport with history and tradition—not legislative deference, not deference to law enforcement interests, and certainly not deference to a multi-tiered sliding-scale used in non-Second Amendment cases that assesses competing policy concerns.

Answering the question presented at the outset—*how best* to decide whether 18 U.S.C. § 922(g)(3) violates the Second Amendment—is simple and straightforward: courts should take the originalist approach and follow *Heller's* path.

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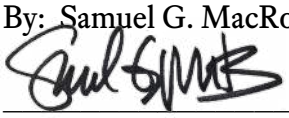
Kansas Justice Institute
By: Samuel G. MacRoberts, 22781



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