MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. HAN-19-245

STATE OF MAINE,
Plaintiff/Appellee,

vs.

RICHARD TONINI,
Defendant/Appellant.

On Appeal from Judgment and Commitment of Hancock County
Unified Criminal Docket Case No. HANCD-CR-2018-1171

BRIEF OF *AMICI CURIAE* FIREARMS POLICY COALITION AND FIREARMS POLICY FOUNDATION IN SUPPORT OF APPELLANT

Robert J. Ruffner (ME Bar No. 8855)
Ruffner-Greenbaum
415 Congress Street, STE 202
Portland, ME 04101
P: (207) 221-5736
E: rjr@mainecriminaldefense.com

Adam Kraut
FIREARMS POLICY COALITION
1215 K Street, 17th Floor
Sacramento, CA 95814
P: (916) 476-2342
E: akr@fpchq.org
(pro hac vice pending)

December 2, 2019

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus curiae Firearms Policy Coalition, Inc. (FPC) is a nonprofit membership organization that defends constitutional rights—including the right to keep and bear arms—and promotes individual liberty throughout the United States.

Amicus curiae Firearms Policy Foundation (FPF) is a nonprofit organization with members throughout the United States. FPF serves its members and the public through programs including research, education, and legal efforts.

Amici are interested in the outcome of this case because the issue presented is germane to litigation and research in which *amici* are currently engaged. Additionally, the Court's decision will directly affect the constitutional rights of the State's citizenry and likely influence the public policy and legislation of several other states currently considering de-criminalization of marijuana. This brief seeks to aid the Court by addressing the negative policy implications and conflicts of law that would result from affirmation of the Superior Court's decision and the analysis under the United States Supreme Court's *Heller* and *McDonald* decisions.[1]

[1] *Amici* file this brief pursuant to Maine Rule of Appellate Procedure 7A(e)(1)(A) by way of the Law Court's invitation to brief the matter.

INTRODUCTION

As evidenced by both the existence and advancement of the Marijuana Opportunity Reinvestment and Expungement Act of 2019,[2] America's opinion on marijuana is changing. Underscoring this fact, according to a 2019 poll, two-thirds of Americans surveyed indicated that they believe marijuana should be legalized.[3] And although Maine is one of the most advanced states when it comes to decriminalization of marijuana,[4] it is not alone: as of 2019, eleven states and the District of Columbia have legalized recreational marijuana, and thirty-three states have legalized marijuana for medicinal use.[5]

As Maine's Constitution eloquently affirms, "All people are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness." Maine Const., Art. I, Sec. 1. And "[e]very citizen has a right to keep and bear arms and this right shall never be questioned." Maine Const., Art. I, Sec. 16. Moreover, the Second Amendment to the United States Constitution, consistent with multiple state

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[2] H.R. 3884, 116th Cong. (2019-2020), online at https://www.congress.gov/bill/116th-congress/house-bill/3884.

[3] Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization,* PEW FACT-TANK (Nov. 14, 2019), https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/ (last visited Dec. 1, 2019).

[4] *See* Appellee's Brief, at 3 (where the Appellee concedes that marijuana is a "state sanctioned drug.").

[5] Skye Gould and Jeremy Berke, *Illinois Just Became the First State to Legalize Marijuana Sales Through the Legislature — Here are all the States Where Marijuana is Legal*, BUSINESS INSIDER (Jun. 25, 2019), https://www.businessinsider.com/legal-marijuana-states-2018-1.

declarations and constitutions,[6] enshrines a pre-existing right against government infringement in response to the Founders' concerns about governments imposing policy preferences over liberty interests and depriving non-violent individuals of their natural rights.

But the Superior Court's interpretation and application of 15 M.R.S.A. § 393(1)(G) results in the total destruction of Appellant's right to keep and bear arms for lawful purposes, including self-defense in the home, and failed to demonstrate that the Appellant posed a threat to the public (thus placing him into a historically understood category of disarmed persons). As a result of the Superior Court's decision, Mainers must make a choice between exercising their fundamental right to keep and bear arms, or surrendering their rights in order to peacefully and lawfully pursue medical care. Upholding the Superior Court's decision would deprive Appellant from exercising fundamental rights under the Maine and federal constitutions. The decision below should be reversed.

[6] *See, e.g.,* Penn. Const., Art. 13 (Sep. 28, 1776) (That the people have a right to bear arms for the defence of themselves and the state[.]); Virginia Declaration of Rights, § 13 (June 12, 1776) (That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state[.]); Vermont Const., Ch. 1, § XVIII (Jul. 8, 1777) (That the people have a right to bear arms for the defence of the themselves and the State[.]); Massachusetts Declaration of Rights, Ch. 1, Art. XVII (Jun. 15, 1780) ("The people have a right to keep and to bear arms for the common defence.").

STATEMENT OF PROCEDURAL HISTORY AND FACTS

Amici adopt the procedural history and material facts as set forth by Appellant in his brief, pp. 1–4.

QUESTIONS PRESENTED

1. Can a person who possesses marijuana be determined to be "an unlawful user of or . . . addicted to any controlled substance" within the meaning of the firearms possession prohibition in 15 M.R.S. § 393(1)(G)?

2. What effect, if any, does an acquittal on a charge of furnishing a scheduled drug have on the State's ability to establish that the defendant was prohibited from possessing a firearm pursuant to section 393(1)(G)?

3. What is the test for evaluating the constitutionality of section 393 in light of the United States Supreme Court's decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010)?

SUMMARY OF ARGUMENT

To convict a defendant under 15 M.R.S.A. § 393(1)(G), the State must satisfy two elements. First, the State must show that the defendant is either an unlawful user of or addicted to a controlled substance while in possession of a firearm. Second, the State must then show that as a result of being an unlawful user of, or addicted to, a controlled substance, the defendant is prohibited from possessing a firearm under 18 U.S.C. § 922(g)(3). The State mistakenly concludes that it has satisfied both elements with the inference that (1) the Appellant possessed marijuana at the time of the arrest and therefore must be an unlawful user, and (2) the Appellant was

prohibited under 18 U.S.C. § 922(g)(3). *Amici* take the position that the State failed to provide any evidence establishing any (let alone a sufficient) nexus between controlled substance use or addiction and the Appellant's possession of a firearm.

Regarding the second question presented, *amici* take the position that acquittal on the charge of furnishing has no bearing on the analysis of 18 U.S.C. § 922(g)(3) or 15 M.R.S.A. § 393(1)(G) because possession of marijuana for the purpose of furnishing neither indicates intent to unlawfully use marijuana, nor that an individual is addicted to a controlled substance within the context of § 922(g)(3). Thus, *amici* do not address this question in their argument.

As to the Court's third question, it is *amici*'s view that the appropriate method for evaluating laws that restrict the right to keep and bear arms is a categorial analysis. And in applying the Supreme Court's required categorical analysis, it is clear that the total destruction of the right at issue in this case is unconstitutional.

ARGUMENT

1. Federal precedent indicates that persons similarly situated to the Appellant cannot be determined to be "unlawful users of or . . . addicted to any controlled substance" within the meaning of 18 U.S.C. § 922(g)(3).

15 M.R.S.A. § 393(1)(G) prohibits the possession, ownership, or control of a firearm by any person who is "an unlawful user of or is addicted to any controlled substance and as a result is prohibited from possession of a firearm under 18 United States Code, Section 922(g)(3)." The statute is bifurcated; the issue at hand is

whether the Appellant is either "an unlawful user of" marijuana or "is addicted to" marijuana, and is also in violation of 18 U.S.C. § 922(g)(3). If one of those conditions is not met, then the individual cannot be prohibited under Maine's statute.

15 M.R.S.A. § 393 fails to provide a definition of "controlled substance"; this begs the question of whether the Maine Legislature was referring to "controlled substances" as defined by state or federal law.[7] Regardless, *arguendo*, if this Court were to determine that marijuana is a "controlled substance" for the purpose of this analysis, some federal courts have already construed what constitutes an "unlawful user of" in the context of 18 U.S.C. § 923(g)(3). [8] Additionally, those courts, in interpreting Section 922(g)(3), held that the phrases "unlawful user of" and "is addicted to" are disjunctive.

In 2012, the First Circuit defined who a "prohibited person" is under Section 922(g)(3) while also defining what constitutes an "unlawful user" of a controlled substance:

> The [federal Sentencing] Guidelines define "prohibited person" as any person described in 18 U.S.C. § 922(g) or (n). *Id.* § 2K2.1 cmt. n. 3. Section 922(g)(3), applicable here, bars firearm possession by a person "who is an unlawful user of ... any controlled substance." 18 U.S.C. § 922(g)(3). We have held that the term "unlawful user" in section

[7] The statute's ambiguity here should trigger the rule of lenity. In the light most favorable to the Appellant, Maine's classification of controlled substances would control rather than the federal classification.

[8] *See, United States v. Bennett*, 329 F.3d 769, 776 (10th Cir. 2003) ("The words 'unlawful user of or addicted to any controlled substance' are written in the disjunctive, implying each has a separate meaning."). *See also*, *Sobolewski v. U.S.*, 649 Fed. Appx. 706, 710 (11th Cir. 2016) ("[T]his Court has recognized that the disjunctive form of § 922(g)(3) prohibits either unlawful users of controlled substances or addicts from possessing firearms.").

> 922(g)(3) "requires a 'temporal nexus between the gun possession and regular drug use.' " *United States v. Marceau,* 554 F.3d 24, 30 (1st Cir. 2009) (citing *United States v. Edwards,* 540 F.3d 1156, 1162 (10th Cir. 2008)). Thus, "an 'unlawful user' is one who engages in '[(1)] regular use [(2)] over a long period of time [(3)] proximate to or contemporaneous with the possession of the firearm.' " *Id.* (citing *United States v. McCowan,* 469 F.3d 386, 392 n. 4 (5th Cir. 2006)).

United States v. Caparotta, 676 F.3d 213, 216 (1st Cir. 2012).[9] In the instant case, the record shows no temporal nexus between the Appellant's firearm possession and any regular drug use. Thus, under any appropriate analysis, the Appellant is not an individual who is an "unlawful user"; as noted in his brief, there is nothing in the record to support that he was intoxicated at the time he was pulled over, or even that he had recently used marijuana.[10] The Appellee contends that "[o]ne need not reach the question raised by the appellant as to whether one use or multiple uses are required in order to violate the law. *Any* use of marijuana pursuant to federal law, just like *any* felony, makes gun possession unlawful."[11] Based on the record, there

[9] *See also United States v. Navarez*, 251 F.3d 28, 30 (2d. Cir. 2001) ("In order to qualify as a prohibited person, a defendant's unlawful use of a controlled substance must be ongoing and contemporaneous with the commission of the offense."); *United States v. Augustin*, 376 F.3d 135, 138 (3rd Cir. 2004) ("[C]ourts generally agree the law runs the risk of being unconstitutionally vague without a judicially-created temporal nexus between the gun possession and regular drug use.") quoting *United States v. Turnbull,* 349 F.3d 558, 561 (8th Cir.2003); *United States v. Herrera*, 313 F.3d 882, 885 (5th Cir. 2002) ("[T]he Government conceded [. . .] that, for a defendant to be an 'unlawful user' for § 922(g)(3) purposes, his 'drug use would have to be with regularity and over an extended period of time'."). In light of *Rehaif v. United States*, 139 S. Ct. 2191 (2019), conflicting circuit courts' holdings are in question (*see, e.g.*, *Cook v. United States*, 914 F.3d 545 (7th Cir. 2019), remanded by the Supreme Court for further consideration).

[10] Appellant's Brief at 16 (representing that "there was no direct evidence that defendant was using marijuana at the time, nor was there evidence of recent use. The officer testified that he did not smell marijuana smoke and that defendant did not appear intoxicated. The officer did not find any smoking paraphernalia is the vehicle.").

[11] Appellee's Brief at 4.

is nothing to indicate that the Appellant actually *used* marijuana. And federal courts have held that possession of marijuana is not the same as unlawful use of marijuana.

Nor is the Appellant an "addict." Per 21 U.S.C. § 802(1), an addict is "any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction." To *amici*'s knowledge, the record lacks any reference to or proof of the Appellant's habitual use of any narcotic that endangers the public or his inability to exercise self-control.

Even if the State did demonstrate that the Appellant was an "unlawful user" of marijuana, the United State Supreme Court's recent interpretation of § 924(a)(2) in *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019) would require the State to also demonstrate that the Appellant was a prohibited person within the meaning of 18 USC § 922(g). Based upon the record (including statements made by the Appellant to the arresting officer), the State would have a difficult, if not impossible, time making that case. Moreover, following *Rehaif*, the Appellant would be required to have knowledge that he was in violation of § 922(g)—a standard the State has not satisfied.

2. The appropriate test for assessing the Section 393's constitutionality is an examination of the constitutional text as informed by history, tradition, and public meaning.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court extensively explored the text, history, and public meaning of the Second Amendment, and established a straight-forward categorical method for examining rights protected under the Second Amendment and laws that infringe on them. The "central" holding in *Heller* was "that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010). And the fundamental, individual right to keep and bear arms "is fully applicable to the States." *Id.* at 750 (2010).

Under *Heller*'s categorical analysis, courts must examine laws according to the text of the Second Amendment in light of the history, tradition, and public meaning at the time of its adoption; if the regulated conduct falls within the protection of such text, the regulation should be declared unconstitutional and enjoined from enforcement. Rights encompassed by the text of the Second Amendment – as interpreted and understood according to history, practice, and public meaning when it and the Fourteenth Amendment were adopted – are not subcategorized "into lesser and greater categories. The Constitution itself has done the categorizing and those rights covered 'shall not be infringed.' Period. There is no further clause beginning with 'except * * *.' No qualification of the prohibition saying some of those rights can be infringed a little, or if the government really feels

strongly about it, or has reconsidered the costs and benefits of protecting such rights. *District of Columbia v. Heller*, 554 U.S. 570, 635-36 (2008)." [12]

Historical analysis shows that the individual right to keep and bear arms was not permitted to be restricted except where an individual posed a danger or demonstrated a propensity of violence.[13] Under the categorical analysis required by *Heller* and *McDonald*, Section 393 unconstitutionally violates the fundamental rights secured by the U.S. Constitution.

CONCLUSION

For all of the foregoing reasons, this honorable Court should reverse the Superior Court's decision.

Respectfully submitted,

Robert J. Ruffner
Ruffner-Greenbaum
415 Congress Street, STE 202
Portland, ME 04101
P: (207) 221-5736
E: rjr@mainecriminaldefense.com

Adam Kraut
FIREARMS POLICY COALITION
1215 K Street, 17th Floor
Sacramento, CA 95814
P: (916) 476-2342
E: akr@fpchq.org
(pro hac vice pending)

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[12] *See*, *e.g.*, Brief of Amici Curiae Firearms Policy Coalition, et al. in Support of Petitioners (merits stage), *New York State Rifle & Pistol Ass'n, et al. v. City of New York, et al.*, U.S. Supreme Court no. 18-280, discussing categorical analysis under *Heller* at p.7, available online at http://bit.ly/scotus-nysrpa-fpc-merits.
[13] *See*, *e.g.*, Brief of Amici Curiae Firearms Policy Coalition, et al. in Support of Petitioner (cert. stage), *Medina v. Barr*, U.S. Supreme Court no. 19-287, available online at http://bit.ly/scotus-medina-fpc (tracing and reviewing history of arms prohibitions).

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December 2019, a copy of the foregoing brief was served by first-class mail, postage pre-paid, on counsel for Plaintiff/Appellee and Defendant/Appellant as follows:

Toff Toffolon
Deputy District Attorney
70 State Street
Ellsworth, Maine 04605

Maxwell G. Coolidge
3 Franklin Street
Ellsworth, Maine 04605

December 2, 2019

_____

Robert J. Ruffner
ME Bar No. 8855
Ruffner-Greenbaum
415 Congress Street, STE 202
Portland, ME 04101
(207) 221-5736
rjr@mainecriminaldefense.com

Attorney for *Amici Curiae*