NO. 12-845

In the
Supreme Court of the United States

ALAN KACHALSKY, CHRISTINA NIKOLOV, JOHNNIE NANCE, ANNA MARCUCCI-NANCE, ERIC DETMER, AND SECOND AMENDMENT FOUNDATION, INC.,
Petitioners,

v.

SUSAN CACACE, JEFFREY A. COHEN, ALBERT LORENZOR, ROBERT K. HOLDMAN, AND COUNTY OF WESTCHESTER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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RULE 29.6 STATEMENT

The National Rifle Association of America, Inc., has no parent corporation. No publicly held company owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*[1]

The National Rifle Association of America, Inc., ("NRA") is America's oldest civil rights organization and is widely recognized as America's foremost defender of the Second Amendment. The NRA was founded in 1871 by Union generals who, based on their experiences in the Civil War, desired to promote marksmanship and expertise with firearms among the citizenry. Today, the NRA has more than four million members, and its programs reach millions more. The NRA is America's leading provider of firearms marksmanship and safety training for both civilians and law enforcement. The NRA has actively participated in litigation to vindicate Second Amendment rights. The NRA has participated as either an *amicus curiae* or a party in both of this Court's major Second Amendment decisions and has also participated in a number of lower court cases involving the scope and meaning of the Second Amendment and this Court's decisions. *See, e.g.*, *Nat'l Rifle Assoc. of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185 (5th Cir. 2012) (challenging constitutionality of federal restrictions on firearm sales to individuals under 21); *Nordyke v.*

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* NRA states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of *amicus curiae*'s intent to file and have consented to this filing in letters on file with the Clerk's office.

King, 681 F.3d 1041 (9th Cir. 2012) (en banc) (challenging constitutionality of ordinance prohibiting possession of firearms on county property). The NRA has a significant interest in the issue raised by this case because the NRA does not view the Second Amendment as a homebound right, and the rights of its members are infringed by laws that, like the one at issue here, preclude law-abiding individuals from carrying firearms outside the home for the constitutionally protected purpose of self-defense. Accordingly, the NRA has been involved in cases raising the constitutional question presented in courts throughout the Nation for the past few years. *See, e.g.*, *Shepard v. Madigan*, No. 12-1788 (7th Cir.), decided *sub nom Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012).

INTRODUCTION

This case involves a constitutional question of substantial and recurring importance: whether the individual right to keep and bear arms protected by the Second Amendment is confined to the home. This Court's analysis in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), would seem to leave little room for doubt that the Second Amendment, like other fundamental constitutional rights, applies outside the home. Nonetheless, some states and municipalities have continued to maintain otherwise, and thus to insist that their blanket prohibitions on the carrying of handguns by law-abiding citizens outside the home for self-defense (or regulatory regimes that are the functional equivalent thereof) are

entirely consistent with their very narrow conception of the Second Amendment.

As challenges to those laws have begun to work their way through the Courts of Appeals, it has become immediately apparent that judges are sharply divided on the question presented. Not two weeks after the Second Circuit rejected a challenge to New York's regulatory scheme, a panel of the Seventh Circuit struck down Illinois' scheme by a vote of 2 to 1, only to have the full court promptly take under consideration a request for en banc review that has now been pending for more than a month. Challenges to similar regulatory schemes in California and Maryland have recently been argued before the Ninth and Fourth Circuits, which likely will weigh in on the constitutional question in the months to come. Although the manner in which those courts will resolve these questions may not yet be certain, one thing is already crystal clear: Whether and to what extent the Second Amendment applies outside the home is a question that ultimately is all but certain to require this Court's resolution.

REASONS FOR GRANTING THE PETITION

I. Whether The Right To Keep And Bear Arms Applies Outside The Home Is An Important And Recurring Question.

This Court's decision in *Heller* marked a watershed moment in Second Amendment jurisprudence. Resolving a debate that had been ongoing for the better part of a century, the Court concluded that the text, structure, and history of the Second Amendment confirm that it "confer[s] an

individual right to keep and bear arms." *Heller*, 554 U.S. at 595. Two years later, the Court concluded in *McDonald* that this individual right is a fundamental one that applies with full force to the States as well. *McDonald*, 130 S. Ct. at 3026 (plurality opinion); *id.* at 3058 (Thomas, J., concurring in part and concurring in the judgment).

Given that *Heller*'s holding was contrary to the circuit law that had governed most of the Nation, one would have expected to see states and municipalities respond by reexamining their laws to determine whether they were consistent with the fundamental individual right this Court recognized. Instead, the nearly five years since *Heller* was decided have been marked by intransigence if not outright defiance of the Court's decision by many of the states, municipalities, and courts that seemingly disagree with this Court's conclusion. *See, e.g.*, *Ezell v. City of Chicago*, 651 F.3d 684, 712 (7th Cir. 2011) (Rovner, J., concurring in the judgment) (describing new laws adopted by Chicago in wake of *McDonald* as "a thumbing of the municipal nose at the Supreme Court"). While *Heller*'s detractors have begrudgingly accepted that laws *identical* to those invalidated in *Heller* and *McDonald* must fall, many have at the same time endeavored to render both decisions as narrow as possible, limiting the scope of the Second Amendment to the precise circumstances at issue in those cases. *See* Pet. 12 n.3. Indeed, the Second Circuit recently declined to rule definitively that the Second Amendment even extends to a summer home. *See Osterweil v. Bartlett*, --- F.3d ----, 2013 WL 322884 (2d Cir. Jan. 29, 2013) (certifying question to New York Court of Appeals rather than giving immediate

relief to individual denied permit to possess a handgun in his summer residence).

One of the primary themes of this campaign has been an effort to confine the Second Amendment to the boundaries of one's home. States and municipalities have attempted to do so by continuing to enforce what are often pre-*Heller* regulatory regimes, premised on the mistaken belief that the amendment did not protect an individual right, to effectively ban law-abiding citizens from carrying handguns outside the home for purposes of self-defense.

This case involves one such effort—Westchester County and the state of New York have continued to enforce and defend a regulatory scheme under which carrying a handgun openly is prohibited entirely, yet carrying a concealed handgun is permissible only if the person requesting a license to do so can demonstrate "proper cause," which the county and the state interpret as "'a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.'" Pet. App. 49 (quoting *In re: Bando v. Sullivan*, 290 A.D.2d 691, 693 (N.Y. App. Div. 2002)). Since after *Heller* and *McDonald* individuals in "the general community" have Second Amendment rights, the requirement that individuals demonstrate a special need to exercise their fundamental right is incompatible with those decisions. Nonetheless, by respondents' logic, a de facto ban on carrying a handgun outside the home is constitutional because the Second Amendment ceases to apply (or at the very least is deprived of most of its force) as soon as

an individual steps off of his or her property. *See, e.g.*, 2d Cir. Br. for State Appellees 24–25; 2d Cir. Br. for Def.-Appellee-Cross Appellant 13–16.

Respondents are not alone in taking that remarkably restrictive view of the Second Amendment. A number of counties in California, which also prohibits openly carrying a handgun in public, have concluded that the state's "good cause" requirement for obtaining a permit to carry a concealed handgun may be interpreted to require the same kind of particularized showing of a special need for self-defense more acute than that of the general public. *See, e.g.*, *Peruta v. Cnty. of San Diego*, 758 F. Supp. 2d 1106, 1110 (S.D. Cal. 2010).[2] The government has defended the California regime by arguing that the Second Amendment has no application outside the home. Oral Argument, *Peruta v. Cnty. of San Diego*, No. 10-56971 (9th Cir. Dec. 6, 2012), http://www.ca9.uscourts.gov/media/view.php?pk_id=0000010109. Maryland likewise has continued to enforce and defend a regulatory scheme that

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[2] While California used to allow open carry of *unloaded* handguns, which could be loaded in the very narrow circumstance of "the brief interval" between when an individual notified law enforcement of an "immediate, grave danger" to his or her safety and when law enforcement arrived, *see* Cal. Penal Code § 12031(j)(1)–(2) (2010), during the pendency of the *Peruta* case, California banned open carry of unloaded handguns. *See* Assembly Bill No. 144 (Cal. 2011) (amending Penal Code § 12050). While the narrow "brief interval" exception remains on the books, it is now deprived of all force, as an individual generally cannot be lawfully in possession of a handgun to load should "immediate, grave danger" arise.

prohibits carrying a handgun outside the home (openly or concealed) absent a permit that may be obtained only on a showing of "good and substantial reason," which Maryland interprets in essentially the same way as Westchester and San Diego interpret the "proper cause" and "good cause" requirements. *See Woollard v. Sheridan*, 863 F. Supp. 2d 462, 464–65 (D. Md. 2012). And Illinois has done these jurisdictions one better—it is the *only* state that maintains an outright ban on carrying a ready-to-use handgun in public. *See Moore v. Madigan*, 702 F.3d 933, 934 (7th Cir. 2012).

In November, the Second Circuit in this case became the first Court of Appeals to resolve a challenge to one of these de facto bans on carrying a handgun outside the home. While the court purported to "proceed[] on th[e] assumption" that the Second Amendment "must have *some* application" outside the home, it then went on to conclude that New York's near-total prohibition does not run afoul of *Heller* because it "affects the ability to carry handguns only *in public*, while the District of Columbia ban applied *in the home*." Pet. App. 16, 26–27. Two weeks later, a 2-1 panel of the Seventh Circuit reached the opposite conclusion in a pair of companion cases to which the NRA is a party, striking down Illinois' complete ban on carrying handguns in public after concluding that this "Court has decided that the [Second A]mendment confers a right to bear arms for self-defense, which is as important outside the home as inside." *Moore*, 702 F.3d at 942. Illinois sought rehearing en banc of that decision in early January; the court immediately requested responses but has yet to decide whether to

vacate the panel opinion and rehear the case en banc. *See Moore v. Madigan*, No. 12-1269 & *Shepard v. Madigan*, No. 12-1788.

The Second and Seventh Circuits are not the only Courts of Appeals that have recently been asked to address the application of the Second Amendment outside the home. In the one week between the Second Circuit's decision in *Kachalsky* and the Seventh Circuit's decision in *Moore*, the Ninth Circuit heard oral argument on the same issue in three cases, including the *Peruta* case, which was argued by counsel of record on this brief on December 6, 2012, and involves the San Diego regulatory scheme nearly identical to the New York scheme upheld in *Kachalsky*. *Peruta v. Cnty. of San Diego*, No. 10-56971; *see also Richards v. Prieto*, No. 11-16255; *Baker v. Kealoha*, No. 12-16258. The Fourth Circuit also heard argument on October 24, 2012, in *Woollard v. Sheridan*, No. 12-1437, on the constitutionality of Maryland's very similar scheme. And the same constitutional issue was argued before the Fifth Circuit on December 3, 2012, in a challenge brought by the NRA and others to a Texas regime that prohibit individuals under the age of 21 from carrying handguns outside the home. *See Nat'l Rifle Assoc. of Am., Inc. v. McCraw*, No. 12-10091. Accordingly, whether the individual right protected by the Second Amendment is confined to the home is an important and recurring question.

II. The Second Amendment Right To Keep And Bear Arms Is Not Confined To The Home.

Nothing in this Court's decisions in *Heller* or *McDonald* supports the notion that the Second

Amendment protects an individual right to keep and bear arms only within the confines of one's home. While both cases involved challenges to prohibitions on possession of handguns in the home, the reasoning by which the Court arrived at the conclusion that the challenges must prevail in no way suggests that the Court intended to draw a constitutional line between the right to keep and bear arms for purposes of self-defense inside and outside the home. In fact, as the Seventh Circuit panel recognized, that reasoning confirms the opposite.

As the Court explained in *Heller*, "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them." 554 U.S. at 634–35. The Court's extensive review of that historical understanding led it to conclude that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Id.* at 592; *see also id.* at 628 ("the inherent right of self-defense has been central to the Second Amendment"). Needless to say, the possibility for confrontations is hardly limited to the home. Moreover, whatever would be the proper interpretation of a hypothetical constitutional provision that protected only the right to keep arms, the Framers' decision to protect the pre-existing right to keep *and bear* arms forecloses any coherent effort to limit the right to the home. The Court defined the right to "bear" arms as the right 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.* at 584 (internal quotation marks omitted).

Although the Court went on to note, in the course of examining the specific challenge before it, that "*the need* for [self-defense] is most acute" in the home, the Court found the right itself, not the place in which one most acutely needs to exercise it, "central to the Second Amendment." *Id.* at 628 (emphasis added). Indeed, in the entirety of its nearly 50-page analysis of the scope of the Second Amendment right (as opposed to its application of that right to the challenge at hand), the Court referred to the "home" or "homestead" a grand total of three times, in each instance quoting a historical source that recognized a right to keep and bear arms to defend both one's home *and* one's person and family. *See id.* at 615–16, 625.

Heller also plainly contemplates that the right to keep and bear arms for self-defense extends outside the home. For example, when the Court searched in vain for past restrictions as severe as the District of Columbia's handgun ban, it deemed restrictions that applied *outside* the home most analogous, and noted with approval that "some of those [restrictions] have been struck down." *Id.* at 629 (citing *Nunn v. State*, 1 Ga. 243, 251 (1846) (striking down prohibition on carrying pistols openly), and *Andrews v. State*, 50 Tenn. 165, 187 (1871) (same)). Such laws could hardly be analogous to D.C.'s invalid law or represent "severe" restrictions on the right to self-defense, *id.* at 629, if the Second Amendment's core protection were limited to possession in the home. The same is clear from the Court's suggestion that laws forbidding firearms in schools and certain government buildings are "presumptively lawful." *Heller*, 554 U.S. at 626–27 & n.26. The Court would

have had no need to single out these truly "sensitive places," *id.* at 626, if *all* restrictions on the right to keep and bear arms outside the home are subject to only minimal constitutional scrutiny.

Regulatory regimes like the one at issue here and in *Moore*, *Peruta*, and *Woollard*, all of which preclude the vast majority of law-abiding citizens from carrying weapons outside the home for the core purpose of self-defense, are thus fundamentally incompatible with the Second Amendment right that this Court recognized. Like many of the District Courts that have analyzed the issue, the Second Circuit concluded otherwise only by heavily discounting the value of the Second Amendment outside the confines of the home, and then applying the same sort of "interest-balancing" approach that *Heller* and *McDonald* squarely rejected. *See* Pet. App. 25, 42 (deferring to New York's view "that limiting handgun possession to persons who have an articulable basis for believing they will need the weapon for self-defense is in the best interest of public safety and outweighs the need to have a handgun for an unexpected confrontation").

As this Court has already explained, states and municipalities have a significant interest in regulating firearms and preventing handgun violence, "[b]ut the enshrinement of" the Second Amendment "necessarily takes certain policy choices off the table." *Heller*, 554 U.S. at 636. No understanding of the Second Amendment as protecting a right to keep and bear arms for self-defense outside the home could possibly exclude from that list a regulatory regime that wholly prohibits

law-abiding citizens from exercising that right. *See id.* at 629 ("'a statute which, under the pretense of regulating, amounts to a destruction of the right … would be clearly unconstitutional'" (quoting *State v. Reid*, 1 Ala. 612, 616–17 (1840))). Courts would not tolerate for one second a regime that granted free speech or the privilege against self-incrimination only to those who could demonstrate an unusually heightened need for those constitutional protections. The failure of states, municipalities, and now courts to recognize that the Second Amendment demands nothing less only underscores the unduly restrictive view of the right to keep and bear arms that has taken hold in the wake of *Heller* and *McDonald*, and the need for this Court's ultimate resolution of the important constitutional question presented.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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