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 LORENZO, ROBERT K. HOLDMAN, AND COUNTY OF WESTCHESTER,

Respondents.

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

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Ambassador Curtin Winsor, Jr.; former Assistant Attorney General for Justice Programs, Richard

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

Bender Abell and former Ohio Secretary of State J. Kenneth Blackwell.

This case is of interest to the ACRU because we are concerned to protect the constitutional rights of all Americans, regardless of political correctness, including the individual right to keep and bear arms in the Second Amendment.

STATEMENT OF THE CASE

New York state law requires a showing of "proper cause" for a permit to carry a handgun for self-defense. N.Y. Penal Law Section 265.03(3). But the statute does not define proper cause or establish standards for determining when proper cause exists, leaving broad discretion to local officials over who can exercise the constitutional right to keep and bear arms. Indeed, local officials can withdraw that right for any undefined "good cause," and that determination cannot be challenged unless it is arbitrary and capricious. *Bando v. Sullivan*, 290 A.D.2d 691, 735 N.Y.S.2d 660 (3d Dep't 2002).

Each individual Petitioner applied for a handgun license for self-defense, and each was rejected by one of the Respondent licensing officials for lack of proper cause, under recommendations from Respondent County of Westchester. App. 131-47. Petitioners sued in the United States District Court for the Southern District of New York, claiming that their license application rejections pursuant to the above restrictive gun licensing policy violate the Second Amendment.

The District Court granted summary judgment to the local licensing officials and the County, holding that *Heller* is based on the interest in home self-defense, and is narrowly limited to that. App. 92-93. On appeal, the Second Circuit conceded that the Second Amendment must have some application outside the home, but concluded that the "core" self-defense interest served by the Second Amendment is limited to the home. App. 16, 25. The Second Circuit decided that regulation of arms outside the home for self-defense is best left to the legislature, as long as there is some evidence supporting its judgment, affirming the lower court. App. 33-34.

SUMMARY OF ARGUMENT

The court below failed to follow the plain language of *District of Columbia* v. *Heller*, 554 U.S. 570 (2008), greatly circumscribing the Second Amendment rights recognized there. The court below limited the Second Amendment right to keep and bear arms to within the home. But *Heller* recognized a much broader right to keep and bear arms both within and without the home.

The court below says the "core" interest protected by the Second Amendment under *Heller* is self-defense inside the home. But *Heller* explicitly states that the core interest protected by the Second Amendment is self-defense, not limited to the home.

McDonald v. *City of Chicago*, 130 S. Ct. 3020 (2010) carefully followed *Heller* in reiterating its broad protection for Second Amendment rights. But

the court below did not. Instead it followed *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) in interpreting the scope of the Second Amendment, even though NFIB did not involve interpreting a right protected under the Bill of Rights.

The court below also embraced stepchild, second class status for the Second Amendment, contrary to both *Heller* and *McDonald*.

Because the government at any level does not even have the power to take away guns from criminals, the challenged policy here involves disarming only law abiding crime victims, while leaving the criminals fully armed. That is not rational, and so cannot even pass the rational basis test.

The federal circuit courts, and state high courts, are deeply split over whether the Second Amendment right to keep and bear arms is limited to self-defense within the home, and are openly asking this Court for guidance.

REASONS FOR GRANTING THE PETITION

I. The Decision of the Court Below is Contrary to This Court's Decisions in *Heller* and *McDonald*.

District of Columbia v. *Heller*, 554 U.S. 570 (2008) made clear that the right to "bear arms" means the right to be "armed and ready . . . in case of a conflict with another person." 554 U.S. at 584. *Heller* added

that the Second Amendment secures "the individual right to possess and carry weapons in case of confrontation." *Id.* at 592.

But the court below dismissed this binding precedent in saying, "there is no right to engage in self-defense with a firearm until the objective circumstances justify the use of deadly force." App. 41. Did the Second Circuit really mean to say that there is no constitutionally protected right to own a gun until burglars invade your home? That is not how this Court has defined the constitutionally protected right to "keep and bear arms."

The above quoted statements from *Heller* clearly protect the right to bear arms outside the home, as well as inside the home. Yet, the court below said, "*Heller* explains that the 'core' protection of the Second Amendment is the 'right of law abiding, responsible citizens to use arms in defense of hearth and home." App. 25. But this Court in *Heller* says repeatedly that the "core" interest of the Second Amendment is self-defense, not limited to the home. *Heller* openly states that the Second Amendment's "core lawful purpose [is] self-defense." 554 U.S. at 630. *Heller* also said "the inherent right of self-defense has been central to the Second Amendment right." *Id.* at 628. *Heller* added, "self-defense . . . was the *central component* of the right itself." *Id.* at 599.

Similarly, *McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010) explained *Heller* as holding "that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense," noting

that was the reason *Heller* "struck down a District of Columbia law that banned the possession of handguns in the home." 130 S. Ct. at 3026. Neither *Heller* nor *McDonald* limited the right to self-defense to inside the home.

Heller also relied on early state constitutional provisions protecting the right to bear arms, 554 U.S. at 584-86, which were applied to carrying handguns in public.[2] It cited early constitutional authorities discussing defensive gun use outside the home. Charles Humphreys, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY 482 (1822) (cited at 554 U.S. at 588 n. 10). And *Heller* discussed time, place and manner restrictions on carrying handguns, which can only be relevant to use of guns for self-defense outside the home. 554 U.S. at 626-27 & n. 26.

Moreover, though the lower court recognized *Heller's* statement that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table," App. 42, it also cited, and followed, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) for a "general reticence to invalidate the acts of our elected leaders."

Such judicial deference to the legislature is not warranted when the legislative restriction infringes on conduct specifically protected by a constitutional right, as *Heller* found regarding the right to keep and bear arms. Moreover, *NFIB* did not involve

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[2] *E.g. State v. Reid*, 1 Ala. 612 (1840); *State v. Huntly*, 25 N.C. (3 Ired.) 418 (1843); *Simpson v. State*, 13 Tenn. 356 (1833); *State v. Rosenthal*, 55 A. 610 (Vt. 1903).

infringement of a fundamental, enumerated right specifically protected in the Bill of Rights, as *Heller, McDonald,* and the present case do. *NFIB* instead involved the very different question of whether Congress acted within a specific, enumerated grant of legislative power.

In addition, the present case does not even involve deference to the legislature, as the New York legislature did not define "proper cause." Rather, the lower court deferred to the judgments of local licensing officials about who might have a "special need" to carry a gun for self-defense, thus amounting to "proper cause." It is the Second Amendment that reflects the will of the people, not such judgments of unelected local officials regarding who may exercise the constitutional rights protected by the Second Amendment.

The lower court also disparaged Second Amendment rights as sort of an embarrassing stepchild of constitutional law, in criticizing Plaintiffs' supposed "misunderstanding of the Second Amendment," with "a crude comparison" between the Second Amendment and other rights in the Bill of Rights. App. 40.

This directly contradicts Justice Alito's opinion in *McDonald*, which refused to countenance "that the Second Amendment differs from all of the other provisions of the Bill of Rights because it concerns the right to possess a deadly implement and thus has implications for public safety." 130 S. Ct. at 3045. Justice Alito also recognized that

> "The right to keep and bear arms . . . is not the only constitutional right that has controversial public safety implications. All of the constitutional *provisions* that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category."

Id.

Note also that failure to enforce the Second Amendment adequately can undermine other constitutional rights as well. Because the court in *United States v. Hart*, 726 F. Supp. 56 (D. Mass. 2010) viewed the Second Amendment as only protecting the right to keep and bear arms within the home, it upheld under the Fourth Amendment an investigatory stop based upon suspicion that the individual carried a handgun.

But the court in *United States v. Garvin*, Crim. No. 11-480-01, 2012 U.S. Dist. LEXIS 76540, at *10 (E.D. Pa. May 31, 2012) upheld the Fourth Amendment in the same circumstances, saying, "as some individuals are legally permitted to carry guns pursuant to the Second Amendment . . . , a reasonable suspicion that an individual is carrying a gun, without more, is not evidence of criminal activity afoot." Indeed, in virtually all states, individuals have statutory rights to carry handguns, some 5 million in total[3], which are protected under the Fourth Amendment, *Hart* to the contrary notwithstanding.

[3] Lott, MORE GUNS, LESS CRIME (3d ed. 2010).

II. New York's Restrictive Handgun Policy Is Not Rational, and, Therefore, Cannot Even Pass a Rational Basis Test In Any Event.

Any analysis of New York's restrictive handgun policy, denying handgun licenses to average, law abiding citizens, has to start with this undeniable proposition: Neither the state nor local governments of New York even have the power to deny handguns to criminals.

That proposition is so transparently undeniable, it can be observed by judicial notice. The gangs of New York do not obey current gun control laws, and neither does anyone else who is violently breaking the law. Guns have even been smuggled into prisons. Criminals are not going to even apply for handgun licenses.

All that New York's governments even have the power to do is deny handguns to the law abiding *victims* of criminals. Is that even rational? To disarm the victims of crime, but not the criminals?

No it is not. That is why the New York handgun license policy at issue in this case could not even pass the rational basis test. There is no rational basis for denying handguns to the victims of crime, but not to the criminals. But that is all that the challenged New York policy in this case amounts to.

That is not to say that the proper test for Second Amendment violations is the rational basis test. Not all gun control challenges under the Second Amendment will be so easily resolved as this case.

Potential Second Amendment violations should be analyzed under the same heightened scrutiny as potential violations of other rights in the Bill of Rights. But where the gun restriction at issue cannot even pass the rational basis test, the restriction should be easily disposed of.

The former Chief Economist of the U.S. Sentencing Commission, John Lott, has demonstrated using the most sophisticated regression analysis that shall issue conceal and carry policies save lives. John Lott, MORE GUNS, LESS CRIME (3d ed. 2010). Indeed, his analysis concludes that such policies reduce the murder rate by roughly 20%. He provides specific examples of lives being saved in the work cited above. It is not rational to deny the law abiding the means to defend themselves in these life threatening situations.

When guns are outlawed, only outlaws will have guns. That is not a rational policy. This case should not be made more difficult than it is.

III. The Federal Circuit Courts, and State High Courts, Are Split Over Whether the Second Amendment Protects the Use of Firearms for Self-Defense Outside the Home.

The court below stated, 'in many ways, [*Heller]* raises more questions than it answers." App. 14. That should be read as an appeal to this Court to take this case, and answer those questions.

The Fourth Circuit seemed to be making the same plea, in saying, "[A] considerable degree of

uncertainty remains as to the scope of [the Second Amendment] right beyond the home and the standards for determining whether and how the right can be burdened by government regulations." *United States v. Masciandoro,* 638 F.3d 458, 467 (4th Cir. 2011). The court added, "On the question of *Heller's* applicability outside the home environment, we think it prudent to await direction from the Court itself." *Id.* at 475.

The court below followed a growing number of other courts who have misread *Heller* to fail to provide protection to arms carried for self-defense outside the home.[4] But the Seventh Circuit leads a

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[4] *Hightower v. City of Boston*, 693 F. 3d 61, 72 & n.8 (1st Cir. 2012); *United States v. Barton*, 633 F.3d 168, 170 (3d. Cir. 2011); *United States v. Staten*, 666 F.3d 154, 158 (4th Cir. 2011); *United States v. Greeno*, 679 F.3d 510, 517 (6th Cir. 2012); *United States v. Reese*, 627 F. 3d 792, 800 (10th Cir. 2010); *United States v. Tooley,* 717 F. Supp. 2d 580, 596 (S.D. W.Va. 2010) ("possession of a firearm outside of the home or for purposes other than self-defense inside the home are not within the 'core' of the Second Amendment as defined in *Heller*"); *Young v. Hawaii*, Civ. No. 12-00336, 2012 U.S. Dist. LEXIS 169260 at *30 (D. Haw. Nov. 29, 2012), *appeal pending*, No. 12-17808 (9th Cir. filed Dec. 14, 2012)("the Second Amendment right articulated by the Supreme Court in *Heller* and *McDonald* establishes only a narrow individual right to keep an operable handgun at home for self-defense. The right to carry a gun outside the home is not part of the core Second Amendment right.") (citations omitted); *Moreno v. New York City Police Dept.*, No. 10 Civ. 6269, 2011 U.S. Dist. LEXIS 76129 at *7-*8 (S.D.N.Y. May 9, 2011) ("*Heller* has been narrowly construed, as protecting the individual right to bear arms for the specific purpose of self-defense within the home."); *Piszczatoiski v. Filko*, 840 F.Supp. 2d 813, 829 (D.N.J. 2012)("Given the considerable uncertainty regarding if and when the Second Amendment rights should apply outside the home, this Court does not intend to place a burden on the government to endlessly litigate and

growing number of alternative decisions which acknowledge the broad language of *Heller* as recognizing a constitutional right to keep and bear arms for self-defense both inside and outside the home. *Moore v. Madigan*, Nos. 12-1269, 12-1788, 2012 U.S. App. LEXIS 25264 (7th Cir. Dec. 11, 2012) (finding Illinois' prohibition on carrying

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justify every individual limitation on the right to carry a gun in any location for any purpose."); *Williams v. State*, 10 A.3d 1167, 1177 (Md. 2011) ("If the Supreme Court . . . meant its holding [in *Heller* and *McDonald*] to extend beyond home possession, it will need to say so more plainly"); *Commonwealth v. Perez*, 952 N.E.2d 441, 451 (Mass. App. Ct. 2011) ("The Second Amendment does not protect the defendant in this case because he was in possession of the firearm outside of his home."); *People v. Dawson*, 934 N.E.2d 598, 605-06 (Ill. App. Ct. 2010)("*Heller* specifically limited its ruling to interpreting the amendment's protection of the right to possess handguns in the home, not the right to possess handguns outside of the home in case of confrontation."); *State v. Knight*, 241 P.3d 120, 133 (Kan. Ct. App. 2010)(*Heller* "turned solely on the issue of handgun possession in the home . . . It is clear that the Court was drawing a narrow line regarding the violations related solely to use of a handgun in the home for self-defense purposes."); *People v. Yarborough*, 169 Cal. App. 4th 303, 313-14, 86 Cal. Rptr. 3d 674, 682 (2008)(statute prohibiting carrying a gun in public does not implicate *Heller*); *People v. Perkins*, 62 A.D. 3d 1160, 1161, 880 N.Y.S.2d 209, 210 (3d Dep't 2009)(no Second Amendment right where "defendant was not in his home"); *Little v. United States*, 989 A.2d 1096, 1101 (D.C. 2010) ("appellant was outside of the bounds identified in *Heller, i.e.*, the possession of a firearm in one's private residence for self-defense purposes"); *Mack v. United States*, 6 A.3d 1244, 1236 (D.C. 2010)("*Heller* did not endorse a right to carry weapons *outside* the home"); *Wooden v. United States*, 6 A.3d 833, 841 (D.C. 2010)("Neither self-defense as such, nor even self-defense in the home of another (with a weapon carried there), is entitled to [Second Amendment] protection, as we have read *Heller*").

handguns in public unconstitutional under the Second Amendment). The Seventh Circuit rightly said in *Moore*, "The Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside." 2012 U.S. App. LEXIS 25264, at *29. Indeed, the Seventh Circuit explicitly rejected the decision of the Second Circuit below, saying, "To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*." *Id.* at *12.

The Seventh Circuit rightly added in *Moore,* exactly contrary to the Second Circuit below, that *Heller* "says that the amendment 'guarantee[s] the individual right to possess and carry weapons in case of confrontation.' 554 U.S. at 592. Confrontations are not limited to the home." 2012 U.S. App. LEXIS 25264, at *8.[5] This split among the federal appellate courts now encompasses 7 circuits. *Supra,* n.4.

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[5] ACCORD: *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) (struck down Chicago's ban on gun ranges as "a serious encroachment on the right to maintain proficiency in firearm use"); *United States v. Weaver*, No. 2:09-CR-00222, 2012 U.S. Dist. LEXIS 29613 (S.D. W.Va. Mar. 7, 2012) ("the Second Amendment, as historically understood at the time of ratification, was not limited to the home," 2012 U.S. Dist. LEXIS 29613 at *13; "Limiting this fundamental right to the home would be akin to limiting the protection of the First Amendment freedom of speech to political speech or college campuses, 2012 U.S. Dist. LEXIS 29613 at *14, n.7); *Woollard v. Sheridan*, 863 F. Supp. 2d 462, 471 (D. Md. 2012) *appeal pending*, No. 12-1437 (4th Cir. filed April 2, 2012) ("the right to bear arms is not limited to the home," 863 F. Supp. 2d at 471; "A citizen may not be required to offer a 'good and substantial reason' why he should be permitted to exercise his rights. The right's existence is all the reason he needs," 863 F. Supp. at

CONCLUSION

For all of the foregoing reasons, this Court should grant the requested Petition.

Respectfully submitted,

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475); *Bateman v. Purdue*, No. 5:10-CV-265-H, 2012 U.S. Dist. LEXIS 47336 at *10-*11 (E.D.N.C. Mar. 29, 2012) ("Although considerable uncertainty exists regarding the scope of the Second Amendment right to keep and bear arms, it undoubtedly is not limited to the confines of the home."); *People v. Yanna*, Nos. 304293, 306144, 2012 Mich. App. LEXIS 1269, at *11 (Mich. Ct. App. June 26, 2012) ("a total prohibition on the open carrying of a protected arm . . . is unconstitutional"); *In re Brickey*, 70 P. 609 (Idaho 1902).