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

REPLY BRIEF

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PRELIMINARY STATEMENT

Respondents mostly ignore conflicts between the lower court's opinion and this Court's precedent, instead reading *District of Columbia* v. *Heller*, 554 U.S. 570 (2008) and *McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010) as narrowly limited to their facts. Moreover, Respondents join the lower court's endorsement of alternative historical narratives that this Court rejected. These are arguments for granting, not denying, review.

Respondents also err in disputing the plain existence of conflicts among the lower courts, and seriously misconstrue the Petitioners' claims.

But most critically, Respondents err in claiming that this Court can wait to address the problems manifested below. Developments since the Petition's filing continue to prove that this decision, if left unchecked, will accelerate the lower courts' resistance to *Heller* and *McDonald*.

This Court presumably decided *Heller* and *McDonald* as it did with the expectation that lower courts would implement the Second Amendment as a normal, legitimate part of the Bill of Rights. Unfortunately, the opinion below confirms the emergence of a different reality in the absence of this Court's intervention.

ARGUMENT

I. Respondents Largely Failed To Dispute That The Lower Court "Decided An Important Federal Question In A Way That Conflicts With Relevant Decisions Of This Court."

1. This Court has already decided that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Heller*, 554 U.S. at 592. The lower court directly defied this holding by imagining that Second Amendment rights are inoperative until one is actually under an attack meriting the use of deadly force. App. 41. It construed Petitioners' Second Amendment interest as an interest not in being "armed and ready . . . in a case of conflict," *Heller*, 554 U.S. at 584, but in shooting people.

Respondents did not address this conflict. They should have. If that is how one views the right to bear arms, no one may exercise such a "right" until under serious criminal attack. Of course, Petitioners do not seek a "right" to shoot people. Law-abiding, responsible Americans do not keep and carry guns for the purpose of shooting others. As this Court already explained, Americans keep and carry guns for the purpose of being ready to defend themselves should the need arise. The lower court's holding that there is no right to bear arms until one has a right to shoot people is inconsistent with *Heller* in a manner warranting very serious review.

2. This Court held that "the people" enjoy the right to bear arms for the purpose of self-defense. The lower court upheld the government's contrary judgment that an ordinary person's self-defense interest does not justify the carrying of handguns, which is in practice a privilege normally reserved to celebrities and the well-connected. Academics Br. at 11. It held that the State's belief that carrying guns is presumptively too dangerous to allow "outweighs the need [sic] to have a handgun for an unexpected confrontation." App. 42.

Respondents also failed to address this conflict. While they asserted, erroneously, that New York's law has direct historical antecedents, Respondents did not address the essential problem that the essence of New York's challenged provision is to deny the Second Amendment's premise that "the people" have a right to carry handguns for self-defense.

3. This Court banished the rational basis test from Second Amendment law. Respectfully, there is nothing "heightened" or "intermediate" about the lower court's standard of review in Second Amendment cases, which asks only whether the legislature has proffered some excuse for the law – since guns are dangerous, apparently any excuse will do – and demands that challengers carry a burden of disproving the presumption of constitutionality.

Respondents failed to respond to this argument. Indeed, they completely failed to explain how the

lower court's approach is compatible with intermediate scrutiny. Respondents asserted that the lower court "concluded that the statute at issue here must meet heightened scrutiny, and found that it satisfied that test." Opp. at 7. That is the entirety of Respondents' discussion of intermediate scrutiny.

4. Topping off its rejection of this Court's precedent, the lower court attacked Petitioners' "crude" "misunderstanding" of the Second Amendment because they deigned to suggest that it should be treated like other portions of the Bill of Rights. App. 40. The lower court's language here was constructive only in the sense that it clarified the urgent need for certiorari review. *McDonald* made much the same allegedly "crude" point. 130 S. Ct. at 3045; see also *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 484 (1982) ("we know of no principled basis on which to create a hierarchy of constitutional values").

Respondents did not address this conflict, either.

II. *Heller* And *McDonald* Are Not Limited To Their Facts.

Respondents claim that "there is no conflict" between the lower court's opinion and those of this Court because "[b]oth *Heller* and *McDonald* concerned laws that totally banned handguns, including their possession in the home for the purpose of self-defense." Opp. at 8. "New York's proper-cause requirement was not directly controlled by *Heller* and

McDonald because the New York statute differs from the laws at issue in *Heller* and *McDonald*. . . . " *Id.* In other words, *Heller* and *McDonald* are limited to their facts, at least for purposes of Sup. Ct. R. 10(c).

Since *Heller* and *McDonald* had nothing to do with rifles, Respondents' arguments would presumably shield from review decisions approving rifle prohibitions. Under Respondents' cramped view of Sup. Ct. R. 10(c), no opinion could ever "decide an important federal question *in a way* that conflicts with relevant decisions of this Court" (emphasis added) unless it literally contradicted this Court's precedent on identical facts.

Plainly this Court's precedent, even its Second Amendment precedent, provides more guidance than directing the outcome of factually identical disputes.

III. The Lower Court Followed The Alternative Historical Narrative That This Court Rejected.

Respondents err in asserting that the lower court "followed this Court's guidance in treating the long history of the regulation at issue as relevant." Opp. at 9. The lower court did not apparently place exceptional weight on whether a regulation is longstanding. "We do not view this language as a talismanic formula for determining whether a law regulating firearms is consistent with the Second Amendment." App. 17 n.11.

Nor did history play much role in the decision. The lower court declined to "look solely to this highly ambiguous history to determine the meaning of the Second Amendment." App. 20. "Analogizing New York's licensing scheme (or any other gun regulation for that matter) to the array of statutes enacted or construed over one hundred years ago has its limits." App. 21. And while the lower court erroneously found that New York's law "has a number of close and longstanding cousins," App. 20 (footnote omitted), it qualified this assertion by offering that "[h]istory and tradition do not speak with one voice here." *Id.*

But to the extent the lower court addressed history, it erred pervasively, as do Respondents, by seeking guidance from sources that emphatically reject *Heller* – and which, in turn, this Court has rejected.

For example, the lower court and Respondents both invoked the work of a self-described historian, Patrick Charles, Opp. at 9; App. 29-30 & n.20, who joined a brief in *McDonald* asking this Court to "correct its error" by overruling *Heller*. See Brief for English/Early American Historians, *McDonald*, 130 S. Ct. 3020, at 3. Assailing the "discredited scholarship upon which *Heller* relied," Mr. Charles argued that the English right to arms "did not intend to protect an individual's right to possess, own, or use arms for private purposes such as to defend a home against burglars (what, in modern times, we mean when we use the term 'self-defense')." *Id.* at 2. "[A]rmed self-defense of the home by individuals

acting for private interests was not the right enshrined in the Second Amendment." *Id.* at 4.

As *amici* Academics noted, Mr. Charles introduced error into the lower court's analysis by asserting that statutory compilations of British laws reflected an early American decision to specifically enact the Statute of Northampton, 2 Edw. 3, c. 3 (1328). Academics Br. at 15-17. The lower court thought it was "curious" that "North Carolina referred to 'the King's Justices' after the colonies had won their independence," App. 29 n.20, but there is nothing curious about the language if one seeks better historical accounts.

This Court should continue to discount Mr. Charles's persistent attacks on the history of the right to bear arms. For example, one argument that this Court found persuasive, on behalf of viewing the Second Amendment as securing individual rights, draws on Blackstone's discussion of the English right to arms. *Heller*, 554 U.S. at 593-94. Blackstone described three "great and primary rights, of personal security, personal liberty, and private property," 136, secured by "auxiliary subordinate rights" 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 136 (1765). The fifth auxiliary right is the right to arms, *id.* at 139, but Mr. Charles argues that "Blackstone never equated auxiliary rights with individual civil rights." Patrick Charles, *The Faces of the Second Amendment Outside the Home*, 60 CLEV. ST. L. REV. 1, 48 (2012).

Blackstone's "fourth subordinate right appertaining to every individual" is the right of "petitioning the king or either house of parliament for redress of grievances." 1 COMMENTARIES at 138-39; compare U.S. Const. amend. I ("right to petition the Government for a redress of grievances"). Would the lower court reject an argument on behalf of *First* Amendment rights based on Mr. Charles's theory that Blackstone did not view his "auxiliary and subordinate rights of the subject," 1 COMMENTARIES at 136, as civil rights?

Attempts to link New York's "proper cause" requirement to the Statute of Northampton and the common law crime of affray, App. 29 n.20; Opp. at 9, 11, are likewise inapposite. As *amici* Academics noted, by 1686, English courts had limited this crime to the carrying of arms in a manner that would "terrify the King's subjects." Academics Br. at 14 (quoting *Rex* v. *Knight*, 87 Eng. Rep. 75, 90 Eng. Rep. 300 (K.B. 1686)). *Heller* itself invoked numerous sources that explained no violation could occur absent terrifying conduct – sometimes noting the Second Amendment confirms this limitation. See, e.g., Charles Humphreys, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY 482 (1822); *Heller*, 554 U.S. at 588 n.10 (quoting same).

Nor is the lower court's exposition of early American law relating to the carrying of arms convincing. See generally Academics Br. at 12-24. At this stage, and as the lower court readily acknowledged, App. 21,

it cannot be said that New York's proper cause requirement is obviously supported by historical practice.

Judge Posner, not personally enamored of *Heller*,[1] acknowledged that the lower court departed from "historical issues as settled by *Heller*." *Moore* v. *Madigan*, 702 F.3d 933, 941 (7th Cir. 2012). This Court should see as much in the lower court's opinion, and reverse it.

IV. Petitioners Do Not Claim A Right To Carry Handguns In Any Particular Manner.

In modern popular usage, the word "concealed" has become appended to the word "carry," such that "concealed carry" is synonymous and used interchangeably with the concept of "carry." Respondents thus present the common – and erroneous – logic:

1. There is no right to carry concealed handguns. Opp. at 10 & n.3;
2. Petitioners have not specifically argued that they should carry handguns openly, *id.* at 11, thus
3. Petitioners lose. Q.E.D.

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[1] Richard Posner, *In Defense of Looseness*, THE NEW REPUBLIC (Aug. 27, 2008).

But the Second Amendment says nothing about concealment or display of firearms; it merely speaks of bearing arms. The term includes open as well as concealed carry. See *Heller*, 554 U.S. at 584 ("in the clothing or in a pocket") (citation omitted).

That is not to deny that concealed carrying may be forbidden. Of course it might. And so might open carrying be forbidden and, indeed, a number of states prohibit that practice.

The rule to be gleaned from precedent approving of concealed carry bans is not that there is, specifically, only a right to openly carry handguns (a right which would doubtless horrify Respondents were it exercised in Manhattan). The rule is that states may prescribe the manner in which handguns are carried. *State* v. *Reid*, 1 Ala. 612, 616-17 (1840).

Petitioners seek to bear arms, pursuant to the only license available under state law for that purpose. "[T]here are no alternative options for obtaining a license to carry a handgun." App. 25.

> There is no provision for a license to carry an unconcealed weapon, so for applicants who want to carry a weapon and do not fit in one of the occupational categories, the only way to obtain a license to carry a handgun – whether openly or not – is to meet the requirements, including "proper cause,"

> of the licensing provision for concealed weapons.

App. 49.[2]

Had Petitioners not applied for, and been denied, handgun carry licenses, Respondents would have doubtless complained that Petitioners' claim is speculative and unripe. And had Petitioners filed a specious claim for a right to carry guns, specifically, in the open, Respondents would have properly objected citing the same precedents upholding the state's prerogative to regulate the manner of carrying handguns. In any event, Respondents assert that "prohibitions and near prohibitions on all public carrying" are constitutional. Opp. at 11.

Petitioners pled this case exactly as they had to, given New York's decision to channel the right to carry handguns into a licensing system for concealed handgun carry.[3] That decision is not at issue.

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[2] Respondents' Counterstatement of Question Presented, relating only to one mode of carrying, is thus incomplete and misleading.

[3] Respondents ironically rushed to allege that "*Moore* expressly criticizes the plaintiffs in that case" for omitting a citation's approval of "some sort of permit system." Opp. at 14 n.5 – omitting the fact that the court directed criticism not at the *Moore* plaintiffs, but at "the plaintiffs in appeal no. 12-1788," *Moore*, 702 F.3d at 937, the companion case of *Shepard* v. *Madigan*.

V. The Conflicts Of Authority Are Plain.

This Court's conflict resolution function is not limited to situations where literally identical laws are upheld in one court but struck down by another. Such a standard would help shield from review precisely those laws that are most unusual – and thus, more likely to depart from legal tradition and raise constitutional concerns. *McDonald*, 130 S. Ct. at 3047; *Heller*, 554 U.S. at 629; *Moore*, 702 F.3d at 941.

New York's "proper cause" requirement could not survive faithful application of *Moore*. And Respondents do not seriously challenge the fact that Michigan's Supreme Court applied prior restraint reasoning to strike down the discretionary licensing system in *People* v. *Zerillo*, 189 N.W. 927 (Mich. 1922), nor do they even mention *Schubert* v. *DeBard*, 398 N.E.2d 1339 (Ind. Ct. App. 1980), which stands directly on-point. Respondents' arguments explaining how "proper cause" is somehow not an improper standard allowing total discretion should be properly reserved for the merits.

VI. This Court's Intervention Is Urgently Needed.

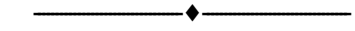
Were this petition granted, this case would be heard and decided in the October, 2013 Term, as would a forthcoming petition arising from *Woollard* v. *Gallagher*, No. 12-1437, 2013 U.S. App. LEXIS 5617 (4th Cir. Mar. 21, 2013). As Respondents noted, the Third and Ninth Circuits have already heard argument on the subject as well. Barring any unusual delays, certiorari petitions arising from these cases

would most likely be due in time to have those cases heard and decided this term as well.

Thus, if this Court is to consider discretionary handgun licensing regimes, the upcoming term is the term in which to do so.

But leaving the lower court's opinion in place might unduly influence the remaining cases' outcome, as it has in *Woollard*, 2013 U.S. App. LEXIS 5617 at *42 ("[w]e specifically subscribe to the *Kachalsky* court's analysis"). Indeed, the lower court's restoration of rational basis review is too tempting for courts to resist generally in Second Amendment cases. See Cato Br. at 8-10 (discussing *Schrader* v. *Holder*, 704 F.3d 980 (D.C. Cir. 2013)).

Woollard confirms Petitioners' prediction that left standing, the lower court's opinion would enable the Second Amendment's continued evisceration. Pet. at 36-37. *Woollard* upheld Maryland's "good and substantial reason" license prerequisite because it "constitutes 'a more moderate approach' . . . than a wholesale ban on the public carrying of handguns," *id*. at *42 (citing *Kachalsky* v. *County of Westchester*, 701 F.3d 81, 98-99 (2d Cir. 2012)) – as though a wholesale ban were an available choice under the Second Amendment, and the current system were materially different from a wholesale ban, designed as it was to disarm virtually the entire population. Petitioners should be excused for not appreciating such moderation in the restriction of their rights.



CONCLUSION

Heller and *McDonald* are largely symbolic and pointless if lower courts may persist in following the alternative historical narrative rejected in those cases, if no one may exercise Second Amendment rights without police permission, and if – lofty paeans to "heightened" or "intermediate" scrutiny notwithstanding – *any* law broadly restricting or even abolishing Second Amendment rights is sustained upon *any* legislator's or police officer's assertion that it serves the public good.

The only thing worse than explicitly refusing to enforce an enumerated constitutional right would be to declare a right "fundamental" while standing aside as lower courts render it worthless. Few outcomes could promote as much cynicism about our legal system. If this Court is unprepared to overrule *Heller*, it should reverse decisions such as that entered by the lower court here.

Petitioners respectfully pray that the Court grant the petition.

Respectfully submitted,

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