

No. 12-845

---

---

IN THE  
**Supreme Court of the United States**

---

ALAN KACHALSKY, *et al.*,

*Petitioners,*

*v.*

SUSAN CACACE, *et al.*,

*Respondents.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

---

**BRIEF OF AMICI CURIAE S.C.O.P.E., INC.,  
LI SECOND AMENDMENT PRESERVATION  
ASSOCIATION INC., NEW JERSEY SECOND  
AMENDMENT SOCIETY, AND COMMONWEALTH  
SECOND AMENDMENT, INC. IN  
SUPPORT OF PETITIONERS**

---

---

DAVID D. JENSEN

*Counsel of Record*

DAVID JENSEN PLLC

111 John Street, Suite 230

New York, NY 10038

(212) 380-6615

david@djensenpllc.com

*Counsel for Amici Curiae*



**TABLE OF CONTENTS**

|   | <i>Page</i> |
|---|-------------|
| TABLE OF CONTENTS.....  | i           |
| TABLE OF CITED AUTHORITIES .....  | iii         |
| INTERESTS OF THE <i>AMICI</i> .....   | 1           |
| SUMMARY OF ARGUMENT.....  | 3           |
| ARGUMENT.....   | 5           |
| I. MULTIPLE CONFLICTS EXIST<br>BETWEEN STATE HIGH COURTS<br>AND FEDERAL APPELLATE<br>COURTS REGARDING THE SCOPE<br>OF THE RIGHT TO “BEAR ARMS”..... | 5           |
| A. Some courts find that the right to keep<br>and bear arms is limited to the home.....   | 5           |
| B. Other courts recognize that the<br>right to bear arms exists outside the<br>home, but disagree as to the rigor<br>of its protection .....        | 8           |
| C. Courts also conflict in their treatment<br>of the “presumptively lawful regulatory<br>measures” outlined in <i>Heller</i> .....                  | 10          |
| II. ONLY SEVEN STATES AND THE<br>DISTRICT OF COLUMBIA HAVE<br>BROAD PRECLUSIONS ON BEARING<br>HANDGUNS IN PUBLIC .....                              | 12          |

*Table of Contents*

|  | <i>Page</i> |
|--|-------------|
| III. STATE COURTS HISTORICALLY<br>UPHELD DISCRETIONARY<br>CARRY LICENSING LAWS ON<br>THE BASIS OF DISAVOWED<br>INTERPRETATIONS OF THE SECOND<br>AMENDMENT..... | 17          |
| CONCLUSION .....   | 20          |

TABLE OF CITED AUTHORITIES

Page

CASES

*Burton v. Sills*,  
248 A.2d 521, 53 N.J. 86 (1968) .....19

*Commonwealth v. Davis*,  
343 N.E.2d 847, 369 Mass. 886 (1976).....17

*Commonwealth v. Eberhart*,  
965 N.E.2d 791, 461 Mass. 809 (2012).....7

*Commonwealth v. Gouse*,  
965 N.E.2d 774, 461 Mass. 787 (2012)..... 6-7, 11

*Digiacinto v.*  
*Rector & Visitors of George Mason Univ.*,  
704 S.E.2d 365, 281 Va. 127 (2011) .....9

*District of Columbia v. Heller*,  
554 U.S. 570 (2008) ..... *passim*

*Gamble v. United States*,  
30 A.3d 161 (D.C. 2011).....6

*GeorgiaCarry.org, Inc. v.*  
*Baptist Tabernacle of Thomaston Ga. Inc.*,  
687 F.3d 1244 (11th Cir. 2012) .....9, 10

*In re McIntyre*,  
552 A.2d 500 (Del. Super. Ct. 1988) .....13

*Cited Authorities*

|   | <i>Page</i>   |
|---|---------------|
| <i>In re Mikhaeil's Application</i> ,<br>No. A-3467-05T3, 2006 N.J. Super. Unpub.<br>LEXIS 1811 (App. Div. Dec. 4, 2006) . . . . .            | 19            |
| <i>Kachalsky v. County of Westchester</i> ,<br>701 F.3d 84 (2d Cir. 2012) . . . . .   | 8, 10, 11     |
| <i>Mack v. United States</i> ,<br>6 A.3d 1224 (D.C. 2010) . . . . .   | 6             |
| <i>MacNutt v. Police Comm'r</i> ,<br>572 N.E.2d 577, 30 Mass. App. Ct. 632 (1991) . . . . .   | 17            |
| <i>McDonald v. Chicago</i> ,<br>130 S. Ct. 3020 (2010) . . . . .  | 3, 7, 10, 20  |
| <i>Moore v. Gallup</i> ,<br>45 N.Y.S.2d 63, 267 A.D. 64 (App. Div. 1943),<br><i>aff'd mem.</i> , 59 N.E.2d 439, 293 N.Y. 846 (1944) . . . . . | 18            |
| <i>Moore v. Madigan</i> ,<br>No. 12-1269, 2012 U.S. App. LEXIS 25264<br>(7th Cir. Dec. 11, 2012) . . . . .                                    | <i>passim</i> |
| <i>Morris v. State</i> ,<br>342 So. 2d 417 (Ala. Cr. App. 1977) . . . . .   | 13            |
| <i>Nat'l Rifle Ass'n of Am., Inc. v. Bureau of<br/>Alcohol, Tobacco, Firearms, and Explosives</i> ,<br>700 F.3d 185 (5th Cir. 2012) . . . . . | 11            |

*Cited Authorities*

|   | <i>Page</i> |
|---|-------------|
| <i>People ex rel. Darling v. Warden</i> ,<br>134 N.Y.S. 335, 74 Misc. 151 (Sup. Ct., N.Y.<br>Co. 1911), <i>rev'd</i> , 139 N.Y.S. 277, 154 A.D. 413<br>(App. Div. 1st Dep't 1913) . . . . . | 18          |
| <i>People ex rel. Darling v. Warden</i> ,<br>139 N.Y.S. 277, 154 A.D. 413<br>(App. Div. 1st Dep't 1913) . . . . .   | 18          |
| <i>People v. Persce</i> ,<br>97 N.E. 877, 204 N.Y. 397 (1912) . . . . .   | 18          |
| <i>Ruggiero v. Police Comm'r</i> ,<br>464 N.E.2d 104, 18 Mass. App. Ct. 256 (1984) . . . . .  | 16          |
| <i>Siccardi v. State</i> ,<br>284 A.2d 533, 59 N.J. 545 (1971) . . . . .  | 19          |
| <i>Sims v. United States</i> ,<br>963 A.2d 147 (D.C. 2008) . . . . .  | 6, 8, 11    |
| <i>Thorne v. United States</i> ,<br>55 A.3d 873 (D.C. 2012) . . . . .   | 6           |
| <i>United States v. Bena</i> ,<br>664 F.3d 1180 (8th Cir. 2011) . . . . .   | 11          |
| <i>United States v. Chester</i> ,<br>628 F.3d 673 (4th Cir. 2010) . . . . .   | 11          |

*Cited Authorities*

|  | <i>Page</i> |
|--|-------------|
| <i>United States v. Marzzarella</i> ,<br>614 F.3d 85 (3d Cir. 2010) . . . . .                                    | 11          |
| <i>United States v. Masciandaro</i> ,<br>638 F.3d 458 (4th Cir. 2011) . . . . .                                  | 7, 8, 12    |
| <i>United States v. Playboy Entm't Group, Inc.</i> ,<br>529 U.S. 803 (2000) . . . . .                            | 15          |
| <i>United States v. Torres-Rosario</i> ,<br>658 F.3d 110 (1st Cir. 2011). . . . .                                | 11          |
| <i>United States v. Williams</i> ,<br>616 F.3d 685 (7th Cir. 2010) . . . . .                                     | 11          |
| <i>Williams v. State</i> ,<br>10 A.3d 1167, 417 Md. 479, <i>cert. denied</i> ,<br>132 S. Ct. 93 (2011) . . . . . | 6, 8        |
| <i>Wooden v. United States</i> ,<br>6 A.3d 833 (D.C. 2010). . . . .  | 6           |

**CONSTITUTION, STATUTES AND RULES**

|                                    |               |
|------------------------------------|---------------|
| U.S. Const. amend. II . . . . .    | <i>passim</i> |
| Ala. Code § 13A-11-73 . . . . .    | 13            |
| Ala. Code § 13A-11-75 . . . . .    | 13            |
| Alaska Stat. § 18.65.700 . . . . . | 13            |

*Cited Authorities*

|  | <i>Page</i> |
|--|-------------|
| Ariz. Rev. Stat. § 13-3112 . . . . .   | 13          |
| Ark. Code Ann. § 5-73-309 . . . . .  | 13          |
| Cal. Penal Code § 25400 . . . . .  | 12          |
| Cal. Penal Code § 25850 . . . . .  | 12          |
| Cal. Penal Code § 26150 . . . . .  | 14          |
| Cal. Penal Code § 26350 . . . . .  | 12          |
| Colo. Rev. Stat. Ann. § 18-12-203 . . . . .  | 13          |
| Conn. Gen. Stat. § 29-32b . . . . .  | 13, 16      |
| 11 Del. Code Ann. § 1441 . . . . .   | 13          |
| 11 Del. Code Ann. § 1442 . . . . .   | 13          |
| D.C. Code § 22-4504 . . . . .  | 12, 14      |
| D.C. Code § 22-4506 (2008), <i>repealed by</i> 56 D.C. Reg.<br>1162 (Feb. 6, 2009) . . . . . | 5, 14       |
| Fla. Stat. Ann. § 790.06 . . . . .   | 13          |
| Ga. Code Ann. § 16-11-129 . . . . .  | 13          |
| Haw. Rev. Stat. § 134-9 . . . . .  | 12, 14      |
| Haw. Rev. Stat. § 134-25 . . . . .   | 12          |



*Cited Authorities*

|  | <i>Page</i> |
|--|-------------|
| Idaho Code Ann. § 18-3302 .....          | 13          |
| 720 Ill. Comp. Stat. § 5/24-1 .....      | 12, 14      |
| Ind. Code Ann. § 35-47-2-3 .....         | 13          |
| Iowa Code Ann. § 724.7 .....             | 13          |
| Kan. Stat. Ann. § 75-7c03 .....          | 13          |
| Ky. Rev. Stat. Ann. § 237.110 .....      | 13          |
| La. Rev. Stat. Ann. § 40:1379.3 .....    | 13          |
| 1906 Mass. Acts ch. 172, § 2 .....       | 17          |
| Mass. Gen. Laws ch. 140, § 131 .....     | 14, 17      |
| Mass. Gen. Laws ch. 269, § 10 .....      | 12          |
| Md. Code Ann., Crim. Law § 4-203 .....   | 12          |
| Md. Code Ann., Pub. Safety § 5-306 ..... | 14          |
| 25 Me. Rev. Stat. Ann. § 2003 .....      | 13          |
| Mich. Comp. Laws Ann. § 28.422 .....     | 13          |
| Minn. Stat. § 624.714, subdiv. 2 .....   | 13          |
| Miss. Code Ann. § 45-9-101 .....         | 13          |

*Cited Authorities*

|   | <i>Page</i> |
|---|-------------|
| Mo. Ann. Stat. § 571.101 . . . . .                    | 13          |
| Mont. Code Ann. § 45-8-321. . . . .                   | 13          |
| Neb. Rev. Stat. § 69-2430 . . . . .                   | 13          |
| Nev. Rev. Stat. Ann. § 202.3657. . . . .              | 13          |
| N.C. Gen. Stat. § 14-415.11 . . . . .                 | 13          |
| N.D. Cent. Code § 62.1-04-03. . . . .                 | 13          |
| N.H. Rev. Stat. Ann. § 159.6. . . . .                 | 13          |
| 1966 N.J. Laws ch. 60, sec. 32, § 2A:151-41 . . . . . | 19          |
| 1966 N.J. Laws ch. 60, sec. 35, § 2A:151-44 . . . . . | 19          |
| 1978 N.J. Laws ch. 95, § 2C:58-4. . . . .             | 19          |
| N.J. Stat. Ann. § 2C:39-5 . . . . .                   | 12          |
| N.J. Stat. Ann. § 2C:58-4 . . . . .                   | 14          |
| N.M. Stat. Ann. § 29-19-4. . . . .                    | 13          |
| 1911 N.Y. Laws ch. 195, sec. 1, § 1897 . . . . .      | 18          |
| N.Y. Civil Rights Law § 4 . . . . .                   | 18          |
| N.Y. Penal Law § 265.03 . . . . .                     | 12          |

*Cited Authorities*

|   | <i>Page</i> |
|---|-------------|
| N.Y. Penal Law § 400.00 . . . . .         | 14          |
| Ohio Rev. Code Ann. § 2923.125 . . . . .  | 13          |
| 21 Okla. Stat. Ann. § 1290.12 . . . . .   | 13          |
| Or. Rev. Stat. Ann. § 166.291 . . . . .   | 13, 16      |
| 18 Pa. Cons. Stat. Ann. § 6109 . . . . .  | 13, 16      |
| R.I. Gen. Laws § 11-47-11 . . . . .       | 13          |
| S.C. Code Ann. § 23-31-215 . . . . .      | 13          |
| S.D. Codified Laws § 23-7-7 . . . . .     | 13          |
| Tenn. Code Ann. § 39-17-1351 . . . . .    | 13          |
| Tex. Gov’t Code § 411.177 . . . . .       | 13          |
| Utah Code Ann. § 53-5-704 . . . . .       | 13          |
| Va. Code Ann. § 18.2-308 . . . . .        | 13, 16      |
| Wash. Rev. Code Ann. § 9.41.070 . . . . . | 13, 16      |
| W. Va. Code Ann. § 61-7-4 . . . . .       | 13          |
| Wis. Stat. § 175.60 . . . . .             | 13          |
| Wyo. Stat. Ann. § 6-8-104 . . . . .       | 13          |

*Cited Authorities*

|   | <i>Page</i> |
|---|-------------|
| <i>Beats the Gun Law in his Test Case</i> , N.Y. Times,<br>Nov. 4, 1911.....  | 18          |
| Empire State Dev., <i>Census 2010</i> , NYS Data<br>Center, <i>available at</i> <a href="http://www.empire.state.ny.us/NYSDataCenter/Data/Census2010/PL2010Tab2NY.pdf">http://www.empire.state.ny.us/NYSDataCenter/Data/Census2010/PL2010Tab2NY.pdf</a> (last visited<br>Feb. 10, 2013).....  | 15          |
| Matt Friedman, <i>N.J., Senator Pushes Law Allowing<br/>Residents to Carry Handguns</i> , Star Ledger,<br>Sept. 26, 2010, <i>available at</i> <a href="http://www.nj.com/news/index.ssf/2010/09/nj_senator_pushes_law_allowing.html">http://www.nj.com/news/index.ssf/2010/09/nj_senator_pushes_law_allowing.html</a> (last visited Feb. 10, 2013)..... | 15          |
| Sewell Chan, <i>Annie Hall, Get Your Gun</i> ,<br>N.Y. Times, Dec. 2, 2008 .....  | 15          |
| U.S. Census Bureau, <i>2010 Census Data – New Jersey</i> ,<br><i>available at</i> <a href="http://www.census.gov/2010census/data/embedstate.html?state=NJ">http://www.census.gov/2010census/data/embedstate.html?state=NJ</a> (last visited<br>Feb. 10, 2013).....  | 15          |
| U.S. Gen. Accounting Office, <i>States’ Laws and<br/>Requirements for Concealed Carry Permits<br/>Vary Across Nation</i> (2012).....  | 15, 16      |

**INTERESTS OF THE *AMICI***

*Amicus* S.C.O.P.E., Inc. or Shooters' Committee on Political Education of New York ("SCOPE") is a New York not-for-profit corporation focused on the protection and preservation of the right of firearms ownership. A group of western New York gun owners founded SCOPE in 1965 to educate the public about the importance of the right to keep and bear arms in modern society, and to rebut the claims that the Second Amendment is outmoded, and that it is not applicable to individuals. SCOPE does not align itself with any political party, and it does not endorse candidates for elective office. Rather, SCOPE focuses on providing New York legislators and executives with timely and accurate information to support sound decisions. SCOPE also seeks to provide accurate and useful information on firearms laws and policies to law-abiding New York gun owners.

*Amicus* LI Second Amendment Preservation Association Inc. ("LISAPA") is a New York not-for-profit corporation dedicated to protecting the natural right of civilian self-defense for residents of New York State, and particularly those living on Long Island. LISAPA, together with its affiliate firearms club, Long Island Firearms, LLC ("LIF"), promotes responsible firearms ownership through its educational website and through frequent workshops, covering topics such as firearms

---

1. No counsel for any party authored this brief in whole or in part, nor did any counsel or party make any monetary contribution intended to fund the preparation or submission of this brief. All parties' counsel of record received timely notice of the intended filing of this brief, and all consented to its filing. Such consents are submitted herewith.

safety and maintenance. Aside from their focus on firearms, LISAPA and LIF also seek to provide a means for gun owners to contribute to the community as a group, and they sponsor blood drives, coat collections for the needy, and other community services.

*Amicus* New Jersey Second Amendment Society (“NJ2AS”) is a New Jersey nonprofit corporation that seeks to restore and preserve the right of the people of New Jersey to keep and bear arms for self-defense, hunting, competition, collecting, and recreation. Like the other *Amici*, NJ2AS is a grass roots organization whose primary asset is thousands of members and supporters who care about protecting the right to keep and bear arms in New Jersey. NJ2AS focuses primarily on educating public officials, the community, and its members about New Jersey firearms laws and their application, and also about legislative proposals and their ramifications. NJ2AS also seeks to educate both its members and the public about the safe and responsible use of firearms. NJ2AS has multiple projects which seek to secure the equal and consistent application of New Jersey’s firearms licensing laws.

*Amicus* Commonwealth Second Amendment, Inc. (“Comm2A”) is a Massachusetts nonprofit corporation dedicated to preserving and expanding the Second Amendment rights of individuals residing in New England and beyond. Comm2A works locally and with national organizations to promote a better understanding of the rights guaranteed by the Second Amendment. Comm2A has previously submitted *amicus curiae* briefs to this Court and to state supreme courts, and it has also sponsored litigation to vindicate the rights

of law-abiding Massachusetts gun owners. Comm2A receives and responds to many queries from the public regarding firearms licensing in Massachusetts, and particularly, regarding the issuance of licenses to carry handguns under the discretionary standard set forth in Massachusetts law.

Since this Court issued its seminal decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. Chicago*, 130 S. Ct. 3020 (2010), significant conflicts have developed among lower courts regarding the scope and meaning of the right to “bear arms,” and particularly, regarding its application away from the home. We further detail these conflicts herein, but here it suffices to say that this conflict substantially impacts both the *Amici* and their members – who are often denied licenses to carry firearms on the ground that the Second Amendment is “limited to the home,” or alternatively, that it has only limited application outside the home.

### SUMMARY OF ARGUMENT

Significant and irreconcilable conflicts have arisen regarding the scope of the Second Amendment right to bear arms, and particularly, regarding its application away from private residences. Petitioners have ably demonstrated both the irreconcilability of the decision below with this Court’s prior decisions in *Heller* and *McDonald*, and also the conflict between that decision and the decision of the Court of Appeals for the Seventh Circuit in *Moore v. Madigan*, no. 12-1269, 2012 U.S. App. LEXIS 25264 (7th Cir. Dec. 11, 2012). As such, this Brief focuses on providing further detail regarding the conflicting authorities that have developed, and on providing context

to explain why this dispute is focused in only a handful of States.

Point I explains that lower courts have split regarding whether the Second Amendment has *any* application away from the home. Several States' supreme courts have interpreted *Heller* and the Second Amendment to secure rights only within the home. Other courts reject this view, but still disagree (as the decision below and *Moore* disagreed) about the actual scope of the right to bear arms in the public context.

A related area of conflict involves the “presumptively lawful regulatory measures” that this Court outlined in *Heller*. Judicial treatment of this issue falls on a spectrum. At one end, some courts (such as the court below) find that these examples do not serve to illustrate the scope of the Second Amendment, but instead support only the broad and generic proposition that gun regulations are permissible. At the other end, some courts find that the presumptively lawful restrictions do serve to illustrate the scope of the Second Amendment's protections, and further, that the restrictions illustrate conduct that falls within the Second Amendment's scope (but presumptively passes constitutional scrutiny). Finally, some courts take a “middle” approach under which the presumptively lawful restrictions illustrate the scope of the Second Amendment, but detail conduct that falls outside the scope of the right's protection. All three of these approaches lead to different results, particularly when the issue is the right of self-defense in public places.

Point II places the judicial decisions in context. Because only seven States and the District of Columbia



broadly preclude people from carrying guns, it is little surprise that much of the “bearing arms” litigation has arisen in these jurisdictions. These are the only places in America where it is impossible (or nearly impossible) for people to bear arms for their protection. Point III details the history of restrictive carry laws in the *Amici*’s States (Massachusetts, New Jersey, and New York) and shows that state courts historically upheld these restrictive laws on the basis of Second Amendment interpretations that this Court has explicitly rejected. These laws are ripe for review, and this Petition provides a timely, and needed, opportunity for this Court to resolve the conflicts that have arisen.

## ARGUMENT

### I. MULTIPLE CONFLICTS EXIST BETWEEN STATE HIGH COURTS AND FEDERAL APPELLATE COURTS REGARDING THE SCOPE OF THE RIGHT TO “BEAR ARMS”

#### A. Some courts find that the right to keep and bear arms is limited to the home

The District of Columbia Court of Appeals was the first high court to interpret the scope of the right to bear arms after *Heller*, and it was the first court to adopt the view that the right to keep and bear arms is limited to the home. At the time, D.C. law provided for the discretionary issuance of licenses to carry handguns. *See* D.C. Code § 22-4506 (2008), *repealed by* 56 D.C. Reg. 1162, 1165 (Feb. 6, 2009). A few months after *Heller*, the D.C. Court of Appeals upheld a conviction for carrying a handgun without a license on the rationale that it was not clear

that *Heller* “dictates an understanding of the Second Amendment which would compel the District to license a resident to carry and possess a handgun outside the confines of his home.” *Sims v. United States*, 963 A.2d 147, 150 (D.C. 2008). Since D.C. repealed its licensing law in 2009, the D.C. high court has repeatedly upheld D.C.’s blanket prohibition on carrying weapons on the ground that “*Heller* did not endorse a right to carry weapons outside the home.” *Mack v. United States*, 6 A.3d 1224, 1236 (D.C. 2010) (citing *Wooden v. United States*, 6 A.3d 833 (D.C. 2010)); see also *Thorne v. United States*, 55 A.3d 873, 883 (D.C. 2012) (“the Supreme Court limited its holding to possession of a firearm within the home and ‘did not attempt to define the “full scope” of this right” (quoting *Gamble v. United States*, 30 A.3d 161, 163 (D.C. 2011))).

The Court of Appeals of Maryland followed suit in ruling that the right to bear arms ends at the threshold of one’s home. The court resolved *Williams v. State*, 10 A.3d 1167, 417 Md. 479, cert. denied, 132 S. Ct. 93 (2011), by “hold[ing] that [the Maryland statute] which prohibits wearing, carrying, or transporting a handgun, without a permit and *outside of one’s home*, is *outside of the scope* of the Second Amendment.” *Id.* at 1169, 417 Md. at 481 (emphases added). The court reasoned that “*Heller* and *McDonald* emphasize that the Second Amendment is applicable to statutory prohibitions against home possession,” and concluded that “[i]f the Supreme Court . . . meant its holding to extend beyond home possession, it will need to say so more plainly.” *Id.* at 1177, 417 Md. at 496.

Massachusetts is the final State to adopt a homebound interpretation of the right to bear arms. In *Commonwealth*

*v. Gouse*, 965 N.E.2d 774, 461 Mass. 787 (2012), the Supreme Judicial Court rejected a criminal appeal for “violating [the statute that] prohibits generally the carrying of a firearm outside of one’s home or business,” *id.* at 785, 461 Mass. at 800. The court found that *Heller* and *McDonald* only “articulated a right ‘to possess a handgun in the home for the purposes of self-defense.’” *Id.* at 786, 461 Mass. at 801 (*quoting McDonald*, 130 S. Ct. at 3050; *Heller*, 554 U.S. at 635). The court concluded that the case before it “does not implicate [the Second Amendment] right” because “the defendant was charged with and convicted of possessing a firearm in an automobile, not his home, and there was no evidence or suggestion that it was possessed for the purpose of defending the same.” *Id.* at 786, 461 Mass. at 802; *see also Commonwealth v. Eberhart*, 965 N.E.2d 791, 795, 461 Mass. 809, 814 n.11 (2012).

The decision of the Court of Appeals for the Fourth Circuit in *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011), provides insight into the need for additional guidance from this Court. Judge Niemeyer, who wrote most of the Fourth Circuit’s opinion, focused on *Heller*’s discussion of the nature of the right to conclude that the right to bear arms was not “confined” to the home. *See id.* at 468 (op. of Niemeyer, J.). However, two of the judges on the panel declined to join Judge Niemeyer’s analysis on this point. *See id.* at 475. Chief Judge Wilkinson’s view was that because the court had concluded that the law would pass muster under the intermediate level of means-end burden analysis, “it is unnecessary to explore in this case the question of whether and to what extent the Second Amendment right recognized in *Heller* applies outside the home.” *Id.* at 474. Judge Wilkinson relied on

*Williams* and *Sims*, which had both held that the right to bear arms was *limited* to the home, to support a somewhat different proposition – that “outside the home environment, we think it prudent to await direction from the Court itself.” *Id.* at 475. Other issues aside, this case’s resolution certainly shows the extent of judicial confusion over the scope of the right.

**B. Other courts recognize that the right to bear arms exists outside the home, but disagree as to the rigor of its protection**

Several courts have rejected the limited-to-the-home interpretation adopted by the high courts of the District of Columbia, Maryland, and Massachusetts, discussed above, and have instead found that the Second Amendment applies, at least to some extent, in public places. However, these decisions still conflict regarding the rigor of judicial scrutiny that should apply.

The court below found that the right to bear arms “must have *some* application in the very different context [from home possession] of the public possession of firearms.” *Kachalsky v. County of Westchester*, 701 F.3d 84, 89 (2d Cir. 2012). However, the court found that the “proper cause” requirement “falls outside the core Second Amendment protections identified in *Heller*” because it “affects the ability to carry handguns only in public, while the District of Columbia ban applied in the home.” *Id.* at 94. On this basis, the Court of Appeals for the Second Circuit upheld New York’s restrictive licensing scheme. *See id.* at 96-97. The Seventh Circuit explicitly rejected this view. *See Moore*, 2012 U.S. App. LEXIS 25264 at \*25-26. As a result, it subjected the Illinois law to a more demanding form of scrutiny. *See id.* at \*21-22.

The Supreme Court of Virginia also rejected a “homebound” limitation, at least implicitly, when it decided *Digiacinto v. Rector & Visitors of George Mason Univ.*, 704 S.E.2d 365, 281 Va. 127 (2011). This case concerned a ban on carrying guns in the buildings of a state university. *See id.* at 367, 281 Va. at 130-31. Although the Virginia high court observed that *Heller* had arisen in the context of the home, *see id.* at 369, 281 Va. at 134, this fact did not prevent the court from analyzing the case on its merits, concluding that GMU buildings were “sensitive places,” and finding that the ban was constitutional, *see id.* at 370, 281 Va. at 136.

Finally, the Court of Appeals for the Eleventh Circuit has also implicitly rejected a homebound limitation. The decision in *GeorgiaCarry.org, Inc. v. Baptist Tabernacle of Thomaston Ga. Inc.*, 687 F.3d 1244 (11th Cir. 2012), concerned a State law that (in substance) required people to follow special procedures if they attempted to carry a gun into a “house of worship.” *See id.* at 1248-49 (detailing requirement that licensed gun carriers notify management and follow instructions upon their arrival). The Eleventh Circuit concluded that this restriction fell outside the scope of the Second Amendment – not because it took place outside the home, but instead, because it took place on private property. *See id.* at 1264. The court reasoned that the common law established an owner’s absolute right to control the use of his or her property, and accordingly concluded that “the Second Amendment does not include protection for a right to carry a firearm in a place of worship against the owner’s wishes.” *Id.* It is significant that the Eleventh Circuit observed that *Heller* had concerned conduct in the home, and characterized *Heller* as “emphasiz[ing] the special place that the home—an individual’s private property—occupies in our society.”

*See id.* at 1259. The home’s status as a “special place” was no basis to avoid reviewing the law.

**C. Courts also conflict in their treatment of the “presumptively lawful regulatory measures” outlined in *Heller***

A final conflict between many courts is the meaning and import of the “presumptively lawful regulatory measures” that this Court outlined in *Heller* and reiterated in *McDonald*. *See McDonald*, 130 S. Ct. at 3047 (2010); *Heller*, 554 U.S. at 626-27 & n.26. Courts are split in two different regards when it comes to interpreting this part of *Heller*. The first is whether the presumptively lawful restrictions serve to illustrate the scope of the Second Amendment’s protections. If they do, then the second split concerns whether these regulatory examples illustrate conduct that falls *inside* or *outside* the scope of the Second Amendment’s protection.

The decision below concluded (or appears to have concluded) that the presumptively lawful examples do not serve to illustrate the scope of the Second Amendment’s protection. For example, the court reasoned that this Court’s discussion of the validity of “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings,” *Heller*, 554 U.S. at 626-27, supported the conclusion that “regulating firearms because of the dangers posed by exercising the right is entirely consistent with the Second Amendment,” *Kachalsky*, 701 F.3d at 99. And, the court cited the discussion of bans on felons and the mentally ill to support the proposition that “regulation under the Second Amendment has always been more robust than of other enumerated rights.” *Id.*

at 100. In a footnote, the court explained that while this Court's discussion of presumptively lawful restrictions was "informative, it simply makes clear that the Second Amendment right is not unlimited." *Id.* at 90 n.11. It is significant that some courts adopting a limited-to-the-home interpretation of the Second Amendment have wholly ignored this Court's presumptively-lawful discussion. *See Gouse*, 965 N.E.2d 774, 461 Mass. 787; *Sims*, 963 A.2d 147.

Most courts have adopted the view that the presumptively lawful restrictions *do* serve to illustrate the scope of the Second Amendment in some way. However, there is still a split of authority regarding whether they illustrate conduct falling *within* the scope of the Second Amendment, or instead, whether the restrictions burden conduct that falls *outside* the scope of the Amendment's protections. *See United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010).

The Courts of Appeals for the First, Fourth, and Seventh Circuits have taken the inside-the-scope approach and ruled that the restrictions illustrate conduct that falls inside the scope of the Second Amendment's protections. *See United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011); *United States v. Chester*, 628 F.3d 673, 679-80 (4th Cir. 2010); *United States v. Williams*, 616 F.3d 685, 693 (7th Cir. 2010). In contrast, the Courts of Appeals for the Third, Fifth, and Eighth Circuits have all concluded that the presumptively lawful regulations fall outside the scope of the right. *See Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 196 (5th Cir. 2012); *United States v. Bena*, 664 F.3d 1180, 1183 (8th Cir. 2011); *Marzzarella*, 614 F.3d at 91.

This conflict has significant results when it comes to the right to bear arms. For example, in *Moore* the Seventh Circuit tacitly relied on the inside-the-scope view (previously adopted in the Seventh Circuit) when it reasoned that “a lesser showing” would be needed when a law “bans guns merely in particular places, such as public schools” – but that “[a] blanket prohibition on carrying guns in public” was much harder to sustain. *See Moore*, 2012 U.S. App. LEXIS 25264 at \*21. Of course, if the scope of the right to keep and bear arms did not include the general act of carrying guns in public, then either burden would, presumably, be readily sustained. Another example of the significance of the conflict is Judge Niemeyer’s opinion in *Masciandaro*. Judge Niemeyer relied significantly on the observation that “[i]f the Second Amendment right were confined to self-defense *in the home*, the Court would not have needed to express a reservation for ‘sensitive places’ outside of the home.” *Masciandaro*, 638 F.3d at 468 (op. of Niemeyer, J.).

## II. ONLY SEVEN STATES AND THE DISTRICT OF COLUMBIA HAVE BROAD PRECLUSIONS ON BEARING HANDGUNS IN PUBLIC

Only seven States and the District of Columbia broadly preclude their citizens from carrying guns for protection.<sup>2</sup> People living in the remaining 43 States must meet various sets of requirements relating to their background and qualifications, of course – but once they

---

2. *See* Cal. Penal Code §§ 25400(a), 25850(a), 26350(a); D.C. Code § 22-4504(a); Haw. Rev. Stat. § 134-9(c); *id.* § 134-25(a); 720 Ill. Comp. Stat. 5/24-1(a)(4); *id.* § 5/24-1.6; Md. Code Ann., Crim. Law § 4-203(a)(1)(i)-(ii); Mass. Gen. L. ch. 269, § 10(a); N.J. Stat. Ann. § 2C:39-5(b); N.Y. Penal L. § 265.03(3).



do, the laws of their States *entitle* them to carry handguns for protection.<sup>3</sup> This background fact provides context and shows why it is little surprise that litigation concerning the right to bear arms has oftentimes centered on these jurisdictions.

---

3. Thirty-seven states issue licenses to carry handguns on nondiscretionary terms. *See* Ark. Code Ann. § 5-73-309; Colo. Rev. Stat. Ann. § 18-12-203(1); Conn. Gen. Stat. § 29-32b(b); Fla. Stat. Ann. § 790.06(2); Ga. Code Ann. § 16-11-129(d)(4); Idaho Code Ann. § 18-3302(1); Ind. Code Ann. § 35-47-2-3(e); Iowa Code Ann. § 724.7(1); Kan. Stat. Ann. § 75-7c03(a); Ky. Rev. Stat. Ann. § 237.110(4); La. Rev. Stat. Ann. § 40:1379.3(A)(1); 25 Me. Rev. Stat. Ann. § 2003(1); Mich. Comp. Laws Ann. § 28.422(3); Minn. Stat. § 624.714, subdiv. 2(b); Miss. Code Ann. § 45-9-101(2); Mo. Ann. Stat. § 571.101(1); Mont. Code Ann. § 45-8-321(1); Neb. Rev. Stat. § 69-2430(3); Nev. Rev. Stat. Ann. § 202.3657(2); N.H. Rev. Stat. Ann. § 159.6(I); N.M. Stat. Ann. § 29-19-4(A); N.C. Gen. Stat. § 14-415.11(b); N.D. Cent. Code § 62.1-04-03(1); Ohio Rev. Code Ann. § 2923.125(D)(1); 21 Okla. Stat. Ann. § 1290.12(A)(12); Or. Rev. Stat. Ann. § 166.291(1); 18 Pa. Cons. Stat. Ann. § 6109(e); R.I. Gen. Laws § 11-47-11(a); S.C. Code Ann. § 23-31-215(A); S.D. Codified Laws § 23-7-7; Tenn. Code Ann. § 39-17-1351(b); Tex. Gov't Code § 411.177(a); Utah Code Ann. § 53-5-704(1)(a); Va. Code Ann. § 18.2-308(D); Wash. Rev. Code Ann. § 9.41.070(1); W. Va. Code Ann. § 61-7-4(f); Wis. Stat. § 175.60(2)(a). Alabama and Delaware have discretionary statutes for licensing the carry of concealed handguns, but do not, without more, ban private citizens from openly carrying handguns. *See* Ala. Code §§ 13A-11-73, 75; *Morris v. State*, 342 So. 2d 417, 418 (Ala. Cr. App. 1977); 11 Del. Code Ann. §§ 1441-42; *In re McIntyre*, 552 A.2d 500, 501 n.1 (Del. Super. Ct. 1988). The States of Alaska, Arizona, Vermont, and Wyoming do not require licenses to carry handguns (either concealed or exposed), although Alaska, Arizona, and Wyoming will issue licenses to individuals who wish to travel out-of-state. *See* Alaska Stat. § 18.65.700(a); Ariz. Rev. Stat. § 13-3112(A); Wyo. Stat. Ann. § 6-8-104(b).

Laws in Illinois and the District of Columbia generally prohibit people from carrying guns in public.<sup>4</sup> Laws in the other six preclusive States – California, Hawaii, Maryland, Massachusetts, New Jersey, and New York – preclude the carry of guns by conditioning licenses to carry them on discretionary findings. New York’s discretionary standard is “proper cause,”<sup>5</sup> while it is “good cause” in California,<sup>6</sup> “good reason” in Massachusetts,<sup>7</sup> and “good and substantial reason” in Maryland.<sup>8</sup> New Jersey requires “justifiable need,”<sup>9</sup> and in Hawaii it is “reason to fear injury.”<sup>10</sup>

While these discretionary laws provide a theoretic means of carrying handguns for protection, the right is often rendered illusory by State officials’ refusal to issue permits. Indeed, in her dissent in *Moore*, Judge Williams observed that the “virtual ban” resulting from the refusal of New York City officials to issue permits was “in effect

---

4. See D.C. Code § 22-4504(a) (requiring license); *id.* § 22-4506 (2008) (license provision repealed 2009); 720 Ill. Comp. Stat. 5/24-1(a)(4); *id.* § 5/24-1.6. As the Court knows, the Court of Appeals for the Seventh Circuit has ordered Illinois to amend its laws. See *Moore v. Madigan*, no. 12-1269, 2012 U.S. App. LEXIS 25264, \*29 (7th Cir. Dec. 11, 2012).

5. N.Y. Penal L. § 400.00(2)(f).

6. Cal. Penal Code § 26150(a)(2).

7. Mass. Gen L. ch. 140, § 131(d).

8. Md. Code Ann., Pub. Safety § 5-306(a)(5)(ii).

9. N.J. Stat. Ann. § 2C:58-4(c), (d).

10. Haw. Rev. Stat. § 134-9(a).

like” the complete ban in Illinois. *See Moore*, 2012 U.S. App. LEXIS 25264 *id.* at 63-64 (Williams, J., dissenting).<sup>11</sup>

Issuance numbers reflect this. For example, as of a 2008 *New York Times* article, there were 2,291 New York City residents who held “full carry” handgun licenses – or about 0.028% of the population.<sup>12</sup> In Maryland, about 0.3% of the adult population holds a handgun carry license.<sup>13</sup> And, in New Jersey, the figure is about 0.018%.<sup>14</sup> Licensing

---

11. The majority opinion observed that there were “meager exceptions” to the ban on carrying guns, and remarked that Illinois law “comes close” to a ban. *See Moore*, 2012 U.S. App. LEXIS 25264 at \*23 (emphasis added). Of course, it is a familiar principle that “[t]he distinction between laws burdening and laws banning speech is but a matter of degree.” *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 812 (2000).

12. *See* Sewell Chan, *Annie Hall, Get Your Gun*, N.Y. Times, Dec. 2, 2008; Empire State Dev., *Census 2010*, NYS Data Center (New York City population as of Apr. 1, 2010 was 8,175,133), available at <http://www.empire.state.ny.us/NYSDataCenter/Data/Census2010/PL2010Tab2NY.pdf> (last visited Feb. 10, 2013).

13. *See* U.S. Gen. Accounting Office, *States’ Laws and Requirements for Concealed Carry Permits Vary Across Nation* 75 (2012).

14. *See* Matt Friedman, *N.J. senator pushes law allowing residents to carry handguns*, Star Ledger, Sept. 26, 2010 (1,595 permits per the New Jersey State Police), available at [http://www.nj.com/news/index.ssf/2010/09/nj\\_senator\\_pushes\\_law\\_allowing.html](http://www.nj.com/news/index.ssf/2010/09/nj_senator_pushes_law_allowing.html) (last visited Feb. 10, 2013); U.S. Census Bureau, *2010 Census Data – New Jersey* (population of 8,791,894), available at <http://www.census.gov/2010census/data/embedstate.html?state=NJ> (last visited Feb. 10, 2013). The GAO report indicates that New Jersey has issued 32,000 permits, but this consists almost entirely of permits issued to retired law enforcement officers. *See* U.S. Gen. Accounting Office, *supra* note 13, at 76.

numbers are not available for New York State.<sup>15</sup> Finally, although Massachusetts reports that 5.1% of its citizens have “licenses to carry,” this number is far overstated because most of these licenses have restrictions that preclude the carry of handguns for protection.<sup>16</sup>

However, licensure rates are *much* higher in neighboring States that have non-discretionary laws: 4.7% in both Virginia and West Virginia, 3.2% in Ohio, 8.3% in Pennsylvania, and 6.2% in Connecticut.<sup>17</sup> This also holds true on the West Coast. Hawaii law allows for the issuance of handgun carry licenses, at least theoretically, but there were *no* licenses in force as of December 31, 2011.<sup>18</sup> And, while only about 0.1% of California’s residents have been able to obtain licenses to carry handguns under their State’s discretionary “good cause” standard, 5.1% and 7.1% of their neighbors living in Oregon and Washington, respectively, have obtained licenses under their States’ “shall issue” systems.<sup>19</sup>

---

15. New York has no means of identifying the number of active licenses that authorize private citizens to carry handguns. See U.S. Gen. Accounting Office, *supra* note 13, at 76-77 n.b.

16. See *id.* at 75; *Ruggiero v. Police Comm’r*, 464 N.E.2d 104, 107, 18 Mass. App. Ct. 256, 260 (1984) (approving practice of restricting licenses to carry).

17. See U.S. Gen. Accounting Office, *supra* note 13, at 75; see also Conn. Gen. Stat. § 29-32b(b) (“shall order”); 18 Pa. Cons. Stat. Ann. § 6109(e) (“shall be issued”); Va. Code Ann. § 18.2-308(D) (“shall issue”).

18. See U.S. Gen. Accounting Office, *supra* note 13, at 75 (2012).

19. See U.S. Gen. Accounting Office, *supra* note 13, at 75-76; see also Or. Rev. Stat. Ann. § 166.291(1); Wash. Rev. Code Ann. § 9.41.070(1).

### III. STATE COURTS HISTORICALLY UPHELD DISCRETIONARY CARRY LICENSING LAWS ON THE BASIS OF DISAVOWED INTERPRETATIONS OF THE SECOND AMENDMENT

The *Amici* are all located in States (Massachusetts, New Jersey, and New York) that have discretionary carry licensing laws – and these laws were all upheld, historically, on the basis of erroneous views about the meaning and scope of the right to keep and bear arms. These laws are ripe for review by this Court.

In 1906, five years before New York enacted the Sullivan Law, Massachusetts was the first State to make the carry of handguns (in any form) subject to a discretionary license. *See* 1906 Mass. Acts ch. 172, § 2 (punishing one who “carries on his person a loaded pistol or revolver, without authority or permission”). This original law provided that local officials “may . . . issue a license . . . if it appears that the applicant has good reason to fear an injury to his person or property. . . .” *Id.* § 1. Notwithstanding numerous amendments, this remains the basic articulation of the discretionary licensing standard in Massachusetts today. *See* Mass. Gen. Laws ch. 140, § 131(a)-(b). The Supreme Judicial Court of Massachusetts addressed the meaning of the Second Amendment only once prior to *Heller*, and it concluded that the right protected only “State militias,” not individuals, and that it did not apply to the States. *See Commonwealth v. Davis*, 343 N.E.2d 847, 850, 369 Mass. 886, 891 (1976). Massachusetts courts have relied on this decision to justify the State’s discretionary system for issuing carry licenses. *See MacNutt v. Police Comm’r*, 572 N.E.2d 577, 579, 30 Mass. App. Ct. 632, 635 (1991).

New York enacted the Sullivan Law in 1911, which required a license to either own or carry a handgun in any form. *See* 1911 N.Y. Laws ch. 195, sec. 1, § 1897. Shortly thereafter, a New York City attorney challenged the law as unconstitutional. *See People ex rel. Darling v. Warden*, 134 N.Y.S. 335, 74 Misc. 151 (Sup. Ct., N.Y. Co. 1911), *rev'd*, 139 N.Y.S. 277, 154 A.D. 413 (App. Div. 1st Dep't 1913).<sup>20</sup> The trial court adopted a limited construction of the law to avoid “a very serious question as to whether . . . the act was not unconstitutional.” *Id.* at 336-37, 74 Misc. at 153. However, a New York Appellate Division reversed (3-2), and one of its findings was that the Second Amendment did not apply to the States. *See People ex rel. Darling v. Warden*, 139 N.Y.S. 277, 283, 154 A.D. 413, 419 (App. Div. 1st Dep't 1913). The court further ruled that the (near verbatim) State law analogue protecting the right to keep and bear arms<sup>21</sup> would preclude only a “prohibit[ion on] the keeping of arms” because doing so would interfere with potential militia obligations. *See id.* at 284, 154 A.D. at 421-22. Over the years, New York courts have upheld the Sullivan Law and its discretionary provisions on the rationale that the Second Amendment does not apply to the States, and that any right to arms does not, in any event, protect handguns as a class (as opposed to rifles and shotguns). *See People v. Persce*, 97 N.E. 877, 879, 204 N.Y. 397, 403 (1912); *Moore v. Gallup*, 45 N.Y.S.2d 63, 66, 267 A.D. 64, 67 (App. Div. 1943), *aff'd mem.*, 59 N.E.2d 439, 293 N.Y. 846 (1944).

---

20. It is of interesting historical note that George Darling needed to summon New York City police *three times* before they would charge him with violating the newly enacted law. *See Beats the Gun Law in his Test Case*, N.Y. Times, Nov. 4, 1911. Times have changed.

21. N.Y. Civil Rights Law § 4.

Finally, New Jersey precluded the unlicensed carry of handguns in any form in 1966. *See* 1966 N.J. Laws ch. 60, sec. 32, § 2A:151-41(a) (unlawful to have “a pistol or revolver” “on or about [one’s] clothes or person . . . in any public place or public area”). The licensing standard was “need . . . to carry a pistol or revolver,” *id.* sec. 35, § 2A:151-44, which was later amended to “justifiable need” in 1978, *see* 1978 N.J. Laws ch. 95, § 2C:58-4(c), (d). In *Burton v. Sills*, 248 A.2d 521, 53 N.J. 86 (1968), the Supreme Court of New Jersey upheld the 1966 law against a Second Amendment challenge on the rationale that the right protected only “the collective right ‘of the people’ to keep and bear arms in . . . the active, organized militia of each state,” *id.* at 526, 53 N.J. at 97. For years, New Jersey courts have cited this decision to uphold denials of handgun carry licenses under New Jersey’s discretionary “need” standard. *See Siccardi v. State*, 284 A.2d 533, 538, 59 N.J. 545, 554 (1971); *In re Mikhaeil’s Application*, no. A-3467-05T3, 2006 N.J. Super. Unpub. LEXIS 1811, \*3 (App. Div. Dec. 4, 2006).

**CONCLUSION**

When it comes to the scope and application of the right to bear arms outside the home, there are multiple conflicts between the decisions of different federal appellate courts and state supreme courts. The result is a state of uncertainty for courts that are called upon to decide bearing-arms cases. While *Amici* consider the Court's decisions in *Heller* and *McDonald* to be straightforward, the existence of this large body of caselaw makes it difficult for courts to find the right path – as it is hoped this review of the inconsistent decisions has shown. Indeed, some judges have gone so far as to expressly articulate their confusion about how to move forward, and to request further guidance from this Court.

The time is ripe for this Court to resolve this issue, and the Petition should be granted.

Respectfully submitted,

DAVID D. JENSEN  
*Counsel of Record*  
DAVID JENSEN PLLC  
111 John Street, Suite 230  
New York, NY 10038  
(212) 380-6615  
david@djensenpllc.com

*Counsel for Amici Curiae*