NO. 13-42

In the
Supreme Court of the United States

RAYMOND WOOLLARD AND
SECOND AMENDMENT FOUNDATION, INC.,

Petitioners,

v.

DENIS GALLAGHER, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth 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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[*]

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 approximately five 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 a party or *amicus curiae* 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 Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185 (5th Cir. 2012), *petition for cert. filed*, No. 13-137 (U.S. July 29, 2013) (challenging constitutionality of federal restrictions on handgun sales to adults under

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[*] 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/or 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.

age 21); *Nordyke v. 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. The NRA therefore has been involved in cases raising that constitutional question in courts throughout the Nation for many 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); *Peruta v. Cnty. of San Diego*, 758 F. Supp. 2d 1106 (S.D. Cal. 2010), *appeal pending*, No. 10-56971 (9th Cir.).

INTRODUCTION

It has been five years since this Court concluded in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment secures an individual right to keep and bear arms, and three years since the Court underscored in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), that this individual right is a fundamental one that applies with full force to the states. Given the number of laws enacted by the federal government, states, and localities in the years when a mistaken understanding of the Second Amendment held sway, one would have expected a major reconsideration of extant firearms laws to have occurred. It has not. Instead, jurisdictions have

engaged in massive resistance to the clear import of those landmark decisions, and the lower federal courts, long out of the habit of taking the Second Amendment seriously, have largely facilitated this resistance. For example, a petition recently filed by *amicus*, *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 13-37, seeks review of a Fifth Circuit decision refusing to protect the Second Amendment rights of law-abiding adults under age 21 to purchase the quintessential weapon for self-defense, and the Second Circuit recently deferred ruling on whether the Second Amendment even applies to a summer home. The decision below, which purports to simultaneously assume the existence of a constitutional right to carry a handgun outside the home, yet uphold a near-total restriction on the exercise of that right precisely *because* its restricts the exercise of that right, is another example of this dogged resistance. It is also another example of the pressing need for this Court's intervention to restore the Second Amendment to the fundamental status to which it is entitled.

REASONS FOR GRANTING THE PETITION

Heller marked a watershed moment in Second Amendment jurisprudence. Resolving a debate that had been ongoing for the better part of a century, this 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 law that had held sway over most of the Nation for decades, one would have expected to see federal, state, and local governments respond to this landmark decision by reexamining their laws to determine whether they are consistent with the fundamental individual right this Court recognized. It simply could not be that hundreds of jurisdictions operating on the assumption that the Second Amendment protected only collective rights nonetheless uniformly passed laws that were fully compatible with an individual right subject to some form of heightened scrutiny. Some degree of reexamination clearly was necessary. And to the extent governments failed to undertake that reexamination, one would have expected to see courts engage in serious scrutiny of stringent firearms regulations that pre-date *Heller*.

Instead, the five years since *Heller* was decided have been marked by intransigence by governments with the cooperation of courts that at best have simply been unable to break habits formed during pre-*Heller* days and at worst are engaged in massive resistance to this Court's decisions. While *Heller*'s detractors have begrudgingly accepted that laws *identical* to those invalidated in *Heller* and *McDonald* must fall, many at the same time have 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 and none others.

For instance, in what one judge described as "a thumbing of the municipal nose at the Supreme Court," shortly after *McDonald* the City of Chicago attempted to circumvent this Court's decision by imposing a new requirement that all firearms owners obtain training at live shooting ranges, but simultaneously banning live shooting ranges within city limits. *See Ezell v. City of Chicago*, 651 F.3d 684, 712 (7th Cir. 2011) (Rovner, J., concurring in the judgment). Adopting an equally minimalist view of *Heller* and *McDonald*, the Fifth Circuit recently concluded that adults under the age of 21 likely possess no Second Amendment rights at all, but in any event may declared too "irresponsible" to exercise them. *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives* ("*BATF*"), 700 F.3d 185 (5th Cir. 2012), *petition for cert. filed*, No. 13-137 (U.S. July 29, 2013); *see also Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338 (5th Cir. 2013) (relying on same reasoning to uphold state law prohibiting 18-to-20-year-olds from carrying handguns in public). Indeed, as mentioned, the Second Circuit would not even make a definitive ruling on whether the Second Amendment applies to a summer home. *See Osterweil v. Bartlett*, 706 F.3d 139 (2d Cir. 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).

The decision below, which upheld a regulatory scheme that precludes the vast majority of law-abiding adults from carrying handguns outside the home, reflects the same stubborn resistance to *Heller* and *McDonald*. Under a regulatory regime that pre-

dates *Heller*, Maryland prohibits an individual from carrying a handgun outside the home unless he possesses a permit to do so. Md. Code Ann., Pub. Safety § 5-303 (West 2013). To obtain a permit, however, an individual must demonstrate a "good and substantial reason" for needing to carry a handgun outside the home. *Id.* § 5-306(a)(5)(ii). That statutory standard is bad enough. Under our Constitution, the people enjoy fundamental constitutional rights whether or not they can satisfy some local official that they have a "good and substantial reason" for exercising them.

But as interpreted by the Maryland courts, this standard is far more problematic. It is not satisfied by a desire to carry a handgun for self-defense; instead, an applicant must demonstrate some particularized need, such as a concrete and verifiable threat to his safety. *See, e.g.*, *Scherr v. Handgun Permit Review Bd.*, 880 A.2d 1137, 1138 (Md. Ct. Spec. App. 2005). As the District Court recognized, this requirement is not aimed at "ensuring that guns are kept out of the hands of those adjudged most likely to misuse them," "does not ban handguns from places where the possibility of mayhem is most acute," "does not attempt to reduce accidents," and "does not even … limit the carrying of handguns to persons deemed 'suitable.'" Pet. App. 76a–77a. Instead, it is nothing more than "a rationing system," designed "simply to reduce the total number of firearms carried outside the home." Pet. App. 77a. This is completely antithetical to the Second Amendment and this Court's decision in *McDonald*. Whatever else it means for a constitutional right to be ranked as fundamental, it surely means that the

right is enjoyed by all law-abiding adults equally. Thus, a regulatory system that allows an individual to exercise a fundamental right only if the individual can establish a particularly good reason—vis-à-vis the rest of the citizenry—to exercise the right simply denies the right's fundamental character. Nonetheless, the Fourth Circuit held this scheme compatible with the Second Amendment.

In doing so, the Fourth Circuit committed much the same error the Fifth Circuit committed when it rejected the NRA's constitutional challenge to the federal scheme that precludes law-abiding adults under the age of 21 from purchasing handguns from licensed firearms dealers. *See BATF*, 700 F.3d at 205. Applying the malleable "two-step" approach that has become the norm among lower courts, both courts purported to proceed on the assumption that the challenged scheme burdens conduct protected by the Second Amendment. *See id.*; Pet. App. 24a ("assum[ing] that the *Heller* right exists outside the home and that such right … has been infringed"). Yet when it came to determining whether those schemes survive constitutional scrutiny, both courts applied only a watered down form of "intermediate" scrutiny, reasoning that the very conduct they had just purported to presume constitutionally protected does not fall within some ill-defined "core" of the Second Amendment. *See BATF*, 700 F.3d at 206 ("[t]he Second Amendment, at its core, protects 'law-abiding, *responsible*' citizens," and "Congress found that persons under 21 tend to be relatively irresponsible" (quoting *Heller*, 554 U.S. at 635; emphasis added by Fifth Circuit)); Pet. App. 25a (relying on circuit precedent describing "'right of self-

defense in the home'" as the "'core'" of the Second Amendment and declaring that, "'outside the home, … public safety interests often outweigh individual interests in self-defense'" (quoting *United States v. Masciandaro*, 638 F.3d 458, 470–71 (4th Cir. 2011)).

Both decisions also illustrate the manipulability of the weak form of "intermediate" scrutiny that has become so routine in Second Amendment cases. In *BATF*, for example, the Fifth Circuit reasoned that even assuming 18-to-20-year-olds are protected by the Second Amendment, the challenged scheme survives constitutional scrutiny because it serves Congress' "important" interest in solving the "problem" of "the ease with which young persons—including 18-to-20-year-olds—[a]re getting their hands on handguns." *BATF*, 700 F.3d at 207. In effect, the court reasoned that this burden on Second Amendment activity advances the important interest of curtailing the very right the court purported to presume existed. In other words, the court first assumed that the unfettered exercise of Second Amendment rights is somehow problematic, and then justified the fettering of a fundamental right not by identifying some independent compelling or important interest, but rather by the simple fact that the restriction prevents the unfettered exercise of Second Amendment rights.

The Fourth Circuit applied the same circular logic here. In its view, it did not need to decide whether the right protected by the Second Amendment is limited to the home because, even assuming individuals possess the right to carry arms outside the home, Maryland's scheme "advances the

objectives of protecting public safety and preventing crime because it reduces the number of handguns carried in public." Pet. App. 32a. In other words, the court deemed the scheme constitutional not in spite of, but *because of*, the burden it places on the presumed right to carry a handgun outside the home. As the District Court correctly recognized in rejecting that incongruous argument, it simply cannot be the case that the Second Amendment protects a right to carry arms outside the home, yet legislatures have an important interest in ensuring that only a select few are able to exercise that right so that society is spared the consequences of allowing the entire people to exercise a right enshrined in the Constitution.

The Fourth and Fifth Circuits are not alone in this failure to take seriously this Court's admonition that "the enshrinement of" the Second Amendment "necessarily takes certain policy choices off the table." *Heller*, 554 U.S. at 636. The Second and Third Circuits likewise have applied the same combination of the prevailing two-step approach and a very loose form of intermediate scrutiny to uphold regulatory regimes that require individuals to demonstrate a particularized need to carry a handgun outside the home. *See Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013) (upholding New York scheme that requires applicant to show "proper cause" to carry a handgun outside the home); *Drake v. Filko*, --- F.3d ----, 2013 WL 3927735 (3d Cir. July 31, 2013) (upholding New Jersey scheme that requires applicant to show a "justifiable need" to carry a handgun outside the home). Like the Fourth and Fifth Circuits, these courts reached that conclusion

even while purporting to presume that the Second Amendment *does* apply outside the home. *See Kachalsky*, 701 F.3d at 89 (assuming that "that the Amendment must have *some* application" outside the home); *Drake*, 2013 WL 3927735, at *3 ("the Second Amendment's individual right to bear arms *may* have some application beyond the home").

District Courts in the Ninth Circuit have employed similar rights-denying methodologies. In *Peruta v. Cnty. of San Diego*, 758 F. Supp. 2d 1106 (S.D. Cal. 2010), for example, the District Court likewise contended that San Diego's policy of requiring a particularized need to carry a handgun outside the home needed to satisfy only a loose form of intermediate scrutiny because "heightened scrutiny has been reserved for instances in which the 'core right' of possession of a firearm in the home is infringed." *Id.* at 1115. The court then went on to uphold San Diego's de facto ban on the reasoning that the county has "an important interest in reducing the number of concealed weapons in public." *Id.* at 1117. As counsel of record on this brief argued for the *Peruta* plaintiffs in their pending appeal, that circular reasoning is fundamentally incompatible with *Heller* and *McDonald*. *See* 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.

In stark contrast, the Seventh Circuit correctly recognized that this Court's holding that "the [Second A]mendment confers a right to bear arms for self-defense, which is as important outside the home as inside," compelled the conclusion that Illinois'

"blanket prohibit on carrying gun[s] in public" was unconstitutional. *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012). In doing so, the court reiterated, as other judges have, that it is not for lower courts "to repudiate th[is] Court's historical analysis" or relieve governments of their burden of proof in an effort to uphold substantial curtailments of the right to keep and bear arms. *Id.* at 935; *see also, e.g.*, *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 714 F.3d 334, 336 (5th Cir. 2013) (Jones, J., joined by five other judges dissenting from denial of rehearing en banc) (rejecting panel's approach as failing to "take seriously *Heller*'s methodology and reasoning"); *Drake*, 2013 WL 3927735, at *26 (Hardiman, J., dissenting) (recognizing that this Court has already "rejected th[e] sort of balancing inquiry" the majority applied "as inconsistent with the very idea of constitutional rights"); *Heller v. District of Columbia*, 670 F.3d 1244, 1269 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("it is not our role to re-litigate *Heller* or to bend it in any particular direction"); *United States v. Skoien*, 614 F.3d 638, 654 (7th Cir. 2010) (en banc) (Sykes, J., dissenting) (rejecting majority's approach as merely "pay[ing] lip service" to *Heller* and *McDonald*).

As this flood of recent and divergent decisions confirms, these critical constitutional questions are not going away. Indeed, the NRA remains actively engaged in litigating as a party or *amicus* a number of important Second Amendment cases throughout the country, including in the pending *Peruta* appeal in the Ninth Circuit. Much like the state officials in this case and the federal government in *BATF*, the county

in *Peruta* has insisted that there is no right to carry a handgun for self-defense outside the home, but that even if such a right exists, a near-total prohibition on its exercise is permissible because the right does not fall within the "core" of the Second Amendment. Whether that remarkably restrictive reading of *Heller* and *McDonald* and the analytical methodology they applied is compatible with those decisions and, more importantly, with the Constitution is undoubtedly a question that warrants this Court's ultimate resolution.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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