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 FOR THE STATE RESPONDENTS IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Second Amendment to the United States Constitution prohibits the State of New York from requiring an applicant to show proper cause to obtain a license to carry a concealed handgun in public.

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STATEMENT

1. New York requires a license for the possession of concealable firearms, such as handguns, but not for the possession of most rifles or shotguns. N.Y. Penal Law §§ 265.01(1), 265.20(3) (Pet. App. 148-150). Licenses are issued both with and without restrictions to particular places or purposes. *O'Connor v. Scarpino*, 83 N.Y.2d 919, 638 N.E.2d 950 (1994). To obtain a license to carry a concealed handgun in public places without restriction, known as a "full-carry license," an applicant must show "proper cause" for the license, N.Y. Penal Law § 400.00(2)(f) (Pet. App. 152), which New York courts have defined to mean a need for self-protection distinguishable from that of the general public. *Klenosky v. N.Y City Police Dep't*, 75 A.D.2d 793, 793 (1st Dep't 1980), *aff'd on op. below*, 53 N.Y.2d 685, 421 N.E.2d 503 (1981); *accord Matter of Bando v. Sullivan*, 290 A.D.2d 691, 693 (3d Dep't 2002). In most parts of the State, and as relevant here, state judges are responsible for receiving and acting on applications for firearms licenses. N.Y. Penal Law § 265.00(10) (Pet. App. 148).

2. Each of the five individual petitioners resides in Westchester County and applied in that county for an unrestricted license to carry a concealed handgun under N.Y. Penal Law § 400.00(2)(f). (Pet. App. 1, 12.) Of the five, three already held restricted licenses to carry concealed handguns for the purpose of target shooting or hunting or both. (*See* Pet App. 12 n.7.) Petitioners' license applications did not purport to demonstrate any special need beyond that of the general public to carry a concealed weapon outside the home for the purpose of self-defense. (*See* Pet. App. 13.)

The four individual respondents, Susan Cacace, Jeffrey A. Cohen, Albert Lorenzo, and Robert K. Holdman were, at the time of the filing of the complaint, state court judges in Westchester County, New York, who acted as firearms licensing officers.[1] In that capacity they received the individual petitioners' applications for licenses to carry concealed handguns outside their homes. Each application was denied on the ground that the applicant failed to satisfy the proper-cause requirement in Penal Law § 400.00(2)(f).[2] (Pet. App. 13.) Only one of the petitioners sought state-court judicial review of the denial of his license application in the New York courts, and this effort was unsuccessful. *See Kachalsky v. Cacace*, 65 A.D.3d 1045 (2d Dep't 2009), *appeal dismissed*, 14 N.Y.3d 743 (2010).

3. After this Court issued its decision in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), holding that the Second Amendment right to bear arms was made applicable to the States by the Fourteenth Amendment to the United States Constitution, petitioners brought this action in the United States District Court for the Southern District of New York, seeking declaratory and injunctive relief under 42 U.S.C. § 1983. They asserted that New

[1]Only one respondent, Judge Susan Cacace, still serves as a firearms licensing officer in Westchester County. The other respondents have either left the bench or assumed positions on other courts that have no role in firearms licensing in Westchester County. This brief is filed on behalf of the four individual judicial respondents; respondent County of Westchester's Department of Public Safety is separately represented.

[2]The district court held that the organizational plaintiff, the Second Amendment Foundation (SAF), lacked standing to sue. (Pet. App. 74-75.) The court of appeals did not reach SAF's standing. (Pet. App. 4 n.3.)

York's proper-cause requirement for issuance of an unrestricted license to carry a concealed handgun violates the Second Amendment both on its face and as applied to them; they also raised a claim under the Equal Protection Clause of the Fourteenth Amendment. Petitioners sought an injunction against enforcement of the proper-cause requirement, as well as an order directing respondents to issue them full-carry licenses, that is, licenses to carry a concealed handgun in public places without restriction. (*See* Pet. App. 60.)

On September 2, 2011, the district court granted summary judgment to all defendants. (Pet. App. 45-130.) The court gave two alternative grounds for its ruling. First, the court reasoned that the Second Amendment right as explained in *District of Columbia v. Heller*, 554 U.S. 570 (2008), does not include a right to carry concealed weapons in public, and therefore the right is not implicated by New York's permit requirement for carrying handguns outside the home. (Pet. App. 97-109.) Alternatively, the court held that if the Second Amendment protects a right that is implicated by this statute, then the law passes constitutional muster (Pet. App. 109-125), because the level of scrutiny applicable to New York's proper-cause requirement is intermediate scrutiny (Pet. App. 115), and the law satisfies that test because it is substantially related to the important state interest "in promoting public safety and preventing crime" (Pet. App. 121-122).

4. The court of appeals unanimously affirmed the judgment. (Pet. App. 1-44.) The court expressly declined to adopt the district court's conclusion that the rights guaranteed by the Second Amendment do not include public carrying of handguns, and instead proceeded on

the understanding that the Second Amendment applies to public carrying. (Pet. App. 16.)

The court of appeals observed that the Court's opinions in *Heller* and *McDonald* did not provide definitive answers to the question presented in this case because in each of those cases the Court struck down laws banning handgun possession in the home. (Pet. App. 24-26). The court of appeals understood *Heller* and *McDonald* to hold that the Second Amendment permits the least latitude for restrictions on possession in the home. (Pet. App. 16.) But the court went on to reason that "the Amendment must have *some* application in the very different context of the public possession of firearms." (Pet. App. 16.) The court then set out to determine, based on the history of regulation of firearms in England and the United States, the scope of the Second Amendment right to *public* possession of firearms, and the proper standard of scrutiny for evaluating restrictions on that right.

The court recounted the extensive nineteenth-century state regulation and prohibition of public carrying of concealed weapons, of openly carried weapons, and of concealable weapons, such as handguns (whether or not actually concealed). (Pet. App. 18-20, 28-32.) Relying on that history, the court of appeals rejected petitioners' argument that "history and tradition demonstrate that there is a 'fundamental right' to carry handguns in public." (Pet. App. 16.) It specifically found that New York's restriction on public carrying of handguns "has a number of close and longstanding cousins" (Pet. App. 20), and concluded that history and tradition did not definitively resolve the scope of Second Amendment protection for public carrying of handguns.

The court of appeals next rejected petitioners' proposal to import First Amendment prior-restraint doctrine into the analysis of their Second Amendment claim. The court held that petitioners' argument ignored important differences between the state's regulatory powers and responsibilities under the two Amendments (Pet. App. 22), observing that the Second Amendment permitted weapons possession to be prohibited for convicted felons or mentally ill persons, but that similar prohibitions on the exercise of First Amendment rights by such persons would clearly be unconstitutional. (Pet. App. 40-41.) The court further concluded that New York's proper-cause requirement would satisfy prior-restraint principles even if they applied, because the proper-cause requirement does not confer unfettered discretion on licensing officials, but rather is "defined by binding judicial precedent." (Pet. App. 23.)

The court of appeals concluded that New York's proper-cause requirement should be analyzed under intermediate scrutiny. The court noted that intermediate scrutiny in this case was consistent with the approach taken by other circuits. (Pet. App. 25-26 & n.17.) The court observed that constitutional rights often receive greater protection against government regulation in the home than in public places. (Pet. App. 27-28.) Finally, the court considered the "longstanding tradition of states regulating firearm possession and use in public because of the dangers posed to public safety." (Pet. App. 28-32.) The court thus held that the history and tradition reflecting a "substantial role for state regulation of the carrying of firearms in public" favored the application of intermediate scrutiny. (Pet. App. 33.)

The court then upheld the proper-cause requirement under intermediate scrutiny, concluding that the requirement was substantially related to New York's compelling interest in public safety and crime prevention. (Pet. App. 33.) Relying on intermediate-scrutiny cases decided by this Court, the court of appeals determined that deference was due to the New York legislature's predictive judgments "concerning the dangers in carrying firearms and the manner to combat those risks." (Pet. App. 34.) It then deferred to the enduring judgment of the elected representatives of the people of New York that the proper-cause requirement would advance the State's strong interest in public safety and crime prevention.

The court further observed that the proper-cause requirement was "oriented to the Second Amendment's protections" because it evaluated persons' need to carry a weapon for self-defense. (Pet. App. 36.) The court found the reasonableness of New York's regulation of public carrying buttressed both by the adoption of similar laws in other States (Pet. App. 36), and by the availability of other licenses to carry handguns outside the home under New York law. (Pet. App. 37.) The court rejected petitioners' request "to conduct a review bordering on strict scrutiny" by analyzing whether New York has used the least restrictive means to achieve its public safety ends. (Pet. App. 37.) Thus, declining to require a "perfect fit" between the means chosen by New York and the governmental objective of protecting public safety, the court of appeals held that New York's proper-cause requirement was substantially related to that compelling governmental objective, observing that *Heller* and *McDonald*—both of which approve prohibitions of firearms in certain sensitive public places—already implicitly recognized that the

authority of legislatures to regulate firearms in public is "entirely consistent with the Second Amendment." (Pet. App. 40.)

REASONS FOR DENYING THE PETITION

The petition in this case presents no question that warrants this Court's review. The decision of the court of appeals here does not conflict with either the decisions of this Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), or the decision of any other United States court of appeals or state court of last resort.

Petitioners claim there are such conflicts, but their claim rests on a mistaken understanding of the decision below. They say the court below rejected any application for the Second Amendment outside the home (Pet. 12-13, 29-31), but it did not. The court of appeals carefully acknowledged the application of the Second Amendment outside the home, concluded that the statute at issue here must meet heightened scrutiny, and found that it satisfied that test. As we demonstrate below, the Second Circuit's decision in this case is entirely consistent with the decisions that petitioners point to as creating a conflict. Moreover, questions similar to those presented here are pending today in at least three different courts of appeals. Those decisions may develop a conflict that warrants this Court's attention, or they may show that the guidance provided by this Court in *Heller* and *McDonald* is sufficient to permit an orderly development of the law in the courts of appeals. Because there is no present conflict to be resolved, the Court should allow the issues to percolate in the courts of appeals so that it may assess

whether review is warranted based on a developed body of decisions on the subject.

A. The Decision of the Court of Appeals Is Consistent With This Court's Decisions in *Heller* and *McDonald*.

Contrary to petitioners' contentions (Pet. 27-37), there is no conflict between the decision of the court of appeals and this Court's decisions in *Heller* and *McDonald*. Both *Heller* and *McDonald* concerned laws that totally banned handguns, including their possession in the home for the purpose of self-defense. The Court in both cases identified the home as a place where Second Amendment rights require especially strong protection, *Heller,* 554 U.S. at 628; *McDonald*, 130 S. Ct. at 3036 (plurality op.), but did not limit Second Amendment protections to the home, and made clear that the Second Amendment permits reasonable regulation of firearms. 554 U.S. at 626-27; 130 S. Ct. at 3047 (plurality op.).

The court of appeals correctly noted (Pet. App. 14) that 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* in at least three critical respects. First, the New York statute at issue here addresses carrying handguns in public places and not possessing them at home. Second, the New York statute imposes a permit requirement and not a total ban. And third, the New York statute has long historical roots, having existed in its present form for over a century, and resembling laws prohibiting the carrying of concealed and concealable weapons with even deeper historical roots in both the United States and England.

Indeed, the court of appeals' analysis followed this Court's guidance in treating the long history of the regulation at issue as relevant to a determination that it is reasonable and consistent with the Second Amendment. *See Heller*, 554 U.S. at 626-28. The court of appeals traced the history of laws prohibiting or restricting the public carrying of weapons as far back as the fourteenth-century Statute of Northampton, 2 Edw. 3, c.3 (1328) (Eng.), which prohibited individuals from going or riding while armed. (Pet. App. 29 n.20.) This prohibition, included in Blackstone's *Commentaries*, 4 William Blackstone, *Commentaries on the Laws of England* *148 (1769), was maintained in Massachusetts, North Carolina, and Virginia after independence, *see* Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1, 31-32 & n.166 (2012). Statutes adopted by States throughout the nineteenth century restricted and prohibited public carrying of weapons, particularly smaller concealable weapons, and some prohibitions extended to all public carrying. (*See* Pet. App. 30-32.) New York's restriction on the public carrying of readily concealable handguns, which is over a century old (*see* Pet. App. 4-7), is part of this long-standing tradition.

This Court's historical analysis in *Heller* led to the conclusion that the Second Amendment does not protect "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 554 U.S. at 626. *Heller* observed that prohibitions on the concealed carrying of weapons were upheld by most nineteenth century courts. *Id.* And in *McDonald* the Court reiterated that *Heller* "did not cast doubt on such longstanding regulatory measures" as prohibitions on firearms possession by felons and the mentally ill, and possession

in certain public places, such as schools and government buildings, 130 S. Ct. at 3047 (plurality op.), and the Court expressly *distinguished* "a variety of state and local firearms laws that courts have upheld" from the blanket bans at issue in *McDonald* and *Heller*, *id.* Recognizing "the problem of handgun violence in this country," *Heller* expressly stated that "[t]he Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns," 554 U.S. at 636, and cross-referenced the portion of the opinion describing prohibitions on concealed carrying of weapons, as well as other regulations.

New York's proper-cause requirement—which is neither a ban on public carrying nor any form of restriction on possession of handguns in the home—is similar to the types of long-standing laws that courts have repeatedly upheld and that *Heller* and *McDonald* recognize as "presumptively lawful regulatory measures."[3] 554 U.S. at 627 n.26; *see also* 130 S. Ct. at 3047 (plurality op.).

Because *Heller* acknowledges with approval the long-standing precedent upholding *prohibitions* on the carrying of concealed firearms, the court of appeals did not flout *Heller* by upholding New York's statute *regulating* concealed carrying.

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[3]The Court also left undisturbed its statement in *Robertson v. Baldwin*, that "the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons." 165 U.S. 275, 281-82 (1897). *See Peterson v. Martinez*, No. 11-1149, 2013 U.S. App. LEXIS 3776, at *29-*30 (10th Cir. Feb. 22, 2013) (relying on *Robertson* in part to conclude "the Second Amendment does not confer a right to carry concealed weapons," and opining that *Heller* and *McDonald* support this point).

Petitioners may be suggesting that New York's restriction on concealed carrying of handguns should be scrutinized more closely because New York also prohibits open carrying of handguns. (*See* Pet. 5; Pet. App. 16-17.) They are mistaken for two reasons.

First, they have not challenged the ban on open carrying, only a particular restriction on concealed carrying, namely the requirement that an applicant for an unrestricted concealed-carry license demonstrate proper cause. Second, even if the petition were construed to challenge the ban on open carrying as well, that ban is also fully supported by a long historical tradition: prohibitions and near-prohibitions on all public carrying have their origin in the fourteenth-century Statute of Northampton, were maintained in several States after independence, and were enacted (and upheld by courts) around the time of the ratification of the Fourteenth Amendment. (*See* Pet. App. at 31-32.)

B. There Is No Conflict Among the Courts of Appeals That Have Directly Addressed States' Ability To Regulate Public Carrying of Guns.

Only three federal courts of appeals have addressed the constitutionality since *Heller* and *McDonald* of state laws regulating public carrying of weapons. The decision here was the first such ruling.

A few months later, the Seventh Circuit struck down an Illinois ban on public carrying of guns that was the most restrictive state law on the subject nationwide. *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), *reh'g en banc denied*, 2013 U.S. App. LEXIS 3691 (7th Cir. Feb.

22, 2013). This ban applied both to handguns and long guns and contained no license exemption at all, and was therefore far more restrictive than New York's statute, as the Seventh Circuit recognized. *See id.* at 940-41.

And in February 2013, after the petition for certiorari in this case was filed, the Tenth Circuit upheld Colorado's residency requirement for obtaining a concealed-handgun permit. The Tenth Circuit, relying on the same long history of state regulation that the Second Circuit discussed here, concluded that the Second Amendment does not protect a right to carry a concealed weapon in public places. *Peterson v. Martinez*, No. 11-1149, 2013 U.S. App. LEXIS 3776, at *34-*35 (10th Cir. Feb. 22, 2013).

The Second Circuit's decision is consistent with both of these subsequent decisions. Contrary to petitioners' claim (Pet. 17), the Seventh Circuit's decision in *Moore* does not conflict with the decision here.[4] There is no inherent or logical conflict, because the Illinois public-carry ban invalidated there was far more restrictive than New York's proper-cause licensing requirement upheld in this case. *Moore* took pains to distinguish the Illinois law it struck down from the New York law that the Second Circuit had upheld in this case just months earlier. *Moore* described Illinois's statute as "[a] blanket prohibition on carrying [a] gun in public." 702 F.3d at 940. The statute went further

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[4]Petitioners (Pet. 14 n.5) also invoke *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011), to support their claim that a relevant circuit split exists. But *Ezell* is not a case about public carrying of handguns at all; rather, it struck down a Chicago ordinance prohibiting firing ranges in the city, *id.* at 690. Moreover, that prohibition effectively curtailed *all* possession of firearms because it made training at a firing-range a condition of lawful ownership of guns, including for home possession. *See id.* at 689-690, 695.

than New York's law in two critical ways. First, Illinois's ban applied to all guns, not just concealable firearms, such as handguns. By contrast New York's law does not restrict public carrying of most rifles and shotguns. Second, Illinois's law imposed an absolute ban on public carrying, whereas New York's law merely regulates it by requiring a showing of cause for issuance of a general concealed-carry license.

Moore repeatedly emphasized the uniquely restrictive quality of Illinois's public-carry ban. The Seventh Circuit stressed that "Illinois is the *only* state that maintains a flat ban on carrying concealed guns outside the home," *id.* (emphasis in original), and thus has "the most restrictive gun law of any of the 50 states," *id.* at 941. By contrast, the Seventh Circuit observed that New York's law was "less restrictive," recognizes "that the interest in self-defense extends outside the home," and is an example of discretionary state licensing schemes, *id.* at 940-41. States with similar statutes include California, Hawaii, Maryland, Massachusetts, and New Jersey.

Because the laws addressed in the two cases differ in important ways, the decision in *Moore* does not conflict with the Second Circuit's decision here. Indeed the two opinions agree on fundamental points. Both courts acknowledge that the Second Amendment has application outside the home. *Moore*, 702 F.3d at 936; Pet. App. 16. And both courts acknowledge that the Second Amendment permits the government to restrict public carrying: the Seventh Circuit expressly invited the Illinois legislature to revise the statute to impose "reasonable limitations . . . on the carrying of guns in public." *Moore*, 702 F.3d at 942 (staying the mandate for this purpose).

The *Moore* court gave careful attention to the Second Circuit's opinion in this case, and voiced no disagreement with its holding. To be sure, *Moore* noted a "reservation" about the Second Circuit's suggestion that the Second Amendment was like certain other provisions of the Constitution in affording much less protection outside than inside the home. *Id.* But that comparison was not critical to the Second Circuit's reasoning, and *Moore* did not suggest that it was. Rather, the primary bases for the Second Circuit's conclusion that the Second Amendment allows greater room for regulation outside the home were this Court's statement in *Heller* that bans on possession of firearms in certain public places are permissible under the Second Amendment (Pet. App. 27), and the historical record showing that the right to carry weapons in public places has always been more limited (Pet. App. 28-30). Thus, *Moore* does not suggest that the Seventh Circuit would have invalidated New York's proper-cause license standard, and the opinion below does not suggest that the Second Circuit would have upheld Illinois's blanket prohibition on public carrying.[5]

Petitioner can assert a conflict only by claiming, mistakenly, that the Second Circuit applied a "conclusive presumption of constitutionality" to restrictions on weapons possession outside the home. (Pet. 12.) The decision below applies no such presumption, and does not conflict with *Moore.*

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[5]Indeed, *Moore* expressly criticizes the plaintiffs in that case for quoting an article that predicts very little public safety impact from invalidating a gun ban, without noting that the quoted sentence assumes that some sort of permit system for public carry would be allowed to stand. 702 F.3d at 937.

The Second Circuit's decision is also consistent with the Tenth Circuit's decision in *Peterson*. Although the Tenth Circuit held that concealed carrying of handguns was outside the scope of Second Amendment protection, *Peterson*, 2013 U.S. App. LEXIS 3776, at *34-*35, the Colorado residency requirement would survive intermediate scrutiny even if concealed carrying of handguns were protected under the Second Amendment. *See id.* at *49 (Lucero, J., concurring). *Peterson* is thus consistent with the decision of the court of appeals here.[6]

C. This Court Should Await Further Consideration by the Courts of Appeals Before Addressing the Scope of Second Amendment Protection for Public Carrying of Handguns.

The decisions of federal district courts and of state intermediate appellate courts cited by petitioners (Pet. 14-17) do not establish a conflict worthy of this Court's attention. To the contrary, several of these lower court decisions are currently pending on appeal to the courts of appeals, and the pendency of these appeals provides a strong reason for this Court to deny this petition, allow the pending cases to proceed to decisions in the courts of

[6] The court of appeals' decision is also in harmony with the Fourth Circuit's decision in *United States v. Masciandaro*, which considered a federal regulation prohibiting the possession of a loaded handgun in a motor vehicle in a national park. 638 F.3d 458 (4th Cir.), *cert. denied*, 132 S. Ct. 756 (2011). The Fourth Circuit concluded that "as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense," *id.* at 470, and thus evaluated and upheld the regulation under intermediate scrutiny, *id.* at 473-74.

appeals, and assess whether review is warranted after the issues are better developed in the courts of appeals.

For example, the district court in *Woollard v. Sheridan* (cited at Pet. 15-16) struck down a Maryland statute that, like New York's, limits licenses for public carrying of handguns to those who demonstrate a reason for doing so. 863 F. Supp. 2d 462, 464, 476 (D. Md. 2012). But the Fourth Circuit has stayed the district court's injunction against enforcement of the Maryland law pending appeal. Order, *Woollard v. Gallagher*, No. 12-1437 (4th Cir. Aug. 1, 2012), ECF No. 65. The Fourth Circuit heard oral argument in the case on October 24, 2012.

The district court in *Piszczatoski v. Filko* (cited at Pet. 14) upheld New Jersey's statute requiring an applicant for a permit to carry a handgun in public to demonstrate a "justifiable need to carry a handgun," N.J. Stat. Ann. § 2C:58-4(c)-(d). 840 F. Supp. 2d 813, 816 (D.N.J. 2012). That decision is on appeal; the Third Circuit heard argument on February 12, 2013. (*See* ECF Docket, No. 12-1150 (3d Cir.).) And in separate appeals not mentioned by petitioners, a panel of the Ninth Circuit is considering the constitutionality under the Second Amendment of a California statute requiring an applicant to show "good cause" for issuance of a license to carry a handgun in public, as well as the constitutionality of a Hawaii statute that requires an applicant for a license to carry a handgun in public, either openly or concealed, to demonstrate a reason to fear injury to the applicant's person or property that is exceptional. *Peruta v. County of San Diego*, 758 F. Supp. 2d 1106, 1110, 1121 (S.D. Cal. 2010), *appeal argued*, No. 10-56971 (9th Cir. Dec. 6, 2012), ECF No. 107; Order, *Baker v. Kealoha*, No. 11-cv-528 (D. Haw. Apr. 30, 2012), ECF No. 51, *appeal argued*, No. 12-16258 (9th Cir. Dec. 6, 2012), ECF No. 42.

The Court should await the decisions in these pending appeals, and others that may arise, and assess whether review is warranted after more courts of appeals have addressed the issue. Further decisions of the courts of appeals may produce a developed conflict, or they may show that this Court's guidance in *Heller* and *McDonald* has been adequate to permit the courts of appeals to develop and apply a consistent body of law. In either event, the decisions will provide further helpful development of the issues surrounding regulation of public carrying of concealed and concealable weapons. Granting certiorari at this early point, by contrast, would "deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari," *United States v. Mendoza*, 464 U.S. 154, 160 (1984).

D. The Decision of the Court of Appeals Does Not Conflict with State Court Decisions on First Amendment Prior-Restraint Doctrine, Which Has No Application Here.

Petitioners separately assert a conflict between the court of appeals here and various state supreme courts regarding the application of First Amendment prior-restraint doctrine in the Second Amendment context (Pet. 22-27), but they are mistaken on that point as well. They seek to invoke the strand of prior-restraint doctrine holding that "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). But this doctrine is rooted in concerns specific to the First Amendment, namely concerns that a regime for licensing parades or public demonstrations that affords the government unfettered discretion could easily become

a vehicle for government censorship based on the content or viewpoint of speech.

No decision supports application of this prior-restraint doctrine in the Second Amendment context. Petitioners rely on two state supreme court opinions—both decided before *Heller* and *McDonald*—but neither even adjudicates a Second Amendment claim or mentions First Amendment prior restraint doctrine. *Mosby v. Devine* (cited at Pet. 24-25) upholds two handgun-licensing provisions under the Rhode Island Constitution. 851 A.2d 1031, 1048 (R.I. 2004). The passage from *Mosby* quoted by petitioners is mere dicta hypothesizing that constitutional problems would be presented if a license were denied arbitrarily in a particular situation. *People v. Zerillo* (cited at Pet. 24) concluded that Michigan's Constitution was violated by a statutory provision that, unlike New York's, conferred unfettered discretion on a county official in firearm licensing. 219 Mich. 635, 639, 189 N.W. 927, 928 (1922). Both decisions address rights to keep and bear arms under state constitutions, not the Second Amendment, and in any event neither adopts a rule that would call into question the constitutionality of a proper-cause standard, as defined by New York law.

Every court to consider the question after *Heller* and *McDonald* has rejected attempts to transplant prior-restraint doctrine into Second Amendment analysis. *See Hightower v. City of Boston*, 693 F.3d 61, 80 (1st Cir. 2012); *Young v. Hawaii*, No. 12-cv-336, 2012 U.S. Dist. LEXIS 169260, at *37-*38 (D. Haw. Nov. 29, 2012), *appeal docketed*, No. 12-17808 (9th Cir. Dec. 24, 2012); *Woollard*, 863 F. Supp. 2d at 471-72; *Piszczatoski*, 840 F. Supp. 2d at 831-33.

Moreover, even if prior-restraint doctrine were applicable in the Second Amendment context, New York's proper-cause standard would satisfy that doctrine. As the court of appeals held (Pet. App. 23), New York's proper-cause requirement does not confer unbridled discretion on licensing officials, but rather frames a well-defined and objective inquiry guided by a body of New York judicial decisions. The court of appeals aptly observed that petitioners are not really complaining because there is no licensing standard under New York law, but rather are complaining because they "do not like" the standard that New York law imposes. (Pet. App. 23.) Consequently, even if there were any conflict regarding the applicability of the prior-restraint doctrine under the Second Amendment (and there is no such conflict), its resolution would have no bearing on the outcome of this case.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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