No. 16-894

In the

Supreme Court of the United States

EDWARD PERUTA; MICHELLE LAXSON; JAMES DODD; LESLIE BUNCHER, DR.; MARK CLEARY; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION,
Petitioners,

v.

STATE OF CALIFORNIA; COUNTY OF SAN DIEGO; WILLIAM D. GORE, individually and in his capacity as Sheriff,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

This Court has already established that the "core lawful purpose" of the Second Amendment is "self-defense." *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008). The text of the Second Amendment protects a right to bear arms, as well as to keep them, and the need for self-defense is equally necessary outside the home as inside. It therefore should be beyond cavil that ordinary, law-abiding citizens have a constitutional right to bear arms outside the home for self-defense in *some* manner, whether by open or concealed carry. Yet, 225 years after the Second Amendment's ratification, lower courts are divided over that question, and the Ninth Circuit has now widened the chasm. The time has come for this Court to resolve that exceptionally important constitutional question.

Respondents' efforts to deny that split blink reality. Lower courts have clearly reached different conclusions about whether and to what extent the Second Amendment protects a right to bear arms outside the home, with now two courts concluding that it does; three courts concluding that it does not; three courts assuming that it does, but that any protection is less robust than protections for other fundamental rights; and the Ninth Circuit concluding that the government has *carte blanche* to prohibit concealed carry even if it bans open carry.

Respondents nonetheless ask this Court to stay its hand until the next outside-the-home case comes along, insisting that there is no need to review *this* case because the en banc panel's conclusion that there is no free-standing right to *concealed* carry is

correct. But the en banc panel's transparent attempt to narrow the case beyond recognition by conflating the claims brought and the relief sought cannot change the reality that this case is and always has been about whether petitioners have *any* right to carry handguns outside the home for self-defense, whether openly or concealed. By concluding that the Sheriff may close off the only legal outlet for ordinary, law-abiding individuals to carry a handgun under California law, the court sanctioned the continued enforcement of a regime that deprives petitioners of the constitutional right that they initiated this litigation to vindicate.

Respondents' attempts to resist that conclusion fall flat. Allowing individuals to carry handguns in vanishingly small subsections of sparsely populated "unincorporated" areas, or while fishing or camping, or during "the brief interval" when they are *already* confronted with "an immediate, grave danger," is no substitute for allowing individuals to be armed and ready for self-defense should confrontation arise. Thus, the simple reality is that, in the vast majority of San Diego County, ordinary, law-abiding citizens like petitioners can carry handguns neither openly nor concealed. The same is true for millions of individuals in several of the most populous jurisdictions throughout both California and the rest of the country. Whether that result is consistent with the Constitution is a question that was squarely pressed and repeatedly passed upon below. Accordingly, this is the right time and the right case for this Court to decide whether the right to bear arms really can be confined to a select subset of "the people" that the Second Amendment protects.

I. Courts Are Divided Over Whether And To What Extent The Second Amendment Applies Outside The Home.

Numerous courts have now addressed and divided over whether and to what extent the Second Amendment applies outside the home. The conflict among the lower courts is clear, and respondents' attempts to paper it over are unavailing.

The State concedes that the Seventh Circuit in *Moore v. Madigan*, 702 F.3d 933 (2012), held that the Second Amendment protects a right to bear arms outside the home. StateBIO9. As the court cogently explained in striking down a prohibition on carrying handguns outside the home, *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), make clear that the Second Amendment "confers a right to bear arms for self-defense, which is as important outside the home as inside." *Moore*, 702 F.3d at 942. And just last week, the Florida Supreme Court also held that "the core of the constitutional right to bear arms for self-defense" includes the "carrying of firearms in public." *Norman v. State*, No. SC15-650, slip op. 36-37 (Fla. Mar. 2, 2017). Nonetheless, three state courts of last resort have reached the opposite conclusion. Pet.16. Respondents dismiss those cases as lacking in "extended discussion or analysis of the scope of the Second Amendment." StateBIO10-11. That may explain how those courts reached a conclusion plainly at odds with the text of the Second Amendment and *Heller* and *McDonald*, but it does not change the reality that each case rejected a Second Amendment challenge on the ground that carrying a firearm outside the home is not protected.

In *Commonwealth v. Gouse*, the court held that the case "does not implicate" the Second Amendment because "the defendant was charged with and convicted of possessing a firearm in an automobile, not his home." 965 N.E.2d 774, 801-02 (Mass. 2012). In *Williams v. State*, the court held that restrictions on "wearing, carrying, or transporting a handgun in public" do not implicate the Second Amendment because "the Second Amendment is applicable to statutory prohibitions against home possession." 10 A.3d 1167, 1177 (Md. 2011). The court then labeled *Heller*'s broader explications of the right "dicta," declaring that "[i]f the Supreme Court … meant its holding to extend beyond home possession, it will need to say so more plainly." *Id.* Finally, *Mack v. United States* concluded that neither *Heller* nor *McDonald* "endorse[d] a right to carry weapons *outside* the home." 6 A.3d 1224, 1236 (D.C. 2010). That is impossible to reconcile with the Seventh Circuit's holding that "confin[ing] the right to be armed to the home is to divorce the Second Amendment from the right of self-defense." *Moore*, 702 F.3d at 937.

Three Courts of Appeals have adopted another approach, assuming that the Second Amendment extends beyond the home, yet nonetheless concluding that ordinary, law-abiding citizens may be categorically denied the right to bear arms for self-defense. *See Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 98 (2d Cir. 2012); *Drake v. Filko*, 724 F.3d 426, 434 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 881 (4th Cir. 2013). As the Seventh Circuit explained, the reasoning of those decisions is irreconcilable with *Moore*, as each rests on the

erroneous premise "that the Second Amendment should have much greater scope inside the home than outside." *Moore*, 702 F.3d at 941. In other words, those decisions are premised on the view that the Second Amendment right to bear arms is not entitled to the same protection as the right to keep arms inside the home (or, for that matter, other fundamental constitutional rights). That is precisely the reasoning that *Moore* (and the three-judge panel below) rejected.

The Ninth Circuit added yet another approach when it held that there is *never* a right to *concealed* carry, even when *open* carry is prohibited by state law but concealed carry is not. Thus, in the Ninth Circuit, the only way to even *try* to assert a right to carry outside the home is by attacking restrictions on open carry. That novel approach is deeply flawed, as it puts unnecessary constitutional pressure on open-carry prohibitions and puts even the most restrictive concealed-carry laws beyond challenge, even though the vast majority of states have made concealed carry their preferred avenue for exercising the right.[1] But it also makes clear beyond cavil that the lower courts are deeply divided over whether and to what extent the Second Amendment protects the right of ordinary, law-abiding individuals to carry a handgun for self-defense.

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[1] The State tries to escape that conclusion by claiming that any "open carry" right may still be accommodated by concealed carry. It is far from clear that the Ninth Circuit shares that view, but even if it does, the court's decision still needlessly forces broadside facial challenges to open-carry restrictions.

II. This Is The Right Case To Resolve The Exceptionally Important Constitutional Question Presented.

Notwithstanding that clear division among the lower courts, the State insists that this Court should stay its hand because the en banc panel "correctly resolve[d] the only question it addresse[d]": whether there is a free-standing right to concealed carry. StateBIO6-7. But the State conspicuously declines to defend the notion that this is the question the en banc panel was *asked*. And for good reason, as the parties—including the State itself—litigated this case every step of the way as a dispute over whether petitioners have a right to carry handguns outside the home for self-defense in *some* manner, whether openly or concealed. Pet.27-28. That is the dispute the three-judge panel resolved, as did the District Court before it. *See* Pet.App.90 ("We … decide whether a responsible, law-abiding citizen has a right under the Second Amendment to carry a firearm in public for self-defense."); Pet.App.205-06 ("[T]he parties' dispute is whether the right recognized by the Supreme Court's rulings in [*Heller* and *McDonald*] … extends to … the right to carry a loaded handgun in public, either openly or in a concealed manner.").

The State half-heartedly argues that the Ninth Circuit "reasonably declined to address" the question everyone asked it to answer. StateBIO8. But there is nothing "reasonable" about willfully conflating the claim brought and the relief sought, or slicing and dicing a constitutional right into narrow pieces in a transparent effort to avoid remedying its

deprivation—especially when even the en banc panel acknowledged that petitioners "do *not* contend that there is a free-standing Second Amendment right to carry concealed firearms." Pet.App.10. Rather than assert such a right, petitioners steadfastly demanded only *some* outlet for their constitutional right to carry for self-defense. Moreover, given that numerous California counties implement their concealed-carried regimes in ways that allow ordinary, law-abiding citizens to carry for self-defense, petitioners focused their claim for relief on requiring San Diego County to interpret state law in the same constitutionally compliant manner as, say, San Bernardino County. Respondents also make no effort to reconcile the Ninth Circuit's slice-and-dice approach with how this Court analyzes violations of other constitutional rights. *See* Pet.29-30. But this Court has already rejected invitations to treat the Second Amendment as a "second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald*, 561 U.S. at 780 (plurality opinion).

In all events, whatever the en banc panel did or did not decide, this is hardly a case in which the question presented was not pressed and passed upon below. It was pressed by every party at every opportunity, and it was passed upon by the District Court, by Judge O'Scannlain's exhaustively detailed opinion for the three-judge panel, and by multiple opinions penned by members of the en banc panel (reaching differing answers). Indeed, few questions arrive at this Court having been so thoroughly ventilated by so many judges below—not to mention the many jurists in other circuits addressing these

issues in majority and dissenting opinions. *See, e.g.*, *Drake*, 724 F.3d at 440 (Hardiman, J., dissenting). There is thus nothing to be gained from delaying review while the 9 states and 60 million people in the Ninth Circuit suffer under the en banc panel's peculiar and federalism-destructive demand to make a broadside attack on the State's open-carry statutes, in order to obtain the modest relief of getting a "good cause" standard interpreted in a manner that gives some outlet for the constitutional right for ordinary, law-abiding citizens to carry for self-defense.[2]

Nor is there anything to be gained by waiting for the D.C. Circuit. There is nothing "premature," StateBIO14, about granting certiorari to resolve a question that five Courts of Appeals have addressed. Whatever other courts may ultimately have to say on the matter, millions of residents in California's most populous cities—not to mention New York, New Jersey, and Maryland—are being deprived *right now* of a right that other courts have concluded, *see* *Moore*, 702 F.3d at 942, and a *majority* of states have urged, *see* Amicus Br. of Alabama and 25 Other States, is protected by the Second Amendment. This Court need not wait to see whether the District's residents will suffer the same fate before determining whether the Constitution can tolerate that result.

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[2] The State suggests that the Ninth Circuit is poised to rule on the constitutionality of the State's open-carry laws in *Nichols v. Brown*, No. 14-55873. StateBIO15 n.10. Notably, the State has never until now suggested that this pro se case, which is littered with procedural irregularities and other deficiencies, is an appropriate vehicle for resolution of such a weighty constitutional issue.

III. Respondents Have Deprived Petitioners Of Their Second Amendment Rights.

This Court's intervention is all the more essential because respondents have plainly deprived petitioners of their fundamental constitutional rights. The State notably makes no effort—none—to defend the proposition that it may prohibit ordinary, law-abiding citizens from carrying handguns for self-defense either openly *or* concealed without running afoul of the Second Amendment. Instead, it just resists the premise that petitioners have suffered that fate. That argument blinks reality.

The State does not deny that petitioners cannot obtain concealed-carry licenses, as the Sheriff has confined such licenses to individuals who can document a *particularized* need for self-defense, such as "restraining orders," "documented victim case incidents or threats." Pet.6-7. But the State nonetheless suggests that petitioners retain a meaningful outlet for carrying handguns because "public carry is allowed in many unincorporated areas in the State." StateBIO11. That is little solace for the many residents of *incorporated* areas who wish to carry handguns for self-defense—individuals who, according to recent estimates, comprise nearly 85% of San Diego County's population. San Diego Assoc. of Gov'ts, *San Diego Region City/County Population and Housing Estimates* (Jan. 1, 2010), *available at* http://bit.ly/2l11F78. California's answer might be responsive if the threats that give rise to the constitutional right to bear arms for self-defense outside the home were conveniently limited to the

unincorporated portions of San Diego County. They are not.

But even setting that aside, the "unincorporated areas" exception is far narrower than the State lets on. Carrying a handgun is permissible for ordinary, law-abiding citizens only in those portions of unincorporated areas that are not designated "prohibited areas"—a sweeping category that encompasses any public road or highway, any location within 150 yards of any building, and wide swaths of state and federal property (*i.e.*, virtually any part of the unincorporated areas, beyond their own property, where citizens are likely to find themselves). *See* Cal. Penal Code §374c, Cal. Fish & Game Code §3004(a), Cal. Code Regs. tit. 14, §§550(b)(10), 551, 552, 1413, 4313(a). Moreover, localities can and do designate additional "prohibited areas," creating a patchwork of state and local laws that renders the "unincorporated areas" exception practically useless.

The State notes that California allows carrying a handgun "while hunting or fishing … or camping." StateBIO11. But the woman who wants to "tot[e] a small handgun in her purse as she walks through a dangerous neighborhood," Pet.App.100, is unlikely to find bringing her handgun on her next fishing trip a meaningful substitute. And while the State also notes that a loaded handgun may be carried "in some circumstances to protect against an immediate danger to person or property," StateBIO11, that exception applies only in "the brief interval" between when law enforcement is informed that an "immediate, grave danger" has arisen and law

enforcement arrives on the scene, Cal. Penal Code §26045(a), (c). Moreover, since California generally prohibits carrying even unloaded handguns, "where the fleeing victim would obtain a gun during that interval is apparently left to Providence." Pet.App.90 n.1. Finally, the State notes (at 11) that individuals *other* than petitioners may be able to obtain carry licenses if they can document a threat or are one of the lucky few excepted from carry restrictions. *See* Pet.5 nn.2 & 3. But the fact that *some* people retain the ability to exercise their Second Amendment rights by making a showing that distinguishes them from their fellow law-abiding citizens with the exact same Second Amendment rights hardly eliminates the constitutional injury to petitioners or the vast majority of "the people" protected by the Second Amendment.

Ultimately, then, the State's repeated refrain that petitioners cannot claim a right "to carry loaded handguns in public whenever and wherever they want," StateBIO12, rings hollow. It is not petitioners who insist that they are entitled to carry handguns *everywhere*, but rather respondents who insist that it is enough that *some* individuals may be able to carry them, or that petitioners may be able to carry them *somewhere*. But that is not how fundamental rights work. Alternative channels for exercising a fundamental right must be *meaningful*, not wholly divorced from the purpose for which the right exists. And carrying a handgun while camping is obviously not a meaningful alternative to having a firearm for self-defense purposes on a public road when a car breaks down. In this context, as with other rights enshrined in the Constitution, "one is not to have

[constitutional rights] abridged on the plea that [they] may be exercised in some other place." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77 (1981).

* * *

In sum, this is the right case, and this is the right time, for this Court to resolve the persistent division over whether the Second Amendment protects the right of ordinary, law-abiding citizens to carry handguns for self-defense. If, as petitioners contend and several jurists have agreed, the right to keep and bear arms includes the right to bear arms outside the home, then millions of individuals are actively being denied a fundamental constitutional right—a right that can literally have life or death consequences. That is not a situation that can tolerate further percolation. Whatever the answer to the question presented may be, a question of such immense constitutional and practical importance readily warrants the attention of the nation's highest court.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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