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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC15-650
DCA NO.: 4D12-3525

DALE NORMAN,
Petitioner

-vs-

STATE OF FLORIDA
Respondent.
_____/

PETITIONER'S APPENDIX TO REPLY BRIEF

Comes now the Petitioner, by and through his undersigned counsel, and files this Appendix to Petitioner's Reply Brief.

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APPENDIX A

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 THE COMMONWEALTH OF VIRGINIA AND THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, KANSAS, MICHIGAN, MONTANA, NEBRASKA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL PROVISIONS

RULES

STATUTES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

STATEMENT OF IDENTITY, INTERESTS, AND AUTHORITY OF AMICI TO FILE[1]

The Commonwealth of Virginia, pursuant to Sup. Ct. R. 37(2)(a), and other States, file this Amicus Brief in support of the Petitioners' petition for a writ of certiorari because N.Y. Penal Law § 400.00(2)(f), improperly trenches upon the Second Amendment. The Amici have an interest in this Court holding that the self-defense interest animating the Second Amendment's individual right to keep and bear arms applies broadly beyond the confines of an individual's home and that no government may condition the exercise of this constitutional right on a ex ante showing of cause. Because this Court's interpretation of the federal constitutional right will affect the constitutional rights of Amici States' citizens with regard to the federal government and with regard to other States as they travel, the Amici States urge this Court to interpret the scope of the right and to apply a standard of review to its infringement that will recognize the inherent right of all citizens of the United States to "bear arms" and so lawfully and effectually protect themselves from unlawful violence.

United States Supreme Court Rule 37(4) authorizes State Attorneys General to file as amici on

[1] On January 23, 2013, counsel of record for petitioners and respondents received timely notice of Amici States' intent to file this brief to which each consented. Sup. Ct. R. 37(2)(a).

behalf of their State without consent of the parties or further leave of this Court.

REASONS FOR GRANTING THE PETITION

SUMMARY OF ARGUMENT

The petition places before the Court multiple issues central to the practical import of the individual right of self-defense protected by the Second Amendment. On these matters, the courts of appeals and other courts are divided, including on whether the Second Amendment's right to bear arms extends to areas outside the home. *See* (Pet. 12-13, nn.3-4, 18 n.6). These issues bear on a fundamental aspect of the liberty interest. *See District of Columbia v. Heller*, 554 U.S. 570, 606 (2008) (quoting St. George Tucker's notes on the Second Amendment in his "version of Blackstone's Commentaries" to the effect that the right is "'the true palladium of liberty. . . . The right to self defence is the first law of nature: in most governments it has been the study of rulers to confine the right within the narrowest limits possible. Wherever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.'"); *see also McDonald v. City of Chicago*, 130 S. Ct. 3020, 3038 (2010) (citing a similar statement in Justice Joseph Story's *Commentaries on the Constitution of the United States*). The right to keep and bear arms

continues to be popularly understood as central to the continuation of a free society. Rasmussen Reports, *65% see gun rights as protection against tyranny*, http://www.rasmussenreports.com/public_content/politics/current_events/gun_control/65_see_gun_rights_as_protection_against_tyranny_control/65_see_gun_rights_as_protection_against_tyranny (Jan. 18, 2013).

Nevertheless, a handful of States like New York have lost sight of the Amendment's "guarantee [to] the individual [of the] right to possess and carry weapons in case of confrontation," *Heller,* 554 U.S. at 592, even imposing some outright bans. *See* D.C. Code §§ 22-4504 to -4504.02; 720 Ill. Comp. Stat. 5/24-1(a)(4); *cf. Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) (holding Illinois' ban on carrying handguns in public to violate the Second Amendment). New York's brand of animus to Second Amendment rights also has been enacted by the States of California, Cal. Penal Code § 26150(a) (requiring, inter alia, "good cause"), Maryland, Md. Code Ann., Pub. Safety § 5-306(a)(1)-(5) (requiring, inter alia, "good and substantial reason"), and New Jersey, N.J. Stat. Ann. § 2C:58-4(c) (requiring, inter alia, a "justifiable need"), all of which are in litigation. *See McKay v. Hutchens*, No. 12-57049 (9th Cir.) (notice of appeal filed November 9, 2012); *Muller v. Maenza*, No. 12-1550 (3d Cir.) (awaiting oral argument); *Woollard v. Gallagher*, No. 12-1437 (4th Cir.) (argued October 24, 2012).

In the wake of the Seventh Circuit's decision in *Moore*, Illinois is being counseled to follow New York's

standard as well. *See Editorial: Madigan Should Appeal Gun Ruling*, Chicago Sun-Times, Dec. 11, 2012, *available at* http://www.suntimes.com/opinions/16952377-474/editorial-madigan-should-appeal-gun-ruling.html ("the Legislature could consider a narrowly crafted law, such as that in New York, which has concealed carry in theory but does not grant many permits."). The petition thus presents the Court with an excellent vehicle to resolve two of the most contested aspects of Second Amendment jurisprudence: (1) whether its protections apply with equal force outside the home, and (2) whether governments may condition the right of persons that are law-abiding upon a demonstration of particular "need."

Not only does a need to exercise a right requirement uniquely treat Second Amendment rights as disfavored, the New York requirement considers the self-defense component of those rights as being of a lower order than "carry[ing] a handgun for target practice or hunting." *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 86 (2d Cir. 2012). (App. 3, 9.)

Furthermore, the Second Circuit did not employ a meaningful standard of review. In view of the less-restrictive alternatives available to New York to address safety concerns, demonstrated by the experience of a majority of the States who have honored their citizens' self-defense rights, and by empirical research showing that right-to-carry laws do not result in criminal violence or public safety lapses, respondents cannot carry their burden to justify New York's broad

restriction. Hence, the judgment of the Second Circuit should be reviewed and reversed.

ARGUMENT

I. The Second Circuit's Categorical Distinction Between Bearing Arms Outside the Home and Keeping Arms Within the Home Finds No Support in the Constitution's Text, Breaks with This Court's Recognition that the Second Amendment Enshrines a Right to Self-Defense, and Conflicts with the Holding of the Seventh Circuit and Other Courts that the Right to Bear Arms Outside the Home Enjoys Robust Second Amendment Protection.

The Second Amendment *reads*: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep *and bear* Arms, shall not be infringed." U.S. Const. amend. II (emphasis added). As this Court noted in *Heller*, "[i]n interpreting this text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" *Heller*, 554 U.S. at 576 (citation omitted). The conjunctive "and" leaves no room for decoupling the right "to keep" from the right "to bear" or in affording categorically less protection to the latter activity. *Id.* at 592 (the Second Amendment "guarantee[s] the individual right to possess and carry weapons

in case of confrontation."); *id.* at 584 ("At the time of the founding, as now, to 'bear' meant to 'carry.' "); *cf. Moore*, 702 F.3d at 936 ("[c]onfrontations are not limited to the home," and the Second Amendment applies with equal force to "a loaded gun outside the home"). Thus, the Second Circuit's holding that handgun carry in public by law-abiding citizens "falls outside the core Second Amendment protections," *Kachalsky*, 701 F.3d at 94 (App. 26), conflicts with both the reasoning of this Court in *Heller*, 554 U.S. at 592, and *McDonald*, 130 S. Ct. at 3044, as well as the reasoning of the Seventh Circuit, *Moore*, 702 F.3d at 937 ("To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*."), and so merits this Court's review. *See* Sup. Ct. R. 10(a) and (c).

This petition also presents the Court with a court of appeals adopting a construction of the Second Amendment that would render nugatory a "right of the people" by excessively deferring to the transitory policy determinations of the people's current representatives with respect to the right's effect on "public safety and crime prevention." *Kachalsky*, 701 F.3d at 98; *see McDonald*, 130 S. Ct. at 3045 (plurality opinion) (rejecting "public safety" arguments against incorporation of the Second Amendment); *Heller*, 554 U.S. 570. (App. 33.) Accordingly, the Court should grant this petition and again reject any construction of its protections that permits a government to deny a particular law-abiding citizen, objectively competent in the use of arms, the right "to bear arms" for defense.

Compare Heller, 554 U.S. at 634 ("A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."), *with Kachalsky*, 701 F.3d at 100 (recognizing "that the need for self-defense may arise at any moment without prior warning," but affirming a requirement that a citizen "show[ ] that there is an objective threat to a person's safety – a 'special need for self-protection' – before granting a carry license" on the ground that "New York determined that limiting handgun possession to persons who have an articulable basis for believing they will need the weapon for self-defense is in the best interest of public safety and outweighs the need to have a handgun for an unexpected confrontation"). (App. 41-42.) "'The very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.'" *McDonald*, 130 S. Ct. at 3050 (plurality opinion) (quoting *Heller*, 554 U.S. at 634).

The court below, noting that "[t]he plain text of the Second Amendment does not limit the right to bear arms to the home," and assuming "that the Amendment must have ***some*** application in the very different context of the public possession of firearms," nonetheless deferred to the legislature's judgment that only law-abiding citizens who could prove that they had been threatened were entitled to "carry weapons in case of confrontation." *Kachalsky*, 701 F.3d at 88-89 & n.10, 93, 97-98. (App. 16, 24-25, 33.) The court of appeals reached this result by reading *Heller*, and the

Second Amendment, for the least that they could grammatically stand for. Furthermore, it stretched and reached for distinctions that in their insubstantiality reveal an animus against the very right at issue. For example, it treated as "a critical difference" the New York's statute's application "to carry[ing] handguns only ***in public***," while the District of Columbia's restriction struck down in *Heller* "applied ***in the home***." *Kachalsky*, 701 F.3d at 94. (App. 27.) The Second Circuit also cited this Court's inapposite case law respecting searches of the home and prosecution for possessing obscenity, and engaging in sexual conduct, within the home. *Id.* at 94. (App. 27-28.)

The Second Circuit's historical analysis was also discordant with that of *Heller*, *McDonald* and the Seventh Circuit in *Moore*, in relying on the fact that some 19th century courts upheld against constitutional challenge laws passed limiting the right to carry firearms concealed. However, the Second Circuit conceded that no court had addressed such a broad limitation as New York's, effectively prohibiting its citizenry from either open or concealed carry. *Id.* at 91, 94-96 ("[T]he cited sources do not directly address the specific question before us[.]"). (App. 20.) The Second Circuit appears to have concluded that, in the absence of a holding striking such a statute down, a State was therefore within its authority to limit Second Amendment rights in this unusual, bureaucratic way. Accordingly, the Second Circuit pronounced that "state regulation of the use of firearms in public was 'enshrined with[in] the scope' of the

Second Amendment when it was adopted," and proceeded to apply what it denominated "intermediate scrutiny." *Id.* at 96 (alteration in original) (quoting *Heller*, 554 U.S. at 634). (App. 26, 30-33.)

The Second Circuit then concluded that New York's decision "not to ban handgun possession, but to limit it to those individuals who have an actual reason . . . to carry the weapon," "rather than [a] merely speculative or specious . . . need for self-defense," "is substantially related to New York's interests in public safety and crime prevention," although plainly not "the least restrictive alternative." *Id.* at 98. (App. 36-37.) Even assuming that it could ever be constitutionally justified to advance a state interest solely by denying the vast majority of the citizenry the exercise of a constitutional right, the Second Circuit plainly did not apply heightened scrutiny as usually understood. *See Heller*, 554 U.S. at 628 n.27.

This is clear because while purporting to conduct "intermediate scrutiny," the Second Circuit neglected the necessary "fit analysis"; requiring no evidence from the State of New York that the regulation does not "'burden substantially more [protected activity] than is necessary to further the government's legitimate interests.'" *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 662 (1994) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). It also neglected the advancement requirement: "that the regulation will in fact alleviate [the recited harms] in a direct and material way." *Id*. at 664; *see Kachalsky*, 701 F.3d at 98 (refusing "to conduct a review bordering on strict scrutiny"). (App. 37.) Instead, it stated the issue as

merely "whether the proper cause requirement is substantially related to [public safety and crime prevention] interests," citing legislative reports that particular legislators believed that it was, the fact that a dwindling minority of States impose similar restrictions, and "studies and data [purportedly] demonstrating that widespread access to handguns in public increases the likelihood that felonies will result in death and fundamentally alters the safety and character of public spaces." *Kachalsky*, 701 F.3d at 97-99; *but see supra* Part II.B. (App. 33-38.)

Tellingly, the Second Circuit conceded that its approach was not consistent with the level of judicial protection for "any other enumerated right," *Kachalsky*, 701 F.3d at 100 (App. 41), a discriminatory approach this Court has rejected. *See McDonald*, 130 S. Ct. at 3044 (plurality opinion) (refusing to treat the "personal right to keep and bear arms for lawful purposes. . . . as a second-class right"). Instead of judicially protecting an enumerated right, the Court deferred to New York's preference for a policy over a right based on the state's claim "that limiting handgun possession to persons who have an articulable basis for believing they will need the weapon for self-defense is in the best interest of public safety and outweighs the need to have a handgun for an unexpected confrontation." *Kachalsky*, 701 F.3d at 100. (App. 42.) In doing so, the Second Circuit employed a weighted interest-balancing test, deferring entirely to the judgment of the legislature that a core right can be broadly balanced against the State's ordinary

policy interests: "[i]t is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments" regarding whether the right to bear arms should be limited to those who can show a "particularized interest in self defense." *Id.* at 99. (App. 38.) In this, the Second Circuit plainly treated the right to self-defense "as a second-class right, subject to an entirely different body of rules than the other Bill of Rights' guarantees," something which it may not do. *McDonald*, 130 S. Ct. at 3044 (plurality opinion).

Everyone has, in the only relevant sense, a "particularized interest" in the exercise of their rights. First, this Court's case law, consistent with the Constitution's text, suggests no different level of constitutional protection for keeping handguns in the home than that accorded to bearing them without. Rather, it suggests the same standard should apply. *See Heller*, 554 U.S. at 592 (finding that the Second Amendment "guarantee[s] the individual right to possess *and carry* weapons in case of confrontation" (emphasis added)); *id.* at 628 ("the inherent right of self-defense [is] central to the Second Amendment right."). While not purporting to provide an "exhaustive" list of "presumptively lawful regulatory measures," this Court in *Heller* did not include any restrictions on the general carrying of firearms by law-abiding, responsible citizens as one of the available "tools for combating [handgun violence]" or one of the lawful "measures regulating handguns." *See id.* at 626-27 & n.26, 636.

In sum, neither *Heller* nor *McDonald* contemplated governmental application of a proper cause to keep and bear arms standard to law-abiding citizens' exercise of self-defense rights. *Heller*, 554 U.S. at 635. Accordingly, New York's parsimonious approach to the right to bear arms should be found wanting. As the United States District Court for the District of Maryland, employing intermediate scrutiny to strike down Maryland's analogous restriction, so aptly put it, "[a] citizen may not be required to offer a 'good and substantial reason' why he should be permitted to exercise his rights. The right's existence is all the reason he needs." *Woollard v. Sheridan*, 863 F. Supp. 2d 462, 475 (D. Md. 2012), *appeal pending*, *Woollard v. Gallagher*, No. 12-1437 (4th Cir.).

Consequently, this Court should grant this petition both to make clear that the lower courts are not free "to repudiate the Court's historical analysis," *Moore*, 702 F.3d at 935, and to confirm the import of its citations in *Heller* to *Nunn* and *Andrews* that broad-brush restrictions on law-abiding citizens carrying handguns in public, whether open or concealed, premised on the view that the public is better off if citizens do not exercise their rights, run afoul of the "right of the people to . . . bear arms." *Heller*, 554 U.S. at 629; *see Nunn v. State*, 1 Ga. 243, 251 (1846); *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 187 (1871). It should make plain that the Second Amendment took New York's "policy choice[ ] off the table." *Heller,* 554 U.S. at 636.

II. Because New York's Prohibition on Law-Abiding Citizens Carrying Handguns for Self-Defense Without First Demonstrating a Necessity Does Not Survive Any Level of Scrutiny More Demanding than the Rational Basis Test, This Case Presents an Excellent Vehicle to Make Clear that the Right to Bear Arms Merits Heightened Scrutiny and that the New York Law Fails.

No level of scrutiny that accords with American history and traditions or with this Court's individual rights jurisprudence could support the validity of New York's proper cause requirement. We note that this Court has rejected application of rational basis scrutiny to Second Amendment claims and has suggested that the presumption of constitutionality that figures so heavily in the Second Circuit's analysis in *Kachalsky*, 701 F.3d at 100 (App. 42), should not apply. *See Heller*, 554 U.S. at 629 n.27. In view of the experience of the States that respect their citizens' right to bear arms, and the social science literature, New York cannot demonstrate that its "proper cause" requirement is fitted to advancing the interests it asserts.

More than an Article V majority of the States, 41 at last count, *see* U.S. Const. art. V; John R. Lott, Jr., *What a Balancing Test Will Show For Right-to-Carry Laws*, 71 Md. L. Rev. 1205, 1207 (2012) (hereinafter Lott, *Right-to-Carry*), recognize their citizens' "natural right of defense 'of one's person,'" *Heller*, 554 U.S. at 585 (citation omitted), by requiring the issuance to

all law-abiding citizen applicants of a permit to carry a handgun in public. These "shall issue" permitting regimes generally require only that the applicant demonstrate the character of a law-abiding citizen reasonably proficient in the use of handguns. *See* Clayton E. Cramer & David B. Kopel, *"Shall Issue": The New Wave of Concealed Handgun Permit Laws*, 62 Tenn. L. Rev. 679, 690-91 (1995). Generally, to show that one is law-abiding, a criminal background check is performed to discover past criminal charges and convictions, including certain misdemeanors, protective orders, mental incompetency adjudications, and the like. *See, e.g.*, Fla. Stat. § 790.06(2)(a)-(g), (i)-(m), (3), (5)(a)-(e); N.M. Stat. Ann. § 29-19-4; Va. Code Ann. § 18.2-308(D) and (E)(1)-(20). Competency with a handgun may be demonstrated by showing record of completion of any number of designated training or safety courses. *See, e.g.*, Fla. Stat. § 790.06(2)(h)(1)-(7); Va. Code Ann. § 18.2-308(G)(1)-(9). It is estimated that nearly eight million Americans have been issued a permit to carry a handgun in public. *See* Lott, *Right-to-Carry*, *supra* at 1207.

Conversely, the State of New York requires a license to own or possess any handgun. *See* N.Y. Penal Law § 400.00(1). For those who meet the eligibility requirements to own a handgun and acquire a license to do so, they may carry a concealed firearm only upon a showing of proper cause. *Id*., § 400.00(2)(f). And proper cause to carry a handgun for purposes of self-defense has been defined by the New York courts as requiring the applicant to

"'demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession,'" which is not satisfied by the applicant's "living or being employed in a 'high crime area[].'" *Kachalsky*, 701 F.3d at 86-87. (App. 10.) In New York, a "'generalized desire to carry a concealed weapon to protect one's person and property does not constitute "proper cause,"'" as petitioners discovered when their applications were denied for "[f]ailure to show any facts demonstrating a need for self-protection distinguishable from that of the general public," *i.e.*, not reporting "'any type of threat to [their] own safety.'" *Id.* at 86, 88 (citation omitted). (App. 10, 13.) In short, the average, law-abiding New Yorker enjoys no legal right to bear a handgun in public for self-defense, but may engage in self-defense with a handgun only with the let and leave of local New York officials. *See* N.Y. Penal Law § 400.00(3)(a). Unsurprisingly, this regime has resulted in relatively few New Yorkers carrying. *Compare* N.Y. Div. of State Police, Firearms: Pistol Permit Bureau, http://troopers.ny.gov/Firearms/ (last visited Feb. 7, 2013), *with* U.S. Census Bureau, State & County Quick Facts: New York, http://quickfacts.census.gov/qfd/states/36000.html (last revised Jan. 10, 2013). This regime violates the plaintiffs' constitutional rights, for even average "citizens must be permitted 'to use [handguns] for the core lawful purpose of self-defense.'" *McDonald*, 130 S. Ct. at 3036 (quoting *Heller*, 554 U.S. at 630).

A. New York's Interest in Protecting the Public and Preventing Crime Does Not Justify Such a Broad Restriction.

Unquestionably, the "proper cause" requirement burdens "the core right identified in *Heller* – the right of a law-abiding, responsible citizen to possess and carry a weapon for self-defense." *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (emphases omitted) (suggesting that any abridgement of the "core right" would be subject to strict scrutiny). Although strict scrutiny should be adopted in this scenario – a crude rationing regime of the right to bear arms outside the home for law-abiding citizens who are competent to carry – this restriction is subject, at the very least, to the burden of satisfying intermediate scrutiny. Intermediate scrutiny can be met only by "demonstrating (1) that [a State] has an important governmental 'end' or 'interest' and (2) that the end or interest is substantially served by enforcement of the regulation." *United States v. Carter*, 669 F.3d 411, 417 (4th Cir. 2012) (quoting *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 822 (2000)). Furthermore, the State may not "rely upon mere 'anecdote and supposition'" in attempting to meet its burden to show that the claimed ends are substantially served by the "proper cause" requirement. *Id.* at 418. And while the requirement, under an intermediate standard, need not be the "least restrictive means" to pass muster, it may not "substantially burden more" of the exercise of Second Amendment rights "than is necessary to further the government's legitimate interests" or "regulate . . . in such a manner that a substantial

portion of the burden on [constitutional rights] does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

New York claimed below that its requirement advances its interests in "public safety and crime prevention." *Kachalsky*, 701 F.3d at 97, 98. But the State cannot simply prohibit handguns, "the quintessential self-defense weapon." *Heller*, 554 U.S. at 629. Furthermore, the exercise of the right itself cannot be the evil to be remedied. That is, New York can claim no legitimate interest in preventing law-abiding citizens from using "handguns for the core lawful purpose of self-defense," nor may it so circumscribe that right to eliminate it for the ordinary citizen. *See id.* at 630. New York's statute is thus premised on a belief that runs contrary to our system of ordered liberty: that law-abiding citizens may not be trusted to bear arms in defense of themselves and that there is a presumption against their doing so.

The "proper cause" requirement obviously is not a proper fit for the claimed interest in reducing "widespread access to handguns in public" so as to decrease "the likelihood that felonies will result in death." *Kachalsky*, 701 F.3d at 99. Moreover, it necessarily overburdens the core right.

Other proponents of such restrictions have claimed that such requirements limit the availability of handguns to criminals. The reasoning proceeds that by prohibiting law-abiding citizens from carrying handguns in public, there will be fewer persons who

criminals can steal them from. But this rationale proves too much as it offers no justification for distinguishing between persons with proper cause and those without, or distinguishing between carriage outside the home or possession within it, and thus would justify prohibiting all persons from carrying or owning handguns, for anyone could be robbed of them. And the risk is implausible on its face, as unlike police officers who are known to keep guns, criminals are unlikely to know which law-abiding citizens do, making them difficult to target. This concern is made all the more implausible by New York's permitting only concealed rather than open carry. *See Kachalsky*, 701 F.3d at 86.

Other proponents assert that allowing persons to carry handguns outside the home does not further the self-defense interests of citizens because they might be caught off-guard and, lacking adequate training, have the gun turned upon them by an assailant. It has also been suggested that the incidence of accidents is increased by allowing more persons to carry. Such a practical elimination of the right of self-defense for most citizens because of a claimed fear that the right might be less effective than in the home is to cry crocodile tears. Moreover, requiring sufficient training, as New York does for residents of the County of Westchester only, N.Y. Penal Law § 400.00(1)(f), and as many other States do, would adequately mitigate these concerns without the wholesale abridgement of the rights of citizens. *See, e.g.*, N.C. Gen. Stat. § 14-415.12(a)(4); S.C. Code Ann.

§ 23-31-210(5); Va. Code Ann. § 18.2-308(G); W. Va. Code § 61-7-4(d).

Another argument that might be raised in the proper cause requirement's defense is that the restriction results in not authorizing carriage by citizens who subsequently use the lawful firearm unlawfully. As a matter of statistical probabilities, some portion of the persons who later commit felonies with firearms will not have previously committed a felony, and thus may be qualified at some point in their lives as law-abiding, and thus may be issued a New York carry permit but-for the proper cause requirement. Of course, a future felon could still be issued one; they are simply less likely to be, just like everyone else, because so few are issued. And plainly there is no fit at all between the proper cause requirement and the claimed concern because requiring one to receive a threat before being permitted to carry does not tend to filter out future felons (in fact, it could filter them in). And, if it chose, New York could, as other states have done, impose additional restrictions to those it already imposes that are predictive of future criminality, *see* N.Y. Penal Law § 400.00(1)(a)-(f), such as a history of involvement in a criminal gang or drug abuse. *See, e.g.*, Minn. Stat. § 624.714, subd. 2(b); N.M. Stat. Ann. § 29-19-4(A) and (B); N.C. Gen. Stat. § 14-415.12(a)(3), (b)(1)-(11); Va. Code Ann. § 18.2-308(G)(1)-(20); W. Va. Code § 61-7-4(a)(4), (5), (6), (7), and (8). There is, in any event, no evidence that New York's other restrictions do not

adequately prune from the applicant field future bad apples.

Proponents of such laws have contended that such requirements reduce the likelihood that disputes will result in the use of deadly force. It might more logically be supposed that depriving most citizens of the right of self-defense will make it more likely that confrontations with the non-law abiding will turn deadly for the law abiding. Moreover, by ensuring that persons who are subject to individualized threats have handguns, New York is already intentionally increasing the likelihood that deadly force will be employed in a confrontation. Furthermore, the policy choice to abridge the right of self-defense for most citizens in most circumstances is foreclosed by the Second Amendment itself.

Lastly, some proponents have suggested that having fewer law-abiding citizens carrying handguns in public – the natural and intended effect of the proper cause requirement – reduces interference with the ability of law enforcement to protect public safety by reducing the number of persons who police observe carrying a handgun, thus supposedly presenting fewer persons for the police to stop and speak with on suspicion of criminal activity. Again, cause requirement proponents are grasping at straws, for New Yorkers that are licensed to carry are required to do so concealed. In any case, it is a matter of some dispute in the lower courts whether suspicion that an individual is carrying a handgun, without more, justifies an investigatory stop. *See* (Pet. 16-17.)

The effect of requiring a proper fit between the dangers arising from the exercise of a right and a State's response to that danger is to ensure that the right is being appropriately valued and protected by the State. However, in the guise of protecting the public, a State may not simply eliminate that right for most people in most circumstances on the ground that it is the right itself that is the problem. *See Woollard*, 863 F. Supp. 2d at 475 ("States may not, however, seek to reduce the danger by means of widespread curtailment of the right itself.").

B. New York Cannot Show that its Restriction is a Proper One Because the Experiences of a Large Number of the States and Empirical Evidence Demonstrate that Right-to-Carry Laws Do Not Increase Criminal Violence and that Carry Restrictions on Law-Abiding Citizens Do Not Reduce Crime.

As noted previously, New York is one of merely a handful of States which require its law-abiding citizens to satisfy a State official that a handgun is needed to defend themselves in public. Instead of placing this life and death decision in the hands of an unaccountable agency, forty-one other States leave to citizens who have been determined to be law-abiding and to possess the requisite proficiency with a handgun, the decision whether they will protect themselves. With these rules having been in place for decades in some States, and their effects having been

studied since their inception, the social science research demonstrates that public carry of handguns by law-abiding citizens does not increase criminal violence or threaten public safety, but prevents crime and protects the public.

In 1987, the State of Florida adopted what has become the model for handgun carry permit laws: non-discretionary issuance of permits to carry handguns concealed in public upon a showing that the applicant was a law-abiding citizen who possessed the requisite proficiency in the handling of a handgun. *See* Fla. Stat. § 790.06; Cramer & Kopel, *The New Wave*, *supra* at 690-91. Since then, dozens of states have followed suit, licensing millions of law-abiding citizens to carry handguns in public for self-defense on their own initiative. *See* Lott, *Right-to-Carry*, *supra* at 1207. Public support for repealing these laws or imposing tighter restrictions, despite recent acts of mass violence involving the use of guns, and a sustained legislative push, remains weak. *See generally* Rasmussen Reports, *Gun Control*, http://www.rasmussenreports.com/public_content/politics/current_events/gun_control (last visited Feb. 7, 2013).

This broad political consensus against sweeping gun control and in favor of self-defense rights is premised upon a view of criminal behavior that enjoys both empirical support and differs fundamentally from the assumptions underlying the New York proper cause requirement. The political consensus in the States may be summarized as follows: law-abiding citizens, those whose past actions do not

suggest future criminality, are not likely to be perpetrators, but victims, of crime. When laws are in place that forbid the keeping and bearing of arms, whether in the home or outside of it, or only in certain places, those citizens will abide by them. However, those who commit acts of violence, whether assault, robbery, burglary, rape, or murder, are unlikely to be deterred from those crimes by an additional law forbidding possessing or carrying their desired weapon or by the knowledge that the police may apprehend them in the attempt or after the fact. In such cases, the only protection for the citizen is the would-be criminal's knowledge that their would-be victim could be armed and the ability of that citizen to act effectively in self-defense. *See* Cramer & Kopel, *The New Wave*, *supra* at 686.

This view of criminal behavior is confirmed by scholarly conclusions that a jurisdiction's adoption of right-to-carry laws results in the reduction of violent crime rates. *See* Lott, *Right-to-Carry*, *supra* at 1212-16. In a seminal study of the effects of right-to-carry laws, which were then in place in only eighteen states, it was found that following adoption, "murders fell by 7.65 percent, and rapes and aggravated assaults fell by 5 and 7 percent." John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. Legal Stud. 1, 23 (1997). Further studies following the effects of these laws over time indicate that rates of violent crime experience greater "drops the longer the right-to-carry laws are in effect" and "[t]he greater the percentage of

the population with permits." *See* Lott, *Right-to-Carry*, *supra* at 1212.

Sadly, the political and scholarly consensus is also confirmed by the high incidence of violence in jurisdictions that continue to impose onerous restrictions on law-abiding citizens owning or carrying firearms. Take Chicago for example, which both prohibits the possession of firearms anywhere without a permit, *see Gowder v. City of Chicago*, No. 11-C-1304, 2012 U.S. Dist. LEXIS 84359, at *3; 2012 WL 2325826, at *1 (N.D. Ill. June 19, 2012), and is located within the only State that completely bans citizens from carrying or possessing weapons almost anywhere outside their home. *See* 720 Ill. Comp. Stat. 5/24-1(4); *but see Moore*, 702 F.3d at 942. Despite all this regulation, the rate of violent crimes has been tragically high for decades and remains so. *See* Mark Konkol & Frank Main, *Chicago under fire: Murders rising despite decline in overall crime*, Chicago Sun-Times, July 7, 2012, *available at* http://www.suntimes.com/news/violence/13574486-505/chicago-under-fire-murders-rising-despite-decline-in-overall-crime.html. The suggestion that permit holders will suddenly turn to a life of wanton violence is not borne out by the data either, as demonstrated by the experience of Florida, which issued over 2 million permits from October 1, 1987 to July 31, 2011 and revoked "[o]nly 168 . . . for any type of fire-arms related violation," less than 1 percent, and those violations were mostly for "accidentally carrying concealed handguns into restricted areas." Lott, *Right-to-Carry*, *supra* at 1211.

Nor is there any academic support for the argument that permitting law-abiding citizens to carry handguns in public increases the incidence of "accidental gun deaths or suicides." Lott, *Right-to-Carry*, *supra* at 1206. In sum, New York is left with only "anecdote and supposition" to justify its substantial impairment of fundamental rights. *Playboy Entertainment*, 529 U.S. at 822. That should not be permitted to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished this 10th day of March, 2016, via electronic service and e-mail, to the following:

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