No. _____

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under California law, openly carrying a handgun outside the home is generally prohibited, but concealed carry is permissible with a license. While an applicant must demonstrate "good cause" to obtain a concealed-carry license, county sheriffs can—and many do—interpret "good cause" to include a desire to carry a handgun for self-defense. The San Diego County Sheriff takes a different, and much more restrictive, approach, defining "good cause" to require a *particularized* need for self-defense that differentiates the applicant from the ordinary citizen. The majority of a three-judge panel held the Sheriff's policy unconstitutional, concluding that ordinary, law-abiding citizens may not be deprived of the ability to obtain concealed-carry licenses for self-defense when state law already prohibits open carry. But the majority of an en banc panel reached the opposite conclusion, holding that the Sheriff may deny concealed-carry licenses on any terms he chooses because there is no independent constitutional right to *concealed* carry. In reaching that conclusion, the Ninth Circuit added to the sharp division among the lower courts over whether the Second Amendment allows ordinary, law-abiding citizens to be deprived of all means of carrying a handgun for self-defense.

The question presented is:

Whether the Second Amendment entitles ordinary, law-abiding citizens to carry handguns outside the home for self-defense in some manner, including concealed carry when open carry is forbidden by state law.

PARTIES TO THE PROCEEDING

Petitioners are Edward Peruta, Michelle Laxson, James Dodd, Leslie Buncher, Mark Cleary, and the California Rifle and Pistol Association Foundation. They were plaintiffs in the District Court and plaintiffs-appellants in the Court of Appeals.

Respondents are the State of California, the County of San Diego, and William D. Gore, who was sued individually and in his capacity as Sheriff of San Diego County. The County of San Diego and William D. Gore were defendants in the District Court and defendants-appellees in the Court of Appeals. The State of California was intervenor in the Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

The California Rifle and Pistol Association Foundation has no parent corporation and has issued no stock to any publicly held corporation.

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PETITION FOR WRIT OF CERTIORARI

This case presents perhaps the single most important unresolved Second Amendment question after this Court's landmark decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010): whether the Second Amendment secures an individual right to bear arms for self-defense outside the home. The text of the amendment and this Court's decisions interpreting it plainly support the conclusion that the Constitution guarantees ordinary, law-abiding citizens *some* means of bearing firearms outside the home for self-defense, whether it be open or concealed carrying. And the majority of the three-judge panel in this case agreed, concluding that San Diego County could not deprive petitioners of the ability to obtain concealed-carry licenses when California law prohibits open carry. But an en banc panel concluded, in a sharply divided 7-4 decision, that the San Diego Sheriff's policy of reserving concealed-carry licenses to those who can document a *particularized* need for self-defense passes constitutional muster—because individuals have no independent constitutional right to *concealed* carry.

That conclusion is wrong for any number of reasons, not the least of which is (as the en banc panel openly acknowledged) that petitioners "do *not* contend that there is a free-standing Second Amendment right to carry concealed firearms." App.10. The only right they have ever asserted is the right to bear a handgun outside the home *in some manner*, whether openly or concealed. They challenged the Sheriff's policy, rather than the

State's laws, only because there is no dispute that state law does not compel the restrictive policy that the Sheriff employs, and other counties have adopted concealed-carry policies that render both state law and those policies constitutional. And yet, the en banc court concluded that depriving petitioners of *any* means of carrying handguns outside the home for self-defense does not violate their Second Amendment rights because the *only* way individuals may vindicate the right to bear arms outside the home (to the extent the Ninth Circuit is even willing to acknowledge its existence) is by insisting on *open* carry.

That conclusion readily warrants this Court's review, particularly given the exceptional importance of the constitutional question presented and the anomaly that the decision below effectively deprives states of the flexibility (flexibility petitioners have never disputed) to choose whether to allow open carry, concealed carry, or both. And the pressing need for certiorari is confirmed by the fact that the Ninth Circuit is just the most recent court to consider whether, and to what extent, the Second Amendment applies outside the home. Numerous courts have now weighed in on that question, with some concluding that it applies with full force outside the home, others concluding that it does not apply outside the home at all, others still reaching the confounding conclusion that it applies (or at least presumptively applies) outside the home, but that states and municipalities nonetheless may prohibit *both* open *and* concealed carry, and now the en banc Ninth Circuit weighing in with yet another position—that the government always has *carte*

blanche to prohibit concealed carry even when it bans open carry.

The time has come for this Court to resolve that four-way split of authority. The majority of circuits where jurisdictions have severely restricted the right to bear arms outside the home have already addressed whether those restrictions are constitutional. And as the divided three-judge and en banc panel opinions below vividly illustrate, jurists are no closer to consensus on how to answer that question. This Court should grant review and provide clarity on this important constitutional question.

OPINIONS BELOW

The en banc panel's opinion is reported at 824 F.3d 919. App.1-86. The three-judge panel's opinion is reported at 742 F.3d 1144. App.89-204. The District Court's opinion is reported at 758 F. Supp. 2d 1106. App.205-32.

JURISDICTION

The en banc panel issued its opinion on June 9, 2016. Petitioners timely filed a petition for full court rehearing en banc, which the court denied on August 15, 2016. On November 1, 2016, Justice Kennedy extended the time for filing this petition to and including December 14, 2016. On December 6, 2016, Justice Kennedy further extended the time to file this petition to and including January 12, 2017. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment, the Fourteenth Amendment, the relevant portions of the California Penal Code, and the Sheriff's "good cause" policy are reproduced at App.233-53.

STATEMENT OF THE CASE

A. Statutory and Regulatory Scheme

California law recognizes two potential ways citizens can bear arms outside the home: open carry and concealed carry. California has made the policy decision to prohibit individuals from openly carrying firearms, whether loaded or unloaded, outside the home. *See* Cal. Penal Code §25850 (prohibiting carry of loaded firearms in public); §26350 (prohibiting open carry of unloaded handguns in public). There are exceptions to this general prohibition on open carry, but they either are exceptions in name only,[1]

[1] For example, while California's firearms prohibitions do not apply in "unincorporated" (largely remote) areas, they do apply "in any public place or on any public street in a prohibited area of unincorporated territory." *See* Cal. Penal Code §§25850(a), 26350(a). A "prohibited area" is "any place where it is unlawful to discharge a weapon." *Id.* §17030. In San Diego County, it is unlawful to discharge a weapon in "any place within the unincorporated territory of the County which is not a reasonably safe distance from all recreational areas, communities, roads or occupied dwelling house, residence, or other building or any barn or other outbuilding used in connection therewith." San Diego, Cal. County Code tit. 3, div. 3, ch. 1, §33.101. Thus, if individuals are anywhere near civilization in San Diego County—in other words, are pretty much anywhere in San Diego County where a need for self-defense might arise—they are prohibited from open carry.

or apply only to a narrow set of persons or places.[2] For example, California allows individuals to carry a loaded firearm if they reasonably believe that they are in "immediate, grave danger." *Id.* §26045(a). But an individual may carry the firearm under this exception *only* during "the brief interval" between when law enforcement officials are notified of the danger and when law enforcement arrives on scene. *Id.* §26045(c). And as Judge O'Scannlain pointedly noted, "where the fleeing victim would obtain a gun during that interval is apparently left to Providence." App.90 n.1.

California also generally bans the concealed carry of firearms outside the home. Cal. Penal Code §25400.[3] But California has made the policy choice that an individual may carry a concealed handgun outside the home if he obtains a license. *Id.* §25655. Concealed-carry licenses are issued by the sheriff or police chief in the county or city where the individual resides or works. *See id.* §§26150, 26155. Applicants must meet a host of eligibility requirements that are not challenged here, including passing a criminal background check and successfully completing a

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[2] *See, e.g.*, Cal. Penal Code §25900 (peace officers); *id.* §26005 (target ranges and hunting on premises of shooting clubs); *id.* §26015 (armored vehicle guards); *id.* §26020 (retired federal officers); *id.* §26025 (animal control officers and zookeepers); *id.* §26035 (individuals engaged in lawful business); *id.* §26040 (hunters); *id.* §26050 (individuals making a lawful arrest); *id.* §26055 (residences).

[3] The concealed carry ban includes many of the same narrow and inapplicable exemptions as the open carry ban. *See, e.g.*, Cal. Penal Code §§25450, 25520, 25525, 25530, 25630, 25635, 25640, 26055.

training course covering handgun safety and California firearms laws. *Id.* §§26165, 26185. An applicant must also convince the sheriff or police chief that the applicant is of "good moral character" and has "good cause" to carry a loaded handgun in public. *Id.* §§26150(a)(1)-(2), 26155(a)(1)-(2).

Rather than defining "good cause," the State has delegated that task to each sheriff or police chief. *Id.* §26160. Consistent with the concealed-carry regimes that govern in the vast majority of states, many sheriffs have reasonably (and constitutionally) concluded that an individual's desire to carry a handgun for self-defense in case of confrontation qualifies as "good cause." And the State treats that policy judgment as a permissible interpretation of "good cause."

The Sheriff of San Diego County, however, has taken a different tack. His policy requires applicants to prove a *particularized* need to carry a handgun in public:

> [G]ood cause has been determined to be circumstances which would make a person a specific target in contrast to a random one. Applicants are require[d] to demonstrate the specific situation that places them in danger and submit evidence of current incidents which documents their claim. Licenses are NOT issued based on fear alone.

App.250 (quotation marks omitted). In other words, to establish "good cause" in San Diego County, an applicant must "distinguish" himself from "the mainstream," App.252, and provide supporting documentation, such as "restraining orders," "law

enforcement referrals," or "documented victim case incidents or threats." App.251. If an applicant cannot document a particularized threat that satisfies this narrow definition of "good cause" and distinguishes his need for self-defense from that of other citizens, then the Sheriff will not issue a concealed-carry license.

The net effect of this restrictive interpretation of "good cause" is that the typical law-abiding resident of San Diego County cannot obtain a concealed-carry license. Indeed, the whole point of the Sheriff's policy is to confine concealed-carry licenses to a very narrow subset of law-abiding residents. And because California law prohibits openly carrying a handgun outside the home, the result is that the typical law-abiding resident cannot bear a handgun for self-defense outside the home at all.

B. District Court Proceedings

Petitioners are five individuals who reside in San Diego County and the California Rifle and Pistol Association Foundation, which includes numerous San Diego County residents. Each individual petitioner either was denied a concealed-carry license for failure to establish "good cause" or declined to apply after being informed that the County would not accept an undifferentiated need for self-defense as a "good cause."[4] No petitioner is prohibited under federal or state law from possessing firearms.

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[4] The Sheriff Department's will provide prospective applicants with an "educated guess" as to whether they will receive a concealed-carry license. App.206-07 n.1.

Petitioners initiated this case against the County and its Sheriff over seven years ago, on October 23, 2009, not long after this Court issued its landmark decision in *Heller*. Their principal claim was that the Sheriff's restrictive interpretation of "good cause" infringed their Second Amendment rights to bear arms for self-defense outside the home. As petitioners explained in their complaint, "[b]ecause California does not permit the open carriage of loaded firearms, concealed carriage with a CCW permit is the only means by which an individual can bear arms in public spaces in order to exercise his or her Second Amendment right to armed self-defense." Am.Compl.11. To remedy this violation of their "right to bear arms," *id.* at 17, petitioners sought a declaration that the Sheriff's interpretation of "good cause" is unconstitutional and an injunction preventing the Sheriff from denying concealed-carry licenses based on that restrictive interpretation, *id.* at 22-23. Petitioners also sought such other "relief as the Court deems just and proper." *Id.* at 24.

As the District Court explained, "the heart of the parties' dispute [wa]s 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." App.205-06. The court resolved that dispute by concluding that even if the Second Amendment protects that right, any burden the Sheriff's policy imposed on that right was sufficiently "mitigated" because state law "permit[s] loaded open carry for *immediate* self-defense." App.218 (emphasis added). The court did not explain, however, how an individual could obtain a loaded

firearm should the need for "immediate self-defense" arise given that state law prohibited an individual from carrying a loaded firearm unless and until an "immediate, grave danger" manifested.[5] The court further held that, even if the Sheriff's policy burdened petitioners' Second Amendment rights, the law passed muster under intermediate scrutiny because it allows California "to effectively differentiate between individuals who have a bona fide need to carry a concealed handgun for self-defense and individuals who do not." App.224 n.1.

C. Panel Proceedings

Petitioners appealed, and the Ninth Circuit reversed. Writing for the panel, Judge O'Scannlain began by recognizing that the issue in the case is "whether a responsible, law-abiding citizen has a

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[5] At the time of the District Court's opinion, state law allowed the open carry of *unloaded* firearms, which the court apparently believed sufficed to create the potential for an individual to pause and load the firearm if suddenly attacked. Whatever the merits of that far-fetched speculation, the law permitting unloaded open carry has since been repealed. *See* Cal. Penal Code §12031 (2011), *repealed by* AB 144, 2011-12 Leg., 2011-12. Sess. (Cal. 2011). Under the law that was in place by the time this case reached the three-judge and en banc panels, individuals who reasonably believe they are in "immediate, grave danger" may still carry a loaded firearm during "the brief interval" between when law enforcement officials are notified of the danger and when they arrived on scene, *see* Cal. Penal Code §§26045(a)-(c), but they may no longer have an unloaded firearm on or near their persons to load should "immediate, grave danger" arise, *see id.* §26350 (prohibiting open carry of unloaded firearms). Accordingly, "where the fleeing victim would obtain a gun during that interval is apparently left to Providence." App.90 n.1.

right under the Second Amendment to carry a firearm in public for self-defense." App.90. To answer that question, the panel examined this Court's precedents and found that "both *Heller* and *McDonald* identify the 'core component' of the right as self-defense, which necessarily 'take[s] place wherever [a] person happens to be,' whether in a back alley or on the back deck." App.102 (quoting Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1515 (2009)). After conducting an exhaustive historical analysis, the court further found that "the majority of nineteenth century courts agreed that the Second Amendment right extended outside the home." App.118. The court thus concluded that "the carrying of an operable handgun outside the home for the lawful purpose of self-defense … constitutes 'bear[ing] Arms' within the meaning of the Second Amendment." App.131.

With that "unsurprising" conclusion established, *id.*, the court turned to whether the Sheriff's interpretation of "good cause" infringed petitioners' Second Amendment rights. The panel recognized that petitioners could vindicate their rights with a narrow challenge to the Sheriff's "good cause" licensing requirement, rather than a sweeping challenge to California's entire statutory scheme, because "in light of the California licensing scheme *as a whole* … acquiring such a license is the only practical avenue by which [petitioners] may come lawfully to carry a gun for self-defense in San Diego County." App.141. The panel then held that the Sheriff's policy deprived petitioners of their right to

bear arms because, "in California, the only way that the typical responsible, law-abiding citizen can carry a weapon in public for the lawful purpose of self-defense is with a concealed-carry permit," and, "in San Diego County, that option has been taken off the table." App.137. By "enjoin[ing] completely a responsible, law-abiding citizen's right to carry in public for self-defense," the "good cause" requirement led to "a destruction of the right to bear arms" that "cannot be sustained under any standard of scrutiny." App.151 (emphasis omitted). While the panel made clear that the Second Amendment does not "require[] the states to permit *concealed* carry," it concluded that it "does require that the states permit *some form* of carry for self-defense outside the home." App.143-44 (first emphasis added).

Judge Thomas dissented, insisting that the case should be resolved on the ground that the Second Amendment does not confer a right to carry a *concealed* weapon. App.186. He further maintained that even if the Sheriff's policy implicated petitioners' Second Amendment rights, that policy should survive intermediate scrutiny. App.192.

D. En Banc Proceedings

The County and the Sheriff declined to seek rehearing or further defend their position. Dkt.149 at 1. The State moved to intervene, however, on the ground that "this case draws into question the constitutionality of the State's statutory scheme regulating the public carrying of firearms." Dkt.122-1 at 1. Although the panel denied that motion as untimely, *Peruta v. Cty. of San Diego*, 771 F.3d 570, 573-74 (9th Cir. 2014), the Ninth Circuit *sua sponte*

granted rehearing before an 11-judge en banc panel and permitted the State to argue, *Peruta v. Cty. of San Diego*, 781 F.3d 1106 (9th Cir. 2015). Due to the Ninth Circuit's unique en banc process, the en banc panel excluded the panel opinion's authoring judge, Judge O'Scannlain.

Echoing their written submissions, petitioners reiterated at the en banc argument that they are not asserting "a constitutional right to concealed carry," but rather seek only "a constitutional right to some outlet to exercise the right to bear, or carry, arms for purposes of self-defense." Oral Arg. Rec. 1:47-2:05. The State, for its part, conceded that the Second Amendment must have *some* purchase outside the home, and acknowledged that a state may not be able to "categorically … ban both open and concealed carry" without running afoul of the Constitution. *Id.* at 41:05-50; 44:06-16.

The en banc panel issued a divided decision in which Judge Fletcher, writing for a seven-judge majority, rejected petitioners' constitutional claims. Rather than decide whether denying petitioners any outlet to carry firearms for self-defense violates the Second Amendment, however, the court resolved the case on the ground that "there is no Second Amendment right for members of the general public to carry *concealed* firearms in public." App.11 (emphasis added). Although the majority acknowledged that petitioners "do *not* contend that there is a free-standing Second Amendment right to carry concealed firearms," App.10, it nonetheless refused to analyze the claim petitioners actually pressed—*i.e.*, that prohibiting them from carrying a

firearm *either openly or concealed* violates the Second Amendment. And although the majority allowed the State to intervene to defend "the entirety of California's statutory scheme," App.40, it refused to accept the State's concession that the Second Amendment must protect "to some degree a right of a member of the general public to carry a firearm in public," instead opining only that "[i]f there is such a right, it is only a right to carry a firearm openly," App.44.

Four judges dissented from the majority's "over-simplistic analysis." App.71. Judge Callahan authored the principal dissent, which Judges Silverman, Bea, and Randy Smith joined in whole or in part. Judge Callahan explained that the "majority sets up and knocks down an elaborate straw argument by answering only a narrow question—whether the Second Amendment protects a right to carry concealed firearms in public." App.55. In her view, the "individual constitutional right that Plaintiffs seek to protect is not the right to concealed carry per se," but "their individual right to self-defense guaranteed by" the Second Amendment. App.70. And because California chose "to prohibit open carry," the Sheriff's refusal to issue concealed-carry licenses to ordinary, law-abiding citizens was "tantamount to [a] complete ban[] on the Second Amendment right to bear arms outside the home for self-defense," which the Constitution cannot tolerate. App.64-65. Judge Callahan also lamented the perverse effects that the majority's contrary conclusion will have, as "States may have good reasons for allowing concealed carry but banning open carry," yet under the majority's opinion, "states

must accommodate the right to bear arms through open carry." App.74.

Petitioners sought rehearing en banc before the full Ninth Circuit, but the court denied their petition.

REASONS FOR GRANTING THE PETITION

There are few unresolved constitutional questions of greater legal and practical significance than whether the Second Amendment entitles ordinary, law-abiding citizens to bear handguns outside the home for self-defense. While the vast majority of states have adopted laws that obviate the need to answer that question by respecting the right to bear arms, a small number of jurisdictions have insisted that they may both prohibit open carry and confine concealed carry to individuals who can demonstrate a *particularized* need for self-defense that distinguishes them from their fellow citizens. And nearly ten years after *Heller*, lower courts are no closer to consensus on the constitutionality of those regimes. Even before the divided panel and en banc decisions here, the lower courts split three ways, with some recognizing that the Second Amendment protects the right to bear arms for self-defense outside the home, other courts rejecting that position, and a third group adopting a hybrid approach.

Rather than pick a side in that extant three-way split of authority, the en banc court adopted a "fourth way" that is deeply flawed. Instead of squarely addressing petitioners' argument that the Second Amendment demands some outlet—whether open or concealed carry—for the right to bear arms for self-defense outside the home, the en banc court adopted the entirely novel view that states have *carte blanche*

to prohibit concealed carry, even when they prohibit open carry, and thus that open carry laws must accommodate whatever constitutional right to bear arms may exist.

That result has nothing to recommend it. This Court has previously recognized that states historically have had flexibility to favor either open carry or concealed carry and have gotten themselves in constitutional trouble only when they banned both. *See, e.g., Heller*, 554 U.S. at 629 (discussing with approval cases establishing that proposition). The en banc court's decision unjustifiably places all the constitutional pressure on open carry laws and needlessly restricts the options of states and localities. Equally important, the en banc court's decision leaves petitioners in the constitutionally untenable position of having no valid outlet to exercise their constitutional right to bear arms for self-defense. That intolerable situation cries out for this Court's review, especially in light of the four-way split in authority that now exists.

I. This Case Presents An Exceptionally Important Constitutional Question That Has Divided The Lower Courts.

This case presents a constitutional question of profound importance: whether the individual, fundamental, and enumerated right to keep and bear arms is confined to the home. If the answer to that question is no, then the legal regime petitioners have challenged cannot possibly withstand constitutional scrutiny, as the Sheriff's policy of reserving concealed-carry licenses to the few who can document a particularized need for self-defense deprives

ordinary, law-abiding residents of the only lawful means of carrying a handgun—"the quintessential self-defense weapon," *Heller*, 554 U.S. at 629—outside the home for self-defense in California.

While the applicability of the Second Amendment outside the home seems clear—especially after this Court's decisions in *Heller* and *McDonald*—the issue has divided the lower courts. The Seventh Circuit has held that the Second Amendment applies with full force outside the home. *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2013). As Judge Posner explained, this "Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside." *Id.* at 942. Accordingly, "[t]o 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*." *Id.* at 937. Nonetheless, some courts have held that the Second Amendment has *no* application outside the home, and that individuals thus may keep and bear arms only within the confines of their homes. *See Commonwealth v. Gouse*, 965 N.E.2d 774, 802 (Mass. 2012) ("The case before us does not implicate th[e Second Amendment] right: the defendant was charged with and convicted of possessing a firearm in an automobile, not his home."); *Williams v. State*, 10 A.3d 1167, 1777 (Md. 2011) ("If the Supreme Court … meant its holding to extend beyond home possession, it will need to say so more plainly."); *Mack v. United States*, 6 A.3d 1224, 1236 (D.C. 2010) ("[W]e simply cannot find any error that is 'plain' in failing to extend *Heller* to a case … where a weapon is carried outside the home.").

Other courts have concluded that even assuming (without deciding) that the Second Amendment *does* apply outside the home, ordinary, law-abiding citizens nonetheless may be denied any ability to lawfully carry a handgun outside the home. *See Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013). Considering legal regimes indistinguishable from the one challenged here, those courts have concluded that the government may both prohibit open carry entirely and confine concealed-carry to "persons known to be in need of self-protection" without infringing on the assumed-but-not-actually-recognized right to carry a firearm for self-defense. *Woollard*, 712 F.3d at 881; *see also Kachalsky*, 701 F.3d at 98 (applying "intermediate scrutiny" to uphold a law "[r]estricting handgun possession in public to those who have a reason to possess the weapon for a lawful purpose"); *Drake*, 724 F.3d at 434 (deeming law nearly identical to Sheriff's "good cause" policy a "longstanding regulation that enjoys presumptive constitutionality" and therefore "regulates conduct falling outside the scope of the Second Amendment's guarantee").

As the panel recognized in this case, that reasoning is impossible to reconcile with this Court's admonishment that the Second Amendment protects a fundamental right that may not be "singled out for special—and specially unfavorable—treatment," *McDonald*, 561 U.S. at 778-79 (plurality opinion). *See, e.g.*, App.151-58; *Drake*, 724 F.3d at 457 (Hardiman, J., dissenting); *Woollard v. Sheridan*, 863 F. Supp. 2d 462, 474 (D. Md. 2012); *Grace v. District*

of Columbia, No. 15-2234, 2016 WL 2908407 (D.D.C. May 17, 2016). Assuming, as the Second, Third, and Fourth Circuits all purport to do, that the Second Amendment does in fact protect a right to carry a handgun outside the home for self-defense, then it simply cannot be correct that the government may deprive ordinary, law-abiding citizens of any avenue for lawfully exercising that right. After all, the Second Amendment secures a fundamental right to "the people," not just to whatever subset of the people a state or locality deems in particular need of that right. Indeed, there is no other fundamental right that the government may categorically deny to ordinary, law-abiding citizens. Simply put, if the Constitution protects a right, then the government must allow law-abiding citizens to exercise it and not demand an especially good reason to exercise a right secured to "the people." That is why rights are enshrined in the Constitution in the first place.

Rather than pick a side in this three-way split of authority, as the panel opinion forthrightly did, the en banc panel adopted a novel "fourth way." The en banc panel sidestepped the question whether the Second Amendment guarantees individuals some outlet to exercise a right to bear arms for self-defense outside the home. Instead, the en banc panel rested its decision on the absence of a free-standing right to concealed, as opposed to open, carry. Based on that premise, which no party to the litigation contested, the en banc panel then concluded that states and localities have *carte blanche* to prohibit concealed carry, even when, as in this case, the state prohibits open carry. As a result, the en banc panel held that there is never a right to concealed carry, even when

that is the only permissible avenue for exercising the right to bear arms for self-defense outside the home. The en banc court thus erected an anomalous regime where all the constitutional pressure is directed at laws restricting open carry. That result is deeply flawed, as demonstrated below, but also cements a four-way split of authority on the question presented. No other court of appeals or state high court has adopted this slice-and-dice approach to the right to bear arms. And since the en banc Ninth Circuit has embraced this anomaly, the circuit split will remain unless and until this Court grants review.

Equally problematic, as things stand, in numerous circuits cities and states have been judicially empowered to deprive ordinary, law-abiding citizens of any means of exercising a right that courts purport to recognize is protected by the Constitution. And by insisting that individuals may vindicate that right *only* by demanding *open* carry, the en banc panel's decision in this case adds yet another option to the menu of paths through which ordinary, law-abiding citizens may be deprived of their Second Amendment rights. That is intolerable. Whether individuals may exercise the fundamental rights the Constitution protects cannot depend on the policy views of the city or state in which they live. Nor can it depend on whether they are fortunate enough to live in the rare circuit that is willing to acknowledge the clear import of this Court's Second Amendment precedents. Accordingly, this Court's intervention is imperative, as only this Court can resolve the pressing and hotly disputed question whether the Second Amendment requires states and municipalities to both recognize *and protect* the right

of ordinary, law-abiding citizens to bear arms for self-defense outside the home.

II. The Decision Below Is Profoundly Wrong.

This Court's review is all the more imperative because the decision below not only deepens an entrenched split of authority but also is profoundly wrong, both in its bottom line and in its mode of analysis. The Second Amendment plainly protects the right to bear arms outside the home for self-defense, and the Sheriff's decision to close off the only lawful outlet for exercising that right in California clearly violates the Constitution. That conclusion cannot be avoided by conflating the remedy petitioners have sought with the constitutional right they have spent seven years trying to vindicate.

A. The Second Amendment Protects the Right to Carry a Handgun Outside the Home for Self-Defense.

The Second Amendment provides that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. Nearly a decade ago, this Court settled the debate over the nature of that right, holding that the Second Amendment "confer[s] an individual right" that belongs to "the people," not a collective right reserved only to those in the "Militia." *Heller*, 554 U.S. at 595. That individual right contains two distinct components: the right to "keep arms" and the right to "bear arms." The "most natural reading of 'keep Arms' in the Second Amendment is to 'have weapons.'" *Id.* at 582. And to "bear arms" means to "'wear, bear, carry … upon the person or in the clothing or in a pocket, for the purpose … of being armed and ready for offensive

or defensive action in a case of conflict with another person.'" *Id.* at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). Accordingly, this Court explained in *Heller* that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Id.* at 592. Indeed, the "core lawful purpose" of the Second Amendment, the Court confirmed, is "self-defense." *Id.* at 630.

While *Heller* did not definitively hold that the Second Amendment applies outside the home, its explication of the right protected by the amendment all but answers that question. The Court emphasized that the Second Amendment protects the right to bear arms, not just to keep them in the home, and to do so for purposes of self-defense. As a matter of common sense, the right to be "armed and ready for offensive or defensive action in a case of conflict with another person" must extend beyond the home. *Id.* at 584. After all, the notion of carrying a handgun to be "armed and ready" for confrontation naturally "brings to mind scenes such as a woman toting a small handgun in her purse as she walks through a dangerous neighborhood, or a night-shift worker carrying a handgun in his coat as he travels to and from his job site." App.100. Indeed, Justice Ginsburg's dissent in *Muscarello* explained that "one could carry his gun to a car, transport it to the shooting competition, and use it to shoot targets." *Muscarello*, 524 U.S. at 147. Thus, the very opinion that *Heller* invoked to define the meaning of "bear arms" expressly recognized that the term naturally applies outside the home.

To be sure, *Heller* recognized that the need for self-defense may be "most acute" in the home. *Heller*, 554 U.S. at 628. But it by no means suggested that the home is the *only* place where that need arises, let alone the only place where the Second Amendment applies. To the contrary, in the entirety of its nearly 50-page analysis of the scope of the Second Amendment right (as opposed to its application of the right to the D.C. ordinances at issue), the Court referred to the "home" or "homestead" a grand total of three times, in each instance quoting a historical source that recognized a right to keep and bear arms to defend both one's home *and* one's person and family. *See id.* at 615-16, 625. And when the Court searched in vain for past restrictions as severe as the District's handgun ban, it deemed restrictions that applied *outside* the home most analogous, and noted with approval that "some of those [restrictions] have been struck down." *Id.* at 629 (citing *Nunn v. State*, 1 Ga. 243, 251 (1846) (striking down prohibition on carrying pistols openly), and *Andrews v. State*, 50 Tenn. 165, 187 (1871) (same)). Such laws could hardly constitute analogous or "severe" restrictions on the Second Amendment right, *id.*, if that right were limited to the home.

The historical understanding of the right to bear arms also confirms that it encompasses the right to carry a handgun outside the home for self-defense. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures … think that scope too broad." *Id.* at 634-35. The Second Amendment, "like the First and Fourth Amendments, codified a *pre-existing* right," *id.* at

592, and that right undoubtedly included carrying arms outside the home for self-defense. In his seminal commentary on English law in the 18th century, William Blackstone described "the right of having and using arms for self-preservation and defence," which, as *Heller* authoritatively concluded, corresponded to "an individual right protecting against *both public and private* violence." *Id.* at 594 (emphasis added). As St. George Tucker explained in his American version of Blackstone's Commentaries, "[i]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than a European fine gentleman without his sword by his side." App.105-06; *see also Moore*, 702 F.3d at 936 (in 18th-century America, one "would need from time to time to leave one's home to obtain supplies from the nearest trading post, and en route one would be as much (probably more) at risk if unarmed as one would be in one's home unarmed").

The reality that the need for self-defense is as likely to arise outside the home as inside it remains as true today as it was when the Second Amendment was ratified. Even if the home is not literally a castle, it does provide a measure of protection that one lacks when walking or driving on a deserted street in a dangerous neighborhood. And as several legal scholars have noted, statistics unfortunately show that a substantial majority of rapes, armed robberies, and other serious assaults occur outside the home. *See* Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 Am. U. L. Rev. 585, 610-11

(2012); Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. at 1518.

Finally, the beyond-the-home understanding of the right to "bear arms" is reinforced by longstanding precedent. "Over the past two centuries, American courts applying the individual right to bear arms for the purpose of self-defense have held with near-uniformity that this right includes the carrying of handguns and other common defensive weapons outside the home." O'Shea, *Modeling the Second Amendment Right*, 61 Am. U. L. Rev. at 590; *id.* at 623-37 (discussing cases in detail); *see* App.109-19 (same). In an illustrative case, the Georgia Supreme Court held that a state statute that banned *both* open *and* concealed carry of handguns "is in conflict with the Constitution, and *void*." *Nunn*, 1 Ga. at 251; *see also Andrews*, 50 Tenn. at 187 (same); *State v. Reid*, 1 Ala. 612, 615-17 (1840) (same). Those are the very cases this Court cited with approval in *Heller* when observing that the few historical restrictions as severe as the District's handgun ban did not survive judicial review. *Heller*, 554 U.S. at 629.

In sum, this Court's precedents, the historical record, and the Second Amendment itself all confirm what the three-judge panel majority concluded: The individual and fundamental right protected by the Second Amendment includes the right to carry a handgun outside the home for self-defense.

B. The En Banc Panel's Reasoning Is Deeply Flawed.

Given the clarity with which the Second Amendment's text and history protect a right to bear arms outside the home, this should have been an easy case. California prohibits openly carrying a handgun outside the home but allows concealed carry if an individual obtains a license. It is perfectly permissible as a matter of state law for a sheriff to treat the "good cause" requirement for obtaining a concealed-carry license as met by an individual's satisfaction of various eligibility and training requirements along with a stated interest in carrying a handgun for self-defense. Indeed, that is precisely how numerous other jurisdictions in California implement the concealed carry laws. Yet the Sheriff of San Diego County refuses to employ that approach, instead defining "good cause" to require a *particularized* need for self-defense that differentiates the applicant from the ordinary, law-abiding citizen. But Second Amendment rights are secured to "the people," not a subset of the people with a particularly strong need for constitutional protection. Accordingly, as the three-judge panel majority correctly concluded, the Sheriff's policy violates the Second Amendment "[u]nder any of the standards of scrutiny." *Heller*, 554 U.S. at 629.

The en banc panel majority concluded otherwise not by denying that the Second Amendment applies outside the home, but by "set[ting] up and knock[ing] down an elaborate straw argument." App.55. Instead of asking whether the Sheriff may deprive petitioners of their only lawful means of carrying a

firearm outside the home for self-defense, the en banc panel asked only "whether the Second Amendment protects a right to carry *concealed* firearms in public." *Id.* (emphasis added). Never mind that petitioners have never claimed such a right—in fact, they have expressly disavowed any such claim repeatedly. And never mind that every party and both courts below proceeded on the understanding that this case is about whether the right to carry a handgun outside the home may be denied *entirely*. Determined to definitively deny petitioners relief while avoiding a definitive ruling that the Second Amendment tolerates a complete ban on all means of carrying for self-defense, the en banc court embraced a novel and deeply flawed analysis that gives constitutional primacy to a right to carry openly and gives jurisdictions *carte blanche* to restrict concealed carry.

That transparent effort to avoid the unenviable task of trying to explain how the challenged regime could possibly withstand scrutiny while denying any outlet for bearing arms for self-defense outside the home underscores the need for this Court's review. While the en banc panel declined to explain how California law could be reconciled with the right to have some outlet to carry arms for self-defense outside the home, it nonetheless definitively rejected petitioners' effort to vindicate the only avenue for exercising that right consistent with California law. And lest there be any confusion about whether that result is the product of some technicality unique to this case, the Ninth Circuit has already applied its decision in this case to end challenges to comparable "good cause" regimes in other California counties.

See, e.g., *Birdt v. Beck*, No. 12-55115, 2016 WL 6610221 (9th Cir. Nov. 9, 2016) (Los Angeles); *McKay v. Hutchens*, No. 12-57049, 2016 WL 4651412 (9th Cir. Sept. 7, 2016) (Orange County). Accordingly, it is now Ninth Circuit law that the *only* way individuals may even *try* to vindicate their constitutional right to bear arms is by insisting on being permitted to carry a handgun *openly*.

That conclusion is as wrong in its reasoning as in its result. From day one, petitioners made perfectly clear that the right they are asserting is the right to carry a handgun *in some manner* outside the home for self-defense. Indeed, their complaint invokes the "right to bear arms" repeatedly without once mentioning any purported "right to concealed carry." Am.Compl.2, 4, 5, 13, 15, 17. To be sure, petitioners sought concealed-carry licenses as a *remedy* for the violation of that right—but only because that is "the least intrusive remedy" given California's decision to prohibit open carry but allow counties to grant concealed-carry licenses without requiring the kind of particularized need for self-defense that San Diego demands. App.141. Whether petitioners have an independent constitutional right to concealed-carry licenses is therefore beside the point, as they neither claimed such a right nor needed to invalidate anything other than the Sheriff's policy to obtain concealed-carry licenses.[6] Accordingly, the question

[6] Of course, the situation might be different if petitioners were independently barred from obtaining concealed-carry licenses by some law or rule that they *did not* challenge. But that is manifestly not the case, as there is no dispute that California allows sheriffs to interpret "good cause" to include a general desire to carry a handgun for self-defense. Indeed, numerous

the en banc panel should have asked is not whether petitioners have a constitutional right to concealed-carry licenses, but whether the Sheriff's policy of refusing to grant them such licenses deprives them of their Second Amendment rights.

That conclusion follows directly from *Heller*. There, petitioner sought "to enjoin the city from enforcing the bar on the registration of handguns [and] the licensing requirement insofar as it prohibits the carrying of a firearm in the home without a license." *Heller*, 554 U.S. at 575-76. In resolving those claims, this Court did not ask whether individuals have a constitutional right to possess an unregistered handgun, or to possess a handgun without a license. The Court instead asked whether individuals have a constitutional right to possess a handgun in the home for self-defense. And after concluding that they do, the Court did not invalidate the District's licensing or registration regimes in toto, or empower Heller to ignore them. It instead held that "the District must permit [Heller] to register his handgun and must issue him a license to carry it in the home." *Id.* at 635. In other words, the Court simply ordered the District to protect Heller's Second Amendment rights in a manner consistent with the District's preference that firearms be registered and licensed. By failing to abide by that approach, the en banc panel blurred the basic distinction between "rights" and "remedies." *See Lewis v. Lewis & Clarke Marine, Inc.*, 531 U.S. 438, 445 (2001) ("A right is a well founded or acknowledged claim; a remedy is the

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sheriffs and police chiefs have adopted exactly that practice, and the State has conceded that it is permissible for them to do so.

means employed to enforce a right or redress an injury." (quoting *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 384 (1918)).

As Judge Callahan explained in dissent, App.70-71, the en banc panel's approach also is inconsistent with how this Court approaches efforts to vindicate other constitutional rights. As the Court recently noted when deciding whether laws refusing to recognize same-sex marriages violate the Constitution:

> *Loving* did not ask about a "right to interracial marriage"; *Turner* did not ask about a "right of inmates to marry"; and *Zablocki* did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case inquired about the right to marry in its comprehensive sense[.] … That principle applies here.

Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015). Likewise, this Court did not ask whether there is "a right to hold Nazi parades in Skokie, Illinois," *Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam); or to "picket at a soldier's funeral," *Snyder v. Phelps*, 562 U.S. 443 (2008); or to "caricature religious ministers with sexually charged double-entendre," *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). Instead, it simply asked whether the challenged state action deprived the complaining parties of their First Amendment rights. The en banc panel's refusal to follow the same approach here is another impermissible effort to relegate the Second Amendment to 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).

Indeed, the decision below is an outlier even among Second Amendment decisions. Every other circuit faced with a challenge to a legal regime like the Sheriff's "good cause" policy has at least acknowledged that it could not assess the constitutionality of such a policy without taking into consideration whether open carry was permitted. *See, e.g.*, *Drake*, 724 F.3d at 433; *Woollard*, 712 F.3d at 869; *Kachalsky*, 701 F.3d at 85-87. In *Kachalsky*, for example, the Second Circuit did not ask whether there is an independent "right to concealed carry," but rather accounted for New York's ban on open carry in determining whether Westchester County could confine concealed-carry permits to those able to show something comparable to the Sheriff's "good cause" policy without violating the plaintiffs' Second Amendment rights. 701 F.3d at 85-87. The en banc panel, by contrast, blinded itself to the very thing that makes the Sheriff's policy unconstitutional—*i.e.*, that it deprives petitioners of the *only* outlet they have under California law for exercising their asserted right to carry handguns outside the home.

In doing so, the panel not only reached the wrong result, but also arrived at a decision that has perverse consequences for federalism. It is one thing to say that the Second Amendment does not entitle individuals to demand a choice between carrying their firearms openly or concealed. It is another thing to say that the Second Amendment protects "*only* a right to carry a firearm openly," and that individuals may vindicate the right to bear arms only

by insisting on open carry. App.43-44 (emphasis added). An overwhelming majority of states allow concealed carry, and many follow California's approach of allowing only concealed carry. *See* NRA-ILA, *Gun Laws*, https://www.nraila.org/gun-laws/ (last visited Jan. 11, 2017); *see also, e.g.*, 430 Ill. Comp. Stat. 66/10; N.Y. Penal Law §400.00(2)(f); Fla. Stat. Ann. §790.06; D.C. Code §22-4506(a). There are certainly reasons why a state might prefer concealed carry to the exclusion of open carry. *See, e.g.*, App.74 (quoting Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. at 1521); James Bishop, Note, *Hidden or on the Hip: The Right(s) to Carry After* Heller, 97 Cornell L. Rev. 907, 925 (2012). And the same 19th-century sources on which *Heller* relied indicate that it is for states to decide whether to accommodate Second Amendment rights through open carry, concealed carry, or both. *See, e.g.*, *State v. Chandler*, 5 La. Ann. 489, 489-90 (1850); *Nunn*, 1 Ga. at 243; 1 *The American Students' Blackstone* 84 n.11 (George Chase ed. 1884).

Yet under the en banc panel's reasoning, all those regimes are constitutionally suspect, as they foreclose the only mode of carry the court was willing to suggest might be entitled to Second Amendment protection. At a minimum, the decision below invites challenges to those regimes, as that is the only way plaintiffs can even *assert* a right to bear arms outside the home under the en banc panel's reasoning. Indeed, a lawsuit challenging California's open carry ban was initiated within months of the en banc panel's decision. *See Flanagan v. Harris*, No. 16-cv-6164 (C.D. Cal. filed Aug. 17, 2016). So at the end of

the day, the Ninth Circuit inevitably will still be forced to answer the question petitioners posed—whether the Second Amendment protects the right to carry a handgun *in some manner* outside the home for self-defense—but will have artificially constrained itself to providing only one remedy if the answer is yes. And in the meantime, the en banc panel's insistence that individuals separately litigate the constitutionality of California's *open* carry prohibition will have achieved nothing but countless more years of delay, waste of judicial and litigant resources, and, worst of all, deprivation of fundamental rights.[7]

* * *

In sum, this is the right case, and this is the right time, for this Court to resolve the division of authority over whether the Second Amendment secures the rights of law-abiding citizens to carry firearms outside the home for self-defense. This case is in a summary-judgment posture in which the material facts are uncontested, including the fact

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[7] That is particularly true given the Ninth Circuit's penchant for ordering en banc proceedings any time a panel recognizes even *the possibility* of a viable Second Amendment claim—a pattern that typically adds at least a year (here, more than two) onto already-drawn-out appellate proceedings. *See Teixeira v. Cty. of Alameda*, No. 13-17132, 2016 WL 7438631 (9th Cir. 2016) (granting rehearing en banc to reconsider panel's holding that plaintiff stated a viable claim by alleging that county effectively banned new gun stores); *Nordyke v. King*, 664 F.3d 775 (9th Cir. 2011) and *Nordyke v. King*, 575 F.3d 890 (9th Cir. 2009) (granting rehearing en banc twice to reconsider panel's holdings that plaintiffs could state a viable claim by alleging that county banned gun shows on county property).

that the Sheriff's "good cause" policy was outcome-determinative as to petitioners' inability to obtain concealed-carry licenses. So the only dispute is the parties' purely legal dispute over whether the Sheriff's policy deprives petitioners of their Second Amendment rights, an exceptionally important question that has divided courts and judges. There is now a four-way split on the constitutionality of restrictions on the right to bear arms outside the home for self-defense, with en banc Ninth Circuit cementing that split by adopting an entirely anomalous position. There is no prospect of the Ninth Circuit changing that view or any other circuit adopting its analysis. Only this Court's review can bring clarity to the law.

Absent that review, millions of individuals will be forced to continue to live under legal regimes in which they are denied any outlet to exercise what courts have repeatedly purported to assume is a fundamental constitutional right, while who knows how many other jurisdictions will be emboldened to adopt the same rights-denying approach. If it is indeed to be the law of the nation that ordinary, law-abiding individuals may be flatly deprived of the ability to carry handguns outside the home for self-defense, then at least this Court should be the one to say so.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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