No. 13-827

IN THE
MORRIS TYLER MOOT COURT OF APPEALS AT YALE

JOHN M. DRAKE, ET AL.,
Petitioners,

v.

EDWARD A. JEREJIAN, ET AL.,
Respondents.

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

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

I. Whether the Second Amendment right to bear arms for self-defense secures an individual right to carry a handgun outside the home for the purpose of self-protection; and

II. Whether New Jersey's permit scheme violates the Second Amendment by denying law-abiding individuals the right to carry a handgun outside the home for self-defense unless they first prove a "justifiable need" for self-protection that sets them apart from the general public.

PARTIES TO THE PROCEEDING

Petitioners in this matter are John M. Drake; Gregory C. Gallaher; Lenny S. Salerno; Finley Fenton; the Second Amendment Foundation, Inc.; and Association of New Jersey Rifle & Pistol Clubs, Inc.

Respondents are the Honorable Rudolph A. Filko, in his Official Capacity as Judge of the Superior Court of Passaic County; the Honorable Edward A. Jerejian, in his Official Capacity as Judge of the Superior Court of Bergen County; the Honorable Thomas V. Manahan, in his Official Capacity as Judge of the Superior Court of Morris County; Superintendent New Jersey State Police; Chief Richard Cook, in his Official Capacity as Chief of the Montville, New Jersey Police Department; Attorney General of New Jersey; Robert Jones, in his Official Capacity as Chief of the Hammonton, New Jersey Police Department.

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The opinion of the court of appeals is available at 724 F.3d 426. The opinion of the district court is reported at 840 F.Supp.2d 813.

JURISDICTION

The Third Circuit issued its ruling on July 31, 2013. Petition for certiorari was filed on January 9, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second Amendment of the U.S. Constitution provides: "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."

N.J. Statute § 2C:39-5(b)(1) provides: "Any person who knowingly has in his possession any handgun, including any antique handgun, without first having obtained a permit to carry the same as provided in N.J.S. 2C:58-4 is guilty of a crime of the second degree.".

Section 2C:58-4 of New Jersey's Handgun Permit Law provides, in relevant part: "No application shall be approved by the chief police officer of the superintendent unless the applicant demonstrates that he is not subject to any of the disabilities set forth in 2C:58-3c, that he is thoroughly familiar with the safe handling and use of handguns, and that he has a justifiable need to carry a handgun."

STATEMENT OF THE CASE

I. Violent Crime Outside the Home and State Firearm Carry Permits

Four-fifths of all violent crimes and two-thirds of all rapes and sexual assaults happen outside of the victim's home. Bureau of Justice Statistics, U.S. Dep't Justice, NCJ 227669, Criminal Victimization in the United States, 2008 Statistical Tables, tbl.61 (2008). The majority of these attacks cannot be foreseen, as strangers commit most of the violent victimizations that happen in public places. *See* Bureau of Justice Statistics, U.S. Dep't Justice, NCJ 239424, Violent Victimization Committed by Strangers, 1993-2010, at 5 (2012). By contrast, strangers commit approximately one quarter of the violence that takes place inside of the home. *Id.*

Millions of American citizens are licensed to carry handguns in public for self-defense.[1] Currently, forty-four states have concealed-carry licensing regimes whereby the state "shall issue" concealed-carry permits to individuals who meet objective and reasonable competency and technical proficiency requirements.[2] Only six states have licensing regimes where state officials "may issue" licenses once these standard requirements are met.[3] These "may issue" states require applicants to prove to state officials that they satisfy an additional, subjective requirement: a "justifiable need" or a "good and substantial reason" for self-defense. *See, e.g.*, N.J. Stat. Ann. § 2C:58–4(c); N.Y. Penal Law § 400.00(2)(f).

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[1] *See* U.S. Gov't Accountability Office, GAO-12-717, Gun Control: States' Laws and Requirements for Concealed Carry Permits Vary Across the Nation 75 (2012), http://www.gao.gov/assets/600/592552.pdf.

[2] *See* USA Carry, Concealed Carry Maps, http://www.usacarry.com/concealed_carry_permit_reciprocity_maps.html (last updated Mar. 19, 2014). Included in this number are California and Hawaii, whose "may" carry regimes are now subject to the Ninth Circuit's recent decision in *Peruta* finding such provisions unconstitutional. *See Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014).

[3] These states are Delaware, New York, Connecticut, Maryland, Massachusetts, New Jersey. *See* Del. Code Ann. tit. 11, § 1441; N.J. Stat. Ann. § 2C:58–4(c); N.Y. Penal Law § 400.00(2)(f); Md. Code Ann., Pub. Safety § 5–306; Mass. Gen. Laws ch. 140, § 131(d); However, although Connecticut is a "shall issue" state in statute, the state is generally considered a "may issue" state in practice. *See* HandgunLaw US, *Connecticut*, http://www.handgunlaw.us/states/connecticut.pdf (last updated Mar. 14, 2014).

In contrast, "open carry" is generally permitted, commonly without a license. *See Drake v. Filko*, 724 F.3d 426, 440 (3d. Cir. 2013) (Hardiman, J., dissenting).[4] Thirteen states require a permit before a handgun may be carried openly. *Id.* This includes New Jersey, which issues all permits on a "may issue" basis. *See* N.J. Stat. Ann. § 2C:58-4.

Firearm carry for law-abiding citizens does not demonstrably increase net crime or death. *See* 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, 1520 (2009) [hereinafter *Implementing the Right to Keep and Bear Arms*]. According to the National Research Council, "the evidence to date does not adequately indicate either the sign or the magnitude of a causal link between the passage of right-to-carry laws and crime rates." Nat'l Research Council, *Firearms and Violence: A Critical Review* 7 (2004); *see* Philip J. Cook et al., *Gun Control After Heller: Threats and Sideshows from A Social Welfare Perspective*, 56 UCLA L. Rev. 1041, 1082 (2009) [hereinafter Cook, *Gun Control after Heller*]. Most gun crime is committed by criminals who ignore gun laws just as they ignore other laws. *See* Volokh, *Implementing the Right to Bear Arms*, *supra*, at 1519.

II. New Jersey's Carry Laws

A. The History of Carry Laws in New Jersey

Until 1966, New Jersey prohibited only *concealed* carry without a permit. *Drake*, 724 F.3d at 449 (Hardiman, J., dissenting). In 1905, New Jersey issued its first carry permit law, applying only to concealed weapons. *Id.* (citing 2 *Compiled Statutes of New Jersey*, 1759 (Soney

[4] *See also* OpenCarry.org, Maps, http://my.opencarry.org/?page_id=103 (providing map of open carry laws). Only five states prohibit open carry entirely: Texas, Illinois, South Carolina, Florida, and New York. *See* Fla. Stat. § 790.053(1); 720 Ill. Comp. Stat. 5/24–1; N.Y. Penal Law §§ 265.03(3), 400.00(2)(f); S.C. Code Ann. §§ 16–23–20(12), 23–31–215; Tex. Penal Code Ann. § 46.035(a). Open carry is also very limited in Rhode Island, seemingly permitted only for those with concealed carry licenses issued by the Attorney General. *See* R.I. Gen. Laws §§ 11-47-8(a), 11-47-11(a); HandgunLaw US, *Rhode Island*, http://www.handgunlaw.us/states/rhodeisland.pdf (last updated Jan. 5, 2014). Washington, D.C. stands alone in banning all forms of public carry. *See* D.C. Code § 22-4504.

& Sage 1911)). In 1924, the New Jersey legislature revised the law to require an officer issuing a concealed carry permit to assess "the need of such person carrying concealed upon his person, a revolver, pistol, or other firearm." *Siccardi v. State*, 284 A.2d 533, 538 (N.J. 1971).

In 1966, for the first time, New Jersey extended the permit requirement, including the "need" provision, to open carry. *Drake*, 724 F.3d at 448 (Hardiman, J., dissenting) (citing N.J. Stat. Ann. § 2A:151–41 (1966)). The same statute also made possessing a handgun without a permit a felony. N.J. Stat. Ann. §§ 2A:151–32–36, 41–45 (1966). In a 1971 decision, the New Jersey Supreme Court held that the legislature had given the courts responsibility to define what constitutes "need" warranting a permit. *Siccardi*, 284 A.2d at 540. The court found that state judges had restricted carry permits to security employees and "limited personnel who can establish an urgent necessity for carrying guns for self-protection." *Id.*

The legislature amended the law again in 1979 to require prospective permit holders to demonstrate "justifiable need" rather than merely "need." N.J. Stat. Ann. § 2C:58–4(c) (1979). In 1990, the New Jersey Supreme Court clarified that the "urgent necessity" standard described in *Siccardi* requires permit applicants to show "specific threats or previous attacks demonstrating a special danger to the applicant's life that cannot be avoided by other means." *In re Preis*, 573 A.2d 148, 152 (N.J. 1990). The "urgent necessity" test laid out in *Siccardi* and clarified in *Preis* remains the law today. *Drake*, 724 F.3d at 448 (Hardiman, J., dissenting).

B. New Jersey's Current Handgun Permit Law

Under New Jersey's Handgun Permit Law, individuals who wish to a carry a handgun outside their homes for self-defense must first apply to obtain a permit from the chief police officer or the state police superintendent. N.J. Stat. Ann. § 2C:58–4. Applicants must satisfy each of the statute's three prongs: the applicant must demonstrate he is not subject to statutory

disabilities, that "he is thoroughly familiar" with the safe use of handguns, and that that he "has a justifiable need to carry a handgun." *Id.* § 2C:58–4(c).

To be free of "disabilities" under the first prong, an applicant must meet various character, physical health, mental health and age requirements and lack a criminal history, *Id.* § 2C:58–3(c). To satisfy the statute's second prong, the applicant must complete a specified firearms training course, submit handgun qualification scores, and pass tests on state laws governing use of force. N.J. Admin. Code § 13:54–2.4(a)-(c). The final requirement, "justifiable need," codifies the "urgent necessity" standard. The applicant must demonstrate "specific threats or previous attacks" indicating a "special danger to the applicant's life that cannot be avoided" by other means. *Id.* § 13:54–2.4(d)(1).

If the chief police officer or superintendent determines the applicant fulfills all three prongs, the application is sent to a superior court judge who conducts an independent review. N.J. Stat. Ann. § 2C:58–4(d). The applicant may appeal a denial by the chief police officer or the Superior Court, *id.* § 2C:58–4(e), but appellate review is highly deferential, *see In re Pantano*, 60 A.3d 507, 510 (N.J. App. Div. 2013).

III. Procedural History

The Petitioners are four private New Jersey residents who were denied handgun permits for failure to show "justifiable need" and two advocacy organizations. *Drake*, 724 F.3d at 428. The Petitioners filed a 42 U.S.C. § 1983 suit against multiple defendants, including three Superior Court judges, two counties and the New Jersey Attorney General, on the grounds that New Jersey's justifiable need requirement violates the Second Amendment. *Id.* at 443. Two additional plaintiffs—one a victim of interstate kidnapping—were initially denied a permit but were later issued some form of carry permit following the filing of this suit. *Id.* at 443 n.11.

The district court ruled against the Petitioners, holding that the Second Amendment does not secure a right to carry a gun for self-defense outside the home. *Piszczatoski v. Filko,* 840 F.Supp.2d 813, 820-29 (D.N.J. 2012). The court determined, in the alternative, that the justifiable need provision of New Jersey's handgun law is presumptively constitutional as a "longstanding prohibition." *Id.* at 829-31. Lastly, the court found that even if not presumptively lawful, the provision would nonetheless survive intermediate scrutiny. *See id.* at 831–37.

The Third Circuit, by contrast, determined the Second Amendment may have application outside the home but declined to answer the question definitively. *Drake*, 724 F.3d at 431. The court instead held that the justifiable need requirement constitutes a "longstanding regulation" and thus "fall[s] outside the scope of the Second Amendment's guarantee." *Id.* at 434.

Rather than end its analysis there, the Third Circuit speculated as to the appropriate level of scrutiny if means-end scrutiny applied. *Id.* at 434-35. The court settled on intermediate scrutiny based on a previous case in which the court had used the same standard to uphold a ban on handguns with obliterated serial numbers. *Id.* at 436 (citing *United States v. Marzzarella*, 614 F.3d 99 (3d Cir. 2010)). In applying intermediate scrutiny to the case before it, the Third Circuit acknowledged the state had presented no evidence to show that the justifiable need requirement advanced the state's interest in safety but declined "to intrude upon the sound judgment and discretion" that the state had exercised in making its "policy judgment." *Id.* at 439-40.

SUMMARY OF ARGUMENT

I. This Court in *Heller* and *McDonald* recognized self-defense as the "central component" of the Second Amendment right. Both the text and the history of the Second Amendment demonstrate that an individual's right to bear arms for self-defense naturally and necessarily extends to public places.

Nothing in the text of the Second Amendment indicates the founders intended to dramatically limit the individual right to bear arms for self-defense to the home. The definition of "to bear" articulated by this Court in *Heller*, and confirmed by founding-era dictionaries, is "to carry." Specifically, the term refers to the carrying of firearms "upon the person or in the clothing or in a pocket" in order to be "armed and ready" in the case of confrontation. This definition naturally connotes carrying firearms in public places, and it would stretch common understanding to confine the right to bear arms within the home. Moreover, given the realities of eighteenth-century life, the right to bear arms for self-defense was critical outside of the home.

The history of the Second Amendment confirms this reading. This Court in *Heller* looked to the history of the right from the time of the English Bill of Rights through the nineteenth century in order to illuminate the "public understanding" of the right at the time of ratification. This same exploration reveals that the public understood the right to extend beyond the home. Prior to the founding, in England and the American colonies, carrying arms outside of the home was integral to the right to keep and bear arms. The state courts' interpretation of the Second Amendment through the nineteenth century indicate a presumption that the right to bear arms extended beyond the home. Although states legislated the *manner* of public carry, courts struck down laws that sought to destroy the right to carry. After the Civil War, Congress passed legislation as well as the Fourteenth Amendment partly in response to Black Codes that denied black citizens the right to carry firearms in public.

II. It is not merely that the Second Amendment right extends beyond the home—the law-abiding citizen's right to bear arms for self-defense outside the home is part of the core Second Amendment protection. Yet New Jersey's firearm licensing scheme destroys the right's application outside the home for most law-abiding citizens by conditioning the issuance of carry

permits on their ability to prove they have a "justifiable" need for self-protection that sets them apart from the general public. The Third Circuit erred in using this Court's dicta in *Heller* as to the existence of certain "longstanding," "presumptively lawful" prohibitions to hold that a law that destroys half the core constitutional right falls outside the Second Amendment's scope. A restrictive, need-based firearm law cannot be insulated from constitutional review simply because it is longstanding. And even if longstanding regulations could be properly placed in a kind of "safe harbor", the justifiable need requirement would not qualify because New Jersey did not require permits for open carry, much less proof of justifiable need for open carry, until 1966.

Because it denies the average law-abiding, responsible citizen the ability to exercise self-defense outside the home, part of the core Second Amendment right, New Jersey's justifiable need requirement is categorically unconstitutional. Means-end scrutiny is thus as unnecessary here as it was in *Heller*. If means-end scrutiny is applied, however, the proper standard of review is closer to strict scrutiny than intermediate scrutiny. The lower courts, including the Third Circuit, have widely used the latter to review firearm regulations that impose minor burdens on the Second Amendment right. It would be inconsistent with this Court's jurisprudence, however, to apply the same scrutiny to a law that amounts to *denying* part of the average citizen's constitutional right and laws that merely inconvenience the exercise of that right or regulate the manner in which it may be exercised. More rigorous review is also warranted here because the justifiable need requirement creates a statutory presumption against the individual right and vests administrative officials with great discretion in denying that right.

In any case, irrespective of the standard of review applied, the justifiable need requirement would not survive any form of heightened scrutiny because it is not substantially related to the important state interest of public safety, much less narrowly tailored to achieve it.

ARGUMENT

I. The Second Amendment Secures An Individual Right to Carry a Firearm Outside the Home for the Purpose of Self-Defense

In *Heller*, this Court held that the Second Amendment guarantees an "individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 554 U.S. 570, 599, 592 (2008). Although *Heller* and later *McDonald* applied this guarantee only to the facts at hand—handgun possession in the home—this Court recognized self-defense as the "central component" of the Second Amendment right. *Id.* at 629; *see also McDonald v. Chicago*, 130 S.Ct. 3020 (2010) ("Two years ago, in [*Heller*], we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense."). Close examination of the Amendment's text and history confirms that an individual's right to "carry weapons in case of confrontation" for purposes of self-defense, *Heller*, 554 U.S. at 592, naturally and necessarily extends to public places.

A. The Text of the Second Amendment Secures an Individual Right to Carry Weapons Outside the Home in Case of Confrontation

In determining the scope of the Second Amendment, the *Heller* Court first looked to the Amendment's text and its original meaning as understood by "ordinary citizens in the founding generation." *Id.* at 577. Based on seventeenth- and eighteenth-century sources, this Court confirmed that the "most natural reading of 'keep arms' in the Second Amendment" is to have or possess weapons, as in the right of individuals to "keep arms in their houses." *Id.* at 583. Conversely, "[a]t the time of the founding, as now," to "bear arms" meant to "carry." *Id.* at 584. More specifically, the phrase indicated "carrying for a particular purpose—confrontation." *Id.*

This Court found that Justice Ginsburg "accurately captured the natural meaning of 'bear arms'" in *Muscarello v. United States*. *Id.* There, Justice Ginsburg wrote that the "most familiar

meaning" of the phrase was to "wear, bear, or 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." *Muscarello*, 542 U.S. 125, 143 (1998) (Ginsburg, J., dissenting) (quoting *Black's Law Dictionary* 214 (6th ed. 1990)); *see Heller*, 554 U.S. at 584.

Eighteenth-century dictionaries confirm Justice Ginsburg's reading. Samuel Johnson's founding-era dictionary, relied on throughout *Heller*'s majority and dissenting opinions, defines "to bear" as "to convey or carry." 1 Samuel Johnson, *Dictionary of the English Language* (5th ed. 1773); *see Heller*, 554 U.S. at 581, 582, 584, 597; *see also* 1 Noah Webster, *American Dictionary of the English Language* 19 (1828) (defining "bear" as "to carry; to convey; to support and remove from place to place").[5]

These definitions naturally connote the practice of carrying arms in public. It would stretch common understanding if the founders used "to bear" to refer strictly to movement within a personal residence, thereby securing individuals' ability to carry or wear a gun in "armed and ready" wait for confrontation as they cook dinner or spend time with family. *Muscarello*, 542 U.S. at 143 (Ginsburg, J., dissenting). The better interpretation is that bearing arms connotes carrying arms outside of one's home, such as in a holster on the hip. *Keeping* arms most naturally refers to the common practice of storing arms in a home, secured in a safe place for access if and when a home confrontation arises.

Nothing in the text of the Second Amendment indicates the Founders intended to dramatically limit the right to carry arms in public. This is consistent with the fact that public

[5] Also included in Johnson's first uses are "to carry as a burden" and "to carry as a mark of distinction" or authority (as in, to "bear [a] name"), 1 *Dictionary of the English Language* (6th ed. 1785). While Johnson provides later definitions of "to bear" as merely meaning "to support" or "to keep aloft," his dictionary notes these meanings are connoted "frequently with *up*." *Id*.

carry for personal self-defense was vitally important in the eighteenth century. As Judge Posner observed, it does not take a historian "to realize that a right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home." *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012). Indeed, facing threats such as neighboring American Indian tribes, colonists were often *required* to carry arms outside of their home. *See Heller*, 554 at 601; *infra*, Part I.B. In short, enshrined in the text of the Second Amendment is a timeless practical reality. Although modern threats are different, it is outside of the home that individuals are most likely to encounter threats of violence today. *See* Bureau of Justice Statistics, Criminal Victimization in the United States, *supra*, at tbl.61.

B. The History of the Second Amendment Confirms the Text Was Intended to Secure the Right to Public Carry for Individual Self-Defense

In addition to examining the Second Amendment's text, this Court in *Heller* looked to the "historical background" of the Amendment at the time of the founding as well as the public understanding of its meaning through the nineteenth century. *Heller*, 554 U.S. at 592. This history is significant "because it has always been widely understood that the Second Amendment . . . codified a *pre-existing* right." *Id.*; *United States v. Cruikshank*, 92 U.S. 542, 553 (1876). This historical exploration demonstrates that carrying firearms in public for individual self-defense was understood as within the scope of the Second Amendment's guarantee.

1. Before the founding, bearing arms was understood to encompass carrying arms in public for individual self-defense

a. The public use of firearms for public and private defense was deeply embedded in the right and duty to bear arms in England

Lacking a permanent police force until the nineteenth century, Englishmen were not only required to bear arms in militia participation but were also "involved in everyday police work." Joyce Lee Malcolm, *To Keep and Bear Arms* 2 (1996). Citizens pursued fleeing criminals "from

town to town, and from county to county," and kept "watch and ward." *Id.* at 2-3; *See* Nicholas J. Johnson et al., *Firearms Law and the Second Amendment* 88 (2012). These tasks were an integral component of the personal duty and privilege to bear arms that, following the abuses of the Stuart Kings, Englishmen "recognized as a right" in the English Bill of Rights. *Heller*, 544 U.S. at 592-93; *see* Malcolm, *supra*, at 1-2, 134.

By the time of the founding, Englishmen would not have conceived of limiting the right to the home. *See* W. Blizzard, *Desultory Reflections on Police* 59-60 (London 1785). Even in 1780, citizens were still required "to be ready, at all times, to assist the sheriff and other civil magistrates" in the "preservation of public peace." *Id*. This was not a *collective right* to self-defense outside of the home. Rather, as London's city attorney recognized, this was the collective *exercise* of the people's *individual right* to arm themselves for self-defense. *Id.*; *see Heller*, 554 U.S. at 594 (citing the same passage in describing the English fundamental right). The individual right to bear arms for self-defense was recognized inside and outside the home as protection against "both public and private violence." *Heller*, 554 U.S. at 594.

b. In the American colonies, the right to bear arms for self-defense was understood to encompass carrying arms in public

The American colonial experience was substantially similar, and the threats facing the American colonies led the colonists to recognize a broader right to bear arms than that recognized in England. *See* Malcolm*, supra*, at 139. Early colonial statutes *required* individuals to own arms, often extending these requirements beyond militia members. *Id.* But many of the colonies mandated more than the *possession* of firearms: approximately half required the public *carrying* of arms. *See* Johnson et al., *supra*, at 106. For example, Massachusetts required individuals over the age of eighteen to come armed to public assemblies and restricted unarmed travel. *Id.* at 107; *see* 1 *Records of the Governor and Company of the Massachusetts Bay in New*

England 1628 – 1641, at 85 (1853). Virginia laws required "that men go not to work[] in the ground without their arms." Malcolm, *supra*, at 139. Recognizing the threat of "internal dangers," Georgia and South Carolina required men to individually carry arms "to places of public worship." *Heller*, 554 at 601 (quoting 19 *Colonial Records of the State of Georgia*, pt. 2, 137-39 (A. Candler ed., 1911)).

Widespread arms possession did require statutes to regulate the public *use* of firearms. This was necessary particularly because firearms were used both for celebration and for sending out alarms, purposes often in conflict. *See* Robert H. Churchill, *Gun Regulation, The Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, Law & Hist. Rev. 139, 162 (2007). A seventeenth-century Virginia statute, for example, concerned about American Indian invasion, warned that "the only means for the discovery of their plots is by alarms, of which no certainty can be had in respect of the frequent shooting of guns in drinking." 1 *The Statutes at Large: Being a Collection of All the Laws of Virginia* 401-02 (William Waller Hening ed., 1823) ("Act XII of March 10, 1655"). The statute thus outlawed such shooting, with "marriages and funerals only excepted." *Id.* Later colonial statutes also regulated the hazardous use of weapons in large cities. *See Heller*, 554 U.S. at 632-33. As *Heller* recognized, these reasonable public safety laws imposed minor fines and were "akin to modern penalties for minor public-safety infractions." *Id.* at 633. They imposed no burden on carrying weapons in public or using such weapons for self-defense. *Id.*

Although the colonies regulated the indiscreet and hazardous *use* of firearms in public, no laws prohibited citizens from carrying regular firearms publicly. The only unequivocal prohibitions on public carry were those forbidding slaves from carrying weapons without permission, *See, e.g.*, An Act for the Trial of Negroes, sec. V, Nov. 27, 1700 *in* 2 *Statutes at*

Large of Pennsylvania From 1682 to 1801, at 77-79 (James T. Mitchell ed., 1896)). More ambiguously, in the late eighteenth century, Virginia, North Carolina, and Massachusetts prohibited "affrays." *See, e.g.*, 1 *A Collection of All Such Acts of the General Assembly of Virginia* 43 (1786); 2 Isaiah Thomas, *The Perpetual Laws, of the Commonwealth of Massachusetts, from the Establishment of its Constitution to the Second Session of the General Court, in 1798*, 259 (1799). These state statutes borrowed directly from the 1328 English Statute of Northampton, which prohibited riding or going armed "in fairs, markets, []or in the presence of the justices or other ministers." 2 Ed. 3, c. 3. Although "almost in desuetudinem" by 1686, the King's Bench construed the statute as punishing "people who go armed to terrify the King's subjects," *Rex v. Sir John Knight*, 90 Eng. Rep. 330, 330 (K.B. 1686), and commentators recognized the statute as only prohibiting "dangerous and unusual weapons." 1 William Hawkins, *A Treatise on the Pleas of the Crown 135*, ch. 63, § 4 (London, Eliz. Nutt 1716).[6] These American statutes codified this construction. *See A Collection of All Such Acts of the General Assembly of Virginia*, *supra*, at 43 (including "terror of the people" expressly in the statute); Thomas, *supra*, at 259 (same).

The character of the public safety regulations at the time, and the dearth of laws prohibiting the public carrying of firearms, together suggest that "bearing arms" for confrontation outside of one's home fell within the ambit of the Second Amendment's protections. In the "most important early American edition of Blackstone's Commentaries," *Heller*, 554 U.S. at 595, St. George Tucker accurately captured this sentiment in his discussion of

[6] In his well-known 1783 legal dictionary, Timothy Cunningham provided: "no wearing of arms is within the meaning of this statute unless it be accompanied with such circumstances as are apt to terrify the people . . . persons of quality are in no danger of offending against this statute by wearing common weapons." 1 Timothy Cunningham, *A New and Complete Law Dictionary* (1783) (quoting Hawkins's definition of "affray"); *see Heller*, 554 U.S. at 581 (relying on Cunningham's "important" dictionary for the definition of "arms.").

the crime of treason. Whereas England recognized a "presumption of warlike force" for the "bare circumstance of having arms" in a public assembly, Tucker indicated this presumption was improper in the United States, where "the right to bear arms is recognized and secured in the constitution itself" and where "a man no more thinks, of going out of his house *on any occasion*, without his rifle or musket in his hand." St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States; and of the Commonwealth of Virginia* 19 (1803) (emphasis added).

2. The nineteenth-century public understanding of the Second Amendment included the public carrying of firearms for individual self-defense

To determine the meaning of the Second Amendment, *Heller* also looked to how the interpretation of the Amendment "through the end of the 19th century" illuminated the "public understanding" of the text. *See* 554 U.S. at 605. Nineteenth-century sources closest to the ratification of the Amendment offer the best "insight into its original meaning," *id.* at 614, but even late century sources written by "those born and educated in the early 19th century" are instructive in understanding "the origins and continuing significance of the Amendment." *Id.* These sources show that courts and individuals who interpreted the right to bear arms as protecting an individual self-defense right recognized the guarantee extended to public carry.

a. State court decisions regarding carry regulations affirmed the Second Amendment secures a right to bear arms in public for self-defense

The *manner* of public carrying—either open or concealed—became an important issue in the early nineteenth century. Some states, particularly in the South, feared the "evil practice" of "secretly" carrying a concealed weapon. *See State v. Reid*, 1 Ala. 612, 615 (Ala. 1840). But this was because the preferred manner of carrying weapons was "in full *open* view which places men upon an equality." *See State v. Chandler*, 5 La. Ann. 489, 490 (La. 1850) (emphasis added).

Nineteenth-century state court decisions considering the public carrying of weapons—many of which the *Heller* court relied on for its analysis of the Second Amendment's original meaning—illustrate that courts and the public understood the Second Amendment to embrace public carry for self-defense. *See Heller*, 554 U.S. at 612-13, 628-29. Consistently, courts that interpreted the right to bear arms as securing an individual right to self-defense viewed this right as necessarily extending to public self-defense. Although courts upheld concealed carry laws, they did so only as long as firearms could be carried *openly* for defensive purposes, thus ensuring the right to bear arms remained intact. While states could regulate the *manner* of public carrying, they could not categorically deny the presumed underlying right to carry for self-defense.

i. State courts that interpreted the Second Amendment as an individual right to self-defense presumed the right extended outside and could not be destroyed

Kentucky passed the nation's first law prohibiting the practice of concealed carry in 1813. *See* Clayton E. Cramer, *Concealed Weapon Laws of the Early Republic: Dueling, Southern Violence, and Moral Reform* 2 (1999) (citing *Acts Passed at the First Session of the Twenty First General Assembly for the Commonwealth of Kentucky* 100-101 (1813)). This carry regulation resulted in the nation's first published appellate decision on the right to bear arms.

In *Bliss v. Commonwealth*, the Kentucky Supreme Court struck down the concealed carry regulation as unconstitutional. 2 Litt. 90 (Ken. 1822). The court emphatically affirmed the right to bear arms was a pre-existing individual right to self-defense and that this right encompassed public carry. *See id.* at 91. Although the Attorney General claimed the state was "merely regulating the *manner* of exercising this right"—an interpretation that itself presumes the right to bear arms extends to public carry—the court rejected the regulation's potential sweep. *Id.* (emphasis added). The court was concerned that the legislature, "by successive enactments,"

would first prohibit concealed carry and then would forbid "the wearing such as are exposed," eroding the constitutional right. *Id.* at 92. Although later courts did not follow *Bliss* in prohibiting *all* regulation, *Bliss* was nonetheless influential to contemporary courts.

The Supreme Court of Alabama's 1840 decision in *State v. Reid* echoed the view expressed in *Bliss* but recognized, consistent with other courts in the period, that the state could regulate so long as the right was not infringed. 1 Ala. 612 (Ala. 1840). Indeed, *Heller* cited *Reid* for this exact proposition. *See* 554 U.S. at 629. Reid, serving as a sheriff, carried a concealed pistol on his person in violation of the state's concealed weapon statute. *See* 1 Ala. at 612-13. Although the court applied Alabama's constitution, it traced the "right to bear arms" provision back to the English Bill of Rights. *Id.* at 615. The court concluded that while the Legislature can legislate "in regard to the *manner* in which arms shall be borne," it is not left to its own discretion: "A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional." *Id.* at 618; *see Heller*, 554 U.S. at 629. In short, while concealed carry was a permissible regulation, a law that prohibited all public carry, or a law requiring a manner that would prohibit effective self-defense, was an impermissible destruction of the right.

The Supreme Court of Georgia also followed this reasoning in *Nunn v. State*, a case that *Heller* cited as "perfectly captur[ing]" the Second Amendment's proper interpretation. *See* 554 U.S. at 612. In *Nunn*, a Georgia statute prohibited the carrying of "pistols, dirks, sword-canes," and other weapons. 1 Ga. 243, 246 (1846). While certain weapons were exempted if *openly* carried, pistols were categorically prohibited. *Id.* Nunn was indicted for openly carrying a pistol. *Id.* at 247. Finding the right to bear arms to be pre-existing, the court applied the Second

Amendment and held that "so far as the act of 1837 seeks to suppress the practice of carrying weapons *secretly*, that is valid, inasmuch as it does not deprive the citizen of his *natural* right of self defence or his constitutional right to keep and bear arms." *Id.* at 251. But the act's open carry prohibition amounted to deprivation, thus "in conflict with the Constitution, and *void.*" *Id.*

Courts held similarly throughout the nineteenth century: the state could regulate the "habit of carrying concealed weapons" but could not interfere with the right to bear arms by categorically prohibiting the right to public carry. *See, e.g.*, *State v. Chandler*, 5 La. Ann. 489 (La. 1850); *State v. Wilforth*, 74 Mo. 528 (Mo. 1881); *State v. Roten*, 86 N.C. 701 (N.C. 1882). This recognition continued into the early twentieth century. *See, e.g.*, In re *Brickey*, 70 P. 609 (Idaho 1902); *State v. Rosenthal*, 55 A. 610 (Vt. 1903).

State courts' recognition of the right to bear arms in public for self-defense was not limited to decisions regarding the manner of carry. Because citizens held the right "to keep and bear arms for their defence," the Tennessee Supreme Court held a man could not be indicted for being "arrayed in a warlike manner" on a public street. *See State v. Simpson*, 13 Tenn. 356, 361 (Tenn. 1833). The state court refused to recognize an affray absent violence.[7] *Id.* at 362.

ii. State courts that denied the right to carry in public relied on the militia-based understanding of the right to bear arms repudiated in *Heller*

Some nineteenth century state courts found that the right to bear arms offered no protection for carrying arms in public. Significantly, however, they relied on a militia-based understanding of the right—an interpretation that *Heller* declared has *always been* incorrect. *See* 554 U.S. at 592. Specifically, these courts found that the state could prohibit any manner of carry

[7] North Carolina did recognize the common law crime of affray in *State v. Huntly*. 3 Ired. 418 (N.C. 1843). However, the facts of that indictment clearly indicate the defendant bore arms to the "terror of the people." Huntly armed himself "with pistols, guns, knives, and other dangerous and unusual weapons" and publicly threatened in the highway to "beat, wound, kill, and murder." *Id.* at 418. The court emphasized: "the carrying of a gun *per se* constitutes no offense." *Id.* at 423.

because the Second Amendment was merely a militia-based right. *See, e.g.*, *Aymette v. State*, 21 Tenn. 154, 160 (1840); *English v. State*, 35 Tex. 473, 476 (Tex. 1871); *Fife v. State*, 31 Ark. 455, 458 (Ark. 1876); *see also City of Salina v. Blaksley*, 83 P. 619 (1905).

Notably, in many of these decisions, the dissenting justices found that the Constitution or its state equivalent secured an individual right to self-defense, and therefore that the right to bear arms secured a right to carry publicly. *See*, *e.g.*, *Andrews v. State*, 50 Tenn. 165 (1871) (Nelson, J., dissenting). In *State v. Buzzard*, for example, Justice Lacy dissented from the Arkansas Supreme Court's militia-based understanding and instead interpreted the state constitution's "militia" and "common defense" language as "the reasons assigned for granting of the right" and not limitations on the right—a distinction this Court would echo in interpreting the Second Amendment's prefatory clause in *Heller*. 4 Ark. 18, 35 (Ark. 1842) (Lacy, J., dissenting); *see Heller*, 554 U.S. at 598. Justice Lacy concluded that the act of bearing private arms "whether concealed or exposed . . . is not only lawful, but expressly secured by the Constitution." *Buzzard*, 4 Ark. at 40 (Lacy, J., dissenting). The Arkansas Supreme Court itself eventually clarified that a law prohibiting a citizen "from wearing or carrying a war arm, except upon his own premises or when on a journey . . . is an unwarranted restriction upon his constitutional right to keep and bear arms." *Wilson v. State*, 33 Ark. 557, 560 (Ark. 1878).

iii. State constitutions of this period demonstrate that the right to bear arms was presumed to extended outside of the home

Heller explained that state constitutional provisions are also instructive as the "most analogous linguistic context" for understanding the Second Amendment. *See Heller*, 554 U.S. at 586. At least nine states during the nineteenth century explicitly provided in their "right to bear arms" provision that the amendment does not prohibit the legislature from regulating the practice

of concealed carry.[8] Kentucky in particular amended its constitution to expressly permit this regulation following the *Bliss* decision. Ky. Const. of 1850, art. XIII, § 25. Such amendments would be superfluous if "bear arms" was not publicly understood to include an individual's right to self-defense outside of the home. Recognizing the strong public understanding that the right to bear arms included the right to carry, states sought to protect, in express terms, their ability to regulate the manner of carry.

b. The Fourteenth Amendment was intended to secure for all individuals the Second Amendment right to bear arms for public self-defense

The debate over the implications of extending the right to bear arms to black citizens is also instructive as to the public understanding of the Second Amendment in the late nineteenth century. *See Heller,* 554 U.S. at 614. As *Heller* noted, during this period, there "was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly freed slaves." *Id*. This discussion makes clear that those restricting the right to bear arms understood the right to include public carry outside of the home, and feared extending this right to slaves and free blacks. In correcting these deprivations, Congress and the public affirmed, through civil rights legislation and the Fourteenth Amendment, the right to bear arms outside of the home for all citizens.

i. States deprived free blacks of the right to carry arms in public, and this was understood as a larger denial of the constitutional right to bear arms

Numerous antebellum statutes restricted the rights of both slaves and free blacks to carry firearms. *See, e.g.*, Black Code, ch. 33, § 19, 1806 La. Acts 160-62; Act of Dec. 18, 1819, 1819 S.C. Acts 29, 31. Courts and legislatures understood these public carry restrictions deprived a

[8] Colorado, Florida, Georgia, Kentucky, Louisiana, Mississippi, Missouri, Montana, and North Carolina. *See* Colo. Const. art. I, § 13 (1867); Fla. Const. of 1885, art. I, § 20; Ga. Const. of 1868, art. I, § 14; La. Const. of 1879, art. 3; Miss. Const. art. III, § 12; Mo. Const. of 1875, art. II, § 17; Mont. Const. art. II, § 12 (1889); N.C. Const. of 1876, art. I, § 24.

constitutional right. *See, e.g.*, *Cooper v. Savannah*, 4 Ga. 68, 72 (1848). In its infamous *Dred Scott* decision, this Court clearly presumed the Second Amendment extended beyond the home, and used this as a rationale for denying blacks the right to bear arms. 60 U.S. 393 (1856). Writing for the majority, Chief Justice Taney listed, as a parade of horribles, the rights that would be extended to blacks if they were declared citizens. *Id.* at 417. In addition to granting them the "full liberty of speech" and the right to assemble, citizenship would provide the right "to keep and carry arms *wherever they went*." *Id.* (emphasis added).

Even after the Civil War, "blacks were routinely disarmed by Southern States." *See Heller*, 554 U.S. at 614. Black Codes passed in 1865 and 1866 prohibited "blacks from carrying firearms without a license." *McDonald*, 130 S.Ct. at 3082 (Thomas, J., concurring). A Louisiana ordinance is typical of the time: "No freedman who is not in the military service shall be allowed to carry firearms . . . within the limits of the town of Opelousas . . . ." S. Exec. Doc. No. 2, 39th Cong., 1st Sess., at 92-93 (Dec. 13, 1865). Meanwhile whites were not subject to any such restrictions. *See McDonald*, 130 S.Ct. at 3082 (Thomas, J., concurring); *see also* H. Exec. Doc. No. 70, 39th Cong., 1st Sess., at 291 (1866) (reporting to Congress that, in Alabama, whites carried firearms "as a rule of custom" while blacks were prohibited).

Opponents of these restrictions on firearm carry saw them as "in plain and direct violation" of freed blacks' "personal rights as guaranteed by the Constitution." *See Heller*, 554 U.S. at 615-16 (quoting H.R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, at 299 (1866)). As Southern planters attempted to disarm blacks in Arkansas, the chief of the Arkansas Freedmen's Bureau passionately insisted that blacks had "the same rights to carry arms that white men have and will be protected in it." Randy Finley, *From Slavery to Uncertain Freedom: The Freedman's*

Bureau in Arkansas 1865-1869 at 65 (2008). These views were "widely reported" and "widely held." *See Heller*, 554 U.S. at 615; *McDonald*, 13 S.Ct. at 3082-83 (Thomas, J., concurring).

Significantly, the postbellum experience in the South illustrates the critical importance of the right to publicly carry for self-defense. Despite prohibitions, "blacks struggled fiercely between 1865 and 1868" to secure their right to bear arms, and used "arms to protect themselves from white violence." Finley, *supra*, at 161. Freed slaves formed extralegal paramilitary groups "providing self-defense and fostering self-worth." *Id.* at 65. These individuals "carried guns to the fields when they went to work" and into political meetings where they feared disruption. *Id*.

ii. The framers and ratifiers of the Fourteenth Amendment understood the constitution protected the right to publicly carry arms for self-defense

The federal government proved aware that the Black Codes wrongly deprived blacks of the right to publicly carry firearms. Union Army General Daniel Sickles responded in South Carolina with a corrective order that was "issued with the knowledge and approbation of the President, if not by his direction." Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Keep and Bear Arms*, *1866-1876*, at 14, 18 (1998). The order declared: "The constitutional rights of all loyal and well-disposed inhabitants to bear arms will not be infringed." *McDonald*, 130 S.Ct. at 3039 n. 21 (quoting D. E. Sickles, General Order No. 1, Dep't of South Carolina, January 1, 1866). The General and the public clearly presumed that "bear arms" encompassed carrying outside of the home because the order went on to clarify that it did not sanction unlawful concealed carry nor carrying arms on someone else's private property against their consent. *See* Sickles, *supra*.

Congress was also presented with evidence of the Black Codes' public carry prohibitions, including the ordinance of Opelousas in particular. *See, e.g.*, S. Exec. Doc. No. 2, 39th Cong., 1st Sess. pt. 1, at 92-93 (Dec. 13, 1865). In correcting these deprivations, Congress saw General

Sickles' order as "just the right medicine." *Peruta v. County of San Diego*, 742 F.3d 1144, 1163 (9th Cir. 2014); *see* Halbrook, *supra*, at 14, 18.

Congress quickly took up measures to expand the powers of the Freedmen's Bureau and protect the right to bear arms. *See McDonald*, 130 S.Ct. at 3040-41. The Freedmen's Bureau Bill and the Civil Rights Act of 1866 sought to remedy problems that were also addressed by the Fourteenth Amendment, which was "understood to provide a constitutional basis" for protecting these statutes' assurances. *See id.* at 3041. Congressman George W. Julian from Indiana recognized: "Although the civil rights bill is now the law . . . it is pronounced void" in the South, where "Florida makes it a misdemeanor for colored men to carry weapons without a license" and "South Carolina has the same enactments." Halbrook, *supra*, at 39.

The Fourteenth Amendment was "necessary to provide full protection for the rights of blacks" and "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms" as one of the fundamental rights to be secured. *McDonald*, 130 S.Ct. at 3041-42. The evidence before Congress demonstrates lawmakers were acutely aware that the Black Codes included public carry prohibitions and sought to remedy these deprivations through the Fourteenth Amendment.

II. Denying Law-Abiding Individuals Carry Permits Unless They Prove a "Justifiable Need" Violates the Second Amendment Right to Bear Arms for Self-Defense

In the wake of *Heller*, lower courts have adopted a two-pronged approach to assessing the constitutionality of a variety of firearm laws. The first step is a textual and historical inquiry into whether the restricted activity falls within the scope of the Second Amendment. *See, e.g.*, *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011). If the historical evidence is inconclusive or suggests that the activity is not categorically unprotected, the courts apply the appropriate means-end scrutiny to the government's justification for restricting the right. *See id.*

The Third Circuit conceded that the individual right to bear arms may extend beyond the home but improperly confined the *core* right to self-defense *in the home*. *Drake*, 724 F.3d at 431, 436. This mischaracterization of the Second Amendment's core protections impaired the court's assessment of New Jersey's justifiable need requirement at both stages of the analysis.

A. The Third Circuit Erred in Finding that the Justifiable Need Requirement Falls Outside the Scope of the Second Amendment

Perhaps unwilling to predicate their holdings on the dubious premise that the Second Amendment right is confined to the home, the circuit courts that have upheld restrictive need-based carry permit requirements purported to begin by assuming that the Second Amendment may or must have application outside the home. *See Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012); *Drake*, 724 F.3d at 431; *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013). But the Second and Fourth Circuits' failure to understand self-defense outside the home as a key component of the right led them to promptly balance away that application at the second stage of the two-prong analysis. This was in derogation of the *Heller* Court's declaration that "[t]he very enumeration of the right" takes away from the courts "the power to decide on a case-by-case basis whether the right is really worth insisting upon." 554 U.S. at 634.

The Third Circuit's approach was even more extreme: it ruled that the justifiable need requirement, which destroys the average person's right to bear arms outside the home, was sufficiently longstanding to fall beyond the Second Amendment's reach. This was error.

1. The right to bear arms for self-defense outside the home is part of the core Second Amendment protection

The federal courts' views on whether self-defense outside the home is "core" to the Second Amendment right have proven dispositive to whether they strike down or uphold permit provisions similar to New Jersey's justifiable need requirement. The Ninth Circuit recently found

that self-defense outside the home is "core" to the constitutional right and accordingly struck down a municipal law conditioning issuance of a carry permit on the individual's demonstration of "good cause," an analogue to New Jersey's justifiable need requirement. *Peruta*, 742 F.3d 1144, 1167 (9th Cir. 2014); *see also Ezell*, 651 F.3d at 708-09 (striking down a firing-range ban that prohibited law-abiding citizens from maintaining firearm proficiency, "an important corollary to the meaningful exercise of the core right to possess firearms for self-defense."). In contrast, to uphold similarly restrictive permit provisions, the Second and Fourth Circuits found that the "core" constitutional right is confined to self-defense *in the home* and applied means-end scrutiny. *See Woollard*, 712 F.3d at 876 (upholding Maryland's "good and substantial reason" requirement); *Kachalsky*, 701 F.3d at 89 (upholding New York's "proper cause" requirement).

The Third Circuit erred in going the way of the Second and Fourth Circuits. As discussed in Part I, *supra*, the text and history of the Second Amendment indicate that the right is not homebound. The core of the Second Amendment protection is defined not by place but by purpose: that purpose is self-defense. This is precisely why the Second Amendment right to keep and bear arms cannot turn on an inside-outside distinction—common sense and empirical data establish that the need for self-defense does not stop at one's front door. *Moore,* 702 F.3d at 941.

The majority in *Heller* and the plurality in *McDonald* were careful never to suggest that the "core" or "central" component of the Second Amendment is self-defense specifically in the home. *See McDonald,* 130 S. Ct. at 3036 ("[I]n *Heller,* we held that individual self-defense is "the *central component* " of the Second Amendment right."); *Heller*, 554 U.S. at 599, 628, 630 ("the core lawful purpose of self-defense"; "self-defense . . . was the central component of the right itself"; "the inherent right of self-defense has been central to the Second Amendment right"). *Heller* indeed recognized only that the need is "*most* acute" in the home. *Id.* at 628

(emphasis added). After all, an individual's "castle," *id.* at 616, is where she sleeps and is in other ways vulnerable.[9] But this cannot be conflated with the idea that homebound self-defense is the Second Amendment's core, while self-defense outside the home belongs on the margins.

2. The justifiable need requirement destroys the average, law-abiding individual's right to bear firearms for self-defense outside the home

As this Court emphasized in *Heller*, the historical evidence shows that "the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. The justifiable need requirement, however, does not merely regulate the average law-abiding individual's Second Amendment right to self-defense outside the home but extinguishes it. This is what distinguishes the requirement from the many permit requirements that Petitioners do not challenge in this case, as well as from most of the firearm regulations that have undergone judicial review in the state and federal courts post-*Heller*. *See, e,g.*, *Marzzarella*, 614 F.3d at 91 (upholding ban on firearms with obliterated serial numbers).

To illustrate the restrictive nature of the D.C. laws banning handgun possession in the home at issue in *Heller*, this Court relied on two nineteenth-century cases in which state courts struck down bans on *carrying* arms. 554 U.S. at 629 (citing *Nunn v. State*, 1 Ga., at 251; *Andrews v. State,* 50 Tenn., at 187). The total carry bans at issue in those cases were no more destructive than New Jersey's permit scheme is today for the average New Jersey resident. For, by definition, the average person cannot satisfy a "justifiable need" requirement that requires proof of a *unique need* for self-protection *greater* than that of the general public. *See Preis*, 573

[9] This Court's recognition of the home as a place of special protections with respect to other guarantees enshrined in the Bill of Rights is not appropriate here because of the nature of the right. An individual prevented from expression in one forum may be able to exercise his rights in another without necessarily losing the value of the expression. And, as Judge Posner noted in *Moore*, "of course . . . the interest in having sex inside one's home is much greater than the interest in having sex on the sidewalk." 702 F.3d, 933, 941 (2012). The same cannot be said for an individual's interest in self-defense. It is of poor comfort to a victim violently attacked on the street that in the *home* their right to possess firearms remained intact.

A.2d at 152. Moreover, to prove "justifiable need," applicants must prove they have already suffered a specific threat or previous attack such that they fear for their lives. This requirement disregards the fact that strangers commit most of the violent victimizations that take place in public places, presumably often against individuals who could not have foreseen the assault. *See* Bureau of Justice Statistics, Violent Victimization Committed by Strangers, *supra*, at 5.

It is not enough that *some* individuals will be able to demonstrate justifiable need. The average law-abiding citizen's right to carry a firearm for public self-defense is an *individual* right whose guarantees are not satisfied by reference to the collective. *See Heller*, 554 U.S. at 635 (declaring the Second Amendment protects "the right of law-abiding, responsible citizens"); *see also Ezell*, 651 F.3d at 701 (noting that "Second Amendment rights are entitled to full solicitude under *Heller*" where the plaintiffs are "law-abiding, responsible citizens").

3. A law that destroys part of the core Second Amendment right cannot be considered a "presumptively lawful," "longstanding" prohibition falling outside the Amendment's scope

The Third Circuit attempted to have it two ways: it acknowledged that the Second Amendment "*may* have some application beyond the home," *Drake*, 724 F.3d at 431, but then declared that a law destroying that application constitutes a categorical exception to the Second Amendment. It did so based on a uniquely expansive reading of a single passage of *Heller*.

In striking down D.C.'s bans on handgun possession and operability in the home, the *Heller* Court cautioned: "[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions" on "the possession of firearms by felons and the mentally ill," "the carrying of firearms in sensitive places," or "dangerous and unusual weapons," or laws imposing "qualifications on the commercial sale of arms." 554 U.S. at 626-7. In a footnote, the Court indicated that this list of "presumptively lawful" prohibitions is not exhaustive. *Id.* at 627 n.26.

The Third Circuit seized upon this language to conclude that certain longstanding regulations are "exceptions" falling entirely outside the Second Amendment's scope. *See Drake*, 724 F.3d at 431 (citing *United States v. Barton*, 633 F.3d 168, 172 (3d Cir. 2011)). But this conflates *Heller*'s indication that certain prohibitions are *presumptively* lawful with the conclusion that they are lawful, full stop. Finding that a firearm regulation is "presumptively lawful" cannot be the end of the constitutional inquiry; the courts must have some systematic means for determining whether that presumption of lawfulness can be overcome.

Indeed, the Third Circuit and other courts have acknowledged that the Supreme Court may have characterized certain longstanding firearms regulations as "presumptively lawful" to indicate not that they are categorically exempt from Second Amendment analysis but rather that the regulations pass muster under any level of means-end scrutiny. *See, e.g.*, *United States v. Marzzarella*, 614 F.3d 85, 91 (3rd Cir. 2010). The Fourth Circuit noted that the word "presumptively" suggests that the Court intended to articulate "not . . . a limitation *on the scope* of the Second Amendment, but rather on the analysis to be conducted with respect to the burden on that right." *Masciandaro*, 638 F.3d 458, 473 (4th Cir. 2011).[10] *See also United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010) (noting that *Heller*'s declaration that certain bans are "'presumptively lawful,' . . . by implication, means that there must exist the possibility that the ban could be unconstitutional in the face of an as-applied challenge"); *United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010) (same).

Despite these possible meanings, some lower courts have expanded upon the *Heller*'s cautionary language to construct a kind of "safe harbor" that insulates from constitutional

[10] The *Masciandaro* interpretation suggests that the "longstanding" regulations referenced in *Heller* may simply be entitled to lesser scrutiny than might otherwise be appropriate. For example, if found longstanding and presumptively lawful, age minimums for firearm possession might be properly subjected to rational basis review despite the general rule that rational basis review is not appropriate for Second Amendment challenges.

scrutiny not only the "longstanding" regulations identified by *Heller* but also supposedly analogous regulations. For example, prohibitions on possession of firearms by domestic violence misdemeanants may warrant inclusion in the safe harbor because they further the same goals as felon dispossession laws. *See United States v. White* 593 F.3d 1199, 1205 (11th Cir. 2010). *But see United States v. Skoien*, 614 F.3d 638, 646 (7th Cir. 2010) (en banc) (Sykes, J., dissenting).

Even assuming the safe harbor construction is a legitimate interpretation of *Heller*'s dicta, the justifiable need requirement is not a law that can be included in the safe harbor by analogy. Unlike New Jersey's requirement, none of the "presumptively lawful" regulations identified by *Heller* destroys the law-abiding individual's right to publicly carry a firearm. To justify placing New Jersey's law into the so-called *Heller* safe harbor, the Third Circuit aggressively read *Heller* to mean that prohibitions fall beyond the Second Amendment's reach not because they bear *substantive* resemblance *to Heller*'s presumptively lawful regulations, but because they are approximately as old. *See Drake*, 724 F.3d at 432. In so doing, the Third Circuit disregarded its own warning that "prudence counsels caution when extending" *Heller*'s exceptions "to novel regulations unmentioned by *Heller*." *Marzzarella*, 614 F.3d at 93; *cf. United States v. Greeno*, 679 F.3d 510, 517 (6th Cir. 2012).

No other federal appellate court confronted with a restrictive need-based permit provision has used the *Heller* safe harbor to uphold it. This is perhaps because as applied to such a law, the safe harbor approach has the perverse effect of dropping beyond the reach of the Second Amendment a law that destroys the Second Amendment right's applicability outside the home. *See Kachalsky*, 701 F.3d at 90 n.11 (upholding New York's "proper cause" permit requirement but finding that *Heller*'s language about longstanding prohibitions "simply makes clear that the

Second Amendment right is not unlimited"); *Woollard*, 712 F.3d at 876 (upholding Maryland's "good and substantial reason" permit requirement without endorsing the *Heller* safe harbor).

In short, the Third Circuit's determination that the justifiable need requirement is an "exception" to the Second Amendment must be rejected, for it is not only unsupported by this Court's decisions in *Heller* and *McDonald* but is also logically unsound.

4. The justifiable need requirement is not longstanding

The Third Circuit found that the justifiable need requirement is a longstanding exception to the Second Amendment right based on little more than the notion that some form of "need" requirement has existed in the state since 1924. *Drake*, 724 F.3d at 432-34. It predicated this conclusion on an incomplete picture of the state's overall licensing scheme.

As discussed in Part I, *supra*, the courts have consistently distinguished laws that prohibit *either* open or concealed carry from laws that prohibit *both*. New Jersey required no permit for open carry, much less a demonstration of justifiable need for open carry, until 1966. *Id.* at 449 (Hardiman, J., dissenting) (citing N.J. Stat. Ann. § 2A:151–41 (1966)). Prior to that year, the justifiable need requirement applied only to concealed carry and therefore functioned as a restriction on the *manner* in which individuals may carry firearms in public, not *whether* they may carry firearms in public. Insofar as it amounts to a denial of the law-abiding citizen's right to bear arms outside the home for self-defense, New Jersey's law dates back to 1966. Thus it cannot be considered longstanding.

B. The Justifiable Need Requirement Fails Any Level of Heightened Means-End Scrutiny

Like the D.C. laws at issue in *Heller*, which destroyed the law-abiding citizen's core right to keep arms for self-defense inside the home, New Jersey's justifiable need requirement destroys the law-abiding citizen's right to bear arms for self-defense outside the home. Thus, in

accordance with its analysis in *Heller*, this Court should deem the justifiable need requirement categorically unconstitutional. Even if means-end scrutiny applies, the justifiable need requirement warrants more rigorous examination than the intermediate scrutiny standard widely used by the lower courts to assess far less burdensome firearm laws. Ultimately, however, the justifiable need requirement fails even intermediate scrutiny, properly applied.

1. A law that destroys the core Second Amendment right to self-defense outside the home is categorically unconstitutional

In *Heller*, this Court declined to apply a standard of review to restrictive D.C. laws that prohibited "law-abiding, responsible citizens" from possessing handguns in the home on the grounds that the laws would not pass constitutional muster "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights." 554 U.S. at 635, 628. For even substantiated policy claims cannot save a firearm law that strangles the self-defense right. *See id.* at 636 ("We are aware of the problem of handgun violence in this country. . . . But the enshrinement of constitutional rights necessarily takes certain policy choices off the table.").

New Jersey's justifiable need requirement warrants the same analysis because it approaches total denial of the law-abiding, responsible citizens' right to bear arms outside the home. *See Moore*, 702 F.3d at 941 (declining to subject an Illinois law banning public handgun carry to an "analysis . . . based on degrees of scrutiny"); *Peruta*, 742 F.3d at 1167 (relying on the logic and structure of the *Heller* analysis to hold San Diego's "good cause" requirement categorically unconstitutional). *Heller* rules out the approach adopted by the Second, Third and Fourth Circuits, which assumed the Second Amendment applies outside the home but nonetheless applied intermediate scrutiny to a law that destroys the right outside the home. If self-defense outside of the home is indeed part of the Second Amendment right, then just as laws

destroying the right to keep arms "fail constitutional muster" under any form of heightened review, so too must regulations that destroy the right to bear arms. *See Heller*, 554 U.S. at 629.

2. If means-end scrutiny applies, the justifiable need requirement is properly subjected to strict scrutiny

a. The justifiable need requirement denies the average law-abiding citizen the right to bear arms for self-defense outside the home

This Court ruled out rational-basis review for assessing laws that burden Second Amendment conduct because it "would be redundant with the separate constitutional prohibitions on irrational laws." *Heller*, 554 U.S. at 629 n. 27. This leaves intermediate or strict scrutiny, *Drake*, 724 F.3d at 436, or something in between, *see Ezell*, 651 F.3d at 701.

The circuit courts have taken sliding-scale and tiered-scrutiny approaches to assessing the constitutionality of gun control regulation but "agree[] as a general matter that 'the level of scrutiny applied to gun control regulations depends on the regulation's burden on the Second Amendment right to keep and bear arms.'" *Peruta*, 742 F.3d at 1167 (quoting *Nordyke v. King*, 681 F.3d 1041, 1045–46 (9th Cir. 2012) (en banc) (O'Scannlain, J., concurring)). Despite paying lip service to this principle, however, here the Third Circuit's commitment to a homebound theory of the Second Amendment prevented it from applying the principle in practice.

Specifically, the Third Circuit declined to apply strict scrutiny because the justifiable need requirement supposedly does not implicate the "core" of the Second Amendment right—the right to keep handguns in the home for self-defense. *Drake*, 724 F.3d at 436; *see also Kachalsky*, 701 F.3d 81, 96 (2d Cir. 2012). The premise is incorrect, as discussed in Part II.A, *supra*. But this reasoning also has problematic consequences, as it compels the Third Circuit to advocate a scheme under which intermediate scrutiny applies equally to a law that strips most individuals of their right to bear arms and to a law that merely requires firearms to bear serial numbers. *See*

Marzzarella, 614 F.3d at 97 (applying intermediate scrutiny because a serial number requirement does not severely limit the possession of firearms); *see also Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 188 (5th Cir. 2012) (applying intermediate scrutiny to a prohibition on selling handguns to persons under 21).

It is inconsistent with this Court's jurisprudence to apply the same scrutiny to laws *denying* a constitutional right and laws merely *regulating* the exercise of that right. Most notably, in the First Amendment context, content-based restrictions on speech in a public forum trigger strict scrutiny, *Marzzarella*, 614 F.3d at 96 (citing *Pleasant Grove City v. Summum,* 555 U.S. 460, 469 (2009), while content-neutral restrictions on time, place, and manner of speech trigger intermediate scrutiny, *id.* (citing *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989)). Like content-based restrictions that determine *whether* individuals may engage in speech, New Jersey's justifiable need restriction determines *whether* a law-abiding individual may carry a firearm and should be subject to strict scrutiny.[11] In contrast, like restrictions on time, manner and place of speech, laws that restrict merely the manner in which firearms may be carried should be subject to lesser scrutiny.

Outside of the First Amendment context, this Court has held that interstate travel is a right implicitly guaranteed by the Constitution and, accordingly, has applied strict scrutiny to state residency requirements that prevent individuals from exercising this right. *See Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (medical care); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (voting); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (welfare benefits).

[11] It may be that certain Second Amendment prohibitions are even more entitled to strict scrutiny than content-based restrictions on speech. For as Judge Sykes notes in her dissenting opinion in *Skoien*, "it is one thing to say that certain narrowly limited categories of speech have long been understood to fall outside the boundaries of the free-speech right and are thus unprotected by the First Amendment. It is quite another to say that a certain category of *persons* has long been understood to fall outside the boundaries of the Second Amendment and thus may be excluded from *ever* exercising the right. 614 F.3d at 650 (Sykes, J., dissenting).

Similarly, in *Kramer v. Union Free School District No. 15*, the Court applied strict scrutiny to a statute that denied childless non-property owners the right to vote in school board elections. In so doing, it expressly distinguished the case from one in which the Court had applied less rigid review: "The present appeal involves an absolute denial of the franchise. In *McDonald v. Board of Election Commissioners of Chicago* on the other hand, we were reviewing a statute which made casting a ballot easier for some who were unable to come to the polls." *Kramer*, 395 U.S. 621, 626 n.6 (1969) (citing 394 U.S. 802 (1969)).

The lower courts, including the Third Circuit, have transferred this burden-contingent approach to review to the Second Amendment realm. In *Marzzarella*, the Third Circuit determined that a law that prohibited possessing firearms with obliterated serial numbers did not "severely limit the possession of firearms" and was therefore subject to intermediate scrutiny. 614 F.3d at 97. Drawing a similar distinction between levels of scrutiny based on the extent of the burden, the Seventh Circuit came to a different conclusion in *Ezell*: an ordinance banning city firing ranges was a serious infringement of Second Amendment rights and required a more rigorous showing than intermediate scrutiny, "if not quite 'strict scrutiny.'" 651 F.3d at 708. New Jersey's justifiable need requirement burdens the self-defense right more than the laws at issue in either *Marzarrella* or *Ezell*. Careful consideration of its own precedent as well as that of its sister circuits should have prompted the Third Circuit to apply more rigorous scrutiny here.

b. The justifiable need requirement places the burden on law-abiding individuals to prove that they are entitled to their Second Amendment right and grants broad discretion to state officials in denying that right

The justifiable need requirement differs from other laws to which the courts have applied intermediate scrutiny in two other key respects: it places the burden on individuals to prove that

their self-defense need rises to the level of a Second Amendment right, a highly subjective determination, and grants an administrative official broad discretion in denying that right.

In the speech realm, these characteristics would render a licensing scheme an invalid prior restraint. Although the doctrine cannot be imported wholesale into the Second Amendment realm,[12] it is instructive here in that it illustrates why certain permit requirements are properly understood not as regulations but as unconstitutional encroachments that demand strict scrutiny.

In *Freedman v. Maryland*, the landmark film-censorship case, this Court identified the procedural safeguards required for a constitutionally valid system of prior restraint. 380 U.S. 51 (1965). Among these was that the *state censor* bear the burden of proving that a film was not protected. *Id.* at 58. For its rationale, the Court relied on *Speiser v. Randall*, where it declared, "[A] constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment." 357 U.S. 513, 526 (1958).

New Jersey forces applicants to distinguish themselves from the general population in order to exercise their right to bear arms in public for self-defense. This effectively releases the state from its burden of establishing why applicants may not exercise their Second Amendment right. This creates precisely the type of statutory presumption condemned by this Court in *Speiser*, and is indeed a transgression of an unequivocal constitutional prohibition: that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

Prior restraint doctrine is illuminating in a second sense: the justifiable need requirement "delegates overly broad licensing discretion to an administrative office," *Freedman*, 380 U.S. at 56. Specifically, the chief of police determines whether an applicant has shown 1) specific threats or previous attacks 2) demonstrating a special danger to the applicant's life 3) that cannot

[12] After all, there exists a strong presumption against licensing requirements for speech, whereas Petitioners do not challenge the legitimacy of requiring individuals to acquire permits before exercising their right to bear arms.

be avoided by other means. *Preis*, 573 A.2d at 152. The ambiguity lies in the interaction of these three elements. It is unclear whether an applicant who has *already suffered* assault could be deemed to have been merely in the wrong place at the wrong time such that she suffers no greater future threat than anyone else. The police chief also retains discretion as to when an applicant can be said to have "other means" for avoiding danger such that she is not entitled to a firearm. Perhaps legal means, such as a temporary restraining order, suffices. Perhaps not.

The facts of this case demonstrate the discretionary nature of the standard: an initial petitioner in this action was the victim of a violent interstate kidnapping but was denied a carry permit by one Superior Court judge;[13] his case became moot when a different judge chose to issue him the permit. *See Drake*, 724 f.3d at 443 n.11.[14] In essence, New Jersey's justifiable need requirement operates as a highly *subjective* standard for *qualification*, whereas the many permit requirements that Petitioners do not challenge serve as *objective* standards for *disqualification*, tailored to keep permits from unfit persons. As such, it should be subjected to higher scrutiny.

3. The justifiable need requirement fails even intermediate scrutiny

Strict scrutiny requires that the justifiable need requirement be "narrowly tailored" to advance "a compelling government interest." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995). But New Jersey's requirement would not withstand strict scrutiny because it cannot withstand even intermediate scrutiny.

To survive intermediate scrutiny, a statutory classification must be "substantially related" to an "important governmental objective." *Id.* at 220. Public safety is an important objective by

[13] Only applications approved by the police chief advance to review by a Superior Court judge. N.J. Stat. Ann. § 2C:58–4(d). Thus the judge's involvement operates less as a protection than as an additional barrier to the permit. If the police chief denies the application, then it falls on the applicant to appeal to the Superior Court. *Id.* § 2C:58–4(e).
[14] Peggy Wright, *Abduction Victim Allowed to Carry Gun*, Daily Record (May 26, 2011, 7:37 PM), http://www.dailyrecord.com/article/20110526/NJNEWS/305260009/Newton-kidnapping-victim-finally-gets-OK-carry-concealed-handgun-third-try.

any measure. But the justifiable need requirement is not substantially related to that interest, much less narrowly tailored to achieve it. Nor can the state establish that the fit between law and objective is "reasonable . . . such that the law does not burden more conduct than is reasonably necessary," as required under other formulations of the standard. *See Drake*, 724 F.3d at 436.

a. The justifiable need requirement is not substantially related to public safety

The Third Circuit misapplied intermediate scrutiny to New Jersey's justifiable need requirement. New Jersey presented "*no evidence at all*" to show that limiting permits to those individuals who have suffered a demonstrated threat to life advances public safety. *Id.* at 454 (Hardiman, J., dissenting). In the absence of evidence, the Third Circuit incorrectly deferred to the legislature's judgments as to the law's reasonableness. As the Ninth Circuit pointed out, the Third Circuit based this deference on a misreading of this Court's precedent in *Turner Broadcasting System, Inc. v. FCC*. *See Peruta*, 742 F.3d at 1177 (citing *Turner*, 520 U.S. 180 (1997)). In *Turner*, the Court urged deference to the legislature's *evaluation* of the evidence before it, not deference as to the very *existence* of evidence. *See* 520 U.S. at 196-213.

But even a careful presentation of the evidence available to support New Jersey's position would not allow the state to meet its burden of showing that the justifiable need requirement furthers public safety. First and foremost, the evidence does not show that issuing carry permits to law-abiding individuals would increase violence. Some studies have linked increased gun *ownership* to increased homicide rates, but as Judge Posner noted in *Moore*, "the issue in this case isn't ownership; it's carrying guns in public." 702 F.3d at 938. The distinction is important and suggests that restrictive carry requirements are particularly unjustified given they coexist with ownership laws that are comparatively lenient (and necessarily so post-*Heller*). This

is relevant because individuals are unlikely to seek to lawfully carry a firearm for unlawful use when they could simply misuse their less regulated home gun.

Second, a law like New Jersey's justifiable need requirement "is counterproductive since it leaves the innocent defenseless against violent predators." Don B. Kates & Clayton E. Cramer, *Second Amendment Limitations and Criminological Considerations*, 60 Hastings L.J. 1339, 1344 (2009). This is a common-sense proposition that predates the founding. As Cesare Beccaria, the father of modern criminology, wrote in 1764, "The laws that forbid the carrying of arms . . . . serve rather to encourage than to prevent homicides, for an unarmed man may be attacked with greater confidence than an armed man." Cesare Beccaria, *On Crimes and Punishments* 87-88 (Henry Paolucci trans., 1963) (1764). Empirical data cannot fully capture the deterrence effect of carry regimes or how often people use firearms for self-defense. But national estimates suggest up to two million instances of defensive gun use a year. Clayton E. Cramer & David Burnett, *Tough Targets: When Criminals Face Armed Resistance from Citizens*, Cato Inst. 1 (2012).

Lastly, the inconclusiveness of the evidence ensures that the justifiable need requirement fails heightened scrutiny. Although anecdotal evidence of self-defensive gun use abounds, *see, e.g.*, *id.*, the statistical evidence as to whether relaxed carry laws result in a net increase or decrease in crime is at best debatable, *see* Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 Stan. L. Rev. 1193, 1197 (2003) (listing studies that reach competing conclusions as to how carry permits affect crime). This uncertainty is fatal for the justifiable need requirement since the state bears the burden of "affirmatively establishing the reasonable fit" required for intermediate scrutiny, *Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).

b. The justifiable need requirement burdens more conduct than is "reasonably necessary"

The justifiable need requirement fails intermediate scrutiny because it burdens far more protected conduct than is "reasonably necessary" to achieve New Jersey's public safety aims.

First, in contrast with other New Jersey permit requirements, which are designed to authorize only responsible, law-abiding individuals to publicly carry weapons, the justifiable need requirement is not geared toward decreasing firearm misuse or accidents. It decreases such risk only indirectly, by purporting to limit the number of firearms on the street and allocating limited permits to those able to prove a likely future attack. As Judge Hardiman noted in his dissent below, the justifiable need requirement functions as a rationing system, and a rationing system that "burdens the exercise of a fundamental constitutional right by simply making that right more difficult to exercise . . . burdens the right too broadly." *Drake*, 724 F.3d at 431.

Second, low arrest rates suggest that permit holders are not in general more likely to misuse their firearms. *See* Cook et al., *supra*, at 1082. Permit holders who *do* commit crimes often fall into a definable class of persons who are not legally entitled to carry permits in the first place. *See, e.g.*, Associated Press, *Felons in Florida Are Getting Permits for Guns, Report Says*, N.Y. Times, Jan. 29, 2007, http://www.nytimes.com/2007/01/29/us/29florida.html (describing a 2007 analysis of Florida state records that revealed that criminals were erroneously issued carry permits). The way to rectify problems arising out of a sloppily administered licensing scheme is to properly enforce existing law, not impose unrelated need-based requirements.

Third, the threat in public places reveals that New Jersey imposes an unacceptable burden on average law-abiding citizens' self-defense right. Again, the vast majority of violent crimes happen outside the home. Bureau of Justice Statistics, Criminal Victimization in the United States, *supra*, tbl.61. Moreover, strangers commit most of the violent crimes that happen in

public places. Bureau of Justice Statistics, Violent Victimization Committed by Strangers, *supra*, at 5. These sobering statistics directly undermine the validity of New Jersey's systematic denial of carry permits to those who cannot prove they suffered some previous threat or attack.

Significantly, individuals who have not yet experienced an attack may nonetheless suffer a higher-than-average probability of attack, and chronic fear, because of their race, gender, sexual orientation, profession or neighborhood. In *McDonald*, this Court indicated that the Second Amendment is properly interpreted as responsive to these individualized concerns. *See* 130 S. Ct. at 3049 ("If, as petitioners believe, their safety and the safety of other law-abiding members of the community would be enhanced by the possession of handguns in the home for self-defense, then the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials."). The fact that the justifiable need requirement is distinctly *not* responsive to such concerns suggests that it is too narrow, at great cost to those who live in fear of violence.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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