No. 13-_____

# In The
# Supreme Court of the United States

JOHN M. DRAKE, GREGORY C. GALLAHER, LENNY S. SALERNO, FINLEY FENTON, SECOND AMENDMENT FOUNDATION, INC., AND ASSOCIATION OF NEW JERSEY RIFLE & PISTOL CLUBS, INC.,

*Petitioners,*

v.

EDWARD A. JEREJIAN, THOMAS D. MANAHAN, JOSEPH R. FUENTES, ROBERT JONES, RICHARD COOK, AND JOHN JAY HOFFMAN,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

The Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *District of Columbia* v. *Heller*, 554 U.S. 570, 592 (2008). But in accordance with "the overriding philosophy of [New Jersey's] Legislature . . . to limit the use of guns as much as possible," *State* v. *Valentine*, 124 N.J. Super. 425, 427, 307 A.2d 617, 619 (N.J. Super. Ct. App. Div. 1973), New Jersey law bars all but a small handful of individuals showing "justifiable need" from carrying a handgun for self-defense, N.J. Stat. Ann. § 2C:58-4(c).

The federal appellate courts, and state courts of last resort, are split on the question of whether the Second Amendment secures a right to carry handguns outside the home for self-defense. The Second, Fourth, Fifth and Seventh Circuits, and the supreme courts of Illinois, Idaho, Oregon and Georgia have held or assumed that the Second Amendment encompasses the right to carry handguns outside the home for self-defense. But along with the highest courts of Massachusetts, Maryland, and the District of Columbia, which have refused to recognize this right, a divided Third Circuit panel below held that carrying handguns outside the home for self-defense falls outside the scope of the Second Amendment's protection. It thus upheld New Jersey's "justifiable need" prerequisite for carrying defensive handguns.

**QUESTIONS PRESENTED** – Continued

The federal appellate courts are also split 8-1 on the question of whether the government must provide evidence to meet its burden in Second Amendment cases. The First, Second, Fourth, Fifth, Seventh, Ninth, Tenth and District of Columbia Circuits require the government to produce legislative findings or other evidence to sustain a law burdening the right to bear arms. But the majority below held that the legislature's policy decisions need not be supported by any findings or evidence to survive a Second Amendment challenge, if the law strikes the court as reasonable. Accordingly, the majority upheld New Jersey's "justifiable need" law despite the state's concession that it lacked legislative findings or evidence of the law's public safety benefits, let alone the degree of fit between the regulation and the interests it allegedly secures.

The questions presented are:

1. Whether the Second Amendment secures a right to carry handguns outside the home for self-defense.

2. Whether state officials violate the Second Amendment by requiring that individuals wishing to exercise their right to carry a handgun for self-defense first prove a "justifiable need" for doing so.

## RULE 29.6 DISCLOSURE STATEMENT

No parent or publicly owned corporation owns 10% or more of the stock in Second Amendment Foundation, Inc. or Association of New Jersey Rifle and Pistol Clubs, Inc.

## PARTIES TO THE PROCEEDINGS

Petitioners John M. Drake, Gregory C. Gallaher, Lenny S. Salerno, Finley Fenton, Second Amendment Foundation, Inc., and Association of New Jersey Rifle and Pistol Clubs, Inc. were plaintiffs and appellants below.

Respondents Edward A. Jerejian and Thomas D. Manahan, Judges of the New Jersey Superior Court; Col. Joseph R. Fuentes, Superintendent of the New Jersey State Police; Robert Jones, Police Chief of Hammonton, New Jersey; and Richard Cook, Police Chief of Montville, New Jersey, were defendants and appellees below. Respondent John Jay Hoffman, Acting Attorney General of New Jersey, was an appellee below.

Daniel J. Piszczatoski was a plaintiff and appellant below. Jeffrey Muller was a plaintiff before the district court. Former New Jersey Attorneys General Paula Dow and Jeffrey Chiesa, and New Jersey Superior Court Judge Rudolph A. Filko were defendants and appellees below. New Jersey Superior Court Judge Phillip Maenza and former Hammonton, New Jersey Police Chief Frank Ingemi were defendants in the district court.

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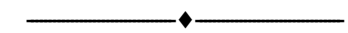
## PETITION FOR A WRIT OF CERTIORARI

John M. Drake, Gregory C. Gallaher, Lenny S. Salerno, Finley Fenton, Second Amendment Foundation, Inc., and Association of New Jersey Rifle and Pistol Clubs, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.



## INTRODUCTION

Until now, federal appellate courts have at least professed fidelity to this Court's holding that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *District of Columbia* v. *Heller*, 554 U.S. 570, 592 (2008). One circuit has struck down laws prohibiting the right's exercise. Three others have upheld infringements, but not without acknowledging the right's existence, and reasoning that their decisions comported with that right. None had held that the Second Amendment does not secure the right to carry a handgun, "the quintessential self-defense weapon." *Id.* at 629.

In clear conflict with the decisions of four other circuits, the majority below held that carrying handguns for self-defense does not come within the Second Amendment's ambit. State courts of last resort are split 4-3 in favor of the proposition that the Second Amendment right exists outside the home.

Defying this Court's repeated instruction that constitutional text has the meaning ascribed to it by the Framers, the majority below held that state legislatures may override constitutional guarantees by altering the understanding of what constitutes a right. To its credit, the majority below acknowledged that one cannot be made to prove "proper cause" or "justifiable need" to exercise fundamental rights. Alas, drawing the precisely wrong conclusion, the majority below held that twentieth century New York and New Jersey laws mandating such prerequisites for carrying handguns must be "longstanding prohibitions" that define the Second Amendment's scope to exclude the carrying of arms. In other words, the challenged statute's enactment proves its constitutionality.

Moreover, the majority below suggested that even if the Second Amendment secured the bearing of arms, the state could pursue a self-justifying interest in minimizing the right's exercise without producing any evidence that doing so is properly tailored to advancing legitimate state interests.

Until now, even courts applying a highly deferential "intermediate" scrutiny standard in Second Amendment cases have at least required the government to point to some legislative findings or other evidentiary support justifying the burdening of this fundamental right. The majority below excused the complete absence of legislative findings and evidence supporting the challenged provision because the legislature was unaware that individuals enjoy Second Amendment rights.

Even against the background of the lower courts' massive resistance to *Heller*, this decision breaks radical new ground. The harm is not confined to Second Amendment rights. It is difficult to imagine what constitutional right could survive the logic employed by the majority below. Decisions such as this seriously undermine public confidence in the judiciary's willingness to enforce constitutional limitations disfavored by judges, and in the rule of law itself. The petition should be granted, and the decision below should be reversed.

## OPINIONS BELOW

The decision of the court of appeals, reported at 724 F.3d 426, is reprinted in the Appendix (App.) at 1a-76a. The district court's opinion, reported at 840 F. Supp. 2d 813, is reprinted at App. 77a-130a.

## JURISDICTION

The court of appeals entered its judgment on July 31, 2013, and denied a petition for rehearing en banc on August 7, 2013. App. 133a. Justice Alito granted Petitioners' application to extend time to file this petition through and including January 9, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Second Amendment to the United States 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."

Relevant New Jersey statutes and administrative code provisions are reprinted in the Appendix.

## STATEMENT OF THE CASE

### A. The Regulatory Regime

New Jersey law prohibits individuals from possessing handguns "without first having obtained a permit to carry the same." N.J. Stat. Ann. § 2C:39-5(b). A first conviction for possessing a handgun without a license is a felony punishable by five to ten years' imprisonment. N.J. Stat. Ann. §§ 2C:39-5(b), 2C:43-6(a)(2). A first-time offender faces a recommended seven year sentence. N.J. Stat. Ann. § 2C:44-1(f)(1)(c). The law exempts unlicensed handgun possession in one's home or business; on one's property; at gun ranges, stores, and exhibitions; and while fishing or hunting. N.J. Stat. Ann. § 2C:39-6(e), (f).

In addition to meeting certain criminal history, age, and mental health requirements, an individual seeking a handgun carry license must complete a training course, be familiar with state use-of-force

laws, pass a qualification test, and demonstrate a "justifiable need to carry a handgun." N.J. Stat. Ann. § 2C:58-4(c); N.J. Admin. Code § 13:54-2.4(b).

"Justifiable need to carry a handgun" is defined as

> the urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun.

N.J. Admin. Code § 13:54-2.4(d)(1).

An application for a handgun carry license is first made to a police official, who determines whether the applicant meets the statutory requirements. N.J. Stat. Ann. § 2C:58-4(c). Upon approval, the police present applications to a Superior Court judge for further review. N.J. Stat. Ann. § 2C:58-4(d). If the police disapprove an application, a judge will not consider it absent the applicant's request. N.J. Stat. Ann. § 2C:58-4(e). Regardless, only a Superior Court judge can actually issue a handgun carry license. N.J. Stat. Ann. § 2C:58-4(c), (d).

The Superior Court judge determines whether the various statutory requirements, including "justifiable need," have been met. N.J. Stat. Ann. § 2C:58-4(d). The judge may deny an application or issue a restricted handgun carry license. *Id.*; N.J. Admin. Code § 13:54-2.7(b).

In practice, few ordinary people can hope to obtain a New Jersey handgun carry permit. As one New Jersey legislator acknowledges, "It's virtually never done."[1] All handgun carry permits expire two years from issuance, though armored car employees lose their permits upon termination of employment occurring prior to the two year expiration date. N.J. Stat. § 2C:58-4(a). Permits may "be renewed every 2 years in the same manner and subject to the same conditions as in the case of original applications." *Id.* Accordingly, the total number of outstanding permits held by non-law-enforcement adults cannot exceed the sum of approvals in the past two years. As of 2011, that number stood at 1,195.[2] New Jersey's adult population in 2010 was 6,726,680.[3] This suggests a licensure rate approaching two-hundredths of one percent, before accounting for any licenses issued to non-residents.

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[1] Matt Friedman, *N.J. senator pushes law allowing residents to carry handguns*, STAR LEDGER, Sept. 26, 2010, available at http://www.nj.com/news/index.ssf/2010/09/nj_senator_pushes_law_allowing.html (last visited Jan. 5, 2014).

[2] See Genova Decl., Appellants' Suppl. Letter Br. at ¶¶ 13-14 (filed Feb. 27, 2012) (2010: 592 permits issued; 2011: 603 permits issued).

[3] Census Bureau, *2010 Demographic Profile Data for New Jersey*, available at http://factfinder2.census.gov/bkmk/table/1.0/en/DEC/10_DP/DPDP1/0400000US34 (last visited Jan. 5, 2014).

### B. The Challenged Provision's Application Against Petitioners

Petitioner John Drake operates a business that services and restocks ATM machines, requiring him to carry large amounts of cash. Respondent Fuentes denied Drake's application for lack of "justifiable need." App. 150a-52a.

Petitioner Finley Fenton is a Reserve Sheriff's Deputy in Essex County, New Jersey, who has full power of arrest throughout the state, and carries a gun in the course and scope of his employment as a Sheriff's Deputy. C.A. App. 115. Considering he disrupts and arrests criminals while on-duty, Fenton desires a gun for self-defense while he is off-duty. *Id.* Respondents Fuentes and Jerejian each denied Fenton's application for lack of "justifiable need." App. 153a-55a.

Respondents Cook and Manahan each denied Petitioner Larry Salerno's handgun carry permit application for lack of "justifiable need." App. 156a-58a. Respondent Jones's predecessor denied Petitioner Gregory Gallaher's handgun carry permit application on the same grounds. App. 159a-60a. Members and supporters of Petitioners Second Amendment Foundation, Inc. ("SAF") and Association of New Jersey Rifle and Pistol Clubs, Inc. ("ANJRPC") have been denied handgun carry permits for lacking "justifiable need," and they would carry handguns for self-defense but for the "justifiable need" requirement. C.A. App. 122-25, 136-38. The organizations' membership also

refrains from applying for handgun carry licenses, as doing so would be futile on account of the "justifiable need" requirement. C.A. App. 122-25, 134-35.

### C. The Litigation Below

1. On November 22, 2010, Petitioners and two others brought suit in the United States District Court for the District of New Jersey, challenging the "justifiable need" requirement's constitutionality under the Second and Fourteenth Amendments. On January 12, 2012, the district court denied Petitioners' motion for summary judgment and granted Respondents' motion to dismiss with prejudice.

The district court declared the Second Amendment a "privilege . . . unique among all other constitutional rights to the individual [sic] because it permits the user of a firearm to cause serious personal injury – including the ultimate injury, death – to other individuals, rightly or wrongly [sic]." App. 79a.[4] It then held that New Jersey's law "does not on its face burden protected conduct because the Second Amendment does not include a general right to carry handguns outside the home." *Id.* "The language of Justice Scalia's majority opinion deliberately limited the scope of the right recognized to the home." App. 92a.

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[4] Petitioners have never argued, and would strongly deny, that the Second Amendment secures a right to wrongly injure or kill others.

In the alternative, the district court held the law would be constitutional, as it was neither a prior restraint, nor did it fail purportedly intermediate scrutiny. App. 115a. After claiming that an assessment of "justifiable need" does not entail the exercise of unbridled discretion on the part of licensing officials, App. 116a-19a, the district court found that "intermediate" scrutiny would apply to a right to bear arms, on the theory that the right's "core" lies only inside the home. App. 122a-23a. Petitioners timely appealed.

2. On July 31, 2013, a Third Circuit panel majority agreed. "[W]e conclude that the requirement that applicants demonstrate a 'justifiable need' to publicly carry a handgun for self-defense qualifies as a 'presumptively lawful,' 'longstanding' regulation and therefore does not burden conduct within the scope of the Second Amendment's guarantee." App. 8a. "Nevertheless, because of the important constitutional issues presented, we believe it to be beneficial and appropriate to consider whether the 'justifiable need' standard withstands the applicable intermediate level of scrutiny." *Id.* The majority concluded that New Jersey's law passed "intermediate" scrutiny, "providing a second, independent basis for concluding that the standard is constitutional." *Id.*

"It remains unsettled whether the individual right to bear arms for the purpose of self-defense extends beyond the home." App. 8a-9a (footnote omitted). "Although *Heller* does not explicitly identify a right to *publicly* carry arms for self-defense, it is

possible to conclude that *Heller* implies such a right." App. 10a. In upholding such a right, "the Seventh Circuit . . . may have read *Heller* too broadly." App. 11a.

The majority was uninterested in Petitioners' appeal to "text, history, tradition, and precedent." *Id.* "[W]e are not inclined to address this contention by engaging in a round of full-blown historical analysis," but the undescribed, less-than-full-blown consideration the majority gave the subject led it to "reject [Respondents'] contention that a historical analysis leads *inevitably* to the conclusion that the Second Amendment confers upon individuals a right to carry handguns in public for self-defense." *Id.* The majority "recognize[d] that the Second Amendment's individual right to bear arms *may* have some application beyond the home," but "refrain[ed] from answering this question definitively because it [was] not necessary to [the court's] conclusion." App. 12a.

Even "assuming that the Second Amendment confers upon individuals some right to carry arms outside the home," the majority determined that the "justifiable need" standard is a "longstanding regulation that enjoys presumptive constitutionality," App. 19a, because New York had required "proper cause" to carry a handgun since 1913, and New Jersey's "justifiable need" standard had antecedents dating to 1924.

App. 18a.[5] The majority expressly rejected the contention that "longstanding" regulations informing the right's scope were those regulations known to the Framers. *Id.* "Accordingly, [the law] regulates conduct falling outside the scope of the Second Amendment's guarantee." App. 19a.

The majority then turned to its alternative rationales, upholding New Jersey's "justifiable need" requirement even if, contrary to the court's holding, the Second Amendment secured a right to carry handguns for self-defense. The majority first refused to apply prior restraint doctrine to the Second Amendment, App. 20a-21a, and reasoned that even were it to do so, the "justifiable need" standards are "clear and specific" and thus do not invite the exercise of unbridled discretion. App. 21a. It then mirrored the district court's opinion, applying "intermediate" scrutiny to any Second Amendment rights outside the home and upholding the law. App. 22a-24a.

The majority's "intermediate" scrutiny application involved, primarily, the recitation of the legislature's "predictive judgment," which need not be supported by any actual evidence or legislative findings. "The predictive judgment of New Jersey's legislators is

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[5] But as Judge Hardiman's dissent noted, New Jersey required no permit to carry handguns openly until 1966. App. 51a-52a, 55a-56a. And while a license to carry concealed handguns required a showing of "need" as of 1924, no court "had ascribed any meaning to it" prior to 1971. App. 52a n.15. "Justifiable need" dates to 1979. App. 53a.

that limiting the issuance of permits to carry a handgun in public to only those who can show a 'justifiable need' will further its substantial interest in public safety." App. 26a (footnote omitted).

> To be sure, New Jersey has not presented us with much evidence to show how or why its legislators arrived at this predictive judgment. New Jersey's counsel acknowledges that "there is no available commentary which would clarify whether or not the Legislature considered statistical information to support the public safety purpose of the State's Carry Permit Law."

App. 26a-27a (citation omitted). But the state's "inability" to support its judgment with evidence was excusable, because the law pre-dated the Second Amendment's judicial recognition. App. 27a. "Simply put, New Jersey's legislators could not have known that they were potentially burdening protected Second Amendment conduct." App. 27a-28a. But in any event, believing that the "justifiable need" law advanced the public interest was a "reasonable inference" and a matter of "history, consensus, and common sense." App. 28a (citations omitted).

"New Jersey legislators . . . have made a policy judgment that the state can best protect public safety by allowing only those qualified individuals who can demonstrate a 'justifiable need' to carry a handgun to do so." App. 30a. And even though the legislature was unaware that it would be bound to respect Second Amendment rights, "[i]n essence, New Jersey's

schema takes into account the individual's right to protect himself from violence as well as the community at large's interest in self-protection." App. 30a-31a.

> We refuse Appellants' invitation to intrude upon the sound judgment and discretion of the State of New Jersey.

App. 32a-33a.

3. Judge Hardiman dissented. "*Heller* engaged in significant historical analysis on the meaning of the text of the Second Amendment, specifically focusing on the words 'keep' and 'bear' as codifying distinct rights." App. 42a (citation omitted). Recalling *Heller*'s definition of "bear arms," Judge Hardiman noted that "bear" could not be redundant of "keep," nor can the defense-against-confrontation interest at the amendment's core be limited to the home. App. 42a-43a. If the Second Amendment right did not extend beyond the home, this Court would not have declared it only "most acute" in the home, nor carved out exceptions for public "sensitive places." App. 43a-44a.

"Most importantly, the *McDonald* Court described the holding in *Heller* as encompassing a general right to self-defense." App. 44a (citing *McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010)). "In making [] comments regarding the home, the Court was merely applying the Second Amendment to the facts at issue in the case before it. *Heller* challenged the District of Columbia's prohibition on guns in the home, not its prohibitions on public carry." App. 45a.

Judge Hardiman then rejected the notion that New Jersey's "justifiable need" law is a "longstanding" regulation that removes defensive handgun carrying from the Second Amendment's scope. After demonstrating that New Jersey did not so restrict all handgun carrying until 1966, App. 55a-56a, Judge Hardiman noted that "*Heller* requires, at a minimum, that a regulation be rooted in history." App. 58a. And as Judge Hardiman observed, courts had historically struck down total prohibitions on carrying handguns, upholding only restrictions on carrying particular handguns, or carrying handguns in a particular manner. App. 58a-60a.

Judge Hardiman agreed with the majority that New Jersey's "justifiable need" law should be analyzed under intermediate scrutiny, App. 63a, but was troubled by the state's failure to demonstrate the required "fit."

> To be clear, New Jersey has provided *no evidence at all* to support its proffered justification, not just no evidence that the legislature considered at the time the need requirement was enacted or amended. The majority errs in absolving New Jersey of its obligation to show fit. Our role is to evaluate the State's proffered evidence, not to accept reflexively its litigation position.

App. 66a.

But even had the state's reasons been adequate without supporting evidence, Judge Hardiman would

have found "no reasonable fit between the justifiable need requirement and the State's interest. . . . The fact that one has a greater need for self-defense tells us nothing about whether he is less likely to misuse or accidentally use handguns." App. 67a.

Judge Hardiman observed that the majority's level of deference amounted to nothing more than rational basis review.

> By deferring absolutely to the New Jersey legislature, the majority abdicates its duty to apply intermediate scrutiny and effectively applies the rational basis test, contrary to the Supreme Court's explicit rejection of that test in the Second Amendment context.

App. 73a. Judge Hardiman further noted "that the majority's version of deference to the New Jersey legislature is akin to engaging in the very type of balancing that the *Heller* Court explicitly rejected." App. 74a.

4. On August 7, 2013, the Third Circuit denied Petitioners' request for rehearing en banc by an 8-4 vote. App. 133a.

## REASONS FOR GRANTING THE PETITION

### I. The Federal Courts of Appeals and State High Courts Are Divided Over Whether the Second Amendment Protects Carrying Handguns Outside the Home for Self-Defense.

The majority below's determination that carrying handguns outside the home for self-defense is "conduct falling outside the scope of the Second Amendment's guarantee," App. 19a, directly conflicts with the Seventh Circuit's opinion striking down Illinois' total ban on carrying handguns outside the home, *Moore* v. *Madigan*, 702 F.3d 933 (7th Cir. 2012).

"The Supreme 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. "To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*." *Id.* at 937.

The decision below also conflicts with holdings of other circuits upholding similar laws. The Second Circuit, for example, "assum[ed] that the Second Amendment applies to this context." *Kachalsky* v. *Cnty. of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012); see also *id.* at 89 & n.10. The majority below "agree[d]" that even though *it* found New York's "proper cause" requirement inconsistent with a constitutional right to carry handguns, the Second Circuit "upheld New York's law because it survived intermediate scrutiny,

not because it evaded Second Amendment cognizance on account of its longstandingness." App. 18a n.12 (citation omitted).

And while the Fourth Circuit "refrain[ed] from any assessment of whether Maryland's good-and-substantial-reason requirement for obtaining a handgun permit implicates Second Amendment protections," it "assume[d] that the *Heller* [sic] right exists outside the home and that such right . . . has been infringed" by a "good-and-substantial-reason" prerequisite. *Woollard* v. *Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013).

Similarly, in upholding a Texas law prohibiting the issuance of concealed handgun carry permits to adults younger than 21, the Fifth Circuit apparently accepted that the Second Amendment secures a right to carry handguns outside the home for self-defense. *Nat'l Rifle Ass'n of Am., Inc.* v. *McCraw*, 719 F.3d 338 (5th Cir. 2013) ("*McCraw*"), *petition for cert. pending*, No. 13-390. Proceeding on the basis of this Court's holding that "the '*central component* of [this] right' is self-defense," *id*. at 346 (quoting *Heller*, 554 U.S. at 599) (alteration in source), the Fifth Circuit did not uphold the law by excluding the public carrying of handguns from the Second Amendment, as had the district court, see Pet. App., No. 13-390, at 37a. Rather, the Fifth Circuit upheld the carry restriction based upon circuit precedent suggesting that laws "restrict[ing] 18-20-year-olds' access to and use of firearms" on account of their alleged "immaturity" are longstanding regulations. See *McCraw*, 719 F.3d at 347.

In the alternative, the Fifth Circuit upheld Texas' restriction under intermediate scrutiny. The law's exclusive reach to the carrying of guns in public outside the home was but one factor underlying the court's application of intermediate scrutiny. *Id.* at 348. And plaintiffs' youth, not the public nature of the right they would exercise, was held to be the proper subject of legislative action. "Texas determined that *a particular group* was generally immature and that allowing immature persons to carry handguns in public leads to gun violence. Therefore, it restricted the ability *of this particular group* to carry handguns outside their vehicles in public. This means [survives intermediate scrutiny]." *Id.* at 349 (emphasis added).

The split of authority as to whether the Second Amendment secures a right to carry handguns outside the home for self-defense also extends to state courts of last resort. Illinois' supreme court followed the Seventh Circuit's decision to strike down Illinois' ban on carrying handguns in public. "[I]if *Heller* means what it says, and individual self-defense is indeed the central component of the second amendment right to keep and bear arms, then it would make little sense to restrict that right to the home, as confrontations are not limited to the home." *People* v. *Aguilar*, 2013 IL 112116, ¶ 20 (quotations and alteration omitted). Carrying a handgun in public for self-defense is "a personal right that is specifically named in and guaranteed by the United States Constitution, as construed by the United States Supreme Court." *Id.* ¶ 21.

Likewise, Idaho's Supreme Court invoked the Second Amendment in striking down a law prohibiting the carrying of guns in urban areas. *In re Brickey*, 8 Idaho 597, 70 P. 609 (1902). Oregon's Supreme Court "read[s] [*Heller*] as recognizing a right to self-defense outside the home to a degree yet to be determined by the Court." *State* v. *Christian*, 354 Ore. 22, 44 n.11, 307 P.3d 429, 443 n.11 (2013). And Georgia's Supreme Court applied intermediate scrutiny to assess the constitutionality of laws regulating the carrying of guns outside the home. *Hertz* v. *Bennett*, 294 Ga. 62, 65-66, 751 S.E.2d 90, 94 (2013); *id.* at 70, 751 S.E.2d at 96 ("the Court today . . . acknowledges that the constitutional guarantees secure a right to carry firearms in public places") (Blackwell, J., concurring).

But Massachusetts' Supreme Judicial Court holds that carrying a gun outside one's home "does not implicate" the Second Amendment. *Commonwealth* v. *Gouse*, 461 Mass. 787, 802, 965 N.E.2d 774, 786 (2012). Maryland's high court has refused to consider whether the Second Amendment secures the right to carry handguns in public for self-defense. "If the Supreme Court . . . meant its holding [in *Heller* and *McDonald*] to extend beyond home possession, it will need to say so more plainly." *Williams* v. *State*, 417 Md. 479, 496, 10 A.3d 1167, 1177 (2011). Likewise the District of Columbia Court of Appeals has thrice rejected the notion that Second Amendment rights extend beyond the home. See *Mack* v. *United States*, 6 A.3d 1224, 1236 (D.C. 2010) ("*Heller* did not endorse a

right to carry weapons *outside* the home"); *Wooden* v. *United States*, 6 A.3d 833, 841 (D.C. 2010) ("Neither self-defense as such, nor even self-defense in the home of another (with a weapon carried there), is entitled to such protection, as we have read *Heller*"); *Little* v. *United States*, 989 A.2d 1096, 1101 (D.C. 2010) ("appellant was outside of the bounds identified in *Heller*, *i.e.*, the possession of a firearm in one's private residence for self-defense purposes").

The conflict over whether the Second Amendment secures the right to carry handguns outside the home for self-defense is profound, recurring, and widespread, extending well beyond that ordinarily sufficient for review under Sup. Ct. R. 10. Many other courts either limit *Heller* to its facts,[6] or for whatever

[6] See, *e.g.*, *United States* v. *Tooley*, 717 F. Supp. 2d 580, 596 (S.D. W. Va. 2010) ("possession of a firearm outside of the home or for purposes other than self-defense in the home are not within the 'core' of the Second Amendment right as defined by *Heller*"); *People* v. *Perkins*, 62 A.D.3d 1160, 1161, 880 N.Y.S.2d 209, 210 (N.Y. App. Div. 2009) (no Second Amendment right where "defendant was not in his home"); *State* v. *Knight*, 44 Kan. App. 2d, 241 P.3d 120, 133 (Kan. Ct. App. 2009) (*Heller* "turned solely on the issue of handgun possession in the home. . . . It is clear that the Court was drawing a narrow line regarding the violations related solely to use of a handgun in the home for self-defense purposes"); *People* v. *Yarbrough*, 169 Cal. App. 4th 303, 313-14, 86 Cal. Rptr. 3d 674, 682 (Cal. Ct. App. 2008) (statute proscribing public gun carrying does not implicate *Heller*); *Moreno* v. *N.Y. City Police Dep't*, No. 10 Civ. 6269, 2011 U.S. Dist. LEXIS 76129 at *7-*8 (S.D.N.Y. May 9, 2011) ("*Heller* has been narrowly construed, as protecting the individual right to bear arms for the specific purpose of self-defense within the home"); *Young* v. *Hawaii*, 911 F. Supp. 2d 972, 989 (D. Haw. 2012) ("the

(Continued on following page)

reason refuse to directly adjudicate Second Amendment controversies arising outside the home.[7] Yet others recognize that the Second Amendment has substantial operative effect outside the home, and do not hesitate to strike down laws or otherwise limit governmental conduct trenching upon the right to bear arms in public settings.[8] As one district court surmised,

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Second Amendment right articulated by the Supreme Court in *Heller* and *McDonald* establishes only a narrow individual right to keep an operable handgun at home for self-defense. The right to carry a gun outside the home is not part of the core Second Amendment right") (citations omitted).

[7] *Doe* v. *Wilmington Hous. Auth.*, 880 F. Supp. 2d 513, 530 (D. Del. 2012) ("the Court declines to determine whether Second Amendment rights extend outside of the 'hearth and home' "); cf. *Hightower* v. *City of Boston*, 693 F.3d 61, 72 & n.8 (1st Cir. 2012) (interest in carrying concealed handguns outside the home "distinct" from *Heller*'s "core," but declining to "reach the issue of the scope of the Second Amendment as to carrying firearms outside the vicinity of the home without any reference to protection of the home").

[8] See, *e.g.*, *Bonidy* v. *United States Postal Serv.*, No. 10-CV-02408-RPM, 2013 U.S. Dist. LEXIS 95435 at *7 (D. Colo. July 9, 2013) ("the Second Amendment protects the right to openly carry firearms outside the home for a lawful purpose"); *United States* v. *Weaver*, No. 2:09-CR-00222, 2012 U.S. Dist. LEXIS 29613, at *13 (S.D. W. Va. Mar. 7, 2012) ("the Second Amendment, as historically understood at the time of ratification, was not limited to the home"); *Bateman* v. *Perdue*, 881 F. Supp. 2d 709, 714 (E.D.N.C. 2012) ("[a]lthough considerable uncertainty exists regarding the scope of the Second Amendment right to keep and bear arms, it undoubtedly is not limited to the confines of the home"); *People* v. *Yanna*, 297 Mich. App. 137, 146, 824 N.W.2d 241, 246 (Mich. Ct. App. 2012) ("a total prohibition on the open

(Continued on following page)

> [t]he fact that courts may be reluctant to recognize the protection of the Second Amendment outside the home says more about the courts than the Second Amendment. Limiting this fundamental right to the home would be akin to limiting the protection of First Amendment freedom of speech to political speech or college campuses.

*United States* v. *Weaver*, No. 2:09-CR-00222, 2012 U.S. Dist. LEXIS 29613, at *14 n.7 (S.D. W. Va. Mar. 7, 2012).

"[A] considerable degree of uncertainty remains as to the scope of [the Second Amendment] right beyond the home and the standards for determining whether and how the right can be burdened by governmental regulation." *Woollard*, 712 F.3d at 874 (quoting *United States* v. *Masciandaro*, 638 F.3d 458, 467 (4th Cir. 2011)). "[W]e do not know . . . the scope of that right beyond the home and the standards for determining when and how the right can be regulated by a government." *Id.* (quoting *Kachalsky*, 701 F.3d at 89). There is not

> even a general consensus among federal courts as to even the most basic points –

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carrying of protected arms . . . is unconstitutional"); cf. *Dickens* v. *Ryan*, 688 F.3d 1054, 1085 (9th Cir. 2012) (Reinhardt, J., dissenting) ("Carrying a gun, which is a Second Amendment right . . . cannot legally lead to a finding that the individual is likely to murder someone; if it could, half or even more of the people in some of our states would qualify as likely murderers").

> such as whether the protections of the Second Amendment extend outside the home, or what standard the courts should apply in assessing government regulation of firearms outside the home.

*Pineiro* v. *Gemme*, 937 F. Supp. 2d 161, 173 (D. Mass. 2013).

This Court should grant certiorari to resolve the lower courts' significant and widespread confusion on this critical point.

## II. The Federal Courts of Appeals Are Split 8-1 Over Whether Government Officials Must Provide Any Evidence Justifying the Burdening of Second Amendment Rights.

Until now, the circuit courts have split on the issue of whether Second Amendment challenges require any sort of meaningful review, with most courts answering in the negative. But even so, courts have at least uniformly required the government to proffer *some* legislative finding or evidence allegedly supporting its (always beneficent) policy goal. Eight federal courts of appeals follow the unremarkable rule that the government's burden in Second Amendment cases, however minimal, is not merely to proclaim the belief that its laws are good and wholesome.

The D.C. Circuit, for example, has placed some teeth behind its deferential "intermediate" scrutiny standard in Second Amendment cases. "Although we do accord substantial deference to the predictive

judgments of the legislature, the District is not thereby insulated from meaningful judicial review." *Heller* v. *District of Columbia*, 670 F.3d 1244, 1259 (D.C. Cir. 2011) (quotations omitted). In reversing that part of a district court opinion upholding novel gun regulations, that court instructed that "the District needs to present some meaningful evidence, not mere assertions, to justify its predictive judgments." *Id.*

The First Circuit held that the federal firearms ban on domestic violence misdmeanants, 18 U.S.C. § 922(g)(9), "must be supported by some form of 'strong showing,' necessitating a substantial relationship between the restriction and an important governmental objective." *United States* v. *Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (quoting *United States* v. *Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc)). The government established that "strong showing" with "figures collected by the Justice Department and included in the record," and other statistical material previously recounted by the Seventh Circuit, found in medical and criminological literature. *Id.* (citations omitted).

The Second Circuit declared that although "substantial deference to the predictive judgments of the legislature is warranted," the court's role was "to assure that, in formulating its judgments, [the state] has drawn reasonable inferences based on *substantial evidence*." *Kachalsky*, 701 F.3d at 97 (emphasis added) (quotation omitted). Petitioners may dispute whether the *Kachalsky* defendants' "evidence" was "substantial,"

but the court plainly believed that its characterization was warranted.

The Fourth Circuit has repeatedly reversed, for lack of evidence, district court decisions denying Second Amendment challenges. "Significantly," even "intermediate scrutiny places the burden of establishing the required fit squarely upon the government." *United States* v. *Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (citing *Bd. of Trs. of State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 480-81 (1989)).

> The government has offered numerous plausible *reasons* why the disarmament of domestic violence misdemeanants is substantially related to an important government goal; however, it has not attempted to offer sufficient *evidence* to establish a substantial relationship between [18 U.S.C.] § 922(g)(9) and an important governmental goal.

*Id.*

"To discharge its burden . . . the government may not rely upon mere anecdote and supposition." *United States* v. *Carter*, 669 F.3d 411, 418 (4th Cir. 2012) (quotation omitted). The Fourth Circuit reversed a decision upholding § 922(g)(3)'s constitutionality where "[w]ithout pointing to any study, empirical data, or legislative findings, [the government] merely argued to the district court that the fit was a matter of common sense." *Id.* at 419.

As noted supra, the Seventh Circuit required a "strong showing" to sustain 18 U.S.C. § 922(g)(9). *Skoien*, 614 F.3d at 641. And ordering an injunction against Chicago's gun range ban, that court found that prohibiting "the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense," would be subjected to greater-than-intermediate "if not quite strict scrutiny." *Ezell* v. *City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011).

> [T]he City has not come close to satisfying this standard. In the district court, the City presented no data or expert opinion to support the range ban, so we have no way to evaluate the seriousness of its claimed public-safety concerns. . . . [I]t produced no evidence to establish that these are realistic concerns, much less that they warrant a total prohibition on firing ranges.

*Id.* at 709.

Analogizing to the First Amendment, where "the government must supply actual, reliable evidence to justify restricting" speech, the Seventh Circuit focused on the fact that "the City produced no empirical evidence whatsoever and rested its entire defense of the range ban on speculation about accidents and theft." *Id.* Surveying the record, the Seventh Circuit found plaintiffs established a strong likelihood of success on the merits. "Perhaps the City can muster sufficient evidence to justify banning firing ranges

everywhere in the city, though that seems quite unlikely." *Id.* at 710.

While other circuits have not said, in so many words, that the government may only meet its burden in Second Amendment cases with actual evidence, their decisions leave little doubt that at least some supportive evidence is expected if a law is to survive constitutional challenge. Upholding a prohibition on the sale of handguns to individuals younger than 21, the Fifth Circuit was "inclined" to hold that the law did not implicate conduct secured by the Second Amendment, but ultimately held that the law satisfied means-ends scrutiny. *Nat'l Rifle Ass'n of Am., Inc.* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 204 (5th Cir. 2012) ("*BATFE*"), *petition for cert. pending*, No. 13-137. The Fifth Circuit upheld the law because, under the "intermediate" standard of review the court selected, "[t]he government has put forth evidence that . . . Congress sought to manage an important public safety problem." *Id.* at 207. "Congress conducted a multi-year investigation," and held a hearing. *Id.* It created an extensive "legislative record," which supported its findings. *Id.* at 207-08.

> Overall, the government has marshaled evidence showing that Congress was focused on a particular problem: *young persons under 21*, who are immature and prone to violence, easily accessing *handguns*, which facilitate violent crime, primarily by way of *FFLs*.

> We find the government has satisfied its burden. . . .

*Id.* at 208 (citation omitted).

Upholding 18 U.S.C. § 922(g)(9) against Second Amendment challenge, the Ninth Circuit "agree[d] with the government that a high rate of domestic violence recidivism exists," recounting *Skoien*'s findings. *United States* v. *Chovan*, 735 F.3d 1127, 1140 (9th Cir. 2013) (quotation omitted). The court also agreed that "domestic abusers use guns," citing evidence from the Congressional Record and *Booker*, and accepted the medical literature *Skoien* endorsed. *Id.* And in upholding 18 U.S.C. § 922(g)(8) against Second Amendment challenge, the Tenth Circuit quoted at length from *Skoien*'s findings, "point[ing] to evidence that is highly relevant to, and supportive of, the government's assertion that the restriction imposed by § 922(g)(8) is substantially related to an important government objective." *United States* v. *Reese*, 627 F.3d 792, 802 (10th Cir. 2010) (citation omitted).

In sharp contrast to these eight circuits' rulings, requiring that the government submit more than mere assertions to justify curtailment of fundamental Second Amendment rights, the majority below was untroubled by the state's "inability" to substantiate its "predictive judgment" with any evidence or findings, because that legislative judgment struck *the*

*majority* as "reasonable" and "common sense." App. 28a. Incredibly, the legislature would be excused for not considering its intrusion upon rights of which it was ignorant. App. 27a.

As Judge Hardiman correctly noted, the majority "abdicate[d]" its judicial role, and "applie[d] the rational basis test, contrary to the Supreme Court's explicit rejection of that test in the Second Amendment context." App. 73a. It "engag[ed] in the very type of balancing that the *Heller* Court explicitly rejected." App. 74a.

Petitioners are well-aware that "New Jersey legislators . . . have made a policy judgment." App. 30a. They did not file a federal lawsuit to discover that much. Rather, the whole point of this exercise is to obtain the *independent judgment of a court*, one entrusted to "say what the law is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch.) 137, 177 (1803). As Judge Hardiman noted, "the majority never discusses whether those [legislative] judgments violate the Constitution." App. 73a. Is every constitutional case now to be answered with the shrug that "legislators have made a policy judgment"?

Worse still, it is unclear what individuals complaining of civil rights violations are supposed to make of the majority's holding that "New Jersey's legislators could not have known that they were potentially burdening protected Second Amendment conduct." App. 27a-28a. Hopefully, the legislature would not pass a law it *knows* to be unconstitutional.

But what is left of judicial review if laws are not unconstitutional whenever the legislature pleads ignorance of constitutional constraints?

The majority's complete deference to the "policy judgment" of state legislators, in the face of a constitutional challenge, conflicts with the approach of eight other circuits, and seriously undermines public confidence that the federal courts are open to hearing constitutional claims. It should be reversed.

## III. The Court Below Decided an Important Question of Law In a Manner Contrary to This Court's Precedent.

The majority below erred in practically reading out of this Court's precedent the "right to carry weapons in case of confrontation." *Heller*, 554 U.S. at 592. It also erred in allowing "legislative judgment" to substitute for the right enshrined by the Framers, in clear contravention of this Court's admonishment that the Second Amendment is not "subjected to a free-standing 'interest-balancing' approach." *Id.* at 634.

1. Three times, *Heller* succinctly describes the Second Amendment's "core" interest, to wit: (1) the Second Amendment's "core lawful purpose [is] self-defense," *Heller*, 554 U.S. at 630; (2) "Individual self-defense . . . was the *central component* of the right itself," *id.* at 599; and (3) "the inherent right of self-defense has been central to the Second Amendment right." *Id.* at 628. Nothing in these terse definitions of

the Second Amendment's "core" limits the self-defense interest to the home.

"[I]n [*Heller*], we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, and we struck down a District of Columbia law that banned the possession of handguns in the home." *McDonald*, 130 S. Ct. at 3026. The syntax is clear: the holding, relating to self-defense, was applied in a factual setting arising inside the home.

The "policy choices [taken] off the table" by the Second Amendment "*include* the absolute prohibition of handguns held and used for self-defense in the home." *Heller*, 554 U.S. at 636 (emphasis added). But "since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field. . . ." *Id.* at 635. This Court's observations that "the need for defense of self, family, and property is *most acute*" in the home, *id.* at 628 (emphasis added), and that the Second Amendment right is secured "*most notably* for self-defense within the home," *McDonald*, 130 S. Ct. at 3044 (emphasis added), exclude the possibility that the right exists only in the home.

Moreover, there is *Heller*'s exposition of early state constitutional arms-bearing provisions, 554 U.S. at 584-86, which were often applied to secure the

carrying of handguns in public;[9] its reliance upon authorities referencing defensive actions outside the home;[10] and its discussion of time, place and manner restrictions on the carrying of handguns.[11]

To "bear arms," as used in the Second Amendment, is 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." *Id.* at 584 (quotation omitted). "It is clear . . . that 'bear arms' did not refer only to carrying a weapon in an organized military unit." *Id.* at 585.

Explaining that this right is "not unlimited," in that there is no right to "carry any weapon whatsoever in any manner whatsoever and for whatever purpose," *id.* at 626 (citations omitted), this Court confirmed that there is a right to carry at least some weapons, in some manner, for some purpose. And there would have been no need to announce that "laws forbidding the carrying of firearms in sensitive

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[9] See, *e.g.*, *State* v. *Reid*, 1 Ala. 612 (1840) (interpreting Ala. Const. of 1819, art. I, § 27); *State* v. *Huntly*, 25 N.C. (3 Ired.) 418, 423 (1843) (N.C. Declaration of Rights § 17 (1776); *Simpson* v. *State*, 13 Tenn. (5 Yer.) 356 (1833) (Tenn. Const. of 1796, art. XI, § 26); *State* v. *Rosenthal*, 75 Zt. 295, 55 A. 610 (1903) (Vt. Const. c. 1, art. 16 (1777)).

[10] See, *e.g.*, *Heller*, 554 U.S. at 587 n.10 (quoting Charles Humphreys, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY 482 (1822)).

[11] See *Heller*, 554 U.S. at 626-27 & n.26.

places," *id.*, are presumptively lawful, were there not "non-sensitive" public places into which people may carry arms.

The notion that carrying handguns outside the home is "conduct falling outside the scope of the Second Amendment's guarantee," App. 19a, simply cannot be squared with *Heller*. Surely, the majority below erred in holding that 1913 and 1924 state laws are "longstanding" regulations altering the scope of a constitutional right as understood by its 1791 Framers. "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Heller*, 554 U.S. at 634-35.

2. The majority below alternatively upheld New Jersey's "justifiable need" requirement, in the complete absence of evidence, because "New Jersey's legislature 'has continually made the reasonable inference'" that the law "serves the State's interest in public safety." App. 28a (citation omitted). Moreover, while refusing to consider Petitioners' historical arguments, the majority flatly announced that New Jersey's law is justified by "history, consensus, and simple common sense." *Id.* (citation omitted).

Of course, history, consensus, and simple common sense do not remotely support New Jersey's law, a relatively modern and intensely controversial regulation that exists in only a small handful of states. App. 58a n.16.

More to the point, it is not enough that "New Jersey legislators . . . have made a 'policy judgment.'" App. 30a. This Court has plainly forbidden the substitution of "interest balancing" for the rights enshrined by the Framers, *Heller*, 554 U.S. at 634, and it has made clear that the rational basis test is inapplicable in Second Amendment cases, *id.* at 628 n.27. While the majority below thinks New Jersey's law is a "reasonable" matter of "common sense," this Court has instructed that the Second Amendment does not "require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise." *McDonald*, 130 S. Ct. at 3050.

## IV. This Case Presents An Exceptional – and Timely – Vehicle to Clarify the Law.

Petitioners are responsible, law-abiding citizens, who question only whether they must prove a "justifiable need" to exercise a fundamental right. This narrowly focused case implicates no other aspect of New Jersey's regulatory scheme concerning the public carrying of firearms. Nor does it involve any difficult questions as to time, place or manner restrictions on the carrying of handguns. Because New Jersey's law operates without distinction between the concealed and open carrying of handguns, confusing questions as to the manner in which Petitioners might exercise their rights are avoided.

While other worthy petitions raising similar issues are pending before this Court, notably, the aforementioned petitions in *McCraw* and *BATFE*, Petitioners note that this case presents at least an equal, if not better adjudicatory vehicle. As noted supra, *McCraw* did not directly address the issue of carrying handguns outside the home. Albeit wrongly decided, *McCraw* accepted the Second Amendment's public dimension.

And while Petitioner SAF supports reversal in *BATFE*, see Brief of Second Amendment Foundation, Inc. as amicus curiae, No. 13-137, the *BATFE* court at least invoked a wealth of evidence supporting its application of means-ends scrutiny. In contrast, the instant petition questions not the sufficiency of the government's evidence, but a sharp split on the question of whether evidence is even required.[12]

The Court might have understandably wished to avoid discussing the Second Amendment's public application when only one or two circuits had opined on the topic, but the issue has now thoroughly percolated among the lower courts without clear resolution or anything approaching consensus.

As Judge Hardiman noted, New Jersey's law is an outlier. Few states require some form of "justifiable

[12] While this Court should grant certiorari in this case now, in the alternative, and at a minimum, Petitioners would request that their petition be held pending disposition of *BATFE* and *McCraw*.

need" to carry handguns, and only the District of Columbia flatly bans the right. Most circuits hosting such laws have already addressed the topic, and no case is likely to soon bring the matter before this Court.

On December 6, 2012, a Ninth Circuit panel heard argument in two cases challenging application of California's "good cause" handgun carrying prerequisite, Cal. Penal Code § 26150; and another case arising from Hawaii's similar "exceptional case" law, Haw. Rev. Stat. § 134-9. *Richards* v. *Prieto*, No. 11-16255; *Peruta* v. *County of San Diego*, No. 10-56971; *Baker* v. *Kealoha*, No. 12-16258.[13] The panel's initial decision of these cases may well arrive sometime this year, but there is no way to predict what the outcomes may be, or whether any of these outcomes would generate a petition for certiorari. Moreover, the likely en banc proceedings could prove protracted. The Ninth Circuit's first post-*Heller* case addressing the Second Amendment was twice reheard en banc, with over three years elapsing between the initial panel, *Nordyke* v. *King*, 563 F.3d 439 (9th Cir. 2009), and final en banc decision, *Nordyke* v. *King*, 681 F.3d 1041 (9th Cir. 2012) (en banc).

The nation's last total prohibition on the carrying of firearms, D.C. Code § 22-4504(a), may yet be further from this Court's docket. On August 9, 2009, Petitioner SAF and its members brought suit challenging

[13] Petitioner SAF is an appellant in *Richards*.

this prohibition's constitutionality in the United States District Court for the District of Columbia. *Palmer* v. *Dist. of Columbia*, D.D.C. No. 09-1482-FJS. Cross-dispositive motions were fully briefed and ready for decision on October 6, 2009 – but the district court has yet to rule.

On July 1, 2011, Chief Justice Roberts assigned a senior judge from the Northern District of New York to the District of Columbia, in order to alleviate the delay in *Palmer* and other unduly protracted cases. But not much has changed. The district court ignored a consent motion to expedite the proceedings, per 28 U.S.C. § 1657(a), filed on the case's fourth anniversary. On October 21, 2013, *Palmer* plaintiffs petitioned the D.C. Circuit for a writ of mandamus to compel a decision. See, *e.g.*, *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655, 661-62 (1978) (mandamus available where "a district court persistently and without reason refuses to adjudicate a case properly before it"). But on December 16, 2013, the D.C. Circuit denied the petition. Although the relevant facts are simple and undisputed, and plaintiffs complain of a total prohibition of a fundamental right preserving an interest in self-defense, the court did not believe waiting over four years for a decision is "so egregious or unreasonable as to warrant" mandamus. *In re Palmer*, No. 13-5317 (D.C. Cir. Dec. 16, 2013).

Presumably, had the *Palmer* court believed plaintiffs were being denied a fundamental right, it would have acted long ago. All the same, *Palmer* plaintiffs' avenue to this Court remains blocked. The episode

underscores the extreme antipathy toward the right to bear arms pervading many of the lower courts. Certiorari is needed, now, to correct course.

## CONCLUSION

Petitioners respectfully pray that the Court grant the petition.

Respectfully submitted,

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**PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 12-1150

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JOHN M. DRAKE; GREGORY C. GALLAHER;
LENNY S. SALERNO; FINLEY FENTON;
SECOND AMENDMENT FOUNDATION, INC.;
ASSOCIATION OF NEW JERSEY
RIFLE & PISTOL CLUBS, INC.,

Appellants

v.

THE HON. RUDOLPH A. FILKO, in his Official Capacity as Judge of the Superior Court of Passaic County; HON. EDWARD A. JEREJIAN, in his Official Capacity as Judge of the Superior Court of Bergen County; THE HON. 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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On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 2-10-cv-06110)
District Judge: Honorable William H. Walls

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Argued February 12, 2013

Before: HARDIMAN and ALDISERT, *Circuit Judges*, and STARK,* *District Judge*.

(Filed: July 31, 2013)

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* The Honorable Leonard P. Stark, Judge of the United States District Court for the District of Delaware, sitting by designation.

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OPINION OF THE COURT

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ALDISERT, *Circuit Judge*.

Four New Jersey residents and two organizations (collectively "Appellants") appeal from a judgment of the United States District Court for the District of New Jersey that held constitutional N.J.S.A. § 2C:58-4, a New Jersey law regulating the issuance of permits to carry handguns in public ("Handgun Permit Law"). Appellants contend that the District Court erred because (1) the Second Amendment secures a right to carry arms in public for self-defense; (2) the "justifiable need" standard of the Handgun Permit Law is an unconstitutional prior restraint; and (3) the standard fails any level of means-end scrutiny a court may apply. We will affirm the judgment of the District Court.

I.

Permits to carry handguns are "the most closely regulated aspect" of New Jersey's gun control laws. *In re Preis*, 573 A.2d 148, 150 (N.J. 1990). Individuals

who wish to carry a handgun in public for self-defense must first obtain a license. N.J.S.A. § 2C:39-5(b).[1] The process and standard for obtaining such a license is found in New Jersey's Handgun Permit Law, N.J.S.A. § 2C:58-4.

Under New Jersey's Handgun Permit Law, individuals who desire a permit to carry a handgun in public must apply to the chief police officer in their municipality or to the superintendent of the state police. N.J.S.A. § 2C:58-4(c). The chief police officer or superintendent considers the application in accordance with the following provisions of the Handgun Permit Law:

> No application shall be approved by the chief police officer or the superintendent unless the applicant demonstrates that he is not subject to any of the disabilities set forth in 2C:58-3c. [which includes numerous criminal history, age and mental health requirements], that he is thoroughly familiar with the safe handling and use of handguns, *and that he has a justifiable need to carry a handgun.*

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[1] For exemptions to the general rule that individuals may not carry a handgun in public without a permit, *see* N.J.S.A. § 2C:39-6. For example, individuals employed in certain occupations may carry a firearm "in the performance of their official duties," *see*, *e.g.*, N.J.S.A. § 2C:39-6(a)(2), and individuals may carry a firearm "in the woods or fields . . . for the purpose of hunting," *see* N.J.S.A. § 2C:39-6(f)(2).

*Id.* (emphasis added). The meaning of "justifiable need," as it appears in this provision, is codified in the New Jersey Administrative Code as follows:

> [T]he urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun.

N.J. Admin. Code 13:54-2.4(d)(1).[2]

Next, if the chief police officer or superintendent determines that the applicant has met all the requirements, including demonstration of a "justifiable need," the application is approved and sent to a superior court judge, who:

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[2] This codification of the "justifiable need" standard closely mirrors an earlier explanation of "need" that was laid out by the Supreme Court of New Jersey in *Siccardi v. State*, 284 A.2d 533 (N.J. 1971). *See id.* at 557 (explaining that New Jersey law restricts the issuance of permits to those "who can establish an urgent necessity for . . . self-protection," which may be limited to those "whose life is in real danger, as evidenced by serious threats or earlier attacks"). Since *Siccardi*, many other New Jersey state court opinions have also explained this standard. *See In re Preis*, 573 A.2d at 152 ("[T]here must be an urgent necessity [ ] for self-protection. The requirement is of specific threats or previous attacks demonstrating a special danger to the applicant's life that cannot be avoided by other means. Generalized fears for personal safety are inadequate. . . .") (internal citations and quotation marks omitted); *In re Pantano*, 60 A.3d 507, 510 (N.J. Super. Ct. App. Div. 2013) (discussing and applying "justifiable need" standard); *In re Application of Borinsky*, 830 A.2d 507 (N.J. Super. Ct. App. Div. 2003) (same).

> shall issue the permit to the applicant if, but only if, it is satisfied that the applicant is a person of good character who is not subject to any of the disabilities set forth in section 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.

N.J.S.A. § 2C:58-4(d). If, alternatively, the chief police officer or superintendent determines that the applicant has not met the requirements, the applicant "may request a hearing in the Superior Court . . . by filing a written request for such a hearing within 30 days of the denial." *Id.* at § 2C:58-4(e).

II.

Desiring to carry handguns in public for self-defense, the individual plaintiffs here each applied for a permit according to the process described above. Their applications were denied, however, because pursuant to N.J.S.A. § 2C:58-4(c) either a police official or superior court judge determined that they failed to satisfy the "justifiable need" requirement.[3] The organizational plaintiffs asserted that their members and supporters have been denied public-carry permits and have refrained from applying for permits

[3] In March 2013, one of the original plaintiffs, Daniel Piszczatoski, was granted a permit on other grounds (as a retired law enforcement officer) and was dismissed as an Appellant.

because they cannot demonstrate a "justifiable need" as required by the Handgun Permit Law. Appellants sought declaratory and injunctive relief, contending that New Jersey may not condition the issuance of a public-carry permit on an applicant's ability to demonstrate a "justifiable need." The District Court rejected Appellants' arguments, and accordingly denied Appellants' motion for summary judgment and granted Appellees' motion to dismiss. Appellants timely appealed.[4]

## III.

This appeal prompts us to consider multiple questions. We will consider each in turn following the two-step approach this Court set forth in *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010):

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[4] The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343, and could consider Appellants' request for declaratory and injunctive relief under 28 U.S.C. §§ 2201 and 2202. We have jurisdiction under 28 U.S.C. § 1291. We exercise plenary review over the District Court's determination that the New Jersey Handgun Permit Law is constitutional, *United States v. Fullmer*, 584 F.3d 132, 151 (3d Cir. 2009); the District Court's dismissal of Appellants' complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, *Monroe v. Beard*, 536 F.3d 198, 205 (3d Cir. 2008); and the District Court's denial of Appellants' motion for summary judgment, *State Auto Prop. & Cas. Ins. Co. v. Pro Design, P.C.*, 566 F.3d 86, 89 (3d Cir. 2009) (citation omitted).

> First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. . . . If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.

Here, we conclude that the requirement that applicants demonstrate a "justifiable need" to publicly carry a handgun for self-defense qualifies as a "presumptively lawful," "longstanding" regulation and therefore does not burden conduct within the scope of the Second Amendment's guarantee. Accordingly, we need not move to the second step of *Marzzarella.* Nevertheless, because of the important constitutional issues presented, we believe it to be beneficial and appropriate to consider whether the "justifiable need" standard withstands the applicable intermediate level of scrutiny. We conclude that even if the "justifiable need" standard did not qualify as a "presumptively lawful," "longstanding" regulation, at step two of *Marzzarella* it would withstand intermediate scrutiny, providing a second, independent basis for concluding that the standard is constitutional.

## IV.

It remains unsettled whether the individual right to bear arms for the purpose of self-defense extends

beyond the home.[5] In 2008, the Supreme Court explicitly recognized for the first time that the Second Amendment confers *upon individuals* a right to keep and bear arms for self-defense by holding that a District of Columbia law forbidding the individual possession of usable handguns *in the home* violated the Second Amendment. *See District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). In 2010, the Court recognized that the Second Amendment right articulated in *Heller* applied equally to the states through the Fourteenth Amendment. *See McDonald v. City of Chicago*, ___ U.S. ___, 130 S. Ct. 3020, 3026 (2010). Taken together, these cases made clear that "Second Amendment guarantees are at their zenith within the home." *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1806 (2013). Outside of the home, however, we encounter the "vast terra incognita" recognized by the Fourth Circuit in *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 756 (2011). *Compare also Marzzarella*, 614 F.3d at 92 ("[C]ertainly, to some degree, [the Second Amendment] must protect the right of law-abiding citizens

[5] Rather than discussing whether or not the individual right to bear arms for the purpose of self-defense articulated in *District of Columbia v. Heller*, 554 U.S. 570 (2008) "extends beyond the home," it may be more accurate to discuss whether, in the public sphere, a right similar or parallel to the right articulated in *Heller* "exists." Firearms have always been more heavily regulated in the public sphere so, undoubtedly, if the right articulated in *Heller* does "extend beyond the home," it most certainly operates in a different manner.

to possess firearms for other, as-yet-undefined, lawful purposes."), *with Masciandaro*, 638 F.3d at 475 ("There may or may not be a Second Amendment right in some places beyond the home.").

Although *Heller* does not explicitly identify a right to *publicly* carry arms for self-defense, it is possible to conclude that *Heller* implies such a right. The Seventh Circuit reached this very conclusion in *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012), when it stated that "[t]he Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside."[6] As the Second Circuit recently explained, however, *Heller* "was never meant 'to clarify the entire field' of Second Amendment jurisprudence," *Kachalsky*, 701 F.3d at 89 (quoting *Heller*, 554 U.S. at 635), but rather struck down a single law that "ran

[6] We note that the Seventh Circuit gave the Illinois legislature time to come up with a new law that would survive constitutional challenge, implying that some restrictions on the right to carry outside the home would be permissible, while holding that the challenged law containing a flat ban on carrying a handgun in public was unconstitutional. Accordingly, on July 9, 2013 Illinois enacted a law requiring issuance of concealed carry licenses to individuals meeting basic statutory requirements similar to those required for New Jersey applicants, but the law does not require applicants to show a "justifiable need." Discretion in granting concealed carry licenses appears to be limited to a determination of whether the applicant "pose[s] a danger to himself, herself, or others, or a threat to public safety." Firearm Concealed Carry Act, Illinois Public Act 098-0063, *available at* http://www.ilga.gov/legislation/publicacts/98/PDF/098-0063.pdf.

roughshod" over D.C. residents' individual right to possess usable handguns *in the home, id.* at 88. Hence, the Seventh Circuit in *Moore* may have read *Heller* too broadly. As the Seventh Circuit itself had earlier stated in *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 1674 (2011), *Heller*'s language "warns readers not to treat *Heller* as containing broader holdings than the Court set out to establish: that the Second Amendment created individual rights, one of which is keeping operable handguns *at home* for self-defense." *Id.* (emphasis added).

Appellants contend also that "[t]ext, history, tradition and precedent all confirm that [individuals] enjoy a right to *publicly* carry arms for their defense." Appellants' Brief 12 (emphasis added). At this time, we are not inclined to address this contention by engaging in a round of full-blown historical analysis, given other courts' extensive consideration of the history and tradition of the Second Amendment. *See*, *e.g.*, *Heller*, 554 U.S. at 605-619 ("We now address how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century."). We reject Appellants' contention that a historical analysis leads *inevitably* to the conclusion that the Second Amendment confers upon individuals a right to carry handguns in public for self-defense. As the Second Circuit observed in *Kachalsky*, "[h]istory and tradition do not speak with one voice here. What history demonstrates is that states often disagreed as to the scope of the right to

bear arms, whether the right was embodied in a state constitution or the Second Amendment." 701 F.3d at 91.

For these reasons, we decline to definitively declare that the individual right to bear arms for the purpose of self-defense extends beyond the home, the "core" of the right as identified by *Heller*. We do, however, recognize that the Second Amendment's individual right to bear arms *may* have some application beyond the home. Ultimately, as our Court did in *Marzzarella*, we refrain from answering this question definitively because it is not necessary to our conclusion.

## V.

Assuming that the Second Amendment individual right to bear arms does apply beyond the home, we next consider whether or not the requirement that applicants demonstrate a "justifiable need" to publicly carry a handgun for self-defense burdens conduct within the scope of that Second Amendment guarantee. *See Marzzarella*, 614 F.3d at 92. As this Court has stated, certain longstanding regulations are "exceptions" to the right to keep and bear arms, such that the conduct they regulate is not within the scope of the Second Amendment. *See United States v. Barton*, 633 F.3d 168, 172 (3d Cir. 2011); *United States v. Huet*, 665 F.3d 588, 600 (3d Cir. 2012). Here, we agree with the District Court that even if some protected right to carry arms outside the home exists,

the challenged requirement that applicants demonstrate a "justifiable need" to obtain a permit to publicly carry a handgun for self-defense qualifies as a "longstanding," "presumptively lawful" regulation.

In *Heller* the Supreme Court noted that nothing in its opinion "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" and identified these "regulatory measures" as "presumptively lawful" ones. 554 U.S. at 571, 571 n.26. It then stated that the presumptively lawful regulations it identified by name did not compose an "exhaustive" list, but the Court did not provide guidance on how to identify other regulations that may qualify. *Id.*

Exploring the meaning of "presumptively lawful," this Court has stated that "presumptively lawful" regulatory measures are "exceptions to the Second Amendment guarantee." *Marzzarella*, 614 F.3d at 91.[7]

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[7] As this Court stated in *Marzzarella*:

> We recognize the phrase "presumptively lawful" could have different meanings under newly enunciated Second Amendment doctrine. On the one hand, this language could be read to suggest the identified restrictions are presumptively lawful because they regulate conduct outside the scope of the Second Amendment. On the other hand, it may suggest the restrictions are presumptively lawful because they pass muster under any standard of scrutiny. Both readings are reasonable interpretations, but we think

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Acknowledging that the exceptions identified in *Heller* "all derived from historical regulations," the *Marzzarella* Court stated that "it is not clear that pre-ratification presence is the only avenue to a categorical exception." *Id.* at 93. Although *Marzzarella* stated also that "prudence counsels caution when extending [the] recognized [*Heller*] exceptions to novel regulations unmentioned by *Heller,*" 614 F.3d at 93, we nevertheless conclude, for the reasons that follow, that the requirement that applicants demonstrate a "justifiable need" to publicly carry a handgun for self-defense is a presumptively lawful, longstanding licensing provision under the teachings of *Heller* and *Marzzarella.*

The "justifiable need" standard Appellants challenge has existed in New Jersey in some form for nearly 90 years. *See Siccardi v. State*, 284 A.2d 533, 538 (N.J. 1971). Beginning in 1924[8] New Jersey "directed that no persons (other than those specifically exempted such as police officers and the like) shall carry [concealed] handguns except pursuant to

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> the better reading, based on the text and the structure of *Heller*, is the former – in other words, that these longstanding limitations are exceptions to the right to bear arms.

614 F.3d at 91.

[8] In 1905, New Jersey enacted a statute providing for criminal punishment of the concealed carrying of "any revolver, pistol, [or] firearm," but allowed an exception for those with permits. *Compiled Statutes of New Jersey, Vol. II.*, 1759 (Soney & Sage 1911). It does not appear, however, that the law contained any standards for issuance of such permits. *Id.*

permits issuable only on a showing of 'need.'" *Id.* (internal citations omitted). In 1966, New Jersey amended its laws to prohibit individuals from carrying handguns in public, in any manner, without first obtaining a permit, and again conditioned the issuance of such permits on a showing of need. The predecessor to the Handgun Permit Law subsequently underwent multiple revisions, the requirement of "need" enduring each, and ultimately the present-day standard of "justifiable need" became statutorily enshrined in 1978.

New Jersey's longstanding handgun permitting schema is not an anomaly. Many recent judicial opinions have discussed historical laws regulating or prohibiting the carrying of weapons in public. *See*, *e.g.*, *Peterson v. Martinez*, 707 F.3d 1197, 1201 (10th Cir. 2013) ("extending" the recognized *Heller* exceptions to cover regulations on the carrying of concealed firearms, stating that "[i]n light of our nation's extensive practice of restricting citizens' freedom to carry firearms in a concealed manner, we hold that this activity does not fall within the scope of the Second Amendment's protections"). In the 19th Century, "[m]ost states enacted laws banning the carrying of concealed weapons," and "[s]ome states went even further than prohibiting the carrying of concealed weapons . . . bann[ing] concealable weapons (subject to certain exceptions) altogether whether carried openly or concealed." *Kachalsky*, 701 F.3d at 95-96. As Appellants correctly note, some state courts determined that prohibitions on concealed carrying were permissible because open carrying remained available as an

avenue for public carrying. But those state court determinations do not compel us to conclude that the "justifiable need" standard, which in New Jersey must be met to carry openly *or* concealed, fails to qualify as a "longstanding," "presumptively lawful" exception to the Second Amendment guarantee. The "justifiable need" standard fits comfortably within the longstanding tradition of regulating the public carrying of weapons for self-defense. In fact, it does not go as far as some of the historical bans on public carrying; rather, it limits the opportunity for public carrying to those who can demonstrate a justifiable need to do so. *See id.* at 90 (discussing states that once "banned the carrying of pistols and similar weapons in public, both in a concealed or an open manner") (citing Ch. 96, §§ 1-2, 1881 Ark. Acts at 191-92; Ch. 13, § 1, 1870 Tenn. Acts at 28; Act of Apr. 12, 1871, ch. 34, § 1, 1871 Tex. Gen. Laws at 25; Act of Dec. 2, 1875, ch. 52, § 1, 1876 Wyo. Terr. Comp. Laws, at 352).[9]

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[9] Contrary to the Dissent's suggestion, requiring demonstration of a "justifiable need" prior to issuance of a permit to carry openly or concealed does not amount to "a complete prohibition on public carry." Dissenting Opinion 19. Although the Dissent eventually acknowledges that New Jersey is merely *regulating* public carry, *see id.* at 24, it takes pains to refer to New Jersey's approach as a "prohibition," referring to New Jersey's schema as "a prohibition against both open and concealed carry *without a permit*. . . ." *Id.* at 21 (emphasis added). This obfuscates what New Jersey is actually doing. It is *regulating* public carry by imposing an objective standard for issuance of a public carry permit, and its *regulation* is a longstanding, presumptively constitutional one.

A close analogue to the New Jersey standard can be found in New York's permit schema, which has required a showing of need, or "proper cause," for a century. In 1913 New York determined that a reasonable method for addressing the dangers inherent in the carrying of handguns in public was to limit handgun possession in public to those showing "proper cause" for the issuance of a permit. *Kachalsky*, 701 F.3d at 85 (citing 1913 Laws of N.Y., ch. 608, at 1627-1630). In combination with New York's ban on open carrying, typical New Yorkers desiring to carry a handgun in public must demonstrate "proper cause," just as typical New Jerseyans must demonstrate "justifiable need."[10] As the District Court noted, New York's statute was "adopted in the same era that states began adopting the felon in possession statutes that *Heller* explicitly recognized as being presumptively lawful longstanding regulations." District Court Opinion 32. The D.C. Circuit in *Heller v. District of Columbia*, 670 F.3d 1244, 1253 (D.C. Cir. 2011) [*Heller II*], stated that the Supreme Court "considered 'prohibitions on the possession of firearms by felons' to be 'longstanding' although states did not start to enact them until the early 20th century." Simply put,

[10] Here, we use the phrase "typical" to refer to persons in New York and New Jersey who do not fall into any of the statutorily specified categories of persons who may carry a firearm in public without demonstrating "proper cause" or "justifiable need," respectively. Accordingly, the individual plaintiffs in this case are "typical," as they do not fall into any of those specified categories.

we need not find that New Jersey and other states, at the time of the adoption of the Bill of Rights, required a particularized showing of objective justification to carry a handgun.[11] Accordingly, New York's adoption of a "proper cause" standard in 1913, 11 years before New Jersey required that permits be issued only upon a showing of "need," supports our conclusion that New Jersey's "justifiable need" standard may be upheld as a longstanding regulation.[12]

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[11] In *Barton*, 633 F.3d at 173, we explained that the "first federal statute disqualifying felons from possessing firearms was enacted in 1938," adding that "Congress did not bar nonviolent felons from possessing guns until 1961." Our sister courts have likewise recognized that a firearms regulation may be "longstanding" and "presumptively lawful" even if it was only first enacted in the 20th century. *See National Rifle Ass'n of America, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 196-97 (5th Cir. 2012) (upholding as a "longstanding" provision a federal statute prohibiting transfer of firearms from federal licensees to individuals under age 21, which Congress did not adopt until 1968); *United States v. Skoien*, 614 F.3d 638, 640-41 (7th Cir. 2010) (explaining that 18 U.S.C. § 922(g)(4), which forbids firearm possession by a person who has been adjudicated to be mentally ill, was enacted in 1968). "After all, *Heller* considered firearm possession bans on felons and the mentally ill to be longstanding, yet the current versions of these bans are of mid-20th century vintage." *National Rifle Ass'n*, 700 F.3d at 196.

[12] The Dissent suggests that the longstanding nature of New York's "proper cause" standard cannot support our conclusion that the "justifiable need" standard qualifies as a longstanding regulation. It states that the "Second Circuit . . . upheld New York's law because it survived intermediate scrutiny, not because it evaded Second Amendment cognizance on account of its longstandingness." Dissenting Opinion 452. We

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We discern no hint in the Second Amendment jurisprudence of either the Supreme Court or this Court that the analysis of a particular regulation in a particular jurisdiction should turn entirely on the historical experience of that jurisdiction alone. To the contrary, in *Barton*, our analysis of the constitutionality of a federal firearm restriction included consideration of the fact that at least seven *state* legislatures "had adopted bans on the carrying of concealed weapons by violent offenders" prior to 1923. 633 F.3d at 173.

Consequently, assuming that the Second Amendment confers upon individuals some right to carry arms outside the home, we would nevertheless conclude that the "justifiable need" standard of the Handgun Permit Law is a longstanding regulation that enjoys presumptive constitutionality under the teachings articulated in *Heller* and expanded upon in our Court's precedent. Accordingly, it regulates conduct falling outside the scope of the Second Amendment's guarantee.

## VI.

As discussed above, we believe that the "justifiable need" standard of the Handgun Permit Law

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agree that this is what the *Kachalsky* court did, but disagree that its decision to resolve the case solely through intermediate scrutiny requires that we do the same here. We cite to *Kachalsky* here merely for its description of New York's law and standard.

qualifies as a "longstanding," "presumptively lawful" regulation that regulates conduct falling outside the scope of the Second Amendment's guarantee. Consequently, we need not move to the second step of *Marzzarella* to apply means-end scrutiny, but we have decided to do so because the constitutional issues presented to us in this new era of Second Amendment jurisprudence are of critical importance. Even assuming that the "justifiable need" standard is not a longstanding regulation enjoying presumptive constitutionality, at the second step of *Marzzarella* it withstands the appropriate, intermediate level of scrutiny, and accordingly we would uphold the continued use of the standard on this basis as well.

A.

As a preliminary matter, we reject Appellants' invitation to apply First Amendment prior restraint doctrine rather than traditional means-end scrutiny. Appellants contend that we should apply the First Amendment prior restraint doctrine because application of the Handgun Permit Law's "justifiable need" standard vests licensing officials with "unbridled discretion." Appellants correctly note that this Court has stated that "the structure of First Amendment doctrine should inform our analysis of the Second Amendment." *See Marzzarella*, 614 F.3d at 89 n.4. This statement, however, reflects this Court's willingness to consider the varying levels of means-end scrutiny applied to First Amendment challenges when determining what level of scrutiny to apply to a

Second Amendment challenge. It does not compel us to import the prior restraint doctrine. Indeed, this Court has rejected a similar invitation to import the First Amendment overbreadth doctrine to the Second Amendment context. *See Barton*, 633 F.3d at 172 n.3.

Even if we were to apply the prior restraint doctrine, it would not compel the result sought by Appellants because New Jersey's Handgun Permit Law does not vest licensing officials with "unbridled discretion." Appellants incorrectly characterize the "justifiable need" standard as a highly discretionary, seat-of-the-pants determination. On the contrary, the standards to be applied by licensing officials are clear and specific, as they are codified in New Jersey's administrative code and have been explained and applied in numerous New Jersey court opinions. Moreover, they are accompanied by specific procedures[13] that provide "safeguards against arbitrary official action." *See Siccardi*, 284 A.2d at 539. Accordingly, we conclude that even if we were to apply the prior restraint doctrine, the Handgun Permit Law would survive its application.

[13] *See* N.J.S.A. § 2C:58-4(e) (allowing an applicant whose application is denied by the chief police officer or superintendent to "request a hearing in the Superior Court . . . by filing a written request for such a hearing within 30 days of the denial").

B.

Having determined that it would not be appropriate to import First Amendment prior restraint doctrine to our analysis of Appellants' Second Amendment challenge here, we conclude that the appropriate level of traditional means-end scrutiny to apply would be intermediate scrutiny.

As laws burdening protected conduct under the First Amendment are susceptible to different levels of scrutiny, similarly "the Second Amendment can trigger more than one particular standard of scrutiny, depending, at least in part, upon the type of law challenged and the type of Second Amendment restriction at issue." *United States v. Reese*, 627 F.3d 792, 801 (10th Cir. 2010) (citing *Marzzarella*, 614 F.3d at 96-97) (internal quotation marks and alterations omitted).

Three levels of scrutiny are potentially available: rational basis review, intermediate scrutiny, and strict scrutiny. *Marzzarella*, 614 F.3d at 95-99. Under rational basis review, we would "presume[ ] the law is valid and ask [ ] only whether the statute is rationally related to a legitimate state interest," *id.* at 95-96 n.13 (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)), but *Heller* makes clear that we may not apply rational basis review to a law that burdens protected Second Amendment conduct, *id.* at 95-96 (citing *Heller*, 554 U.S. at 628 n.27). At the other end of the spectrum is strict scrutiny, which demands that the statute be "narrowly tailored to

promote a compelling Government interest . . . [;] [i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) (internal citations omitted). In between is intermediate scrutiny, under which the government's asserted interest must be more than just legitimate but need not be compelling. It must be "significant, substantial, or important." *Marzzarella*, 614 F.3d at 98 (internal quotation marks and citations omitted). Additionally, "the fit" between the asserted interest and the challenged law need not be "perfect," but it must be "reasonable"[14] and "may not burden more [conduct] than is reasonably necessary." *Id.*

In *Marzzarella*, this Court applied intermediate scrutiny to evaluate the constitutionality of a federal law prohibiting possession of firearms with obliterated serial numbers. 614 F.3d at 97. Appellants contend that *Marzzarella* should not inform our analysis of the appropriate level of scrutiny to apply here because the law at issue in *Marzzarella* "d[id] not

[14] *Marzzarella* has articulated for this Court that Second Amendment intermediate scrutiny requires a fit that is "*reasonable*." *See* 614 F.3d at 98. We note that the Fourth Circuit also requires a "reasonable" fit, although the Second Circuit requires a "substantial" fit. *Compare Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013) (stating that the fit must be "reasonable," but need not be perfect), *with Kachalsky*, 701 F.3d at 97 (stating that the fit must be "substantial" but citing *Marzzarella* for the standard).

severely limit the possession of firearms." *See id.* They contend that only strict scrutiny could possibly apply to the case at bar because the burden imposed by the "justifiable need" standard "is substantial, implicating the core rights of responsible, law-abiding citizens to engage in an activity whose protection is literally enumerated." Appellants' Brief 52. We disagree.

In the First Amendment context, strict scrutiny is triggered when the government imposes content-based restrictions on speech in a public forum. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009). In essence, this is the core of the First Amendment, just like the core of the right conferred upon individuals by the Second Amendment is the right to possess usable handguns *in the home* for self-defense. *See Kachalsky*, 701 F.3d at 93 ("[W]e believe that applying less than strict scrutiny when the regulation does not burden the 'core' protection of self-defense in the home makes eminent sense in this context and is in line with the approach taken by our sister circuits."). We agree with the District Court, therefore, that strict scrutiny should not apply here, because "[i]f the Second Amendment protects the right to carry a handgun outside the home for self-defense at all, that right is not part of the core of the Amendment." District Court Opinion 39. Accordingly, we will apply intermediate scrutiny here.

C.

As stated above, under intermediate scrutiny the government must assert a significant, substantial, or important interest; there must also be a reasonable fit between that asserted interest and the challenged law, such that the law does not burden more conduct than is reasonably necessary. *Marzzarella*, 614 F.3d at 98. When reviewing the constitutionality of statutes, courts "accord substantial deference to the [legislature's] predictive judgments." *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997).

D.

The State of New Jersey has, undoubtedly, a significant, substantial and important interest in protecting its citizens' safety. *See United States v. Salerno*, 481 U.S. 739, 745 (1987).[15] The issue here, therefore, is whether there is a "reasonable fit" between this interest in safety and the means chosen by New Jersey to achieve it: the Handgun Permit Law and its "justifiable need" standard.[16]

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[15] Appellants do not dispute this point.

[16] The Dissent repeatedly states that we do not consider the "justifiable need requirement itself" but rather "examin[e] the permitting requirement as a whole." *See*, *e.g.*, Dissenting Opinion 29, 36. This is a mischaracterization, to which we respond, *res ipsa loquitur*.

1.

The predictive judgment of New Jersey's legislators is that limiting the issuance of permits to carry a handgun in public to only those who can show a "justifiable need" will further its substantial interest in public safety.[17] New Jersey contends that the "justifiable need" standard "precisely fits New Jersey's interest in assessing the corresponding dangers and risk to the public and to the person seeking to carry a handgun. The [standard] provides a means to determine whether the increase in risk and danger borne by the public is justified by a demonstrated risk and danger borne to the person seeking to carry a handgun." Appellees' Brief 34. To be sure, New Jersey has not presented us with much evidence to show how or why its legislators arrived at this predictive judgment. New Jersey's counsel acknowledges that "there is no available commentary which would clarify whether or not the Legislature considered

[17] New Jersey has asserted that the interests served by the Handgun Permit Law and its "justifiable need" standard include "combating handgun violence," "combating the dangers and risks associated with the misuse and accidental use of handguns," and "reduc[ing] the use of handguns in crimes." Appellees' Brief 34. All of these interests fall under the substantial government interest in "ensur[ing] the safety of all of its citizenry." *Id.* The Dissent improperly narrows the "fit" inquiry to consider only one asserted interest, writing: "we must ask whether the State has justified its conclusion that those with a special need for self-defense are less likely to misuse or accidently use a handgun than those who do not have a special need." Dissenting Opinion 29.

statistical information to support the public safety purpose of the State's Carry Permit Law." Appellees' February 27, 2013 Letter at 1-2.

New Jersey's inability to muster legislative history indicating what reports, statistical information, and other studies its legislature pondered when it concluded that requiring handgun permit applicants to demonstrate a "justifiable need" would reasonably further its substantial public safety interest, notwithstanding the potential burden on Second Amendment rights, is unsurprising. First, at each relevant moment in the history of New Jersey gun laws, spanning from 1905[18] to 1981,[19] the legislature could not have foreseen that restrictions on carrying a firearm outside the home could run afoul of a Second Amendment that had not yet been held to protect an *individual* right to bear arms, given that the teachings of *Heller* were not available until that landmark case was decided in 2008. Moreover, Second Amendment protections were not incorporated against the states until 2010, when the Supreme Court issued its splintered opinion in *McDonald.* Simply put, New

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[18] *See Compiled Statutes of New Jersey, Vol. II.*, 1759 (Soney & Sage 1911) (reprinting 1905 statute stating "[a]ny person who shall carry any revolver, pistol, firearm, bludgeon, blackjack, knuckles, sand-bag, slung-shot or other deadly, offensive or dangerous weapon, or any stiletto, dagger or razor or any knife with a blade five inches in length or over concealed in or about his clothes or person, shall be guilty of a misdemeanor").

[19] New Jersey's permit schema as it stands today was last amended in 1981. N.J. Stat. Ann. § 2C:58-4.

Jersey's legislators could not have known that they were potentially burdening protected Second Amendment conduct, and as such we refuse to hold that the fit here is not reasonable merely because New Jersey cannot identify a study or tables of crime statistics upon which it based its predictive judgment. As the District Court correctly concluded, New Jersey's legislature "has continually made the reasonable inference that given the obviously dangerous and deadly nature of handguns, requiring a showing of particularized need for a permit to carry one publicly serves the State's interests in public safety." District Court Opinion 42. To require applicants to demonstrate a "justifiable need" is a reasonable implementation of New Jersey's substantial, indeed critical, interest in public safety. *See IMS Health, Inc. v. Ayotte*, 550 F.3d 42, 55 (1st Cir. 2008) (explaining that under intermediate scrutiny states are "allowed to justify speech restrictions by reference to studies and anecdotes," and also by reference to "history, consensus, and simple common sense") (internal quotation marks omitted), *abrogated on other grounds by* 131 S. Ct. 2653 (2011).

2.

Legislators in other states, including New York and Maryland, have reached this same predictive judgment and have enacted similar laws as a means to improve public safety. As mentioned above, in 1913 New York enacted a law requiring applicants to demonstrate "proper cause – a special need for

self-protection." *Kachalsky*, 701 F.3d at 84. Maryland law allows issuance of a permit to carry a handgun in public only upon a finding that an applicant "has good and substantial reason to wear, carry, or transport a handgun, such as a finding that the permit is necessary as a reasonable precaution against apprehended danger." *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013) (citing Md. Code Ann., Pub. Safety § 5-306(a)(5)(ii)).

In *Siccardi*, the Supreme Court of New Jersey quoted from a staff report to the National Commission on the Causes and Prevention of Violence by Newton and Zimring, who:

> evaluated the utility of firearms as weapons of defense against crime. They found that private possession of a handgun is rarely an effective means of self-protection; and so far as the carrying of handguns is concerned, they noted that "no data exist which would establish the value of firearms as a defense against attack on the street" though "there is evidence that the ready accessibility of guns contributes significantly to the number of unpremeditated homicides and to the seriousness of many assaults."

*Siccardi*, 284 A.2d at 537 (citing Newton and Zimring, Firearms and Violence in American Life, p. 67 (1968)).

Although we lack an explicit statement by New Jersey's legislature explaining why it adopted the "justifiable need" standard, its 1978 decision to change "need" to "justifiable need" suggests that the

legislature agreed with Siccardi's reasoning and ultimate conclusion. *See Siccardi*, 284 A.2d at 535 (approving denial of a permit for failure to "*justify* a need for carrying a weapon") (emphasis added). As discussed above in Section I, the executive branch similarly indicated its approval of *Siccardi* when it defined "justifiable need" in the Administrative Code by closely tracking the Supreme Court of New Jersey's language. *See id.* at 540.

3.

We must emphasize that the fit between the challenged law and the interest in public safety need only be "reasonable." As New Jersey correctly notes, the Handgun Permit Law and its "justifiable need" standard provide "a means to determine whether the increase in risk and danger borne by the public is justified by a demonstrated risk and danger borne to the person seeking to carry a handgun." Appellees' Brief 34. By contrast, Appellants contend that enabling qualified, responsible, law abiding people to defend themselves from crime by carrying a handgun, *regardless* of their ability to show a "justifiable need," serves the interest of public safety. New Jersey legislators, however, have made a policy judgment that the state can best protect public safety by allowing only those qualified individuals who can demonstrate a "justifiable need" to carry a handgun to do so. In essence, New Jersey's schema takes into account the individual's right to protect himself from violence as well as the community at large's interest in

self-protection. It is New Jersey's judgment that when an individual carries a handgun in public for his or her own defense, he or she necessarily exposes members of the community to a somewhat heightened risk that they will be injured by that handgun. New Jersey has decided that this somewhat heightened risk to the public may be outweighed by the potential safety benefit to an individual with a "justifiable need" to carry a handgun. Furthermore, New Jersey has decided that it can best determine when the individual benefit outweighs the increased risk to the community through careful case-by-case scrutiny of each application, by the police and a court.[20]

Other states have determined that it is unnecessary to conduct the careful, case-by-case scrutiny mandated by New Jersey's gun laws before issuing a permit to publicly carry a handgun. Even accepting that there may be conflicting empirical evidence as to the relationship between public handgun carrying

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[20] As the Supreme Court of New Jersey has explained:

> So concerned is the [New Jersey] Legislature about this licensing process that it allows only a Superior Court judge to issue a permit, after applicants first obtain approval from their local chief of police. In this (as perhaps in the case of election laws) the Legislature has reposed what is essentially an executive function in the judicial branch. We have acceded to that legislative delegation because "[t]he New Jersey Legislature has long been aware of the dangers inherent in the carrying of handguns and the urgent necessity of their regulation. . . ."

*In re Preis*, 573 A.2d at 151 (quoting *Siccardi*, 284 A.2d at 538).

and public safety, this does not suggest, let alone compel, a conclusion that the "fit" between New Jersey's individualized, tailored approach and public safety is not "reasonable."

4.

As to the requirement that the "justifiable need" standard not burden more conduct than is reasonably necessary, we agree with the District Court that the standard meets this requirement. "Unlike strict scrutiny review, we are not required to ensure that the legislature's chosen means is 'narrowly tailored' or the least restrictive available means to serve the stated governmental interest." *Kachalsky*, 701 F.3d at 97. New Jersey engages in an individualized consideration of each person's circumstances and his or her objective, rather than subjective, need to carry a handgun in public. This measured approach neither bans public handgun carrying nor allows public carrying by all firearm owners; instead, the New Jersey Legislature left room for public carrying by those citizens who can demonstrate a "justifiable need" to do so.[21] We refuse Appellants' invitation to

[21] Although the Dissent acknowledges that the "fit" required need only be "reasonable," in application the Dissent repeatedly demands much more of the "justifiable need" provision than a reasonable fit. For example, the Dissent suggests that New Jersey has failed to show "that the justifiable need requirement is *the provision* that can best determine whether the individual right to keep and bear arms 'outweighs' the increased risk to the community that its members will be injured by handguns."

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intrude upon the sound judgment and discretion of the State of New Jersey, and we conclude that the "justifiable need" standard withstands intermediate scrutiny.

## VII.

We conclude that the District Court correctly determined that the requirement that applicants demonstrate a "justifiable need" to publicly carry a handgun for self-defense qualifies as a "presumptively lawful," "longstanding" regulation and therefore does not burden conduct within the scope of the Second Amendment's guarantee. We conclude also that the District Court correctly determined that even if the "justifiable need" standard fails to qualify as such a regulation, it nonetheless withstands intermediate scrutiny and is therefore constitutional. Accordingly, we will affirm the judgment of the District Court.

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Dissenting Opinion 38 (emphasis added). Of course, this far overstates what must be shown in order for a challenged regulation to survive intermediate scrutiny.

*Drake v. Filko*, No. 12-1150

HARDIMAN, *Circuit Judge*, dissenting.

The Second Amendment states: "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." In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court held that the Second Amendment protects an individual right to keep and bear arms for purposes of self-defense. Two years later, the Court applied the Second Amendment to the States in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). Because I am convinced that New Jersey's law conditioning the issuance of a permit to carry a handgun in public on a showing of "justifiable need" contravenes the Second Amendment, I respectfully dissent.

## I

As befits a diverse nation of fifty sovereign States and countless municipalities, gun regulation in the United States resembles a patchwork quilt that largely reflects local custom. Regarding the public carry of firearms, two dichotomies are relevant to this case. First, in many States, laws distinguish between open carry of a handgun – such as in a visibly exposed belt holster – and concealed carry – such as hidden from view under clothing or in a pocket. Thirty-one States currently allow open carry of a

handgun without a permit, twelve States (including New Jersey) allow open carry with a permit,[1] and seven States prohibit open carry entirely.[2] By contrast, four States and parts of Montana allow concealed carry without a permit[3] and forty-four States allow concealed carry with a permit.[4] One State,

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[1] *See* Conn. Gen. Stat. § 29-35; Ga. Code Ann. § 16-11-126(h); Haw. Rev. Stat. § 134-9(c); Iowa Code Ann. § 724.4(1), (4)(i); Md. Code Ann., Crim. Law § 4-203(a)(1)(i), (b)(2); Mass. Gen. Laws ch. 269, § 10(a)(2); Minn. Stat. § 624.714(1a); N.J. Stat. Ann. § 2C:39-5(b); Okla. Stat. tit. 21, §§ 1289.6, 1290.5(A); Tenn. Code Ann. § 39-17-1351; Utah Code Ann. §§ 53-5-704(1)(c), 76-10-505(1)(b). In California, open carry of a loaded handgun is permitted with a license in rural counties, but prohibited elsewhere. *See* Cal. Penal Code §§ 25850, 26150(b)(2).

[2] *See* Ark. Code Ann. §§ 5-73-120, 5-73-315; Fla. Stat. § 790.053(1); 720 Ill. Comp. Stat. 5/24-1; N.Y. Penal Law §§ 265.03(3), 400.00(2)(f); R.I. Gen. Laws §§ 11-47-8(a), 11-47-11(a); S.C. Code Ann. §§ 16-23-20(12), 23-31-215; Tex. Penal Code Ann. § 46.035(a).

[3] If one can lawfully possess a handgun, one can lawfully carry it concealed without a permit in Alaska, Arizona, Vermont, and Wyoming. Nicholas J. Johnson et al., Firearms Law and the Second Amendment 21 (2012). Although Montana requires a permit for concealed carrying of a handgun in cities and towns, concealed carrying of a handgun without a permit is allowed for "a person who is outside the official boundaries of a city or town or the confines of a logging, lumbering, mining, or railroad camp." Mont. Code Ann. § 45-8-317(1)(i); *see id.* §§ 45-8-316(1), 45-8-321.

[4] *See* Ala. Code §§ 13A-11-50, 13A-11-73; Ark. Code Ann. § 5-73-315(a); Cal. Penal Code § 26150; Colo. Rev. Stat. § 18-12-105(2)(c); Conn. Gen. Stat. § 29-35(a); Del. Code Ann. tit. 11, § 1442; Fla. Stat. § 790.06; Ga. Code Ann. § 16-11-126; Haw. Rev. Stat. § 134-9; Idaho Code Ann. § 18-3302(7); Ind. Code § 35-47-2-1(a); Iowa Code § 724.4(4)(i); Kan. Stat. Ann. § 21-6302(d)(8); Ky.

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Illinois, prohibited public carry of handguns altogether, but that law was struck down as violative of the Second Amendment by the United States Court of Appeals for the Seventh Circuit in December 2012. *See Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012).

The second relevant dichotomy is between "shall-issue" and "may-issue" permitting regimes. In the forty shall-issue States,[5] permitting officials must

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Rev. Stat. Ann. § 527.020(4); La. Rev. Stat. Ann. § 40:1379.3; Me. Rev. Stat. tit. 25, § 2001-A; Md. Code Ann., Crim. Law § 4-203(b)(2); Mass. Gen. Laws ch. 269, § 10(a)(2); Mich. Comp. Laws § 750.227(2); Minn. Stat. § 624.714(la); Miss. Code Ann. §§ 45-9-101, 97-37-1(1); Mo. Rev. Stat. § 571.030(1), (4); Neb. Rev. Stat. § 28-1202(1)(a), (2); Nev. Rev. Stat. §§ 202.350(1)(d)(3), 202.3657; N.H. Rev. Stat. Ann. § 159:4; N.J. Stat. Ann. § 2C:39-5(b); N.M. Stat. Ann. § 30-7-2(A)(5); N.Y. Penal Law §§ 265.03(3), 400.00(2)(f); N.C. Gen. Stat. § 14-269(a1)(2); N.D. Cent. Code § 62.1-04-02; Ohio Rev. Code Ann. § 2923.12; Okla. Stat. tit. 21, §§ 1290.4, 1290.5; Or. Rev. Stat. §§ 166.250(1)(a), 166.260(1)(h); 18 Pa. Cons. Stat. Ann. § 6106(a)(1); R.I. Gen. Laws § 11-47-8(a); S.C. Code Ann. § 16-23-460(B)(1); S.D. Codified Laws § 22-14-9; Tenn. Code Ann. § 39-17-1351; Tex. Gov't Code Ann. § 411.171 *et seq.*; Utah Code Ann. § 76-10-504; Va. Code Ann. § 18.2-308; Wash. Rev. Code § 9.41.050(1)(a); W. Va. Code § 61-7-3; Wis. Stat. § 941.23(2)(d).

[5] *See* Alaska Stat. § 18.65.700; Ark. Code Ann. § 5-73-309; Ariz. Rev. Stat. § 13-3112; Colo. Rev. Stat. § 18-12-203(1); Fla. Stat. § 790.06(2); Ga. Code Ann. § 16-11-129; Idaho Code Ann. § 18-3302(1); Ind. Code § 35-47-2-3; Iowa Code § 724.7(1); Kan. Stat. Ann. § 75-7c03; Ky. Rev. Stat. Ann. § 237.110(4); La. Rev. Stat. Ann. § 40:1379.3(A)(1); Me. Rev. Stat. tit. 25, § 2003(1); Mich. Comp. Laws § 28.425b(7); Minn. Stat. § 624.714(2)(b); Miss. Code Ann. § 45-9-101(6)(c); Mo. Rev. Stat. § 571.101(1); Mont. Code Ann. § 45-8-321(1); Neb. Rev. Stat. § 69-2430(3)(b), 69-2433; Nev. Rev. Stat. § 202.3657(3); N.H. Rev. Stat. Ann.

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grant an application for handgun carry permits so long as the applicant satisfies certain objective criteria, such as a background check and completion of a safety course. *See* Nicholas J. Johnson et al., Firearms Law and the Second Amendment 21 (2012). In these jurisdictions, a general desire for self-defense is sufficient to obtain a handgun.

Eight States, including New Jersey, have may-issue permitting regimes.[6] *See id.* In these States, local authorities have more discretion to decide who may be granted permission to carry a handgun, and the general desire to defend one's self or property is insufficient for the permit to issue. Instead, an applicant must demonstrate "justifiable need,"[7]

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§ 159:6(I)(a); N.M. Stat. Ann. § 29-19-4(A); N.C. Gen. Stat. § 14-415.12; N.D. Cent. Code §§ 62.1-04-03(1); Ohio Rev. Code Ann. § 2923.125(D); Okla. Stat. tit. 21, § 1290.12(12); Or. Rev. Stat. § 166.291; 18 Pa. Cons. Stat. Ann. § 6109(e)(1); S.C. Code Ann. § 23-31-215(A)-(C); S.D. Codified Laws § 23-7-7; Tenn. Code Ann. § 39-17-1351; Tex. Gov't Code Ann. § 411.172; Utah Code Ann. § 53-5-704; Va. Code Ann. § 18.2-308.02; Wash. Rev. Code § 9.41.070; W. Va. Code § 61-7-4; Wis. Stat. § 175.60; Wyo. Stat. Ann. § 6-8-104(b). In addition, Alabama and Connecticut "by statute allow considerable police discretion but, in practice, commonly issue permits to applicants who meet the same standards as in shall-issue states." Johnson, *supra*, at 21; *see also* Ala. Code § 13A-11-75; Conn. Gen. Stat. § 29-28(a).

[6] *See* Cal. Penal Code § 26150; Del. Code Ann. tit. 11, § 1441; Haw. Rev. Stat. § 134-9(a); Mass. Gen. Laws ch. 140, § 131(d); Md. Code Ann., Pub. Safety § 5-306; N.J. Stat. Ann. § 2C:58-4(c); N.Y. Penal Law § 400.00(2)(f); R.I. Gen. Laws § 11-47-11(a).

[7] *E.g.*, N.J. Stat. Ann. § 2C:58-4(c).

"proper cause,"[8] or "good and substantial reason"[9] to carry a handgun. Although these standards are phrased differently, they are essentially the same – the applicant must show a special need for self-defense distinguishable from that of the population at large, often through a specific and particularized threat of harm. *See* Maj. Typescript at 5 & n.2 (discussing New Jersey law); *Woollard v. Gallagher*, 712 F.3d 865, 869-70 (4th Cir. 2013) (discussing Maryland law); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 86-87 (2d Cir. 2012) (discussing New York law).[10]

The relative merits of shall-issue regimes versus may-issue regimes are debatable and it is not the role of the federal courts to determine the wisdom of either. And but for the doctrine of incorporation, the States would be free to choose whatever policy they desired without federal intervention. Since *McDonald*, however, we find ourselves in a situation akin to that in which the federal courts found themselves after the Supreme Court held that the exclusionary rule applied to the States in *Mapp v. Ohio*, 367 U.S. 643 (1961). Prior to that decision, many States did not require the exclusion of illegally obtained evidence in recognition of the "grave adverse consequence that exclusion of relevant incriminating evidence always

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[8] *E.g.*, N.Y. Penal Law § 400.00(2)(f).

[9] *E.g.*, Md. Code Ann., Pub. Safety § 5-306(a)(5)(ii).

[10] Of the remaining two states – Vermont and Illinois – Vermont issues no permits to carry weapons and public carry is allowed, whereas Illinois prohibited public carry altogether.

entails (viz., the risk of releasing dangerous criminals into society)." *Hudson v. Michigan*, 547 U.S. 586, 595 (2006); *see also Elkins v. United States*, 364 U.S. 206, 224-25 (1960) (in the year before *Mapp*, twenty-two States had a full exclusionary rule, four States had a partial exclusionary rule, and twenty-four States had no exclusionary rule).

As it did with the exclusionary rule, the Supreme Court has applied the Second Amendment to the States, *McDonald*, 130 S. Ct. at 3026, and "the enshrinement of constitutional rights necessarily takes certain policy choices off the table," *Heller*, 554 U.S. at 636. So the question presented is not whether New Jersey's justifiable need requirement is a reasonable, let alone a wise, policy choice. Rather, we must decide whether the New Jersey statute violates the Second Amendment.

## II

With few exceptions, New Jersey law prohibits handgun possession in public without a permit. *See* N.J. Stat. Ann. § 2C:39-5(b). In addition to meeting certain age, criminal history, and mental health requirements, an individual seeking a permit must complete a training course, pass a test of the State's laws governing the use of force, provide qualification scores from test firings administered by a certified instructor, and demonstrate a "justifiable need" to carry a handgun. *See id.* § 2C:58-4(c); N.J. Admin. Code § 13:54-2.4. "Justifiable need" is defined as:

> the urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun.

N.J. Admin. Code § 13:54-2.4(d)(1). "Generalized fears for personal safety are inadequate, and a need to protect property alone does not suffice." *In re Preis*, 573 A.2d 148, 152 (N.J. 1990).

An application for a handgun carry permit is first made to a police official, who determines whether the applicant meets the statutory requirements. N.J. Stat. Ann. § 2C:58-4(c). Upon approval, the police present the application to a Superior Court judge for independent review of whether the statutory requirements, including "justifiable need," have been met. *Id.* § 2C:58-4(d). The Superior Court judge may issue an unrestricted permit, issue a limited-type permit that restricts the types of handguns the applicant may carry and where or for what purposes such handguns may be carried, or deny the application. *Id.* If the Superior Court denies an application, the applicant may appeal the decision, *id.* § 2C:58-4(e), but appellate review is highly deferential, *see In re Pantano*, 60 A.3d 507, 510 (N.J. Super. Ct. App. Div. 2013).

Appellants brought suit under 42 U.S.C. § 1983 to challenge New Jersey's justifiable need requirement, arguing that it is incompatible with the Second Amendment. Each of the individual appellants – a

group which included a reserve sheriff's deputy, a civilian FBI employee, an owner of a business that restocks ATM machines and carries large amounts of cash, and a victim of an interstate kidnapping – applied for a handgun carry permit, but were denied for want of justifiable need.[11]

The District Court rejected their challenge in a series of alternative holdings. *Piszczatoski v. Filko*, 840 F. Supp. 2d 813 (D.N.J. 2012). First, it ruled that the Second Amendment does not protect a general right to carry a gun for self-defense outside the home. *See id.* at 820-29. Second, the Court concluded that even if the law "implicate[d] some narrow right to carry a firearm outside the home," the law is a "longstanding" regulation that is presumptively constitutional. *See id.* at 829-31. Finally, it determined that even if the Second Amendment extended outside the home and the law was not longstanding enough to be presumptively constitutional, it would still survive intermediate scrutiny. *See id.* at 831-37.

## III

Pursuant to the first prong of the test we established in *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010), we must determine whether New Jersey's justifiable need requirement burdens conduct

[11] During the pendency of this litigation, two of the original plaintiffs were granted permits, and thus their cases became moot.

protected by the Second Amendment. New Jersey argues – and the District Court held – that the justifiable need requirement does not burden conduct protected by the Second Amendment because that right has no application beyond the confines of one's home. This view is based on an incorrect reading of *Heller* and *McDonald*, both of which indicate that the Second Amendment extends beyond the home.

First, *Heller* engaged in significant historical analysis on the meaning of the text of the Second Amendment, specifically focusing on the words "keep" and "bear" as codifying distinct rights. *See Heller*, 554 U.S. at 582-84. The Court defined "keep arms" as to "have weapons," *id.* at 582, and to "bear arms" as 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," *id.* at 584 (citation and alterations omitted). To speak of "bearing" arms solely within one's home not only would conflate "bearing" with "keeping," in derogation of the Court's holding that the verbs codified distinct rights, but also would be awkward usage given the meaning assigned the terms by the Supreme Court. *See Moore*, 702 F.3d at 936 ("The right to 'bear' as distinct from the right to 'keep' arms is unlikely to refer to the home. To speak of 'bearing' arms within one's home would at all times have been an awkward usage. A right to bear arms thus implies a right to carry a loaded gun outside the home.").

In addition, the *Heller* Court repeatedly noted that the Second Amendment protects an inherent right to self-defense, *see* 554 U.S. at 599 ("self-defense . . . was the *central component* of the right itself" (emphasis in original)); *id.* at 628 ("[T]he inherent right of self-defense has been central to the Second Amendment right."), and consistently employed language referring to a more general right to self-defense than one confined to the home. For example, the Court described the Amendment's operative clause – "to keep and bear arms" – as "guarantee[ing] the individual right to possess and carry weapons in case of confrontation." *Id.* at 592. The Court also defined "bear arms" to include being "armed and ready for offensive or defensive action in a case of conflict with another person." *Id.* at 584. Obviously, confrontations and conflicts "are not limited to the home." *Moore*, 702 F.3d at 936.

Moreover, while the Court noted that "the need for defense of self, family, and property is *most* acute" in the home, *Heller*, 554 U.S. at 628 (emphasis added), "that doesn't mean it is not acute outside the home," *Moore*, 702 F.3d at 935. Instead, it "suggest[s] that some form of the right applies where that need is not 'most acute.'" *United States v. Masciandaro*, 638 F.3d 458, 468 (4th Cir. 2011) (Niemeyer, J., concurring). Were it otherwise, there would be no need for the modifier "most." This reasoning is consistent with the Supreme Court's historical understanding of the right to keep and bear arms as "an individual right protecting against both public and private violence,"

such as in cases of armed resistance against oppression by the Crown. *Heller*, 554 U.S. at 594; *see also id.* at 592-95.

Furthermore, *Heller* also recognized that the right to bear arms was understood at the founding to "exist not only for self-defense, but also for membership in a militia and for hunting, neither of which is a home-bound activity." *Masciandaro*, 638 F.3d at 468 (Niemeyer, J., concurring) (citing *Heller*, 554 U.S. at 598-99). Likewise, when the Court acknowledged that the Second Amendment right was not unlimited, it listed as presumptively lawful regulations those "laws forbidding the carrying of firearms in *sensitive places such as schools and government buildings.*" *Heller*, 554 U.S. at 626 (emphasis added). "If the Second Amendment right were confined to self-defense *in the home*, the Court would not have needed to express a reservation for 'sensitive places' outside of the home." *Masciandaro*, 638 F.3d at 468 (Niemeyer, J., concurring) (emphasis in original).

Most importantly, the *McDonald* Court described the holding in *Heller* as encompassing a general right to self-defense. The very first sentence of *McDonald* states: "Two years ago, in *District of Columbia v. Heller*, we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, and we struck down a District of Columbia law that banned the possession of handguns in the home." *McDonald*, 130 S. Ct. at 3026 (citation omitted). Describing the holding this way – first establishing the legal principle embodied in the

Second Amendment and then explaining how it was applied – demonstrates that the legal principle enunciated in *Heller* is not confined to the facts presented in that case.

Advocates of a home-bound Second Amendment, including New Jersey and the District Court, argue that *Heller*'s recognition of an individual Second Amendment right of self-defense was inextricably tied to the home. *See* Appellee Br. 15-16; *Piszczatoski*, 840 F. Supp. 2d at 821-22. They cite statements in *Heller* such as the directive that the District of Columbia must allow Heller "to register his handgun and must issue him a license to carry it *in the home*." *Heller*, 554 U.S. at 635 (emphasis added). Also, they note that *Heller* purposely left unclear the entire universe of Second Amendment law: "And whatever else [the Second Amendment] leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms *in defense of hearth and home*." *Id.* (emphasis added). Finally, they cite *Heller*'s statement that the Second Amendment is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626.

These arguments prove too much. In making these comments regarding the home, the Court was merely applying the Second Amendment to the facts at issue in the case before it. Heller challenged the District of Columbia's prohibition on guns in the home, not its prohibitions on public carry. The application of the law to the facts does not vitiate the

Court's articulation of the right to keep and bear arms as a general right of self-defense.

Although the majority declines to determine whether the Second Amendment extends outside the home, *see* Maj. Typescript at 12, my view that the Second Amendment extends outside of the home is hardly novel. Indeed, the only court of appeals to squarely address the issue has so held. *See Moore*, 702 F.3d at 942 ("The Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside."). In addition, we and other courts of appeals have acknowledged in dicta that the Second Amendment applies beyond the home. *See Marzzarella*, 614 F.3d at 92 ("At its core, the Second Amendment protects the right of law-abiding citizens to possess non-dangerous weapons for self-defense in the home. And certainly, to some degree, it must protect the right of law-abiding citizens to possess firearms for other, as-yet-undefined, lawful purposes." (internal citations and footnote omitted)); *see also Kachalsky*, 701 F.3d at 89 ("Although the Supreme Court's cases applying the Second Amendment have arisen only in connection with prohibitions on the possession of firearms in the home, the Court's analysis suggests . . . that the Amendment must have *some* application in the very different context of the public possession of firearms." (emphasis in original)); *Masciandaro*, 638 F.3d at 467 (Niemeyer, J., concurring).

In light of these precedents, I disagree with the majority's assertion that the Seventh Circuit "may

have read *Heller* too broadly" in *Moore*. Maj. Typescript at 11. For as I have explained, other courts, including ours, have read *Heller* the same way. *See Marzzarella*, 614 F.3d at 92; *see also Kachalsky*, 701 F.3d at 89. In addition, the majority does not support its criticism of *Moore* with anything but language from a previous Seventh Circuit case, *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc), that warned readers "not to treat *Heller* as containing broader holdings than the Court set out to establish: that the Second Amendment creates individual rights, one of which is keeping operable handguns at home for self-defense." *Id.* at 640; *see* Maj. Typescript at 11. Although the majority places its emphasis in that passage on the words "at home," perhaps the better place for emphasis is on the words "one of which," especially considering the *Skoien* court's very next sentence: "What other entitlements the Second Amendment creates . . . were left open." *Skoien*, 614 F.3d at 640. More importantly, however, it is incongruous for the majority to find it only "possible" to conclude that *Heller* implies a right to bear arms beyond the home when we have previously indicated that such a right "must" exist, at least "to some degree."[12] *Marzzarella*, 614 F.3d at 92; *see* Maj. Typescript at 10.

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[12] For the same reasons, the majority's assertion that "it may be more accurate" to discuss whether or not the individual right to bear arms for self-defense purposes "exists," rather than whether it "extends," outside the home conflicts with *Marzzarella*. *See* Maj. Typescript at 9 n.5.

In sum, interpreting the Second Amendment to extend outside the home is merely a commonsense application of the legal principle established in *Heller* and reiterated in *McDonald*: that "the Second Amendment protects the right to keep and bear arms for the purpose of self-defense." *McDonald*, 130 S. Ct. at 3026. Because the need for self-defense naturally exists both outside and inside the home, I would hold that the Second Amendment applies outside the home.

## IV

Having concluded that the Second Amendment extends outside the home, I now address the majority's holding that New Jersey's justifiable need requirement does not burden conduct protected by the Second Amendment because it is a longstanding regulation exempt from Second Amendment scrutiny.

In *Heller*, the Supreme Court cautioned that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. at 626-27. Calling these "presumptively lawful regulatory measures,"[13] the Court also

[13] In *Marzzarella*, we interpreted the phrase "presumptively lawful" to mean that "these longstanding limitations are

(Continued on following page)

noted that the list was not exhaustive. *Id.* at 627 n.26. As we noted in *Marzzarella*, however, "the approach for identifying these additional restrictions is also unsettled." 614 F.3d at 93. Observing that "*Heller*'s identified exceptions all derived from historical regulations," but acknowledging that "it is not clear that pre-ratification presence is the only avenue to a categorical exception," we concluded that "prudence counsels caution when extending these recognized exceptions to novel regulations unmentioned by *Heller*." *Id.*; *see also United States v. Huet*, 665 F.3d 588, 602 (3d Cir. 2012).

Our hesitance to recognize additional exceptions is unsurprising in light of the fact that by doing so we are determining that a certain regulation is *completely outside the reach* of the Second Amendment, not merely that the regulation is a permissible burden on the Second Amendment right. *See Marzzarella*, 614 F.3d at 91. Accordingly, it is also unsurprising that courts have declined to find that regulations not mentioned in *Heller* fall within its "longstandingness" exception without a clear historical pedigree. *See*, *e.g.*, *Heller v. District of Columbia*, 670 F.3d 1244, 1255 (D.C. Cir. 2011) (*Heller II*) (declining to recognize as longstanding a multitude of District of Columbia handgun registration requirements, including laws requiring re-registration after three years and

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exceptions to the right to bear arms," although we acknowledged that this was not the only reasonable interpretation. 614 F.3d at 91.

requiring applicants to demonstrate knowledge about firearms, be fingerprinted and photographed, take firearms training or safety courses, meet a vision requirement, and submit to a background check every six years); *United States v. Chester*, 628 F.3d 673, 681 (4th Cir. 2010) (declining to recognize as longstanding a law prohibiting firearm possession by domestic violence misdemeanants because historical data was inconclusive); *Marzzarella*, 614 F.3d at 95 (declining to recognize as longstanding a law prohibiting possession of unmarked firearms). And even if some of these courts eventually uphold the law at issue, they do so by subjecting it to constitutional scrutiny. *See*, *e.g.*, *Marzzarella*, 614 F.3d at 95-101. By contrast, courts that have upheld laws by virtue of their longstandingness do so on the basis that the court "do[es] not have to broaden any of *Heller*'s presumptively valid categories to find that the conduct alleged . . . is outside the scope of Second Amendment protection." *Huet*, 665 F.3d at 603; *see also United States v. Barton*, 633 F.3d 168, 172 (3d Cir. 2011).

Despite the caution that we and other courts have counseled, the majority today holds that New Jersey's justifiable need requirement is a longstanding exception to the Second Amendment right to bear arms. It does so mostly on the basis that some form of need requirement has existed in New Jersey since 1924. *See* Maj. Typescript at 14-15. But the majority's analysis ignores the major changes that New Jersey's law has undergone in the decades since 1924 and also misapprehends the legal standards for deeming a law

longstanding such that it is beyond the scope of the Second Amendment. A detailed review of the history of New Jersey's gun laws is necessary to explain my first disagreement with my colleagues. I then turn to their misapprehension of *Heller*'s requirements.

## A

In 1905, New Jersey enacted its first general ban on carrying concealed firearms. *Compiled Statutes of New Jersey, Vol. II.* 1759 (Soney & Sage 1911). Although the law contained an exception whereby a local official could grant a permit, there were no standards for issuance.[14] *Id.* In 1924, the New Jersey legislature revised the law to incorporate the word "need" for the first time. As amended, the statute provided that concealed carry permits would be issued only after the issuing officer was "satisfied of the sufficiency of the application, and of the need of such person carrying concealed upon his person, a revolver, pistol, or other firearm." *Cumulative Supplement to the Compiled Statutes of New Jersey, 1911-1924 (Volume I)* 844 (Soney & Sage 1925). Violation of the permitting requirement was a misdemeanor. And critically for our purposes, the permitting requirement applied only to the *concealed* carry of firearms. *Open* carry was still allowed without a permit (and

[14] Several other exceptions existed for certain occupations, as well as carry in one's home or business and carry while hunting.

thus without any showing of need). *See State v. Repp*, 324 A.2d 588, 592 (N.J. Super. Ct. App. Div. 1974) (Kole, J.S.C, concurring), *rev'd* 352 A.2d 260 (N.J. 1976) (reviewing history).

In 1966, New Jersey made wholesale revisions to its firearms permit laws. For the first time, the State extended the permitting requirement to open carry as well as concealed carry. *See* N.J. Stat. Ann. § 2A:151-41 (1966). In addition, the 1966 Act eliminated a single permit to carry and replaced it with three distinct types of firearms permits: (1) a permit to purchase, which was required to acquire a pistol or revolver; (2) a firearms purchaser identification card to acquire a rifle or shotgun; and (3) a permit to carry a pistol or revolver. *See* N.J. Stat. Ann. §§ 2A:151-32-36, 41-45 (1966); *Repp*, 324 A.2d at 592 (Kole, J.S.C, concurring) (reviewing history). The 1966 Act also made possession of a handgun without a permit a felony.

As for the need requirement, it was first defined in *Siccardi v. State*, 284 A.2d 533 (N.J. 1971).[15] Although the court acknowledged that "need" was somewhat vague, the court defined it as "an urgent necessity for carrying guns for self-protection." *Id.* at 540.

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[15] Prior to *Siccardi*, only two cases had mentioned the need requirement, and neither had ascribed any meaning to it. *See McAndrew v. Mularchuk*, 162 A.2d 820, 827 (N.J. 1960); *State v. Neumann*, 246 A.2d 533, 535 (Monmouth Cnty. Ct. 1968).

In 1979, the law was amended to its current form, using the phrase "justifiable need" rather than merely "need." *See* N.J. Stat. Ann. § 2C:58-4(c) (1979); *In re Friedman*, 2012 WL 6049075, at *4 (N.J. Super. Ct. App. Div. Dec. 6, 2012) (not precedential) (reviewing history). The New Jersey courts have not ascribed any significance to that change of phrasing, however. *See Doe v. Dover Twp.*, 524 A.2d 469, 470 (N.J. Super. Ct. App. Div. 1987) (noting that the change from "need" to "justifiable need" was "intended basically to restate the repealed statutes which were 'carried forward without substantial change'" (quoting 2 *Final Report of the New Jersey Criminal Law Revision Commission* 370 (1971))).

In 1990, the New Jersey Supreme Court clarified that the "urgent necessity" formulation articulated in *Siccardi* requires applicants to show "specific threats or previous attacks demonstrating a special danger to the applicant's life that cannot be avoided by other means" as opposed to "[g]eneralized fears for personal safety" or "a need to protect property alone." *Preis*, 573 A.2d at 152. The "urgent necessity" test laid out in *Siccardi* and clarified in *Preis* remains the law to the present day. *See*, *e.g.*, *Pantano*, 60 A.3d at 510.

B

One facet of New Jersey's history of firearm regulation is particularly important to the longstandingness inquiry. Until 1966, New Jersey allowed the open carry of firearms without a permit. Only concealed

carry without a permit issued upon a showing of need has been banned since 1924. This distinction is significant because courts have long distinguished between these two types of carry, holding that although a State may prohibit the open *or* concealed carry of firearms, it may not ban *both* because a complete prohibition on public carry violates the Second Amendment and analogous state constitutional provisions. For example, in *State v. Reid*, 1 Ala. 612 (1840), the Supreme Court of Alabama upheld a prohibition on the concealed carrying of "any species of fire arms" but cautioned that the State's ability to regulate firearms was not unlimited: "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 614, 616-17. Relying on *Reid*, the Georgia Supreme Court held that a statute prohibiting the carrying of concealed pistols was unconstitutional insofar as it also "contains a prohibition against bearing arms *openly*." *Nunn v. State*, 1 Ga. 243, 251 (1846) (emphasis in original). The Louisiana Supreme Court adopted a similar interpretation in *State v. Chandler*, 5 La. Ann. 489 (1850). There, the court held that a law prohibiting the carrying of concealed weapons was constitutional because "[i]t interfered with no man's right to carry arms . . . in full open view." *Id.* at 490 (internal quotation marks omitted). Finally, the Tennessee Supreme Court held that although the State could prohibit concealed carry, it could not prohibit all

carrying of weapons. *Andrews v. State*, 50 Tenn. 165, 180-82, 186-88 (1871).

The United States Supreme Court in *Heller* cited *Nunn, Chandler*, and *Andrews* as relevant precedents in determining the historical meaning of the Second Amendment, going so far as to say that the Georgia Supreme Court's opinion in *Nunn* "perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause." *Heller*, 554 U.S. at 612; *see also id.* at 613. Notably, the Court later described the laws struck down in *Reid, Nunn*, and *Andrews* as "laws [that] have come close to the severe restriction of the District's handgun ban," which was struck down as well. *Id.* at 629.

The crux of these historical precedents, endorsed by the Supreme Court, is that a prohibition against both open and concealed carry without a permit is different in kind, not merely in degree, from a prohibition covering only one type of carry. After all, if a State prohibits only one type of carry without a permit, an opportunity for the free exercise of Second Amendment rights still exists. That opportunity disappears when the prohibition is extended to both forms of carry.

The same logic applies to the 1966 New Jersey law. Prior to that year, New Jersey prohibited only concealed carry without a permit. Accordingly, individuals were able to exercise their Second Amendment rights without first obtaining permission from

the State. By enacting a prohibition on open carry without a permit in the 1966 law, New Jersey eliminated that right.

Thus, when the majority identifies 1924 as the operative date for its longstandingness inquiry, it does so in derogation of historical precedents, cited approvingly by the Supreme Court in *Heller*, that draw an important distinction between concealed and open carry. Under these precedents, when New Jersey eliminated the ability of its residents to openly carry arms without a permit in 1966, it was, as a constitutional matter, enacting an entirely new law.

Regardless of whether we use 1924 or 1966 as the operative date, however, the majority misapprehends the legal standards applicable to the longstandingness analysis. Because that analysis demonstrates that New Jersey's justifiable need requirement is not sufficiently grounded in history and tradition even if retroactive to 1924, I would hold that the requirement is not exempt from Second Amendment scrutiny.

C

As we observed in *Marzzarella*, "*Heller*'s identified exceptions all derived from historical regulations." 614 F.3d at 93. Therefore, the majority concentrates on *Heller*'s recognition of "prohibitions on the possession of firearms by felons," *Heller*, 554 U.S. at 626, as the benchmark against which it compares the justifiable need requirement's pedigree. Maj. Typescript at

17-18 & n.11. The majority cites our opinion in *United States v. Barton*, in which we explained that the "first federal statute disqualifying felons from possessing firearms was enacted in 1938" and that "Congress did not bar non-violent felons from possessing guns until 1961." 633 F.3d at 173; *see* Maj. Typescript at 18 n.11. According to my colleagues, because "a firearms regulation may be 'longstanding' and 'presumptively lawful' even if it was only first enacted in the 20th century," Maj. Typescript at 18 n.11, New Jersey's justifiable need requirement, which, according to their interpretation, has existed since 1924, satisfies the standard. *But see Heller II*, 670 F.3d at 1260 & n.* (finding that a District of Columbia law prohibiting semi-automatic rifles and large-capacity magazines was not longstanding even though the District had banned such weapons and ammunition since 1932 and Michigan had enacted a similar ban in 1927).

I perceive several problems with the majority's analysis. First, it ignores the fact that, as we explained in *Barton*, the federal felon-in-possession laws have historical pedigrees that originated with the founding generation. Immediately after discussing the dates of enactment of the federal felon-in-possession laws, we noted that "[d]ebates from the Pennsylvania, Massachusetts, and New Hampshire ratifying conventions, which were considered 'highly influential' by the Supreme Court in *Heller*, also confirm that the common law right to keep and bear arms did not extend to those who were likely to commit violent offenses." *Barton*, 633 F.3d at 173

(quoting *Heller*, 554 U.S. at 604) (internal citation omitted); *see also Skoien*, 614 F.3d at 640 ("Many of the states [in the eighteenth century], whose own constitutions entitled their citizens to be armed, did not extend this right to persons convicted of crime.").

Although "a regulation can be deemed 'longstanding' even if it cannot boast a precise founding-era analogue," *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 196 (5th Cir. 2012), *Heller* requires, at a minimum, that a regulation be rooted in history. Otherwise, there would have been no point for the Court to state that it would "expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us," *Heller*, 554 U.S. at 635, and no reason for the Court to describe the exceptions as "longstanding," *id.* at 626.[16]

Perhaps recognizing that some historical support is required, the majority attempts to root New

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[16] Even if modern laws alone could satisfy the longstandingness test, there presumably would have to be a strong showing that such laws are common in the states. *Cf. Kennedy v. Louisiana*, 554 U.S. 407, 422-26 (2008) (only six states permitting death penalty for rape of a child shows national consensus *against* it). Today, only eight States have enacted may-issue permitting regimes like New Jersey's, which condition the issuance of a permit on some showing of special need. By contrast, forty-one States either require no permit at all or have enacted shall-issue permitting schemes for concealed carry. And over half the States do not require permits for open carry. *See* Part I, *supra*.

Jersey's justifiable need requirement in history by citing the Second Circuit's decision in *Kachalsky* for the proposition that "[i]n the 19th century, most states enacted laws banning the carrying of concealed weapons, and some states went even further than prohibiting the carrying of concealed weapons banning concealable weapons (subject to certain exceptions) altogether whether carried openly or concealed." Maj. Typescript at 15 (citing *Kachalsky*, 701 F.3d at 95-96) (alterations and internal quotation marks omitted). As explained in the previous section, however, laws that banned concealed carry alone have little bearing on laws that now regulate both concealed and open carry. In addition, the laws that the majority cites which purportedly banned both open and concealed carry altogether actually provide little support. *See* Maj. Typescript at 16 (citing Ch. 96, §§ 1-2, 1881 Ark. Acts at 191-92; Act of Dec. 2, 1875, ch. 52, § 1, 1876 Wyo. Terr. Comp. Laws, at 352; Ch. 13, § 1, 1870 Term. Acts at 28; Act of Apr. 12, 1871, ch. 34, § 1, 1871 Tex. Gen. Laws at 25). The statutes in Arkansas, Texas, and Tennessee were upheld only to the extent that they prohibited weapons that were not "arms" within the meaning of the Second Amendment or their state constitutional analogues (which were defined as the arms of a militiaman or a soldier). *See Fife v. State*, 31 Ark. 455, 461 (1876); *Andrews*, 50 Tenn. at 186-87; *English v. State*, 35 Tex. 473, 473 (1871); *see also Kachalsky*, 701 F.3d at 91 n.14. To the extent that the state laws prohibited the carry of weapons used in war, such as a full-sized pistol or revolver, they were struck down. *See Wilson v. State*,

33 Ark. 557, 559-60 (1878); *Fife*, 31 Ark. at 461; *Andrews*, 50 Tenn. at 186-88. As one commentator has noted, "*Heller* stated that bans on concealed carry of firearms are so traditionally recognized that they must be seen as constitutionally permissible. . . . The same cannot, however, be said about general bans on carrying firearms in public, which prohibit open as well as concealed carrying." 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, 1516 (2009) (footnote omitted).

The greatest flaw I perceive in the majority's opinion, however, is that the longstandingness analysis is conducted at too high a level of generality. Rather than determining whether there is a longstanding tradition of laws that condition the issuance of permits on a showing of a greater need for self-defense than that which exists among the general public, the majority chooses as its reference point laws that have regulated the public carry of firearms. This is "akin to saying that because the government traditionally could prohibit defamation, it can also prohibit speech criticizing government officials." *Heller II*, 670 F.3d at 1294 (Kavanaugh, J., dissenting). In the First Amendment context, when determining whether a regulation is longstanding, the Supreme Court has looked to that particular type of regulation, not to a broader general category. *See Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2736 (2011) (considering a First Amendment challenge to a ban

on sale of violent video games: "California's argument would fare better if there were a longstanding tradition in this country of specially restricting children's access to depictions of violence, but there is none"); *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010) (considering a First Amendment challenge to a ban on depictions of animal cruelty: "the prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies. But we are unaware of any similar tradition excluding *depictions* of animal cruelty from 'the freedom of speech' codified in the First Amendment" (citations omitted) (emphasis in original)). Demonstrating that there has been a longstanding tradition of regulating the public carry of firearms tells us nothing about whether New Jersey's justifiable need requirement itself is longstanding.

Finally, the majority's reference to New York's permitting scheme, which requires a showing of "proper cause" and was enacted in 1911, provides no support for its conclusion that New Jersey's justifiable need requirement qualifies as longstanding for purposes of the Second Amendment. *See* Maj. Typescript at 16-18. The Second Circuit in *Kachalsky* upheld New York's law because it survived intermediate scrutiny, not because it evaded Second Amendment cognizance on account of its longstandingness. In fact, the Second Circuit found that the cited sources – including the Arkansas, Tennessee, Texas, and Wyoming statutes cited by the majority – "do not directly address the specific question before us: Can New York

limit handgun licenses to those demonstrating a special need for self-protection? Unlike the cases and statutes discussed above, New York's proper cause requirement does not operate as a complete ban on the possession of handguns in public." *Kachalsky*, 701 F.3d at 91. As a result, the court declined to find that the law was a longstanding exception to the Second Amendment.

D

In light of the foregoing, regardless of whether New Jersey's justifiable need requirement dates to 1924 or 1966 for purposes of the inquiry, there is not a sufficiently longstanding tradition of regulations that condition the issuance of permits on a showing of special need for self-defense to uphold New Jersey's law on that basis. As we and other courts have stated, we must be cautious in recognizing new exceptions to the Second Amendment. After all, finding that a regulation is longstanding insulates it from Second Amendment scrutiny altogether; it is as good as saying that individuals do not have a Second Amendment right to engage in conduct burdened by that regulation. Accordingly, unless history and tradition speak clearly, we should hesitate to recognize new exceptions. Because there is no such history and tradition here, I would hold that New Jersey's justifiable need requirement is not a longstanding regulation immune from Second Amendment scrutiny.

V

Having concluded that New Jersey's justifiable need requirement burdens conduct protected by the Second Amendment, I now turn to *Marzzarella*'s second prong, which requires us to evaluate the law using some form of means-end scrutiny. Although I agree with the majority that intermediate scrutiny applies, I disagree with its conclusion that New Jersey's justifiable need requirement satisfies that standard.[17]

A

Under intermediate scrutiny, the State must assert a significant, substantial or important interest and there must be a reasonable fit between the asserted interest and the challenged regulation. *Marzzarella*, 614 F.3d at 98. "The regulation need not be the least restrictive means of serving the interest, but may not burden more [conduct] than is reasonably necessary." *Id.* The State bears the burden of establishing both of these requirements. *Bd. of Trs. of*

[17] I agree with my colleagues that First Amendment prior restraint doctrine does not apply in the Second Amendment context. Although "the First Amendment is a useful tool in interpreting the Second Amendment," *Marzzarella*, 614 F.3d at 96 n.15, we have never endorsed a wholesale importation of First Amendment principles into the Second Amendment. For instance, in *Barton* we declined to "recognize an 'overbreadth' doctrine outside the limited context of the First Amendment." 633 F.3d at 172 n.3.

*State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989); *Chester*, 628 F.3d at 683.

Because Appellants rightly acknowledge that New Jersey's interest in public safety is significant, substantial, and important, I turn to the question of "fit." "[S]ince the State bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit we require." *Fox*, 492 U.S. at 480. Accordingly, we may consider only the reasons and the evidence proffered by the State in evaluating the fit between the challenged law and the State's interest. The sole reason articulated by New Jersey in this case is that the justifiable need requirement is "designed to combat the dangers and risks associated with the misuse and accidental use of handguns." Appellee Br. 34. According to New Jersey, because those risks "are borne not only by the person seeking the permit, but by the citizenry he encounters," limiting permits to carry a handgun to those who can show a justifiable need to do so serves the State's interest in public safety. *Id.*

At the outset, we should emphasize that the justifiable need requirement itself, not the State's permitting law in general, is at issue. The majority apparently disagrees insofar as its opinion focuses on whether permitting schemes in general further an interest in public safety. By doing so, I submit that the majority misapprehends the regulation under review. Appellants take no issue with permits in general or with the other objective requirements that an applicant must satisfy prior to obtaining a handgun

carry permit, such as background checks, safety courses, and qualification tests. Rather, the regulation at issue is the requirement to show justifiable need, that is, that the applicant has a special need for self-defense greater than that which exists among the general public. *Preis*, 573 A.2d at 152. Accordingly, our inquiry must focus on that requirement. To be precise, we must ask whether the State has justified its conclusion that those with a special need for self-defense are less likely to misuse or accidentally use a handgun than those who do not have a special need.

Although the State must show only a "reasonable" fit, New Jersey comes nowhere close to making the required showing. Indeed, New Jersey has presented no evidence as to how or why its interest in preventing misuse or accidental use of handguns is furthered by limiting possession to those who can show a greater need for self-defense than the typical citizen.[18]

The majority excuses the State for this evidentiary void by reference to the fact that *Heller* was not decided until 2008 and that the Second Amendment had not been incorporated against the States until 2010. "Simply put," the majority states, "New Jersey's legislators could not have known that they were

[18] The majority acknowledges this evidentiary void, *see* Appellees' Feb. 23, 2013 Letter at 1-2, although my colleagues characterize the State's failure too charitably: "To be sure, New Jersey has not presented us with *much* evidence. . . ." Maj. Typescript at 25 (emphasis added).

potentially burdening protected Second Amendment conduct, and as such we refuse to hold that the fit here is not reasonable merely because New Jersey cannot identify a study or tables of crime statistics upon which it based its predictive judgment." Maj. Typescript at 26-27.

Even if one were to ignore the fact that people bore and desired to bear firearms in New Jersey in the decades prior to *Heller*, the lack of legislative history surrounding the State's enactment of the justifiable need requirement is not the chief problem with the State's showing. To be clear, New Jersey has provided *no evidence at all* to support its proffered justification, not just no evidence that the legislature considered at the time the need requirement was enacted or amended. The majority errs in absolving New Jersey of its obligation to show fit. Our role is to evaluate the State's proffered evidence, not to accept reflexively its litigation position. *See Heller II*, 670 F.3d at 1259 (holding that the government had not borne its burden under intermediate scrutiny because "the District needs to present some meaningful evidence, not mere assertions, to justify its predictive judgments"); *Chester*, 628 F.3d at 683 (holding that the government had not borne its burden under intermediate scrutiny because "[t]he government has offered numerous plausible *reasons* why the disarmament of domestic violence misdemeanants is substantially related to an important government goal; however, it has not attempted to offer sufficient *evidence* to establish a substantial relationship

between [18 U.S.C.] § 922(g)(9) and an important governmental goal" (emphasis in original)). "Without pointing to any study, empirical data, or legislative findings," New Jersey submits merely "that the fit [i]s a matter of common sense." *United States v. Carter*, 669 F.3d 411, 419 (4th Cir. 2012). Under these circumstances, the State has not carried its burden to "affirmatively establish the reasonable fit we require." *Fox*, 492 U.S. at 480; *see*, *e.g.*, *Carter*, 669 F.3d at 419; *Heller II*, 670 F.3d at 1259; *Chester*, 628 F.3d at 683.

Even were we to deem adequate the State's proffered reasons alone, without any supporting evidence, there still would be no reasonable fit between the justifiable need requirement and the State's interest in "combating the dangers and risks associated with the misuse and accidental use of handguns." Appellee Br. 34. The fact that one has a greater need for self-defense tells us nothing about whether he is less likely to misuse or accidentally use handguns. This limitation will neither make it less likely that those who meet the justifiable need requirement will accidentally shoot themselves or others, nor make it less likely that they will turn to a life of crime. Put simply, the solution is unrelated to the problem it intends to solve. Our inquiry here focuses on the *way* New Jersey has sought to address the societal ills of misuse and accidental use (by giving permits only to those who have a greater need for self-defense), not on whether New Jersey has an interest in combating these problems. Limiting permits to those who can show a greater need for self-defense than the public

at large does not make it less likely that misuse and accidental use will occur. In fact, that proposition is counterintuitive. Misuse and accidental use presuppose the active handling of handguns and it seems odd to suggest that one who obtains a handgun carry permit because he is in imminent danger is less likely to handle a gun than one who obtains a carry permit because he might want to exercise that right in the future even though he perceives no present danger.

An example demonstrates the absence of a fit between the justifiable need requirement and reducing misuse or accidental use of handguns. Imagine that a 21-year-old with no criminal record is shot in the leg while leaving his home in a high-crime area. Citing the portion of the justifiable need requirement that allows handgun permit issuance to those who have suffered from previous attacks, he applies for and is granted a permit to carry a handgun. Unbeknownst to the permitting officials, however, the 21-year-old is a street-level drug dealer who wants the gun to retaliate against the rival who shot him. It borders on the absurd to believe that this 21-year-old is less likely to misuse or accidentally use a handgun than a reserve sheriff's deputy who wishes to carry a gun for self-defense while off duty, like Appellant Finley Fenton; or a civilian FBI employee who received specific information that a terrorist organization might target him or his family, like former Appellant Daniel Piszczatoski; or an owner of an ATM restocking company who routinely carries large amounts of cash, like Appellant John Drake.

The counterintuitiveness of the idea that limiting handguns to those who have a special need for self-defense reduces misuse or accidental use is borne out by the experience of other States that issue handgun permits on a shall-issue basis, which is what New Jersey's Handgun Permit Law would look like without the justifiable need requirement. For example, Florida has issued 2,525,530 handgun carry licenses since 1987. *Concealed Weapon or Firearm License Summary Report*, http://licgweb.doacs.state.fl.us/stats/cw_monthly.pdf (last visited July 16, 2013). To date, Florida has revoked only 168 licenses-0.00665% – for crimes involving firearms. *Id.* In Texas, of the 63,679 criminal convictions (not just those in which firearms were used) in 2011, only 120-0.1884% – were attributed to individuals licensed to carry handguns. *Conviction Rates for Concealed Handgun License Holders*, http://www.txdps.state.tx.us/RSD/CHL/Reports/ConvictionRatesReport2011.pdf (last visited July 16, 2013).

In addition, although not all States keep detailed statistics on crimes committed by permit holders, many States keep statistics on permit revocations. For instance, Michigan issued 87,637 permits for the year ending June 30, 2011, but revoked only 466 of them. *Concealed Pistol Licensure Annual Report*, http://www.michigan.gov/documents/msp/2011_CPL_Report_376632_7.pdf (last visited July 16, 2013). Tennessee issued 94,975 handgun carry permits in 2011, suspended only 896, and revoked just 97. *Tennessee Handgun Carry Permit Statistics*, http://www.

tn.gov/safety/stats/DL_Handgun/Handgun/Handgun Report2011 Full.pdf (last visited July 16, 2013). North Carolina has issued 228,072 permits in the last 15 years but has revoked only 1,203. *North Carolina Concealed Handgun Permit Statistics by County*, http://www.ncdoj.gov/CHPStats.aspx (last visited July 16, 2013). The reasons for these revocations are unclear, but even if we assumed that *all* of them were because of misuse or accidental use of handguns, the rate in Michigan and North Carolina is 0.5%, and in Tennessee it is 0.1%.

Irrespective of what other States have done, New Jersey has decided that fewer handguns legally carried in public means less crime. And despite its assertion that the justifiable need requirement is specifically targeted to reducing misuse and accidental use, it is obvious that the justifiable need requirement functions as a rationing system designed to limit the number of handguns carried in New Jersey. The New Jersey courts have admitted as much. *See*, *e.g.*, *State v. Valentine*, 307 A.2d 617, 619 (N.J. Super. Ct. App. Div. 1973) ("[T]he overriding philosophy of our Legislature is to limit the use of guns as much as possible."); *see also Siccardi*, 284 A.2d at 540 ("[W]idespread handgun possession in the streets, somewhat reminiscent of frontier days, would not be at all in the public interest."). Even assuming that New Jersey is correct to conclude that fewer guns means less crime, a rationing system that burdens the exercise of a fundamental constitutional right by simply making that right more difficult to exercise

cannot be considered reasonably adapted to a governmental interest because it burdens the right too broadly. *See Ward v. Rock Against Racism*, 491 U.S. 781, 783 (1989) (under intermediate scrutiny, the means chosen to achieve the desired governmental objective may not be "substantially broader than necessary"). The regulation must be more targeted than that to meet intermediate scrutiny.[19]

Those who drafted and ratified the Second Amendment were undoubtedly aware that the right they were establishing carried a risk of misuse, and States have considerable latitude to regulate the exercise of the right in ways that will minimize that risk. But States may not seek to reduce the danger by curtailing the right itself. This point is made starker by the fact that the other requirements in New Jersey's permit law display a closer fit with the articulated interest of reducing misuse and accidental use. For example, New Jersey conducts a criminal background check and requires applicants to complete a training course, pass a test of the State's laws governing the use of force, and provide qualification scores

[19] To be clear, New Jersey need not show that the justifiable need requirement is the least restrictive means of combating the dangers of misuse and accidental use. Rather, New Jersey fails to meet its burden under intermediate scrutiny both because there is no reasonable fit between the justifiable need requirement and the State's asserted interest in combating misuse and accidental use of handguns, and because New Jersey's desire to ration handgun use too broadly burdens conduct protected by the Second Amendment.

from test firings administered by a certified instructor. Appellants have challenged none of these regulations.

In sum, New Jersey has not carried its burden to demonstrate that the justifiable need requirement is reasonably adapted to its interest in reducing the misuse or accidental use of handguns. Accordingly, the justifiable need requirement fails intermediate scrutiny and contravenes the Second Amendment.

B

The majority reaches the opposite conclusion by stressing deference to the New Jersey legislature and by declining to examine the justifiable need requirement itself in favor of examining the permitting requirement as a whole. Maj. Typescript at 24 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (*Turner II*)). Having already addressed the majority's error with respect to the level of generality of its analysis, a few words about deference are in order.

Although the majority is correct that we "'accord substantial deference to the predictive judgments' of the legislature, [New Jersey] is not thereby 'insulated from meaningful judicial review.'" *Heller II*, 670 F.3d at 1259 (quoting *Turner II*, 520 U.S. at 195, and *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994) (*Turner I*) (controlling opinion of Kennedy, J.)). "Rather, we must 'assure that, in formulating its judgments, the legislature has drawn reasonable

inferences based on substantial evidence.'" *Id.* (quoting *Turner II*, 520 U.S. at 195) (alteration omitted). By deferring absolutely to the New Jersey legislature, the majority abdicates its duty to apply intermediate scrutiny and effectively applies the rational basis test, contrary to the Supreme Court's explicit rejection of that test in the Second Amendment context. *Heller*, 554 U.S. at 628 n.27.

Such deference is not consistent with intermediate scrutiny because that standard places the burden of establishing both elements of its test – an important interest and a reasonable fit that does not burden more conduct than reasonably necessary – on the State. *See Fox*, 492 U.S. at 480. The majority says that "New Jersey legislators . . . have made a policy judgment that the state can best protect public safety by allowing only those qualified individuals who can demonstrate a 'justifiable need' to carry a handgun to do so," and says that this determination (and others that it notes) lead it to "refuse Appellants' invitation to intrude upon the sound judgment and discretion of the State of New Jersey." Maj. Typescript at 29, 31. Yet the majority never discusses whether those judgments violate the Constitution. It makes no mention of New Jersey's articulated policy interest in reducing the misuse or accidental use of handguns, it says nothing about whether limiting handguns to those who can show a greater need for self-defense is reasonably related to that interest, and it does not adhere to the fact that the State bears the burden of

proving the justifiable need requirement's constitutionality.

It is also notable that the majority's version of deference to the New Jersey legislature is akin to engaging in the very type of balancing that the *Heller* Court explicitly rejected. The majority states:

> It is New Jersey's judgment that when an individual carries a handgun in public for his or her own defense, he or she necessarily exposes members of the community to a somewhat heightened risk that they will be injured by that handgun. New Jersey has decided that this somewhat heightened risk to the public may be outweighed by the potential safety benefit to an individual with a "justifiable need" to carry a handgun.

Maj. Typescript at 29.

By deferring to New Jersey's judgment that the justifiable need requirement is the provision that can best determine whether the individual right to keep and bear arms "outweighs" the increased risk to the community that its members will be injured by handguns, the majority employs an "'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'" *Heller*, 554 U.S. at 634 (quoting *id.* at 689-90 (Breyer, J., dissenting)). The *Heller* Court rejected this sort of balancing inquiry as inconsistent with the very idea of constitutional rights. *Id.* at 634-35.

The majority's failure to analyze the constitutional fit between the justifiable need requirement and New Jersey's articulated interest in reducing the misuse or accidental use of firearms is thus especially troubling. Only by engaging in a true fit analysis are we faithful both to the Supreme Court's rejection of naked interest balancing and to its reminder that the Second Amendment is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626.

* * *

Gun violence is an intractable problem throughout the United States. In 2011 alone, 6,220 people were murdered by handguns,[20] and although many of the perpetrators of handgun homicides undoubtedly were unlicensed criminals, it is safe to assume that some of the perpetrators were licensed to carry. New Jersey has sought to protect its citizens by reducing the number of guns carried in public. In the bygone era when the Bill of Rights acted as a check solely on federal power, New Jersey could regulate guns as it saw fit. In the post-incorporation era, however, New Jersey must comply with the Second Amendment.

Federal judges must apply the Constitution and the precedents of the Supreme Court regardless of

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[20] FBI Uniform Crime Reports, *Crime in the United States 2011*, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/expanded-homicide-data-table-8 (last visited July 16, 2013).

what each judge might believe as a matter of policy or principle. *See Texas v. Johnson*, 491 U.S. 397, 420-21 (1989) (Kennedy, J., concurring) ("The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result."). No matter how laudable the end, the Supreme Court has long made clear that the Constitution disables the government from employing certain means to prevent, deter, or detect violent crime. *See*, *e.g.*, *United States v. Jones*, 132 S. Ct. 945 (2012); *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Kyllo v. United States*, 533 U.S. 27 (2001); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961); *see also Heller II*, 670 F.3d at 1296 (Kavanaugh, J., dissenting). And the Court has been equally clear that the courts must enforce constitutional rights even when they have "controversial public safety implications." *McDonald*, 130 S. Ct. at 3045 (controlling opinion of Alito, J.); *see also Heller*, 554 U.S. at 636 ("We are aware of the problem of handgun violence in this country, and we take seriously the concerns raised by the many *amici* who believe that prohibition of handgun ownership is a solution. . . . But the enshrinement of constitutional rights necessarily takes certain policy choices off the table."). Because I am convinced that New Jersey's justifiable need requirement unconstitutionally burdens conduct protected by the Second Amendment as interpreted in *Heller* and *McDonald*, I respectfully dissent.

**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEW JERSEY**

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| DANIEL J. PISZCZATOSKI; JOHN M. DRAKE; GREGORY C. GALLAHER; LENNY S. SALERNO; FINLEY FENTON; SECOND AMENDMENT FOUNDATION, INC.; and ASSOCIATION OF NEW JERSEY RIFLE & PISTOL CLUBS, INC.,<br><br>Plaintiffs,<br><br>v.<br><br>THE HON. RUDOLPH A. FILKO, in his Official Capacity as Judge of the Superior Court of Passaic County; THE HON. EDWARD A. JEREJIAN, in his Official Capacity as Judge of the Superior Court of Bergen County; THE HON. THOMAS A. MANAHAN, in his Official Capacity as Judge of the Superior Court of Morris County; COL. RICK FUENTES, in his Official Capacity as Superintendent of the New Jersey State Police; CHIEF ROBERT JONES, in his Official Capacity as Chief of the Hammonton, New Jersey Police | **OPINION**<br>Civ. No. 10-06110 (WHW) |

Department; CHIEF RICHARD COOK, in his Official Capacity as Chief of the Montville, New Jersey Police Department; and PAULA T. DOW, in her Official Capacity as Attorney General of New Jersey,

Defendants.

**WALLS, Senior District Judge**

This case presents a facial challenge to the constitutionality of the New Jersey law governing permits to carry handguns. The challenged provisions in N.J. Stat. § 2C:58-4 and the attendant regulations (the "Handgun Permit Law") require permit applicants to demonstrate a "justifiable need to carry a handgun," first to a police official and then to a Superior Court judge. N.J. Stat. Ann. § 2C:58-4(c)-(d) (2011).

The plaintiffs, five individuals denied handgun permits and two issue advocacy organizations, assert that the Handgun Permit Law is facially unconstitutional because it encroaches upon an alleged fundamental right to carry operable handguns for self-defense under the Second Amendment of the United States Constitution. Compl. ¶ 91. The plaintiffs allege that the Handgun Permit Law vests "uncontrolled discretion" in state officials to deny permits, which they challenge as a prior restraint. *Id.* ¶¶ 101-04. The plaintiffs further allege that requiring an applicant to demonstrate a "justifiable need" for self-protection is

an impermissible burden on the asserted Second Amendment right. *Id.* ¶¶ 107-09.

The plaintiffs move for summary judgment seeking declaratory and injunctive relief. The defendants oppose this motion and cross-move to dismiss the case for failure to state a claim. Oral argument was heard on both motions.

At the outset, it is noted to any reader of this Opinion that this Court shall be careful – most careful – to ascertain the reach of the Second Amendment right that the plaintiffs advance. That privilege is unique among all other constitutional rights to the individual because it permits the user of a firearm to cause serious personal injury – including the ultimate injury, death – to other individuals, rightly or wrongly. In the protection of oneself and one's family in the home, it is a right use. In the deliberate or inadvertent use under other circumstances, it may well be a wrong use. A person wrongly killed cannot be compensated by resurrection.

The Court finds that the Handgun Permit Law is not facially unconstitutional. The Handgun Permit Law does not on its face burden protected conduct because the Second Amendment does not include a general right to carry handguns outside the home. Alternatively, if the scope of the Second Amendment were interpreted to include a right to carry handguns outside the home for self-defense, the Court finds that the challenged provisions do not on their face unconstitutionally burden the protected conduct. The prior

restraint doctrine does not apply in the Second Amendment context and would be inapposite because the statutory scheme does not vest uncontrolled discretion in state officials to deny permits. The justifiable need requirement survives intermediate scrutiny because it is sufficiently tailored to governmental interests in regulating the possession of firearms outside the home. The Court denies the plaintiffs' motion for summary judgment and grants the defendants' motion to dismiss.

## FACTUAL AND PROCEDURAL BACKGROUND

Using a "careful grid of regulatory provisions," New Jersey closely regulates the possession and use of firearms within the state. *In re Preis*, 573 A.2d 148, 150 (N.J. 1990). The possession of firearms is a criminal offense unless a specific statutory exemption applies. N.J. Stat. Ann. § 2C:39-5 (2011). These exemptions generally allow eligible individuals to carry firearms for specific purposes, such as hunting or target practice. *Id.* § 2C:39-6(f)(1)-(2). The exemptions "draw careful lines between permission to possess a gun in one's home or place of business and permission to carry a gun." *In re Preis*, 573 A.2d at 150 (citations omitted). A person may generally keep or carry firearms "about his place of business, residence, premises or other land owned or possessed by him." N.J. Stat. Ann. § 2C:39-6(e) (2011). This exemption also allows for the secure transportation of unloaded firearms between a person's dwelling and place of business. *Id.* Outside one's home, property, or place of business, the

exemptions allowing possession and use of firearms are otherwise more restricted.

The plaintiffs challenge only the limited exemption that permits a person to carry a handgun for self-defense outside his or her home, property, or place of business. Unless a specific statutory exemption otherwise applies, a person may legally carry a handgun for self-defense only if that person first applies for and obtains the necessary permit. *Id.* § 2C:39-5(b). To qualify for a permit under the Handgun Permit Law, an applicant must demonstrate that he or she (1) is a person of good character who is not otherwise disqualified as a result of any statutory disabilities, (2) is thoroughly familiar with the safe handling and use of handguns, and (3) "has a justifiable need to carry a handgun." *Id.* § 2C:58-4(d).

New Jersey courts use a "core substantive standard" to determine whether there is "justifiable need" for a private citizen to be issued a permit to carry a handgun. *In re Preis*, 573 A.2d at 151-52. This standard requires "an urgent necessity for self-protection" based on "specific threats or previous attacks demonstrating a special danger to the applicant's life that cannot be avoided by other means." *Id.* at 152 (citing *Siccardi v. State*, 284 A.2d 533, 540 (N.J. 1971)). Neither "generalized fears for personal safety" nor the "need to protect property alone" satisfy the standard. *Id.* New Jersey's permit to carry regulation reflects this standard, requiring applicants to submit written certification of justifiable need which details

> the urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun. Where possible the applicant shall corroborate the existence of any specific threats or previous attacks by reference to reports of such incidents to the appropriate law enforcement agencies. . . .

N.J. Admin. Code § 13:54-2.4(d)(1) (2011).

The application process for handgun permits involves several tiers of review. Permit applications are first presented for investigation and preliminary approval to a designated police official, either the chief of police of the municipality in which the applicant resides or, under certain circumstances, the state police superintendent. N.J. Stat. Ann. § 2C:58-4(c) (2011). If the police official denies the initial application, then the applicant may request a hearing before a judge on the New Jersey Superior Court. *Id.* § 2C:58-4(e). If the police official approves the initial application, then the applicant presents his or her application to a Superior Court judge for final approval and issuance. *Id.* § 2C:58-4(d). If the judge is satisfied that the applicant meets the requirements, the court must approve the application and issue the permit. *Id.* Any determination that the applicant does not meet the permit requirements is subject to full appellate review. *Id.* § 2C:58-4(e). *See In re Preis*, 573 A.2d at 150; *In re Application of Borinsky*, 830 A.2d 507, 508 (N.J. Super. Ct. App. Div. 2003).

On November 22, 2010, the plaintiffs filed the complaint in the current action as a facial constitutional challenge to the Handgun Permit Law. Individual plaintiffs Daniel J. Piszczatoski, John M. Drake, Gregory C. Gallaher, Lenny S. Salerno, and Finley Fenton are each a New Jersey resident who asserts that his application for a handgun permit was denied under the challenged law solely on the grounds that he lacked a justifiable need to carry a handgun. Compl. ¶¶ 30-82. Jeffrey M. Muller was originally the lead plaintiff in this case, but he was granted a permit while this case was pending. Mots. Hr'g Tr. 3, Oct. 27, 2011. Muller's claims are now moot and were dismissed by stipulation of the parties on November 1, 2011. Stipulation of Dismissal & Substitution ¶ 1. Organizational plaintiffs Second Amendment Foundation, Inc. ("SAF") and Association of New Jersey Rifle & Pistol Clubs, Inc. ("ANJRPC") are non-profit advocacy groups that bring this suit on behalf of their membership, which includes individuals who have been denied permits or who have not applied for permits because they failed to meet the justifiable need requirement.[1] Compl. ¶¶ 83-89; Pls.' Reply Br. 6-7.

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[1] The defendants challenge the standing of the organizational defendants. Defs.' Br. 10-11. The Court need not reach this question because it is not disputed that the individual plaintiffs have standing. Where injunctive and declaratory relief are sought, courts need not reach the question of whether additional plaintiffs have standing. *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 n.9 (1977); *see also Horne v. Flores*, 129 S. Ct. 2579, 2592 (2009) ("Because the superintendent

(Continued on following page)

Defendants are state and local officials sued in their official capacities based on their responsibility for approving applications for permits to carry handguns or otherwise executing and administering New Jersey handgun laws and regulations. New Jersey Superior Court Judges Edward A. Jerejian, Rudolph A. Filko, and Thomas A. Manahan are sued based on their designated roles in approving and issuing permits in their respective counties. Compl. ¶¶ 18-22. Superior Court Judge Philip J. Maenza was dismissed as a party on November 1, 2011 after plaintiff Jeffrey Muller's claims became moot. Stipulation of Dismissal & Substitution ¶ 2. Defendants also include police officials responsible for investigating and approving permit applications, namely Col. Rick Fuentes as Superintendent of the New Jersey State Police and municipal chiefs of police Robert Jones in Hammonton, New Jersey and Richard Cook in Montville, New Jersey. Compl. ¶¶ 23-25; Stipulation of Dismissal & Substitution ¶ 3. Defendant Attorney General Paula T. Dow is sued in her role as Attorney General of the State of New Jersey. Compl. ¶ 26.

## STANDARD OF REVIEW

The plaintiffs move for summary judgment, which the defendants oppose. Summary judgment is

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clearly has standing to challenge the lower courts' decisions, we need not consider whether the Legislators also have standing to do so.").

appropriate where the moving party establishes that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). All parties agree that this lawsuit presents purely legal issues and ask the Court to resolve the suit based solely on the motions submitted. Letter from Pls. and Defs., Dec. 8, 2010, ECF No. 9.

The defendants cross-move under Federal Rule of Civil Procedure 12(b)(6) for dismissal of the complaint for failure to state a claim. To withstand a motion to dismiss, a complaint must permit the "reasonable inference that the defendant is liable for the conduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009). The court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 306 (3d Cir. 2007).

As said, this suit presents a facial challenge to New Jersey's handgun permit regulations. To prevail, the plaintiffs must establish that "no set of circumstances exists under which [the Handgun Permit Law] would be valid, *i.e.*, that the law is unconstitutional in all of its applications." *United States v. Barton*, 633 F.3d 168, 172 (3rd Cir. 2011) (citation omitted). The Third Circuit does not "recognize an 'overbreadth' doctrine" in the context of the Second Amendment. *Id.* at 172 n.3. This doctrine allows

plaintiffs to prevail on a facial challenge by showing that the statute operates unconstitutionally under some particular sets of circumstances rather than in every circumstance. Although recognized in the limited context of the First Amendment, the Supreme Court has explained that this doctrine should be applied extremely sparingly and only in light of particular First Amendment concerns. *See New York v. Ferber*, 458 U.S. 747, 766-73 (1982).

## DISCUSSION

Modern Second Amendment doctrine is a relatively new frontier. In its 2008 decision, *District of Columbia v. Heller*, the Supreme Court explicitly recognized for the first time that the Second Amendment confers an individual right to keep and bear arms. 554 U.S. 570, 595 (2008). The Court held that a District of Columbia law which forbade the individual possession of useable handguns in the home violated the Second Amendment. *Id.* Justice Scalia, writing for the majority, held that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* at 635. At the same time, the Justice wrote that the Second Amendment does not confer "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. The Court did not "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment," *id.*, and also "declin[ed] to establish a level of scrutiny for evaluating Second

Amendment restrictions." *Id.* at 634. Instead the Court held that a total ban on handgun possession in the home is unconstitutional under "any of the standards of scrutiny that we have applied to enumerated constitutional rights. . . ." *Id.* at 628. Later in *McDonald v. City of Chicago*, the Supreme Court determined that the Second Amendment applies to state as well as federal laws through the Fourteenth Amendment, but provided little additional guidance on how it should be applied. 130 S.Ct. 3020, 3026 (2010); *see United States v. Marzzarella*, 614 F.3d 85, 88 n.3 (3d Cir. 2010) ("*McDonald* dealt primarily with the incorporation of the Second Amendment against the states and does not alter our analysis of the scope of the right to bear arms.") (internal citation omitted).

In the wake of *Heller* and *McDonald*, lower courts have endeavoured to resolve the uncertainty left by these decisions by (1) outlining the appropriate scope of the individual Second Amendment rights defined in *Heller* and (2) determining the appropriate standard of scrutiny for federal, state, and local laws that may burden these rights. *See United States v. Masciandaro*, 638 F.3d 458, 467 (4th Cir.), *cert. denied*, No. 10-11212, 2011 WL 2516854 (Nov. 28, 2011). The Third Circuit has marked "a two-pronged approach" to Second Amendment challenges that addresses these issues sequentially. *Marzzarella*, 614 F.3d at 89. First, the Court considers "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. If it does not, our inquiry is complete. If it does,

we evaluate the law under some form of means-end scrutiny." *Id.* (internal citation omitted). Similar two-step approaches have been adopted in other circuits as well. *See Heller v. District of Columbia*, No. 10-7036, 2011 WL 4551558, at *5 (D.C. Cir. Oct. 4, 2011) (hereinafter "*Heller II*"); *Ezell v. City of Chicago*, 651 F.3d 684, 702-04 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010).

## I. The Handgun Permit Law does not burden conduct protected by the Second Amendment.

The first question is whether the challenged law "regulates conduct that falls within the scope of the Second Amendment." *Marzzarella*, 614 F.3d at 89. To state a valid facial challenge, the plaintiffs must demonstrate that the challenged law is invalid as to every set of circumstances to which applied. *Barton*, 633 F.3d at 172. To do this, the plaintiffs must establish that the scope of the Second Amendment extends to all applications of the challenged law. *See id.* In other words, the Second Amendment must protect the right to carry a handgun for self-defense wherever the Handgun Permit Law requires applicants to apply for a permit and demonstrate a justifiable need for self-protection. This Court finds that the challenged law is not facially unconstitutional because it can be applied without creating a burden on protected conduct. The Second Amendment does not protect an absolute right to carry a handgun for self-defense

outside the home, even if the Second Amendment may protect a narrower right to do so for particular purposes under certain circumstances.

The Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. From an extensive textual and historical analysis, *Heller* determined that this language was adopted to protect a pre-existing individual right to possess and carry weapons in certain circumstances. *Heller*, 554 U.S. at 592-95. Because the specific question before the Supreme Court was whether the District of Columbia's prohibition of keeping useable handguns in the home violated the Second Amendment, *Heller* clearly held that the Second Amendment protects at its core an individual right to possess and use a handgun for self-defense within the home. *Id.* at 635 ("[W]hatever else it leaves to future evaluation, [the Second Amendment] surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home."). While *Heller* did not establish a right to carry a handgun for self-defense outside the home, the majority opinion did not explicitly foreclose later extension of the core right.

Because New Jersey's Handgun Permit Law does not affect one's ability to legally carry a handgun in one's home, private property, or place of business, this case requires that this Court address the extent to which the Second Amendment protects a right for individuals to carry handguns outside the home.

As the Fourth Circuit has explained, a "dilemma faced by lower courts in the post-*Heller* world" has been "how far to push *Heller* beyond its undisputed core holding." *Masciandaro*, 638 F.3d at 475. Since neither the Supreme Court nor the Third Circuit has decided the extent to which the Second Amendment applies outside the home, this Court looks at the question through the lens of the reasoning of *Heller* and *McDonald* as applied by the Third Circuit and, where relevant, other circuits.

The parties here advance competing interpretations of the scope of the individual Second Amendment right to keep and bear arms outside the home. Based on a broad reading of the majority opinion in *Heller*, the plaintiffs argue that the Second Amendment protects a "general right to carry handguns, in public, for self-defense" and that protected conduct is necessarily burdened by the challenged law. Pls.' Br. 15. The defendants reply that the conduct regulated by the challenged law is outside the scope of the Second Amendment because *Heller* and *McDonald* recognized only the "right to possess a handgun in the home for the purpose of self-defense" and that there is no basis for extending this right beyond the home. Defs.' Br. 13-14. The plaintiffs counter that *Heller* "plainly recognize[s] that the right to keep and bear arms is not confined to the home, and that the home is merely a place where the right is at its zenith." Pls.' Reply Br. 17.

### A. *Heller* recognized only an individual right to carry handguns for self-defense in the home.

The focus of the plaintiffs' argument is a textual emphasis on *Heller*'s interpretation of the language of the Second Amendment's protection of the individual right to "bear" arms as a right to "carry" firearms in non-sensitive places. The plaintiffs insist that *Heller* "necessarily ruled – held – that the Second Amendment protects an enumerated right to carry guns. This right does not hang on whether one is located in his or her home." *Id.* at 9. Furthermore, they argue that "a key aspect of the Court's ruling was its conclusion that the Second Amendment's right to 'bear Arms' is not an idiomatic reference, but is instead a general right to carry firearms." *Id.* at 12.

Even though *Heller* uses some broad language in recognizing an individual right to bear arms, closer inspection reveals that plaintiffs' argument ultimately misses the mark. *Heller*'s recognition of the right to "bear" arms as a right to "carry" does not inexorably lead to the conclusion that there is a general right to carry arms outside the home. Instead, this definition simply serves to emphasize the nature of the right as an individual right to carry "for a particular purpose – confrontation." *Heller*, 554 U.S. at 584. *Heller* found that the individual right to carry a firearm for confrontation was obviously not an "unlimited" right to carry "for any sort of confrontation," but included a right to carry a handgun "for self-defense in the home." *Id.* at 595, 636. The District of Columbia could

not require that a handgun be kept inoperable in the home and could not "prevent a handgun from being moved throughout one's house." *Id.* at 584 (quoting *Parker v. District of Columbia*, 478 F.3d 370, 400 (D.C. Cir. 2007)).

The language of Justice Scalia's majority opinion deliberately limited the scope of the right recognized to the home. The Southern District of New York recently noted that *Heller*'s focus on the right to carry a handgun "for the purpose of 'self-defense in the home' permeates the Court's decision and forms the basis for its holding – which, despite the Court's broad analysis of the Second Amendment's text and historical underpinnings, is actually quite narrow." *Kachalsky v. Cacace*, No. 10-CV-5413, 2011 WL 3962550, at *19 (S.D.N.Y. Sept. 2, 2011). Judge Easterbrook writing en banc for the Seventh Circuit explained that *Heller*'s language "warns readers not to treat *Heller* as containing broader holdings than the Court set out to establish: that the Second Amendment creates individual rights, one of which is keeping operable handguns at home for self-defense." *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc), *cert. denied*, 131 S.Ct. 1674 (2011).

Even though notably the District of Columbia more generally prohibited handgun possession both inside and outside the home, the majority focused on the specific question presented – whether the Second Amendment protects an individual right to keep and carry handguns in the home. *Heller*, 554 U.S. at 574-75, 628. As a result, *Heller* repeatedly and specifically

limited itself to the home. Justice Scalia explained, "In sum, we hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *Id.* at 635. He emphasized that "whatever else it leaves to future evaluation, [the Second Amendment] surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id.* As a result, the Second Amendment "necessarily takes certain policy choices off the table," including "the absolute prohibition of handguns held and used for self-defense in the home." *Id.* at 636.

Much of *Heller*'s reasoning refers to the need for self-defense specifically in the home. Justice Scalia emphasized that the challenged statute "extends, moreover, to the home, where the need for defense of self, family, and property is most acute." *Id.* at 628. He listed potential reasons that "a citizen may prefer a handgun for home defense" and concluded that "handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid." *Id.* at 629. The reasoning is so tied to the holding that it loses context if one tries to broadly apply it, as the plaintiffs seek, to a general right to carry such weapons for self-defense outside the home.

*Heller*'s reasoning leaves room for the possibility that the Second Amendment could apply to self-defense outside the home in limited circumstances,

but does not recognize or even suggest a broad general right to carry arms. Justice Scalia insisted that "we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment." *Id.* at 626. Because *Heller* was the Supreme Court's "first in-depth examination of the Second Amendment," he wrote that "one should not expect it to clarify the entire field. . . ." *Id.* at 635. He did emphasize that "the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. If the Supreme Court majority had intended to create a broader general right to carry for self-defense outside the home, Heller would have done so explicitly.

### B. Courts have declined to extend Heller beyond its core holding to recognize a general right to carry for self-defense.

Although the Third Circuit has not specifically considered whether the Second Amendment right to carry a handgun for self-defense extends outside the home, the court's formulation of the scope of the right recognized in *Heller* is inconsistent with the plaintiffs' arguments for a broad general right to carry for self-defense outside the home. Consistent with the approach taken by the Third Circuit, other circuits have applied the right outside the home only in limited circumstances or declined to reach the issue where alternative grounds for upholding a law are available. State courts and federal district courts have also

consistently declined to recognize any broad general right to carry outside the home.

In upholding a federal law criminalizing possession of a firearm with an obliterated serial number, the Third Circuit in *Marzzarella* noted that "*Heller* delineates some of the boundaries of the Second Amendment right to bear arms." 614 F.3d at 92. The circuit court interpreted *Heller* as holding that, "[a]t its core, the Second Amendment protects the right of law-abiding citizens to possess non-dangerous weapons for self-defense in the home."[2] *Id.* (citing *Heller*, 554 U.S. at 635). *See also Barton*, 633 F.3d at 170-71 ("At the 'core' of the Second Amendment is the right of 'law-abiding, responsible citizens to use arms in defense of hearth and home.'") (quoting *Heller*, 554 U.S. at 635). Although the law at issue in *Marzzarella* applied both within and outside the home, the court explicitly limited its formulation of the scope of *Heller*'s core right to carry for self-defense in the home.

*Marzzarella* also observed that "certainly, to some degree, [the Second Amendment] must protect the right of law-abiding citizens to possess firearms for other, as-yet-undefined, lawful purposes." 614 F.3d at 92. The examples the Third Circuit provided,

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[2] The Third Circuit explained that the misleading term of art "non-dangerous weapons" refers specifically "to weapons that do not trigger *Miller*'s exception for dangerous and unusual weapons." *Marzzarella*, 614 F.3d at 92 n.10. *See Heller*, 554 U.S. at 624-26 (citing *United States v. Miller*, 307 U.S. 174, 178 (1939)).

however, were for purposes other than self-defense. *Marzzarella* specifically referred to *Heller*'s discussions of "hunting's importance to the pre-ratification conception of the right" and "the right to bear arms as a bulwark against potential governmental oppression." *Id.* (citing *Heller*, 554 U.S. at 599). While *Marzzarella* did not explicitly preclude the possibility that the Second Amendment right extends to self-defense outside the home, the Third Circuit clearly has not recognized or even suggested such a right.

Other circuits have also recognized *Heller*'s limited definition of the right, even where the challenged law applied more broadly. The Seventh Circuit en banc in *United States v. Skoien* explained that "the Second Amendment creates individual rights, one of which is keeping operable handguns at home for self-defense. What other entitlements the Second Amendment creates, and what regulations legislatures may establish, were left open." 614 F.3d at 640. In *Heller II*, the District of Columbia Circuit applied *Heller* by considering whether certain novel registration requirements "make it considerably more difficult for a person lawfully to acquire and keep a firearm, including a handgun, for the purposes of self-defense in the home – the 'core lawful purpose' protected by the Second Amendment." 2011 WL 4551558, at *8 (citing *Heller*, 554 U.S. at 630). *See also Moreno v. New York City Police Dep't*, No. 10-cv-6269, 2011 WL 2748652, at *3 (S.D.N.Y. May 7, 2011) ("*Heller* has been narrowly construed, as protecting the individual right to bear arms for the specific purpose of self-defense

within the home."), *report and recommendation adopted*, 2011 WL 2802934 (S.D.N.Y. July 14, 2011).

Recognizing the uncertainty surrounding *Heller*'s application outside the home, the Fourth Circuit in *Masciandaro* explicitly declined to decide whether Second Amendment rights extended beyond the home in upholding a conviction under a federal law prohibiting possession of a loaded handgun in a motor vehicle within a national park. 638 F.3d at 474-75. Although Judge Niemeyer wrote for the panel on all other issues, he wrote separately in finding that the law burdened the Second Amendment rights of an individual sleeping in his car with a handgun for self-defense. *Id.* at 468. That judge argued that "a plausible reading of *Heller* " could provide "a constitutional right to possess a loaded handgun for self-defense outside the home" that extended "at least in some form" to "wherever a person could become exposed to public or private violence." *Id.* at 467-68.

The majority specifically declined to follow his finding, upholding the conviction solely on the basis that the law would survive intermediate scrutiny even if it was found to burden protected conduct. *Id.* at 475. Describing the scope of Second Amendment rights as "a vast terra incognita," the majority explained that there "may or may not be a Second Amendment right in some places beyond the home, but we have no idea what those places are" or even "what the criteria for selecting them should be. . . ." *Id.* Declining to "break ground that our superiors have not tread," the majority noted that it was "not

far-fetched to think" that *Heller* intentionally left open the applicability of the Second Amendment outside the home because the dangers of accidentally formulating the right to bear arms too broadly "would rise exponentially as one moved the right from the home to the public square." *Id.* at 475-76.

In finding that a statute banning firing ranges from Chicago likely violates the Second Amendment, the Seventh Circuit panel in *Ezell v. City of Chicago* recently recognized a limited Second Amendment right to bear arms outside the home. 651 F.3d 684, 710-11 (7th Cir. 2011). Because firing range training was a prerequisite to all lawful carry, including in the home, the statute at issue in *Ezell* actually operated as a "complete ban on gun ownership within City limits" and "imposed an impossible pre-condition on gun ownership for self-defense in the home." *Id.* at 711-12 (Rovner, J., concurring). Judge Sykes, writing for the majority, reasoned that the "right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn't mean much without the training and practice that make it effective." *Id.* at 704. Notably, since N.J. Stat. § 2C:39-6(f) contains explicit provisions for the use of handguns for target practice, any similar right recognized in this circuit would not be burdened by the Handgun Permit Law.

Judicial authority addressing this issue favors planting the right to self-defense in the home or extending it outside the home only in a limited way. State and federal courts have consistently upheld

statutory schemes comparable to New Jersey's Handgun Permit Law on the grounds that they do not burden protected conduct.

The Southern District of New York recently denied a constitutional challenge to a comparable New York state law. *Kachalsky*, 2011 WL 3962550, at *30. The New York law conditions licenses to carry handguns on a discretionary determination that "proper cause exists for the issuance thereof," which has been "interpreted by New York state courts to mean 'a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.'" *Id.* at *1-2 (internal citations omitted). *Kachalsky* found that "the scope of the Second Amendment right in *Heller* does not extend to invalidate regulations . . . on carrying handguns." *Id.* at *20. "[T]he language of *Heller* makes clear that the Court recognized 'not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose,' but rather a much narrower right – namely the 'right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" *Id.* (quoting *Heller*, 554 U.S. at 626, 635). Even where the licensing law regulates possession in the home, the Southern District of New York has upheld it against constitutional challenge. *See Moreno*, 2011 WL 2748652, at *4 (finding that as long as the denial of an "application comports with New York licensing laws – which regulate, but do not prohibit, firearm possession in the home – this Court finds that the

denial is consistent with *Heller* and does not infringe upon [the applicant's] Second Amendment rights").

The District of Hawaii also dismissed a constitutional challenge to a statute requiring an applicant to demonstrate need to carry a handgun outside the home. *Young v. Hawaii*, No. 08-cv-00540, 2009 WL 1955749, at *9 (D. Haw. Jul. 2, 2009). Reading *Heller*, the court concluded that it could not "identify any language that establishes the possession of an unconcealed firearm in public as a fundamental right. *Heller* held as unconstitutional a law that effectively banned the possession of a useable handgun in one's home." *Id.*

State courts have also consistently upheld convictions for unlawful possession of a handgun in public without a permit despite arguments that the underlying permit laws were unconstitutional under the Second Amendment. The Maryland Court of Appeals upheld a conviction for possession of a handgun in public without a permit on the grounds that the permit requirement did not burden any Second Amendment rights. *Williams v. State*, 10 A.3d 1167, 1177-78 (Md. 2011), *cert. denied, Williams v. Maryland*, No. 10-1207, 2011 WL 4530130 (Oct. 3, 2011). The court wrote "it is clear that prohibition of firearms in the home was the gravamen of the certiorari questions in both *Heller* and *McDonald* and their answers. If the Supreme Court . . . meant its holding to extend beyond home possession, it will need to say so more plainly." *Id.* The Supreme Court declined to review that holding by its denial of certiorari. The statute

upheld in *Williams* is similar to New Jersey's in that one requirement to obtain a permit is that the applicant "has good and substantial reason to wear, carry, or transport a handgun, such as a finding that the permit is necessary as a reasonable precaution against apprehended danger." Md. Code Ann., Pub. Safety § 5-301(d) (West 2003). Maryland's regulations require consideration of the "[r]easons given by the applicant as to whether those reasons are good and substantial; . . . Whether the applicant has any alternative available to him for protection other than a handgun permit; . . . [and] Whether the permit is necessary as a reasonable precaution for the applicant against apprehended danger." Md. Code Regs. 29.03.02.04 (2011).

In *People v. Dawson*, the Illinois Appellate Court upheld the defendant's conviction under a statute barring individuals from carrying loaded firearms. *People v. Dawson*, 934 N.E.2d 598, 604, 607 (Ill. App. Ct. 2010), *cert. denied, Dawson v. Illinois*, 131 S.Ct. 2880 (2011). The Illinois court noted that the Supreme Court "deliberately and expressly maintained a controlled pace" in outlining the scope of the Second Amendment and limited its holdings in both *Heller* and *McDonald* to "the right to possess handguns in the home, not the right to possess handguns outside of the home in case of confrontation. . . ." *Id.* at 605-06. Because the statute did not prohibit possession of a firearm in one's "legal dwelling," it "does not implicate the fundamental right to keep and bear arms in one's home for self-defense." *Id.* at 607. *See also*

*People v. Aguilar*, 944 N.E.2d 816, 826-28 (Ill. App. Ct. 2011) ("No reported cases have held that *Heller* or *McDonald* preclude states from prohibiting the possession of handguns outside the home."), *appeal allowed*, 949 N.E.2d 1099 (Ill. 2011). The District of Columbia has also upheld convictions under a law prohibiting individuals from carrying handguns in public without a license. *See Little v. United States*, 989 A.2d 1096, 1101 (D.C. 2010) ("Appellant concedes that he was not in his own home. Thus, appellant was outside of the bounds identified in *Heller, i.e.*, the possession of a firearm in one's private residence for self-defense purposes."). *See also Sims v. United States*, 963 A.2d 147, 149-50 (D.C. 2008).

### C. Historical sources cited by *Heller* reveal at most historical uncertainty about the scope of the right outside the home.

In addition to relying on the language of *Heller*, the plaintiffs argue that the historical understanding of the enumerated rights codified in the Second Amendment included a general right to carry arms for self-defense. Justice Scalia wrote in *Heller* that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them. . . ." *Heller*, 554 U.S. at 634-35. Because the "original meaning" of the Second Amendment included a recognition that "some categorical limits are proper," legislatures have retained power to enact regulations limiting firearm possession that are outside the

scope of the Second Amendment. *Skoien*, 614 F.3d at 640. As the Third Circuit has interpreted *Heller*, laws regulating possession that fall outside the scope of the Second Amendment must be based either on (1) longstanding historical regulations that have become incorporated over time into the understanding of the right or (2) novel regulations designed to address a heightened capability to cause damage. *Marzzarella*, 614 F.3d at 91-95.

The plaintiffs point to the reasoning of a selection of nineteenth-century authorities mentioned in *Heller* to support their proposition "that concealed carry might be banned if people were still allowed to carry guns openly." Pls.' Br. 16. The plaintiffs argue that "if concealed carry bans can be upheld only where open carry remains available, then ipso facto, there is a basic right to 'carry' guns – perhaps subject to a requirement that the gun be kept concealed or exposed." Pls.' Br. 17. The plaintiffs also refer to *Peruta v. County of San Diego*, a Southern District of California opinion, to support their conclusion that "the right to bear arms historically allowed concealed carry to be banned where 'alternative forms of carrying arms were available.'" Pls.' Reply Br. 26 (citing 758 F. Supp. 2d 1106, 1114 (S.D. Cal. 2010)).

That conclusion is off-target because the focus of the nineteenth-century cases was on the upholding of prohibitions on concealed carry of arms. *Heller* cited these cases to emphasize that the Second Amendment does not convey "a right to keep and carry any weapon

whatsoever in any manner whatsoever and for whatever purpose." 554 U.S. at 629. Only one nineteenth-century case went far afield to find that a handgun ban was unconstitutional to the extent that it also categorically prohibited the open carry of a pistol. *Nunn v. State*, 1 Ga. 243, 251 (1846) (cited in *Heller*, 554 U.S. at 629.).

Rather than establishing that there is a general right to carry firearms outside the home for self-defense, these cases stand for little more than a suggestion that a categorical ban on carrying firearms in public without any alternative could implicate the Second Amendment. This Court agrees with the Southern District of New York's reading that these cases

> seem not to be premised on the existence of open carry provisions specifically, but rather on the existence of provisions for some other means of carry generally; in other words, they suggest that such statutes would fail to pass muster only if functioning as complete bans to carrying weapons outside the home under any circumstances.

*Kachalsky*, 2011 WL 3962550, at *22. As *Kachalsky* noted, the plaintiffs' reading is also in tension with other nineteenth-century cases that upheld the constitutionality of more general bans on carrying handguns outside the home either openly or concealed. *Id.* That court cited *Fife v. State* as upholding a statute that generally prohibited carrying a pistol as a weapon because this prohibition was a lawful

"exercise of the police power of the State without any infringement of the constitutional right." *Id.* (quoting 31 Ark. 455, 1876 WL 1562, at *4 (1876)). *See also State v. Workman*, 14 S.E. 9, 11 (W.Va. 1891).

Furthermore, because these are nineteenth-century cases, they do not specifically define the scope of the pre-existing right at the time the Second Amendment was adopted but provide a window into "the public understanding of a legal text in the period after its enactment or ratification." *Heller*, 554 U.S. at 605. Without engaging in a full historical analysis of the scope of the right to bear arms as it was understood at the time the Second Amendment was adopted, these sources serve only to reveal a historical uncertainty in applying the Second Amendment outside the home that long pre-dates the Supreme Court's 2008 decision. Given this uncertainty, it follows that the historical sources cited by *Heller* do not establish that the individual right necessarily extended to a broad general right to carry for self-defense. At most, they suggest that there may be a limited right to carry a handgun outside the home for certain purposes in certain situations that should be explored and determined on a case-by-case basis.

*Peruta* does not support the proposition that the historical scope of the Second Amendment has been held to extend outside the home. Contrary to plaintiffs' assertion that *Peruta* "certainly recognized a general right to carry guns in public," Pls.' Reply Br. 26, *Peruta* expressly avoided the question. The court explicitly said that it did "not need to decide whether

the Second Amendment encompasses Plaintiffs' asserted right to carry a loaded handgun in public." *Peruta*, 758 F. Supp. 2d at 1115. The plaintiffs' [sic] themselves quote the court as writing "*to the extent* [the concealed weapon law] burden[s] conduct falling within the scope of the Second Amendment, *if at all*, the burden is mitigated by the provisions . . . that expressly permit loaded open carry for immediate self-defense." Pls.' Reply Br. 26 (quoting *Peruta*, 758 F. Supp. 2d at 1114-15) (emphasis added, emphasis in original omitted). The *Peruta* court discussed concealed versus unconcealed, or open, carry to address only whether the challenged concealed carry law could survive the applicable level of scrutiny for the statutory scheme as a whole. It assumed for the sake of disposing of the case that the Second Amendment right did extend outside the home, without addressing its scope. *Peruta*, 758 F. Supp. 2d at 1114-15.

To further support their reading of *Heller* as recognizing a historical general right to carry a handgun for self-defense, the plaintiffs point to *Heller*'s examples of historical regulations that do not burden conduct protected by the Second Amendment. They cite *Heller*'s suggestion that laws burdening the individual ability to possess firearms in "sensitive places such as schools and government buildings" are "presumptively lawful." *See Heller*, 554 U.S. at 626, 627 n.26. In a twist of logic, the plaintiffs argue that "this cautionary statement recognizes that carry bans are not presumptively lawful when they pertain to

places that are not sensitive." Pls.' Br. 15-16 (internal citations omitted).

To the extent that the Supreme Court has not yet established a right to carry a handgun for self-defense outside the home, these categorical exceptions are irrelevant and do not establish outer bounds for the scope of Second Amendment rights. In noting a longstanding history of prohibiting firearms in sensitive places, *Heller* was simply identifying one of several common firearms regulations that were clearly beyond the scope of the Second Amendment. The en banc Seventh Circuit decision in *Skoien* has warned that these references function as "precautionary language" about the limits of the Second Amendment rights recognized in *Heller* rather than "a comprehensive code" outlining the exact scope of those rights. 614 F.3d at 640.

The logical fallacy of the plaintiffs' argument that the sensitive places exception necessitates the interpretation that the Supreme Court recognized a general right to carry outside the home is easily demonstrated. While *Heller*'s underlying reasoning does imply that there are some situations where the Second Amendment includes a right to carry outside the home, logic does not bear the argument that the Supreme Court necessarily recognizes a general right to carry for self-defense in all non-sensitive locations. This presumptively lawful "sensitive places" ban could apply to cases having nothing to do with self-defense. Since *Heller*'s language limits even possession in a sensitive place, this prohibition could apply to the

transport of weapons in an inoperable state through sensitive places. The exclusion on possessing firearms in sensitive places could also implicate other potentially protected Second Amendment rights, such as possessing firearms for the purposes of hunting or protection against governmental oppression. *See Marzzarella*, 614 F.3d at 92.

And even if the Court was indicating, however obliquely, that the Second Amendment right to carry a gun for self-defense extends outside the home, it does not follow that it extends to a general right to carry everywhere. The plaintiffs erroneously argue that a categorical exception for sensitive places would have no effect if there is not an absolute right to carry firearms in public. This argument ignores the possibility that the Second Amendment right could extend outside the home in limited circumstances and locations, and that those locations could be subject to a sensitive places exception. Courts could potentially find that there are locations outside the home where there is an established historical right to bear arms for self-defense based on an individual's vulnerability in that location. As example, the Handgun Permit Law would continue to be outside the scope of the Second Amendment even if the Supreme Court were to recognize a right to carry in one's place of business. The Handgun Permit Law allows individuals to carry handguns within their "place of business" without requiring them to demonstrate justifiable need. N.J. Stat. Ann. § 2C:39-6(e) (2011). But even if, hypothetically, the Second Amendment were to extend to one's

place of business, New Jersey would be free to prohibit people from bringing handguns to work if they work in sensitive locations. *Heller*'s statement about the presumptive lawfulness of laws limiting the right to carry in sensitive places would be fully operative despite the absence of an absolute constitutional right to carry firearms in public.

Where the scope of the historical right to keep and bear arms under the Second Amendment is unclear, this right should be narrowly construed against recognizing an absolute right to carry in public. As said when this Opinion began, the Second Amendment is unique among the enumerated constitutional rights because it permits the use of a lethal weapon by one person who rightly or wrongly may cause serious personal injury – including the ultimate injury of death – to another person. The inherent risks associated with the public exercise of that right require this Court to carefully analyze the self-described limited scope of *Heller*.

Given the considerable uncertainty regarding if and when the Second Amendment rights should apply outside the home, this Court does not intend to place a burden on the government to endlessly litigate and justify every individual limitation on the right to carry a gun in any location for any purpose. The risks associated with a judicial error in discouraging regulation of firearms carried in public are too great. *See United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) ("This is serious business. We do not wish to be even minutely responsible for some unspeakably

tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights.")

Drawing a historical distinction between the constitutional right to carry for self-defense at home and any right to carry for self-defense in public is neither unreasonable nor arbitrary. New Jersey, like other jurisdictions, already makes a significant distinction under its criminal laws by justifying the use of deadly force for self-defense without an obligation to retreat in the home. N.J. Stat. Ann. § 2C:3-4 (2011). *See*, *e.g.*, *People v. Tomlins*, 107 N.E. 496, 497 (N.Y. 1914) ("It is not now, and never has been the law that a man assailed in his own dwelling is bound to retreat. . . . Flight is for sanctuary and shelter, and shelter, if not sanctuary, is in the home. That there is, in such a situation, no duty to retreat is, we think, the settled law in the United States as in England."); *see also* 40 Am. Jur. 2d *Homicide* § 163 (2011) ("Regardless of any general theory to retreat . . . before one can justify . . . taking life in self-defense, the law imposes no duty to retreat upon one who . . . is attacked at or in his or her own dwelling or home. . . . [T]he rule is practically universal. . . ."). The Supreme Court has found limitations on the scope of a constitutional right outside the home in the First Amendment context, recognizing a right to privately possess obscene materials in the home but allowing the states broad power to regulate obscenity outside the home. *Stanley v. Georgia*, 394 U.S. 557, 565-68 (1969).

### D. Longstanding handgun permit regulations requiring applicants to demonstrate need do not burden protected conduct.

To the extent that New Jersey's Handgun Permit Law may implicate some narrow right to carry a firearm outside the home, the challenged provisions would not necessarily burden any protected conduct. The requirement that an applicant demonstrate need for a permit to carry a handgun in public is a "longstanding" licensing provision of the kind that *Heller* identified as presumptively lawful. 554 U.S. at 626-27, 627 n.26. The Third Circuit has found that these longstanding regulations have become exceptions to the right to keep and bear arms so that the regulated conduct falls outside the scope of the Second Amendment. *United States v. Barton*, 633 F.3d 168, 172 (3d Cir. 2011) (citing *Marzzarella*, 614 F.3d at 91); *United States v. Huet*, No. 10-4729, 2012 WL 19378 at *8 (3d Cir. Jan. 5, 2012). *Marzzarella* explained that this list of presumptively lawful regulations was not exhaustive and that other laws "derived from historical regulations" could be outside the scope of the Second Amendment. 614 F.3d at 92-93.

The District of Columbia Circuit in *Heller II* found that certain basic handgun registration requirements are presumptively outside the scope of the Second Amendment based on their historical acceptance. 2011 WL 4551558, at *7. The court explained that a longstanding regulation "necessarily . . . has long been accepted by the public" and that

"concomitantly the activities covered by a longstanding regulation are presumptively not protected from regulation by the Second Amendment." *Id.* at *6. The court focused on the fact that the specific registration requirements it upheld were "longstanding in American law, accepted for a century in diverse states and cities and now applicable to more than one fourth of the Nation by population." *Id.* at *7. Similarly, the New Jersey Handgun Permit Law's requirement that an applicant demonstrate need to carry a handgun to state officials is longstanding.

The challenged provisions are longstanding because they are almost a century old. Noting that the "New Jersey Legislature has long been aware of the dangers inherent in the carrying of handguns and the urgent necessity for their regulation," the New Jersey Supreme Court has traced the history of the Handgun Permit Law and its requirement that an applicant demonstrate need as far back as the 1920s. *Siccardi v. State*, 284 A.2d 533, 538 (N.J. 1971).

> [A]lmost a half century ago [the New Jersey Legislature] directed that no persons (other than those specifically exempted such as police officers and the like) shall carry handguns except pursuant to permits issuable only on a showing of 'need.' L. 1924, c.137; R.S. 2:176-41-44. Under the terms of the 1924 statute the application for permit was submitted to the local chief of police for approval and, on approval, to the Justice of the Supreme Court holding the circuit for the county in which the applicant was a resident.

> If, after investigation, the Justice was satisfied with the sufficiency of the application and 'the need of such person carrying concealed upon his person, a revolver, pistol or other firearm' he would issue the permit.

*Id.* Since that time, "there were many enactments affecting firearms but none of them changed the requirement that 'need' must be shown for the issuance of a permit to authorize the carrying of a handgun." *Id. See also In re Preis*, 573 A.2d 148, 151 (N.J. 1990). As a result, the challenged New Jersey handgun permitting requirements have been in effect and accepted by the public with substantially similar substance and procedure for almost a century.

Without undertaking a full historical survey, this Court also notes that New Jersey is not the only state with a longstanding regulation by which permits to carry handguns are issued based on a discretionary determination of need or cause. New York has an even longer history of requiring a judicial or law enforcement official to grant a permit to carry a pistol based on a finding "that proper cause exists for the issuance thereof. . . ." *See People v. Tarantolo*, 194 N.Y.S. 672 (N.Y. App. Div. 1922) (quoting N.Y. Penal Law § 1897 (1919)). *See also Moore v. Gallup*, 45 N.Y.S.2d 63, 64-65, 68 (N.Y. App. Div. 1943) (upholding determination that a resident with good moral character and proper training alone failed to meet the "proper cause" standard for issuing a permit to carry). Notably, these statutes were adopted in the same era that states began adopting the felon in possession

statutes that *Heller* explicitly recognized as being presumptively lawful longstanding regulations. *Heller II*, 2011 WL 4551558, at *6 (citing *Heller*, 554 U.S. at 630) ("The Court in *Heller* considered 'prohibitions on the possession of firearms by felons' to be 'longstanding' although states did not start to enact them until the early 20th century.").

This analysis further supports the conclusion that the challenged provisions of the Handgun Permit Law fall outside the scope of the Second Amendment. These provisions do not burden the right to possess handguns in the home for self-defense recognized in *Heller*. The Supreme Court has not recognized any absolute Second Amendment right to carry firearms in public for self-defense and the historical record does not persuade this Court that the holding of *Heller* should be extended to establish such. To the extent that the Second Amendment right may narrowly extend outside the home in certain circumstances, New Jersey's permit requirements are longstanding regulations that are presumptively constitutional. While this Court finds unequivocally that the challenged provisions fall outside the scope of *Heller*'s Second Amendment right, because this area of law is unsettled the Court deems it prudent to address, under *Marzzarella*'s second prong, whether the challenged provisions would survive the appropriate level of scrutiny.

## II. The Handgun Permit Law passes constitutional muster.

If the scope of the Second Amendment extended to a right to carry handguns for self-defense outside the home, that right would still be subject to government regulation which does not unconstitutionally burden protected conduct. To repeat, the plaintiffs allege that the challenged provisions of the Handgun Permit Law are facially unconstitutional for two reasons: they vest "uncontrolled discretion" in the hands of state officials, Compl. ¶¶ 101-04, and "impermissibly burden" the alleged right by "requiring private citizens to show 'justifiable need' or 'urgent necessity for self protection,'" Compl. ¶ 108.

These provisions pass constitutional muster even if they burden conduct within the scope of the Second Amendment. The Handgun Permit Law would not be facially unconstitutional as a prior restraint because this doctrine should not be imported into the Second Amendment context and because the challenged provisions do not vest uncontrolled discretion in state officials. The justifiable need requirement would survive the intermediate scrutiny analysis applied to laws burdening protected conduct outside the core Second Amendment right because this requirement is sufficiently tailored to address an important state interest.

### A. The Handgun Permit Law is not invalid as a prior restraint vesting uncontrolled discretion to state officials.

The plaintiffs argue that the Handgun Permit Law is facially unconstitutional under the Second Amendment because it gives the government "uncontrolled discretion" over licenses to state officials. Compl. ¶¶ 101-04. This argument rests on the plaintiffs' importation of the First Amendment analysis of prior restraints on speech to the Second Amendment context. *See* Pls.' Br. 21-22 (arguing that First Amendment principles should apply to the Second Amendment). Under the First Amendment, facial challenges to laws that burden "free expression" are permitted when "a licensing statute plac[es] unbridled discretion in the hands of a government official. . . ." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757 (1988).

The defendants argue that "there is no basis or precedence for taking the prior restraint framework out of the First Amendment jurisprudence, to which it has been specifically limited, and applying it in this context." Defs.' Reply Br. 10. The general rule is that facial challenges are disfavored. It is only in light of particular censorship related concerns that "they have been permitted in the First Amendment context where the licensing scheme vests unbridled discretion in the decisionmaker and where the regulation is challenged as overbroad." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223 (1990) (O'Connor, J., concurring); *see also City of Lakewood*, 486 U.S. at 759

("[U]nbridled licensing schemes" are subject to facial challenge when the law has "a close enough nexus to expression . . . to pose a real and substantial threat of the identified censorship risks."). As the Third Circuit has declined to extend overbreadth doctrine from the First Amendment to the Second Amendment, *see United States v. Barton*, 633 F.3d 168, 172 n.3 (3rd Cir. 2011), the prior restraint doctrine should not be transplanted from the First Amendment free expression context to a facial challenge analysis under the Second Amendment.

Even if the prior restraint framework were to apply, this Court finds that the Handgun Permit Law does not vest state officials with uncontrolled discretion. The prior restraint doctrine requires consideration of "any limiting construction that a state court or enforcement agency has proffered." *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989); *see also City of Lakewood*, 486 U.S. at 770 ("[W]hen a state law has been authoritatively construed so as to render it constitutional . . . the state law is read in light of those limits."). Such limits on discretion may be made explicit by "textual incorporation, binding judicial or administrative construction, or well-established practice." *City of Lakewood*, 486 U.S. at 770.

The standard controlling official discretion has been clearly laid out and consistently applied by all four of these routes. The statutory text's standard is "justifiable need to carry a handgun." N.J. Stat. Ann. § 2C:58-4(c)-(d) (2011). Though gun laws in New

Jersey have changed, the requirement that permits are "issuable only on a showing of 'need' " has persisted since at least 1924. *Siccardi*, 284 A.2d at 538. This standard is further defined in binding judicial construction as requiring "urgent necessity for self-protection. The requirement is of specific threats or previous attacks demonstrating a special danger to the applicant's life that cannot be avoided by other means. Generalized fears for personal safety are inadequate, and a need to protect property alone does not suffice." *In re Preis*, 573 A.2d 148, 152 (N.J. 1990) (internal citations omitted); *see also Siccardi*, 284 A.2d at 540 (Permits to carry are granted to those "who can establish an urgent necessity for self-protection. One whose life is in danger, as evidenced by serious threats or earlier attacks, may perhaps qualify . . . but one whose concern is with the safety of his property, protectible [sic] by other means, clearly may not so qualify."). This construction is repeated in the administrative code requiring permit applicants to provide evidence of this need by submitting certification of

> the urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun. Where possible the applicant shall corroborate the existence of any specific threats or previous attacks by reference to reports of such incidents to the appropriate law enforcement agencies. . . .

N.J. Admin. Code § 13:54-2.4(d)(1). This is a specific and clear standard which guides officials' discretion and has become part of well-established practice in reviewing permit applications.

The plaintiffs' real objection appears to be to the results generally reached by the consistent application of this clearly articulated standard, not to lack of any standard at all. Although the law is applied narrowly, this does not mean that the standard amounts in practice to an outright ban on issuing permits to carry: during the pendency of this very lawsuit, the original lead plaintiff Jeffrey Muller withdrew from this action because he was granted a permit after the Complaint was filed. Mots. Hr'g Tr. 3, Oct. 27, 2011.

### B. The Handgun Permit Law's "justifiable need" requirement meets the appropriate level of judicial scrutiny.

If New Jersey's Handgun Permit Law implicates conduct within the scope of the Second Amendment, the burden imposed by the justifiable need requirement still survives judicial scrutiny under the applicable means-end standard. The Supreme Court in *Heller* avoided deciding what level of scrutiny to apply to a particular limitation on the right. 554 U.S. at 628-29. The Court found only that the laws at issue in *Heller* would be unconstitutional "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights. . . ." *Id.* While

this statement does not lead to a particular standard of scrutiny, it does indicate that one of the traditional standards applied to enumerated rights – either intermediate or strict scrutiny – should be applied.

The defendants and their amici suggest that if the Handgun Permit Law burdens a Second Amendment right, the Court should apply the "reasonable regulation test." Defs.' Br. 19-20; Br. of Amici Curiae in Supp. of Defs. 15. The defendants' amici describe the reasonable regulation test as applying a standard in-between rational basis and intermediate scrutiny. Br. of Amici Curiae in Supp. of Defs. 16. Amici further describe this test as focusing on "the balance of the interests at stake. . . ." *Id.* But the *Heller* majority rejected a similar "interest-balancing inquiry" proposed by Justice Breyer in dissent. *Heller*, 554 U.S. at 634. Judge Breyer's formulation would have asked "whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." *Id.* Justice Scalia answered that "[w]e know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach." *Id.* Handgun possession outside the home is not the Second Amendment's core protection as defined in *Heller.* But if possession outside the home for the purpose of self-defense is protected as part of an enumerated right, this Court sees no reason to depart from the common forms of means-end scrutiny in favor of the reasonable regulation test.

Rational basis is also inappropriate to determine the constitutionality of specifically enumerated rights. *Id.* at 628 n.27. *Heller* explained that if rational basis were used, "the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws. . . ." *Id.* "*Heller* rejects [rational basis] for laws burdening Second Amendment rights." *Marzzarella*, 614 F.3d at 95-96; *see also United States v. Huet*, No. 10-4729, 2012 WL 19378, at *8 (3d Cir. Jan. 5, 2012).

**a. The Handgun Permit Law would be subject to intermediate scrutiny.**

The question, then, is whether strict or intermediate scrutiny would apply to the justifiable need requirement of the Handgun Permit Law if such laws are within the scope of the Second Amendment. Courts look to First Amendment jurisprudence for guidance regarding which level of scrutiny applies to a law regulating conduct protected by the Second Amendment. *See id.* at 96. Just as laws burdening protected conduct under the First Amendment are susceptible to different standards of scrutiny, it is probable that "the Second Amendment can trigger more than one particular standard of scrutiny. . . ." *Id.* at 97; *see also United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011). Because affirmative rights are not susceptible to a one-size-fits-all standard, a court must decide whether intermediate or strict scrutiny applies based on the individual case before it.

In the First Amendment context, strict scrutiny "is triggered by content-based restrictions on speech in a public forum. . . ." *Marzzarella*, 614 F.3d at 96 (citing *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009)). In the Second Amendment context, strict scrutiny is triggered by the core of the right, "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *See Heller*, 554 U.S. at 635. *See also Masciandaro*, 638 F.3d at 470-71 ("[W]e assume that any law that would burden the 'fundamental,' core right of self-defense in the home by a law-abiding citizen would be subject to strict scrutiny.").

If the Second Amendment protects the right to carry a handgun outside the home for self-defense at all, that right is not part of the core of the Amendment. *E.g. Kachalsky*, 2011 WL 3962550, at *23 (collecting federal cases supporting the statement that "the core Second Amendment concern articulated in *Heller* [is] self-defense in the home"). Burdens on any right to carry a gun outside the home should be subject to less exacting scrutiny than burdens on the right to use a gun for self-defense in the home. "Since historical meaning enjoys a privileged interpretative role in the Second Amendment context, [the] longstanding out-of-the-home/in-the-home distinction bears directly on the level of scrutiny applicable." *Masciandaro*, 638 F.3d at 470 (citations omitted). New Jersey's justifiable need requirement applies only to permits to carry outside the home. No permit is needed to lawfully carry a handgun "about [one's]

place of business, residence, premises or other land [one] own[s] or possesse[s]. . . ." N.J. Stat. Ann. § 2C:39-6(e) (2011). Even if the justifiable need requirement burdens some conduct protected by the Second Amendment, such conduct is not the possession and use of a handgun for self-defense in the home. It follows that intermediate scrutiny is the appropriate standard to apply. *See Masciandaro*, 638 F.3d at 471 ("While we find the application of strict scrutiny important to protect the core right of the self-defense of law-abiding citizen in his home, . . . we conclude that a lesser showing is necessary with respect to laws that burden the right to keep and bear arms outside of the home.").

**b. The "justifiable need" requirement survives intermediate scrutiny.**

In the Second Amendment context, the Third Circuit has described how to apply intermediate scrutiny derived from First Amendment speech cases. "In the First Amendment speech context, intermediate scrutiny is articulated in several different forms." *Marzzarella*, 614 F.3d at 97. But the various terminology leads to essentially the same practical requirements: the cases "all require the asserted governmental end to be more than just legitimate, either 'significant,' 'substantial,' or 'important.'" *Id.* at 98 (citations omitted). And they "generally require the fit between the challenged regulation and the asserted objective be reasonable, not perfect." *Id.* Finally, the "regulation need not be the least restrictive means of

serving the interest, but may not burden more speech than is reasonably necessary." *Id.* (citations omitted).

This Court finds that the justifiable need requirement in New Jersey's Handgun Permit Law meets the intermediate scrutiny standard if a right to carry handguns in public for self-defense exists. First, the government has asserted important interests. Second, limiting permits to carry handguns in public to those applicants who demonstrate a justifiable need is a reasonable fit with New Jersey's asserted interests. Finally, the permit requirement does not burden more protected conduct than is reasonably necessary to serve the State's interests.

The governmental interest in regulating permits to carry handguns is established. The Supreme Court has consistently recognized that the governmental interest in protecting public safety is important or even compelling. *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Schall v. Martin*, 467 U.S. 253, 264 (1984). New Jersey has asserted that the interests served by the Handgun Permit Law include "combating handgun violence and combating the dangers and risks associated with the accidental and misuse of handguns" and "reducing the use of handguns in crimes." Defs.' Br. 26-27. All of these interests fall under the substantial government interest in "ensuring the safety of all of its citizens." Defs.' Reply Br. 14. This interest is substantial and significant. The protection of citizens from potentially lethal force is compelling.

The justifiable need requirement fits reasonably with this asserted interest. When reviewing the constitutionality of statutes, the courts "accord substantial deference to the [legislature's] predictive judgments." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997). The judiciary's role is "to assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence." *Id.* New Jersey's Handgun Permit Law is no political whim. The legislature has long recognized "the dangers inherent in the carrying of handguns" and decided as far back as 1924 to combat this danger by requiring that "no persons . . . shall carry handguns except pursuant to permits issuable only on a showing of 'need.'" *Siccardi*, 284 A.2d at 538. The "need" requirement has been included in all iterations of New Jersey's handgun regulation since then. *Id.*; *see also In re Preis*, 573 A.2d 148, 151(N.J. 1990) ("At the time of the reenactment of the gun-licensing provisions as part of the Code of Criminal Justice of 1979, the most relevant definition of 'justifiable need' was set forth in *Siccardi v. State*.") (citations omitted). The legislature has continually made the reasonable inference that given the obviously dangerous and deadly nature of handguns, requiring a showing of particularized need for a permit to carry one publicly serves the State's interests in public safety.

This determination is supported by the reasoning of other district courts finding that comparable handgun permit regulations fit the interest in public safety where those regulations require applicants to

demonstrate need based on specific circumstances. *See Kachalsky*, 2011 WL 3962550, at *28 (upholding New York permit law requiring articulable, non-speculative need for self-defense); *Peruta v. County of San Diego*, 758 F. Supp. 2d 1106, 1110, 1117 (S.D. Cal. 2010) (upholding concealed carry regulation requiring demonstration of "good cause" based on personal circumstances more specific than a "generalized fear for one's personal safety"). *Peruta* found that this type of requirement sufficiently fit the government's asserted interests, explaining that "the government has an important interest in reducing the number of concealed weapons in public in order to reduce the risks to other members of the public who use the streets and go to public accommodations." *Id.* at 1117 (citations omitted). In *Richards v. County of Yolo*, another district court determined that a concealed carry licensing process that required demonstration of a "valid reason to request the permit," including "credible threats of violence against the applicant," did not substantially burden protected conduct and survived a facial challenge under rational basis review. No. 09-CV-01235, 2011 WL 1885641, at *1, *3-5 (E.D. Cal. May 16, 2011).

The plaintiffs attempt to make much of the distinction between New Jersey's Handgun Permit Law and permit laws that apply to concealed carry only. See Pls.' Br. 35. This Court agrees with *Kachalsky* that when it comes to the application of intermediate scrutiny, "the same rationales apply equally, or almost equally, to the regulation of open carry [as to

concealed carry]." 2011 WL 3962550, at *28. The strength of the interests are comparable, and whether a permit is required to carry a handgun either openly or concealed (as in New Jersey) or only to carry one concealed (as in California and New York) makes no difference to whether the law requiring a permit and setting out conditions for such permit is sufficiently tailored to the state's asserted interests.

The plaintiffs' argument also ignores the larger context of the statutory schemes in California and New York. In *Peruta*, the alternative open carry provision cited as mitigating some of the burden on any potential Second Amendment right is very limited. The California law permits open carry only where the individual "reasonably believes that the person or property of himself or herself or of another is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property." *Peruta*, 758 F. Supp. 2d at 1113 (quoting Cal. Penal Code § 12031(j)). This section allowing open carry applies only in the "brief interval before and after the local law enforcement agency, when reasonably possible, has been notified of the danger and before the arrival of its assistance" and open carry by a person who "reasonably believes that he or she is in grave danger because of circumstances forming the basis of a current restraining order. . . ." *Id.* In circumstances beyond these very narrow situations where open carry is permitted, those wishing to carry a firearm for self-defense in public must obtain a concealed carry permit. As

explained in *Kachalsky*, concealed carry with a permit is the only option in New York. 2011 WL 3962550, at *2. Open carry of handguns is always illegal and even a concealed carry permit would not permit one to carry a handgun openly. *Id.* Neither New York's nor California's law is really far removed from New Jersey's Handgun Permit Law, despite New Jersey's permit requirement applying to both open and concealed carry.

Finally, the justifiable need requirement of the Handgun Permit Law survives intermediate scrutiny because it does not burden more of any alleged right to carry a handgun for self-defense than would be reasonably necessary to achieve New Jersey's interest in public safety. "[T]he overriding philosophy of [the New Jersey] legislature is to limit the use of guns as much as possible." *State v. Valentine*, 307 A.2d 617, 619 (N.J. Super. Ct. App. Div. 1973). As discussed, it is within the discretion of the legislature to make the reasonable determination that limiting the use of guns leads to fewer incidents of gun-related injury and death. The Handgun Permit Law is tailored specifically to leave room for the exercise of any alleged right to carry a handgun in public for the sole purpose of self-defense. The justifiable need standard allows permits to be issued only upon showing of objective rather than subjective need. N.J. Stat. § 2C:58-4(c)-(d) delegates to neutral licensing officers the responsibility for determining whether such need exists. This process allows the legislature "to effectively differentiate between individuals who have a bona

fide need to carry a concealed handgun for self-defense and individuals who do not." *Peruta*, 758 F. Supp. 2d at 1117. The legislature's decision to allow for individualized consideration of each applicant's need to carry a handgun shows a legislative desire to tailor the consideration to each applicant's individual circumstances. The alternative to requiring "a showing of specific, direct, and serious threats to one's physical safety" is granting a permit to carry a deadly weapon to those who feel the subjective need based on nothing more than "general fears" to go about their daily lives prepared to use deadly force. *See In re Piszczatoski*, No. PAS-10-040 (N.J. Super. Nov. 3, 2010), Piszczatoski Decl. Ex. 2, at 4. A ruling mandating such a result would illegally interfere with the New Jersey legislature's repeated determinations over nearly a century that this alternative to an individualized need determination would not meet the state interest in preventing gun-related injury, including the ultimate injury, death.

## CONCLUSION

The plaintiffs have failed to state a valid facial constitutional challenge to New Jersey's Handgun Permit Law under the Second Amendment. The challenged provisions requiring those who wish to carry a handgun in public to obtain a permit based on justifiable need do not on their face burden conduct protected by the Second Amendment. Even if the justifiable need requirement does burden conduct protected by the Second Amendment right to keep

and bear arms, the Handgun Permit Law is not facially invalid as an unconstitutional burden because there is a reasonable fit between the justifiable need requirement and the government's compelling interest in public safety. The Handgun Permit Law is also not facially unconstitutional as a prior restraint because this framework does not apply in the Second Amendment context and the challenged provisions do not vest uncontrolled discretion to state officials. The Court denies the plaintiffs' motion for summary judgment and grants the defendants' motion to dismiss this action with prejudice.

January 12, 2012

**/s/ William H. Walls**

United States Senior
District Judge

**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEW JERSEY**

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|---|---|
| DANIEL J. PISZCZATOSKI; JOHN M. DRAKE; GREGORY C. GALLAHER; LENNY S. SALERNO; FINLEY FENTON; SECOND AMENDMENT FOUNDATION, INC.; and ASSOCIATION OF NEW JERSEY RIFLE & PISTOL CLUBS, INC.,<br><br>Plaintiffs,<br><br>v.<br><br>THE HON. RUDOLPH A. FILKO, in his Official Capacity as Judge of the Superior Court of Passaic County; THE HON. EDWARD A. JEREJIAN, in his Official Capacity as Judge of the Superior Court of Bergen County; THE HON. THOMAS A. MANAHAN, in his Official Capacity as Judge of the Superior Court of Morris County; COL. RICK FUENTES, in his Official Capacity as Superintendent of the New Jersey State Police; CHIEF ROBERT JONES, in his Official Capacity as Chief of the Hammonton, New Jersey Police | **ORDER**<br>Civ. No. 10-06110 (WHW) |

Department; CHIEF RICHARD COOK, in his Official Capacity as Chief of the Montville, New Jersey Police Department; and PAULA T. DOW, in her Official Capacity as Attorney General of New Jersey,

Defendants.

**Walls, Senior District Judge**

This matter having come before the Court on the plaintiffs' motion for summary judgment and the defendants' cross-motion to dismiss, and David Jensen, Esq. appearing for the plaintiffs and Gregory Spellmeyer, Esq. appearing for the defendants, and the Court having considered the arguments of counsel and the submissions of the parties, for reasons set forth in the accompanying Opinion and good cause therefor,

It is, on this 12th day of January, 2012:

ORDERED that the plaintiffs' Motion for Summary Judgment (ECF No. 12) is DENIED; and

ORDERED that the defendants' Cross-Motion to Dismiss (ECF No. 25) is GRANTED and that the plaintiffs' Complaint is hereby dismissed with prejudice.

/s/ [Illegible]
William H. Walls
United States Senior
District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 12-1150

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JOHN M. DRAKE; GREGORY C. GALLAHER; LENNY S. SALERNO; FINLEY FENTON; SECOND AMENDMENT FOUNDATION, INC.; ASSOCIATION OF NEW JERSEY RIFLE & PISTOL CLUBS, INC.,

Appellants

v.

THE HON. RUDOLPH A. FILKO, in his Official Capacity as Judge of the Superior Court of Passaic County; HON. EDWARD A. JEREJIAN, in his Official Capacity as Judge of the Superior Court of Bergen County; THE HON. 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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(D.N.J. Civ. No. 2-10-cv-06110)

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SUR PETITION FOR REHEARING

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Present: McKEE, *Chief Judge*, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, and ALDISERT,[1] *Circuit Judges* and STARK[2], *District Judge.*

The petition for rehearing filed by Appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied. Judges Ambro, Fisher, Jordan and Hardiman have voted for rehearing en banc.

BY THE COURT,

/s/ Ruggero J. Aldisert
Circuit Judge

Dated: August 27, 2013
tmk/cc: Alan Gura, Esq.
David D. Jensen, Esq.
Robert T. Lougy, Esq.
Mary E. Wood, Esq.
Adam K. Levin, Esq.

[1] The vote of Honorable Ruggero J. Aldisert is limited to panel rehearing.

[2] The vote of Honorable Leonard P. Stark, District Judge for the District of Delaware is limited to panel rehearing.

## RELEVANT NEW JERSEY STATUTES AND REGULATIONS

**N.J. Stat. Ann. § 2C:39-5(b)**

Handguns. (1) 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. (2) If the handgun is in the nature of an air gun, spring gun or pistol or other weapon of a similar nature in which the propelling force is a spring, elastic band, carbon dioxide, compressed or other gas or vapor, air or compressed air, or is ignited by compressed air, and ejecting a bullet or missile smaller than three-eighths of an inch in diameter, with sufficient force to injure a person it is a crime of the third degree.

**N.J. Stat. Ann. § 2C:39-6**

* * *

e. Nothing in subsections b., c. and d. of N.J.S.2C:39-5 shall be construed to prevent a person keeping or carrying about his place of business, residence, premises or other land owned or possessed by him, any firearm, or from carrying the same, in the manner specified in subsection g. of this section, from any place of purchase to his residence or place of business, between his dwelling and his place of business, between one place of business or residence and another when moving, or between his dwelling or place of business and place where such firearms are

repaired, for the purpose of repair. For the purposes of this section, a place of business shall be deemed to be a fixed location.

f. Nothing in subsections b., c. and d. of N.J.S.2C:39-5 shall be construed to prevent:

(1) A member of any rifle or pistol club organized in accordance with the rules prescribed by the National Board for the Promotion of Rifle Practice, in going to or from a place of target practice, carrying such firearms as are necessary for said target practice, provided that the club has filed a copy of its charter with the superintendent and annually submits a list of its members to the superintendent and provided further that the firearms are carried in the manner specified in subsection g. of this section;

(2) A person carrying a firearm or knife in the woods or fields or upon the waters of this State for the purpose of hunting, target practice or fishing, provided that the firearm or knife is legal and appropriate for hunting or fishing purposes in this State and he has in his possession a valid hunting license, or, with respect to fresh water fishing, a valid fishing license;

(3) A person transporting any firearm or knife while traveling:

(a) Directly to or from any place for the purpose of hunting or fishing, provided the person has in his possession a valid hunting or fishing license; or

(b) Directly to or from any target range, or other authorized place for the purpose of practice, match,

target, trap or skeet shooting exhibitions, provided in all cases that during the course of the travel all firearms are carried in the manner specified in subsection g. of this section and the person has complied with all the provisions and requirements of Title 23 of the Revised Statutes and any amendments thereto and all rules and regulations promulgated thereunder; or

(c) In the case of a firearm, directly to or from any exhibition or display of firearms which is sponsored by any law enforcement agency, any rifle or pistol club, or any firearms collectors club, for the purpose of displaying the firearms to the public or to the members of the organization or club, provided, however, that not less than 30 days prior to the exhibition or display, notice of the exhibition or display shall be given to the Superintendent of the State Police by the sponsoring organization or club, and the sponsor has complied with such reasonable safety regulations as the superintendent may promulgate. Any firearms transported pursuant to this section shall be transported in the manner specified in subsection g. of this section;

(4) A person from keeping or carrying about a private or commercial aircraft or any boat, or from transporting to or from such vessel for the purpose of installation or repair a visual distress signaling device approved by the United States Coast Guard.

* * *

**N.J. Stat. Ann. § 2C:43-6(a)**

Except as otherwise provided, a person who has been convicted of a crime may be sentenced to imprisonment, as follows:

* * *

(2) In the case of a crime of the second degree, for a specific term of years which shall be fixed by the court and shall be between five years and 10 years;

* * *

**N.J. Stat. Ann. § 2C:44-1(f)**

Presumptive Sentences. (1) Except for the crime of murder, unless the preponderance of aggravating or mitigating factors, as set forth in subsections a. and b., weighs in favor of a higher or lower term within the limits provided in N.J.S.2C:43-6, when a court determines that a sentence of imprisonment is warranted, it shall impose sentence as follows:

* * *

(c) To a term of seven years for a crime of the second degree;

* * *

**N.J. Stat. Ann. § 2C:58-4**

a. Scope and duration of authority. Any person who holds a valid permit to carry a handgun issued pursuant to this section shall be authorized to carry a handgun in all parts of this State, except as prohibited by

section 2C:39-5e. One permit shall be sufficient for all handguns owned by the holder thereof, but the permit shall apply only to a handgun carried by the actual and legal holder of the permit.

All permits to carry handguns shall expire 2 years from the date of issuance or, in the case of an employee of an armored car company, upon termination of his employment by the company occurring prior thereto whichever is earlier in time, and they may thereafter be renewed every 2 years in the same manner and subject to the same conditions as in the case of original applications.

b. Application forms. All applications for permits to carry handguns, and all applications for renewal of such permits, shall be made on the forms prescribed by the superintendent. Each application shall set forth the full name, date of birth, sex, residence, occupation, place of business or employment, and physical description of the applicant, and such other information as the superintendent may prescribe for the determination of the applicant's eligibility for a permit and for the proper enforcement of this chapter. The application shall be signed by the applicant under oath, and shall be indorsed by three reputable persons who have known the applicant for at least 3 years preceding the date of application, and who shall certify thereon that the applicant is a person of good moral character and behavior.

c. Investigation and approval. Each application shall in the first instance be submitted to the chief

police officer of the municipality in which the applicant resides, or to the superintendent, (1) if the applicant is an employee of an armored car company, or (2) if there is no chief police officer in the municipality where the applicant resides, or (3) if the applicant does not reside in this State. The chief police officer, or the superintendent, as the case may be, shall cause the fingerprints of the applicant to be taken and compared with any and all records maintained by the municipality, the county in which it is located, the State Bureau of Identification and the Federal Bureau of Identification. He shall also determine and record a complete description of each handgun the applicant intends to carry.

No application shall be approved by the chief police officer or 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. If the application is not approved by the chief police officer or the superintendent within 60 days of filing, it shall be deemed to have been approved, unless the applicant agrees to an extension of time in writing.

d. Issuance by Superior Court; fee. If the application has been approved by the chief police officer or the superintendent, as the case may be, the applicant shall forthwith present it to the Superior Court of the county in which the applicant resides, or to the Superior Court in any county where he intends to carry a

handgun, in the case of a nonresident or employee of an armored car company. The court shall issue the permit to the applicant if, but only if, it is satisfied that the applicant is a person of good character who is not subject to any of the disabilities set forth in section 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. The court may at its discretion issue a limited-type permit which would restrict the applicant as to the types of handguns he may carry and where and for what purposes such handguns may be carried. At the time of issuance, the applicant shall pay to the county clerk of the county where the permit was issued a permit fee of $ 20.00.

e. Appeals from denial of applications. Any person aggrieved by the denial by the chief police officer or the superintendent of approval for a permit to carry a handgun may request a hearing in the Superior Court of the county in which he resides or in any county in which he intends to carry a handgun, in the case of a nonresident, by filing a written request for such a hearing within 30 days of the denial. Copies of the request shall be served upon the superintendent, the county prosecutor and the chief police officer of the municipality where the applicant resides, if he is a resident of this State. The hearing shall be held within 30 days of the filing of the request, and no formal pleading or filing fee shall be required. Appeals from the determination at such a hearing shall

be in accordance with law and the rules governing the courts of this State.

If the superintendent or chief police officer approves an application and the Superior Court denies the application and refuses to issue a permit, the applicant may appeal such denial in accordance with law and the rules governing the courts of this State.

f. Revocation of permits. Any permit issued under this section shall be void at such time as the holder thereof becomes subject to any of the disabilities set forth in section 2C:58-3c., and the holder of such a void permit shall immediately surrender the permit to the superintendent who shall give notice to the licensing authority.

Any permit may be revoked by the Superior Court, after hearing upon notice to the holder, if the court finds that the holder is no longer qualified for the issuance of such a permit. The county prosecutor of any county, the chief police officer of any municipality, the superintendent or any citizen may apply to the court at any time for the revocation of any permit issued pursuant to this section.

**N.J. Admin. Code § 13:54-2.2**

No person, except as provided in N.J.S.A. 2C:39-6, shall carry, hold or possess a handgun without first having obtained a permit to carry the same in accordance with the provisions of this chapter.

**N.J. Admin. Code § 13:54-2.3**

(a) No application for a permit to carry a handgun shall be approved by a chief police officer of a municipality, the Superintendent or the Superior Court, unless the applicant:

1. Is a person of good character who is not subject to any of the disabilities which would prevent him or her from obtaining a permit to purchase a handgun or a firearms purchaser identification card as provided in this chapter;

2. Has demonstrated that at the time of the application for the permit he or she is thoroughly familiar with the safe handling and use of handguns; and

3. Has demonstrated a justifiable need to carry a handgun.

**N.J. Admin. Code § 13:54-2.4**

(a) Every person applying for a permit to carry a handgun shall furnish such information and particulars as set forth in the application form designated SP 642. The application shall be signed by the applicant under oath and shall be endorsed by three reputable persons who have known the applicant for at least three years preceding the date of application, and who shall also certify thereon that the applicant is a person of good moral character and behavior. Applications can be obtained at police departments and State Police stations.

(b) Each applicant shall demonstrate a thorough familiarity with the safe handling and use of handguns by indicating in the space provided therefor on the application form, and on any sworn attachments thereto, any relevant information. Thorough familiarity with the safe handling and use of handguns shall be evidenced by:

1. Completion of a firearms training course substantially equivalent to the firearms training approved by the Police Training Commission as described by N.J.S.A. 2C:39-6j;

2. Submission of an applicant's most recent handgun qualification scores utilizing the handgun(s) he or she intends to carry as evidenced by test firings administered by a certified firearms instructor of a police academy, a certified firearms instructor of the National Rifle Association, or any other recognized certified firearms instructor; and

3. Passage of any test in this State's laws governing the use of force administered by a certified instructor of a police academy, a certified instructor of the National Rifle Association, or any other recognized certified instructor.

(c) The information in (b) above shall be accompanied and validated by certifications of the appropriate instructor(s).

(d) Each application form shall also be accompanied by a written certification of justifiable need to carry a handgun, which shall be under oath and which:

1. In the case of a private citizen shall specify in detail the urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun. Where possible the applicant shall corroborate the existence of any specific threats or previous attacks by reference to reports of such incidents to the appropriate law enforcement agencies; or

2. In the case of employees of private detective agencies, armored car companies and private security companies, that:

i. In the course of performing statutorily authorized duties, the applicant is subject to a substantial threat of serious bodily harm; and

ii. That carrying a handgun by the applicant is necessary to reduce the threat of unjustifiable serious bodily harm to any person.

(e) The completed application together with two sets of the applicant's fingerprints and fees as established by N.J.A.C. 13:59 in accordance with N.J.S.A. 53:1-20.5 et seq., four photographs (1 1/2 x 1 1/2 square), a consent for mental health records search form designated SP 66, and a permit fee of $ 20.00 payable to the County Clerk where the permit is to be issued shall be submitted to the chief police officer of the municipality in which the applicant resides, or the Superintendent:

1. If there is no full time police department in the municipality where the applicant resides; or

2. If the applicant is a non-resident of this State or if the applicant is an employee of an armored car company.

**N.J. Admin. Code § 13:54-2.5**

The chief of police or the Superintendent, as the case may be, shall cause the applicant to be thoroughly investigated. The investigation shall include, but not be limited to, ascertaining that the applicant satisfies all of the requirements contained in this chapter for obtaining a permit to purchase a handgun or a firearms purchaser identification card, that the applicant has or has not demonstrated a thorough familiarity with the safe handling and use of handguns as evidenced by the application and accompanying materials, and that the applicant has or has not factually demonstrated a justifiable need to carry a handgun. The chief of police or the Superintendent shall approve or disapprove the application after completion of the investigation. If the application is approved, by the chief of police or the Superintendent, as the case may be, it shall be forwarded to the Superior Court of the county where the applicant resides, or if a nonresident or an employee of an armored car company, to a county where he or she intends to carry the handgun, for presentation to a judge of the Superior Court.

**N.J. Admin. Code § 13:54-2.7**

(a) Upon being satisfied of the sufficiency of the application and the fulfillment of the provisions of Chapter 58, Laws of 1979, the judge shall issue a permit.

(b) The court may, at its discretion, issue a limited type permit which would restrict the applicant as to the types of handguns he or she may carry and where and for what purposes such handguns may be carried.

(c) The Superintendent shall be provided with copies of all permits to carry handguns issued or reissued by the Superior Court.

**N.J. Admin. Code § 13:54-2.8**

(a) Any person making application for a permit to carry a handgun who is denied approval by the chief police officer or the Superintendent may request a hearing in the Superior Court of the county in which he or she resides, or a county in which he or she intends to carry a handgun, in the case of a non resident or an employee of an armored car company. Such request shall be made in writing within 30 days of denial of the application. Copies of the request shall be served on the Superintendent, the county prosecutor and the chief police officer of the municipality where the applicant resides, if he or she is a resident of this State.

(b) If the application is denied by the judge of the Superior Court the appeal shall be made in accordance with law.

**N.J. Admin. Code § 13:54-2.9**

(a) All permits to carry a handgun shall expire two years from the date of issuance or, in the case of an employee of an armored car company, upon termination of his or her employment by the company occurring prior thereto, whichever is earlier in time.

(b) Permits must be renewed in the same manner and subject to the identical procedures by which the original permit was obtained. The chief police officer, the Superintendent and the Superior Court shall process a renewal for a permit to carry a handgun utilizing the same criteria established by this chapter for the issuance of an initial permit. This includes, but is not limited to, a renewed showing by the applicant of need, a renewed demonstration of thorough familiarity with the safe handling and use of handguns, as may be evidenced by recitation of all of the information requested on the initial application, including, but not limited to, the applicant's most recent qualification scores in the firing of a handgun.

**N.J. Admin. Code § 13:54-2.10**

(a) Any permit issued pursuant to this chapter shall be void at such time as the holder no longer meets the requirements of N.J.A.C. 13:54-1.5 and 1.6, and the

holder of such a void permit shall immediately surrender it to the Superintendent who shall give notice to the licensing authority.

(b) Any permit may be revoked by the Superior Court, after hearing, upon notice to the holder of the permit, if the Court finds that the holder no longer satisfies the requirements of N.J.A.C. 13:54-2.3 or any applicable law.

(c) The county prosecutor of any county, the chief police officer of any municipality, the Superintendent or any citizen may apply to the Court at any time for revocation of any permit issued pursuant to this chapter.

(d) Any person having knowledge that a person is subject to any of the disabilities set forth in this chapter and no longer qualifies to carry a handgun may so notify the chief of police, the Superintendent or any other law enforcement officer who may take such action as may be deemed appropriate.

[SEAL]

**State of New Jersey**
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF STATE POLICE
POST OFFICE BOX 7068
WEST TRENTON NJ 08628-0068
(609) 882-2000

| | |
|---|---|
| CHRIS CHRISTIE<br>*Governor* | PAULA T. DOW<br>*Attorney General* |
| KIM GUADAGNO<br>*Lt. Governor* | COLONEL JOSEPH R. FUENTES<br>*Superintendent* |

**July 01, 2010**

John R. Drake Jr.
[redacted]

Dear Mr. Drake:

Your application for a handgun carrying permit has been disapproved by the Superintendent of State Police. The denial was based on your failure to demonstrate a justifiable need for the issuance of a permit to carry a handgun as required pursuant to N.J.S. 2C:58-4c and consistent with New Jersey case laws. You failed to establish that an urgent necessity for self protection as evidenced by prior specific threats or previous attacks demonstrating a special danger to your life exists that cannot be avoided by any other means other than the issuance of a permit to carry a handgun. New Jersey Courts have consistently determined that generalized fears for personal

safety alone are inadequate and insufficient in establishing justifiable need.

A review of your initial application with letter of need indicate that you are the sole proprietor for an ATM servicing company, Overcoat LLC. Functions of your business include installing ATM machines, repairing ATM machines, as well as loading and stocking cash into the machines. On May 18, 2010, correspondence was sent to you requesting further details as to your need for a permit to carry a handgun. On June 08, 2010, this office received your correspondence and reviewed same. In your letter you indicate that your need is not the same as a private citizen, but that of armored car employees and private security employees. You further indicate that as such, you become subject to substantial threat of serious bodily harm while performing your duties. In reviewing your response, no information was provided to detail the urgent necessity for self protection as evidenced by prior specific threats or previous attacks demonstrating a special danger to your life. Subsequently, your request for a permit to carry a handgun has been denied.

Pursuant to *N.J.S.* 2C:58-4e, any person aggrieved by the denial for a permit to carry a handgun may request a hearing in the Superior Court of the county in which he resides if he is a resident of New Jersey or the county he intends to carry, if he is a nonresident. The request for a hearing shall be made in writing within 30 days of the denial of the application for a permit to carry a handgun. The applicant shall

serve copies of the request upon the Superintendent, the county prosecutor, and the chief police officer of the municipality where the applicant resides, if the applicant resides in New Jersey.

If you have any further questions, please contact Detective I Glenn Ross, Firearms Investigation Unit at 609-882-2000 ext. 6612.

Sincerely,

FOR COLONEL JOSEPH R. FUENTES SUPERINTENDENT

/s/ Lt. David B. Schlueter 3577
David B. Schlueter, Lieutenant
Unit Supervisor
Firearms Investigation Unit

[SEAL]

**State of New Jersey**
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF STATE POLICE
POST OFFICE BOX 7068
WEST TRENTON NJ 08628-0068
(609) 882-2000

CHRIS CHRISTIE
*Governor*

PAULA T. DOW
*Attorney General*

KIM GUADAGNO
*Lt. Governor*

COLONEL JOSEPH R. FUENTES
*Superintendent*

**August 30, 2010**

Finley Fenton
[redacted]

Dear Mr. Fenton:

Your application for a handgun carrying permit has been disapproved by the Superintendent of State Police. The denial was based on your failure to demonstrate a justifiable need for the issuance of a permit to carry a handgun as required pursuant to N.J.S. 2C:58-4c and consistent with New Jersey case laws. You failed to establish that an urgent necessity for self protection as evidenced by prior specific threats or previous attacks demonstrating a special danger to your life exists that cannot be avoided by any other means other than the issuance of a permit to carry a handgun. New Jersey Courts have consistently determined that generalized fears for personal

safety alone are inadequate and insufficient in establishing justifiable need.

Pursuant to N.J.S. 2C:58-4e, any person aggrieved by the denial for a permit to carry a handgun may request a hearing in the Superior Court of the county in which he resides if he is a resident of New Jersey or the county he intends to carry, if he is a nonresident. The request for a hearing shall be made in writing within 30 days of the denial of the application for a permit to carry a handgun. The applicant shall serve copies of the request upon the Superintendent, the county prosecutor, and the chief police officer of the municipality where the applicant resides, if the applicant resides in New Jersey.

If you have any further questions, please contact Detective I Glenn Ross, Firearms Investigation Unit at 609-882-2000 ext. 6612.

Sincerely,

FOR COLONEL
JOSEPH R. FUENTES
SUPERINTENDENT

/s/ Lt. David B. Schlueter
David B. Schlueter, Lieutenant
Unit Supervisor
Firearms Investigation Unit

JOHN L. MOLINELLI
BERGEN COUNTY PROSECUTOR
BERGEN COUNTY JUSTICE CENTER
HACKENSACK, NJ 07601
(201/646-2300)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – BERGEN COUNTY

| | |
|---|---|
| IN THE MATTER OF THE APPLICATION BY FINLEY FENTON FOR A PERMIT TO CARRY A HANDGUN | CIVIL ACTION<br>**ORDER**<br>(Filed Nov. 29, 2010) |

This matter having been presented to the Court on October 22, 2010, and November 12, 2010, by Finley Fenton, appearing *pro se,* and Assistant Bergen County Prosecutor Dion Findley, appearing on behalf of the State, and the Court having considered the testimony of the applicant, the written submissions and oral arguments of each party, and for good cause shown:

IT IS on this 29th day of November 2010,

**ORDERED** that, for the reasons stated on the record, the application by Finley Fenton for a permit to carry a handgun is hereby **DENIED**, in accordance with the provisions of N.J.S.A. 2C:58-4.

/s/ [Illegible]
Hon. Edward A. Jerejian, J.S.C.

[SEAL] ***Township of Montville***

**BUSINESS OFFICES:**
MUNICIPAL BUILDING
195 CHANGEBRIDGE ROAD
MONTVILLE, NEW JERSEY
07045-9498
(973) 331-3300 •
FAX: (973) 402-0787

**POLICE DEPARTMENT:**
PUBLIC SAFETY BUILDING
360 ROUTE 202
MONTVILLE, NEW JERSEY
07045-8697
(973) 257-4300 •
FAX: (973) 334-4880



August 31, 2009

Lenny S. Salerno
[redacted]

Dear Mr. Salerno:

Your application for a New Jersey Firearms Carrying Permit has been denied as of August 31, 2009, due to the following reason:

Your reasons for application listed in your "CERTIFICIATION [sic] IN SUPPORT OF APPLICATION FOR A PERMIT TO CARRY A HANDGUN" is an insufficient reason for the issuance of the above listed permit.

In accordance with N.J.S.A 2C:58-3, you have thirty (30) days in which to file for a hearing with the

Morris County Court, if you are aggrieved by the denial, Should you desire to file for a hearing, you must also notify this office and the office of the Superintendent of the State Police by forwarding a copy of that request.

There are no provisions under the law for the return of your fees except for you [sic] money order in the amount of $20.00 written out to N.J. Judiciary.

For your convenience, below is a listing of mailing addresses should you wish to aggrieve.

/s/ Rich Cook
Richard Cook
Chief of Police

Delivered via Registered Mail
Hon. T. Manahan
Morris County Courthouse
CN 900
Morristown, NJ 07960-0900

Superintendent of
State Police
New Jersey State Police
Box 7068
West Trenton, NJ 08625
Attn: Firearms Section

Cc: Baron Samson LLP

**PREPARED BY THE COURT**

**SUPERIOR COURT OF NEW JERSEY LAW DIVISION – CRIMINAL COURT COUNTY OF MORRIS**

| | |
|---|---|
| **IN THE MATTER OF AN APPEAL FROM THE DENIAL OF AN APPLICATION FOR A PERMIT TO CARRY A HANDGUN** | **FIREARMS APPEAL No.:** 10-006 |
| **LENNY SALERNO,** Applicant. | **ORDER** (Filed Jul. 8, 2010) |

**THIS MATTER** having been opened to the Court on July 8, 2010, by the Applicant, and the Court, having considered the certifications of the Applicant, the arguments of counsel, the basis for the denial and the applicable statutory law and case law, and for good cause shown;

**IT IS ON THIS** 8th day of **July, 2010,**

**ORDERED** that Firearms Appeal No. 10-006 is hereby **denied** as the applicant has not demonstrated a "justifiable need to carry a handgun," pursuant to N.J.S.A. 2C:58-4d.

/s/ [Illegible]
Hon. Thomas V. Manahan, P.J. Cr.

**Reasons stated on the record on July 8, 2010.**

[SEAL] ***This form is prescribed by the Superintendent for use by applicants for a Permit to Carry a Handgun. Any alteration to this form is expressly forbidden.*** [SEAL]

**STATE OF NEW JERSEY**
**APPLICATION FOR PERMIT**
**TO CARRY A HANDGUN**

**Application must be delivered, in triplicate, to the Chief of Police of the municipality wherein you reside, or to the Superintendent of State Police in all other cases. A money order in the amount of $20.00 payable to State of New Jersey must accompany this application.**

**Answer all questions. If more space is needed, attach bond paper. Page two must be completed. Four photographs of the applicant, one and one-half inch square, head and shoulders, no hat, light background, taken within the last 30 days must accompany this application.**

☒ **NEW** ☐ **RENEWAL** | Municipal Code **0113**

***Each person applying for a Permit to Carry and Handgun must supply a letter of need, specific in content, as to why they have a need to carry a firearm in the State of New Jersey. If this application is employment-related, then your employer must supply this letter. List the reason for this application:*** **DEFENSE OF SELF AND FAMILY**

| (1) Last Name *(If female, include maiden)* | First | Middle | (2) Resident Address *(Number – Street – City – State – Zip)* |
|---|---|---|---|
| **GALLAHER** | **GREGORY** | **CUYLER** | [redacted] |

| (3) Date of Birth | (4) Age | *(Place of Birth - City - State or Country)* | (5) U.S. Citizen | (6) Social Security Number |
|---|---|---|---|---|
| [redacted] Month Day Year | **60** | [redacted] | ☒ Yes ☐ No | [redacted] |

| (7) Sex | Height | Weight | Eyes | Race | Hair | Complexion | (8) Distinguishing Physical Characteristics |
|---|---|---|---|---|---|---|---|
| **M** | **5'-10"** | **180** | **BLUE** | **W** | **BLND** | **FAIR** | **TATTOO ON RIGHT BICEP AND RIGHT ANKLE** |

| (9) Name of Employer | (10) Employer's Address *(Number - Street - City - State - Zip)* |
|---|---|
| **GALLAHER ENTERPRISES, INC.** | [redacted] |

| (11) Occupation | (12) Home Telephone | (13) Business Telephone |
|---|---|---|
| **BUILDING CONTRACTOR** | ( [redacted] | |

| (14) Driver's License Number & State | (15) If you possess a N.J. Firearms Purchaser ID Card, list the number |
|---|---|
| [redacted] | [redacted] |

| | | | | | |
|---|---|---|---|---|---|
| (16) Have you ever been adjudged a juvenile delinquent? | ☐ Yes ☒ No | If Yes, List Date(s) | Place(s) | Offense(s) | |
| (17) Have you ever been convicted of a disorderly persons offense, that has not been expunged or sealed? | ☐ Yes ☒ No | If Yes, List Date(s) | Place(s) | Offense(s) | |
| (18) Have you ever been convicted of a criminal offense, that has not been expunged or sealed? | ☐ Yes ☒ No | If Yes, List Date(s) | Place(s) | Offense(s) | |
| (19) Have you ever had a firearms purchaser identification card, permit to purchase a handgun, or permit to carry a handgun refused or revoked? | ☐ Yes ☒ No | If Yes, By Whom? | When? | Where | Why? |
| (20) Have you ever had an Employee of Firearms Dealer License refused or revoked? | ☐ Yes ☒ No | If Yes, By Whom? | When? | Where | Why? |

| | | | |
|---|---|---|---|
| (21) Are you an Alcoholic? | ☐ Yes ☒ No | (22) Have you ever been confined or committed to a mental institution or hospital for treatment or observation of a mental or psychiatric condition on a temporary, interim or permanent basis? *If Yes, give the name and location of the institution or hospital and the date(s) of such confinement or commitment* | ☐ Yes ☒ No |
| (23) Are you dependent upon the use of any narcotic or other controlled dangerous substance? | ☐ Yes ☒ No | | |
| (24) Are you now being treated for a drug abuse problem? | ☐ Yes ☒ No | (25) Have you ever been attended, treated or observed by any doctor or psychiatrist or at any hospital or mental institution on an inpatient or outpatient basis for any mental or psychiatric conditions? *If Yes, give the name & location of the doctor, psychiatrist, hospital or institution and the date(s) of such occurrence.* | ☐ Yes ☒ No |
| (26) Do you suffer from a physical defect or sickness? | ☐ Yes ☒ No | | |
| (27) If answer to question 26 is yes, does this make it unsafe for you to handle firearms? *If not, explain.* | ☐ Yes ☐ No | (28) Are you subject to any court order issued pursuant to Domestic Violence? *If yes, explain.* | ☐ Yes ☒ No |
| (29) Have you ever been convicted of any domestic violence in any jurisdiction which involved the elements of (1) striking, kicking, shoving, or (2) purposely or attempting to or knowingly or recklessly causing bodily injury, or (3) negligently causing bodily injury to another with a weapon? *If Yes, explain.* | | | ☐ Yes ☒ No |
| (30) Are you presently, or have you ever been a member of any organization which advocates or approves the commission of acts of violence, either to overthrow the government of the United States or of this State, or to deny others of their rights under the Constitution of either the United States or the State of New Jersey? *If yes, list name and address of organization(s) here*: | | | ☐ Yes ☒ No |

**APPLICANT: DO NOT WRITE BELOW THIS SPACE**

**To the Judge of the Superior Court of Atlantic County: I have investigated or caused to be investigated the applicant, and from the results of such investigation, the applicant is:**
***(Attach investigation Report when submitting to Superior Court.)***

| | | |
|---|---|---|
| **APPROVED** ☐ | This 5th Day of Oct., 2010 | **Reason for Disapproval** |
| **DISAPPROVED** ☒ | /s/ Chief [Illegible] Police Chief<br>Signature Title<br>/s/ Chief [Illegible]<br>Department of Police | ☐ A. CRIMINAL RECORD<br>☐ B. PUBLIC HEALTH SAFETY AND WELFARE<br>☐ C. MEDICAL, MENTAL OR ALCOHOLIC BACKGROUND<br>☐ D. NARCOTICS/ DANGEROUS DRUG OFFENSE<br>☐ E. FALSIFICATION OF APPLICATION<br>☐ F. DOMESTIC VIOLENCE<br>☑ G. LACK OF JUSTIFIABLE NEED<br>☐ H. OTHER (SPECIFY) _____ |
| **The foregoing application, having been presented to me, and the determination made of the sufficiency thereof, and the need of the applicant to carry a handgun, I hereby: a permit, pursuant to Section 2C:58-4 of the New Jersey Statutes.** | | |
| Grant ☐ This _____ Day of _____, 20___<br>Deny ☐ _____ NJ<br>Judge of the Superior Court County | **GRANTED ON APPEAL** ☐ | SBI Number:<br>Permit Number:<br>Restrictions: ☐ Yes (List on Page 2) ☐ No |