No. 13-827

IN THE
Supreme Court of the United States

JOHN M. DRAKE, ET AL., *Petitioners*,
v.
EDWARD A. JEREJIAN, JUDGE, SUPERIOR COURT OF NEW JERSEY, BERGEN COUNTY, ET AL., *Respondents*.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals for the Third Circuit

Brief *Amicus Curiae* of Gun Owners Foundation, Gun Owners of America, Inc., U.S. Justice Foundation, Lincoln Institute for Research and Education, Abraham Lincoln Foundation, Institute on the Constitution, Conservative Legal Defense and Education Fund, and Policy Analysis Center in Support of Petitioners

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MISCELLANEOUS

INTEREST OF *AMICI CURIAE*[1]

Gun Owners Foundation, U.S. Justice Foundation, Lincoln Institute for Research and Education, Conservative Legal Defense and Education Fund, and Policy Analysis Center are nonprofit educational organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). Gun Owners of America, Inc. and Abraham Lincoln Foundation for Public Policy Research, Inc. are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Institute on the Constitution is an educational organization.

These organizations were established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research and to inform and educate the public on important issues of national concern, the construction of state and federal constitutions and statutes, questions related to human and civil rights secured by law, and the Second Amendment and individual right to acquire, own, carry, and use firearms, and related issues. Each organization has filed many *amicus curiae* briefs in this Court and other federal courts.

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The court of appeals below committed three different errors commonly made by lower federal courts in the aftermath of District of Columbia v. Heller and McDonald v. City of Chicago.

Instead of applying the Second Amendment principles set forth in Heller and McDonald, the court refused to address and resolve the question whether the right to keep and bear arms extends to self-defense outside the home. Hiding behind the "presumptively lawful" language in Heller, the court erroneously determined that the "justifiable need" requirement for carrying a handgun in public was valid because it constituted a "longstanding exception" to the Second Amendment. Finally, the court wrongly ignored Heller's instruction that the Second Amendment not be overridden by any professed, overriding state interest in public safety.

New Jersey's requirement that a person demonstrate a "justifiable need" to carry a gun is part of that State's "careful grid of regulatory provisions" that pre-dated Heller and McDonald. Those provisions, in turn, are based upon the unconstitutional assumption that handgun possession is a privilege that may be granted or denied at the State's discretion, rather than as a matter of constitutional obligation.

The court below also came to its decision in disregard of the Second Amendment principle that the right to keep and bear arms belongs to the People of

New Jersey as a whole, not just to a special class of favored current and former government employees.

Finally, both courts below subordinated the People's right to keep and bear arms to the state's alleged interest in promoting public safety. It is not, however, within the authority of courts to override the Constitution as ratified by the People.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED TO CORRECT THREE DIFFERENT ERRORS COMMITTED BELOW, AND COMMONLY COMMITTED IN SECOND AMENDMENT CASES.

Since this Court decided District of Columbia v. Heller, 554 U.S. 570 (2008) and McDonald v. City of Chicago, 561 U.S. ___, 130 S. Ct. 3020 (2010), various lower federal courts have made three different types of errors in interpretation and application of these two precedents. Remarkably, the United States Court of Appeals for the Third Circuit committed all three errors in its decision in Drake v. Filko, 742 F.3d 426 (3d Cir. 2013), denying the Second Amendment right of New Jersey citizens to carry a firearm in public for self-defense.

A. The Court Erred By Refusing to Decide Whether the Right to Keep and Bear Arms Applies Outside the Home.

The court of appeals below refused to apply the holdings of Heller and McDonald beyond their factual settings, dismissively asserting that it was "**not inclined to address**" the petitioners' "contention ... that '**[t]ext, history, tradition and precedent** all confirm that [individuals] enjoy a right to *publicly* carry arms for their defense.'" Drake, 742 F.3d at 431 (emphasis added). Despite refusing to engage in what it called a "full-blown historical analysis," the court summarily "reject[ed] [petitioners'] 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.* Although the court recognized that "it is possible to conclude that Heller implies such a right," it "decline[d] 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*." *Id.* at 430, 431.

Instead of exercising its judicial duty to apply the Heller and McDonald principles to the facts of the instant case, the court of appeals fashioned a question of its own choosing: Whether the "justifiable need" requirement was a "longstanding regulation[] [that is an] 'exception[]' to the right to keep and bear arms, such that the conduct ... is not within the scope of the Second Amendment." *Id.*

B. The Court Erred By Assuming that the "Justifiable Need" Requirement Is a "Presumptively Lawful" "Longstanding" Regulation that Is an Exception to the Second Amendment.

The court below assumed that, if New Jersey's "justifiable need" requirement was a "longstanding," "presumptively lawful regulatory measure," as stated in Heller,[2] then it was therefore constitutional, even though the conduct regulated was within the protective umbrella of the Second Amendment. Drake, 724 F.3d at 432. The court is mistaken.

The Third Circuit willfully ignores the fact that the "longstanding," "presumptively lawful" language, as it appears in the Heller opinion, is prefaced by the clause: "Although we do not undertake an exhaustive historical analysis today of the **full scope** of the Second Amendment...." Heller, 554 U.S. at 626 (emphasis added). This prefatory clause establishes that the "longstanding" and "presumptively lawful regulatory measures" listed are **not** "exceptions" to the scope of the Second Amendment, but only that they are outside the scope of the Heller decision.

While presumptively lawful, as all statutes are, the listed regulatory measures are, by definition, not conclusively lawful, as they would have been if they had been ruled to be "exceptions." Rather, the Heller Court implied that such laws very well could be found unlawful after a textual and historical analysis similar that in Heller. However, until such an analysis is undertaken, Heller, standing alone, should not be read to "cast doubt" on cerain "longstanding" prohibitions and conditions, such as those listed. However, when a statute is challenged, Heller requires courts to

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[2] 554 U.S. at 626-27, n. 26.

undertake a proper analysis to determine whether it violates the Second Amendment. A statute which infringes on rights protected by the Second Amendment is unconstitutional — whether or not it is longstanding. Instead of performing its duty to address the text and historical context to determine the "full scope" of the Second Amendment, the court below shirked it. *See* Drake, 724 F.3d at 431.

Having finessed the question whether the Second Amendment applied to the carrying of a handgun (concealed or unconcealed), in public places, the court of appeals set itself free to decide the case as the judges thought best, quite apart from any Second Amendment textual or historical constraints — in direct conflict with the admonition in Heller against such a judicial free-for-all. *See* Heller, 554 U.S. at 631-32.

C. The Court Below Erred By Engaging in "Interest Balancing."

The U.S. Court of Appeals for the Third Circuit, like its sister circuits, rejects the notion that its authority in Second Amendment cases begins and ends with an inquiry into whether the particular regulatory measure "infringes" the right to keep and bear arms, as provided by the Second Amendment as it is written.[3] The court below assumed that it must also "'evaluate the law using some form of means-end scrutiny.'" *See* Drake, 724 F.3d at 453. Citing United

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[3] *See* A. Roston, "Justice Breyer's Triumph in the Third Battle over the Second Amendment," 80 *Geo. Wash. L. Rev.* 703 (2012).

States v. Marzzarella, 614 F.3d 85, 89 (3rd Cir. 2010), the court below explained that this second step is required "in this **new era** of Second Amendment jurisprudence...." *Id.*, 724 F.3d at 434-35 (emphasis added). Then, applying "intermediate scrutiny," it found the New Jersey "justifiable need" requirement constitutional because (i) "[t]he State of New Jersey has, undoubtedly, a significant, substantial and important interest in protecting its citizens' safety," and (ii) "there is a 'reasonable fit' between this interest ... and the means chosen by New Jersey to achieve it...." *Id.*, at 437.

Nothing in Heller or McDonald authorizes such a ruling. Quite to the contrary, the Heller opinion expressly rejects "a judge-empowering '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. Yet, in disregard of this admonition, the court of appeals found 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." Drake, 724 F.3d at 437. Citing similar laws in New York and Maryland and a 1968 private study on firearms and violence in American life embraced by a 1971 New Jersey Supreme Court opinion, the court below observed that (i) there was no evidence that the carrying of handguns enhanced individual self-defense, and (ii) there was evidence that "'ready accessibility of guns contributes significantly to the number of unpremeditated homicides and to the seriousness of

many assaults.'" *Id.*, 724 F.3d at 438. Bolstered by such findings, the court below found New Jersey's firearms carry policy judgment to be reasonable:

> 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 "justified need" to carry a handgun. [724 F.3d at 439 (emphasis added).]

This is the very kind of means-end scrutiny condemned in Heller — "[t]he Second Amendment [being] the very product of an interest balancing by the people." Heller, 554 U.S. at 635.

II. THE DECISIONS BELOW ARE BASED UPON THE UNCONSTITUTIONAL PREMISE THAT POSSESSING A FIREARM IS A DISCRETIONARY PRIVILEGE, NOT A CONSTITUTIONAL RIGHT.

The question presented by this petition is whether the Second Amendment is violated by a New Jersey law that requires an American citizen to prove to state

government officials that he has a "justifiable need" before he may lawfully carry a firearm in public. Petition for a Writ of Certiorari, p. ii. That narrow question is best addressed within the context of an examination of the foundation of New Jersey's "'careful grid of regulatory provisions,'" by which the State "closely regulates the possession and use of firearms"[4] enacted before this Court made crystal clear the Second Amendment protects the individual right to keep and bear arms.

Under New Jersey's statutory scheme of gun control, a citizen's right to possess a firearm is treated as if it were a privilege to be granted or withheld by the State at its discretion, not as a right secured by the United States Constitution. As the district court below explained, "[t]he **possession** of firearms [in New Jersey] is a **criminal offense unless** a specific statutory exemption applies." Piszczatoski v. Filko, 840 F. Supp. 2d 813, 816 (D.N.J. 2012) (emphasis added). Under state law, possession of a firearm — even a handgun possessed for the purpose of self-defense in one's home or place of business — is a matter of legislative grace, not of constitutional right. *See* New Jersey Code of Criminal Justice, § 2C:39-6.e. As the Supreme Court of New Jersey proclaimed in 1990, "the subject of gun control is a comprehensive one that is almost invariably resolved on the basis of legislative intention." In Re Preis, 118 N.J. 564, 574, 573 A.2d 148, 153 (1990).

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[4] *See* Piszczatoski v. Filko, 840 F. Supp. 2d 813, 816 (D.N.J. 2012).

Both courts below adopted this view. Relying on Preis, decided in 1990, and Siccardi v. State,[5] decided in 1971, the court of appeals concluded that "the requirement that applicants demonstrate a 'justifiable need' to publicly carry a handgun for self-defense qualifies as a 'presumptively lawful,'[6] 'longstanding' regulation and therefore does not burden conduct within the scope of the *Second Amendment's* guarantee." Drake, 724 F.3d at 428-29. The district court took the same position. Piszczatoski, 840 F. Supp. 2d at 829-31. Dissenting from this view, Circuit Judge Hardiman pointed out that the "justifiable need" test is hardly "longstanding," having been put into place in 1979. *See* Drake, 724 F.3d at 447-48 (Hardiman, J., dissenting). Having demonstrated that the appellate court had played fast and loose with the state legislative and judicial history, Judge Hardiman warned against misusing the "presumptively lawful" language in Heller to forge "new [legislative] exceptions to the Second Amendment." *See id.* at 452.

In fact, New Jersey's entire gun control scheme antedates Heller and is built upon an unconstitutional foundation. According to Heller, the Second Amendment right to keep and bear arms protects the preexisting right of the people "to resist tyranny" — to "secur[e] a free State." *Id.*, 554 U.S. at 597-98. In McDonald v. Chicago, this Court recognized that the 14th Amendment protects that same right as against the States. *Id.,* 130 S. Ct. 3020, 3036-50 (2010).

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[5] 59 N.J. 545, 284 A.2d 533 (1971).

[6] Heller, 554 U.S. at 627, n.26.

Central to this twin objective is each citizen's "inherent right of self-defense," including the "'need for defense of self, family, and property...' in one's abode." Heller, 554 U.S. at 628; McDonald, 130 S. Ct. at 3105.

Diametrically opposite, N.J.S. § 2C:39-5(b) prohibits possession of "any handgun, including any antique handgun." In order not to run afoul of this prohibition, a person must demonstrate affirmatively that he fits one or more statutorily defined categories of person and weaponry that exempt him from criminal liability under N.J.S. § 2C:39-5. In other words, any right to possess a handgun even in one's home in New Jersey is **not** an inherent individual right protected by the United States Constitution, but a discretionary privilege granted or withheld by the state.

There are two narrow exemptions to the statutory prohibition within which a New Jersey resident must fit to carry or even transport a firearm.

First, N.J.S. § 2C:39-6(e) states that "[n]othing in subsection (b) ... 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 [including a handgun]."

Second, although N.J.S. § 2C-39-6.e permits the carrying of a handgun from one's home to one's business, or from one's home to a repair shop or from any place of purchase, it does not on its face appear to permit the carrying of a handgun back to the dealer from whom the purchase was made, or to carry the

handgun to a pawnshop or other place to sell. If permitted by N.J.S. § 2C-39-6.e, N.J.S. § 2C-39-6.g requires that the handgun be "unloaded and contained in a closed and fastened case, gunbox, securely tied package, or locked in the trunk of the automobile in which it is being transported, and in the course of travel shall include only such deviations as are reasonably necessary under the circumstances." Thus, while a person may transport the handgun for certain limited purposes, the handgun must be disabled, unavailable for self-defense in much the same way that the city ordinances — discredited in Heller and in McDonald — made one's handgun inaccessible for self-defense in the home.

A New Jersey citizen-resident may carry a handgun unencumbered by these restrictive rules only if he obtains a permit to carry a handgun in public which, as established in this case, can only be accomplished by showing a "justifiable need," defined 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).]

As the court of appeals below found, "[t]his codification of the 'justifiable need' standard closely mirrors an earlier explanation of 'need'" that was laid down in the 1971 New Jersey Supreme Court opinion in Siccardy v. New Jersey, 59 N.J. 545, 284 A.2d 533 (1971). Instead of testing the continuing validity of Siccardy

under the Heller and McDonald rulings that possession of a handgun for self-defense is a matter of constitutional right, the court of appeals relied upon Siccardy, which is based upon the discredited proposition that possession of a handgun for any purpose whatsoever is a discretionary privilege. *See* Drake, 724 F.3d at 432-34. *See also* Piszczatoski, 840 F. Supp.2d at 829-31. Had the court done its duty, it would have concurred with dissenting Judge Hardiman that "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*." Drake, 724 F. 3d at 446 (Hardiman, J., dissenting). *See* Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012).

III. THE DECISIONS BELOW ARE BASED UPON THE UNCONSTITUTIONAL PREMISE THAT THE RIGHT TO KEEP AND BEAR ARMS BELONGS TO SOME, BUT NOT ALL, AMERICANS.

At the outset of this litigation, the lead plaintiff was Daniel J. Piszczatoski. On appeal, Mr. Piszczatoski was dismissed. The court of appeals explained:

> 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. [Drake, 724 F.3d at 429, n.3.]

By statute, Mr. Piszczatoski, as a retired police officer, obtained a carry permit because he was required to

prove only that he "retired in good standing," not "because of a disability," was "75 years of age or younger," and had been "regularly employed as a full-time member" of a qualifying law enforcement body, namely:

> of the State Police; [of] an interstate police force; ... of a county or municipal police department of this State; ... of a State law enforcement agency; [as a] sheriff, undersheriff or sheriff's officer of a county of this State; [as a] State or county corrections officer; [as a] county park police officer; [as a] county prosecutor's detective or investigator; [as a] federal law enforcement officer [or as a] retired [federal] law enforcement officer ... in this State.... [N.J.S. § 2C-39-6.l.]

Under N.J.S. § 2C-39-6.l, such a retired law enforcement officer shall have the same right to "carrying a handgun in the same manner as law enforcement officers exempted under paragraph (7) of subsection (a) of this section." Indeed, N.J.S. § 2C-39-6.a.7 states that N.J.S. § 2C-39-5 — the statute that outlaws possession of handguns — does not apply to "a regularly employed member" of a qualifying law enforcement body. Thus, as a retired law enforcement officer, Mr. Piszczatoski was not required to show a "justifiable need" to obtain a carry permit, nor to show any need whatsoever. Indeed, as a retired law enforcement officer, he was not bound by any of the restrictions on the possession of a handgun in his home or business that would otherwise apply if he were just an ordinary citizen.

As a retired law enforcement officer, Mr. Piszczatoski belongs to a favored class, entitled to preferential treatment. However, according to Heller, the right to keep and bear arms belongs to "all Americans," that is, "all members of the political community, not an unspecified subset." *Id.*, 554 U.S. at 580. As applied to the States through the Fourteenth Amendment, the right to keep and bear arms belongs to all citizens of New Jersey, not just to a privileged few selected by the state. As this Court ruled in McDonald, one of the primary purposes of the Fourteenth Amendment was to protect the inherent right of newly freed slave class, as citizens, to keep and bear arms. *Id.*, 130 S. Ct. at 3038-42. This right was not limited to citizens afflicted by racial discrimination; rather, the right extended equally to "all citizens." *Id.* at 3040-41. Otherwise, "whites in the South who opposed the Black Codes ... would have been left without the means of self-defense — as had abolitionists in Kansas in the 1850's." *Id.*, 130 S. Ct. at 3043.

Nor was that right of self-defense, including the right to carry, subject to control by civil government officials. *See id.*, 130 S. Ct. at 3038-39. To the contrary, the Fourteenth Amendment was designed to end the gun control monopoly imposed upon "private citizens" by the ruling class. As the McDonald Court pointed out, unarmed "African Americans in the South would likely have remained vulnerable to attack by many of their worst abusers: the state militia and state peace officers." *Id.*, 130 S. Ct. at 3043. Thus, this Court found that the Chicago and Oak Park ordinances that "effectively bann[ed] handgun

possession by almost all private citizens who reside in the City," "presumably would have permitted the possession of guns by those acting under the authority of the State and would thus have left firearms in the hands of the militia and local peace officers." *Id.*, 130 S. Ct. at 3026, 3043. And that is precisely what the New Jersey gun control laws do here.

In 1971, the New Jersey Supreme Court observed that "the Legislature [has] listed the types of persons who may carry handguns without permits; these notably include designated persons charged with law enforcement and guarding responsibilities." Siccardi, 59 N.J. at 557, 284 A.2d at 540. Nineteen years later that Court observed:

> **Very few** persons are exempt from the criminal provisions for carrying a gun without a permit. Members of the armed forces of the United States or National Guard, federal-law-enforcement officers, State Police, sheriff's officers, correction officers, or *regular* members of municipal and county police forces have authority to carry guns both on and off duty. [In re Preis, 118 N.J. at 569, 573 A.2d at 150-51 (emphasis added).]

Indeed, historically almost no "ordinary" New Jersey citizens are issued carry permits. This is no accident. As the New Jersey Supreme Court recounted in Siccardi, "[s]everal police chiefs and a representative of the State Police testified as expert witnesses before the County Court; they all supported a **highly restrictive** approach in the granting of carrying

permits." *Id.*, 59 N.J. at 550, 284 A.2d at 536 (emphasis added). Not surprisingly, the Petition states:

> 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." [Petition for a Writ of Certiorari, p. 6 (emphasis added).]

In Heller, this Court ruled that the right to keep and bear arms, including the possession and carrying thereof, belongs to "the People," because the Framers of the Second Amendment expressly stated that the right was essential for the purpose of securing a "**free** State." *Id.*, 544 U.S. at 580-600 (emphasis added). In New Jersey, however, the right to keep and bear arms belongs only to certain current and former government officials — for the purpose of keeping a "**safe**" State, as defined by other government officials. *See* In re Preis, *supra*, and Siccardi, *supra*. Neither court below addressed this contradiction. The court of appeals candidly refused to "engag[e] in a round of full-blown historical analysis" without lifting a finger to determine if the New Jersey statutory scheme measured up to the Amendment's original text and foundational precepts. *See* Drake, 724 F.3d at 431. The district court made a brief mention of Heller's statement that "'the right to bear arms as a bulwark against potential government oppression,'" but made no effort whatever to assess the question whether the Second Amendment extended the right to carry outside the narrow confines of one's home, business, or other property. *See* Piszczatoski, 840 F. Supp. 2d at 823.

Instead, both courts below assumed that the Second Amendment question before them was to be decided as if the Constitution protected only a narrow common law right of self-defense in the home. In reality, while personal self-defense may be described by some to be a "core component" of the Second Amendment, it is nevertheless a component of a much more encompassing right of the People to resist tyranny, should a lawless government rise up in the future. According to New Jersey gun control laws, however, government officials are the people's Lords and Benefactors[7] asserting monopoly control over instruments by which the People might resist arbitrary power. *See* Siccardi, 59 N.J. at 547-52, 284 A.2d at 535-37.

Although the state never bothered to reach the issue, its claim rests upon a mistaken understanding of the scope of the government's jurisdiction, presuming that its police powers over firearms on the public streets and parks are the same as its proprietary powers over firearms in courthouses and city halls. *See* Siccardi, 59 N.J. at 558, 284 A.2d at 540; In re Preis, 118 N.J. at 571-72, 573 A.2d at 152-53. But, "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public ... a part of the privileges, immunities, rights, and liberties of citizens." *See* Hague v. CIO, 307 U.S. 496, 515 (1939) (plurality

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[7] *See Luke* 22:25: "The kings of the Gentiles exercise lordship over them; and they that exercise authority upon them are called benefactors."

opinion per Roberts, J.).[8] While originally applied to, and commonly associated with, the exercise of First Amendment rights, there is no good reason to deny access to these same public areas to the exercise of Second Amendment rights which are as "'deeply rooted in this Nation's history and tradition'" as the freedoms of speech, press, assembly, and petition. *See* McDonald, 130 S. Ct. at 3036-37.

As is also true of those First Amendment freedoms, the right to keep and bear arms is based upon the same principle of the sovereignty of the people[9] — that government officials are not our masters, but our servants. *See Romans* 13:4,6. To that end, the Heller Court recognized that the right of the People to keep and bear arms is not just helpful, but absolutely "necessary to the security of a free State." Thus, the Second Amendment is constitutional insurance against tyrants who would disarm the people, leaving them defenseless against a state militia or standing army to suppress political opponents. *See* Heller, 554 U.S. at 598. As Heller has applied this ancient principle to protect the right of the people to keep and bear a handgun in defense of hearth and home, so should this Court apply that same principle to protect the right of the people to keep and bear arms on public thoroughfares, sidewalks and other open public spaces

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[8] While this view was first expressed in a plurality decision of this Court, it was embraced quickly by a near-unanimous court in Schneider v. State, 308 U.S. 147 (1939).

[9] *See* R. Perry and J. Cooper, eds., Sources of Our Liberties, ABA Foundation (Rev. ed. 1978), pp. 425-27.

that have been "from ancient times [forums] for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *See* Hague, 307 U.S. at 515.

The New Jersey gun control scheme is to the contrary. Treating firearm possession as a privilege granted by the civil authorities only to those citizens who now serve or once served the state as law enforcement officers is in no way consistent with the inherent right to keep and bear arms vested in the People.

IV. THE DECISIONS BELOW ARE BASED ON JUDICIALLY CONTRIVED PREDICTIONS CONCERNING PUBLIC SAFETY.

Both courts below assumed that, even if the Second Amendment secured some, albeit undefined, right to keep and bear arms for self-defense outside the home, that right nonetheless must be subordinate to New Jersey's statutorily enacted gun control policies. *See* Drake, 724 F.3d at 434-40; Piszczatoski, 840 F. Supp. 2d at 831-37. To reach this common result, both courts ignored Heller's instruction that the Second Amendment right was not to be "weighed" by courts with power to determine the right to be "wanting."[10] Rather, as Chief Justice Marshall wrote in Marbury v. Madison,[11] "*courts,* as well as other departments, are

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[10] *See Daniel* 5:27.

[11] 5 U.S. (1 Cranch) 137 (1803).

bound" by the Constitution, as it is written. *Id.* at 180. As Justice Scalia wrote in Heller:

> The very enumeration of the right [to keep and bear arms] takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. 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. [*Id.*, 554 U.S. at 634-35.]

The district court opinion was written in utter disregard of this precept. "At the [very] outset, [the court] noted" that its opinion was colored by fear of a "wrong use" of a firearm in self-defense that could cause the death of a person who "cannot be compensated by resurrection." 840 F. Supp. 2d at 816. The same might be said of death resulting from a wrongful use of the freedom of speech, such as "falsely shouting fire in a theatre and causing a panic." *See* Schenk v. United States, 249 U.S. 47 (1919). However, the district court erroneously assumed that the Second Amendment:

> **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. [Piszczatoski, 840 F. Supp. 2d at 816 (emphasis added).]

Apparently, the district court did not read, or did not take to heart, Justice Alito's McDonald opinion, in which he rejected this very argument:

> The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category. [*Id.*, 130 S. Ct. at 3045.]

Additionally, quoting the Fourth Circuit's opinion in United States v. Masciandaro,[12] the district court adopted as its own the desire "not ... 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." *See* Piszczatoski, 840 F. Supp. 2d at 829 (emphasis added). Accordingly, the district court announced that "the risks associated with a judicial error in discouraging regulation of firearms carried in public are too great." *Id.* at 829. Hence, it looked for a way of escape, concluding that "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

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[12] 638 F.3d 458 (4th Cir. 2011).

than would be reasonably necessary to achieve New Jersey's interest in public safety." *Id.*, 840 F. Supp. 2d at 837.

The court of appeals readily agreed. Although not as emotionally candid as the district court, two of the judges on the Third Circuit panel approached the constitutional question as timidly as the district court, finally lighting on "[t]he **predictive judgment** of New Jersey's legislators ... 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." Drake, 724 F.3d at 437 (emphasis added). Unable to find "much evidence to show how or why its legislators arrived at this predictive judgment," the panel majority made excuses for the absence of any "reports, statistical information, and other studies its legislature pondered," and obligingly filled the void, reaching all the way back to a 1968 study on "Firearms and Violence in American Life," relied upon in 1971 by the New Jersey Supreme Court in Siccardi. *See* Drake, 724 F.3d at 438 (emphasis added). And, then, in a move that even Houdini could not have duplicated, the majority stated:

> 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. [*Id.*]

The fact is that the "predictive judgment" of the legislature, upon which the court based its ultimate opinion, is pure fiction. As dissenting Circuit Judge Hardiman forcefully contends, "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." *Id.*, 724 F.3d at 454. Nor, Judge Hardiman continued, is it even possible to demonstrate any link between the justifiable need requirement and the dangers and risks associated with the misuse or accidental use of handguns: "Put simply, the solution is unrelated to the problem it intends to solve." *Id.*

It is inescapable, then, that the majority's deference to the "predictive judgment" of the New Jersey legislature is no more than camouflage, behind which the panel majority tried to hide its antipathy to the Second Amendment. It is also irrefutable evidence that, despite the Heller admonition to leave off "judge-empowering 'interest balancing,'"[13] the judiciary and the members of the bar practicing constitutional law are so habituated to balancing tests that only a strong word from this Court will secure the rule of law. Otherwise, the Second Amendment will continue to be ruled not by the law of the Constitution, but by judges, thereby weakening the very foundation of judicial review. *See* A. Scalia & B. Garner, Reading Law, pp. 407-08 (West: 2012).

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[13] Heller, 554 U.S. at 634.

CONCLUSION

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

Respectfully submitted,

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