No. 19-27

In The
Supreme Court of the United States

MARK CHEESEMAN,

Petitioner,

v.

JOHN POLILLO, CHIEF OF THE GLASSBORO, NEW JERSEY POLICE DEPARTMENT; AND KEVIN T. SMITH, SUPERIOR COURT JUDGE, GLOUCESTER COUNTY, NEW JERSEY,

Respondents.

On Petition For A Writ Of Certiorari To The Superior Court Of New Jersey, Appellate Division

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* FIREARMS POLICY COALITION, FIREARMS POLICY FOUNDATION, CALIFORNIA GUN RIGHTS FOUNDATION, AND SECOND AMENDMENT FOUNDATION IN SUPPORT OF PETITIONER

JOSEPH G.S. GREENLEE
Counsel of Record
FIREARMS POLICY COALITION
1215 K Street, 17th Floor
Sacramento, CA 95814
(916) 378-5785
jgr@fpchq.org

August 1, 2019

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* FIREARMS POLICY COALITION, FIREARMS POLICY FOUNDATION, CALIFORNIA GUN RIGHTS FOUNDATION, AND SECOND AMENDMENT FOUNDATION IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2(b), Firearms Policy Coalition, Firearms Policy Foundation, California Gun Rights Foundation, and Second Amendment Foundation respectfully request leave to submit a brief as *amici curiae* in support of the Petition for Writ of Certiorari.

As required under Rule 37.2(a), *Amici* provided timely notice to all parties' counsel of their intent to file this brief more than 10 days prior to the brief's due date. Petitioner's counsel consented to the filing of this brief. Respondent's counsel withheld consent by deciding not to take a position.

Amici are all nonprofit organizations dedicated to protecting the right to bear arms.

Firearms Policy Coalition defends constitutional rights and promotes individual liberty through direct and grassroots advocacy, research, legal efforts, outreach, and education.

Firearms Policy Foundation serves its members and the public through charitable programs including research, education, and legal efforts, with a focus on constitutional rights.

California Gun Rights Foundation focuses on educational, cultural, and judicial efforts to advance civil rights.

Second Amendment Foundation, which organized and prevailed in *McDonald v. City of Chicago*, protects the right to arms through educational and legal action programs.

Amici's interests will be substantially affected by the outcome of this case. First, the fundamental Second Amendment rights of *Amici*'s members residing in New Jersey are infringed by New Jersey's "justifiable need" standard to carry a handgun. Second, all of *Amici*'s members are impacted by the fact that the right to bear arms applies differently across the country from state to state. And third, because *Amici* and their members are often litigants in cases raising Second Amendment issues, they have an interest in ensuring that the right is properly protected.

Amici respectfully submit that they offer unique perspectives and information that will assist the Court beyond the help the parties were able to provide. All *Amici* frequently litigate and file *amicus briefs* in Second Amendment cases. *Amici* thus have a special understanding of the need for this Court to define the right to bear arms, as well as an understanding of how deeply the issues presented have divided lower courts.

Specifically, in the brief, *Amici* detail the various ways federal circuit courts have defined the right to bear arms, and identify several related issues that have divided circuits as a result of these different

definitions. These issues include whether states can categorically deny nonresidents the right, whether certain adults can be deprived of the right based on age, whether the right can be denied on outdoor government property, whether firearms can be banned in areas surrounding "sensitive places," and whether criminal activity can be inferred from the mere carrying of a firearm in public, among others.

Amici identify additional issues presented in this case that have divided lower courts, including what laws are "presumptively lawful," what laws are "longstanding," and what type of interest-balancing is prohibited in Second Amendment cases.

The brief demonstrates—unlike any other—how the issues presented in this case have troubled lower courts and why lower courts have been requesting additional guidance for the past decade. Because these concerns affect the constitutional rights of *Amici*'s members and all Americans, *Amici* respectfully seek leave to file their brief in support of the Petition for Writ of Certiorari.

Respectfully submitted,

JOSEPH G.S. GREENLEE
Counsel of Record
FIREARMS POLICY COALITION
1215 K Street, 17th Floor
Sacramento, CA 95814
(916) 378-5785
jgr@fpchq.org

August 1, 2019

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

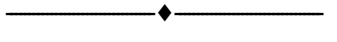
INTEREST OF THE *AMICI CURIAE*[1]

Firearms Policy Coalition, Inc. ("FPC") is a nonprofit membership organization that defends constitutional rights—including the right to keep and bear arms—and promotes individual liberty. FPC engages in direct and grassroots advocacy, research, legal efforts, outreach, and education.

Firearms Policy Foundation ("FPF") is a nonprofit organization that serves its members and the public through charitable programs including research, education, and legal efforts, with a focus on constitutional rights.

California Gun Rights Foundation ("CGF") is a nonprofit organization that focuses on educational, cultural, and judicial efforts to advance civil rights. CGF has conducted research and participated in litigation on the right to bear arms for over a decade.

Second Amendment Foundation ("SAF") is a nonprofit foundation dedicated to protecting the right to arms through educational and legal action programs. SAF has over 650,000 members, in every State of the Union. SAF organized and prevailed in *McDonald v. City of Chicago*.



[1] All parties were timely notified of *Amici*'s intent to file this brief. Petitioner's counsel consented to the filing, but Respondents' counsel withheld consent—*Amici* have thus filed a motion seeking leave to file the brief. No counsel for any party authored the brief in whole or in part. No one other than *Amici* funded its preparation or submission.

SUMMARY OF ARGUMENT

Lower courts are deeply divided over the extent to which the right to bear arms applies beyond the home. Some courts have held that the right applies with equal strength outside the home as inside the home; some have determined that the right likely applies outside the home, but in a weaker form; some have declined to decide whether the right exists outside the home; and some have decided that bans on carrying concealed firearms are constitutional, although perhaps not if open carry is also prohibited. The only broad consensus among lower courts is the need for additional guidance from this Court.

The proper resolution of several other issues depends on how this Court defines the right to bear arms. For instance, lower courts have had to guess how this Court will define the right to decide whether young adults can be prohibited from bearing arms; whether states can categorically deprive nonresidents of the right; whether the right can be denied on outdoor government property; whether firearms can be banned in areas surrounding "sensitive places"; and whether criminal activity can be inferred from the mere carrying of a firearm in public.

Another divisive issue among lower courts is the handling of "longstanding" and "presumptively lawful" regulations. What qualifies as "longstanding," which laws are "presumptively lawful," and whether the presumption can be rebutted have caused confusion.

More problematic is the interest-balancing that the right to bear arms has been subjected to—despite this Court's explicit and repeated repudiation of interest-balancing Second Amendment rights. Laws requiring an applicant to demonstrate a special need to bear arms necessarily require the governing agency to balance interests. Here, New Jersey's "justifiable need" standard requires agreement among both law enforcement and a judge that an applicant's interest in self-protection is necessary; the need is urgent; the danger is special; and no alternative exists to armed defense.

Additionally, lower courts often uphold these laws through the application of an interest-balancing heightened scrutiny. All this interest-balancing has allowed the Second Amendment to be singled out for special—and specially unfavorable—treatment. Indeed, many courts have boldly admitted doing so, offering justifications that this Court has previously rejected. Until this Court reinforces its precedents, lower courts will continue to treat the right to bear arms as a second-class right.

ARGUMENT

I. Certiorari should be granted to define the right to bear arms.

The court below upheld New Jersey's "justifiable need" requirement due largely to what it perceived as a "lack of clarity that the Supreme Court in [*District of*

Columbia v. Heller, 554 U.S. 570 (2008)] intended to extend the Second Amendment right to a state regulation of the right to carry outside the home." *In re Cheeseman*, No. A-2412-17T2, 2018 WL 5831294, at *3 (N.J. Super. Ct. App. Div. Nov. 8, 2018). The court hesitated "to find a constitutional infirmity absent clear expression of the law from the United States Supreme Court, particularly where it would disturb settled law." *Id.* at *2 (quoting *In re Pantano*, 429 N.J. Super. 478, 487 (App. Div. 2013)).

A. To what extent the right to bear arms applies beyond the home has deeply divided lower courts.

Like the Superior Court of New Jersey, the federal circuit courts of appeals have struggled to find clarity in *Heller*. The circuit courts are intensely divided over the right to bear arms. Nearly every circuit has addressed the issue, yet agreements among even a few courts are rare.

1. The D.C. and Seventh Circuits held that the right applies just as strongly outside the home as inside the home.

Both the D.C. and Seventh Circuits concluded that the right to bear arms applies outside the home as strongly as it applies inside the home.

The D.C. Circuit held that "possession and carrying—keeping and bearing—are on equal footing." *Wrenn v. District of Columbia*, 864 F.3d 650, 666 (D.C.

Cir. 2017). Striking down a requirement that applicants demonstrate a "good reason" for a handgun carry permit, the court concluded that "the individual right to carry common firearms beyond the home for self-defense—even in densely populated areas, even for those lacking special self-defense needs—falls within the core of the Second Amendment's protections." *Id.* at 661.

The Seventh Circuit struck down a prohibition on bearing arms in *Moore v. Madigan*, reasoning that "the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside." 702 F.3d 933, 942 (7th Cir. 2012).

2. The First and Second Circuits determined that the right likely applies outside the home, but in a weaker form.

The First and Second Circuits determined that the right to bear arms likely exists outside the home but in weaker form than inside the home.

The First Circuit "view[s] *Heller* as implying that the right to carry a firearm for self-defense guaranteed by the Second Amendment is not limited to the home." *Gould v. Morgan*, 907 F.3d 659, 670 (1st Cir. 2018). But the court determined that "[t]his right is plainly more circumscribed outside the home," *id.* at 672, and upheld a law requiring concealed carry permit applicants to demonstrate "good reason to fear injury." *Id.* at 674 (citing Mass. Gen. Laws ch. 140, § 131(d)).

Similarly, the Second Circuit determined that "the Amendment must have *some* application in the very different context of the public possession of firearms." *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012). But it further determined that restrictions outside the home "fall[ ] outside the core Second Amendment protections," and upheld a requirement that applicants for concealed carry permits demonstrate "proper cause." *Id.* at 94.

3. The Third and Fourth Circuits declined to decide whether the right exists outside the home.

Both the Third and Fourth Circuits have declined to decide whether there is a right to bear arms outside the home.

The Third Circuit "decline[d] to definitively declare that the individual right to bear arms for the purpose of self-defense extends beyond the home," upholding New Jersey's "justifiable need" requirement for a carry permit as a " 'longstanding,' 'presumptively lawful' regulation." *Drake v. Filko*, 724 F.3d 426, 431, 432 (3d Cir. 2013).

Upholding a similar requirement, the Fourth Circuit "hew[ed] to a judicious course today, refraining from any assessment of whether Maryland's good-and-substantial-reason requirement for obtaining a handgun permit implicates Second Amendment protections." *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013).

4. The Ninth and Tenth Circuits held that the right to bear arms does not protect concealed carry.

The Ninth and Tenth Circuits both held that the Second Amendment does not protect carrying concealed firearms—but while expressly refusing to consider the availability of openly carrying firearms. *Peterson v. Martinez*, 707 F.3d 1197, 1208 (10th Cir. 2013) (basing analysis "on the effects of the state statute [restricting concealed carry] rather than the combined effects of the statute and the ordinance [restricting open carry]"); *Peruta v. Cty. of San Diego*, 824 F.3d 919, 927 (9th Cir. 2016) (en banc) ("We do not reach the question whether the Second Amendment protects some ability to carry firearms in public, such as open carry."). In contrast, Florida's Supreme Court upheld an open carry ban because Florida's concealed carry "licensing scheme provides almost every individual the ability to carry a concealed weapon." *Norman v. State*, 215 So. 3d 18, 28 (Fla. 2017).

5. What lower courts agree on is the need for further guidance from this Court.

Lower courts have roundly called for additional guidance on the right to bear arms.

Addressing a ban on firearms in national parks, the Fourth Circuit explained, "This case underscores the dilemma faced by lower courts in the post-*Heller* world: how far to push *Heller* beyond its undisputed

core holding. On the question of *Heller*'s applicability outside the home environment, we think it prudent to await direction from the Court itself." *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011). Anticipating additional guidance over eight years ago, the court added, "we believe the most respectful course is to await that guidance from the nation's highest court. There simply is no need in this litigation to break ground that our superiors have not tread." *Id.* Others have voiced similar reservations about getting ahead of this Court. *See Hightower v. City of Boston*, 693 F.3d 61, 74 (1st Cir. 2012) ("we should not engage in answering the question of how *Heller* applies to possession of firearms outside of the home"); *Dearth v. Lynch*, 791 F.3d 32, 41 (D.C. Cir. 2015) (Griffith, J., concurring) ("I would extend *Heller* no further unless and until the Supreme Court does so").

Other courts have expressed a similar need for more guidance. *See Gould*, 907 F.3d at 670 ("Withal, *Heller* did not supply us with a map to navigate the scope of the right of public carriage for self-defense."); *Kachalsky*, 701 F.3d at 89 ("What we do not know is the scope of that right beyond the home and the standards for determining when and how the right can be regulated by a government. This vast '*terra incognita*' has troubled courts since *Heller* was decided."); *Drake*, 724 F.3d at 430 ("Outside of the home, however, we encounter the 'vast terra incognita' ").

The Court of Appeals of Maryland was bolder. Adopting the narrowest interpretation of *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010),

despite acknowledging that the opinions suggested a broader interpretation, the court proclaimed, "[i]f the Supreme Court, in this dicta, meant its holding to extend beyond home possession, it will need to say so more plainly." *Williams v. State*, 417 Md. 479, 496 (2011).

B. Several related issues depend on how this Court defines the right to bear arms.

Lower courts have addressed several issues related to the right to bear arms, the holdings of which were based on predictions of how this Court will define the right. Until this Court provides additional guidance, lower courts will continue to guess what the right is as they decide similar cases.

1. Can certain adults be denied the right to bear arms based on their age?

Can the right to bear arms be limited to certain ages, even among adults? Without definitively deciding what the right to bear arms protects, the Fifth Circuit upheld a statutory scheme prohibiting 18–to–20–year–old adults from carrying handguns in public. *Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338 (5th Cir. 2013). The Supreme Court of Illinois upheld a related prohibition. *People v. Mosley*, 2015 IL 115872 (statute "that prohibited possession of a firearm while outside one's home or on a public way while under 21 years of age and not engaged in lawful hunting activities did not violate right to keep and bear arms"). *But*

see David B. Kopel & Joseph G.S. Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. ILL. U. L.J. (2019)[2] (demonstrating that in the colonial and founding eras, 18–to–20–year–olds were commonly required, and never forbidden, to keep and bear arms).

2. Can a state categorically deny nonresidents from bearing arms?

Does the right to bear arms stop at state lines? The Seventh Circuit upheld Illinois's concealed carry licensing scheme that made nonresidents from 45 states categorically ineligible to even apply for an Illinois license, based merely on their state of residence. *Culp v. Raoul*, 921 F.3d 646 (7th Cir. 2019).

In a related case, the Second Circuit established that a part-time resident of New York who makes his permanent domicile elsewhere is eligible to apply for a carry license. *Osterweil v. Bartlett*, 738 F.3d 520, 521 (2d Cir. 2013).

3. Can the right to bear arms be prohibited on United States Postal Service property?

Does the right to bear arms extend to a Post Office, or its parking lot? The Tenth Circuit upheld a regulation "which prohibits the storage and carriage of firearms on USPS property . . . including the . . . parking

---

[2] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=320566.

lot." *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1122–23 (10th Cir. 2015).

Similarly, in an unpublished opinion, the Fifth Circuit upheld a handgun ban on USPS property—including the parking lot—even "[a]ssuming Dorosan's Second Amendment right to keep and bear arms extends to carrying a handgun in his car." *United States v. Dorosan*, 350 F. App'x 874, 875 (5th Cir. 2009) (unpublished).

4. Can the right to bear arms be prohibited on Army Corps of Engineers' land?

The "Army Corps manages 422 projects, mostly lakes, in forty-two states and is the steward of twelve million acres of land and water used for recreation, with 54,879 miles of shoreline." *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Engineers*, 212 F. Supp. 3d 1348, 1353 (N.D. Ga. 2016). Can it prohibit firearms on all this property?

The Eleventh Circuit upheld the federal regulation prohibiting loaded firearms and ammunition on U.S. Army Corps of Engineers' property. *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Engineers*, 788 F.3d 1318, 1320 (11th Cir. 2015). The United States District Court for the District of Idaho, however, ruled it unconstitutional. *Morris v. U.S. Army Corps of Engineers*, 60 F. Supp. 3d 1120 (D. Idaho 2014).

5. Can firearms be prohibited in areas surrounding "sensitive places"?

Are areas surrounding "sensitive places" also sensitive? The D.C. Circuit recently held that the area containing "the many angled parking spots that line the 200 block of Maryland Avenue SW . . . approximately 1,000 feet from the entrance to the Capitol itself" was sensitive because "although it is not a government building . . . it is sufficiently integrated with the Capitol for *Heller I*'s sensitive places exception to apply." *United States v. Class*, No. 15-3015, 2019 WL 3242381, at *1, *2 (D.C. Cir. July 19, 2019). By comparison, Illinois's Supreme Court struck a prohibition on carrying arms within 1,000 feet of a public park, reasoning that the area surrounding a sensitive place cannot itself be treated as sensitive. *People v. Chairez*, 2018 IL 121417.

6. Can criminal activity be inferred from merely carrying a firearm in public?

Can criminal activity be inferred based merely on an individual publicly carrying a firearm? The Supreme Court of Pennsylvania held that it cannot. *Commonwealth v. Hicks*, 208 A.3d 916, 937 (Pa. 2019) ("there simply is no justification for the conclusion that the mere possession of a firearm, where it lawfully may be carried, is alone suggestive of criminal activity."). But plaintiffs have lost 42 U.S.C. § 1983 actions for false arrest and unconstitutional seizure of property—despite being wrongfully arrested and having their arms confiscated for lawfully carrying a firearm—

because the right remains undefined. *Gonzalez v. Vill. of W. Milwaukee*, 671 F.3d 649, 659 (7th Cir. 2012) ("Whatever the Supreme Court's decisions in *Heller* and *McDonald* might mean for future questions about open-carry rights, for now this is unsettled territory."); *Burgess v. Town of Wallingford*, 569 F. App'x 21, 23 (2d Cir. 2014) (unpublished) ("the protection that Burgess claims he deserves under the Second Amendment—the right to carry a firearm openly outside the home—is not clearly established law.").

II. Certiorari should be granted to clarify *Heller*'s "presumptively lawful" regulations.

Heller identified "presumptively lawful regulatory measures," including "longstanding prohibitions on the possession of firearms by felons and the mentally ill, [] laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, [and] laws imposing conditions and qualifications on the commercial sale of arms." 554 U.S. at 626–27. This Court repeated these "longstanding regulatory measures" in *McDonald*, 561 U.S. at 786.

The Third Circuit upheld the "justifiable need" requirement at issue here as "a longstanding regulation that enjoys presumptive constitutionality under the teachings articulated in *Heller*," because "[t]he 'justifiable need' standard . . . has existed in New Jersey in some form for nearly 90 years." *Drake*, 724 F.3d at 432, 434.

Lower courts have struggled to decipher *Heller*'s "presumptively lawful" language. *Masciandaro*, 638 F.3d at 469 ("The full significance of these pronouncements is far from self-evident.") (internal citation omitted); *Pena v. Lindley*, 898 F.3d 969, 976 (9th Cir. 2018) ("Our sister circuits have struggled to unpack the different meanings of 'presumptively lawful.' ").

Circuits have struggled to determine, *inter alia*: whether a presumption can be rebutted; what makes a law "longstanding"; and what unlisted laws are presumptively lawful.[3]

A. Can the presumption be rebutted?

The word "presumptively" indicates that a regulation's constitutionality can be rebutted. "A presumption is a rule of law, statutory or judicial, by which finding of a basic fact gives rise to existence of presumed fact, *until presumption is rebutted*." Black's Law Dictionary 1185 (6th ed. 1990) (emphasis added). "Nevertheless, the answer has proven elusive, as the circuits have splintered over the question." *Pena*, 898 F.3d at 1004 (Bybee, J., concurring in part and dissenting in part).

As the Third Circuit explained, if the presumption in favor of conditions and qualifications on the commercial sale of arms were irrebuttable and "there were

---

[3] For other circuit splits over "presumptively lawful" regulations, *see* David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS L.J. 193, 214–28 (2017).

somehow a categorical exception for these restrictions, it would follow that there would be no constitutional defect in prohibiting the commercial sale of firearms. Such a result would be untenable under *Heller*." *United States v. Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010).

Some courts allow the presumption to be rebutted. *See Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 686 (6th Cir. 2016) (en banc) ("*Heller* only established a presumption that such bans were lawful; it did not invite courts onto an analytical off-ramp to avoid constitutional analysis."); *United States v. Barton*, 633 F.3d 168, 173 (3d Cir. 2011) ("the Supreme Court implied that the presumption may be rebutted.") (citation omitted); *Heller v. District of Columbia*, 670 F.3d 1244, 1253 (D.C. Cir. 2011) ("*Heller II*") ("A plaintiff may rebut this presumption"); *Peterson*, 707 F.3d at 1218 n.1 (quoting *Heller II*); *United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010) ("the phrase '*presumptively* lawful regulatory measures' suggests the possibility that one or more of these 'longstanding' regulations 'could be unconstitutional in the face of an as-applied challenge.' ") (quoting *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010)). *See also Pena*, 898 F.3d at 1004 (Bybee, J., concurring in part and dissenting in part) ("It is contrary to my instincts to read 'presumptively lawful' as 'conclusively lawful.' ").

Yet other courts have treated "presumptively lawful" measures as conclusively lawful. *See*, *e.g.*, *United States v. Bogle*, 717 F.3d 281, 281 (2d Cir. 2013) (ban on felons); *United States v. McRobie*, No. 08-4632, 2009

WL 82715, at *1 (4th Cir. 2009) (unpublished) (ban on mentally ill); *United States v. Castro*, No. 10-50160, 2011 WL 6157466, at *1 (9th Cir. 2011) (unpublished) (commercial sales); *United States v. Davis*, 304 F. App'x 473, 474 (9th Cir. 2008) (unpublished) (prohibition on weapons in sensitive places).

B. What is "longstanding"?

The Third Circuit found "nearly 90 years" sufficient for the "justifiable need" standard to be considered longstanding. *Drake*, 724 F.3d at 432. But the Fifth Circuit has "assume[d], without deciding, that [restrictions from 1909] are not 'longstanding regulatory measures' and are not 'presumptively lawful regulatory measures.'" *Mance v. Sessions*, 896 F.3d 699, 704 (5th Cir. 2018) (citations omitted). This assumption was based on the district court's historical analysis, which determined that "these early twentieth century . . . restrictions do not date back quite far enough to be considered longstanding," because "[w]hile two-hundred years from now, restrictions from 1909 may seem longstanding, looking back only to 1909, today, omits more than half of America's history and belies the purpose of the inquiry." *Mance v. Holder*, 74 F. Supp. 3d 795, 805 (N.D. Tex. 2015).

This Court never explained what makes a regulation "longstanding," instead stating that it would "expound upon the historical justifications" of the presumptively lawful longstanding regulatory measures at a later date. 554 U.S. at 635.

In the meantime, lower courts have struggled to make sense of the timeframe. None has defined "longstanding," but some have observed that the measures listed in *Heller* were not widespread in the founding era. *See Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 196 (5th Cir. 2012) ("*BATFE*") ("*Heller* demonstrates that a regulation can be deemed 'longstanding' even if it cannot boast a precise founding-era analogue"); *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc) ("we do take from *Heller* the message that exclusions need not mirror limits that were on the books in 1791."); *United States v. Booker*, 644 F.3d 12, 23–24 (1st Cir. 2011) (explaining that the federal felony firearm possession ban, 18 U.S.C. § 922(g)(1), "bears little resemblance to laws in effect at the time the Second Amendment was ratified," was enacted in 1938, included non-violent felons starting in 1961, and targeted possession rather than receipt starting in 1968).

C. What other laws are "presumptively lawful"?

After providing specific examples of "presumptively lawful regulatory measures," this Court noted in a footnote that "our list does not purport to be exhaustive." *Heller*, 554 U.S. at 627 n.26.

Lower courts are uncertain about what other regulatory measures are presumptively lawful. "Some courts have treated *Heller*'s listing of 'presumptively

lawful regulatory measures,' for all practical purposes, as a kind of 'safe harbor' for unlisted regulatory measures . . . which they deem to be analogous to those measures specifically listed in *Heller*." *Chester*, 628 F.3d at 679. For examples of laws that are not longstanding, yet were upheld merely by analogy to laws listed in *Heller*, *see United States v. White*, 593 F.3d 1199 (11th Cir. 2010) (domestic violence misdemeanors); *United States v. Bena*, 664 F.3d 1180, 1184 (8th Cir. 2011) (domestic violence restraining orders); *United States v. Dugan*, 657 F.3d 998 (9th Cir. 2011) (drug users).

The Fourth Circuit criticized the practice of analogizing modern laws to longstanding laws, because that "approximates rational-basis review." *Chester*, 628 F.3d at 679. Other courts have decided against that approach as well. *See*, *e.g.*, *United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013) (prohibition on domestic violence misdemeanants is not longstanding or rooted in history); *United States v. Greeno*, 679 F.3d 510, 517 (6th Cir. 2012) (dangerous weapon enhancement was not presumptively lawful because it was not specifically listed in *Heller*).

III. Certiorari should be granted to clarify what sort of interest-balancing this Court rejected in *Heller*.

"The Supreme Court has at every turn rejected the use of interest balancing in adjudicating Second

Amendment cases." *Tyler*, 837 F.3d at 702–03 (Batchelder, J., concurring in most of the judgment).

Heller rebuffed the "judge-empowering 'interest-balancing inquiry' " from Justice Breyer's dissent "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.' " 554 U.S. at 634 (quoting *id.* at 689–90 (Breyer, J., dissenting)).

This Court rejected interest-balancing again in *McDonald*:

> Justice BREYER is incorrect that incorporation will 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. As we have noted, while his opinion in *Heller* recommended an interest-balancing test, the Court specifically rejected that suggestion.

561 U.S. at 790–91; *id.* at 785 ("we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing") (quoting *Heller*, 554 U.S. at 633–35).

"The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634. "We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing'

approach." *Id.* "We would not apply an 'interest-balancing' approach to the prohibition of a peaceful neo-Nazi march through Skokie." *Id.* at 635 (citing *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977) (*per curiam*)). Rather, "The Second Amendment . . . [l]ike the First . . . is the very *product* of an interest balancing by the people." *Id.* at 635.

Indeed, "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Id.* at 634.

A. Ascertaining a "justifiable need" requires interest-balancing.

Despite this Court's explicit and repeated repudiations of interest-balancing tests, several courts have upheld concealed carry permitting schemes that allow government officials to determine whether an individual's need for self-defense is sufficiently unique to outweigh the government's interest in an unarmed public. *See Kachalsky*, 701 F.3d 81 (upholding "proper cause" requirement); *Woollard*, 712 F.3d 865 (upholding "good-and-substantial-reason" standard); *Drake*, 724 F.3d 426 (upholding "justifiable need" requirement at issue here).

Here, New Jersey's "justifiable need" is defined as an "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).

Thus, to determine whether someone should be entitled to armed self-defense, the government must weigh whether: (1) self-protection is necessary; (2) the need is urgent; (3) the danger is special; and (4) no alternative exists to armed defense.

What is more, "Upon receiving the approval of the chief of police or superintendent . . . the application is then presented to a judge of the Superior Court . . . who 'shall issue' the permit after being satisfied that the applicant is qualified and has established a 'justifiable need' for carrying a handgun." *In re Cheeseman*, No. A-2412-17T2, at *1.

Under this scheme, both law enforcement and a judge are granted "the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634.

B. Means-end scrutiny requires interest-balancing.

"*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny." *Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting).

Indeed, when declining to apply "Justice Breyer's *Turner Broadcasting* intermediate scrutiny approach,"

id. at 1278, this Court also rejected strict scrutiny—as Justice Breyer acknowledged:

> Respondent proposes that the Court adopt a "strict scrutiny" test . . . But the majority implicitly, and appropriately, rejects that suggestion. . . .
>
> Indeed, adoption of a true strict-scrutiny standard for evaluating gun regulations would be impossible. . . . [A]ny attempt *in theory* to apply strict scrutiny to gun regulations will *in practice* turn into an interest-balancing inquiry, with the interests protected by the Second Amendment on one side and the governmental public-safety concerns on the other, the only question being whether the regulation at issue impermissibly burdens the former in the course of advancing the latter.

Heller, 554 U.S. at 688–89 (Breyer, J., dissenting). Undeterred, every circuit has adopted a heightened scrutiny test[4] for Second Amendment challenges except the

---

[4] The test was established in *Marzzarella*, 614 F.3d at 89. It was adopted in *Gould*, 907 F.3d at 669; *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015) ("*NYSRPA I*"); *Chester*, 628 F.3d at 680; *BATFE*, 700 F.3d at 194; *Greeno*, 679 F.3d at 518; *Ezell v. City of Chicago*, 651 F.3d 684, 701–03 (7th Cir. 2011) ("*Ezell I*"); *Chovan*, 735 F.3d at 1136–37; *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1261 n.34 (11th Cir. 2012) ("*GeorgiaCarry.Org I*"); *Heller II*, 670 F.3d at 1252.

Eighth.[5] If heightened scrutiny contradicts this Court's precedent, the precedent must be reaffirmed.

IV. Certiorari should be granted to clarify Second Amendment doctrine so lower courts stop running roughshod over it.

Lower courts have taken advantage of the lack of express guidance from this Court to treat the Second Amendment as a second-class right. Indeed, taking examples from this brief alone, lower courts have prohibited ordinary citizens from bearing arms, limited the ages of adults that can exercise the right, allowed states to discriminate against nonresidents, banned arms on outdoor government property, treated "presumptively lawful" regulations as "conclusively lawful," deemed restrictions of recent vintage "longstanding," analogized modern laws to longstanding laws, upheld interest-balancing permitting schemes, and adopted interest-balancing tests for Second Amendment cases.

This Court declared that the Second Amendment is not a "second-class right" to be "singled out for special—and specially unfavorable—treatment." *McDonald*, 561 U.S. at 778–79, 780. Yet several courts have boldly admitted doing so.

---

[5] *United States v. Hughley*, 691 F. App'x 278, 279 (8th Cir. 2017) (unpublished) ("Other courts seem to favor a so-called 'two-step approach.' . . . We have not adopted this approach and decline to do so here.").

The Second Circuit acknowledged that "analogies between the First and Second Amendment were made often in *Heller*" and that "[s]imilar analogies have been made since the Founding." *Kachalsky*, 701 F.3d at 92. Nevertheless, the court refused to "assume that the principles and doctrines developed in connection with the First Amendment apply equally to the Second," because "that approach . . . could well result in the erosion of hard-won First Amendment rights." *Id.* Put differently, if the First and Second Amendments were treated equally, courts would undermine the First in order to avoid enforcing the Second.

The Tenth Circuit believes the Second Amendment can be treated as inferior because of its inherent dangers. In *Bonidy*, the court determined that "[t]he risk inherent in firearms and other weapons distinguishes the Second Amendment right from other fundamental rights that have been held to be evaluated under a strict scrutiny test, such as the right to marry and the right to be free from viewpoint discrimination." 790 F.3d at 1126.

Similarly, the Third Circuit admitted that "[w]hile our Court has consulted First Amendment jurisprudence concerning the appropriate level of scrutiny to apply to a gun regulation, we have not wholesale incorporated it into the Second Amendment. This is for good reason: 'the risk inherent in firearms and other weapons distinguishes the Second Amendment right from other fundamental rights. . . .'" *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 124 n.28 (3d Cir. 2018) (quoting *Bonidy*, 790

F.3d at 1126) (brackets omitted). Thus, "the articulation of intermediate scrutiny for equal protection purposes is not appropriate here." *Id.*

As the Third Circuit dissent noted, "the majority candidly admits that it is not applying intermediate scrutiny as we know it. It concedes that its approach does not come from the First Amendment or the Fourteenth Amendment (or any other constitutional provision, for that matter). It offers only one reason: guns are dangerous." *Id.* at 133 (Bibas, J., dissenting) (citations omitted).

This Court has denounced special treatment for the Second Amendment. "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." *McDonald*, 561 U.S. at 783.

As "*Heller* explained, other rights affect public safety too. The Fourth, Fifth, and Sixth Amendments often set dangerous criminals free. The First Amendment protects hate speech and advocating violence. The Supreme Court does not treat any other right differently when it creates a risk of harm. And it has repeatedly rejected treating the Second Amendment differently from other enumerated rights. The Framers made that choice for us. We must treat the Second Amendment the same as the rest of the Bill of Rights." *Ass'n of New Jersey Rifle & Pistol Clubs*, 910 F.3d at

133–34 (Bibas, J., dissenting) (citing *Heller*, 554 U.S. at 634–35; *McDonald*, 561 U.S. at 787–91).

"*Heller* noted, while it is true that, in the decades before the Founding, the right to bear arms was often treated by English courts with far less respect than other fundamental rights . . . that is not how *we* may treat that right." *Tyler*, 837 F.3d at 706–07 (Batchelder, J., concurring in most of the judgment) (citing *Heller*, 554 U.S. at 608; *McDonald*, 561 U.S. at 780).

Justices of this Court have lamented lower courts' disregard for its precedents. *See Jackson v. City & Cty. of San Francisco*, 135 S. Ct. 2799, 2799 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) ("Despite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts, including the ones here, have failed to protect it."); *Friedman v. City of Highland Park*, 136 S. Ct. 447, 447 (2015) (Thomas, J., joined by Scalia, J., dissenting from denial of certiorari) (denouncing "noncompliance with our Second Amendment precedents" by "several Courts of Appeals"); *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., joined by Gorsuch, J., dissenting from denial of certiorari) (noting "a distressing trend: the treatment of the Second Amendment as a disfavored right."); *Silvester v. Becerra*, 138 S. Ct. 945, 950 (2018) (Thomas, J., dissenting from denial of certiorari) ("the lower courts are resisting this Court's decisions in *Heller* and *McDonald* and are failing to protect the Second Amendment").

Others have noticed the nullification problem. *See*, *e.g.*, *Ass'n of New Jersey Rifle & Pistol Clubs*, 910 F.3d at 126 (Bibas, J., dissenting) (the majority opinion and five other circuits that reached similar decisions "err in subjecting the Second Amendment to different, watered-down rules and demanding little if any proof."); *Mance v. Sessions*, 896 F.3d 390, 398 (5th Cir. 2018) (Ho, J., dissenting from denial of rehearing en banc) ("the Second Amendment continues to be treated as a 'second-class' right"); David Kopel, *Data Indicate Second Amendment Underenforcement*, 68 DUKE L.J. ONLINE 79 (2018) (identifying systemic problems in the Second, Fourth, and Ninth Circuits); George Mocsary, *A Close Reading of an Excellent Distant Reading of* Heller *in the Courts*, 68 DUKE L.J. ONLINE 41, 53–54 (2018) (Second Amendment claims are subjected to a substantially weakened form of heightened scrutiny with extremely lower success rates than other rights); Kopel & Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS L.J. at 294–95 (criticizing one-sided view of evidence in Second Amendment cases).

Until this Court reinforces its precedents, lower courts will continue to treat the right to bear arms as a second-class right.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH G.S. GREENLEE
Counsel of Record
FIREARMS POLICY COALITION
1215 K Street, 17th Floor
Sacramento, CA 95814
(916) 378-5785
jgr@fpchq.org

August 1, 2019