No. _____

In The
Supreme Court of the United States

THOMAS R. ROGERS and the ASSOCIATION OF NEW JERSEY RIFLE & PISTOL CLUBS, INC.,

Petitioners,

v.

GURBIR S. GREWAL, *et al*.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *District of Columbia v. Heller*, this Court held that the Second Amendment protects "the individual right to possess and carry weapons in case of confrontation," 554 U.S. 570, 592 (2008), and in *McDonald v. City of Chicago*, it determined that this right "is fully applicable to the States," 561 U.S. 742, 750 (2010). The Courts of Appeals for the District of Columbia and Ninth Circuits have concluded that the right to carry a firearm extends outside the home and that licensing restrictions that require citizens to show a special need for carrying a firearm effectively "destroy[] the ordinarily situated citizen's right to bear arms" and therefore are categorically unconstitutional. *Wrenn v. District of Columbia*, 864 F.3d 650, 666 (D.C. Cir. 2017); *accord Young v. Hawaii*, 896 F.3d 1044, 1074 (9th Cir. 2018). By contrast, the court below, along with the First, Second, and Fourth Circuits, have upheld substantively indistinguishable licensing restrictions under a watered-down "intermediate scrutiny" analysis.

The questions presented are:

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

2. Whether the government may deny categorically the exercise of the right to carry a firearm outside the home to typical law-abiding citizens by conditioning the exercise of the right on a showing of a special need to carry a firearm.

PARTIES TO THE PROCEEDING

Petitioners Thomas R. Rogers and the Association of New Jersey Rifle & Pistol Clubs, Inc., were the plaintiffs before the District Court and the plaintiffs-appellants in the Court of Appeals.

Respondents Gurbir S. Grewal, in his official capacity as Attorney General of New Jersey, Patrick J. Callahan, in his official capacity as Acting Superintendent of the New Jersey Division of State Police, Kenneth J. Brown, Jr., in his official capacity as Chief of the Wall Township Police Department, Joseph W. Oxley, in his official capacity as Judge of the Superior Court of New Jersey, Law Division, Monmouth County, and N. Peter Conforti, in his official capacity as Judge of the Superior Court of New Jersey, Law Division, Sussex County, were defendants before the District Court and defendants-appellees in the Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

The Association of New Jersey Rifle & Pistol Clubs, Inc., has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

In *District of Columbia v. Heller*, this Court held that the Second Amendment protects "the individual right to possess and carry weapons in case of confrontation" for "the core lawful purpose of self-defense." 554 U.S. 570, 592, 630 (2008). But the lower courts have split over the constitutionality of laws that categorically bar typical, law-abiding citizens from carrying handguns outside the home for self-defense. The D.C. Circuit has seen these laws for what they are—"necessarily a total ban on most [citizens'] right to carry a gun"—and it has struck down the District of Columbia's requirement that citizens show a "good reason," *other than self-defense*, before carrying a handgun outside the home as categorically unconstitutional. *Wrenn v. District of Columbia*, 864 F.3d 650, 666 (D.C. Cir. 2017); *see also Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018). But the court below upheld New Jersey's substantively indistinguishable "justifiable need" requirement, App.1a, based on its reasoning in an earlier case that such a law "does not burden conduct within the scope of the Second Amendment's guarantee" and, even if it did, it would pass constitutional muster under a toothless version of "intermediate scrutiny" that consists of little more than blind deference to the State's unbridled "sound judgment and discretion" in passing the law. *Drake v. Filko*, 724 F.3d 426, 429, 440 (3d Cir. 2013); *see also Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013); *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012).

This direct conflict between the lower courts goes to the core of the Second Amendment. The question presented in this case is nothing less than this: Does the Second Amendment protect, as it says, the right to keep *and bear* Arms for all Americans? Or can some circuits effectively erase two of those words from the Constitution? This Court should intervene to ensure a uniform understanding of the Second Amendment and prevent the lower courts from nullifying rights guaranteed by the text of the Constitution.

The decision below also directly contradicts this Court's decisions in *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). In *Heller*, this Court held that the right to self-defense is "the *central component*" of the Second Amendment, 554 U.S. at 599. But the Third Circuit upheld the requirement that citizens must show *something more* than a desire for self-defense to bear arms as entirely "outside the scope of the Second Amendment's guarantee." 724 F.3d at 434. In *Heller*, this Court held that the Second Amendment takes "off the table" the policy choice of flatly banning core Second Amendment conduct. 554 U.S. at 636; *see also McDonald*, 561 U.S. at 767-68. But the Third Circuit upheld New Jersey's ban on bearing arms for self-defense by blindly deferring to the State's "policy judgment" that *whenever* "an individual carries a handgun in public for his or her own defense," it creates an unacceptable "risk to the public." 724 F.3d at 439. And in *Heller*, this Court held that the government lacks "the power to decide on a case-by-case basis whether the right [to bear arms] is *really worth* insisting upon." 554 U.S. at 634. But the Third Circuit

allowed New Jersey to do precisely that by reserving for itself the prerogative to determine on a case-by-case basis whether a citizen has a sufficiently compelling reason to exercise his or her right to carry a firearm.

The Third Circuit, unfortunately, does not stand alone in its repudiation of this Court's precedent. The First, Second, and Fourth Circuits have upheld materially indistinguishable laws, and like the Third Circuit they have refused to follow this Court's reasoning to where it clearly leads. Indeed, as the Fourth Circuit has stated plainly, the subtext apparently underlying all of these decisions is that these courts will not extend "*Heller* beyond its undisputed core holding" until this Court tells them they must: "If the Supreme Court . . . meant its holding to extend beyond home possession, it will need to say so more plainly." *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011).

While this Court spoke plainly enough in *Heller*, the time has come to give recalcitrant lower courts the even-more explicit direction they claim to need. One of the principal functions of this Court is to resolve fundamental disagreements among the lower courts over the basic contours of constitutional rights. "If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, . . . the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states." *Martin v. Hunter's Lessee*, 1 Wheat. (14 U.S.) 304, 348 (1816). That is precisely

the condition the Second Amendment stands in today: a resident of the District of Columbia or Hawaii has a right to bear arms for self-defense (as does a resident of one of the vast majority of States that respect the right to bear arms), but a resident of New Jersey, New York, or Maryland does not. "The public mischiefs that . . . attend such a state of things [are] truly deplorable," *id.*, and it is time for this Court to put a stop to them.

OPINIONS BELOW

The order of the Court of Appeals summarily affirming the District Court's dismissal of the case is not reported in the Federal Reporter, but it is reproduced at App.1a. The order of the District Court granting Respondents' motion to dismiss is not reported in the Federal Supplement, but it is available at 2018 WL 2298359 and reproduced at App.3a.

JURISDICTION

The Court of Appeals issued its judgment on September 21, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The relevant portions of Amendments II and XIV to the United States Constitution, the New Jersey Statutes Annotated, and the New Jersey Administrative Code are reproduced in the Appendix beginning at App.13a.

STATEMENT

I. New Jersey's "justifiable need" requirement

Under New Jersey law, an ordinary member of the general public who wishes to carry a handgun outside the home must first obtain a permit to do so (a "Handgun Carry Permit"). N.J. STAT. ANN. §§ 2C:39-5(b), 2C:58-4. A person seeking such a permit must first apply to the Chief Police Officer of the municipality where he or she resides. *Id.* § 2C:58-4(c). If the officer concludes, after investigation, that the applicant meets all statutory requirements and approves the application, it is then presented to the Superior Court of the county. *Id.* § 2C:58-4(d). If the application is denied, the applicant may also appeal that denial to the Superior Court. *Id.* § 2C:58-4(e). In either case, if the Superior Court independently determines that the applicant has satisfied all statutory requirements, it may then issue a Handgun Carry Permit. *Id.* In reviewing applications and issuing permits, the Superior Court acts as an "issuing authority" and performs "essentially an

executive function" that is "clearly non-judicial in nature." *In re Preis*, 573 A.2d 148, 151, 154 (N.J. 1990).

New Jersey first imposes some objective restrictions on eligibility for a Handgun Carry Permit. For example, an applicant must not have been convicted of any crime or offense involving an act of domestic violence; must not be addicted to controlled substances, mentally infirm, or an alcoholic; must not be subject to certain restraining orders; and must not be listed on the FBI's Terrorist Watchlist. N.J. STAT. ANN. §§ 2C:58-4(c), 2C:58-3(c). An applicant must also pass criminal and mental health background checks, *id.* § 2C:58-4(c), and must have satisfied extensive firearms safety training requirements, N.J. ADMIN. CODE § 13:54-2.4(b).

In addition to these eligibility requirements, New Jersey also imposes a more restrictive criterion on the availability of Handgun Carry Permits: an applicant must demonstrate "that he has a justifiable need to carry a handgun." N.J. STAT. ANN. § 2C:58-4(c). For an ordinary "private citizen," this requirement is satisfied only if the applicant can "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." *Id.* "Where possible, the applicant shall corroborate the existence of any specific threats or previous attacks by reference to reports of the incidents to the appropriate law enforcement agencies." *Id.* "Generalized fears for personal safety are inadequate,

and a need to protect property alone does not suffice." *In re Preis*, 573 A.2d at 152.

Accordingly, typical law-abiding citizens of New Jersey—the vast majority of responsible citizens who cannot "demonstrate a special danger to [their] life," N.J. STAT. ANN. § 2C:58-4(c)—effectively remain subject to a ban on carrying handguns outside the home for self-defense. Petitioners challenge only this "justifiable need" restriction.

II. Respondents' refusal to issue Petitioners handgun carry licenses

On January 11, 2017, Petitioner Thomas Rogers filed an application for a Handgun Carry Permit with the Chief of Police for Wall Township, the town where he resides. App.57a. Petitioner does not face any special danger to his life, though he was robbed at gunpoint several years ago while working as the manager of a restaurant, and he currently runs a large ATM business that causes him to frequently work in high-crime areas. App.56a-57a. Accordingly, he desires to carry a handgun with him for purposes of self-defense. App.57a.

The Chief of Police, Respondent Kenneth Brown, Jr., did not dispute that Mr. Rogers met all of the eligibility and training requirements imposed by New Jersey law, but he nonetheless denied his application because he "fail[ed] to establish Justifiable Need." App.64a. Petitioner appealed Respondent Brown's denial of his application to the Superior Court, and on

January 2, 2018, a Superior Court judge, Respondent Joseph W. Oxley, also denied Petitioner's application on the basis of his failure to establish justifiable need. App.66a-67a.

Respondents have also refused, on the basis of the "justifiable need" requirement, to grant at least one member of Petitioner Association of New Jersey Rifle & Pistol Clubs a license that would allow them to carry a firearm outside the home for self-defense. App.60a. For instance, on January 31, 2018, Respondent Conforti, a Superior Court judge in Sussex County, denied the application of Kenneth Warren, a member of the Association, for failure to show justifiable need. App.58a-59a.

III. Proceedings Below

1. On February 5, 2018, Petitioners filed suit in the District of New Jersey, alleging that New Jersey's "justifiable need" restriction on the availability of Handgun Carry Permits is facially unconstitutional under the Second Amendment, applicable to New Jersey under the Fourteenth. The district court had jurisdiction over the action under 28 U.S.C. §§ 1331 and 1343. Petitioners' Complaint conceded that their Second Amendment claim was foreclosed at the district-court level by the Third Circuit's decision in *Drake*, 724 F.3d at 426. App.49a.

2. *Drake* was an earlier challenge to the New Jersey laws at issue in this case. Like Petitioners here, the plaintiffs in *Drake* had each been denied a Handgun

Carry Permit for failing to satisfy New Jersey's "justifiable need" standard; they challenged that standard, and the statutory and regulatory provisions implementing it, as inconsistent with the Second Amendment right to bear arms. A panel majority of the Third Circuit rejected that challenge. Applying the "two-step" inquiry that many lower-federal courts have adopted to analyze (and, generally, uphold) firearms restrictions, the *Drake* majority asked "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee," and, if so, whether it passes muster "under some form of means-end scrutiny." 724 F.3d at 429.

At the first step, the panel majority professed uncertainty over whether "the individual right to bear arms for the purpose of self-defense extends beyond the home" *at all*, and it declined to "engag[e] in a round of full-blown historical analysis" of the Amendment's scope to "definitively" answer the question. *Id.* at 431. Instead, "[a]ssuming that the Second Amendment individual right to bear arms does apply beyond the home" for the sake of analysis, the *Drake* majority determined that the "justifiable need" limitation on Handgun Carry Permits "is a presumptively lawful, longstanding licensing provision" that constituted an "exception[ ] to the Second Amendment guarantee." *Id.* at 431, 432. The majority in *Drake* based this "longstanding" exception on the age of New Jersey's "justifiable need" requirement itself (which it claimed "has existed in New Jersey in some form for nearly 90 years"), and on a purported "longstanding tradition of

regulating the public carrying of weapons for self-defense" (though it acknowledged that many of the historical decisions upholding "prohibitions on concealed carrying" in the nineteenth century did so "because open carrying remained available as an avenue for public carrying"). *Id.* at 433.

Finally, the *Drake* majority also held that *even if* the "justifiable need" requirement burdened conduct protected by the Second Amendment, "it withstands the appropriate, intermediate level of scrutiny, and accordingly [the majority] would uphold the continued use of the standard on this basis as well." *Id.* at 435. The panel briskly determined that merely "intermediate scrutiny" applied because "the right to carry a handgun outside the home for self-defense . . . is not part of the core of the [Second] Amendment." *Id.* at 436. It held that New Jersey's interest in ensuring public safety was "significant, substantial and important." *Id.* at 437. And it also concluded that there was a sufficiently "reasonable" relationship between that interest and the "justifiable need" requirement, deferring to "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." *Id.* at 439.

3. Judge Hardiman dissented in *Drake*. In his view, the majority's conclusion that the Second Amendment did not fully apply outside the home was flatly contrary to the text of the Second Amendment and this Court's decision in *Heller*, since "[t]o speak of 'bearing'

arms solely within one's home not only would conflate 'bearing' with 'keeping,' in derogation of [*Heller*'s] holding that the verbs codified distinct rights, but also would be awkward usage given the meaning assigned the terms by the Supreme Court." *Id.* at 444 (Hardiman, J., dissenting). It also was contrary to the Amendment's history, since "the need for self-defense naturally exists both outside and inside the home," and "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." *Id.* at 444, 446 (quotation marks omitted). And Judge Hardiman was unpersuaded that New Jersey's "justifiable need" restriction fit into any "historical exception" to the Second Amendment, given that the weight of historical precedent held "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." *Id.* at 449.

Finally, Judge Hardiman's dissent concluded not only that New Jersey's regime is *subject* to Second Amendment scrutiny but also that it does not pass it. "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." *Id.* at 453. Instead, the "justifiable need" requirement appeared to function as nothing more than "a rationing system

designed to limit the number of handguns carried in New Jersey." *Id.* at 455. And while "States have considerable latitude to regulate the exercise of the right in ways that will minimize th[e] risk [of misuse]," they "may not seek to reduce the danger by curtailing the right itself." *Id.* at 456. The majority reached a contrary conclusion, Judge Hardiman argued, only "[b]y deferring absolutely to the New Jersey legislature"—an analysis "akin to engaging in the very type of balancing that the *Heller* Court explicitly rejected." *Id.* at 457.

4. On April 10, 2018, Respondents moved to dismiss Petitioners' Second Amendment claim on *Drake*'s authority. App.7a-8a. In response, Petitioners again conceded that the majority opinion in *Drake* is controlling but argued that it was wrongly decided and should be overruled by a court competent to do so. App.12a. On May 21, 2018, the district court granted Defendants' motion to dismiss, reasoning that it "has no authority to grant Plaintiffs' requested relief, because the Third Circuit in *Drake v. Filko* explicitly and unequivocally upheld the constitutionality of New Jersey's 'justifiable need' requirement in its gun permit laws." App.10a.

5. Petitioners timely appealed to the United States Court of Appeals for the Third Circuit, on June 18, 2018. Recognizing that any Third Circuit panel would also be bound by the majority opinion in *Drake*, Petitioners filed an unopposed motion asking the court to take summary action on the appeal without briefing or oral argument. As in the district court, Petitioners contended that *Drake* was wrongly decided and ought

to be overruled by a court with authority to do so, but they conceded that a panel of the Third Circuit had no such authority. On September 21, 2018, the Third Circuit summarily affirmed the district court's order dismissing the case. App.1a.

REASONS FOR GRANTING THE WRIT

This Court's review is necessary in this case for three independent reasons: to resolve the direct conflict in the circuits over the constitutionality of laws like New Jersey's, to correct the decision of the court below essentially ignoring the clear holdings of *Heller* and *McDonald*, and to end the lower courts' open and massive resistance to those decisions.

I. Review is needed to resolve the conflict in the circuits over the constitutionality of "good reason"-style restrictions on the right to bear arms outside the home.

The federal circuits are divided over whether laws that effectively ban ordinary, law-abiding citizens from carrying handguns outside the home can be squared with the Second Amendment right to keep and bear arms. As a result, whether an American citizen is allowed to bear arms for "the core lawful purpose of self-defense," *Heller*, 554 U.S. at 630, largely depends on which federal circuit his State of residence falls within. That state of affairs is arbitrary and intolerable, and

this Court should grant the writ to resolve the split of authority over this vital question.

A. The lower federal courts are intractably divided over the questions presented.

Since this Court's decisions in *Heller* and *McDonald*, the lower federal courts have struggled over the extent to which the Second Amendment "individual right to possess and carry weapons in case of confrontation" applies outside the confines of the home. *Id*. at 592. The issue has been hotly contested, generating scores of opinions, but the lower courts have ultimately coalesced around two distinct—and directly contrary—answers to the question.

1. The Third Circuit's decision below upholding New Jersey's "justifiable need" restriction on Handgun Carry Permits tracks the approach also adopted by the Courts of Appeals for the First, Second, and Fourth Circuits, which have upheld substantively identical "good reason"-type requirements based on substantially the same reasoning.

In *Kachalsky v. County of Westchester*, the Second Circuit upheld New York's requirement that ordinary citizens demonstrate "proper cause" to carry handguns outside the home—a standard the defendants defined as demanding "a special need for self-protection distinguishable from that of the general community." 701 F.3d at 86. The *Kachalsky* court concluded that even assuming the Second Amendment applies in public, "[t]he state's ability to regulate firearms . . . is

qualitatively different in public than in the home." *Id.* at 94, 95. Accordingly, it analyzed New York's "proper cause" restriction under merely intermediate scrutiny. And reasoning that "[i]t is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments," it upheld the law. *Id.* at 99.

The Fourth and First Circuits have weighed in with decisions following much the same approach. In *Woollard v. Gallagher*, the Fourth Circuit held that Maryland's similar requirement that citizens demonstrate a "good and substantial reason" to carry handguns is consistent with the Second Amendment. 712 F.3d at 868. Like the Second Circuit, the court in *Woollard* "assume[d] that the *Heller* right exists outside the home," but held that restrictions on the right to bear arms in public need satisfy only "intermediate scrutiny." *Id.* at 876. *Woollard* determined that Maryland's law survives this level of scrutiny, since it "advances the objectives of protecting public safety and preventing crime because it reduces the number of handguns carried in public." *Id.* at 879. Similarly, in *Gould v. Morgan*, the First Circuit upheld Massachusetts' similar "good reason" restriction, as applied by Boston and Brookline, by: (a) "proceed[ing] on the assumption" that the restriction burdened conduct within the scope of the Second Amendment, 907 F.3d at 670; (b) concluding "that the core Second Amendment right is limited to self-defense in the home" and thus merely intermediate scrutiny was necessary, *id.* at 671; and (c) determining that the restriction passed intermediate scrutiny, *id.* at 673-77.

Drake's decision upholding New Jersey's "justifiable need" restriction follows this same approach. But *Drake* goes even further, concluding as an alternative that the Second Amendment *does not even apply* to New Jersey's limits, because "the requirement that applicants demonstrate a 'justifiable need' to publicly carry a handgun for self-defense is a presumptively lawful, longstanding licensing provision." 724 F.3d at 432. According to the court below, then, a state may effectively ban ordinary citizens—those without special self-defense needs—from carrying handguns in public *without even implicating the Second Amendment*. *Id.*

2. Other circuits have coalesced around an approach that is diametrically opposed to these decisions—and have struck down as categorically unconstitutional laws that are functionally indistinguishable from the ones upheld in *Kachalsky*, *Woollard*, *Gould*, and the decision below.

In *Wrenn v. District of Columbia*, the D.C. Circuit struck down the District of Columbia's requirement that ordinary citizens must show a "good reason" to obtain a permit to carry handguns outside the home. *Wrenn*'s conclusions flatly contradict the reasoning of the First, Second, Third, and Fourth Circuits at every step of the analysis. While *Gould*, *Kachalsky*, *Woollard*, and *Drake* determined that "good reason"-type restrictions "fit[] comfortably within the longstanding tradition of regulating the public carrying of weapons for self-defense," *Drake*, 724 F.3d at 433, *Wrenn* drew precisely the opposite conclusion: "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." 864 F.3d at 661.

Similarly, while the Third Circuit, along with the First, Second, and Fourth, upheld the substantively identical restrictions before them under merely intermediate scrutiny, *Wrenn* hewed to a very different course. This Court's decision in *Heller*, the D.C. Circuit explained, adopted a "categorical approach," deeming "complete prohibitions of Second Amendment rights" to be "always invalid." *Id*. at 665 (brackets and quotation marks omitted). And the *Wrenn* court determined that the District of Columbia's "good reason" requirement "is necessarily a total ban on most . . . residents' right to carry a gun in the face of ordinary self-defense needs." *Id.* at 666. After all, by requiring the demonstration of "needs 'distinguishable' from those of the community," the "good reason" requirement necessarily "destroys the ordinarily situated citizen's right to bear arms." *Id.*

The D.C. Circuit recognized that its decision was directly in conflict with the holdings of its sister circuits. But those courts had gone off-course, *Wrenn* explained, by "declin[ing] to use [*Heller*'s] historical method to determine how rigorously the [Second] Amendment applies beyond the home." *Id.* at 663. Accordingly, the D.C. Circuit declined to follow the errant path charted in these cases. The District of Columbia petitioned the full Court of Appeals to rehear the case

en banc and eliminate the split in authority, but the court declined to do so.

The D.C. Circuit is not the only court to have adopted an understanding of the Second Amendment's application outside the home that is flatly contrary to the approach of the court below and the First, Second, and Fourth Circuits. In *Moore v. Madigan*, the Seventh Circuit struck down an Illinois ban on the public carrying of handguns by ordinary citizens. While *Gould*, *Kachalsky*, *Drake*, and *Woollard* held that any right to carry handguns outside the home was peripheral at best, *Moore* explained why that result cannot be squared with the constitutional text, history, and purpose. *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012). And while *Drake* and the others blindly deferred to the legislative judgment that limiting the carrying of firearms in public would increase public safety, in *Moore*, after exhaustively surveying "the empirical literature on the effects of allowing the carriage of guns in public," Judge Posner concluded that the available data did not "provide . . . more than merely a rational basis for believing that [Illinois's] ban is justified by an increase in public safety." *Id.* at 939, 942.

Finally, the Ninth Circuit's opinion in *Young v. Hawaii* adopted much the same approach. After a detailed inquiry into the Second Amendment's text and historical understanding, *Young* concluded that "the right to bear arms must guarantee *some* right to self-defense in public"—whether through carrying a handgun openly or concealed. 896 F.3d at 1068. And because

Hawaii's law "entirely foreclosed" the "typical, law-abiding citizen" from bearing arms outside the home, *Young* concluded that it "eviscerates a core Second Amendment right—and must therefore be unconstitutional." *Id.* at 1048, 1071.

Accordingly, the lower courts have split into two diametrically opposed camps over the question whether a State may effectively ban ordinary, law-abiding citizens from carrying handguns in public for self-defense.

B. The questions presented are important.

When an enumerated constitutional right is at stake—and when the lower courts have divided not over some tangential matter but over whether a core part of the right even exists—this Court should not stay its hand and let the conflict fester.

"It is hard to conceive a task more appropriate for federal courts than to protect civil rights guaranteed by the Constitution against invasion by the states." HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 90 (1973). Indeed, this Court's role in reviewing state statutes that allegedly violate a citizen's federal constitutional rights is one of the foundation stones of our system of government under law. So vital is this function that Justice Holmes famously believed that "the Union would be imperiled" if the Court had not the power to declare void "the laws of the several states." O.W. HOLMES, JR., COLLECTED LEGAL PAPERS 296 (1920). And while the lower federal courts and

courts of each State of course must share in the critical task of enforcing fundamental constitutional rights, the responsibility falls with special weight upon this Court. For "ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text." *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000).

The questions presented in this case, moreover, do not lie at the periphery of constitutional law. New Jersey's law effectively bans *any* ordinary citizen from exercising "the *central component* of [the Second Amendment]" once that citizen steps outside his or her home—the right to "use [firearms] for the core lawful purpose of self-defense." *Heller*, 554 U.S. at 599, 630. And because the plain text of the Second Amendment itself places "the rights to keep and bear arms . . . on equal footing," *Wrenn*, 864 F.3d at 663, the stakes could not be higher. The question presented is this: Does the Second Amendment's explicit guarantee of the right "to . . . bear Arms" really count as part of the Constitution at all?

C. This case is an ideal vehicle for resolving the conflict in the circuits over the questions presented.

This case presents an ideal vehicle for this Court to take up the constitutionality of "good reason"-type laws like New Jersey's and resolve the intractable division that has developed in the lower courts over this issue. The Second Amendment challenge to New

Jersey's law is squarely and distinctly presented: it is the sole claim alleged in Petitioners' complaint, App.60a-61a, and its resolution does not depend on adjudicating any extraneous factual or legal issues, such as disputes over Petitioners' standing. The claim has been squarely raised and argued at every stage in the case, so the resolution of the questions presented will not be impeded by any claims of waiver or forfeiture. And because the Second Amendment claim is the only one raised in the complaint—and the sole basis for the decisions of the courts below—adjudicating it will almost certainly be dispositive of the case.

Moreover, the challenged New Jersey law is perfectly representative of the types of laws that have led to the split in lower-court authority. While the laws at issue in the cases on each side of the divide use slightly different verbal formulations to describe the standard for obtaining handgun carry permits—from "justifiable need," in New Jersey, to "good reason" in D.C., and "good and substantial reason" in Maryland—the substance of these standards is substantially the same. Critically, these laws, like New Jersey's, have been definitively interpreted as requiring an applicant to show a special need for self defense distinguishable from the ordinary citizen's—effectively erecting a flat ban on the use of handguns by *typical* law-abiding citizens outside the home for the core purpose of self-defense. *Compare* N.J. STAT. ANN. § 2C:58-4(c), *with Gould*, 907 F.3d at 664; *Wrenn*, 864 F.3d at 655-56; *Woollard*, 712 F.3d at 870; *Kachalsky*, 701 F.3d at 86-87.

Since this Court's last plenary encounter with the Second Amendment in *McDonald*, it has largely stayed its hand, allowing the lower federal courts an opportunity to flesh out the emerging contours of that right. "Wise adjudication has its own time for ripening." *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 918 (1950) (opinion of Frankfurter, J., respecting the denial of the petition for writ of certiorari). That ripening process is now complete: the circuits have coalesced around two directly opposing approaches to laws like the New Jersey ban challenged here. The time for the Court to resolve the conflict over the constitutionality of these laws has come.

* * *

"When the meaning of a fundamental constitutional right depends on which court . . . a person turns to for redress, . . . it is time for this Court to intervene." *Dejoseph v. Connecticut*, 385 U.S. 982, 983 (1966) (Stewart, J., dissenting from the denial of certiorari). The promise of the Second Amendment belongs to *all* Americans, but because the lower federal courts have intractably divided over the constitutionality of laws like New Jersey's, whether a typical, law-abiding citizen can carry a firearm with her for self-defense when she ventures beyond her home now depends wholly on the jurisdiction she resides in. That "state of things [is] truly deplorable," *Martin*, 1 Wheat. at 348, and "the time has come for the Court to answer this important question definitively," *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., dissenting from the denial of certiorari).

II. Review is needed because the decision below is directly contrary to this Court's decisions in *Heller* and *McDonald*.

This Court should grant the writ for the independent reason that the decision below resolved this critically important constitutional question in a way that directly conflicts with the clear holdings of this Court's decisions in *Heller* and *McDonald*. This Court's Rule 10(c). The Third Circuit's reasoning in upholding New Jersey's ban runs flatly contrary to this Court's teaching at every turn: it is at war with this Court's interpretation of the scope of the Second Amendment; it refuses to apply the categorical approach that *Heller* adopts; and it applies a weak-tea form of scrutiny that is indistinguishable from rational basis review, in the teeth of this Court's unequivocal rejection of that level of scrutiny.

1. The Second Amendment protects "the right of the people to keep and bear Arms," and this Court held in *Heller* that the scope of this provision "is determined by reference to text, history, and tradition." *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1269, 1272-73 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). All three make clear that a State cannot ban typical citizens from carrying handguns outside the home.

By protecting both the keeping *and bearing* of arms, the text of the Second Amendment leaves no doubt that it applies outside the home. This is also clear from *Heller*, which (a) "repeatedly invokes a broader Second Amendment right than the right to

have a gun in one's home," *Moore*, 702 F.3d at 935-36; (b) squarely holds that the Second Amendment "guarantee[s] the individual right to possess *and carry* weapons in case of confrontation," *Heller*, 554 U.S. at 592 (emphasis added); and (c) defines the key constitutional phrase "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'" potential "'conflict with another person,'" *id.* at 584 (alterations in original) (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). And by the plain text of the provision, the right belongs to "the people," U.S. CONST. amend. II—not some subset of individuals who have a heightened need for self-defense. *See id.* at 580.

The inquiry into the historical understanding of the Second Amendment required by this Court's precedents leads to the same destination. As *McDonald* explains, "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day." 561 U.S. at 767. Because the need for self-defense may *arise* in public, it was recognized in England long before the Revolution that the right to self-defense may be *exercised* in public. *See* 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 71 (1716); 4 WILLIAM BLACKSTONE, COMMENTARIES *180. And because the right to self-defense was understood to extend beyond the home, the right to *armed* self-defense naturally was as well. Accordingly, by the late seventeenth century the English courts recognized that it was the practice and privilege of "gentlemen to ride armed for

their security." *Rex v. Knight*, 90 Eng. Rep. 330 (K.B. 1686). And as Judge St. George Tucker observed in 1803, "[i]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side." 5 WILLIAM BLACKSTONE, COMMENTARIES App. n.B, at 19 (St. George Tucker ed., 1803). Indeed, "about half the colonies had laws *requiring* arms-carrying in certain circumstances," such as when traveling or attending church. NICHOLAS J. JOHNSON & DAVID B. KOPEL ET AL., FIREARMS LAW & THE SECOND AMENDMENT 106-08 (2012) (emphasis added).

While *Drake* acknowledged "that the Second Amendment's individual right to bear arms *may* have some application beyond the home," the majority concluded that the conduct burdened by New Jersey's "justifiable need" restriction was outside the Amendment's scope, because that restriction "qualifies as a 'longstanding,' 'presumptively lawful' regulation." 724 F.3d at 431-32. But the traditional, post-ratification understanding of the Second Amendment right in fact *confirms* that it applies outside the home—and again, one need look no further than *Heller* itself to see that this is so.

Drake's principal piece of evidence was a series of nineteenth-century laws targeting "the carrying of concealed weapons." *Id.* at 433. But while these laws limited the carrying of *concealed* firearms—a practice that was disfavored by the social mores of the day—they did so against the background of *freely allowing*

the *open* carrying of arms in common use, thus "le[aving] ample opportunities for bearing arms." *Wrenn*, 864 F.3d at 662. That distinction was absolutely *critical* to most of the judicial opinions assessing their constitutionality. *See State v. Chandler*, 5 La. Ann. 489, 490 (1850); *Aymette v. State*, 21 Tenn. 154, 160-61 (1840); *State v. Reid*, 1 Ala. 612, 616-17 (1840). Indeed, when these state laws restricted *both* forms of carrying, they were *struck down*. In a case that *Heller* described as "perfectly captur[ing]" the correct approach to the Second Amendment, 554 U.S. at 612, the Georgia Supreme Court invalidated such a law as "in conflict with the Constitution, and *void*." *Nunn v. State*, 1 Ga. 243, 251 (1846); *see also Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 91-94 (1822).[1]

Instead, the closest historical analogues to the "good reason"-type restrictions like New Jersey's are the ante- and post-bellum efforts of the southern States to prevent their enslaved and free black populations from carrying firearms in public. An 1832 Delaware law, for example, forbade any "free negroes [or] free mulattoes to have own keep or possess any Gun [or] Pistol," unless they first received a permit from "the Justice of the Peace" certifying "that the circumstances of his case justify his keeping and using a gun."

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[1] A few courts from this era upheld concealed carry bans without relying on this distinction, but they did so "on the basis of an interpretation of the Second Amendment . . . that conflicts with [*Heller*]." *Kachalsky*, 701 F.3d at 91 n.14. Those outlier decisions are thus "sapped of authority by *Heller*," and cannot be cited as reliable guides to the Second Amendment's scope. *Wrenn*, 864 F.3d at 658.

Act of Feb. 10, 1832, sec. 1, Del. Laws 180 (1832). Indeed, Chief Justice Taney recoiled so strongly in the infamous *Dred Scott* case from recognizing African Americans as citizens precisely because he understood that doing so would entitle them "to keep and carry arms wherever they went." *Dred Scott v. Sandford*, 19 How. (60 U.S.) 393, 417 (1857).

After the Civil War, these noxious efforts to suppress the rights of former slaves to carry arms for their self-defense continued. Mississippi's notorious "Black Code," for example, forbade any "freedman, free negro or mulatto" to "keep or carry fire-arms of any kind." An Act To Punish Certain Offences Therein Named, and for Other Purposes, ch. 23, § 1, 1865 Miss. Laws 165. And in an ordinance strikingly similar in operation to New Jersey's "justifiable need" law, several Louisiana towns provided that no freedman "shall be allowed to carry fire-arms, or any kind of weapons, within the parish" without the approval of "the nearest and most convenient chief of patrol." 1 WALTER L. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 279-80 (1906). But as this Court explained at length in *McDonald*, the Reconstruction Congress labored mightily to entomb this legacy of prejudice. *See* 561 U.S. at 770-77. Congress's efforts culminated in the adoption of the Fourteenth Amendment, which ensured the right of every American, regardless of race, to "bear arms for the defense of himself and family and his homestead." Cong. Globe, 39th Cong., 1st Sess. 1182 (1866) (statement of Sen. Pomeroy); *see also McDonald*, 561 U.S. at 775-76. Our history and

traditions have thus affirmatively *rejected* the very types of laws upheld below and by *Gould*, *Kachalsky*, and *Woollard*, excising the cancerous historical analogues of these laws from our constitutional tradition.

Finally, *Drake*'s conclusion that any application of the Second Amendment beyond the home "is not part of the core of the Amendment" simply cannot be squared with this Court's holdings. 724 F.3d at 436. *Heller* plainly contemplates that the right applies outside the home: it indicates that "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" are "presumptively lawful," 554 U.S. at 626, 627 n.26—an exception that would be irrelevant if the right were homebound. And it extensively cites and significantly relies upon *Nunn*, the nineteenth-century Georgia case that "struck down a ban on carrying pistols openly" under the Second Amendment. *Id.* at 612. Moreover, *Heller* makes clear that the right to individual self-defense is "the *central component*" of the Second Amendment. *Id.* at 599. Because the Second Amendment's text, history, and purposes all show that its protections extend outside the home, the right to carry firearms "for the core lawful purpose of self-defense" necessarily extends beyond those four walls as well. *Id.* at 630.

2. Having adopted an understanding of the Second Amendment's scope that is flatly contrary to this Court's precedents, the court below in *Drake* proceeded to apply a form of constitutional scrutiny that this Court explicitly rejected. Where a state law infringes a core Second Amendment right, *Heller* makes the next

analytical steps clear. Because "[t]he 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," wholesale infringements upon the Amendment's "core protection" must be held unconstitutional categorically, not "subjected to a free-standing 'interest-balancing' approach." *Heller*, 554 U.S. at 634-35. The court below thus did not need to "squint to divine some hidden meaning from *Heller* about what tests to apply. *Heller* was up-front about the role of text, history, and tradition in Second Amendment analysis—and about the absence of a role for judicial interest balancing or assessment of costs and benefits of gun regulations." *Heller II*, 670 F.3d at 1285 (Kavanaugh, J., dissenting).

New Jersey's demand that applicants show "a special danger to [their] life," N.J. ADMIN. CODE § 13:54-2.4(d)(1), that is distinguishable from "[g]eneralized fears for personal safety," *In re Preis*, 573 A.2d at 152, *extinguishes* the core Second Amendment rights of *typical* citizens—who by definition cannot make such a showing. To be sure, Respondents' limits theoretically allow individuals to carry firearms if they can first "specify in detail [their] urgent necessity for self-protection." N.J. ADMIN. CODE § 13:54-2.4(d)(1). But the Second Amendment does not set up a race between law-abiding citizens and their assailants to the license bureau. For those who have already been victims of violent crime, it is cold comfort to know that they could have carried a firearm and defended themselves *if only*

they had been able to document their "urgent necessity for self-protection" in advance.

The approach the court below adopted in *Drake* thus demonstrates in stark terms why the interest-balancing approach adopted with near-uniformity by the lower courts is flatly contrary to the Second Amendment. As *Heller* explained, the Second Amendment "is the very *product* of an interest balancing by the people." 554 U.S. at 635. Yet the *Drake* court seized precisely the power denied it by the enshrinement of the Second Amendment—it conducted that interest balancing anew, concluding that "the core lawful purpose of self-defense," *id.* at 630, is *insufficient* to justify "the right of the people to . . . bear Arms," U.S. CONST. amend. II. The government cannot justify a law infringing the right guaranteed by the Second Amendment based on the judgment that the people made a mistake in adopting the Amendment to begin with.

3. Finally, the *Drake* court compounded its error in refusing to apply *Heller*'s categorical text-and-history test by applying a form of scrutiny effectively indistinguishable from the rational-basis review that this Court *singled out as inappropriate*. As this Court explained in *Heller*, "[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." 554 U.S. at 628 n.27. The toothless form of review applied by the court below in *Drake* drains the Second Amendment of significance in just this way.

Drake's purported application of "intermediate scrutiny" took a wrong turn right off the starting blocks, because the interest it accepted was the illegitimate one of *reducing the number of people bearing arms*. That is "not a permissible strategy"—even if used as a means to the further end of increasing public safety. *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 148 (D.D.C. 2016), *aff'd sub nom. Wrenn v. District of Columbia*, 864 F.3d 650. As this Court has made clear under the Free Speech Clause, although the Government may seek to reduce the negative "secondary effects" of protected expression—such as the increased crime that occurs in neighborhoods with adult theaters—it may not argue "that it will reduce secondary effects by reducing speech in the same proportion." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 449 (2002) (Kennedy, J., concurring in judgment). "It is no trick to reduce secondary effects by reducing speech or its audience; but [the government] may not attack secondary effects indirectly by attacking speech." *Id.* at 450; *see also Heller v. District of Columbia (Heller III)*, 801 F.3d 264, 280 (D.C. Cir. 2015). Or as Judge Hardiman put the point in dissent in *Drake*, "States may not seek to reduce the danger [of criminals misusing the right to carry firearms] by curtailing the right itself." 724 F.3d at 456 (Hardiman, J., dissenting).

That is precisely what New Jersey's law does. As the New Jersey courts have explained, "the overriding philosophy of our Legislature is to limit the use of guns as much as possible." *State v. Valentine*, 124 N.J. Super. 425, 427 (App. Div. 1973). Indeed, the court below

upheld the challenged law in *Drake* by deferring to "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." 724 F.3d at 439. That is illegitimate even under "intermediate scrutiny" and contravenes the policy judgment the people made when adopting the Second Amendment.

Even accepting Respondents' justification of the challenged law at face value, it still necessarily fails any genuine application of heightened constitutional scrutiny. As Judge Posner concluded after surveying "the empirical literature on the effects of allowing the carriage of guns in public," the data do not provide "more than merely a rational basis for believing that [a ban on public carriage] is justified by an increase in public safety." *Moore*, 702 F.3d at 939, 942. This is confirmed by experience. Forty-two States do not restrict the carrying of firearms to a privileged few. *See Gun Laws*, NRA-ILA, https://goo.gl/Nggx50. Yet the empirical evidence "overwhelmingly rejects" any suggestion that "permit holders will use their guns to commit crimes instead of using their guns for self-defense." David B. Mustard, *Comment*, *in* EVALUATING GUN POLICY 325, 330-31 (Jens Ludwig & Philip J. Cook eds., 2003). For instance, in 2004 the National Academy of Sciences' National Research Council ("NRC") conducted an exhaustive review of the relevant social-scientific literature. The NRC concluded that "with the current evidence it is not possible to determine that there is a

causal link between the passage of right-to-carry laws and crime rates." NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 150 (Charles F. Wellford, John V. Pepper, & Carol V. Petrie eds., 2005), http://goo.gl/WO1ZNZ; *see also* Robert Hahn et al., *Firearms Laws and the Reduction of Violence: A Systematic Review*, 28 AM. J. PREVENTATIVE MED. 40, 53-54 (2005), http://goo.gl/zOpJFL (CDC-sponsored study concluding that existing evidence does not establish that more permissive carry regimes "increases rates of unintended and intended injury"); Mark E. Hamill et al., *State Level Firearm Concealed-Carry Legislation & Rates of Homicide & Other Violent Crime*, J. AM. C. SURGEONS (forthcoming Jan. 2019) (finding no statistically-significant association between adoption of more permissive firearm carry laws and rates of homicide or other violent crime).

The sum total of the "evidence" discussed by *Drake*'s cursory scrutiny of New Jersey's ban was confined to: (a) a legislative "staff report" evaluating "the utility of firearms as weapons of defense against crime" that was published *in 1968*, and (b) the fact that "[l]egislators 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." *Drake*, 724 F.3d at 438. But a single, irrelevant study from fifty years ago hardly constitutes meaningful evidence that New Jersey's restriction can be said, in light of the *current* evidence, to materially advance public safety *today*. To the contrary, a law that "imposes current burdens . . . must be

justified by current needs." *Shelby Cty. v. Holder*, 570 U.S. 529, 536 (2013). Nor does the fact that a handful of other jurisdictions have enacted similar restrictions suffice, without at least some analysis of whether *those* laws are effective in preventing violent crime or are themselves supported by substantial evidence. After all, the vast majority of States *do not* restrict their citizens' right to carry in this way.

New Jersey's law also fails heightened scrutiny because it is not properly tailored. While laws subject to intermediate scrutiny "need not be the least restrictive or least intrusive means of serving the government's interests," they still must be narrowly tailored, and accordingly "the government must demonstrate that alternative measures that burden substantially less [protected conduct] *would fail* to achieve the government's interests." *McCullen v. Coakley*, 134 S. Ct. 2518, 2535, 2540 (2014) (quotation marks omitted) (emphasis added). Here, there are myriad alternatives that actually *are* targeted at the problem of handguns being carried by those likely to misuse them. These alternatives include a "shall issue" licensing system, along the lines used by the vast majority of the States, that requires the issuance of a license to citizens that meet objective criteria, a training requirement, and a prohibition on carrying by individuals such as violent criminals with a demonstrated propensity to violence. Respondents cannot show that these alternatives would fail to advance its interests to a similar extent as its "justifiable need" requirement.

Any realistic appraisal of existing social-scientific data thus leads inexorably to the conclusion that the "justifiable need" requirement cannot be shown to benefit the public safety. The *Drake* court concluded otherwise only by applying a level of scrutiny indistinguishable from the rational-basis review rejected by *Heller*.

III. Review is needed to correct the lower federal courts' massive resistance to this Court's decisions in *Heller* and *McDonald*.

Since the decisions in *Heller* and *McDonald*, many lower courts have stubbornly and deliberately ignored those decisions, narrowing them to their specific facts and making a hollow mockery of the Second Amendment's promise that law-abiding citizens must be allowed "to use [firearms] for the core lawful purpose of self-defense." *Heller*, 554 U.S. at 630. This Court's review is necessary to correct the lower courts' resistance to its instructions.

This behavior is nowhere more apparent than in cases addressing the right to carry firearms outside the home. Many courts have flatly ruled that "the Second Amendment does not confer a right that extends beyond the home." *Jennings v. McCraw*, 2012 WL 12898407, at *5 (N.D. Tex. Jan. 19, 2012), *aff'd sub nom*. *NRA v. McCraw*, 719 F.3d 338 (5th Cir. 2013); *see also*, *e.g.*, *Kachalsky v. Cacace*, 817 F. Supp. 2d 235, 264-65 (S.D.N.Y. 2011), *aff'd sub nom. Kachalsky*, 701 F.3d 81; *Moreno v. New York Police Dep't*, 2011 WL 2748652,

at *3 (S.D.N.Y. May 7, 2011); *Gonzalez v. Village of W. Milwaukee*, 2010 WL 1904977, at *4 (E.D. Wis. May 11, 2010), *aff'd*, 671 F.3d 649 (7th Cir. 2012); *accord Shepard v. Madigan*, 863 F. Supp. 2d 774, 782 & n.7 (S.D. Ill. 2012), *rev'd sub nom. Moore v. Madigan*, 702 F.3d 933; *Moore v. Madigan*, 842 F. Supp. 2d 1092, 1102 (C.D. Ill. 2012), *rev'd*, 702 F.3d 933; *Williams v. State*, 10 A.3d 1167, 1177 (Md. 2011). And as discussed above, many of those courts that have assumed that the Second Amendment has *some* application beyond the home have gutted it of any force.

The lower courts' decisions in *Drake* exemplify the judiciary's barely disguised hostility to this Court's instructions in *Heller* and *McDonald*. The district court treated the Second Amendment challenge to New Jersey's ban as a nuisance: "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." *Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 829 (D.N.J. 2012), *aff'd sub nom*. *Drake*, 724 F.3d 426. And on appeal, the panel majority likewise intoned that it was "not inclined to address [the plaintiffs' claim of a right to carry arms in public] by engaging in a round of full-blown historical analysis." *Drake*, 724 F.3d at 431.

These cases "reflect[] a distressing trend: the treatment of the Second Amendment as a disfavored

right." *Peruta*, 137 S. Ct. at 1999 (Thomas, J., dissenting from the denial of certiorari). This Court has long insisted that there is "no principled basis on which to create a hierarchy of constitutional values," *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982), and *McDonald* considered and rejected the view that the Second Amendment was somehow "a second-class right," 561 U.S. at 780 (plurality opinion). Yet the lower courts have thumbed the nose at these directions, upholding limitations on Second Amendment conduct that would be unimaginable in any other context. "[N]oncompliance with [this Court's] Second Amendment precedents warrants this Court's attention as much as any of [its] precedents." *Friedman v. City of Highland Park*, 136 S. Ct. 447 (2015) (Thomas, J., dissenting from the denial of certiorari). The Court must intervene to remind the lower courts that there is no Second Amendment exception to the principle that adherence to its precedents is not optional.

CONCLUSION

For the reasons set forth above, the Court should grant the petition for certiorari.

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Respectfully submitted,

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