No. 18-824

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For nearly two centuries, numerous states across the country have required residents who wish to carry a loaded firearm in public to establish a need to do so. The question presented is whether the Second Amendment prevents New Jersey from maintaining such a law.

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STATEMENT

1. Any New Jersey resident who is over 18 and is not otherwise prohibited from possessing firearms may generally keep and carry a loaded handgun in his or her home or place of business. *See* N.J. Stat. Ann. § 2C:39-6(e) (permitting individuals to "keep[] or carry[] about his place of business, residence, premises or other land owned or possessed by him, any firearm"). Residents can transport a firearm—unloaded and properly secured—to and from any place where they may lawfully keep and carry it. *Id.* New Jersey law also permits members of rifle and pistol clubs to have weapons with them when engaging in actions like traveling to and from target practice and participating in competitive target, trap, or skeet shooting competitions. N.J. Stat. Ann. §§ 2C:39-3j, 2C:39-6(f). Finally, members of the military ("Armed Forces of the United States or of the National Guard"), federal, state, and local law enforcement, and other denominated groups may all carry firearms while on duty. *Id.* §§ 2C:39-3g, 2C:39-6(a)(1)-(11).

2. At the same time, for over a century New Jersey has recognized the risks to public safety and to law enforcement that carrying firearms in public can present. *See*, *e.g.*, *In re Preis*, 573 A.2d 148, 150 (N.J. 1990) (noting that New Jersey law "draw[s] careful lines between permission to possess a gun in one's home or place of business . . . and permission to carry" in public). In light of "the known and serious dangers of misuse and accidental use" of weapons, *Siccardi v. State*, 284 A.2d 533, 538 (N.J. 1971), New Jersey has

"continually made the reasonable inference that" additional safeguards are necessary for public carrying, *Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 835 (D.N.J. 2012). That said, New Jersey has not banned carrying a firearm in public; instead, the State has carefully limited public carrying to those individuals with a need to do so.

The history of New Jersey's public carry law stretches back over a century. In 1905, New Jersey enacted its first permitting law, restricting the concealed carrying of firearms to those individuals who had permits to do so. 1905 N.J. Laws, ch. 172 at 324. Starting in 1924, New Jersey began specifically requiring a showing of "need" for individuals wishing to carry a firearm in public. *Siccardi*, 284 A.2d at 553. And while the State has amended its scheme over the intervening 95 years, the fundamental "requirement that need must be shown for the issuance of a permit to authorize the carrying of a handgun" has remained intact. *Id.* at 554. The present "justifiable need" standard was incorporated by statute in 1978, N.J. Stat. Ann. § 2C:58-4d, and the law was amended as recently as 2018, *see* N.J. Stat. Ann. § 2C:58-4c.

Pursuant to its laws, New Jersey applies an "objective standard for issuance of a public carry permit." *Drake v. Filko*, 724 F.3d 426, 434 n.9 (CA3 2014). The law places ultimate responsibility for issuing the public carry permit with a neutral arbiter—a Superior Court judge—after an applicant receives preliminary approval from his or her local police chief or from the Superintendent of the New Jersey State Police. N.J.

Stat. Ann. § 2C:58-4d; *In Re Preis*, 573 A.2d at 571. To receive approval, that individual must show that he is not subject to any statutory prohibitions, has the requisite knowledge of handling and use of handguns, and "has a justifiable need to carry a handgun." N.J. Stat. Ann. §§ 2C:58-4c, d. The State affords applicants a right of appeal if their application is rejected. *See id.* § 2C:58-4e; N.J. Court R. 2:2-3.

3. Petitioner Thomas R. Rogers is a New Jersey resident wishing to obtain a permit to carry a firearm in public. Pet. 57. Rogers alleges his local police chief denied his application because Rogers did not present a justifiable need for carrying a weapon in public. *Id*. Rogers alleges that he appealed that denial to the Superior Court, which affirmed the police chief's decision. Pet. 58. In his complaint, Rogers admits that he "does not face any special danger to his life," but alleges that he needs a license to publicly carry a handgun since he "runs a large ATM business that causes him to frequently service ATM machines in high-crime areas." Pet. App. 56a-57a. For its part, Petitioner Association of New Jersey Rifle and Pistol Clubs represents a member of its organization who also applied for a concealed carry permit but was not named as a plaintiff in the lawsuit. Pet. 58-59. The Association alleges that the Superior Court denied that member's permit application. Pet. 59.

4. Petitioners filed suit on February 5, 2018, asserting that New Jersey's law violates the Second and Fourteenth Amendments to the U.S. Constitution. Pet. App. 44a. The complaint acknowledged that Petitioners

did not have a justifiable need for a carry permit as New Jersey law defines the term; instead, Petitioners mounted a facial attack on the statute. Pet. App. 49a. Although Petitioners alleged that New Jersey's law bans the vast majority of its residents who want to publicly carry firearms for self-defense from doing so, Petitioners did not offer allegations regarding the number or percentage of public carry permits granted pursuant to the law. Instead, Petitioners agreed that "the result they seek is contrary to *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2014)," a prior decision upholding New Jersey's public carry laws. Pet. App. 49a. As a result, on April 3, 2018, Respondents moved to dismiss, and on May 21, 2018, the District Court granted the motion, reasoning that "this Court 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." Pet. App. 10a (internal citation omitted).

5. Petitioners appealed the District Court's decision, but then filed a motion for summary affirmance. Pet. App. 1a. Without further briefing or argument, on September 21, 2018, the Third Circuit issued an order that affirmed the District Court's decision. *Id.*

REASONS FOR DENYING THE PETITION

For 95 years, New Jersey has allowed individuals to publicly carry firearms throughout the state, but only where they have a need to do so. In recent years, this Court has denied petitions challenging other state laws that similarly restrict public carry permits to applicants with such a need. *See Peruta v. California*, No. 16-894 (cert. denied June 26, 2017); *Woollard v. Gallagher*, No. 13-42 (cert. denied Oct. 15, 2013); *Kachalsky v. Cacace*, No. 12-845 (cert. denied Apr. 15, 2013). In fact, this Court has denied a petition involving an identical challenge to this law. *See Drake v. Filko*, No. 13-827 (cert. denied May 5, 2014). There is no reason for this Court to take a different approach here: Petitioner overstates the claimed split; the lack of a factual record makes this case a poor vehicle for addressing the question presented; and the decision below is correct.

I. Petitioners' Claimed Split In Authority Is Overstated, And Is Not Implicated By The Decision Below.

Petitioners argue that certiorari is warranted because lower courts have "coalesced around" two approaches that are "diametrically opposed" on the issue of state public carry laws. Pet. 16. In particular, Petitioners claim the decision below—which relies on *Drake* to uphold New Jersey's longstanding law—cannot be squared with decisions from the Seventh, Ninth,

and D.C. Circuits.[1] But Petitioners are wrong about the Seventh and Ninth Circuits, and overstate the disagreement between the decision below and the D.C. Circuit.

Begin with the Seventh Circuit. In *Moore v. Madigan*, 702 F.3d 933 (CA7 2012), the Seventh Circuit invalidated an outright ban on the public carrying of firearms. *See id.* at 934 (noting the state law entirely "for[bade] a person" from carrying a firearm in public). This total prohibition on public carrying did not permit individuals to argue they had a justifiable need to carry a firearm, as residents in New Jersey are able to do. That was central to the Seventh Circuit's decision: the court noted Illinois was "the *only* state" with "a flat ban on carrying ready-to-use guns outside the home," *id.* at 940, and distinguished state laws that require "a permit to carry a concealed handgun in public" and that "place[ ] the burden on the applicant to show that he needs a handgun to ward off dangerous persons," *id.* at 941. If anything, the Seventh Circuit suggested that a law that "impose[d] reasonable limitations" on the public carrying of firearms would be constitutional. *Id*. at 941-42. So even as the panel struck down Illinois's law on account of its "failure to justify the most restrictive gun law of any of the 50 states," *id.* at 941, the

[1] Petitioners agree the Third Circuit's decision is consistent with rulings from the First, Second, and Fourth Circuits. Pet. 14. *See*, *e.g.*, *Gould v. Morgan*, 907 F.3d 659 (CA1 2018); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (CA2 2012); *Woollard v. Gallagher*, 712 F.3d 865 (CA4 2013).

Seventh Circuit made clear that its reasoning did not extend to laws like the one in New Jersey.

Indeed, the Third Circuit recognized that its decision to uphold New Jersey's law was entirely consonant with the Seventh Circuit's ruling in *Moore*. The Third Circuit agreed *Moore* held only that a "law containing a flat ban on carrying a handgun in public was unconstitutional"—which the Third Circuit had no occasion to consider. *Drake*, 724 F.3d at 430 n.6. Still more, "the Seventh Circuit gave the Illinois legislature time to come up with a new law that would survive constitutional challenge, implying that some restrictions on the right to carry outside the home would be permissible." *Id.* The Third Circuit's and Seventh Circuit's decisions on two different public carry laws are consistent.

There is also no dispute between the Third Circuit and the Ninth Circuit. Petitioners claimed a split between the Third Circuit and *Young v. Hawaii*, 896 F.3d 1044 (CA9 2018), a case that addressed whether individuals have an unqualified constitutional right to carry firearms in public openly (instead of in a concealed manner). Pet. 18-19. Not so. Less than two months after Petitioners filed their petition for certiorari, the Ninth Circuit vacated the panel opinion and agreed to rehear the case en banc. *See Young v. Hawaii*, 915 F.3d 681 (CA9 2019). That alone removes any claimed split between the Third and Ninth Circuits.

In any event, there was never a split between the two circuits for two reasons. First, the vacated decision

in *Young* distinguished the state laws upheld by the Second, Third, and Fourth Circuits, including New Jersey's law, on the basis that those states' "good cause requirements . . . did not disguise an effective ban on the public carry of firearms." *Young*, 896 F.3d at 1072. Second, *Young* dealt only with the *open* carrying of weapons, because the Ninth Circuit had previously upheld state laws restricting the *concealed* carrying of weapons in *Peruta v. County of San Diego*, 824 F.3d 919 (CA9 2016) (en banc). And a majority of the judges in *Peruta* explicitly agreed with the reasoning contained in *Drake* and other similar decisions upholding state public carry laws. *See id.* at 942. The Third Circuit and Ninth Circuit thus remain in accord.

Finally, though Petitioners have identified disagreements between the D.C. Circuit's decision in *Wrenn v. District of Columbia*, 864 F.3d 650 (CADC 2017), and other circuits' decisions upholding state public carry laws, Petitioners overstate the situation. To be sure, the D.C. Circuit did invalidate a law "confin[ing] carrying a handgun in public to those with a special need for self-defense." *Wrenn*, 864 F.3d at 655. But *Wrenn* did not consider the reasoning that lay at the heart of *Drake*—reasoning that was, in fact, consistent with the D.C. Circuit's own prior decisions.

Both the Third Circuit and D.C. Circuit have agreed that "certain longstanding regulations are 'exceptions' to the right to keep and bear arms." *Drake*, 724 F.3d at 431; *accord Wrenn*, 864 F.3d at 657. Applying that principle, the Third Circuit explained that "a firearms regulation may be 'longstanding' and

'presumptively lawful' even if it was only first enacted in the 20th century" because two laws *Heller* cited approvingly as "longstanding"—restrictions on firearm possession by felons and the mentally ill—dated back to that same period. *Drake*, 724 F.3d at 434 & 434 n.11. The D.C. Circuit has agreed with that mode of analysis in prior cases, recognizing that firearms statutes dating back to this time period are "rooted in our history" and benefit from the presumption that they are constitutional. *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1253-54 (CADC 2011). That provided one basis for upholding New Jersey's law: public carry restrictions have "existed in New Jersey in some form for nearly 90 years" and are thus "longstanding" and lawful under *Heller*. *Drake*, 724 F.3d at 432.

Perhaps because the law the D.C. Circuit was reviewing dated back only to 2015, or for whatever other reason, *Wrenn* did not ask whether a public carry regime could be longstanding on the basis that it dates back a century or more. 864 F.3d at 657. *Wrenn* did not grapple with that part of *Drake*'s reasoning, nor did it grapple with the D.C. Circuit's own prior analysis on this score. (It never made mention of any of the language in *Heller II* discussed in the preceding paragraph.) Any intra-circuit tension between *Heller II* and *Wrenn* on this issue, however, could eventually be resolved by the D.C. Circuit en banc, and is not a suitable basis on which to grant certiorari. If anything, that cuts in favor of allowing this issue to further percolate. And at a minimum, it confirms the lack of any

square split between the decision below and the D.C. Circuit.

II. This Case Is A Poor Vehicle For Considering The Constitutionality Of Concealed Carry Permits.

This Court has already denied a petition for certiorari challenging New Jersey's 95-year-old public carry permitting system. *See Drake v. Filko*, No. 13-827 (cert. denied May 5, 2014). This Petition takes another bite at the apple, but provides this Court with a particularly weak record for considering the constitutional issue.[2]

Petitioners' claims rest on a basic premise—that although this New Jersey law allows individuals with a specific self-defense need to obtain public carry permits, it nevertheless guarantees that "typical law-abiding citizens of New Jersey," *i.e.*, "the vast majority of responsible citizens," will "effectively remain subject to a ban on carrying handguns outside the home for self-defense." Pet. 7; *see also*, *e.g.*, Pet. 13 (claiming the "circuits are divided over whether laws that effectively

[2] In addition to asking whether New Jersey's law is constitutional, this Petition also asks "[w]hether the Second Amendment protects the right to carry a firearm outside the home for self-defense." Pet. i. As a vehicle for asking such a question, however, this case is sorely lacking: the Third Circuit, in upholding this law, assumed the Second Amendment applies outside the home. *Drake*, 724 F.3d at 431. In other words, this question seeks no more than an advisory opinion, because a ruling in Petitioners' favor would not change the result or even the reasoning. And Petitioners do not allege a split on this first question.

ban ordinary, law-abiding citizens from carrying handguns outside the home can be squared with the Second Amendment right to keep and bear arms").[3]

But this case is an especially weak vehicle for addressing that issue because it contains no record relating to the basic premise—*i.e.*, whether New Jersey's law bans the "vast majority" of its residents who want to publicly carry firearms for self-defense from doing so. Petitioners simply posit that myriad residents would like to carry firearms publicly for self-defense purposes but cannot establish a justifiable need to do so. While that may be true for Rogers, there is nothing in the record on that broader factual question. Petitioners offered no data or even allegations on the percent of applications denied—whether 95 percent or 5 percent.[4] That information, however, bears on

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[3] This is a central position throughout the Petition. *See*, *e.g.*, Pet. 1 ("The D.C. Circuit has seen these laws for what they are—'necessarily a total ban on most [citizens'] right to carry a gun'. . . ." (quoting *Wrenn v. Dist. of Colum.*, 864 F.3d 650, 666 (D.C. Cir. 2017)); Pet. 16 (claiming the decision below allows a state to "effectively ban ordinary citizens—those without special self-defense needs—from carrying handguns").

[4] In fact, one brief supporting Petitioners—the brief of amici curiae law enforcement groups and state and local firearms rights group in support of Petitioners—noted that New Jersey public records show that hundreds of concealed carry permits were issued in 2014. While amici suggest this number is paltry compared to the total number of residents, they do not offer data regarding how many applications were received—the relevant denominator. Amici thus never discuss the percentage of permits that are granted, or what observable differences between the granted and denied applications account for those results, which is crucial to understanding how a State's regulatory scheme operates.

Petitioners' theory for why the Second Amendment forecloses New Jersey's 95-year-old permitting law, making this case a particularly poor vehicle for evaluating that theory. In other words, insofar as this Court accepts that *some* public carry permit laws are allowed—as opposed to granting a right for anyone to carry a firearm at any time and in any place—this Court has no record by which to assess the alleged defect of New Jersey's law.

That was by Petitioners' own design. In the underlying Complaint, Petitioners did not try to build a record regarding implementation of this law. Petitioners did not make *any* allegations regarding how often state or local officials grant permits. Instead, Petitioners simply alleged that "the result they seek is contrary to *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2014)." Pet. App. 49a. Petitioners even recognized in their briefing that the district court had no power to overturn *Drake*. Then, at the Third Circuit, Petitioners did not seek to overturn *Drake* (through an en banc petition); instead, Petitioners filed a motion for summary affirmance—agreeing *Drake* foreclosed their claims and inviting the Third Circuit to rule against them—in an effort to bring this case to this Court. But in rushing to put together a case for certiorari, Petitioners have failed to provide this Court with the record it needs (or even the factual allegations this Court needs) to evaluate these constitutional issues.

And this Court is not stuck with such a poor vehicle for addressing a constitutional question with far-reaching implications. There is another pending

petition for certiorari, *Gould v. Morgan*, No. 18-1272, raising the same questions and relying on a far more developed record.[5] The decision below in *Gould*, which involves a challenge to the Massachusetts public carry law, followed extensive discovery, including on permit grant rates. That information bore on the First Circuit's ultimate conclusions in that case, *Gould v. Morgan*, 907 F.3d 659, 662 (CA1 2018), and likely would prove useful to this Court. So should this Court wish to take up the issue presented, this Court can do so with the benefit of a robust district court and appellate record, rather than in a factual vacuum.

III. The Decision Below Was Correct.

Applying the same two-step framework used by courts across the country, the Third Circuit correctly held that New Jersey's careful law to govern the public carrying of firearms is constitutional. Under this mode of analysis, the court first asks whether the challenged law burdens any conduct that is protected by the Second Amendment, looking to factors that include history, tradition, and the longstanding nature of the law,

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[5] At a minimum, this Court should reschedule this petition so that it can review this petition and the petition in *Gould* at the same time. (The petition in *Gould* was docketed on April 1, 2019; Respondents have until May 6, 2019, to respond.) The *Gould* petition repeatedly refers to this one, and calls on this Court to grant the writ in *this* case. *See Gould* Pet. 19 (offering, as its conclusion, that this Court should "grant certiorari in *Rogers v. Grewal*, No. 18-824"). It would thus be prudent for this Court to consider the two petitions at the same time, so that it can fully consider the benefits that an underlying record would provide.

see District of Columbia v. Heller, 554 U.S. 570, 626-27 & n.26 (2008); if it does impose a burden, the court then applies either strict or intermediate scrutiny, depending on the degree of the burden, to determine the law's constitutionality. *See*, *e.g.*, *Gould*, 907 F.3d at 668-69; *Woollard*, 712 F.3d at 874-75; *Nat'l Rifle Ass'n of Am., Inc. v. ATFE*, 700 F.3d 185, 194 (CA5 2012); *United States v. Greeno*, 679 F.3d 510, 518 (CA6 2012); *Ezell v. City of Chicago*, 651 F.3d 684, 701-04 (CA7 2011); *United States v. Chovan*, 735 F.3d 1127, 1136-37 (CA9 2013); *United States v. Reese*, 627 F.3d 792, 800-01 (CA10 2010).[6] Ultimately, the Third Circuit rightly found that New Jersey's law reflects a centuries-old approach to advancing state interests in public safety and upheld it.

a. History and tradition show that state public carry laws like this one are consistent with the Second Amendment right.

In *Heller*, this Court found that "the right secured by the Second Amendment is not unlimited," and does not allow a person to "keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 554 U.S. at 624, 626. This Court thus noted that its decision should not "be taken to cast doubt on longstanding prohibitions," such as the

[6] Indeed, the D.C. Circuit already adopted the same two-step framework in *Heller II*. *See* 670 F.3d at 1252. As noted above, insofar as there is any intra-circuit tension between *Heller II* and *Wrenn*, that is not a suitable basis upon which to grant certiorari.

prohibitions "on the possession of firearms by felons and the mentally ill" or the "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Id.* at 626-27 & n.26. The Court added that this list of longstanding laws was not "exhaustive" and that such measures are "presumptively lawful." *Id.*; *see also Heller II*, 670 F.3d at 1274 (Kavanaugh, J., dissenting) (agreeing that "history and tradition show that a variety of gun regulations have co-existed with the Second Amendment right and are consistent with that right").

That analysis supports the Third Circuit's decision to uphold New Jersey's statutory scheme. As the Third Circuit laid out, "[f]irearms have always been more heavily regulated in the public sphere." *Drake*, 724 F.3d at 430 n.2; *see also Peterson v. Martinez*, 707 F.3d 1197, 1201 (CA10 2013) (describing "our nation's extensive practice of restricting citizens' freedom to carry firearms in a concealed manner"); *United States v. Masciandaro*, 638 F.3d 458, 470 (CA4 2011) (explaining that, "outside the home, firearms rights have always been more limited" because the public safety interests are significantly greater in this context).

Indeed, public carrying laws predate the Founding—dating back to fourteenth-century England and seventeenth-century colonial America. *See Peruta*, 824 F.3d at 929-33 (providing thorough discussion of historic public carrying laws). Such laws include the Statute of Northampton in 1328, the English Bill of Rights in 1689, and multiple colonial laws in America. *See id.* They were hardly outliers and could be found in—among other states—Delaware, Maine, Massachusetts,

New Mexico, North Carolina, South Carolina, Tennessee, and Virginia. *See*, *e.g.*, Eric M. Ruben & Saul Cornell, *Firearm Regionalism & Public Carry: Placing S. Antebellum Case Law in Context*, 125 Yale L.J. Forum 121, 129 n.43 (2015) (finding "constables, magistrates, or justices of the peace had the authority to arrest anyone who traveled armed"). The same was true via the common law in New Jersey, Connecticut, Maryland, and New York. *A Bill for the Office of Coroner & Constable* (Mar. 1, 1882) (N.J. Constable Oath); John A. Dunlapp, The N.Y. Justice (N.Y. 1815); John M. Niles, *Conn. Civil Officer: In Three Parts* . . . , 2d ed., ch. 14 (Hartford, Conn. 1833); Md. Const. of 1776, art. III, § 1 (adopting English common law).

Most notably, that approach continued uninterrupted after passage of the Second and Fourteenth Amendments—and especially throughout the nineteenth century. *See Heller II*, 670 F.3d at 1274 n.6 (Kavanaugh, J., dissenting) ("It is not uncommon for courts to look to post-ratification history and tradition to inform the interpretation of a constitutional provision."). At that time, "most states enacted laws banning the carrying of concealed weapons," and some states "went even further . . . bann[ing] concealable weapons . . . altogether whether carried openly or concealed." *Kachalsky*, 701 F.3d at 95-96; *see also Drake*, 724 F.3d at 433 (same). In other words, state laws that "directly regulat[ed] concealable weapons for public safety became commonplace and far more expansive in scope" over two hundred years ago. *Kachalsky*, 701 F.3d at 95. And, as this Court has noted, "the majority

of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *Heller*, 554 U.S. at 626.

Even the more moderate law that New Jersey now has—which does not ban public carrying of firearms, but instead "limits the opportunity for public carrying to those who can demonstrate" a need to do so, *Drake*, 724 F.3d at 433—boasts an impressive pedigree. To take a few examples, in 1836, Massachusetts barred the public carrying of firearms except by those who had a "reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property." 1836 Mass. Laws 748, 750, ch. 134, § 16. Other states, throughout the northern, mid-Atlantic, midwestern, southern, and western parts of the country, followed suit.[7] In 1906, Massachusetts adopted a licensing law permitting an applicant to receive a public carry permit only if he could show a "good reason to fear an

[7] Many states in the mid-nineteenth century limited public carrying to individuals with a reasonable cause to fear assault, including Wisconsin, Maine, Michigan, Virginia, Minnesota, Oregon, Pennsylvania, Texas, and West Virginia. *See* 1838 Wisc. Laws 381, § 16; 1841 Me. Laws 709, ch. 169, § 16; 1846 Mich. Laws 690, ch. 162, § 16; 1847 Va. Laws 127, ch. 14, § 16; 1851 Minn. Laws 526, ch. 112, § 18; 1853 Or. Laws 218, ch. 16, § 17; 1861 Pa. Laws 248, 250, § 6; 1871 Tex. Laws 1322, art. 6512; 1870 W. Va. Laws 702, ch. 153, § 8. As Massachusetts judge Peter Thacher explained in 1837, these laws established that "no person may go armed . . . without reasonable cause to apprehend an assault or violence to his person, family, or property." Saul Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 Fordham Urb. L.J. 1695, 1720 n.134 (2012).

injury to his person or property," 1906 Mass. Laws 150—in substance the same test Massachusetts, New Jersey, and other states use today. New York's "legislative judgment concerning handgun possession in public was made one-hundred years ago," in 1913, when it "limit[ed] handgun possession in public to those showing proper cause." *Kachalsky*, 701 F.3d at 97. So too Hawaii, which barred public carrying without "good cause" the same year, 1913 Haw. Laws 25, act 22, § 1, and New Jersey, which has maintained a similar test for public carry applications since 1924, *see Drake*, 724 F.3d at 432. The historical record thus establishes that these public carry laws cohere with the history and tradition of the Second Amendment, and should be upheld on that basis—exactly as the Third Circuit concluded in *Drake*. *Id.* at 434.

b. New Jersey's law is substantially related to the state's compelling interest in public safety and is thus consistent with the Second Amendment right.

Although the foregoing is a sufficient basis to uphold New Jersey's law, the Third Circuit was also correct to uphold the law because it is substantially related to the state's interest in public safety. Fundamental principles of federalism confirm this result.

As a threshold matter, the Third Circuit rightly reviewed this law under intermediate scrutiny. Consistent with the D.C. Circuit's analysis in *Heller II* (and consistent with decisions from other circuits, *see supra*,

at 14), the Third Circuit distinguished between laws that infringe on the "core" of the right and those that do not. *See Drake*, 724 F.3d at 434-35; *Heller II*, 670 F.3d at 1257. As the Third Circuit found, the core does not include public carrying of firearms. As detailed above, public carrying has "always been more heavily regulated," *Drake*, 724 F.3d at 430 n.2, and *Heller* itself held that an individual's self-defense need is most acute in the home. Thus, consistent with every other court to have considered the scrutiny applicable to laws burdening non-core Second Amendment rights, the Third Circuit applied intermediate scrutiny. *See supra*, at 14 (collecting circuit cases). And the court was right to conclude that New Jersey's law readily met this standard.

In *Drake*, on which the decision below relies, the Third Circuit held "New Jersey has, undoubtedly, a significant, substantial and important interest in protecting its citizens' safety." *Drake*, 724 F.3d at 437; *see also United States v. Salerno*, 481 U.S. 739, 755 (1987) (noting the "primary concern of every government" is "concern for the safety and indeed the lives of its citizens"). The question then becomes whether the regulation at issue is sufficiently tailored to the furtherance of that interest, without burdening more conduct than is reasonably necessary. *Id.* at 436-37.

As the Third Circuit held, New Jersey's legislature "has continually made the reasonable inference that given the obviously dangerous and deadly nature of handguns, requiring a showing of particularized need for a permit to carry one publicly serves the State's

interests in public safety." *Drake*, 724 F.3d at 438. Indeed, "studies and data demonstrat[e] that widespread access to handguns in public increases the likelihood that felonies will result in death and fundamentally alters the safety and character of public spaces." *Kachalsky*, 701 F.3d at 99; *see also Woollard*, 712 F.3d at 879 (citing a significant body of evidence that "limiting the public carrying of handguns protects citizens and inhibits crime by, *inter alia*: [d]ecreasing the availability of handguns to criminals via theft [and] [l]essening the likelihood that basic confrontations between individuals would turn deadly").

This is a concern for law enforcement officers. From 2007 to 2016, "concealed-carry permit holders have shot and killed at least 17 law enforcement officers and more than 800 private citizens—including 52 suicides." *Peruta*, 824 F.3d at 943 (Graber, J., concurring). Unrestricted public carry exacerbates the issue: "civilians without sufficient training to use and maintain control of their weapons, particularly under tense circumstances, pose a danger to officers and other civilians." *Woollard*, 712 F.3d at 880 (citation omitted). That will, of course, impact "routine police-citizen encounters": "[i]f the number of legal handguns on the streets increased significantly, officers would have no choice but to take extra precautions . . . effectively treating encounters between police and the community that now are routine, friendly, and trusting, as high-risk stops, which demand a much more rigid protocol." *Id.* Thus, as the Third Circuit held, "[t]o require applicants to demonstrate a 'justifiable need' is a reasonable

implementation of New Jersey's substantial, indeed critical, interest in public safety." *Drake*, 724 F.3d at 438.

Finally, observing that "New Jersey engages in an individualized consideration of each person's circumstances" and each person's "need to carry a handgun in public," *id.* at 439-40, the Third Circuit held that New Jersey's law does not burden more conduct than "reasonably necessary." *Id.* at 439. The Third Circuit thus upheld the statute.

New Jersey's actions are not unique, and instead align with the view of legislatures from similarly situated and densely populated states, which agree that public carry laws are a necessary way to combat firearm violence within their borders. While not every state adopts this approach, the Constitution embraces the right of States to make different choices based on local needs. That is the idea of federalism. Even as *McDonald v. City of Chicago*, 561 U.S. 742 (2010), confirmed the Second Amendment "creates individual rights that can be asserted against state and local governments," this Court did not "define the entire scope of the Second Amendment—to take all questions about which weapons are appropriate for self-defense out of the people's hands." *Friedman v. Highland Park*, 784 F.3d 406, 412 (CA7 2015). That is because, as Judge Easterbrook put the point, "the Constitution establishes a federal republic where local differences are cherished as elements of liberty, rather than eliminated in a search for national uniformity." *Id.* Although no State can trammel on the rights that *McDonald* set

forth, the Second Amendment "does not foreclose all possibility of experimentation." *Id.*

States thus must be free to canvass the evidence on public safety and make tough calls on how to protect residents from the scourge of gun violence. *See*, *e.g.*, *Heller*, 554 U.S. at 636 ("We are aware of the problem of handgun violence in this country, and . . . [t]he Constitution leaves . . . a variety of tools for combating that problem, including some measures regulating handguns."); *Kolbe v. Hogan*, 849 F.3d 114, 150 (CA4 2017) (en banc) (Wilkinson, J., concurring) ("To say in the wake of so many mass shootings in so many localities across this country that the people themselves are now to be rendered newly powerless, that all they can do is stand by and watch as federal courts design their destiny—this would deliver a body blow to democracy as we have known it since the very founding of this nation."). That is precisely what New Jersey has done in adopting its longstanding public carry law, and its law does not violate the Second Amendment.

* * *

Petitioners ask this Court to strike down a 95-year-old New Jersey law placing careful limits on the public carrying of firearms—along with the similar laws across the country—in one fell swoop. But to act on that request would be without precedent. Under the Second Amendment, this Court has invalidated statutes "that are not traditional or common in the United States," realizing that holding such "laws unconstitutional would not lead to nationwide tumult." *Heller II*,

670 F.3d at 1271 (Kavanaugh, J., dissenting). The Court instead has chosen to "maintain the balance historically and traditionally struck in the United States between public safety and the individual right to keep arms—a history and tradition that *Heller* affirmed and adopted." *Id*. But the request in this case seeks to upend that balance, establishing an unprecedented right to carry loaded firearms publicly at any time and for any reason—despite longstanding law enforcement and legislative objections. At bottom, Petitioners have not come close to establishing the necessary factual or legal predicate for doing so, and they have not provided this Court with a proper vehicle for addressing that question.[8]

[8] While the above discussion offers sufficient basis to deny this petition for certiorari altogether, this Court could also hold the petition pending this Court's decision in *New York State Rifle & Pistol Association v. City of New York*, No. 18-280. Subsequent to the filing of this Petition, this Court granted the writ in *NYSRPA*, which asks "[w]hether [New York] City's ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the Commerce Clause, and the constitutional right to travel." Since disposition of this petition may be affected by the ultimate resolution of *NYSRPA*, the petition could be held pending that decision. Doing so is an established part of this Court's practice, advances judicial economy, and signals nothing about the significance of the underlying constitutional provision, statute, or rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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