

No. 18-824

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**In the  
Supreme Court of the United States**

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Thomas R. Rogers and the Association of New Jersey  
Rifle & Pistol Clubs, Inc.,

*Petitioners,*

v.

Gurbir S. Grewal, *et al.*,

*Respondents.*

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On Petition for Writ of Certiorari to the United  
States Court of Appeals for the Third Circuit

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**BRIEF OF *AMICI CURIAE* LAW ENFORCEMENT  
GROUPS AND STATE AND LOCAL FIREARMS  
RIGHTS GROUPS IN SUPPORT OF PETITIONERS  
(*AMICI* LISTED ON INSIDE COVER)**

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The following law enforcement groups and state and local firearms rights groups are *amici curiae* in this case: Western States Sheriffs' Association, California State Sheriffs' Association, International Law Enforcement Educators and Trainers Association, Law Enforcement Legal Defense Fund, San Francisco Veteran Police Officers Association, International Association of Law Enforcement Firearms Instructors, Bridgeville Rifle and Pistol Club, Connecticut Citizens Defense League, CRPA Foundation, Delaware State Sportsmen's Association, Gun Owners' Action League Massachusetts, Gun Owners of California, Vermont Federation of Sportsmen's Clubs, and Vermont State Rifle & Pistol Association.

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**INTEREST OF *AMICI CURIAE*<sup>1</sup>****Western States Sheriffs' Association**

The Western States Sheriffs' Association ("WSSA") was established in 1993, and consists of more than three hundred members from sixteen member states (Arizona, California, Colorado, Idaho, Montana, North Dakota, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming). Most of these states have "shall issue" concealed carry permit systems, and WSSA members have observed first hand that individuals who voluntarily obtain a license or permit tend to be strongly law-abiding and do not endanger public safety.

**California State Sheriffs' Association**

The California State Sheriffs' Association is a nonprofit professional organization that represents each of the fifty-eight California sheriffs. It was formed to allow the sharing of information and resources between sheriffs and departmental personnel, in order to improve law enforcement throughout the state.

**International Law Enforcement Educators and Trainers Association**

The International Law Enforcement Educators

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<sup>1</sup>No party's counsel authored this brief in whole or in part. No party or party's counsel, and no person other than *amici*, their members, or their counsel contributed money that was intended to fund preparation or submission of this brief. Counsel of record for all parties received timely notice of intent to file this brief under Rule 37.2(a) and consent was granted by all parties.

and Trainers Association (“ILEETA”) is an association of 4,000 professional law enforcement instructors committed to the reduction of law enforcement risk, and to saving lives of police officers and the general citizenry through the provision of training enhancements for criminal justice practitioners. ILEETA’s *amicus* briefs were cited in *District of Columbia v. Heller* and in *McDonald v. Chicago*.

#### **Law Enforcement Legal Defense Fund**

Law Enforcement Legal Defense Fund (“LELDF”) is a 501(c)(3) non-profit organization, headquartered in Alexandria, Virginia, that provides legal assistance to law enforcement officers. LELDF has aided nearly one hundred officers, many of whom have been acquitted, mostly in cases where officers have faced legal action for otherwise authorized and legal activity in the line of duty. While LELDF supports measures that will further legitimate public safety interests, it does not support provisions that are ill-conceived and violate the constitutional rights of citizens.

#### **San Francisco Veteran Police Officers Association**

The San Francisco Veteran Police Officers Association is an organization that represents the interests of veteran police officers in the City and County of San Francisco, including the exercise of their members’ rights to keep and bear arms under the Second Amendment.

### **International Association of Law Enforcement Firearms Instructors**

The International Association of Law Enforcement Firearms Instructors is a non-profit association formed in 1981 whose 3,000-plus members come from local, state, and federal law enforcement agencies nationwide, including New Jersey. It conducts approximately 20 police firearms training events annually, and publishes authoritative training standards and guidelines.

The following are state and local groups that promote the shooting sports, provide firearms safety training, enhance marksmanship, educate the public about firearms, and defend Second Amendment rights, including the right of ordinary citizens to lawfully carry firearms for legitimate purposes such as self-defense: Bridgeville Rifle and Pistol Club, Connecticut Citizens Defense League, CRPA Foundation, Delaware State Sportsmen's Association, Gun Owners' Action League Massachusetts, Gun Owners of California, Vermont Federation of Sportsmen's Clubs, and Vermont State Rifle & Pistol Association. These organizations have numerous members who are current or former law enforcement officers.

Thus, *amici* are all organizations with members who are law enforcement officers or that support law enforcement officers and agencies. *Amici* believe that the perspective of front line law enforcement personnel and organizations that support law enforcement should be of assistance to this Court in evaluating whether any interest in public safety is served by New Jersey's statute requiring "justifiable

need” in order to obtain a permit to carry a handgun outside the home.

### SUMMARY OF ARGUMENT

The petition should be granted to confirm that the Second Amendment right to bear arms applies outside the home. New Jersey’s carry statute requires a showing of “justifiable need,” in the form of specific documented threats to the applicant, which is impossible for most ordinary individuals to meet.

Available data show that in recent years there have been at any time about 1,000 outstanding carry permits in New Jersey. That means that only .016% of the adult population have a carry permit, and the other 99.984% have been effectively deprived outside the home of their “individual right to possess and carry weapons in case of confrontation,” which this Court found in *Heller* to be the right guaranteed by the operative clause of the Second Amendment.

Since *Heller*, widespread misapplication by lower courts of intermediate scrutiny standards has led to serious infringements on core Second Amendment rights. But *Heller* expressly rejected any balancing test. Instead, it held that constitutional rights are enshrined with the scope they were understood to have when the people adopted them.

New Jersey’s “justifiable need” statute cannot withstand genuine heightened scrutiny because it does not actually serve any public safety interest. Under the text, history, and tradition approach of *Heller*, that statutory provision also cannot survive constitutional review. That is because at the time of

the ratification of the Second Amendment and during the early Republic, the right to carry firearms outside the home was treated as legitimate and constitutionally protected.

New Jersey produced no evidence, either in the *Drake* case or in this case, that the carrying of concealed handguns by licensed, law-abiding citizens causes an increased public danger. Furthermore, the issue in this case is whether a public safety interest is advanced by limiting carry to those with a “justifiable need” to carry. New Jersey has not shown that its interest in preventing misuse or accidental use of handguns is furthered by limiting carry to those who can show a greater need for self-defense, or that such people are less likely to misuse or have accidents with firearms. Instead, the “justifiable need” standard is simply a method of rationing the exercise of a constitutional right.

Data from states in which permits are issued in accordance with objective criteria, and without a showing of need, demonstrate that permit holders are vastly more law-abiding than the citizenry as a whole. In Texas, official publications show that carry license holders constituted 5.95% of the population 18 and older, but committed only 0.3811% of the serious crimes in that state. In Florida, carry licenses must be revoked if the licensee commits any disqualifying crime or becomes disqualified for other reasons. As of June 30, 2018, the number of valid licenses was almost two million, but the revocation rate for the previous year was only 0.0096%.

Publications by urban police departments show that the vast majority of homicides and shootings

are committed by individuals with a prior criminal record, who are not eligible in most cases to obtain a carry permit.

Nationwide surveys of rank and file law enforcement officers and law enforcement leadership show overwhelming support for concealed carry by law-abiding citizens. Large majorities of officers also clearly recognize the fact that legally-armed citizens are important in reducing crime.

Text, history, and tradition show that carrying and use of firearms, including handguns, was entirely ordinary and sometimes nearly universal in the early Republic. Many of the Founding Fathers, including the first four Presidents, possessed, carried, and used firearms outside the home, including handguns. George Washington carried handguns when traveling from Alexandria to Mount Vernon. Thomas Jefferson carried a handgun when traveling from Monticello to the District of Columbia while he was President.

For more than thirty years after the end of the Revolutionary War, there were no prohibitions in any state on carrying handguns either openly or concealed. Thereafter, up until the time of the Mexican War, a handful of states enacted concealed carry bans. One of these was struck down by a court decision because the right to bear arms “must be preserved entire,” and any legislative acts “which diminish or impair it as it existed when the constitution was formed, are void.” Other court decisions upheld these early concealed carry statutes, but in every case the right to carry handguns openly was unimpaired.

**ARGUMENT****I. THE “JUSTIFIABLE NEED” STATUTE DESTROYS THE RIGHT OF NEARLY ALL NEW JERSEY CITIZENS TO CARRY HANDGUNS OUTSIDE THE HOME.**

New Jersey requires a permit to carry a handgun outside the home, either openly or concealed. N.J. Stat. Ann. §§ 2C:39-5(b), 2C:58-4. To obtain such a permit, each application by a private citizen:

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

N.J. Stat. Ann. § 2C:58-4(c).

This “justifiable need” test is impossible for most people to meet because criminals who may attack an individual on the street rarely issue threats in advance. In cases where a threat is issued in advance, by the time an individual has documented such threats by reporting them to law enforcement and going through the application process, it is likely



that the threat either will have passed, or that the threatened harm will have already occurred.<sup>2</sup>

New Jersey does not publish the number of active concealed carry permits. In response to an open records act request, the New Jersey State Police stated that 496 concealed carry permits were issued in 2014. Ammoland Shooting Sports News, *New Jersey with 8.983 Million Residents, Only Issued 496 Concealed Carry Permits* (Dec. 18, 2015).<sup>3</sup> Because concealed carry permits expire after two years, there are approximately 1,000 active permits at any given time. According to the Crime Prevention Research Center, New Jersey had 1,212 active carry permits in 2012-13. CRIME PREVENTION RESEARCH CENTER, *CONCEALED CARRY PERMIT HOLDERS ACROSS THE UNITED STATES: 2018 13* (2018).<sup>4</sup>

New Jersey had an adult population of 6,391,930

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<sup>2</sup> In 2015, Carol Bowne was stabbed to death by her ex-boyfriend outside her Berlin Township, New Jersey home. She had previously obtained a restraining order against him, and in mid-April sought to obtain a gun purchase permit. The application was still pending when she was murdered in early June. Greg Adomaitis, *Berlin murder victim told neighbor about gun permit application, then nothing*, NJ.com (Jun. 5, 2015), [https://www.nj.com/camden/index.ssf/2015/06/berlin\\_murder\\_victim\\_told\\_neighbor\\_about\\_gun\\_permit.html](https://www.nj.com/camden/index.ssf/2015/06/berlin_murder_victim_told_neighbor_about_gun_permit.html).

<sup>3</sup><https://www.ammoland.com/2015/12/251102/#axzz5drqyhZWJ>.

<sup>4</sup> The number of permits issued to ordinary private citizens is undoubtedly lower, perhaps vastly lower, since New Jersey issues carry permits to “employees of private detective agencies, armored car companies and private security companies” under the same statutory scheme. N.J. Admin. Code § 13:54-2.4(d)(2).

in the 2010 census.<sup>5</sup> Those 1,000 active permit-holders constitute .016% of the adult population of New Jersey. In other words, only one of about 6,250 adults in New Jersey has a carry permit. The other 99.984% of ordinary citizens cannot leave the home with a handgun for self-defense, even when the potential danger may be very real. In essence, New Jersey’s “justifiable need” test has stripped nearly all citizens of their “individual right to possess and carry weapons in case of confrontation,” which this Court found to be the right guaranteed by the operative clause of the Second Amendment. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

Since *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the lower courts have frequently countenanced serious infringements on core Second Amendment rights. This is largely due to the widespread misapplication of the intermediate scrutiny standard of review. As stated by then-Judge Kavanaugh, dissenting in *Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011):

Are gun bans and regulations to be analyzed based on the Second Amendment’s text, history, and tradition [and appropriate analogues]? Or may judges re-calibrate the scope of the Second Amendment right based on judicial assessment of whether the law

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<sup>5</sup> U.S. Census Bureau, American FactFinder, Profile of General Population and Housing Characteristics: 2010, 2010 Demographic Profile Data (New Jersey), [https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CFhttps://factfinder.census.gov/rest/dnldController/deliver?\\_ts=566694259710](https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CFhttps://factfinder.census.gov/rest/dnldController/deliver?_ts=566694259710).

advances a sufficiently compelling or important government interest to override the individual right?

*Heller* itself answered that question by expressly rejecting any balancing test:

The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.

*Heller*, 554 U.S. at 634-35.

Instead of *Heller*’s text, history, and tradition standard for determining the scope and effect of the Second Amendment’s protections, the default position of the Courts of Appeals seems to be intermediate scrutiny, at least in name, and often less than that in practice. As shown below, New Jersey’s “justifiable need” statute cannot withstand any properly applied standard of heightened scrutiny, either strict scrutiny or genuine intermediate scrutiny. That is because New Jersey’s statute does not actually serve any public safety interest. Under a text, history, and tradition approach, New Jersey’s statute also cannot survive, because historically speaking the right of ordinary

citizens to carry firearms outside the home has been treated as legitimate and constitutionally protected, and that remains true for most of America today.

## **II. NEW JERSEY'S CARRY STATUTE CANNOT WITHSTAND HEIGHTENED SCRUTINY.**

### **A. The “public safety” interest that allegedly supports the “justifiable need” requirement is illusory.**

Although there are variations, state statutes governing the carrying of handguns generally fall into three categories.<sup>6</sup>

First, a small number of states, including New Jersey, have “may issue” statutes, in which a permit or license is required to carry a firearm outside the home, and the government has discretion to determine whether to issue a permit.

Second, the majority of states have “shall-issue” laws, in which eligibility for a carry license or permit is determined by specified, objective criteria, without subjective decision-making by government officials. No showing of need is required. If the individual is not disqualified under those objective criteria, the permit “shall issue.” An example is Virginia’s statute. Code of Virginia, § 18.2-308.09.

Third, fourteen states now have “permitless carry,” referred to by some as constitutional carry, in which any person who is eligible to possess a firearm under federal and state law can carry the firearm,

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<sup>6</sup> For summaries of state firearms laws, including carry laws, see NRA-ILA, State Gun Laws, [https:// www.nraila.org/gun-laws/state-gun-laws/](https://www.nraila.org/gun-laws/state-gun-laws/).

generally either openly or concealed. Vermont has had constitutional carry since 1903, pursuant to *State v. Rosenthal*, 75 Vt. 295, 55 A. 610 (1903).<sup>7</sup>

In the earlier challenge to New Jersey’s highly restrictive carry law, the Third Circuit deferred 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.” *Drake v. Filko*, 724 F.3d 426, 439 (3d Cir. 2013).

However, that extraordinary statement is belied by the facts. Forty-two states plus the District of Columbia now either have “shall-issue” laws or allow permitless carry, without any undue risk. More importantly, the *Drake* court did not require New Jersey to produce evidence that the “justifiable need” requirement actually served any interest in public safety, or that there was a means-end “fit” (whether “narrow tailoring” or a “reasonable relationship”) between that requirement and the interest alleged to be served.

As noted in the dissent of Judge Hardiman in that case:

At the outset, we should emphasize that the justifiable need requirement itself, not the State’s permitting law in general, is at

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<sup>7</sup> The number of states with permitless carry has increased rapidly from one state to fourteen states over the past fifteen years. A bill to make South Dakota a permitless state was signed by the governor on January 31, 2019, thus making fifteen permitless carry states.

issue.... Accordingly, our inquiry must focus on that requirement. To be precise, we must ask whether the State has justified its conclusion that those with a special need for self-defense are less likely to misuse or accidentally use a handgun than those who do not have a special need.

*Drake*, 724 F.3d 453. Judge Hardiman continued:

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

*Id.* Instead, the dissent concluded that, despite New Jersey's assertions regarding misuse and accidents,

it is obvious that the justifiable need requirement functions as a rationing system designed to limit the number of handguns carried in New Jersey. The New Jersey courts have admitted as much. *See, e.g., State v. Valentine*, 124 N.J.Super. 425, 307 A.2d 617, 619 (App.Div.1973) (“[T]he overriding philosophy of our Legislature is to limit the use of guns as much as possible.”); *see also Siccardi v. State*, 284 A.2d 533, 540 (N.J. 1971)] (“[W]idespread handgun possession in the streets, somewhat

reminiscent of frontier days, would not be at all in the public interest.”).

*Id.* at 455-56. In short, the “justifiable need” requirement, which is all that the petitioners challenge here, is unsupported by evidence, either in *Drake* or in the current record.

**B. Data from other jurisdictions show that individuals with carry licenses are exceptionally law-abiding.**

The *amicus* brief filed by the Attorneys General and Governors of 23 states (“AGs’ Brief”) presents some statistics regarding the law-abiding nature of individuals who have concealed carry licenses from a number of shall-issue states. AGs’ Brief at 5-8. These statistics are largely derived from an article by Professor David Kopel. David B. Kopel, *Pretend “Gun-Free” School Zones*, 42 CONN. L. REV. 515, 564-69 (2009).

Some more recent data from Texas and Florida, the two states with the largest numbers of carry permit holders, confirm that carry permit holders in these states are an extraordinarily law-abiding group. Recognizing a right to carry by law-abiding citizens of New Jersey would not jeopardize public safety.

In Texas, official state data for 2017 show total convictions of a long list of serious crimes, and the number of those crimes committed by carry license holders. Carry license holders were convicted of 170 out of a total of 44,608 such crimes, or 0.3811%.<sup>8</sup>

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<sup>8</sup> Texas Department of Public Safety, Conviction Rates for Handgun License Holders Reporting Period: 01/01/2017 - 12/31/

There were 1,244,944 active license holders in 2017.<sup>9</sup> The population 18 and older is estimated by the Census Bureau to be 20,938,557.<sup>10</sup> Thus, carry license holders constituted 5.95% of the population 18 and older, but committed only 0.38% of the crimes. The conviction rate of license holders is therefore about 1/16<sup>th</sup> of the conviction rate for the adult population as a whole.

In Florida, carry licenses must be revoked when the licensee commits any disqualifying crime (all felonies plus others) or is disqualified because of mental health, substance abuse, domestic violence, or other reasons. Fla. Stat. § 790.06. 4,026,565 licenses were issued over the period October 1, 1987 through September 30, 2018.<sup>11</sup> Over that same period, 14,146 licenses have been revoked for all reasons, a rate of 0.35%.<sup>12</sup> As of June 30, 2018, the

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2017, <https://www.dps.texas.gov/rsd/LTC/reports/convrates.htm>.

<sup>9</sup> Texas Department of Public Safety, Active License/Certified Instructor Counts As of December 31, 2017, <https://www.dps.texas.gov/rsd/LTC/reports/ActLicAndInstr/ActiveLicandInstr2017.pdf>.

<sup>10</sup> United States Census Bureau, Estimates of the Total Resident Population and Resident Population Age 18 Years and Older for the United States, States, and Puerto Rico: July 1, 2017, <https://www.census.gov/data/datasets/2017/demo/popest/nation-detail.html>.

<sup>11</sup> Florida Department of Agriculture and Consumer Services, Summary Report October 1, 1987-September 30, 2018, [https://www.freshfromflorida.com/content/download/7499/118851/cw\\_monthly.pdf](https://www.freshfromflorida.com/content/download/7499/118851/cw_monthly.pdf) (“Summary Report”). Florida licenses are valid for seven years.

<sup>12</sup> *Id.*



number of valid licenses statewide was 1,927,724.<sup>13</sup> In the preceding year (July 1, 2017 through June 30, 2018), 1,860 licenses were revoked, an annual revocation rate of .0096%.<sup>14</sup> From 1987 through 2010, when the state stopped publishing this breakdown of the data, only 168 revocations were for a crime with a “Firearm Utilized.” Summary Report, *supra*, n.11.

States with “shall issue” systems thus do not experience a crime problem from carry permit holders, because they are far more law-abiding than the general public. Such a system allows for the relatively free exercise of citizens’ Second Amendment rights, and avoids the effective elimination of those rights as has been done by New Jersey’s “justifiable need” requirement.

**C. Most homicides and violent crimes are committed by individuals with criminal records who are ineligible for carry permits.**

Eliminating the right to carry for most law-abiding citizens, as New Jersey has done, is not tailored to reduce crime. Evidence and law enforcement experience confirm that most violent

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<sup>13</sup> Florida Department of Agriculture and Consumer Services, Number of Valid Florida Concealed Weapon Licenses As Reported at the End of Each Fiscal Year (June 30) Since Program Inception in October 1987, [https://www.freshfromflorida.com/content/download/7504/118881/NumberOfValidCWLicenses\\_FiscalYearEndSince1987-1988.pdf](https://www.freshfromflorida.com/content/download/7504/118881/NumberOfValidCWLicenses_FiscalYearEndSince1987-1988.pdf).

<sup>14</sup> Florida Department of Agriculture and Consumer Services, Applications and Dispositions by County July 1, 2017–June 30, 2018, [https://www.freshfromflorida.com/content/download/76929/2217458/07012017\\_06302018\\_cw\\_annual.pdf](https://www.freshfromflorida.com/content/download/76929/2217458/07012017_06302018_cw_annual.pdf).

crimes are committed by repeat offenders, who are ineligible under most states' carry permitting schemes to receive a carry permit (assuming they would apply for one, which they would not). Indeed, depending on the particular criminal history of an individual, most of those people are ineligible to purchase a firearm legally or even to possess one. Felons cannot legally possess or purchase firearms under federal law. 18 U.S.C. § 922(g). Violent criminals simply don't obey the law, they don't follow the laws relating to firearms purchases and possession, and they don't get carry permits.

An analysis of three years of homicide data by the New York Times revealed a compelling fact. According to the NYPD's Deputy Commissioner for Strategic Initiatives, more than 90% of the killers in New York City had criminal records, as did more than half of those killed. Jo Craven McGinty, *New York Killers, and Those Killed, by Numbers*, NEW YORK TIMES (Apr. 28, 2006).

A report produced by the NYPD showed similar results for the year 2012, the last year for which such a study was produced. In that year, 87% of homicide suspects had at least one prior arrest. POLICE DEPARTMENT CITY OF NEW YORK, MURDER IN NEW YORK CITY 2012 10.<sup>15</sup> Seven out of ten victims had prior arrests. *Id.* at 6.

Data from other cities confirm this pattern. In Baltimore, for the year 2015, police data showed that of all homicide suspects, "76.5 percent had prior

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<sup>15</sup> <https://www1.nyc.gov/site/nypd/stats/reports-analysis/archive.page>.

criminal records,” and those homicide suspects averaged over nine arrests apiece. Kevin Rector, *Statistical snapshots from Baltimore’s deadliest year: suspects, victims, and cops*, BALTIMORE SUN (Jan. 7, 2016).

The most recent annual report for Milwaukee homicides states that “Almost 100% of the 2015 known suspects had a criminal history” and adds that “The overwhelming majority of suspects have criminal histories going back to 2005.” MILWAUKEE HOMICIDE REVIEW COMMISSION, ANNUAL REPORT 2015, HOMICIDE AND NON-FATAL SHOOTINGS 48.<sup>16</sup> Moreover, 83% of the homicide victims had prior arrest histories. *Id.* at 42.

This was true not only of homicides. In Milwaukee in 2015, 235 out of 242 (97%) non-fatal shooting suspects had a criminal history. *Id.* at 49. As with homicides, the vast majority of non-fatal shooting victims (77%) had criminal histories. *Id.* at 43.

In shall-issue states, carry permit holders, by contrast, do not have criminal histories and have undergone background checks. Experienced law enforcement officers know very well that these are not the people who pose a public safety risk.

The national law enforcement organization PoliceOne conducted its Gun Policy & Law Enforcement Survey between March 4 and March 13, 2013, receiving 15,595 responses from verified police professionals across all ranks and department

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<sup>16</sup><http://city.milwaukee.gov/ImageLibrary/Groups/cityHRC/reports/2015AnnualReportFINAL.pdf>.

sizes.<sup>17</sup> Respondents were asked: “Do you support the concealed carry of firearms by civilians who have not been convicted of a felony and/or not been deemed psychologically/medically incapable?” PoliceOne Survey, Question 19. The results were overwhelming: 91.3% of the respondents selected “Yes, without question and without further restrictions,” and only 8.6% were of the belief that concealed carry should be restricted to law enforcement officers, were neutral, or were unsure. This widespread law enforcement support for carry by properly licensed, law-abiding citizens is based, no doubt, on the experience most of them have with states that freely allow carry by such individuals.

The respondents were also asked: “On a scale of one to five—one being low and five being high—how important do you think legally-armed citizens are to reducing crime rates overall?” *Id.*, Question 20. Over half of these law enforcement professionals (54.7%) believed legally-armed citizens should be given the top ranking score of “five.” A total of 90.4% ranked legally-armed citizens as being in the range of three to five on the scale of importance. Those who believed that armed citizens were of relatively little or no importance (one to two on the ranking scale) constituted only 9.6% of respondents. *Id.*

Law enforcement leadership agrees that armed,

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<sup>17</sup> PoliceOne, *Gun Policy & Law Enforcement Survey* (2013), [http://ddq74coujki1i.cloudfront.net/p1\\_gunsurveysummary\\_2013.pdf](http://ddq74coujki1i.cloudfront.net/p1_gunsurveysummary_2013.pdf) (“PoliceOne Survey”). A description of the study is at <http://www.policeone.com/police/products/press-releases/6188461-policeone-com-releases-survey-of-15-000-law-enforcement-professionals-about-u-s-gun-control-policies/>.

law-abiding citizens are an aid to law enforcement, not a danger. In its most recent annual survey, the National Association of Chiefs of Police posed a wide variety of questions to a “broad cross section of professional command officers involving every state and every size department.” Among many other questions, these sheriffs and chiefs of police were asked, “Can qualified, law-abiding armed citizens help law enforcement reduce violent criminal activity?” More than four out of five answered “yes.” National Association of Chiefs of Police, 30th Annual Survey of Police Chiefs and Sheriffs, Question 23 (2018).<sup>18</sup>

Even in intermediate scrutiny cases, courts must consider whether the “provisions were designed to address a real harm, and whether those provisions will alleviate it in a material way.” *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 195 (1997). Here there is no showing at all of a real harm if law-abiding citizens in New Jersey were permitted to carry handguns without a showing of “justifiable need.” The courts below have balanced away an important Second Amendment right of New Jersey citizens to defend themselves, by relying on a factually unsupported threat to public safety. That error is fatal under heightened scrutiny and, as discussed below, New Jersey’s “justifiable need” requirement cannot survive if the text, history, and tradition principles of *Heller* are applied.

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<sup>18</sup> <https://www.nacoponline.org/surveyresults.html>.

### III. THE TEXT, HISTORY, AND TRADITION APPROACH USED IN *HELLER* SUPPORTS THE RIGHT TO CARRY OUTSIDE THE HOME.

#### A. Carrying of handguns and long guns by law-abiding citizens was commonplace in the early Republic.

Carrying and use of firearms (including handguns) was entirely ordinary, sometimes nearly universal, in colonial times and in the early Republic. For an exhaustive study of that subject, see CLAYTON CRAMER, *ARMED AMERICA* (2006). Indeed, many of the Founding Fathers possessed and carried firearms, including handguns.

Patrick Henry stirred the Virginia Ratification Convention by declaring, “The great object is, that every man be armed.... Everyone who is able may have a gun.” 3 J. ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS* 386 (2d ed. 1836). As a lawyer before the Revolution, Henry lived “just north of Hanover town, but close enough for him to walk to court, his musket slung over his shoulder to pick off small game for [his wife] Sarah’s table.” HARLOW GILES UNGER, *LION OF LIBERTY* 30 (2010).

George Washington owned perhaps fifty firearms, and some of his pistols, saddle holsters, and fowlers (shotguns) may be seen today at Mt. Vernon and West Point.<sup>19</sup> After the Revolutionary war ended, Washington and his servant were riding on horseback from Alexandria to Mount Vernon. “As

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<sup>19</sup> STEPHEN HALBROOK, *THE FOUNDERS’ SECOND AMENDMENT* 316-17 (2008), citing Ashley Halsey, Jr., *George Washington’s Favorite Guns*, *AMERICAN RIFLEMAN* 23 (February 1968).

was then the custom, the General had holsters, with pistols in them, to his saddle.” A ruffian and reputed murderer forbade him from passing and threatened to shoot him. Washington handed his pistol to the servant, saying “If this person shoots me, do you shoot him,” and rode on without incident.<sup>20</sup>

Our second President, John Adams, spent his youth playing games and sports, and “above all, in shooting, to which diversion I was addicted to a degree of ardor which I know not that I ever felt for any other business, study, or amusement.”<sup>21</sup> A biographer states:

John’s zest for shooting prompted him to take his gun to school, secreting it in the entry so that the moment school let out he might dash off to the fields after crows and squirrels. [The schoolmaster’s] scolding did not daunt him; he simply began to leave his gun at the home of an old woman who lived close by.<sup>22</sup>

Thomas Jefferson was an avid shooter and gun collector. His memorandum books kept between 1768 and 1823 show numerous references to the acquisition of pistols, guns, muskets, rifles, fusils, gun locks and other gun parts, the repair of firearms, and the acquisition of ammunition.

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<sup>20</sup> BENJAMIN TAYLOE, OUR NEIGHBORS ON LAFAYETTE SQUARE 47 (1872) quoted in HALBROOK at 317.

<sup>21</sup> ANNE BURLEIGH, JOHN ADAMS 8-9 (1969) (quoting III DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 257 (1961)).

<sup>22</sup> *Id.* at 9 (citing III DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 258-59 n.6).

Included were a pair of “Turkish pistols ... so well made that I never missed a squirrel at 30 yds. with them.”<sup>23</sup>

Jefferson carried one or both of these Turkish pistols when traveling as U.S. President. In an 1803 letter, Jefferson wrote to an innkeeper at Orange Courthouse, between Monticello and Washington: “I left at your house ... a pistol in a locked case, which no doubt was found ... after my departure. I have written to desire Mr. Randolph or Mr. Eppes to call on you for it, as they come on to Congress, to either of whom therefore be so good as to deliver it.”<sup>24</sup>

James Madison, in a 1775 missive, extolled the marksmanship “skill of the Virginians” with the rifle:

The strength of this Colony will lie chiefly in the rifle-men of the Upland Counties, of whom we shall have great numbers.... The most inexpert hands rec[k]on it an indifferent shot to miss the bigness of a man’s face at the distance of 100 Yards. I am far from being among the best & should not often miss it on a fair trial at that distance.

CLAYTON CRAMER, *ARMED AMERICA* 151 (2006) (quoting I JAMES MADISON, WILLIAM T. HUTCHINSON AND WILLIAM M.E. RACHAL, ED., *THE PAPERS OF*

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<sup>23</sup> See references in HALBROOK at 318 n.40 (2008).

<sup>24</sup> Jefferson’s letter to Randolph also survives. Both letters are available on the Library of Congress website: <http://memory.loc.gov/cgi-bin/ampage?collId=mtj1&fileName=mtj1page029.db&recNum=210>; <http://memory.loc.gov/cgi-bin/ampage?collId=mtj1&fileName=mtj1page029.db&recNum=208>.



JAMES MADISON 153 (1962)). In the first decades of the Republic, it was completely commonplace to travel with and to use handguns and other firearms, concealed or not, for lawful purposes, and that constitutional right was essentially unregulated.

**B. The right to carry handguns outside the home was clearly recognized by early court decisions.**

In the first 32 years after the conclusion of the War of Independence, no state had a concealed or open handgun carry ban. Prior to the Mexican-American war, only eight states restricted concealed carry in any way, and all of them permitted open carry of handguns, rifles, and shotguns. Those eight states were Kentucky (1813), Louisiana (1813), Indiana (1820), Arkansas (1837-38), Georgia (1837), Tennessee (1838), Virginia (1838), and Alabama (1839). *See* C. CRAMER, CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC 2-3 (1999).

Not all of these states banned carrying concealed firearms. Tennessee's law applied only to Bowie knives and "Arkansas toothpicks," *id.* at 109-10, and Virginia's law applied only to persons who "habitually or generally" carried concealed weapons. *Id.* at 114-15.

In the first half of the nineteenth century, these restrictions on concealed carry were felt to be justified, because the tradition and right to carry openly were so firmly established. The purpose behind Louisiana's concealed carry statute was said to be:

[t]o prevent bloodshed and assassinations committed upon unsuspecting persons. It interfered with no man's right to carry arms (to use its words) "in full open view," which places men upon an equality. This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations.

*State v. Chandler*, 5 La. Ann. 489, 490 (1850).

Kentucky's statute was declared unconstitutional in *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822). The statute provided that "that any person in this commonwealth, who shall hereafter wear a pocket pistol, dirk, large knife, or sword in a cane, concealed as a weapon, unless when travelling on a journey, shall be fined...." *Id.* Notably, the ban on concealed carry extended only to "pocket pistols," not all pistols, and there was an exception for traveling. Open carry was not affected by the statute. Nevertheless, the Court of Appeals of Kentucky held that it violated Kentucky's constitution, which stated that "the right of the citizens to bear arms in defense of themselves and the state, shall not be questioned." *Id.* The court opined that "whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden by the explicit language of the constitution." *Id.* at 91-92. The right to bear arms "must be preserved entire," *id.* at 91, and all legislative acts "which diminish or impair it as it existed when the

constitution was formed, are void.” *Id.* at 92.

*State v. Reid*, 1 Ala. 612 (1840) considered the validity under the Alabama constitution of a statute that prohibited concealed carry but not open carry. The Alabama Supreme Court upheld the statute precisely because armed self-defense was still allowed, stating:

We do not desire to be understood as maintaining, that in regulating the manner of bearing arms, the authority of the Legislature has no other limit than its own discretion. A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional.

*Id.* at 616-17.

The Georgia Supreme Court, reviewing an indictment and conviction that did not charge that the pistol the individual was carrying was concealed, stated as a guiding principle that “The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree.... *Nunn v. State*, 1 Ga. 243, 251 (1846). Because the statute at issue was confusingly drafted, the court held that:

so far as the act of 1837 seeks to suppress the practice of carrying certain weapons *secretly*, that it is valid, inasmuch as it does

not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void*....

*Id.* (emphasis in original).

In brief, when looking at the early statutes and case law regarding carry, the courts were uniform in requiring that citizens be allowed to carry handguns, either openly, concealed, or both.

### CONCLUSION

The petition for certiorari should be granted.

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