No. 13-827

In the Supreme Court of the United States

JOHN M. DRAKE, *ET AL.*,
Petitioners,
v.
EDWARD A. JEREJIAN, *ET AL.*,
Respondents.

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

BRIEF OF JUDICIAL EDUCATION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF JUDICIAL EDUCATION PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

The Judicial Education Project respectfully submits this brief as *amicus curiae* in support of Petitioners.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae the Judicial Education Project ("JEP") is dedicated to strengthening liberty and justice in America through defending the Constitution as envisioned by its Framers: creating a federal government of defined and limited power, dedicated to the rule of law and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as the judiciary's role in our democracy, how judges construe the Constitution, and the impact of court rulings on the nation. JEP's education efforts are conducted through various outlets, including print, broadcast, and internet media.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that Petitioners and Respondents, upon timely receipt of *amicus*'s intent to file this brief, have consented to its filing. Such consents are being submitted herein.

SUMMARY OF ARGUMENT

The court below upheld a New Jersey regulation forbidding law-abiding citizens to carry a handgun in public without a license. A license may be granted only to those who can prove a "justifiable need," defined as follows:

> 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.

N.J. Admin. Code 13:54-2.4(d)(1) (quoted Pet. App. 5a). Very few such licenses are ever granted. *See* Pet. 6 (estimating a licensure rate of .02%).

The court held (1) that this regulation is constitutional because it is "longstanding"; and alternatively (2) that the regulation survives "intermediate scrutiny."[2] The first holding rested on a misreading of a short passage in this Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008). The alternative holding in fact resulted from the use of rational basis review, not intermediate scrutiny.

The decision below is a particularly egregious example of a disturbing pattern of resistance to this Court's guidance in *Heller*. The landmark opinion in that case did not define the scope of the Second

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[2] The court doubted whether the Second Amendment has any applicability at all outside the home, but avoided resolution of that issue. Pet. App. 8a-12a.

Amendment right to bear arms outside the home, but it left no doubt that the text and history of the Amendment require that issue to be taken very seriously.

This case is an appropriate vehicle for clarifying that neither legislatures nor courts may effectively read the right to "bear Arms" out of the Constitution by allowing that right to be exercised only by a tiny subset of the citizenry. This issue has undergone sufficient percolation in the years since *Heller* was decided, and its clarification is a logical next step for this Court.

A reversal of the decision below will leave legislatures with ample means to regulate the carrying of firearms in the interest of public safety, as experience in the overwhelming majority of the states clearly demonstrates. The real threat to public safety is posed by the inability of governments to control violent criminals, not by allowing law-abiding citizens to have the means of defending themselves against these criminals. New Jersey and several other states are depriving their citizens not only of their constitutional rights but also of the fundamental right to defend their own lives. This is an urgent matter whose resolution by this Court should not be delayed any longer.

ARGUMENT

I. The Decision Below Typifies a Pattern of Resistance to this Court's Guidance in *District of Columbia v. Heller*

For many decades prior to this Court's decision in *Heller*, the federal courts of appeals had uniformly upheld every single statute that was subjected to a Second Amendment challenge, often with little more than a gesture in the direction of legal analysis. Such reflexive deference to legislative discretion should have ended after *Heller*'s detailed analysis of the text and history of the Second Amendment, and its forceful insistence on the importance of the right to keep and bear arms in our constitutional structure.

It is true that *Heller* refrained from definitively deciding issues not presented in that case. It is also true that *Heller* refrained from establishing a detailed analytical framework for deciding the many new issues that were bound to arise in future cases. But the Court said nothing to indicate that the right to keep a handgun in the home marked the outer limit of the Second Amendment. Nor did the Court suggest that the inferior courts are free to interpret *Heller* in ways that effectively give legislatures virtually the same *carte blanche* they had previously enjoyed. If *Heller* established anything beyond a fact-specific invalidation of one particular law, it was that courts must now take Second Amendment challenges seriously, and subject challenged regulations to careful legal analysis that respects the importance of the constitutional right.

Some courts have indeed taken *Heller* seriously. In *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011),

for example, the court carefully analyzed this Court's opinions in *Heller* and other relevant cases, articulating an analytical approach that respects both the texts of those opinions and the importance of the Second Amendment. In *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), the same court used a somewhat different style of analysis, but continued to adhere to the fundamental principle that legislative judgments must be subjected to meaningful judicial scrutiny.

Unfortunately, sound opinions like those in *Ezell* and *Moore* have not proved to be the rule. The dominant interpretation of *Heller* in the courts of appeals can be roughly summarized as follows:

- Some regulations, primarily those that are deemed "longstanding," are presumed not to infringe the Second Amendment.
- Regulations that severely restrict the core right of self defense are said to be subject to strict or very exacting judicial scrutiny.
- Regulations that do not severely restrict this core right are subject to intermediate scrutiny.

The tiers-of-scrutiny approach is not an unimpeachably correct interpretation of *Heller*, as Judge Kavanaugh explained in his dissenting opinion in *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011). But perhaps more important, the application of this framework has sometimes betrayed an overzealous inclination to uphold dubious regulations on the basis of flimsy legal analysis.

Two mistakes are especially notable. First, some courts have misread *Heller* to mean that almost any

arguably "longstanding" regulation is presumptively valid, so that no form of heightened scrutiny is required.[3] *Heller* neither said nor implied any such thing. Second, some courts have effectively, if covertly, employed rational basis review.[4] *Heller* expressly forbade the use of rational basis review, and it said nothing to suggest that courts are free to employ such review under another name.[5]

Both of these mistakes were committed by the court below. This case offers the Court an opportunity to correct a disturbing judicial trend in which lip service is paid to *Heller* without actually respecting its guidance. This practice threatens the lives and safety of American citizens by stripping them of the ability to defend themselves against violent criminals, and the issues have been percolating long enough. The Court should throw some cold water on these manifest deviations from the law.

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[3] *See, e.g.*, *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 196-97 (5th Cir. 2012); *Heller v. District of Columbia*, 670 F.3d 1244, 1253 (D.C. Cir. 2011); *United States v. White*, 593 F.3d 1199, 1205-06 (11th Cir. 2010); *United States v. Seay*, 620 F.3d 919, 925 (8th Cir. 2010); *United States v. Richard*, 350 F. App'x 252, 260 (10th Cir. 2009) (unpublished).

[4] *See, e.g.*, *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012); *United States v. Dorosan*, 350 F. App'x 874 (5th Cir. 2009) (unpublished).

[5] The Court recently emphasized that the level of scrutiny is determined by the analysis actually applied by the reviewing court, not by the label placed on the analysis. *Fisher v. University of Texas*, 133 S. Ct. 2411, 2419-21 (2013).

II. *Heller* Did Not Suggest That "Longstanding" Regulations of Firearms Are Generally Exempted from Meaningful Scrutiny

The court below held that New Jersey's "requirement that applicants demonstrate a 'justifiable need' to publicly carry a handgun for self-defense is a presumptively lawful, longstanding licensing provision under the teachings of *Heller* and [*United States v.*] *Marzzarella*[, 614 F.3d 85 (3d Cir. 2010)]." Pet. App. 14a. In support, the court traced the ancestry of the restriction back to a 1924 New Jersey statute requiring a showing of "need" for a concealed carry permit; pointed to regulations in other states regulating the carry of handguns; and noted that New York's putatively longstanding regulations are similar to New Jersey's. *Id*. at 14a-18a. The court based its argument on the following passage from *Heller*:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

554 U.S. at 626-27. In a footnote to this passage, the Court said: "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 627 n.26. The court below badly misread this Court's opinion.

First, *Heller* merely *characterized* certain restrictions as "longstanding," without implying that the mere fact of being "longstanding" is sufficient to make a regulation presumptively lawful. If the Court had meant to establish a blanket presumption applying to all longstanding regulations, it would have said so. But it did not.

Second, *Heller* characterized these regulations only as "presumptively" lawful. Had the Court meant to put conclusive weight on the "longstanding" nature of a regulation, it would have made no sense to allow for the possibility of overcoming the presumption.

Third, the Court merely said that nothing *in the Heller opinion* should be taken to cast doubt on the particular regulations it listed, without saying that nothing *at all* could cast doubt on their constitutionality. The reference to an "exhaustive historical analysis" at the beginning of the passage suggests that such an analysis, which was not undertaken in *Heller*, could cast doubt even on one or more of the regulations listed in the opinion. *A fortiori*, such an analysis could certainly cast doubt on the constitutionality of *other* arguably longstanding regulations that were not even mentioned in *Heller*, like the regulation at issue in this case. Nonetheless, the court below expressly declined to undertake "a round of full-blown historical analysis" of the scope of the Second Amendment. Pet. App. 11a.

Contrary to the court below, the mere fact that carrying weapons in public has long been regulated in some fashion offers no support for this particular regulation. *See* Pet. App. 16a. If it did, the regulations at issue in *Heller* itself would also have been

presumptively constitutional, which is not the way this Court treated them. The logical absurdity of arguing that the existence of some regulations implies the validity of other regulations needs no further elaboration.

The court below also gets no support from the longstanding practice in some jurisdictions of banning or otherwise restricting the carrying of *concealed* weapons. *See* Pet. App. 15a. Early cases finding such regulations constitutional did so with the proviso that the open carry of firearms must remain as a lawful alternative. The reason for sharply distinguishing restrictions on concealed carry from nearly total restrictions on public carry were vividly set forth in both cases cited by *Heller* for the proposition that "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." 554 U.S. at 626 (citing *State v. Chandler*, 5 La. Ann. 489, 489-90 (1850), and *Nunn v. State*, 1 Ga. 243, 251 (1846)).

One of these cases involved a challenge to an 1813 Louisiana statute making it a misdemeanor to carry a concealed weapon. In *Chandler*, 5 La. Ann. at 489-90, the court upheld the statute with this explanation:

> This law became absolutely necessary to counteract a vicious state of society, growing out of the habit of carrying concealed weapons, and to 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.

Even more emphatically, the Georgia Supreme Court struck down an ambiguously-worded statute that appeared to make it a misdemeanor to sell or use any handgun except a "horseman's pistol." In *Nunn*, 1 Ga. at 251, the court explained:

> We are of the opinion, then, 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* . . . .

The regulation challenged in this case applies equally to the open and concealed carry of handguns, and it therefore gets no support from restrictions in some states that apply only to concealed carry, or from *Heller*'s reference to nineteenth-century cases approving such restrictions.

The court below also mistakenly thought that its decision was supported by four nineteenth-century statutes that banned both the open and concealed carry of certain weapons. Pet. App. 16a (citing Ch. 96, §§ 1-2, 1881 Ark. Acts at 191-92; Ch. 13, § 1, 1870 Tenn. Acts at 28; Act of Apr. 12, 1871, ch. 34, § 1, 1871 Tex. Gen.

Laws at 25; Act of Dec. 2, 1875, ch. 52, § 1, 1876 Wyo. Terr. Comp. Laws, at 352). The four cited statutes in fact offer no support for a claim that bans on carrying handguns are presumptively constitutional.

The Arkansas statute expressly permitted citizens to publicly carry "such pistols as are used in the army or navy of the United States."[6] The Tennessee statute was upheld under the constitution of that state only when construed to allow the public carrying of "the usual arms of the citizen of the country, and the use of which will properly train and render him efficient in defense of his own liberties, as well as of the State." *Andrews v. State*, 50 Tenn. 165, 179 (1871). The Texas statute was construed to allow the carrying of ordinary military arms, including holster pistols and side arms. *English v. State*, 35 Tex. 473, 476-77 (1871). The courts of all three states upheld prohibitions on the public carry of certain weapons only after concluding that such weapons were not protected by the Second Amendment or its state analogue. Because *Heller* has established beyond dispute that handguns are protected by the Second Amendment, these statutes offer no support for New Jersey's regulation.

The fourth statute was enacted by the territorial government of Wyoming, and it did not survive Wyoming's entry into the Union. Even under the somewhat far fetched assumption that the territorial

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[6] Some such an exception was plainly required under *Fife v. State*, 31 Ark. 455 (1876) (construing a statute forbidding the carrying of "any pistol of any kind whatever" to apply only to very small pistols designed to be concealed for use in private quarrels and brawls).

government of Wyoming seriously tried for a time to prevent firearms from being carried in public,[7] the *State* of Wyoming never seems to have adopted such a policy.[8]

The right to openly carry a firearm has deep historical roots, as *Chandler* and *Nunn* confirm in the passages quoted above. Even today, thirty-one states allow their citizens to carry handguns openly without a license. *See* Pet. App. 34a-35a (dissenting opinion below). Many legislatures have also concluded that concealed carry does not deserve to be stigmatized, and some may regard concealed carry as preferable to open carry. Nothing in this case requires the courts to make policy choices between concealed and open carry, but neither does anything in nineteenth-century history support a legislative decision to impose a virtually complete ban on *both* open and concealed carry. While legislatures may certainly regulate the public carrying of firearms, and may choose among various policy options involving open or concealed carry, they must

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[7] The only thing that makes this assumption remotely plausible is that the 1876 statute applied only in a "city, town, or village." Even so, it strains credulity to imagine that a statute forbidding citizens to carry "any fire arm or other deadly weapon" in public was consistently enforced during this period of Wyoming's history.

[8] A few months before Wyoming became a state in 1890, the territorial legislature adopted a different provision that prohibited only the *concealed* carry of weapons and the open carry of weapons with the "intent or avowed purpose of injuring [one's] fellow-man." L.1890, c.73, s. 96. When the new state legislature met for the first time later that year, it adopted the 1890 territorial statute of which this provision was a part, and repealed all conflicting statutes. 1890 Wyo. Sess. Laws 157-58.

allow *some* means of carry. Otherwise, the reach of the Second Amendment would effectively be confined to one's home, contravening the text of the Amendment and the clear implication of *Heller*.

Finally, the fact that New York has a regulatory scheme resembling New Jersey's cannot bring the "justifiable need" restriction within the class of presumptively constitutional regulations. *See* Pet. App. 17a-18a. If it could, then the fact that the District of Columbia and the City of Chicago had both adopted general handgun bans would have sufficed to make those bans presumptively constitutional. This Court obviously rejected such logic in *Heller* and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

It is no doubt true that *Heller*'s discussion of presumptively lawful regulations is somewhat cryptic. The Court itself recognized as much when it noted that it did "not undertake an exhaustive historical analysis *today*." 554 U.S. at 626 (emphasis added). This could responsibly be interpreted as a signal that the lower courts should undertake an exhaustive historical analysis before adding to *Heller*'s short list of presumptively lawful regulations. Some courts have recognized this signal. *See*, *e.g.*, *Ezell*, 651 F.3d at 701-03, 704-06. The court below did exactly the opposite by misinterpreting *Heller* as a green light for upholding virtually any regulation that is not utterly novel. This is a canard that badly needs correction.

III. *Heller* Did Not Endorse a Version of Intermediate Scrutiny That is Indistinguishable From Rational Basis Review

The court below held in the alternative that New Jersey's "justifiable need" regulation is valid because it survives what the court called "intermediate scrutiny." Although *Heller* does not expressly address the question, a tiers-of-scrutiny framework may be permissible in reviewing some Second Amendment issues. But it is not permissible to distort that framework so as to avoid any meaningful judicial scrutiny at all. That is what was done by the court below.

The court dismissed the applicability of strict scrutiny on the ground that "[i]f the Second Amendment protects the right to carry a handgun outside the home for self-defense at all, that right is not part of the core of the Amendment." Pet. App. 24a (quoting the District Court). *Heller* nowhere says or implies that the "core" of the Second Amendment is restricted to the home.

The text of the Amendment itself, which expressly protects the right to bear arms, "guarantee[s] the individual right to possess *and carry* weapons in case of confrontation." 554 U.S. at 592 (emphasis added). *Heller* did not limit this to confrontation "in the home." *Heller* also refers to "the core lawful purpose of self-defense," without any qualifying reference to "in the home." *Id*. at 630. Again without any qualification, *Heller* says that "the inherent right of self-defense has been central to the Second Amendment right." *Id*. at 628. *Heller* does note that the need for self-defense is

"most acute" in the home, without so much as suggesting that it may be less than very acute outside the home. *Id*. *Heller* makes it unmistakably clear that the "core" of the Second Amendment right is self-defense, not self-defense "in the home."

This Court had no need to apply a tiers-of-scrutiny approach in *Heller* itself,[9] and chose not to predict how or whether it would apply such an approach in future cases. It may therefore be considered an open question whether the traditional demands of strict scrutiny apply to New Jersey's regulation. But however this Court may answer that question in the future, the court below rejected strict scrutiny on the basis of an "in the home" qualifier that *Heller* never articulated.

Whatever questions *Heller* left for another day, it expressly and emphatically held that rational basis review is *never* sufficient to dispose of a Second Amendment challenge. 554 U.S. at 628 n.27. The court below purported to recognize this unambiguous holding, and proceeded to apply what it called intermediate scrutiny to the challenged regulation. In fact, however, the court applied rational basis review.

The entire analysis of the court below is comprehended in this sentence: "The predictive judgment of New Jersey's legislators is that limiting the issuance of permits to carry a handgun in public to only those who can show a 'justifiable need' will further its substantial interest in public safety." Pet. App. 26a

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[9] "Under any of the standards of scrutiny the Court has applied to enumerated constitutional rights, this prohibition . . . would fail constitutional muster." 554 U.S. at 628-29 (citation and footnote omitted).

(footnote omitted). Of course, this is not actually an analysis. Nowhere in the opinion below did the court make the slightest effort to show the *required fit* between the important goal of public safety and the restriction imposed by the challenged regulation. *See*, *e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989) (intermediate scrutiny requires that the means chosen must not be "substantially broader than necessary to achieve the government's interest").

Instead, the court offered a series of irrelevant reasons for declining to subject the challenged regulation to any meaningful scrutiny at all. First, it noted that the enacting legislature had no reason to document its reasons for adopting the regulation because *Heller* had not yet been decided. Pet. App. 26a-28a. This is a red herring. Legislatures are obviously not obliged to document their reasons for adopting legislation. But their failure to do so just as obviously does not immunize their statutes from constitutional review. Second, the court noted that New York and Maryland have enacted similar regulations. *Id*. 28a-29a. Another red herring, unless one thinks that the mere existence of three similar laws proves that they are all permitted by the Constitution.

What the court below never did was require New Jersey to produce any evidence that might enable it to carry its well established burden of proof under intermediate scrutiny. *See*, *e.g.*, *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480-81 (1989) ("[S]ince the State bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit we require." (citation omitted)). Instead, it offered a vague and unsubstantiated allusion to

"history, consensus, and simple common sense." Pet. App. 28a (quoting *IMS Health, Inc. v. Ayotte*, 550 F.3d 42, 55 (1st Cir. 2008)).

It could not be plainer that the court below simply decided for unstated reasons that it is reasonable for New Jersey's government to deny its citizens their constitutional right to bear arms unless they have suffered "specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun." N.J. Admin. Code 13:54-2.4(d)(1) (quoted Pet. App. 5a).

If anything, it is patently *unreasonable* to require an extraordinary showing of a special need to exercise a constitutional right. The very idea would be laughed out of court in the context of free speech or the free exercise of religion. This Court has expressly rejected the suggestion "that the Second Amendment should be singled out for special—and specially unfavorable—treatment." *McDonald v. Chicago*, 130 S. Ct. at 3043. But that is exactly what was done by the court below.

Presuming that a regulation is constitutional, unless its challengers can make a showing of utter legislative irrationality, is the hallmark of rational basis review. The decision below is inconsistent with *Heller*'s unequivocal rejection of that presumption.

IV. Reversing the Decision Below Will Not Threaten Public Safety

New Jersey imposes a virtually total ban on the public exercise of Second Amendment rights. *See* Pet. 6 (estimating that only .02% of New Jersey citizens are

granted public carry permits). The experience of other states shows that no such drastic measure is required to advance the important government interest in protecting the public from the misuse of firearms.

As the dissent below pointed out, nearly all of the states allow law-abiding citizens to carry handguns in public, without requiring them to prove that they have been subjected to specific threats or previous attacks. Pet. App. 34a-38a. Forty-two states either allow their citizens to carry handguns without a license or grant licenses subject to minimal conditions relevant to public safety, like a background check and completion of a safety course.[10] Many of the states that freely grant carry licenses have large urban and suburban population centers like New Jersey's, including nearby Pennsylvania and Connecticut. The available data indicate that misuse of firearms by license holders is extremely rare. *See* Pet. App. 69a-70a (dissenting opinion below).

New Jersey and seven other states require their citizens to show an exceptional need to exercise their constitutional right to the means of self defense, and the District of Columbia does not allow its citizens to carry a firearm at all.[11] Whatever motives lie behind these laws, it is not surprising that the court below cited no evidence that the challenged regulation makes

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[10] The dissent below lists forty states that grant licenses for concealed carry without a showing of some exceptional need. Pet. App. 36a n.5. In addition, Illinois recently enacted such a statute. Firearm Concealed Carry Act, Ill. Pub. Act 98-600 (2013). Vermont requires no license at all for concealed carry.

[11] Pet. App. 37a-38a (dissent below); D.C. Code § 22-4504(a).

New Jersey a safer place. The actual evidence, which has now been accumulating for many years in other states, affirmatively refutes that proposition.[12]

Petitioners' narrow challenge to New Jersey's "justifiable need" regulation poses no threat at all to any legitimate government interest. If the regulation is invalidated, the state will remain free to regulate the public carry of handguns in the interest of public safety. It may choose to ban concealed carry completely, as *Heller* suggested. It may also choose to require a license for public carry, conditioned on criteria that are actually relevant to public safety, as so many of its sister states have done.

What it surely may not do is what it has done: disable virtually the entire citizenry from protecting themselves against violent street criminals, solely on the basis of an evidence-free supposition that doing so might somehow have some good effects. The court below, which appears to have relied on what it called "simple common sense," Pet. App. 28a, chose to overlook common experience in the vast majority of

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[12] Ironically, regulations like New Jersey's may actually *increase* violent crime by reducing deterrent effects that would otherwise operate on criminals. *See* John R. Lott, Jr., *More Guns, Less Crime: Understanding Crime and Gun Control Laws* (3d ed. 2013). Even those who have criticized Lott's analysis cannot claim to show that liberalized concealed carry laws have led to higher rates of violent crime. *See*, *e.g.*, Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 Stan. L. Rev. 1193 (2003). In any event, New Jersey's regulation certainly threatens the lives and safety of those law-abiding citizens who are prevented from exercising their constitutional rights under the Second Amendment.

states. And it chose to overlook something else that is common knowledge in New Jersey and throughout America: violent street crime is not exactly a thing of the past.

V. This Case Will Allow an Incremental Clarification of a Significant Issue Left Open in *Heller*

Heller noted that "since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field." 554 U.S. at 635. Perhaps the most conspicuous issue left open for the future was the precise scope of the Second Amendment right to bear arms outside the home. For several reasons, this case is a suitable vehicle for a logical next step in the incremental development of the field opened up by *Heller*.

First, the "justifiable need" regulation at issue in this case makes the right to bear arms, expressly protected in the text of the Constitution, almost meaningless. If this regulation could survive judicial scrutiny, the Second Amendment would be a largely empty shell, in clear contravention of *Heller*'s insistence on its value and importance.

Second, the issues raised by legislative efforts to restrict the bearing of arms outside the home have already undergone considerable percolation in the lower courts, and those courts have been inconsistent in their interpretations of *Heller*.[13]

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[13] *See, e.g.*, *Nat'l Rifle Ass'n v. McCraw*, 719 F.3d 338 (5th Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013);

Third, the errors of the court below—especially its misinterpretation of *Heller*'s reference to certain "longstanding" regulations and its conflation of intermediate scrutiny and rational basis review—were so egregious that this Court will have the option of remanding for the application of correct legal standards. Without suggesting that such a remand would be the most appropriate disposition of this case, we note that the existence of the option might be considered relevant at this stage of the proceedings.

Fourth, the issue raised in this case affects an enormous number of people. According to recent estimates from the United States Census Bureau, more than 83 million people—about a quarter of the nation's population—live under laws that severely restrict the right to carry a handgun in public.[14] The jurisdictions that impose these restrictions are few in number, and out of step with the rest of the country, but the impact of their regulations is enormous. It is not just constitutional rights that are at stake, but the lives and safety of countless individuals who are now deprived of the ability to defend themselves against criminal

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Kachalsky v. County of Westchester, 701 F.3d 81 (2d Cir. 2012); *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012); *People v. Aguilar*, 2013 IL 112116, 2013 WL 6798167 (2013); *Hertz v. Bennett*, 294 Ga. 62, 751 S.E.2d 90 (2013); *Commonwealth v. Gouse*, 461 Mass. 787, 965 N.E.2d 774 (2012); *Williams v. State*, 417 Md. 479, 10 A.3d 1167 (2011).

[14] These jurisdictions include California, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, New York, Rhode Island, *see* Pet. App. 37a n.6, and the District of Columbia. Population estimates are at http://www.census.gov/popest/index.html (last visited February 7, 2014).

violence. These citizens should have to wait no longer for their constitutional rights to be respected.

CONCLUSION

For the foregoing reasons, and for those set forth in the Petition, the Court should grant the petition for a writ of certiorari and reverse the judgment of the Third Circuit.

Respectfully submitted,

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