No. 13-827

In The
Supreme Court of the United States

JOHN M. DRAKE, GREGORY C. GALLAHER, LENNY S. SALERNO, FINLEY FENTON, SECOND AMENDMENT FOUNDATION, INC., AND ASSOCIATION OF NEW JERSEY RIFLE & PISTOL CLUBS, INC.,

Petitioners,

v.

EDWARD A. JEREJIAN, THOMAS D. MANAHAN, JOSEPH R. FUENTES, ROBERT JONES, RICHARD COOK, AND JOHN JAY HOFFMAN,

Respondents.

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

PETITIONERS' REPLY BRIEF

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RULE 29.6 DISCLOSURE STATEMENT

No parent or publicly owned corporation owns 10% or more of the stock in Second Amendment Foundation, Inc. or Association of New Jersey Rifle and Pistol Clubs, Inc.

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REPLY BRIEF

I. The Third Circuit Upheld New Jersey's Destruction of the Right to Bear Arms, In Direct Conflict with Decisions of this Court, Other Circuit Courts, and State Courts of Last Resort.

Respondents do not deny that the individual Petitioners, and the organizational Petitioners' other members, have been denied handgun carry permits. Pet. 7-8. Nor do Respondents dispute that the "justifiable need" requirement dissuades people from wasting time and money on a futile application process. Pet. 8. Nor do Respondents challenge the fact that New Jersey consequently bars all but perhaps 0.02% of adults from exercising the Second Amendment right to bear arms. Pet. 6.

Respondents nonetheless claim that New Jersey law does not "severely limit carrying [handguns] temporally or geographically," because "*once a permit is granted*, the permit-holder may carry in whatever manner he chooses, subject only to conditions that may be imposed by the court that granted the permit." BIO 27 (emphasis added) (citation omitted).

And not to worry – New Jersey licensing officials lack broad discretion to deny handgun carry permits, as "the Superior Court 'shall issue' a permit to carry *if it is satisfied* that the applicant," inter alia, "has a justifiable need to carry a handgun." BIO 27 (citation omitted) (emphasis added). Given this understanding of mandatory language, an American citizen

"worshipping the Deity according to the dictates of his own conscience," 12 Writings of George Washington 155 (J. Sparks ed. 1840); cf. Va. Declaration of Rights, § 16 (1776), lacks religious freedom.

No serious person believes that people in New Jersey today enjoy their *right* to "bear arms" – defined by this Court as "carrying [arms] for a particular purpose – confrontation." *District of Columbia* v. *Heller*, 554 U.S. 570, 584 (2008). Even the majority below found that New Jersey's "justifiable need" requirement is incompatible with a right to carry defensive handguns. It thus held – exactly backwards – that the requirement's adoption defeats an understanding that the Second Amendment secures that right.

Without question, the majority below's holding that "publicly carry[ing] a handgun for self-defense" is "not conduct within the scope of the Second Amendment's guarantee," App. 8a, cannot be reconciled with this Court's holding that "[t]he natural meaning of 'bear arms' " is to

> wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.

Heller, 554 U.S. at 584 (quotation omitted). The lower court "has decided an important federal question in a way that conflicts with [a] relevant decision[ ] of this Court." Sup. Ct. R. 10(c).

And because five other circuits have declined to so brazenly war with this Court's interpretation of "bear arms," some following this Court's precedent directly, the lower court "entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). Moreover, state courts of last resort have long acknowledged the Second Amendment's protection of the right to carry defensive arms in public, a process that *Heller* accelerated. Pet. 18-19. The lower court thus "decided an important federal question in a way that conflicts with a decision by a state court of last resort." Sup. Ct. R. 10(a).

Defendants obfuscate the lower court's opinion, confusing an assumption that the Second Amendment applies outside the home with an assumption or holding that it does so by securing a right to carry defensive handguns. BIO 10. These are not the same thing. True, the court below may have assumed that the right to bear arms, in the abstract, may exist outside the home. But various activities not here at issue, *e.g.*, hunting and target practice, implicate the Second Amendment outside the home without directly implicating the bearing of arms as understood by this Court – carrying defensive arms in case of confrontation. *Heller*, 554 U.S. at 584.

The court below stands alone among the federal appellate courts in rejecting extension of the Second Amendment to the activity of carrying handguns for self-defense. Its opinion is obviously and most starkly in direct conflict with those of the Seventh

and Ninth Circuits, which have struck down handgun carry prohibitions. *Peruta* v. *County of San Diego*, 742 F.3d 1144 (9th Cir. 2014); *Moore* v. *Madigan*, 702 F.3d 933 (7th Cir. 2012).

Moreover, Respondents do not seriously address the methodological conflicts raised by the lower court's alternative "intermediate" "scrutiny" holding. Two-prong approaches are commonplace in the Second Amendment, but until the lower court's incredible decision, no court had held that the deference shown the political branches must be so total that "legislative judgment" requires zero supporting evidence or other findings to support proper tailoring.[1]

Respondents offer that "[w]hen examining the reasonableness of the fit, this Court has instructed that 'substantial deference' must be accorded to the predictive judgments of the legislature." BIO 18 (citing *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 195 (1997)). False. Justice Breyer remains a member of "this Court," but respectfully, he offered the *Turner* deference theory of the Second Amendment *in dissent* – against explicit rejection by "this Court's" majority. And even those courts that wishfully confuse *Heller*'s dissents with its majority opinion do not stretch Justice Breyer's reasoning quite so far as did the court below. In any event, by commending the lower

[1] Respondents' extensive discussion conjuring a rationale for New Jersey's law never offered by the legislature is plainly an exercise in rational basis review.

court for following a dissenting opinion, Respondents all but concede that the decision "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

II. Nearly All Other Circuits, and Several State High Courts, Would Have Decided This Case Differently.

Respondents falsely assert that New Jersey's "justifiable need" law differs materially from California's "good cause" requirement effectively struck down in *Peruta*, Cal. Penal Code § 26150, and on that basis deny the existence of a circuit split warranting review.

Even were Respondents' factual predicate true (and it is not, see infra), the question on certiorari is not whether *identical* laws were upheld in one court but not another. Were this Court's conflict-resolution function so narrowly limited, it would largely cease operating. An identical case-different result rule would shield from review precisely those laws that are most unusual, and thus more likely to depart from legal tradition and raise constitutional concerns – such as Washington, D.C. and Chicago's handgun bans. See *McDonald* v. *City of Chicago*, 130 S. Ct. 3020, 3047 (2010); *Heller*, 554 U.S. at 629.

Of course, that is not how Rule 10 functions. Circuit conflicts are reviewable when they implicate "the same important matter." Sup. Ct. R. 10(a). Circuit opinions are also reviewable when they have

"decided an important federal question in a way that conflicts with a decision by a state court of last resort." *Id.* And, even absent a circuit or circuit-state conflict, a circuit opinion warrants review when it has "decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

The opinion below practically demands review for each of these reasons. Whether the Second Amendment secures the right to carry defensive handguns, and whether the Second Amendment tolerates absolute, fact-free deference to "legislative judgment," are plainly "important matters" and "important federal questions" upon which circuit courts and state high courts have reached different conclusions.

III. New Jersey's "Justifiable Need" Requirement Is Materially Indistinguishable from California's "Good Cause" Requirement, as Implemented by San Diego County, and Struck Down in *Peruta*.

As Petitioners demonstrated, New Jersey's "justifiable need" requirement, N.J. Stat. Ann. § 2C:58-4(c), is materially indistinguishable from California's "good cause" requirement, Cal. Penal Code § 26150, as applied by San Diego County in *Peruta*. Suppl. Br. 1-2. The salient flaw in both regimes is that an

individual interest in self-defense – the core Second Amendment interest – is insufficient to obtain a handgun carry permit; individuals must have some rare, specialized reason for the permit as determined by the licensing authority.

Thus, even were it true, Respondents' claim that "[t]he California law examined in *Peruta* is materially different from New Jersey's Handgun Permit Law in a number of ways," BIO 26, would be irrelevant. Not only has the court below "entered a decision in conflict with the decision of another United States court of appeals on the same important matter," Sup. Ct. R. 10(a), the Third and Ninth Circuits reached opposite conclusions in reviewing substantially identical policies.

In any event, New Jersey and California's handgun carry laws are not materially different. Respondents' claim that "California law sets forth a general prohibition as opposed to New Jersey's carefully crafted regulatory scheme," BIO 26, is false. In New Jersey, it is a crime merely to possess a handgun "without first having obtained a permit to carry the same," N.J. Stat. Ann. § 2C:39-5(b), apart from narrowly-defined circumstances. Pet. 4. Respondents fail to cite California's various exemptions from the crime of carrying a loaded firearm which mirror those set forth under New Jersey law. See, *e.g.*, Cal. Penal Code §§ 26005 (target ranges and hunting clubs), 26035 (place of business; lawful possession on private property), 26055 (residence). Indeed, California's exemptions are broader

than New Jersey's in some respects, *e.g.*, California allows loaded guns at campsites. Cal. Penal Code § 26055.

Respondents note that in California counties populated by fewer than 200,000 people, individuals might be issued only permits to openly carry handguns within their own county. BIO 26. But *Peruta* did not address this law; San Diego County's population exceeds 3 million,[2] and permits issued there are valid statewide, Cal. Penal Code § 26010.

The notion that "California's law gives the sheriff more discretion to refuse to issue a permit than the New Jersey law," BIO 27, because New Jersey authorities "'shall issue' a permit [when] satisfied" of an applicant's "justifiable need," *id.*, is risible. Indeed, unlike any licensing authorities in New Jersey, many California sheriffs and police chiefs consider an interest in self-defense to be "good cause." The fact that California generally prohibits open carry, while New Jersey allows it with the unavailable permit at issue here, is likewise irrelevant. As this Court recognized in *Heller*, states are free to regulate the manner in which handguns are carried, and neither *Peruta* plaintiffs nor Petitioners sought to carry handguns in any particular manner.

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[2] United States Census, available at http://quickfacts.census.gov/qfd/states/06/06073.html (last visited March 31, 2014).

But Respondents' credulity-busting brief outdoes itself with the claim that New Jersey's law "affects a very narrow range of conduct" because it is "greatly diminished by numerous statutory exceptions. . . ." BIO 28 (citation omitted). The statutory exemptions from New Jersey's handgun carrying prohibition relate mostly to military, law enforcement, and security personnel. N.J. Stat. Ann. § 2C:39-6. Gun dealers may transport unloaded and locked firearms in the course of their trade. N.J. Stat. Ann. § 2C:39-6(b)(2). Ordinary people may exhibit and fire antique firearms and cannon with permission, N.J. Stat. Ann. § 2C:39-6(d), use guns for hunting and target practice, N.J. Stat. Ann. § 2C:39-6(f), and carry handguns in or between their homes, businesses, and places of repair, without deviation, and so long as the guns are unloaded and locked. N.J. Stat. Ann. § 2C:39-6(e) and (g).

But in no way can people in New Jersey carry a handgun in public for self-defense absent "justifiable need." Perhaps carrying handguns for self-defense is "a very narrow range of conduct," considering that firing antique cannon is also "conduct," but defensive carry – what this Court has held is meant by "bear arms," *Heller*, 554 U.S. at 584 – is the only "conduct" at issue in this case.

The lower court's conflict with *Peruta* is real and should be addressed. Of course, even had *Peruta* never been decided, the decision below still conflicts with numerous circuit decisions regarding the carrying of defensive handguns in public, and the standard of review in Second Amendment cases.

IV. New Jersey's "Justifiable Need" Requirement Is Not a "Longstanding" Exception Consuming the Constitutional Rule.

In holding that New Jersey's law is a "longstanding" regulation informing the right's scope, the majority below invoked a dictum exception to swallow wholesale this Court's considered constitutional rule. Viewing *Heller* as a case of "all exceptions, no holding," the theory holds that even had the Framers ratified a right to carry arms in case of confrontation – as this Court has already held – pre-incorporation twentieth-century state legislatures enacted incompatible laws, including the one at issue in this case, thus defeating the understanding that the Second Amendment encompasses defensive handgun carrying.

The law was enacted, therefore, it's constitutional.

Perhaps sensing the difficulty of this position, Respondents attempt to transport "justifiable need" to the Framing Era, or at least, closer to it. The efforts fail.

Respondents claim that their twentieth century law disabling 99.98% of the state's population from exercising the right to bear arms is historically longstanding because in the 1790s, the state enforced laws "punishing disorderly persons who were apprehended while carrying offensive weapons such as pistols," BIO 22 (citations omitted), and "punishing rioters who were armed with weapons," *id.* 23 (citations omitted).

The argument – "we have long had some gun laws, therefore, this gun law is constitutional" – is silly. By this logic, New Jersey could prohibit Catholics from celebrating Mass if, in the 1790s, it forbade ritualistic human sacrifice, or ban political speech because its laws have long condemned perjury. Petitioners are not disorderly persons seeking permission to riot with their weapons. Indeed, a riot or other public emergency has been held to be an unconstitutional reason for which to bar *law-abiding* people from carrying handguns for self-defense. *Bateman* v. *Perdue*, 881 F. Supp. 2d 709 (E.D.N.C. 2012).

Because the only relevant time frame for a "longstanding" inquiry is 1791, Respondents' effort to drag the "justifiable need" requirement into the twentieth century's earliest reaches is misplaced. The effort also fails. The express and unequivocal language of New Jersey's statutes refutes Respondents' claim that New Jersey law prohibited the carry of firearms in any form prior to 1966. BIO 12-15.

New Jersey's first law regulating the carrying of handguns by adults, enacted in 1905, required a permit only if one carried a handgun "*concealed* in or about his clothes or person." 1905 N.J. Laws ch. 235, § 1 (emphasis added). The legislature continued to use this language when it amended the statute in 1912 and 1922. See 1922 N.J. Laws ch. 138, § 1 ("concealed in or about his clothes or person or in any automobile"); 1912 N.J. Laws ch. 225, § 1 ("concealed in or about his clothes or person"); see also 1928 N.J. Laws ch. 212, § 1 ("in any vehicle or concealed on or

about his person"). Not until 1966 did New Jersey's legislature expand the law to cover guns carried in *any* manner – whether concealed or in open view – when it changed the operative language to "on or about his clothes or person, or otherwise in his possession." See 1966 N.J. Laws ch. 60, sec. 32, § 2A:151-41(a).

New Jersey's Supreme Court thus recognized that "[p]rior to 1966 the form of the statute was somewhat different," as "it was [then] necessary to allege in the indictment and to prove that the weapon was 'concealed.'" *State* v. *Hock*, 257 A.2d 699, 700 & n.1, 54 N.J. 526, 529 & n.1 (1969); see also *State* v. *Thomas*, 252 A.2d 215, 218 n.1, 105 N.J. Super. 331, 337 n.1 (App. Div. 1969) (the 1966 amendment "delete[d] therefrom the element of concealment"). Indeed, prior to 1966 New Jersey courts repeatedly overturned convictions where prosecutors had not proven the necessary element of concealment. See *State* v. *Quinn*, 158 A. 834, 835, 108 N.J.L. 467, 469 (Sup. Ct. 1932) ("The mere carrying of a weapon without concealment is not a violation of the statute."); *State* v. *Meyers*, 157 A. 96, 97, 9 N.J. Misc. 1174, 1176 (Sup. Ct. 1931) ("The conviction on the indictment for concealed weapons must be reversed, as the charge of the court on that offense omitted the essential element of concealment."), *aff'd*, 166 A. 75, 110 N.J.L. 527 (1933); *State* v. *Gratz*, 92 A. 88, 89, 86 N.J.L. 482, 483 (Sup. Ct. 1914) ("in order to secure a conviction of carrying any of the weapons therein enumerated . . . it is necessary to show that they were concealed").

Finally, Respondents' supposition that the legislature's expansion of the law to cover carriage in an automobile reflected a *sub silencio* deletion of the requirement of concealment because otherwise the result "would be nonsensical," BIO 14, is equally meritless. While the 1922 amendment expanded the prohibition to cover carrying a gun "concealed in or about his clothes or person *or* in any automobile," 1922 N.J. Laws ch. 138, § 1 (emphasis added), there was no doubt that concealment was still an element of unlawful carrying outside an automobile. Indeed, the question that troubled New Jersey courts (as apparently nonsensical) was whether prosecutors still needed to prove concealment of guns carried *within* automobiles. See *Hock*, 257 A.2d at 700 n.1, 54 N.J. at 529 n.1; see also *State* v. *Rabatin*, 95 A.2d 431, 434, 25 N.J. Super. 24, 30 (App. Div. 1953).

CONCLUSION

Were this Court to allow the opinion below to stand, it would strongly signal that *Heller* and *McDonald* are not serious, binding opinions. The Second Amendment right is "fundamental," but it can only be exercised if the state agrees it's a good idea; can be overridden by modern "legislative judgments" backed by nothing; sets out rules that are wholly swallowed by the fact that guns have always been regulated or by "longstanding" laws enacted at any time; and is wholly respected by practices disabling

99.98% of the population from exercising the "rights" it secures.

This is simply not how rights function under our Constitution. The petition should be granted.

Respectfully submitted,

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