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 MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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February 12, 2014

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QUESTIONS PRESENTED

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

2. Whether state officials violate the Second Amendment by requiring that individuals wishing to exercise their right to carry a handgun for self-defense first prove a "justifiable need" for doing so where the standard – here a showing of "specific threats or previous attacks which demonstrate a special danger to the applicant's life" – assures that only a scant minority of responsible, law-abiding citizens could possibly be eligible for a carry permit.

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INTEREST OF *AMICI CURIAE*

Amici curiae are members of the 113th Congress.[1] *Amici* are bound by oath or affirmation to support the Constitution, U.S. Const. art. VI, cl. 3, and they must "legislate[ ] in light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). As the Court emphasized in *United States v. Nixon*, 418 U.S. 683, 703 (1974), "[i]n the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." And while Congress must interpret and apply the Constitution within its own political capacity, it remains the Court's duty to "say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

As members of Congress, *amici* have a significant interest in this case because it concerns the scope and substance of the Second Amendment. Congress has the authority to enforce the Second Amendment against the States under § 5 of the Fourteenth Amendment. In addition, this Court has held that

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[1] A list of the members of Congress is provided in the Appendix of this brief. Pursuant to Rule 37.2(a), all parties were timely notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part. Citizens Committee for the Right to Keep and Bear Arms made a monetary contribution to fund the printing and filing of this brief. No other person or entity made a monetary contribution to fund its preparation or submission.

Congress may exercise its legislative power to regulate the possession, sale, and use of firearms, and Congress is often called upon to enact additional legislation that impacts citizens' Second Amendment rights.

Moreover, *amici* submit that clarification of the standard of review governing Second Amendment claims is desperately needed to inform congressional action on future legislation, as well as congressional review of existing firearm legislation and regulation. Indeed, many of the cases cited in the petition for writ of certiorari regarding the standard of review concern the constitutionality of federal statutes. *E.g.*, *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013) (challenging different aspects of 18 U.S.C. § 922).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should grant certiorari to provide much-needed clarification regarding the scope and substance of the Second Amendment. In *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008), the Court held that the Second Amendment confers an individual right to keep and bear arms for self-defense, and in *McDonald v. City of Chicago,* 561 U.S. ___, 130 S. Ct. 3020, 3042 (2010), confirmed that this right is a fundamental one.

These decisions have consequences that seem to be eluding many courts. "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." *Heller*, 554 U.S. at 635 (emphasis in original). Stated another way, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Id.* at 636.

The lower courts have grappled over the scope of the Second Amendment and how to develop an analytical framework for considering Second Amendment challenges that is consistent with *Heller*. This case provides an opportunity for the Court to address at least two important, recurring Second Amendment questions on which the lower courts are fundamentally divided.

First, the Court should affirm that the Second Amendment secures a right to carry handguns outside the home for self-defense. The majority in *Drake* held that it does not, and upheld New Jersey's onerous requirement that an applicant for a carry permit must show "justifiable need" – "specific threats or previous attacks which demonstrate a special danger to the applicant's life" – a standard that bars nearly every law-abiding, responsible citizen from carrying a handgun anywhere outside the home. Two other circuits have refused to expressly decide the question. The Seventh Circuit, by contrast, has squarely concluded that the Second Amendment does protect

citizens' rights to carry handguns outside the home for self-defense.

Second, the Court should clarify the standard of review governing Second Amendment claims involving restrictions on the right of law-abiding adults to carry handguns outside the home. The Third Circuit's so-called "intermediate scrutiny" analysis consisted of the very sort of vague interest-balancing and extreme deference to legislative "policy choices" that *Heller* stated should not occur in resolving Second Amendment challenges. Even if First Amendment-style tiered scrutiny applies to Second Amendment claims outside the factual settings in *Heller* and *McDonald*, the Nation's courts are deeply split on the application of such scrutiny. *Drake* stands out for its refusal to put the government to the burden of citing evidence in support of its restriction, and in refusing to consider whether the restriction burdens more Second Amendment conduct than is "reasonably necessary," all in favor of rubber-stamping the legislature's policy judgment over the citizens' right to keep and bear arms.

Unfortunately, such second-class treatment of the Second Amendment pervades the lower courts. Purported judicial restraint in the form of extreme deference to legislative action is flatly at odds with *Heller*, *McDonald*, and indeed all decisions involving the protection of fundamental *individual* rights against majoritarian impulses. The Court must act to ensure that citizens have a means of enforcing

their individual right to keep and bear arms when legislative bodies infringe that right.

ARGUMENT

I. The Right To Bear Arms For Self-Defense Certainly Extends Outside Of The Home, Yet It Remains An Unsettled, Recurring Question.

One question that *Heller* and *McDonald* did not expressly address has vexed the lower courts: Does the Second Amendment right to keep and bear arms for self-defense extend beyond the home?[2] Three circuits, including the court below, have resisted *Heller* by reading that decision narrowly to hew to the specific facts of the case. (A man, a handgun, and his house.) *Drake v. Filko*, 724 F.3d 426, 430-31 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), cert. denied, 134 S. Ct. 422 (2013); *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 89

[2] *See, e.g.*, *Drake v. Filko*, 724 F.3d 426, 430 (3d Cir. 2013) ("It remains unsettled whether the individual right to bear arms for the purpose of self-defense extends beyond the home."). As the petition points out, however, it is no extension of *Heller* to conclude that the right extends beyond the home. If it did not, there would be no need to describe the right as being at its "core" or "most acute" in the home. Pet. 30-31; *see also, e.g.*, *Drake*, 724 F.3d at 444 (Hardiman, J., dissenting); *Moore v. Madigan*, 702 F.3d 933, 935-36 (7th Cir. 2012); *United States v. Masciandaro*, 638 F.3d 458, 467-68 (4th Cir. 2011), cert. denied, 132 S. Ct. 756 (2011) (Niemeyer, J., writing separately).

(2d Cir. 2012), cert. denied, 133 S. Ct. 1806 (2013).[3] In *Drake*, the Third Circuit held that the Second Amendment did not apply to a blanket ban on carrying handguns in the absence of a showing of "justifiable need." With a nod to *Heller*, the majority looked at the history of New Jersey's handgun carry regulation, and deemed its "longstandingness" sufficient to exempt the justifiable need requirement from Second Amendment scrutiny. *Drake*, 724 F.3d at 431-34 (concluding that the law is a "longstanding," "presumptively lawful" regulation "that enjoys presumptive constitutionality.").

In dissent, Judge Hardiman highlighted the risk of loosely applying historical analysis from "too high a level of generality": If courts can seize on any roughly analogous firearm regulation from the last century as a "longstanding" regulatory measure that exempts a regulation from constitutional scrutiny, the exceptions would swallow the rule. *See Drake*, 724 F.3d at

[3] The Second and Fourth Circuits refused to make a definitive ruling on the scope of the Second Amendment. Instead, each court insulated itself by noting that *Heller* left the question unsettled and analyzed the challenged regulation on the assumption that it burdened protected conduct. *Woollard*, 712 F.3d at 875; *Kachalsky*, 701 F.3d at 89. Even before *Woollard*, the Fourth Circuit caught flak from one of its judges for ducking the issue. *Masciandaro*, 638 F.3d at 468 n.* (Niemeyer, J., writing separately) (criticizing the court for not addressing whether the Second Amendment right extends outside the home).

446-52 (Hardiman, J., dissenting).[4] This is a parody of the historical analysis *Heller* requires.[5]

The Seventh Circuit, by contrast, has reached the seemingly obvious conclusion that the right does indeed extend outside the home. "The Supreme Court has decided that the [Second] [A]mendment confers a right to bear arms for self-defense, which is as important outside the home as inside." *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012).[6] *See also People v. Aguilar*, 2013 IL 112116 (Ill. 2013) (adopting *Moore*);

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[4] "Rather than determining whether there is a longstanding tradition of laws that condition the issuance of permits on a showing of a greater need for self-defense than that which exists among the general public, the majority chooses as its reference point laws that have regulated the public carry of firearms." 724 F.3d at 451 (Hardiman, J., dissenting).

[5] Indeed, the apparent confusion over how to interpret *Heller*'s reference to the presumptive validity of longstanding regulatory measures underscores the need to provide clarity regarding the Second Amendment's scope.

[6] In *Moore*, Judge Posner explained,

> [In the twenty-first century, a] Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower. A woman who is being stalked or has obtained a protective order against a violent ex-husband is more vulnerable to being attacked while walking to or from her home than when inside. She has a stronger self-defense claim to be allowed to carry a gun in public than the resident of a fancy apartment building (complete with doorman) has a claim to sleep with a loaded gun under her mattress.

702 F.3d at 937.

Drake, 724 F.3d at 446 (Hardiman, J., dissenting) ("[I]nterpreting the Second Amendment to extend outside the home is merely a commonsense application of the legal principle established in *Heller* and reiterated in *McDonald*. . . . Because the need for self-defense naturally exists both outside and inside the home, I would hold that the Second Amendment applies outside the home."); *accord Kachalsky*, 701 F.3d at 89 ("Although the Supreme Court's cases applying the Second Amendment have arisen only in connection with prohibitions on the possession of firearms in the home, the Court's analysis suggests, . . . that the Amendment must have some application in the very different context of the public possession of firearms."); *id.* n.10 (noting that "[t]he plain text of the Second Amendment does not limit the right to bear arms to the home."); *Bateman v. Perdue*, 881 F.Supp.2d 709, 714 (E.D.N.C. 2012) ("Although considerable uncertainty exists regarding the scope of the Second Amendment right to keep and bear arms, it undoubtedly is not limited to the confines of the home.").

Given this lack of consistency, the extent to which the Second Amendment reaches outside the home is an important and recurring question that can only be settled by this Court. As Judge Wilkinson observed in *United States v. Masciandaro*,

> There may or may not be a Second Amendment right in some places beyond the home, but we have no idea what those places are, what the criteria for selecting them should be, what sliding scales of scrutiny might

> apply to them, or any one of a number of other questions. . . . The whole matter strikes us as a vast *terra incognita* that courts should enter only upon necessity and only then by small degree.

638 F.3d 458, 475 (4th Cir. 2011), cert. denied, 132 S. Ct. 756 (2011). "On the question of *Heller*'s applicability outside the home environment, we think it prudent to await direction from the Court itself." *Id.* Although the Court has, in fact, already provided direction on this question in *Heller*, many lower courts have not followed it, thereby creating a stark divergence over the recognition of a fundamental constitutional right. It is time for this Court to reapply *Heller*'s principles and expressly confirm that the right to bear arms for self defense extends outside the home.

II. The Court Should Clarify The Standard Of Review That Applies To Second Amendment Challenges.

Drake also highlights the disarray in the lower courts when it comes to selecting and applying the standard of review governing Second Amendment claims. The Third Circuit stated that it was applying a two-step inquiry, which grafts familiar First Amendment concepts onto the Second Amendment:

> First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. . . . If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny. If the law

> passes muster under that standard, it is constitutional. If it fails, it is invalid.

Drake, 724 F.3d at 429 (citing *United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010)) (ellipsis in *Drake*).[7] This same general approach is followed in the majority of circuits.[8]

Heller and *McDonald* demonstrate, however, that Second Amendment claims are not to be judged by unrestrained interest balancing, and therefore the prevailing, nearly automatic application of "intermediate scrutiny" to such claims is misguided. *Heller*, 554 U.S. at 634-35; *McDonald*, 130 S.Ct. at 3047 ("In *Heller*, . . . we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing"); *id.* at 3050 (opinion of Alito, J.) (reiterating that *Heller* "specifically rejected" Justice Breyer's "interest-balancing test," and explaining that "incorporation [of the Second Amendment against the states] will [not] require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack

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[7] *Marzarella* reasoned that because *Heller* "repeatedly invokes the First Amendment in establishing principles governing the Second Amendment," "the structure of First Amendment doctrine should inform our analysis of the Second Amendment." 613 F.3d at 89 n.4.

[8] *See, e.g.*, *Woollard*, 712 F.3d at 874; *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194 (5th Cir. 2012); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010).

expertise."); *see also* Tr. of Oral Arg. at 44, *Heller*, 554 U.S. 570 (2008) (No. 07-290) (Roberts, C.J.) ("[T]hese various phrases under the different standards that are proposed, 'compelling interest,' 'significant interest,' 'narrowly tailored,' none of them appear in the Constitution. . . . I mean, these standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up.").[9] Indeed, as the Court emphasized in *Heller*:

> 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.

554 U.S. at 634-35.

Several judges have noted that the two-step test strays from *Heller*'s focus on the text and history of the Second Amendment: If the right at issue – here the right to carry a handgun without having to make a showing to the government of "justifiable need" that only a tiny minority of citizens could ever meet – is protected by the Second Amendment as the Framers understood it, that is the end of the matter. *See Heller*

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[9] As the Court observed in *Heller*, "[l]ike the First [Amendment], [the Second Amendment] is the very *product* of an interest-balancing by the people. . . ." 554 U.S. at 636 (emphasis in original).

v. Dist. of Columbia, 670 F.3d 1244, 1271 (D.C. Cir. 2011) ("*Heller II*") (Kavanaugh, J., dissenting) ("In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny."); *Nat'l Rifle Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 714 F.3d 334, 338 (5th Cir. 2013) (Jones, J., dissenting from denial of rehearing en banc) ("[T]he Court's discussion [in *Heller*] leaves no doubt that the original meaning of the Second Amendment, understood largely in terms of germane historical sources contemporary to its adoption, is paramount."); *id.* ("[T]he fundamental right to keep and bear arms is not itself subject to interest balancing. The right categorically exists, subject to such limitations as were present at the time of the Amendment's ratification."); *Chovan*, 735 F.3d at 1143 (Bea, J., concurring) (citing Judge Kavanaugh's dissent in *Heller II*); *cf. Ezell v. City of Chicago*, 651 F.3d 684, 701-02 (7th Cir. 2011) (determining the scope of the Second Amendment requires a "textual and historical inquiry into original meaning," "not interest-balancing").[10]

[10] Judge Kavanaugh framed the question this way: "Are gun bans and regulations to be analyzed based on the Second Amendment's text, history, and tradition[?] Or may judges recalibrate the scope of the Second Amendment right based on judicial assessment of whether the law advances a sufficiently compelling or important government interest to override the individual right?" *Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting).

Even if, despite this Court's admonitions, First Amendment-style scrutiny applies to Second Amendment claims outside the factual setting of *Heller* and *McDonald*, the Third Circuit's application of this test demonstrates why review is urgently needed.

Drake is emblematic of lower courts relying on interest balancing to spackle over the cracks left by *Heller* and *McDonald* and uphold a preexisting regulatory scheme. While the appellate court purported to apply intermediate scrutiny, it deferred to the "predictive judgment" of the state legislature, even though New Jersey provided no evidence to support its claim that the regulation furthered its public safety interest. 724 F.3d at 437-38. The court acknowledged the lack of evidence, but nevertheless held that the regulation survived intermediate scrutiny "by reference to 'history, consensus, and simple common sense.'" *Id.* at 438 (citation omitted). As a result, the Third Circuit gave New Jersey a pass not only for failing to produce evidence, but also for failing to establish a fit between the "justifiable need" requirement and the state's asserted interest – concluding with little analysis that the law did not burden more constitutionally protected conduct than is "reasonably necessary."[11] Indeed, the court refused

[11] The dissent highlights several significant flaws in the majority's analysis. First, the majority looked at the permitting law in general, rather than focusing on the justifiable need requirement. *Drake*, 724 F.3d at 453 (Hardiman, J., dissenting). And, of course, the state provided no evidence to demonstrate a reasonable fit between the regulation and the asserted government

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"to intrude upon the sound judgment and discretion of the State of New Jersey," deferring instead to the state's "objective" case-by-case consideration of whether a citizen *really needs* to carry a handgun in public. 724 F.3d at 439-40. The effect of such deference is to superimpose a rational-basis test that, just like the court's presumption that twentieth century gun control legislation is "longstanding" enough to take the legislation outside the Second Amendment, has the effect of *grandfathering* any pre-*Heller* gun control scheme.[12]

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interest. *Id.* at 453-54. Finally (and perhaps most troubling) is the majority's blind acceptance of the proposition that there is a fit between "combating the dangers and risks associated with the misuse and accidental use of handguns," and limiting handguns to those with an elevated need for self-defense. *Id.* at 454-55. As Judge Hardiman put it,

> The fact that one has a greater need for self-defense tells us nothing about whether he is less likely to misuse or accidentally use handguns. This limitation will neither make it less likely that those who meet the justifiable need requirement will accidentally shoot themselves or others, nor make it less likely that they will turn to a life of crime. Put simply, the solution is unrelated to the problem it intends to solve.

Id. at 454. In all, the majority opinion smacks of "judges . . . assess[ing] the costs and benefits of firearms restrictions," and "mak[ing] difficult empirical judgments in an area in which they lack expertise." *McDonald*, 130 S.Ct. at 3050 (opinion of Alito, J.).

[12] Judge Hardiman also called out the majority for applying propped-up rational basis scrutiny: "By deferring absolutely to the New Jersey legislature, the majority abdicates its duty to

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By excusing the state from its burden to establish a reasonable fit between the regulation and its public safety interest because *Heller* and *McDonald* had not yet been decided when the law was passed, the *Drake* majority ignored the import and effect of those decisions. "[I]ncorporation of the Second Amendment right will to some extent limit the legislative freedom of the States, but this is always true when a Bill of Rights provision is incorporated. Incorporation always restricts experimentation and local variations. . . ." *McDonald*, 130 S. Ct. at 3050. The fact that the New Jersey Legislature did not know it was infringing Second Amendment rights when it enacted the justifiable need requirement does not justify continued enforcement of an unconstitutional law.

The petition should be granted to clarify the standard governing Second Amendment challenges, and to confirm that courts must be guided by text and history rather than judicial interest balancing.

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There are times when political or prudential considerations justify the Court's abstention or deferral on issues of national importance. Not now. Defining the scope of the Second Amendment lies at the center of this Court's responsibility to "define the

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apply intermediate scrutiny and effectively applies the rational basis test, contrary to the Supreme Court's explicit rejection of that test in the Second Amendment context." *Id.* at 457 (Hardiman, J., dissenting) (citing *Heller*, 638 n.27).

substance of constitutional guarantees," *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001), and it must not evade this duty simply "because the issues have political implications." *INS v. Chadha*, 462 U.S. 919, 943 (1983). It is time for the Court to "say what the law is." *Marbury*, 1 Cranch at 177.

CONCLUSION

For these reasons, and those stated by petitioners, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

THOSE JOINING IN *AMICI CURIAE* BRIEF

The following members of the United States Congress join in this brief:

Senate

Senator Thad Cochran (MS-R)

House of Representatives

Representative Kerry Bentivolio (MI-11, R)
Representative Paul Broun (GA-10, R)
Representative Michael C. Burgess (TX-26, R)
Representative John Campbell (CA-45, R)
Representative Steve Chabot (OH-1, R)
Representative Howard Coble (NC-6, R)
Representative Tom Cole (OK-4, R)
Representative Chris Collins (NY-27, R)
Representative Doug Collins (GA-9, R)
Representative Kevin Cramer (ND-AL, R)
Representative Jeff Duncan (SC-3, R)
Representative Blake Farenthold (TX-27, R)
Representative John Fleming, M.D. (LA-4, R)
Representative Trent Franks (AZ-8, R)
Representative George Holding (NC-13, R)
Representative Richard Hudson (NC-8, R)
Representative Bill Johnson (OH-6, R)
Representative Walter B. Jones (NC-3, R)
Representative Adam Kinzinger (IL-16, R)
Representative Doug LaMalfa (CA-1, R)
Representative Leonard Lance (NJ-7, R)
Representative James Lankford (OK-5, R)
Representative Billy Long (MO-7, R)
Representative Cynthia Lummis (WY-AL, R)
Representative Jeff Miller (FL-1, R)

Representative Steve Pearce (NM-2, R)
Representative Todd Rokita (IN-4, R)
Representative Adrian Smith (NE-3, R)
Representative Lamar S. Smith (TX-21, R)
Representative Marlin Stutzman (IN-3, R)
Representative Lee Terry (NE-2, R)
Representative Joe Wilson (SC-2, R)
Representative Don Young (AK-AL, R)