

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

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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.*

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

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**BRIEF OF RESPONDENTS JEREJIAN, MANAHAN,  
FUENTES, AND HOFFMAN IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI**

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**COUNTERSTATEMENT OF  
QUESTION PRESENTED**

Whether the Second Amendment to the United States Constitution prohibits the State of New Jersey from requiring applicants to show a justifiable need to obtain a permit to carry a handgun, openly or concealed, in public.

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## STATEMENT

1. New Jersey's gun-control laws establish a "careful grid" of regulatory provisions," that "draw careful lines" between permission to possess a gun in one's home or place of business and permission to carry a gun in public. *In re Preis*, 573 A.2d 148, 150 (N.J. 1990). Purchasing antique firearms or rifles, shotguns, or ammunition requires a firearms purchaser identification card, N.J. Stat. Ann. § 2C:58-3b, while purchasing a handgun requires a permit, N.J. Stat. Ann. § 2C:58-3a. A person of "good character and good repute in the community in which he lives" may obtain a firearms purchaser ID card and/or a permit to purchase a handgun as long as he or she is not subject to any of the disabilities set forth in the law. N.J. Stat. Ann. § 2C:58-3c. Firearms ID cards and purchase permits "shall" be issued by either the Superintendent or the municipal chief of police to persons not disqualified under subsection c. N.J. Stat. Ann. § 2C:58-3d. Denials of either a permit or ID card are subject to due process protections and review by the New Jersey courts. N.J. Stat. Ann. § 2C:58-3d, f.

2. New Jersey's Handgun Permit Law, N.J. Stat. Ann. § 2C:58-4, governs permits to carry handguns, "the most closely regulated aspect" of New Jersey's gun control laws. *In re Preis*, 573 A.2d at 568. Applicants for a permit to carry a handgun, whether openly or concealed, must demonstrate that they: (1) are not disqualified by a disability enumerated in N.J. Stat. Ann. § 2C:58-3(c), (2) are thoroughly familiar with the safe handling and use of handguns, and



(3) have a “justifiable need” to carry a handgun. N.J. Stat. Ann. § 2C:58-4c. The justifiable need requirement must be considered on a case-by-case basis. *In re Borinsky*, 830 A.2d 507, 516 (N.J. Super. Ct. App. Div. 2003). Justifiable need means 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) (2012); *see also In re Preis*, 573 A.2d at 152; *Siccardi v. State*, 284 A.2d 533, 540 (N.J. 1971).

The initial approval or disapproval on a permit application is made by the police chief or superintendent. N.J. Stat. Ann. § 2C:58-4c. Where an application is approved, it must then be presented to a Superior Court judge. N.J. Stat. Ann. § 2C:58-4d. The court “shall issue the permit to the applicant if, but only if, it is satisfied that the applicant is a person of good character who is not subject to any of the disabilities set forth in section 2C:58-3c, that he is thoroughly familiar with the safe handling and use of handguns, and that he has a justifiable need to carry a handgun.” *Id.* The court also has the discretion to “issue a limited-type permit which would restrict the applicant as to the types of handguns he may carry and where and for what purposes such handguns may be carried.” *Id.* If an application is denied, an applicant has the right of appeal. N.J. Stat. Ann. § 2C:58-4e.

3. Petitioners filed their complaint on November 22, 2010. They include individuals<sup>1</sup> John M. Drake, Gregory C. Gallaher, Lenny S. Salerno, and Finley Fenton, as well as the Second Amendment Foundation, and the Association of New Jersey Rifle and Pistol Clubs. The individual Petitioners each sought a permit to carry a handgun in public for self-protection, but were denied because they failed to demonstrate a justifiable need pursuant to N.J. Stat. Ann. § 2C:58-4c and d.

Respondents include the State Respondents (the Attorney General of New Jersey, the Superintendent of the New Jersey Division of State Police, and two judges of the Superior Court of New Jersey, the Honorable Edward A. Jerejian, and the Honorable Thomas V. Manahan), as well as local Police Chiefs Frank Ingemi and Richard Cook.

4. Petitioners filed their complaint in the United States District Court for the District of New Jersey on November 22, 2010, asserting a facial challenge to the Handgun Permit Law on the grounds that it was an unconstitutional prior restraint,<sup>2</sup> and that the justifiable need standard placed an impermissible

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<sup>1</sup> Two of the former lead plaintiffs in this case, Muller and Piszczatoski, were dismissed after being granted permits to carry during the course of the litigation.

<sup>2</sup> Both the District Court and the Third Circuit rejected Petitioners' claim that the Handgun Permit Law was an unconstitutional prior restraint. Petitioners do not challenge that ruling here.

burden on their Second Amendment rights. App. 77a. Petitioners moved for summary judgment seeking declaratory and injunctive relief. Respondents opposed the motion and cross-moved to dismiss for failure to state a claim. App. 79a.

5. On January 12, 2012, the District Court denied Petitioners' motion for summary judgment and granted Respondents' cross motion, dismissing the case with prejudice. App. 131a. At the outset, the court noted that it was

careful – most careful – to ascertain the reach of the Second Amendment right that the plaintiffs advance. That privilege is unique among all other constitutional rights to the individual because it permits the user of a firearm to cause serious personal injury – including the ultimate injury, death – to other individuals, rightly or wrongly. In the protection of oneself and one's family in the home, it is a right use. In the deliberate or inadvertent use under other circumstances, it may well be a wrong use. A person wrongly killed cannot be compensated by resurrection.

App. 79a.

After the most careful consideration, the court ruled that the Handgun Permit Law is not facially unconstitutional. First, the court observed that the Second Amendment has not been recognized as providing an absolute right to carry a handgun for self-defense outside the home, and that the Handgun Permit Law does not affect one's ability to legally possess a handgun in one's home or place of business.

Thus, the court concluded, the Handgun Permit Law can be applied without creating a burden on protected conduct. Second, the court found that the Handgun Permit Law is “a ‘longstanding’ licensing provision” of the kind that this Court “identified as presumptively lawful” in *District of Columbia v. Heller*, 554 U.S. 570 (2008), so it is an exception to the Second Amendment. The court further ruled that, in the alternative, even if the burdened conduct falls within the scope of the Second Amendment, the Handgun Permit Law survives intermediate scrutiny because it is sufficiently tailored to New Jersey’s interests in regulating the possession of handguns outside the home.

6. On July 31, 2013, in a 2-1 decision, the Third Circuit Court of Appeals affirmed. The court applied the two-step approach announced in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), just like most courts that have addressed Second Amendment challenges after *Heller* have done.

Like the District Court, the Third Circuit majority observed that “[i]t remains unsettled whether the individual right to bear arms for the purpose of self-defense extends beyond the home.” App. 8a-9a. Noting that “[f]irearms have always been more heavily regulated in the public sphere,” the majority commented that “undoubtedly, if the right articulated in *Heller* does ‘extend beyond the home,’ it most certainly operates in a different manner.” App. 9a n.5. The majority further observed that even though *Heller* did not explicitly identify a right to publicly carry arms for self-defense, “it is possible to conclude that *Heller* implies such a right.” App. 10a.

Consistent with the other courts considering the right to carry a handgun outside the home under the Second Amendment, the majority here “assum[ed] that the Second Amendment individual right to bear arms *does* apply beyond the home.” App. 12a (emphasis added). It then asked whether New Jersey’s justifiable need requirement burdened conduct within the scope of the Second Amendment guarantee. The majority observed that the challenged standard had existed in New Jersey in some form for nearly 90 years. App. 14a. In fact, the court noted, New Jersey’s standard “does not go as far as some of the historical bans on public carrying.” App. 16a. The majority concluded that the justifiable need standard “fits comfortably within the longstanding tradition of regulating the public carrying of weapons for self-defense.” What “New Jersey is actually doing,” said the court, “is *regulating* public carry by imposing an objective standard for issuance of a public carry permit, and its *regulation* is a longstanding, presumptively constitutional one.” App. 16a n.9.

Even though the court concluded that the justifiable need requirement in New Jersey’s Handgun Permit Law does not burden conduct within the scope of the Second Amendment’s guarantee, because the constitutional questions presented are of “critical importance,” it nevertheless went on to consider whether the standard withstood the applicable intermediate level of scrutiny. App. 20a, 22a. Under intermediate scrutiny, the State must assert a significant, substantial, or important interest; there must

be a reasonable fit between the asserted interest; and the law cannot burden more conduct than reasonably necessary. App. 25a. The majority noted that New Jersey’s “undoubtedly, [] significant, substantial and important interest in protecting its citizens’ safety” was not in dispute. App. 25a n.15. So the question before the court was whether there was a reasonable fit between the State’s interest in safety and the means chosen to achieve it – the justifiable need standard. App. 25a.

While the legislative evidence demonstrating that the justifiable need standard reasonably furthers New Jersey’s public safety interest was limited, the majority observed that the intermediate scrutiny standard allows states to justify restrictions, not only by reference to studies and anecdotes, but also by reference to history, consensus, and simple common sense. App. 28a (quoting *IMS Health, Inc. v. Ayotte*, 550 F.3d 42, 55 (1st Cir. 2008), *abrogated on other grounds*, 131 S. Ct. 2653 (2011)). The majority agreed with the District Court’s conclusion that “New Jersey’s legislature ‘has continually made the reasonable inference that given the obviously dangerous and deadly nature of handguns, requiring a showing of particularized need for a permit to carry one publicly serves the State’s interests in public safety.’” App. 28a (quoting District Court Opinion at 42). The majority further observed that courts in other states have reached the same predictive judgment and enacted similar laws as a means to improve public safety. *Id.* “In essence, New Jersey’s schema takes

into account the individual's right to protect himself from violence as well as the community at large's interest in self-protection." App. 30a-31a.

The majority found that the fit between the challenged law and the interest in public safety was reasonable. App. 31a.

It is 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. New Jersey has decided that this somewhat heightened risk to the public may be outweighed by the potential safety benefit to an individual with a "justifiable need" to carry a handgun. Furthermore, New Jersey has decided that it can best determine when the individual benefit outweighs the increased risk to the community through careful case-by-case scrutiny of each application, by the police and a court.

App. 31a.

Finally, the majority agreed with the District Court that the justifiable need standard does not burden more conduct than is reasonably necessary to effectuate the State's significant, substantial, and important interest in public safety. App. 32a. The majority found that New Jersey's "measured approach neither bans public handgun carrying nor allows public carrying by all firearm owners; instead, the New Jersey Legislature left room for public

carrying by those citizens who can demonstrate a ‘justifiable need’ to do so.” *Id.*

7. The dissenting judge urged that the majority should have more firmly declared that the Second Amendment applies outside the home. The dissent further suggests that New Jersey’s justifiable need standard should not be considered longstanding because New Jersey’s gun control laws have seen changes over the years.<sup>3</sup> The dissent also complains that New Jersey did not adequately demonstrate that the justifiable need standard is reasonably adapted to the State’s interest in protecting the public.



## **BRIEF FOR THE STATE RESPONDENTS IN OPPOSITION**

### **REASONS FOR DENYING THE PETITION**

The petition presents no question that warrants this Court’s discretionary review. The decision of the Third Circuit does not conflict with the decisions of this Court in *Heller* or *McDonald v. City of Chicago*,

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<sup>3</sup> In particular, the dissent focused on changes in 1966 which, according to the dissent, was the first time the State “extended the permitting requirement to open carry as well as concealed carry.” For the reasons set forth more fully, *infra*, the State disagrees with the dissent’s assertion that open public carry was permitted in New Jersey prior to 1966. Because the dissent based its reasoning on an inaccurate reading of New Jersey law, its conclusion that the justifiable need standard is not sufficiently grounded in history is flawed.



130 S. Ct. 3020 (2010). While Petitioners urge this Court to look to the recent decision from the Ninth Circuit in *Peruta v. County of San Diego*, \_\_\_ F.3d \_\_\_, 2014 U.S. App. LEXIS 2786 (9th Cir. 2014), to find a conflict, this Court should reject Petitioners' invitation because San Diego County's permitting scheme is materially different from New Jersey's, the Handgun Permit Law does not operate as a ban on the right to carry a handgun publicly for self-defense, and the justifiable need standard is not inconsistent with the Ninth Circuit's conclusion that the Second Amendment requires that states permit *some form* of carry for self-defense outside the home.

The Third Circuit's determination that New Jersey's justifiable need standard is a longstanding, presumptively lawful regulation that operates as an exception to the Second Amendment is consistent with this Court's teachings in *Heller*. Petitioners incorrectly claim that the Third Circuit declined to consider that the Second Amendment applied outside the home. Rather, the Third Circuit assumed the individual right to bear arms did apply beyond the home when considering whether or not the justifiable need standard burdened conduct within the scope of that Second Amendment guarantee. App. 12a.

Moreover, New Jersey's Handgun Permit Law does not ban the carrying of handguns outside the home or deny individuals use of handguns for self-defense. Instead, subject to numerous exceptions where a permit is not required, the law regulates the public carry of handguns by requiring the issuance of

permits to individuals who, along with other qualifications not challenged here, have a justifiable need to publicly carry a handgun.

**I. The Justifiable Need Standard Is A Presumptively Lawful, Longstanding Regulation Falling Outside Of The Protections Of The Second Amendment.**

This Court cautioned in *Heller* that the opinion “should [not] be taken to cast doubt on certain longstanding prohibitions on the possession of firearms or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings,” and identified these “regulatory measures” as “presumptively lawful” ones. 554 U.S. at 571 n.26. *Heller* further warned that the described presumptively lawful regulations were not meant to compose an “exhaustive” list. *Id.* The Third Circuit has interpreted this Court’s caution to mean that certain longstanding regulations are “exceptions” to the right to keep and bear arms, such that the conduct they regulate is not within the scope of the Second Amendment. *United States v. Marzzarella*, 614 F.3d at 89; *see also United States v. Huet*, 665 F.3d 588, 600 (3d Cir. 2012); *United States v. Barton*, 633 F.3d 168, 172 (3d Cir. 2011). Here, the Third Circuit correctly determined that “even if some protected right to carry arms outside the home exists, the challenged requirement that applicants demonstrate a ‘justifiable need’ to obtain a permit to publicly carry a handgun

for self-defense qualifies as a ‘longstanding,’ ‘presumptively lawful’ regulation.” App. 12a-13a.

Petitioners are incorrect in their assertion that open carry was permissible in New Jersey before 1966. As early as 1905, when the first permitting law was passed, New Jersey required a “written permit” to carry a weapon, and criminalized carrying a weapon “concealed in or about his clothes or person.” 1905 N.J. Laws, Ch. 172 at 324. The 1905 law, just like the law today, made clear that it was not designed to prevent any person from keeping or carrying a firearm at home or in a place of business. *Id.* However, contrary to the arguments of both Petitioners and the dissenting Third Circuit judge, the 1905 law did not provide for a broad right to carry firearms openly.

Instead, the law set out very specific exceptions to the requirement for a permit to carry a handgun in public. Those exceptions were limited and unambiguous. The first exception was for law enforcement officers who carried weapons “in the discharge of their duties.” 1905 N.J. Laws, Ch. 172 at 324. The only other provisos in the 1905 law allowed individuals to carry weapons (1) “from any place of purchase to his or her dwelling house, or place of business,” (2) “from his or her dwelling house or place of business to any place where repairing is done, to have same repaired and returned,” or (3) “in the woods or fields or upon the waters of this state for the purpose of hunting.” *Id.* The very explicit and limited provisos in the 1905 law would not have been necessary if, as

Petitioners and the dissent below assert, there was a general right to carry weapons openly at the time.

As the dissenting judge in *Peruta, supra*, cautioned, we must be cautious “to avoid the danger inherent in any exercise of historiography: that we assemble history to fit a pre-conceived theory.” 2014 U.S. App. LEXIS 2786, at \*108. That is what Petitioners and the dissenting judge did here. By focusing solely on the word “concealed” in the statute and ignoring the remainder of the law, both reached an incorrect conclusion about the scope of the law to fit their pre-conceived theories.

Subsequent amendments to the law further demonstrate their flawed assumptions. The 1912 amendment to the Handgun Permit Law added two additional exceptions. The first exception allowed “duly authorized military or civil organizations,” to carry weapons “when parading . . . [or] going to and from the places of meeting of their respective organizations.” 1912 N.J. Laws, Ch. 225 at 364. The second allowed carrying weapons in the woods, fields or waters for “target practice” in addition to hunting. *Id.* In 1922, the law was amended again to add additional law enforcement employment exceptions. 1922 N.J. Laws, Ch. 31 at 60. If, as Petitioners and the dissent posit, there was a broad general right to openly carry a firearm in public, there would be no need to make specific exceptions for the various identified law enforcement officers carrying firearms in the discharge of their duties, members of civic organizations who wanted to wear firearms while marching in

parades, or for the general public who owned firearms and needed to carry them to and from the places of purchase and repair, or places for hunting and target practice.

Presumably due to the rising popularity of automobiles, the law was once more amended in 1924 to specifically disallow carrying firearms in automobiles, carriages, motorcycles, or other vehicles without a permit. 1924 N.J. Laws, Ch. 137 at 305. Again in 1925, 1926, and 1927, the law was amended to create additional employment-related exceptions, as well as exceptions for certain clubs and organizations. *See* 1925 N.J. Laws, Ch. 64 at 185; 1926 N.J. Laws, Ch. 270 at 453; 1927 N.J. Laws, Ch. 96 at 183. These repeated amendments identifying the employment and organizational exceptions to the permit requirement for public carry all highlight that both Petitioners and the dissent are wrong in asserting a general right to carry openly prior to 1966.

The 1928 and 1937 amendments to the law provide additional evidence. This time, the Legislature reordered the wording describing the criminal element to make clear that carrying a pistol or revolver “in any vehicle,” or concealed on or about his person, without having first obtained a permit to carry same was impermissible. N.J. Stat. Ann. § 2:176-41(a); *see also* 1928 N.J. Laws, Ch. 212 at 384. It would be nonsensical to assert that it was impermissible to carry a pistol or revolver in a vehicle, whether openly or concealed, without a permit, but that it was permissible to openly carry pistol or

revolver without a permit if a person was in public and outside of a vehicle – for example, walking or riding a horse.

Nor did the 1966 amendment to the law change the basic requirement that a permit was required to carry a handgun in public, whether openly or concealed, unless one of the specific exceptions applied. While it may be that the 1966 law removed the word “concealed,” it is likely that the change was merely to reflect the law’s actual practice in New Jersey.

A review of the testimony of then-Attorney General Arthur J. Sills in 1965 and 1966 before the New Jersey Legislature, the Committee on Ways and Means of the United States House of Representatives, and the Senate Subcommittee to Investigate Juvenile Delinquency,<sup>4</sup> demonstrates that the debate at the time was about other aspects of the gun control laws, and did *not* change the longstanding rule that a permit was required to carry a handgun in public, whether openly or concealed. *See generally, Hearing Before the Subcomm. to Investigate Juvenile Delinquency of the Comm. on the Judiciary, United States Senate, 89th Cong. on Bills to Amend the Federal Firearms Act (June 3, 1965) (“Senate Hearing”) (Statement of New Jersey Attorney General Sills); Hearing*

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<sup>4</sup> Unfortunately, this later history was not made known to the Respondents when the Third Circuit requested legislative history. Respondents still have not been able to locate any earlier legislative history from the time period when the need requirement was first mandated.

*Before Comm. on Ways and Means, United States House of Representatives, on Amendments to the Federal Firearms Act and the National Firearms Act* (July 1965) (“*H.R. Hearing*”); *Public Hearing on Assembly Bill No. 165 Before the New Jersey Legislature, Assembly Committee on State Government* (March 2, 1966) (“*N.J. Legis. Hearing*”) (Testimony of Attorney General Sills). At each of those hearings, Attorney General Sills stated very plainly that, in New Jersey, a permit was needed to carry a handgun. *Senate Hearing, supra*, at 404 (“Under present New Jersey law a permit to carry a pistol or revolver is required. . . .”); *H.R. Hearing, supra*, at 6 (“Under our law, permits to purchase or carry must be obtained for pistols and revolvers”); *N.J. Legis. Hearing*, at 5, 42 (stating that present law does not permit carrying handguns without a permit). Notably, Sills did not qualify or limit his statements to carrying *concealed* pistols or revolvers. Both Petitioners and the dissent were wrong in stating that the 1966 amendments to New Jersey’s firearms laws materially changed the handgun permitting requirements in New Jersey.

*Heller* demonstrates that “a regulation can be deemed ‘longstanding’ even if it cannot boast a precise founding-era analogue. . . . *Heller* considered firearm possession bans on felons and the mentally ill to be longstanding, yet the current versions of these bans are of mid-20th century vintage.” *NRA of Am. v. BATFE*, 700 F.3d 185, 196 (5th Cir. 2012) (citations omitted), *cert. denied*, 82 U.S.L.W. 3491 (U.S. Feb. 24, 2014). As both the District Court and the Third Circuit rightly concluded, New Jersey’s justifiable

need standard “is a longstanding regulation that enjoys presumptive constitutionality under the teachings articulated in *Heller* and expanded upon in [Third Circuit] precedent. Accordingly, it regulates conduct falling outside the scope of the Second Amendment’s guarantee.” That determination was correct and does not warrant this Court’s discretionary intervention.

## **II. The Justifiable Need Standard Satisfies Intermediate Scrutiny And Is Constitutional.**

Although the Third Circuit determined that the Handgun Permit Law’s justifiable need standard enjoyed presumptive constitutionality, given the “critical importance” of the issue in this “new era of Second Amendment jurisprudence,” it nevertheless determined to review whether the standard satisfied intermediate scrutiny review. The majority upheld New Jersey’s use of the standard on that basis as well. Petitioners’ claim that the Handgun Permit Law’s justifiable need standard does not survive intermediate scrutiny is without merit.

Under precedent established in the Third Circuit under *United States v. Marzzarella*, the intermediate scrutiny test requires the government to assert a “significant, substantial, or important” interest, and also to establish a reasonable fit between the asserted interest and the challenged law, such that the law does not burden more conduct than is reasonably



necessary. 614 F.3d at 98. The *Marzzarella* two-prong test has been applied by courts in the Second, Fourth, Fifth, and Tenth Circuits. See *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012), *cert. denied*, *Kachalsky v. Cacace*, 133 S. Ct. 1806 (2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 422 (2013); *NRA of Am. v. BATFE*, *supra*; *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010).

Here, it is undisputed that New Jersey has a “significant, substantial, or important” interest in protecting the safety of its citizens. App. 25a. The main thrust of Petitioners’ challenge was the evidence supporting the fit between New Jersey’s asserted public safety interest and the justifiable need standard. When examining the reasonableness of the fit, this Court has instructed that “substantial deference” must be accorded to the predictive judgments of the legislature. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997). As the majority noted here, “[t]he 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.” App. 26a. Those interests include “combating handgun violence,” “combating the dangers and risks associated with the misuse and accidental use of handguns,” and “reduc[ing] the use of handguns in crimes.” App. 26a, n.17.

While the majority commented that Respondents did not provide much evidence to support the Legislature's predictive judgment, it also found the lack of statistical information, reports and studies unsurprising given how long New Jersey's standard had been in place. App. 27a. A review of Attorney General Sills' 1965 testimony before the Senate and House of Representatives in connection with amendments to the Federal Firearms Laws sheds further light on this issue. Sills testified that New Jersey did not have a statewide uniform crime reporting system to obtain statewide statistics on gun violence. Nor was New Jersey able to fully rely on FBI reports for statistical information because the reports did not provide a breakdown in such a manner to allow an analysis. *Senate Hearing*, at 396. Sills provided partial statistics gathered by the New Jersey State Police at the time but noted that "many more armed crimes have been committed and many more arrests have been made for carrying concealed weapons where the police agency in New Jersey which was involved did not submit the gun to the State [P]olice for examination." *Id.*

Nevertheless, Sills was able to point to the FBI's Uniform Crime Report for 1964 which showed that firearms were used in 55 percent of all murders and that, from 1960 to 1964, 96 percent of the 225 police officers slain were killed with firearms. *H.R. Hearing*, at 7-8. In his testimony before the New Jersey Legislature, Sills commented that, "[o]n a regional basis, the F.B.I. reports that 'guns were used in 35 per cent

of the murders in the northeastern states . . . and 64 per cent in the southern states' where gun controls are lax." *N.J. Legis. Hearing*, at 12. The FBI Uniform Crime Report for 1964 states, "[a] gun, because of its accessibility and lethal nature, makes murder easy." *Id.*

In *Terry v. Ohio*, this Court recognized that "[c]oncealed weapons create an immediate and severe danger to the public." 392 U.S. 1, 31-32 (1968). New Jersey agreed. Firearms control is "reasonable and necessary for the safety and welfare of the citizens of our State," said Attorney General Sills. *N.J. Legis. Hearing*, at 7.

[T]he fact is that where [firearms controls] exist, far less murders are committed with guns. J. Edgar Hoover has pointed out that in two states with "stringent laws" controlling firearms, 32 per cent of the murders were committed by firearms. In 18 states which have "bare minimum" controls, over 65 per cent of the murders were committed by guns.

In New York City where there are stringent controls, firearms were involved in 25 per cent of all murders in 1963. Of the 637 homicides in New York City in 1964, firearms were used in 26 per cent of the cases. In Texas, on the other hand, where there was little gun control, firearms were involved in 72 per cent of all murders in 1963 in Dallas.

*Id.* at 10-11.

The statistics cited by Attorney General Sills in 1965 and 1966 support the Legislature's predictive judgment from the 1920s that the justifiable need standard works. Simply stated, there were far fewer murders using firearms in states where controls like those in New Jersey were in place. According to Attorney General Sills, the "main thrust" of New Jersey's firearms laws was to "try to prevent the needless taking of human life with lethal weapons by keeping these weapons from those people with the potential to kill." *Id.* at 7.

The statement of then-Governor Richard J. Hughes upon his signing of the 1966 amendments to the firearms laws provides further anecdotal evidence of the intent behind the law. Referring to the environment in which the legislation was passed, Governor Hughes stated that, "[f]or years we have seen the incidence of violence and violent crimes rising in New Jersey and the nation" and that New Jersey was taking "another firm step forward in the strengthening of its law enforcement system." *Statement of Governor Richard J. Hughes on Signing of Gun Control Legislation* (June 3, 1966). Combating handgun violence, the dangers and risks associated with the use of handguns, and reducing the use of handguns in crimes were all recognized as interests impacting the safety of the citizens of the State. Importantly, the contemporaneous accounts of Attorney General Sills and Governor Hughes highlight these interests as the purpose behind the New Jersey

Legislature’s enactment of additional firearms regulations while continuing the existing handgun permitting scheme.

The intermediate scrutiny standard allows states to demonstrate the reasonableness of the fit by reference not only to studies and anecdotes, but also by reference to “history, consensus and simple common sense.” App. 28a (quoting *IMS Health, Inc. v. Ayotte*, 550 F.3d 42, 55 (1st Cir. 2008), *abrogated on other grounds*, 131 S. Ct. 2653 (2011)). While New Jersey did not have Statewide statistics or studies to inform its predictive judgment, it did look to the available State statistics, as well as statistics from its sister states and the FBI. In addition, the State looked to history, consensus and simple common sense to guide its actions.

As discussed more fully in Point I, New Jersey has had a long history of firearms control. In fact, New Jersey law addressed the dangers of carrying firearms as early as the 1790s, where two laws gave the State broad power to disarm disorderly persons and armed assemblies. See Saul Cornell & Nathan DeDino, *Symposium: The Second Amendment and the Future of Gun Regulation: Historical, Legal, Policy, and Cultural Perspectives: Panel I: Historical Perspective: A Well Regulated Right: The Early American Origins of Gun Control*, 73 Fordham L. Rev. 487, 500-501 (Nov. 2004) (*citing* Act of June 10, 1799, ch. DCCCVI, 2, 1799 N.J. Laws 561, 562 (punishing disorderly persons who were apprehended while carrying offensive weapons such as pistols)); Act of

Feb. 24, 1797, ch. DCXXXVII, 1, 1797 N.J. Laws 179, 179 (punishing rioters who were armed with weapons)). The State clearly retained the right to regulate and restrict the public carrying and use of firearms early in its history. *Id.*; see also *In re Wheeler & Daudlin*, \_\_ A.2d \_\_, 2013 N.J. Super. LEXIS 189, at \*27 (N.J. Super. Ct. App. Div. 2013) (citing 1882 N.J. Laws, Ch. IV, §§ 2-4, which restricted the sale and use of firearms to youngsters).

New Jersey's justifiable need standard for carrying a firearm in public has existed in some form for nearly 90 years. App. 14a (citing *Siccardi v. State*, 284 A.2d at 538). This long history supports the Legislature's predictive judgment that the justifiable need standard is effective in combating handgun violence, reducing the risks and dangers associated with the use of handguns, and reducing the use of handguns in crimes.

Consensus also supports New Jersey's predictive judgment here. As the majority noted, New Jersey's sister states, in particular New York and Maryland, reached the same predictive judgment and enacted laws similar to New Jersey's justifiable need standard. App. 28a. Hawaii, Massachusetts, and Rhode Island also condition the carrying of handguns to a showing of particularized need. *In re Wheeler*, 2013 N.J. Super. LEXIS 189, at \*35-36. Not only was there consensus among sister states, but New Jersey residents were apparently not offended by the permitting scheme. A review of the testimony before Congress and the New Jersey Legislature in 1965 and 1966

demonstrates that the debate was not about the justifiable need standard or whether New Jerseyans were able to carry a handgun openly or concealed without a permit. Rather, the discussions centered on new measures concerning acquisition, fingerprinting, and record-keeping, as well as controlling the purchase of firearms in interstate commerce. *Id.* at \*31-32; *see also*, *Senate Hearing, supra*; *H.R. Hearing, supra*. Significantly, neither the testimony of citizen groups nor the National Rifle Association before the New Jersey Legislature in 1966 challenged the State's handgun permitting scheme, further demonstrating that the justifiable need standard was not disputed or of particular concern. *In re Wheeler*, 2013 N.J. Super. LEXIS 189, at \*32-34, \*72.

As this Court instructed in *McDonald, supra*, states may “devise solutions to social problems that suit local needs and values.” 130 S. Ct. at 3046. New Jersey’s “careful grid of regulatory provisions” that comprises its firearms permitting scheme does just that. *In re Preis, supra*, 573 A.2d at 150. “[E]xtensive state regulation of handguns has never been considered incompatible with the Second Amendment” because such regulation of the use of firearms in public was “‘enshrined within the scope’ of the Second Amendment when it was adopted.” *Kachalsky*, 701 F.3d at 96, 100 (quoting *Heller*, 554 U.S. at 634).

New Jersey’s Legislature, long ago, made the predictive judgment that widespread carrying of

handguns in public would not be consistent with public safety because of the inherent danger it poses. *In re Wheeler*, 2013 N.J. Super. LEXIS 189, at \*82. *Heller* recognized that courts and state legislators have long appreciated the danger to public safety created by allowing unregulated, concealed weapons to be carried in public. *Peruta*, \_\_\_ F.3d \_\_\_, 2014 U.S. App. LEXIS 2786, at \*103 (Thomas, dissenting). The justifiable need standard “is fashioned to account for the admittedly significant burden on the exercise of the right and for the fact that it is imposed only in public places, where restrictions on its exercise have always been understood to be part of the right.” *In re Wheeler*, *supra*, 2013 N.J. Super. LEXIS 189, at \*69. The alternative to requiring a justifiable need would be to allow the widespread carrying of handguns. But that alternative would not address the long-recognized problem at all. *Id.* at \*83 (*citing Siccardi*, *supra*, 284 A.2d at 540).

*Heller* instructs that Second Amendment right “was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” 554 U.S. at 626. “*Heller* supports the conclusion that regulation of the carrying of handguns in public places, despite some impact on self-defense, has always been understood to be consistent with the scope of the limited right to bear arms.” *In re Wheeler*, 2013 N.J. Super. LEXIS 189, at \*72. As the majority correctly observed here, “New Jersey’s schema takes into account the individual’s right to protect himself from violence as well as the community at large’s



interest in self-protection.” App. 30a-31a. The majority found that this careful, objective case-by-case balancing is reasonable, and that it does not burden more conduct than is reasonably necessary. App. 32a. That determination was correct and does not warrant this Court’s intervention.

This Court should reject Petitioners’ invitation to look to the Ninth Circuit’s recent decision in *Peruta*, *supra*, to find a conflict requiring intervention. The California law examined in *Peruta* is materially different from New Jersey’s Handgun Permit Law in a number of ways.

First, the California law sets forth a general prohibition as opposed to New Jersey’s carefully crafted regulatory scheme. The California law generally prohibits “the open or concealed carriage of a handgun, whether loaded or unloaded, in public locations.” *Peruta*, \_\_\_ F.3d \_\_\_, 2014 U.S. App. LEXIS 2786, at \*4 (*citing* Cal. Penal Code § 25400, § 25850, § 26350, and § 25605). A person can apply to a local county sheriff for a license to carry a concealed weapon, which the local sheriff “may issue” upon proof that the applicant is of good moral character, good cause exists for issuance of a license, and applicant has completed a training course. Cal. Penal Code § 26150. If an applicant meets these requirements, the sheriff “may issue a license” to carry a concealed weapon or, in counties of less than 200,000 persons, “a license to carry loaded and exposed in only that county a pistol, revolver, or other firearm capable of being concealed upon the person.” *Id.* In New Jersey, on the other

hand, the Superior Court “shall issue” a permit to carry if it is satisfied that the applicant is a person of good moral character, is not subject to any enumerated disability, is thoroughly familiar with the safe handling and use of handguns, and has a justifiable need to carry a handgun. N.J. Stat. Ann. § 2C:58-4(d). Thus, California’s law gives the sheriff more discretion to refuse to issue a permit than the New Jersey law.

Second, the court in *Peruta* noted that the California law generally operates as a complete prohibition on open carry, subject to a few narrow exceptions, for example, armored vehicle guards and retired federal officers (Cal. Penal Code § 26015, § 26020), or if a citizen is (1) actively attempting to make a lawful arrest; (2) hunting in a lawful location; or (3) “faces immediate, grave danger provided that the weapon is only carried in ‘the brief interval’ between the time law enforcement officials are notified of the danger and the time they arrive on the scene.” 2014 U.S. App. LEXIS 2786, at \*4-5. Conversely, the New Jersey law does not prohibit open carry. Nor does the Handgun Permit Law severely limit carrying temporally or geographically. Rather, 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. N.J. Stat. Ann. § 2C:58-4(d). And, a permit, once issued, is valid in all parts of the State.

Not only is the California law materially different from New Jersey’s Handgun Permit Law, but the

question before the court in *Peruta* also distinguishes that case. According to the Ninth Circuit, “Peruta and his fellow plaintiffs argue that the San Diego County policy in light of the California licensing scheme *as a whole* violates the Second Amendment because it precludes a responsible, law-abiding citizen from carrying a weapon in public for the purpose of lawful self-defense in *any* manner.” *Peruta*, \_\_\_ F.3d \_\_\_, 2014 U.S. App. LEXIS 2786, at \*74. According to the *Peruta* court, the California law’s restrictions are so “severe” that, in effect, carrying a handgun is “forbidden.” *Id.* at \*73. Not so in New Jersey. Even though, at its core, the Handgun Permit Law “is a broadly-stated prohibition on the knowing possession” of a handgun without a permit, in practice “it affects a very narrow range of conduct.” *In re Wheeler*, 2013 N.J. Super. LEXIS 189, at \*10. That is so because the scope of the Handgun Permit Law’s prohibition, “and consequently the obligation to establish ‘justifiable need’ in order to carry and use a handgun, is greatly diminished by numerous statutory exceptions that make [N.J. Stat. Ann. §] 2C:39-5(b) inapplicable in a wide range of circumstances.” *Id.* New Jersey’s Handgun Permit Law is far different than the California law considered by the court in *Peruta*.

According to the Ninth Circuit, the Second Amendment requires “that the states permit *some form* of carry for self-defense outside the home.” *Peruta*, \_\_\_ F.3d \_\_\_, 2014 U.S. App. LEXIS 2786, at \*78. New Jersey’s Handgun Permit Law does precisely this.

In *Heller*, this Court instructed that the Second Amendment protects the lawful, not unlawful uses of firearms. In the public places where a carry permit is required in New Jersey, the only lawful use of a handgun is lawful self-defense. “As the *Heller* Court implicitly recognized in noting the ‘need’ for lawful use of defensive force in the home, the right to use lawful defensive force has always been tied to need.” *In re Wheeler*, 2013 N.J. Super. LEXIS 189, at \*78. The justifiable need standard accommodates that right in a manner that is wholly compatible with the right of self-defense. *Id.* at \*80. Accordingly, there is no real conflict for this Court to resolve.



## CONCLUSION

In sum, the Second Amendment does not prohibit New Jersey from requiring applicants to demonstrate a justifiable need before granting a permit to publicly carry a handgun. The justifiable need standard in New Jersey’s Handgun Permit Law qualifies as a presumptively lawful, longstanding regulation that does not burden conduct within the scope of the Second Amendment’s guarantee. The court further determined that even if the justifiable need standard did not qualify as such a regulation, it nonetheless withstands intermediate scrutiny and is therefore constitutional. Petitioners have failed to demonstrate

that the Third Circuit's decision here presents a question that warrants this Court's discretionary review.

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