No. 13-827

In The
Supreme Court of the United States

JOHN M. DRAKE, ET AL.,

Petitioners,

v.

EDWARD A. JEREJIAN, JUDGE, SUPERIOR COURT OF NEW JERSEY, BERGEN COUNTY, ET AL.,

Respondents.

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

BRIEF OF AMICUS CURIAE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The National Rifle Association of America, Inc. ("NRA") is America's foremost and oldest defender of Second Amendment rights. Founded in 1871, the NRA has approximately five million members and is America's leading provider of firearms marksmanship and safety training for civilians. The NRA has a strong interest in protecting the rights of its members to bear arms for self-defense outside the home.

SUMMARY OF THE ARGUMENT

The State of New Jersey generally bars its citizens from carrying handguns in public to protect themselves unless they can first convince State officials that they have a "justifiable need" to do so. A "justifiable need" is defined as an "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." *Drake v. Filko*, 724 F.3d 426, 428 (3d Cir. 2013) (quoting N.J. ADMIN. CODE § 13:54-2.4(d)(1)).

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus curiae, its members, and its counsel, contributed any money to fund the preparation or submission of this brief. The parties have consented to the filing of this brief. In addition to requesting consent to file this brief, Counsel for the NRA requested that Respondents waive the timely notification requirement under Supreme Court Rule 37.2(a). Counsel for Respondents stated that Respondents do not object to the filing of this brief.

The simple desire to exercise the Second Amendment right to armed self-defense does not suffice.

This case thus should turn on the answer to a single question: whether the Second Amendment right to carry a firearm in case of confrontation extends beyond the home. For if it does, New Jersey cannot make its citizens prove that they have a "justifiable need" to exercise that right: the right's "very enumeration . . . takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) (emphasis in original).

Remarkably, the court below upheld New Jersey's "justifiable need" requirement *without answering this central question*. *See Drake*, 724 F.3d at 431 ("recognize[ing] that the Second Amendment's individual right to bear arms *may* have some application beyond the home," but "refrain[ing] from answering this question definitively"). The Second and Fourth Circuits have also upheld similar laws while steadfastly remaining agnostic on the question of the Second Amendment's application outside the home.[2]

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[2] *See Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) (merely "assum[ing]" without deciding that Second Amendment "must have *some* application" outside the home (emphasis in original)); *Woollard v. Gallagher,* 712 F.3d 865, 875 (4th Cir. 2013) ("[W]e are not obliged" to decide whether amendment applies outside the home and "deem[ ] it prudent to instead resolve" the case by assuming it does and applying some form of intermediate scrutiny.); *see also, e.g.*, *United States v. Masciandaro*, 638 F.3d 458, 474-75 (4th Cir. 2011) (deeming it "unnecessary to explore in this case the question of

(Continued on following page)

These courts have managed this feat either by grossly misapplying *Heller*'s dictum that "nothing in [the Court's] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms" or by flouting *Heller*'s command that Second Amendment rights must not be subject to judicial interest-balancing. *Heller*, 554 U.S. at 626, 634-35. The opinion below exemplifies both of these errors.

While there have been notable exceptions, *see, e.g.*, *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012); *People v. Aguilar*, No. 112116, 2013 IL 112116 (Ill. Sept. 12, 2013), many of the nation's lower courts have thus gone to extreme lengths to avoid recognizing a right to carry a firearm outside the home absent further "guidance from the nation's highest court." *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011); *see also Williams v. State*, 10 A.3d 1167, 1177 (Md. 2011) ("If the Supreme Court . . . meant its holding to extend beyond home possession, it will need to say so more plainly.").

We respectfully submit that the time is ripe for this Court to confirm for these lower courts what is clear from *Heller*: that the Second Amendment "right to bear arms for self-defense" is "as important outside the home as inside," *Moore*, 702 F.3d at 942, and that that right cannot be balanced away by

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whether and to what extent the Second Amendment right recognized in *Heller* applies outside the home"); *Hightower v. City of Boston*, 693 F.3d 61, 72 n.8 (1st Cir. 2012) ("We do not reach the issue of the scope of the Second Amendment as to carrying firearms outside the vicinity of the home without any reference to protection of the home.").

judges resistant to enforcing the Second Amendment and this Court's decisions in *Heller* and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

ARGUMENT

I. THE TEXT AND HISTORY OF THE SECOND AMENDMENT LEAVE NO DOUBT THAT THE RIGHT TO BEAR ARMS FOR SELF-DEFENSE EXTENDS OUTSIDE THE HOME.

A. *Heller* held that the Second Amendment is to be interpreted "on the basis of both text and history." 554 U.S. at 595. Yet the court below was "not inclined to . . . engag[e] in a round of full-blown historical analysis" when confronted with the claim that the Second Amendment extends beyond the home. *Drake*, 724 F.3d at 431. Only by refusing to examine the Second Amendment's text and history was the court able to evade the conclusion that they compel—the right to carry a firearm cannot be limited to the home.

The substance of the Second Amendment right resides in the *twin verbs* of the operative clause: "the right of the people to *keep* and *bear* Arms, shall not be infringed." (Emphasis added.) If this language assured only the right to keep firearms in one's home, a right to "keep" arms would have been sufficient; the Framers would have had no reason to include an explicit guarantee of the right to "bear" arms as well. *See Heller*, 554 U.S. at 581-82. Yet "the founding generation were for every man bearing his arms about him *and* keeping them in his house, his castle, for his own defense." *Id.* at 616 (emphasis added) (internal quotation marks omitted). Therefore " 'to bear

arms implies something more than the mere keeping.' " *Id.* at 617 (quoting Thomas Cooley, TREATISE ON CONSTITUTIONAL LIMITATIONS 271 (1868)).

As this Court explained in *Heller*, "[a]t the time of the Founding, as now, to 'bear' meant to 'carry,' " and "[w]hen used with 'arms,' . . . the term has a meaning that refers to carrying for a particular purpose—*confrontation*." 554 U.S. at 584 (emphasis added). This Court further stressed that "the 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." *Id.* (emphasis added) (citation and internal quotation marks omitted). This Court repeatedly stressed "self-defense . . . [ ]as the *central component* of the right itself." *Id.* at 599 (emphasis in original). *See also McDonald*, 130 S. Ct. at 3036 (controlling opinion of Alito, J.) ("[I]n *Heller*, we held that individual self-defense is 'the *central component*' of the Second Amendment right." (emphasis by the Court in *Heller*)). Accordingly, the Second Amendment "guarantee[s] the *individual right to . . . carry weapons in case of confrontation*." *Heller*, 554 U.S. at 592 (emphasis added). *See also id.* at 590 ("*carrying weapons for potential violent confrontation*" (emphasis added)).

The Court's repeated choice of that locution cannot be dismissed as accidental, and the Court's emphasis on self-defense "in case of confrontation" forecloses any distinction in the right to bear arms based on whether it occurs inside or outside the home. Nor did the Framers perceive any such dis-

tinction. Indeed, noting that "[c]onfrontations are not limited to the home," the Seventh Circuit observed that in the founding era "a distinction between keeping arms for self-defense in the home and carrying them outside the home *would . . . have been irrational*." *Moore*, 702 F.3d at 936-37 (emphasis added).[3]

In short, the Second Amendment guarantees the right to carry weapons for the purpose of self-defense—*not* just for self-defense *within the home*, but for self-defense, *period*.

If there were any lingering doubt about the meaning of the "right to keep and bear arms" in the Second Amendment's "operative clause," it would be dispelled by the Amendment's "prefatory clause." *Heller*, 554 U.S. at 577. That clause "announces the purpose for which the right was codified: to prevent

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[3] *Heller* contains a host of references to historical materials affirming the right of armed self-defense both inside and outside the home. *See, e.g.*, 554 U.S. at 611 ("a citizen has 'a right to carry arms in defence of his property or person, and to use them, if either were assailed' "); *id.* at 585 (discussing "the natural right of defense 'of one's person or house' "); *id.* at 615 (all men "have the right to keep and bear arms to defend their homes, families or themselves"); *id.* at 616 (constitutional right "to bear arms for the defense of himself and family and his homestead"); *id.* at 609 (" 'The rifle has ever been the companion of the pioneer and, under God, his tutelary protector against the red man and the beast of the forest.' "); *id.* at 583 n.7 (collecting 18th century sources affirming right to bear arms "upon Journeys or Hunting," or for "Hunting, Navigation, Travelling"); *id.* at 628-29 (handguns are "most preferred firearm in the nation to keep and use for protection of one's home and family" (internal quotation marks omitted)); *id.* at 625 (weapons used " 'in defense of person and home were one and the same' ").

elimination of the militia" by ensuring that the regular citizenry could never be disarmed by the government. *Id*. at 599. If the government could confine the right to bear arms to the home, the Framers' purpose of preserving the viability of a citizen militia would have been entirely negated. The American Revolution was not fought in the colonists' kitchens; when the Minutemen answered the call to arms on April 19, 1775, they met the Redcoats on the village green in Lexington and at North Bridge in Concord. A home-bound right to bear arms would not have permitted even militia training, let alone active militia service.

B. The common practices of the founding generation confirm this understanding of the right to bear arms. Judge St. George Tucker observed that, "[i]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side." 5 WILLIAM BLACKSTONE, COMMENTARIES App. 19 (St. George Tucker ed., 1803). George Washington rode between Alexandria and Mount Vernon with pistols holstered to his horse's saddle, "[a]s was then the custom." BENJAMIN OGLE TAYLOE, IN MEMORIAM 95 (1872). Thomas Jefferson advised his nephew to "[l]et your gun . . . be the constant companion of your walks." *See* 1 THE WRITINGS OF THOMAS JEFFERSON 398 (letter of August 19, 1785) (H. A. Washington ed., 1853). And even in defending the British soldiers charged in the Boston Massacre, John Adams recognized that "every private person is authorized to arm himself; and on the strength of this authority I do not deny the inhabitants had a right to arm them-

selves at that time for their defence." John Adams, *First Day's Speech in Defence of the British Soldiers Accused of Murdering Attucks, Gray and Others, in the Boston Riot of 1770*, *in* 6 MASTERPIECES OF ELOQUENCE 2569, 2578 (Mayo Williamson Hazeltine et al. eds., 1905).

Indeed, "[m]any colonial statutes *required* individual arms-bearing for public-safety reasons." *Heller,* 554 U.S. at 601 (emphasis added). Some colonies even mandated that citizens carry their firearms to church and other public gatherings.[4] Plainly, if the law imposed on individual citizens a *civic duty to bear arms in public* in the interest of public safety (even when not on militia service), the law necessarily conferred on those citizens a corresponding *right* to do so.

Even *Heller*'s discussion of potential limitations on Second Amendment rights reinforces that those rights are not limited to the home. *Heller* noted that the decision should not "be taken to cast doubt

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[4] *See, e.g.*, JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS 139 (1994) ("The dangers all the colonies faced, however, were so great that not only militia members but all householders were ordered to be armed."); *id.* ("Colonial law went another step beyond English law and required colonists to carry weapons.") (discussing various statutes); *id.* at 139 & nn.21-24 (citing colonial laws and 18th century statutes, some enacted just five years prior to the Revolution, that required citizens to carry firearms in public, including "places of public worship"); A DIGEST OF THE LAWS OF THE STATE OF GEORGIA 157-58 (1800) (discussing a 1770 Georgia statute); NICHOLAS J. JOHNSON & DAVID B. KOPEL ET AL., FIREARMS LAW & THE SECOND AMENDMENT 106-08 (2012).

on longstanding prohibitions on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Id*. at 626. The obvious implication is that the Second Amendment generally protects the right to carry a firearm in public, but that there is an exception for particularly sensitive places.

In sum, the explicit guarantee of the right to "bear" arms would mean nothing if it did not protect the right to "bear" arms outside of the home where they are "kept." The most fundamental canons of construction forbid any interpretation that would relegate explicit text of the Bill of Rights to the status of meaningless surplusage. *See, e.g.*, *Wright v. United States*, 302 U.S. 583, 588 (1938). Ignoring the Second Amendment's explicit distinction between the people's right to "keep" arms for self-defense and to "bear" them for self-defense would be on the order of ignoring the word "persons" in the Fourth Amendment's guarantee of the people's right to be secure "in their persons, houses, papers and effects." U.S. CONST. amend. IV.[5]

[5] Opponents who invoke the Statute of Northampton and other ancient English laws to deny a right to bear arms in public simply misread history. "[Lord] Coke's reference to 'assemble force' suggests that the statutory limitation of the right of self-defense was based on a concern with armed gangs, thieves, and assassins rather than with indoors versus outdoors as such." *Moore*, 702 F.3d at 936.

II. THE DECISION BELOW MISAPPLIES *HELLER*'S RECOGNITION OF HISTORICALLY GROUNDED LIMITATIONS ON SECOND AMENDMENT RIGHTS AND ENGAGES IN PROHIBITED INTEREST-BALANCING.

As explained above, the Third Circuit refused to "engag[e] in a round of full-blown historical analysis" to determine whether the Second Amendment extends outside the home. *Drake*, 724 F.3d at 431. Instead, it held that New Jersey's "justifiable need" requirement is the type of longstanding restriction that this Court held does not infringe Second Amendment rights. As a backup, the court held that New Jersey's law satisfies intermediate constitutional scrutiny. Neither of these conclusions can be squared with *Heller*, and both of them exemplify the ways in which lower courts have strained to uphold laws restricting the right to bear arms in the wake of that decision.

A. In *Heller*, this Court made the unremarkable observation that Second Amendment rights are "not unlimited":

> For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. . . . Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession

> of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

554 U.S. at 626-27.

According to the court below, New Jersey's " 'justifiable need' standard fits comfortably within the longstanding tradition of regulating the public carrying of weapons for self-defense" and thus falls entirely outside the Second Amendment's purview. *Drake*, 724 F.3d at 433. But notably absent from this Court's list of presumptively lawful regulations is any requirement for law-abiding, responsible citizens to prove to the government's satisfaction that they *really need* to exercise their Second Amendment rights. And any such law is wholly antithetical to *Heller*'s holding that "[t]he very enumeration of the [Second Amendment] right takes out of the hands 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 634 (emphasis in original).

Thus, *Heller*'s dictum suggests that the government may limit how firearms are carried (*i.e.*, open vs. concealed), may limit where they are carried (*i.e.*, "sensitive places" vs. everywhere else), and may limit who may carry them (violent felons, mentally disabled, etc. vs. law-abiding, responsible persons), but not that the government may put the burden on citizens to prove that they "need" to exercise their Second Amendment rights.

The court below is not the first to have used *Heller*'s statements about the Second Amendment's limits to uphold regulations wholly dissimilar from those supported by either this Court's language or the historical record. Indeed, the NRA is currently seeking this Court's review of two decisions from the Fifth Circuit upholding laws restricting the Second Amendment rights of law-abiding 18-to-20-year-old adults. (*See NRA v. McCraw*, No. 13-390; *NRA v. Bureau of Alcohol, Tobacco, Firearms, and Explosives* ("*BATF*"), No. 13-137.) In opining that 18-to-20-year-olds likely lack Second Amendment rights, the Fifth Circuit drew "offensive" "analogies between this age group and felons and the mentally ill." *NRA v. BATF*, 714 F.3d 334, 343 (5th Cir. 2013) (Jones, J., dissenting from denial of rehearing en banc).

B. Having held that New Jersey's justifiable need law falls outside the Second Amendment's scope altogether, the court below nonetheless proceeded to issue an advisory opinion to the effect that the law would survive means-ends scrutiny even if the Second Amendment were implicated. *See Drake*, 724 F.3d at 435-36 ("[W]e need not . . . apply means-end scrutiny, but we have decided to do so because the constitutional issues presented to us in this new era of Second Amendment jurisprudence are of critical importance."). The issues presented here are indeed of "critical importance," and the court below got them wrong in several critical respects.

First, *Heller* rejected a "judge-empowering interest-balancing inquiry that asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary

effects upon other important governmental interests." 554 U.S. at 634 (internal quotation marks omitted). *McDonald* reaffirmed that *Heller* had "expressly rejected" such interest-balancing. 130 S. Ct. at 3047 (controlling opinion of Alito, J.). The court below, by contrast, embraced a particularly obsequious form of interest balancing, accepting that New Jersey "can best determine when the individual benefit [of carrying a handgun] outweighs the increased risk to the community through careful case-by-case scrutiny of each application." *Drake*, 724 F.3d at 439.

Second, the Third Circuit's interest balancing analysis is predicated on the very case that formed the foundation of Justice Breyer's *dissent* in *Heller*. Quoting *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 195 (1997), Justice Breyer stated that "this Court, in First Amendment cases applying intermediate scrutiny, has said that our 'sole obligation' in reviewing a legislature's 'predictive judgments' is 'to assure that, in formulating its judgments,' the legislature 'has drawn reasonable inferences based on substantial evidence.' " *Heller*, 554 U.S. at 704 (Breyer, J., dissenting). Justice Breyer then insisted that "[t]here is no cause here to depart from the standard set forth in *Turner* . . . ." *Id*. at 705. The court below adopted Justice Breyer's approach wholesale: "When reviewing the constitutionality of statutes," the court reasoned, "courts 'accord substantial deference to the [legislature's] predictive judgments.' " *Drake*, 724 F.3d at 436-37 (alteration in original) (quoting *Turner*, 520 U.S. at 195). The court then deferred to "[t]he predictive judgment of New Jersey's legislators . . . 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." *Id*. at 437.

Third, the decision below *cannot be squared even with a proper application of Turner*, as it upheld New Jersey's "justifiable need" requirement in the absence of *any* evidence to support it, much less substantial evidence. The court below expressly found: (i) that New Jersey failed to "muster" *any* "legislative history" to support a purported link between its highly restrictive handgun-permit regime and its public safety goals; (ii) that New Jersey conceded that "there is no available commentary which would clarify whether or not the legislature considered statistical information to support the public safety purpose of the . . . Law"; and (iii) that New Jersey "cannot identify" even one "study or table[ ] of crime statistics upon which it based its predictive judgment" that issuing carry permits to trained, rigorously screened, law-abiding citizens poses a threat to public safety. *Drake*, 724 F.3d at 437-38. Indeed, "New Jersey . . . provided *no evidence at all* to support its proffered justification, not just no evidence that the legislature considered at the time the need requirement was enacted or amended." *Id.* at 454 (Hardiman, J., dissenting) (emphasis in original). In relieving New Jersey of the responsibility of providing *any* evidence to support its law, the court below "effectively applie[d] the rational basis test, contrary to the Supreme Court's explicit rejection of that test in the Second Amendment context." *Id*. at 457.

The decision below, unfortunately, is not an outlier. Even a former staff attorney for the Brady Center to Prevent Gun Violence—writing over a year

before the case below was decided—recognized that the lower courts "have effectively embraced the sort of interest-balancing approach that [the *Heller* Court] condemned, adopting an intermediate scrutiny test and applying it in a way that is highly deferential to legislative determinations and that leads to all but the most drastic restrictions on guns being upheld." Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 706-07 (2012). We respectfully submit that it is time for this Court to intervene and to rectify the lower courts' widespread, determined resistance to enforcing the enumerated, fundamental constitutional right to keep and bear arms.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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