No. 12-1150

# In the United States Court of Appeals for the Third Circuit

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

*Plaintiffs-Appellants,*

*v.*

THE HON. RUDOLPH A. FILKO, in his Official Capacity as Judge of the Superior Court of Passaic County; THE HON. EDWARD A. JEREJIAN, in his Official Capacity as Judge of the Superior Court of Bergen County; THE HON. THOMAS A. MANAHAN, in his Official Capacity as Judge of the Superior Court of Morris County; COL. RICK FUENTES, in his Official Capacity as Superintendent of the New Jersey State Police; CHIEF ROBERT JONES, in his Official Capacity as Chief of the Hammonton, New Jersey Police Department; CHIEF RICHARD COOK, in his Official Capacity as Chief of the Montville, New Jersey Police Department; AND PAULA T. DOW, in her Official Capacity as Attorney General of New Jersey,

*Defendants-Appellees.*

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Appeal from a Judgment of the United States District Court for the District of New Jersey, The Hon. William H. Walls, District Judge, No. 2:10-CV-6110

## APPELLANTS' REPLY


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# CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant Second Amendment Foundation, Inc. has no parent corporation, and no publicly held corporation owns its stock.

Plaintiff-Appellant Association of New Jersey Rifle & Pistol Clubs, Inc. has no parent corporation, and no publicly held corporation owns its stock.

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

## SUMMARY OF ARGUMENT

The "right of the people to keep and bear Arms," U.S. Const. amend. II, protects "the individual right to possess and carry weapons in case of confrontation," *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). By its very nature, this is a right that people enjoy both at home and in public. Defendants' attempt to distinguish a "general" from an "absolute" right misses the mark—the general right may be subject to regulation, but without a Permit New Jersey law precludes *any* ability to carry a handgun for self-protection.

Once it is established that people have a right to possess and carry guns, the "justifiable need" requirement unavoidably fails. It is well established that the exercise of constitutional rights cannot be made contingent on an official's discretionary determination of "need." The requirement is equally invalid if evaluated in the context of means-end "burden" analysis, for the only "end" the requirement serves is suppressing a fundamental right.

In the end, Defendants' opposition hangs on their claim that because guns are "serious business," the right to bear arms "should be narrowly construed" to the facts presented in *Heller*. State Br. p. 22 (quotations omitted). But this misstates this Court's "obligation" in the constitutional framework: "to forecast or predict how the [Supreme] Court will decide troubling cases involving new factual situations." *Jaffee v. United States*, 663 F.2d 1226, 1228 (3d Cir. 1981). The

"holding" of a decision "extends beyond a statement of who won or lost a case." *McDonald v. Master Fin., Inc.*, 205 F.3d 606, 612 (3d Cir. 2000). Indeed, it includes "those portions of the opinion necessary to th[e] result." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996). The Court's interpretation of "bear arms" was essential to its resolution of *Heller*, and forecloses Defendants' argument that the Second Amendment right to bear arms does not protect the right to carry handguns in public.

## ARGUMENT

### I. THE SECOND AMENDMENT IS NOT CONFINED TO THE HOME

Defendants contend that the Supreme Court has not recognized a right to carry firearms outside the home, and urge this Court to not "extend the scope of the Second Amendment beyond *Heller*'s limits." State Br. pp. 15, 22. But as this Court observed, "*Heller* did not purport to fully define all the contours of the Second Amendment," which "must protect the right of law-abiding citizens to possess firearms for other, as-yet-undefined, lawful purposes." *United States v. Marzzarella*, 614 F.3d 85, 92 (3d Cir. 2010). Amici contend (p. 9) that this Court embraced the concept of a "limited," homebound right in *Marzzarella* and *United States v. Barton*, 633 F.3d 168 (3d Cir. 2011), but this misreads the decisions. Both *Marzzarella* and *Barton* concerned criminal charges that arose from possession in the home, not the bearing of arms in public—and it was accordingly

appropriate to frame the issue in terms of the burden on the right to possess weapons at home. *See Barton*, 633 F.3d at 169; *Marzzarella*, 614 F.3d at 87-88.

It bears emphasizing that the Supreme Court itself does not read *Heller*'s holding as being limited to the home:

> [I]n [*Heller*], we *held* that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, *and* we struck down a District of Columbia law that banned the possession of handguns in the home.

*McDonald v. Chicago*, 561 U.S. ___, 130 S. Ct. 3020, 3026 (2010) (emphasis added). Certainly, the Supreme Court never excluded "bear" from the status enjoyed by "keep." Self-defense, not home possession, is the "central component of the right itself." *Heller*, 554 U.S. at 599.

Defendants focus on cautionary statements in *Heller* that the right does not "protect the right of citizens to carry arms for *any sort* of confrontation" and is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *See* State Br. p. 15 (quoting *Heller*, 554 U.S. at 595, 626). But this language implicitly recognizes a right to carry *some* weapons, in *some* manners, and for *some* purposes. *See Woollard v. Sheridan*, no. L-10-2068, 2012 U.S. Dist. LEXIS 28498, *20-21 n.8 (D. Md. Mar. 2, 2012) ("*Heller*'s 'presumptively lawful' regulations regarding sensitive places . . . obviously presumes the existence of such a right").

To be sure, some courts have reached a contrary conclusion, *see* State Br. pp. 20-21; Amici Br. pp. 8-12—but the arguments for erasing a textually enumerated right are unpersuasive. As one federal court observed, "[t]he fact that courts may be reluctant to recognize the protection of the Second Amendment outside the home says more about the courts than the Second Amendment." *United States v. Weaver*, no. 2:09-CR-00222, 2012 U.S. Dist. LEXIS 29613, *14 n.7 (S.D.W. Va. Mar. 7, 2012).

## II. NEW JERSEY'S PRECLUSION OF "POSSESSION" IN PUBLIC IS NEITHER "PRESUMPTIVELY VALID" NOR "LONGSTANDING"

Defendants assert that New Jersey's "justifiable need" requirement "*merely regulates* the manner in which persons may lawfully exercise their Second Amendment rights," State Br. p. 14 (emphasis added), and contend that this burden is "a 'longstanding' licensing provision of the kind that *Heller* identified as presumptively lawful." *Id.* at 27. The claims are erroneous.

### A. New Jersey Law *Completely Precludes* the Right to Carry a Handgun in Public for Self-Defense without a Permit

New Jersey outlaws the mere "possession" of a handgun as a "crime" (or felony) of the second degree, carrying a presumptive sentence of seven years—unless a person holds a Permit. N.J.S.A. §§ 2C:39-5(b), 2C:44-1(f)(1)(c). A

person without a Permit can only possess a handgun for target practice, hunting, fishing, and gun exhibitions, *see* N.J.S.A. § 2C:39-6(f)(1)-(2)—not self-defense.

Moreover, New Jersey strictly limits a person's ability to "transport" a handgun and does *not*, as Defendants suggest, allow people to transport handguns so long as they are "secured." *See* State Br. p. 25. Rather, transportation is lawful only "while traveling . . . [*d*]*irectly to or from*" one of the exempted activities. N.J.S.A. § 2C:39-6(f)(3)(a)-(c) (emphasis added). And, a person cannot realistically use a handgun for protection during this travel because the gun must be unloaded and cased. *See* N.J.S.A. § 2C:39-6(g). A person who has a handgun in his "possession," but who cannot establish the requirements of one of the exemptions, commits a felony—regardless of how the handgun is "secured." *State v. Aitken*, no. A-0467-10T4, 2012 N.J. Super. Unpub. LEXIS 696, *28-29 (App. Div. Mar. 30, 2012).

There are few historical or contemporary analogues to the severity of these restrictions. For example, both of the other states in the Third Circuit prohibit the unlicensed carry of concealed handguns, but allow people to "possess" handguns and to carry them in open view. *See* 11 Del. Code Ann. § 1442; 18 Pa. Cons. Stat. Ann. § 6106(a)(1). Nationwide, there are only six other states that either

completely prohibit the carry of guns, or that condition the right on a license that officials have discretion to withhold.[1]

B. The "Justifiable Need" Requirement is Not "Presumptively Lawful"

There is no basis for Defendants' claim that the "justifiable need" requirement "is a 'longstanding' licensing provision of the kind that *Heller* identified as presumptively lawful." State Br. p. 27. The measures that the Supreme Court identified as "presumptively lawful" did not broadly preclude the keeping or bearing of arms. And it is this issue—the basic scope of the right to "bear arms"—that this case presents.

Plaintiffs previously showed that the basic scope of the Second Amendment turns on its understood meaning at the time of ratification. This Court recognized in *Marzzarella* that the Second Amendment "codified the pre-ratification understanding of th[e] right." *Marzzarella*, 614 F.3d at 91; *see also Ezell v. Chicago*, 651 F.3d 684, 701 (7th Cir. 2011) (the basic scope of the right to keep and bear arms turns on "a textual and historical inquiry into original meaning"); Pl. Br. pp. 11-12.

[1] *See* Cal. Penal § 26150(a); Haw. Rev. Stat. § 134-9(a); 720 Ill. Comp. Stat. 5/24-1(a)(4); Md. Code Ann., Pub. Safety § 5-306(a)(5)(ii); Mass. Gen. L. ch. 140, § 131(d); N.Y. Penal L. § 400.00(2)(f). In some states, such as Delaware, a concealed-carry permit is discretionary, but adults can carry guns in open view without a license. *See* 11 Del. Code Ann. §§ 1441(d), 1442.

Defendants ignore this showing and instead rely on the Supreme Court's caution that "nothing in our opinion should be taken to cast doubt on" three types of gun restrictions:

> 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.

*Heller*, 554 U.S. at 626-27. Of course, the proposition that "laws forbidding the carrying of firearms *in sensitive places* such as schools and government buildings" are valid as regulations presupposes a right to bear arms in *non*-sensitive places. Pl. Br. pp. 27-28; *see also Woollard*, 2012 U.S. Dist. LEXIS 28498 at *20-21 n.8.

Defendants invoke this Court's prior observation that other types of regulations, beyond those identified as "presumptively lawful," "may very well be outside of the reach of the Second Amendment as well." State Br. p. 28 (citing *Marzzarella*, 614 F.3d at 92-93). But Defendants ignore this Court's conclusion—that "prudence counsels caution when extending these recognized exceptions to novel regulations unmentioned by *Heller*." *Marzzarella*, 614 F.3d at 93 (prohibition on obliterated serial numbers was not "presumptively lawful").

Defendants' augmentation of the "presumptively lawful" restrictions results in the exception swallowing the rule, requiring one to conclude that when the Supreme Court indicated that bans on carrying guns in *sensitive* areas were

permissible, it was actually indicating that it was permissible to ban (or nearly ban) the carry of guns in *all* areas. However, this Court has previously recognized that "we should not idly ignore considered statements the Supreme Court makes in dicta." *McDonald*, 205 F.3d at 612 (3d Cir. 2000); *accord Official Comm. of Unsecured Creditors v. Chinery*, 330 F.3d 548, 561 (3d Cir. 2003). By Defendants' expansive reasoning, "conditions and qualifications on the commercial sale of arms" could effectively ban the sale of guns. *But see Marzzarella*, 614 F.3d at 92 n.8 (it is "untenable" that "conditions and qualifications on the commercial sale" could allow "prohibiting the commercial sale of firearms"). And, "felons and the mentally ill" could presumably be expanded to include "all Americans." Plainly, this is not what the Supreme Court intended.

C. New Jersey's Preclusion of "Possession," and its Current (Restrictive) Articulation of "Justifiable Need," Date Only to the 1960s and 70s

Defendants' claim that the Permit laws have remained "virtually unchanged, since at least the 1920s" (p. 29) is wildly inaccurate. From the time New Jersey first regulated the carry of handguns (by adults) in 1905 until 1966, people only needed Permits to carry *concealed* handguns in public. *See* 1905 N.J. Laws ch. 235, § 1; *see also, e.g.*, *State v. Gratz*, 86 N.J.L. 482, 483, 92 A. 88, 89 (1914); *State v. Rabatin*, 25 N.J. Super. 24, 30, 95 A.2d 431, 434 (App. Div. 1953). New Jersey's legislature expanded the handgun laws to ban the act of "possessing" a

handgun in public without a Permit in 1966. *See* 1966 N.J. Laws ch. 60, sec. 32, § 2A:151-41(a); *see also State v. Hock*, 54 N.J. 526, 529, 257 A.2d 699, 700 (1969). Thus, the *scope* of the Permit restriction dates to 1966—*not* "at least the 1920s."

Furthermore, the currently articulated "need" standard dates only to 1971, and the term "justifiable need" itself dates only to 1978. *See* 1978 N.J. Laws ch. 95, § 2C:58-4(c), (d). The legislature added a requirement of "good cause" in 1922, *see* 1922 N.J. Laws ch. 138, § 1, and in 1924 it supplanted "need" for "cause," *see* 1924 N.J. Laws ch. 137, § 2. However, the legislature never defined either term, and the term "need" was not construed until the New Jersey Supreme Court's decision in *Siccardi v. State*, 284 A.2d 533, 59 N.J. 545 (1971). In that case, the court approved a newly adopted, county-level "strict policy which wisely confines the issuance of carrying permits to persons . . . who can establish an urgent necessity for carrying guns for self-protection." *Id.* at 540, 59 N.J. at 557.

Contrary to the Defendants' "longstanding" claim, *Siccardi* was clear that this restrictive view marked a change from prior practices, and the court described "need" as "a flexible term" susceptible to "the particular circumstances and the times." *Id.* at 539, 59 N.J. at 555. Officials could deny Permits to people who had previously been found to have adequate "need," without any apparent change in circumstances. *See id.* at 539, 59 N.J. at 556; *see also State v. Reilly*, 59 N.J. 559, 562, 284 A.2d 541, 542-43 (1971). One year after the court reiterated this

restrictive approach in *In re Preis*, 118 N.J. 564, 571, 573 A.2d 148, 152 (1990), the State codified the *Siccardi* and *Preis* "justifiable need" standard in the New Jersey Administrative Code, *see* 23 N.J. Reg. 3521(a), § 13:54-2.4(d)(1) (Nov. 18, 1991).

While there is no basis for Defendants' claim that a "longstanding" regulation can eliminate an *express* protection of the Constitution, it is also clear that the burdens here are not "longstanding"—by any measure.

## III. NEITHER HISTORY NOR TRADITION SUPPORT NEW JERSEY'S PRECLUSION ON BEARING HANDGUNS IN ANY FORM

Defendants' emphasis on concealed carry and other non-preclusive historical regulations fails to counter the fact that the bearing of arms, generally, has long been protected. Defendants fail to rebut the numerous precedents showing concealed carry prohibitions could only be sustained as *manner* regulations. And Defendants' claims about the traditional validity of barring the bearing of arms in any form are not only unsupported, but refuted.

Defendants' claim that there is no distinction between bans on the concealment of guns and bans on carrying guns in any manner (p. 16) is baseless. As Plaintiffs demonstrated, American courts have historically upheld bans on the concealed carry of firearms on the rationale that people were still free to "bear arms" by carrying them in open view. *See* Pl. Br. pp. 28-33. While Defendants

contend that these authorities do not reflect the existence of "a general right to carry a firearm outside the home," they respond to only one case. *See* State Br. p. 17.

According to Defendants, *Nunn v. State*, 1 Ga. 243 (1846), only supports the notion "that states have historically regulated and constrained the carrying of firearms." State Br. p. 19. However, *Nunn* concerned a law that banned the carry of handguns in *any* manner, and the defendant had been convicted "for having and keeping about his person, and elsewhere, a pistol." *Nunn*, 1 Ga. at 247. *Nunn* reviewed other precedent that had upheld bans on the concealed carry of firearms on the rationale that people could still carry guns in open view. *See id.* at 247-49 (quoting and discussing *Bliss v. Commonwealth*, 12 Ky. 90 (1822), and *State v. Reid*, 1 Ala. 612 (1840)). The court found that the carry prohibition was valid "so far [it] seeks to suppress the practice of carrying certain weapons *secretly*, . . . [b]ut that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and void." *Id.* at 251; *see also* Pl. Br. p. 30. The court reversed the conviction because there was no proof the gun had been concealed. *See Nunn*, 1 Ga. at 251. While the court may have gone "afield" in suggesting that the Constitution mandates the open carry of firearms over their concealed carry (State Br. p. 19), the issue of whether a state could prohibit carry

in *any* form was squarely before the court—and the court said that a state could not do this.

*Heller* itself belies Defendants' argument. When the Court wrote that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues," it cited four authorities in addition to *Nunn*: *State v. Chandler*, 5 La. Ann. 489 (1850); 2 J. Kent, COMMENTARIES ON AMERICAN LAW *340 n.2 (O. Holmes ed., 12th ed. 1873); and, THE AMERICAN STUDENTS' BLACKSTONE 84 n.11 (G. Chase ed., 1884). *See Heller*, 554 U.S. at 626. All of these authorities embraced this distinction. *See* Pl. Br. pp. 31-32; *see also Heller*, 554 U.S. at 618 (quoting COMMENTARIES).

Defendants largely ignore the other cases that Plaintiffs cite, but they and their Amici cite *Fife v. State*, 31 Ark. 455 (1876), as a case that "upheld a statute prohibiting the carrying of a pistol," State Br. p. 19; *see also* Amici Br. p. 15. This characterization is inaccurate. *Fife* did not uphold a ban on carrying *any* pistol. Rather, *Fife* reasoned that the "pocket" pistol at issue was not a protected "arm," but expressly observed that the prohibition could *not* be applied to full- or "Army" size handguns. *See Fife*, 31 Ark. at 460-61. Resolving any doubt, Arkansas's high court reversed a conviction for "an army size pistol" three years later. *See Wilson v. State*, 33 Ark. 557, 560 (1878). Another decision that Amici cite invokes this

same rationale. *See Ex parte Thomas*, 21 Okla. 770, 777-78, 97 P. 260, 263 (1908) ("arms" did not include all handguns but did include "horseman's pistols"); Amici Br. p. 16.[2]

Amici's other cited decisions merely upheld non-preclusive restrictions on the *manner* or *place* of carry. *See* Amici Br. pp. 14-17. They offer no support for the claim that states can prohibit the bearing of arms in *any* manner or place. For example, *Hill v. Georgia*, 53 Ga. 472 (1874), upheld a conviction for carrying a gun into a courtroom—but the court observed that regulations on bearing arms could not validly "interfere with the ordinary bearing and using of arms." *Id.* at 483. And, the court in *English v. State*, 35 Tex. 473 (1872), upheld convictions for carrying weapons (1) while intoxicated and (2) into a church. *Id.* at 473 (prior history). But *English* found the law was valid as a restriction on "the place, the time and the manner in which certain deadly weapons may be carried," *id.* at 477, and emphasized that the state's power was to "regulate [the right to bear arms] without taking it away." *Id.* at 478. (The court also suggested that the law might

[2] The distinction between "pocket" and "Army" pistols was not accidental and served to "render safe the high quality, expensive, military issue handguns that many former Confederate soldiers still maintained but that were often out of financial reach for cash poor freedmen." Robert J. Cottrol and Raymond T. Diamond, *"Never Intended to be Applied to the White Population": Firearms Regulation and Racial Disparity—the Redeemed South's Legacy to a National Jurisprudence?*, 70 CHI.-KENT L. REV. 1307, 1333 (1995).

be unconstitutional if applied to "holster pistols," and "side arms" of the type used in military service. *See id.* at 476-77.)

*Aymette v. State*, 21 Tenn. 154 (1840), upheld a ban on concealed carry, but—as *Heller* observes—the Tennessee court adopted a position "whereby citizens were permitted to carry arms openly." *Heller*, 554 U.S. at 613; *see Aymette*, 21 Tenn. at 160. Indeed, Tennessee's high court later overturned a law that prohibited the carry of handguns in *any* manner as "too broad to be sustained." *Andrews v. State*, 50 Tenn. 165, 187-88 (1871). Amici cites language from *Andrews* on the authority of states to regulate the carry of guns, but misses the larger point: the Tennessee court found the right to "bear arms" was inconsistent with a complete preclusion on carrying guns in public. Finally, both *State v. Buzzard*, 4 Ark. 18 (1842), and *State v. Jumel*, 13 La. Ann. 399 (1858), upheld concealed carry prohibitions as regulations on the manner of bearing arms. *See Jumel*, 13 La. Ann. at 400 ("a measure of police, prohibiting only a *particular mode* of bearing arms"); *Buzzard*, 4 Ark. at 28. None of these decisions—none—supports the proposition that the right to "bear arms" is consistent with a law that precludes "possessing" any handgun in public.

Amici's citation (pp. 14, 17) to the Statute of Northampton adds nothing new to the discussion. As discussed in Plaintiffs' brief (pp. 34-37), the Statute always required, as an element of its violation, that arms be carried specifically to

the terror of the people, as apart from merely being carried in socially acceptable ways for self-defense.

While Defendants do not address the Statute of Northampton by name, they quote a statement from *State v. Workman*, 35 W. Va. 367, 14 S.E. 9 (W. Va. 1891), that references the Statute. *See* State Br. p. 19. Defendants' (and Amici's) reliance on *Workman* ignores that the law in that case still allowed people to carry guns if they "prove[d] good character, and that they were in good faith armed only for self-defence." *Workman*, 35 W. Va. at 371, 14 S.E. at 11. Moreover, Defendants (and Amici) do not address *State ex rel. City of Princeton v. Buckner*, 180 W. Va. 457, 377 S.E.2d 139 (1988), which Plaintiffs cited twice in their opening brief (pp. 26, 46), and in which the West Virginia Supreme Court overturned a law that prohibited carrying a gun in *any* manner without a license that was granted on discretionary terms. *See id.* at 462-63, 377 S.E.2d at 144-45. The court reasoned that the law "sweeps so broadly as to infringe a right that it cannot permissibly reach, in this case, the constitutional right of a person to keep and bear arms in defense of self, family, home and state." *Id.* at 462, 377 S.E.2d at 144. Moreover, the court explained that *Workman* had "found that there was a constitutional right to self-defense guaranteed to all persons." *Id.* at 460, 377 S.E.2d at 142.

Defendants' argument that there is no right to bear arms because some historical laws disenfranchised people on the basis of their race or political

affiliation misses the point. *See* State Br. pp. 19-20 (citing *State v. Dempsey*, 31 N.C. 384, 385 (1849), and Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 LAW & HIST. REV. 139, 160 (2007)).[3] Among the Fourteenth Amendment's primary justifications was a desire to outlaw just these types of state laws. *See* Stephen P. Halbrook, SECURING CIVIL RIGHTS: FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS 5, 7-10, 15-17, 22-23 (Independent Institute 2010) (1998) (detailing gun-related "black codes" in various states and Congress' understanding that the Fourteenth Amendment would invalidate them); *see also McDonald*, 130 S. Ct. at 3040 n.23. Contrary to Defendants' characterization, historical laws that limited the bearing of arms to "the citizenry" show "that there existed then an individual right to bear arms, a right possessed only by those individuals who composed the civic polity." Calvin Massey, *Arms, Extremists, and the Constitution*, 57 WASH. & LEE L. REV. 1095, 1108 (2000). Indeed, while *Heller* and *McDonald* discussed historical laws that disarmed people on the basis of race, the Court never suggested that this historical discrimination could justify the deprivation of constitutional rights today. *See McDonald*, 130 S. Ct. at 3038-40; *Heller*, 554 U.S. at 614-16.

[3] But it should be observed that early discretionary handgun licensing laws were often the hallmark of Jim Crow. *See, e.g.*, *Watson v. Stone*, 148 Fla. 516, 524, 4 So. 2d 700, 703 (1941) (Buford, J., concurring) ("The statute was never intended to be applied to the white population and in practice has never been so applied.").

Colonial gunpowder laws also do not support the notion that people enjoy no right to bear arms in public. *See* State Br. pp. 18-19. Contrary to Defendants' contention, only the Boston law prohibited the possession of loaded firearms in buildings, and it is not clear that it actually prohibited people from using loaded guns to protect themselves at home. *See Heller*, 554 U.S. 631-32; *id.* at 685-86 (Breyer, J., dissenting). In any event, *Heller* already found that "[n]othing about those fire-safety laws undermines our analysis." *Id.* at 632; *see also Ezell v. Chicago*, 651 F.3d 684, 705-06 (7th Cir. 2011).

And, the Michigan Supreme Court's decision in *United States v. Sheldon*, 5 Blume Sup. Ct. Trans. 337 (Mich. 1829), by no means indicates that states can withhold rights on the basis of "need." *See* State Br. p. 16. *Sheldon* concerned a conviction for publishing a newspaper article that contained false and misleading information. *See Sheldon*, 5 Blume Sup. Ct. Trans. at 337-39. In the course of upholding the conviction, the court analogized the protections of the First Amendment to those of the Second:

> The constitution of the United States also grants to the citizen the right to keep and bear arms. But the grant of this privilege cannot be construed into the right in him who keeps a gun to destroy his neighbor. No rights are intended to be granted by the constitution for an unlawful or unjustifiable purpose.

*Id.* at 346. Defendants emphasize the Michigan court's use of the word "unjustifiable" (State Br. p. 16), but any application to the "justifiable need"

requirement is far out of context. The fact that the Constitution does not grant rights for "unjustifiable purposes" does not mean that states can require people to individually justify the exercise of their constitutional rights.

Finally, Professor Churchill's work does not support Defendants' claim that a preclusion on bearing arms in any manner was historically valid. *See* State Br. p. 18. The "time, place, and manner" restrictions this article discusses were restrictions on: firing guns after dark, in cities, and upon highways; poaching; setting "trip guns;" and storing loaded guns in Boston. *See* Churchill, *Gun Regulation*, *supra*, at 162-64. These do not show that early Americans accepted a ban on bearing arms in any manner. Rather, Professor Churchill explains that colonial governments "did not, strictly speaking, regulate gun ownership," but that they did act (in the manners indicated) "to curb 'dangerous' uses of guns." *Id.* at 164. Moreover, in another article appearing in the same volume, Professor Churchill repudiates Defendants' *Nunn v. State* interpretation: "The [*Nunn*] court found the law's ban on the carrying of concealed weapons to be constitutional but rejected the provisions banning the sale, possession, and open carrying of firearms as an unconstitutional infringement of the right to keep and bear arms." Robert H. Churchill, *Once More unto the Breach, Dear Friends*, 25 LAW & HIST. REV. 205, 213 (2007).

## IV. THE PRIOR RESTRAINT DOCTRINE APPLIES TO THE SECOND AMENDMENT

Defendants' claim that prior restraint principles apply only to the First Amendment and the risk of censorship, *see* State Br. p. 37, is unfounded. The prior restraint doctrine is not limited to the protections of the First Amendment, but applies more broadly to "freedoms which the Constitution guarantees." *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958). Defendants ignore that the Supreme Court has applied the basic procedural protection against unfettered discretion in other contexts, such as the right to vote and the right to travel. *See Louisiana v. United States*, 380 U.S. 145, 153 (1965) (state law could not leave registration "to the passing whim or impulse of an individual registrar"); *Kent v. Dulles*, 357 U.S. 116, 129 (1958) ("Since we start with an exercise by an American citizen of an activity included in constitutional protection, we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it."); Pl. Br. p. 41. Defendants also ignore Plaintiffs' demonstration (pp. 45-46) that state courts have found that discretionary "need"-based licensing provisions "contravene[] the essential nature of the constitutional guarantee" by "supplant[ing] a right with a mere administrative privilege." *Schubert v. De Bard*, 398 N.E.2d 1339, 1341 (Ind. Ct. App. 1980) ("proper reason"); *see also Mosby v. Devine*, 851 A.2d 1031, 1050 (R.I. 2004) ("this Court will not countenance any system of permitting under the Firearms Act that would be committed to the

unfettered discretion of an executive agency"); *People v. Zerillo*, 219 Mich. 635, 638, 189 N.W. 927, 928 (1922) ("a showing of necessity").

Defendants next argue that the protections of the First and Second Amendments are not analogous. *See* State Br. pp. 37-38. This is because the First Amendment's "core rights are not typically expressed through conduct that presents an inherent risk of grievous danger to the general public." *Id.* p. 38. But this is not accurate, for people often do exercise their First Amendment rights in ways that raise significant public safety concerns. *See McDonald*, 130 S. Ct. at 3045 ("The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications."). For example, Neo-Nazi organizations plan uniformed demonstrations through predominantly Jewish neighborhoods, and religious organizations picket the funerals of U.S. soldiers with signs that say things like, "God hates the USA." *See Snyder v. Phelps*, 562 U.S. ___, 131 S. Ct. 1207, 1213 (2011); *National Socialist Party of America v. Skokie*, 432 U.S. 43, 43 (1977); *see also Skokie v. Nat'l Socialist Party*, 69 Ill. 2d 605, 609-10, 373 N.E.2d 21, 22 (Ill. 1978). Many of the Supreme Court's leading First Amendment cases concern—and reject—public safety rationales that are offered to support unconstitutional preclusions. *See, e.g.*, *Near v. Minnesota*, 283 U.S. 697, 721-22 (1931) ("the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication").

When *Heller* concluded that societal interests could not "balance away" the Second Amendment's protections, it relied on *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977), explaining that it had "not appl[ied] an 'interest-balancing' approach" to the protesting neo-Nazis and the public safety concerns in that case. *Heller*, 554 U.S. at 635. "The Second Amendment is no different." *Id.*

The parallels between the First and Second Amendments are much stronger than Defendants suggest, and indeed, courts have observed these parallels since the earliest days of our nation. *See Commonwealth v. Blanding*, 20 Mass. 304, 314 (1825); *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319, 330 n.* (Pa. 1788). One of the cases Defendants rely upon (p. 16) even recognizes the connection. *See Sheldon*, 5 Blume Sup. Ct. Trans. at 342. The analogy is straightforward: the First and Second Amendments are the only provisions of the Bill of Rights that secure affirmative individual conduct—speech, worship, the keeping and bearing of arms—against governmental infringement. Hence, "the First Amendment is the natural choice." *Marzzarella*, 614 F.3d at 89 n.4.

Defendants' argument that prior restraint requirements cannot be applied to firearms licensing because "there is no prohibition based on content" (p. 37) is faulty. A system of prior restraint that accords an official uncontrolled discretion to grant or deny permission is unconstitutional regardless of whether or not decisions are based on viewpoint. *See, e.g.*, *Thomas v. Chicago Park Dist.*, 534

U.S. 316, 323-25 (2002) (addressing whether "adequate standards to guide the official's decision and render it subject to effective judicial review," after Court had already concluded that system was not content-based). The discussion in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), that Defendants cite to support their "content" proposition (p. 37) did not concern prior restraint protections. Rather, it concerned whether the plaintiffs had standing to challenge the law in additional applications beyond the plaintiffs' own circumstances. *See id.* at 757. This language does *not* hold that the procedural protections surrounding prior restraints apply only to prior restraints that are content-based.

Acknowledging "that courts have often looked to First Amendment law for guidance in navigating uncharted Second Amendment waters," *Woollard*, 2012 U.S. Dist. LEXIS 28498 at *24, *Woollard* nonetheless hesitated to apply an analytical framework to one right that it believed was designed specifically for another. While *Woollard* declined "prior restraint" analysis, Plaintiffs would be hard-pressed to better encapsulate the prior restraint doctrine than *Woollard*'s declaration: "A citizen may not be required to offer a 'good and substantial reason' why he should be permitted to exercise his rights. The right's existence is all the reason he needs." *Id.* at *34.

## V. THE "JUSTIFIABLE NEED" STANDARD FAILS ANY LEVEL OF MEANS-END SCRUTINY

The government has no legitimate interest in suppressing the exercise of constitutional rights—but it is just this rationale that animates the "justifiable need" requirement. *See* Pl. Br. pp. 53-56. Defendants concede that the "justifiable need" requirement serves to "limit[ ] the use of guns," and reflects the rationale that "widespread handgun possession, somewhat reminiscent of frontier days, would not at all be in the public interest." State Br. pp. 36, 33 (quotations omitted). Defendants contend they may choose who may bear arms in order "to combat the dangers and risks associated with the misuse and accidental use of handguns," and that the "justifiable need" requirement "provides a means to determine whether the increase in risk and danger borne by the public is justified." *Id.* at 33-34.

### A. There is No Legitimate Interest in Limiting the Exercise of a Right

The very existence of a right confirms that an activity is in the public interest and precludes the legislative purpose of limiting or suppressing the activity. After all, if there were a valid governmental interest in limiting the exercise of a constitutional right, then the government would be justified in prohibiting the right outright. Or alternatively, "death by a thousand cuts" would be permissible, with each preclusive law upheld as a narrowly tailored restriction that serves the "compelling" purpose of limiting the right in some application.

And this is exactly what Defendants argue. Defendants "take[ ] the effect of the statute"—limiting most people from bearing arms in New Jersey—"and posit[s] that effect as the State's interest." *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120 (1991). Here, Defendants "prove" that carrying guns for self-defense exposes the general public to a risk—and then claim the right to weigh that risk against (their assessment of) any individual person's "need" to exercise his or her constitutional right.

One need only restate this argument in terms pertinent to another right to see its defect. Could a state limit the right of peaceable assembly to those persons determined to have a message of sufficient importance—on the rationale that it "justifies" the importance of one's message against the risk of a riot? Could a state limit the right to distribute literature based on its balancing of the overall societal importance of the literature being distributed against the attendant social costs? Of course not. *Cf. Schneider v. State*, 308 U.S. 147, 162 (1939) ("Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution [of literature] results from the constitutional protection of the freedom of speech and press.").

*Heller* teaches that "[l]ike the First, [the Second Amendment] is the very product of an interest balancing by the people"—and it "takes certain policy choices off the table." *Heller*, 554 U.S. at 635, 636. New Jersey's policy choice to

*limit* the use of guns based on one's "need" to exercise their constitutional right is a policy choice that is off the table.

B. "Justifiable Need" does not Fit the Claimed Governmental Interest

Intermediate scrutiny requires a "reasonable, not perfect" degree of "fit" between a burden and a "governmental end [that is] more than just legitimate, either significant, substantial, or important." *Marzzarella*, 614 F.3d at 98 (quotations omitted). Strict scrutiny requires burdens to be "narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000). Under either approach, Defendants must justify their law, *see City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002)—a burden they cannot meet here.

The only purpose of the "justifiable need" requirement is to limit the ability of people to bear arms. "Justifiable need" stands in stark contrast to the Permit requirements that Plaintiffs do not challenge, such as criminal background requirements, and firearms training and proficiency requirements. *See generally* N.J.S.A. § 2C:58-4(c); N.J.A.C. § 13:54-2.4(b). These regulations concededly have some relation to Defendants' claimed governmental interest in "combat[ing] the dangers and risks associated with the misuse and accidental use of handguns." State Br. p. 33.

"Justifiable need," on the other hand, seeks to balance the (assessed) social cost that follows *any* exercise of the right to bear arms, regardless of how regulated, against the (assessed) "need" of a particular person to exercise his or her right. This is neither narrowly tailored nor reasonably related to the interest in preventing the *misuse and accidental use* of handguns because there is no reason that a person found to have a high "need" for self-protection is *less* likely to negligently or criminally misuse a handgun in public. *See Woollard*, 2012 U.S. Dist. LEXIS 28498 at *33 ("minimizing the proliferation of handguns among those who do not have a demonstrated need for them is not a permissible method of preventing crime or ensuring public safety" and actually "puts firearms in the hands of those most likely to use them in a violent situation").

Defendants' claim that Maryland's "good and substantial reason" requirement is significantly different from New Jersey's "justifiable need" requirement is unfounded. *See* State Br. pp. 26-27. Contrary to Defendants' assertion, Maryland law does indeed disqualify criminals and the mentally infirm from obtaining carry permits. *See* Md. Code Ann., Pub. Safety §§ 5-133(b)(1)-(9), 5-306(a)(2)-(4); *see also Md. State Police v. McLean*, 197 Md. App. 430, 432 & nn.2-3, 14 A.3d 658, 659 & nn.2-3 (Ct. Spec. App. 2011). And, before a person can even buy a handgun, they must complete a basic safety course. *See* Md. Code Ann., Pub. Safety § 5-118(b)(3)(x). Finally, contrary to Defendants' claim,

Maryland law also prohibits the carry of firearms in various sensitive places, such as schools and government buildings. *See* Md. Code Ann., Crim. L. § 4-102(b); Md. Code Regs. 04.05.01.03(B). None of these grounds for distinguishing *Woollard* even exist.

Yet, the defect in Defendants' argument is more fundamental. *Woollard* found the "good and substantial reason" requirement unconstitutional because the discretionary requirement *itself* did not serve any of these objectives—not because Maryland state law did not otherwise impose these requirements. *See Woollard*, 2012 U.S. Dist. LEXIS 28498 at *30-31.

Indeed, the parallels between Maryland and New Jersey are stronger than Defendants suggest. Maryland law stipulates that "good and substantial reason" exists where officials conclude that carrying a gun is "a reasonable precaution against apprehended danger," Md. Code Ann., Public Safety § 5-306(a)(5)(ii), and caselaw emphasizes the importance of prior threats or attacks, *see Scherr v. Handgun Permit Review Bd.*, 163 Md. App. 417, 438, 880 A.2d 1137, 1149 (Ct. Spec. App. 1996). This is substantially similar to New Jersey's definition. *See* N.J.A.C. § 13:54-2.4(d)(1). If anything, the burden of Maryland's law is *less* severe because Maryland makes it illegal to "wear, carry, or transport a handgun," while New Jersey more broadly prohibits "possession." *Compare* Md. Code Ann., Crim. L. § 4-203(a)(1)(i) *with* N.J.S.A. § 2C:39-5(b). And finally, a person who

carries a handgun without a permit in Maryland commits a "misdemeanor" with a penalty of 30 days' to 3 years' imprisonment, not a felony with a 5 to 10 year sentence. *Compare* Md. Code Ann., Crim. L. § 4-203(c)(1)-(2)(i) *with* N.J.S.A. §§ 2C:39-5(b), 2C:43-6(a)(2).

C. If a Standard of Scrutiny is Necessary, Strict Scrutiny Applies

Defendants' argument that intermediate scrutiny should apply because the "justifiable need" requirement is "'neither designed to nor has the effect of prohibiting' possession of firearms" relies on a false premise. *See* State Br. pp. 31-32 (quoting *Marzzarella*, 614 F.3d at 97). The Second Amendment protects the right to *keep* and *bear* arms, and the decision in *Marzzarella* concerned a law that prohibited the possession (keeping) of guns with obliterated serial numbers. *See Marzzarella*, 614 F.3d at 88. It was entirely appropriate for this Court to consider whether the law "prohibit[ed] the possession of any class of firearms." *See id.* at 97. The law did not—for it "le[ft] a person free to possess any otherwise lawful firearm he chooses—so long as it bears its original serial number." *Id.*

This case concerns the right to *bear* arms, and the appropriate question is whether the restriction is designed to or has the effect of prohibiting the bearing of handguns as a class. This makes the application of a strict standard of review straightforward: Defendants concede that the purpose of the "justifiable need" requirement is to prohibit most people from obtaining Permits and bearing

handguns in public. And, a person is not free to carry a handgun of some other type, or in some other manner, in the absence of a Permit.

In the context of fundamental rights, intermediate scrutiny analysis applies to *regulations*—laws imposing restrictions that still leave people with reasonable means to exercise their rights. This is why one of the core requirements of a valid time, place, and manner restriction, and its attendant intermediate scrutiny review standard, is that it "allows for reasonable alternative avenues." *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 50 (1985). A law that *precludes* the exercise of an activity is not, by definition, a "regulation," and it is not subject to intermediate scrutiny review. *See Ezell*, 651 F.3d at 703 ("Both *Heller* and *McDonald* suggest that broadly prohibitory laws restricting the core Second Amendment right—like the handgun bans at issue in those cases, which prohibited handgun possession even in the home—are categorically unconstitutional.").

## CONCLUSION

The Bill of Rights is not a bill of "needs," and the enumeration of a constitutional right to "bear Arms" precludes New Jersey's "justifiable need" requirement—whatever analytic approach the Court finds appropriate.

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s/ David D. Jensen

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,974 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii).

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I hereby certify that the text of the electronically-filed version of Appellants' Reply is identical to the text of the paper hard copies of the same document that Appellants have filed with the Court and served upon the other parties.

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I hereby certify that on July 30, 2012 I checked the electronic version of the foregoing Appellants' Reply for computer viruses using Norton Internet Security version 19.6.2.10 prior to uploading it to the Court's CM/ECF system. No viruses or other malicious programs were found.

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2012 I electronically filed the foregoing Appellants' Reply with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I further certify that on this same date I mailed 10 copies of Appellants' Reply to the Clerk of the Court, and that I have also mailed a copy of these documents to the other parties in this case.

s/ David D. Jensen