

No. 12-1150

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

DANIEL J. PISZCZATOSKI, et al.,

Plaintiffs-Appellants,

v.

THE HON. RUDOLPH A. FILKO, et al.,

Defendants-Appellees.

On Appeal from a Judgment of the United States District Court for the District of
New Jersey, by the Hon. William H. Walls., U.S.S.D.J., No. 2:10-cv-6110

BRIEF AND ADDENDUM FOR THE HON. RUDOLPH A. FILKO, et al.

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JURISDICTIONAL STATEMENT

Defendants-Appellees seek an order affirming the District Court's decision and final order, dated January 12, 2012, disposing of all parties' claims by denying Plaintiffs-Appellants' motion for summary judgment and granting Defendants' cross-motion to dismiss. *See Piszczatoski v. Filko*, 2012 U.S. Dist. LEXIS 4293 (No. 10-06110) (D.N.J. 2012) (App. 4 (opinion)). The United States District Court exercised jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, 2201, and 2202. On January 16, 2012, Plaintiffs timely appealed the District Court's order. This Court has jurisdiction to review final orders of the District Court pursuant to 28 U.S.C. § 1291.

COUNTERSTATEMENT OF ISSUES

1. Whether the District Court correctly concluded that the Second Amendment does not include an absolute right to carry handguns outside the home.
2. Whether the District Court correctly found that New Jersey's handgun permitting laws are a longstanding exception to the Second Amendment within the meaning of *District of Columbia v. Heller*, 554 U.S. 570 (2008).
3. Whether the District Court correctly ruled that the prior restraint doctrine is inapplicable and New Jersey's handgun permitting laws pass constitutional muster under the intermediate level of scrutiny.

COUNTERSTATEMENT OF THE CASE

This case concerns a Second Amendment challenge to the New Jersey statute that requires persons seeking to carry handguns in public to demonstrate “justifiable need” before obtaining a permit to do so. N.J. Stat. Ann. § 2C:58-4 (NJ Carry Permit Law).¹ The five individual Plaintiffs applied for such a permit, failed to make a sufficient showing, and, subsequently, were denied permits to carry handguns. Following the denials, on November 22, 2010, the individual Plaintiffs, along with two issue-advocacy organizations—the Second Amendment Foundation and the Association of New Jersey Rifle & Pistol Clubs, Inc.—filed an action in the United State District Court for the District of New Jersey. The named defendants are the Superior Court judges who presided over the permit application hearings for the five individual plaintiffs, the Superintendent of the New Jersey Division of State Police, two local police chiefs, and the Attorney General of New Jersey.²

On December 20, 2010, Plaintiffs moved for summary judgment. On January 26, 2011, Defendants opposed that application and cross-moved to dismiss Plaintiffs’ complaint.

¹ Defendants’ Addendum reproduces the statutory provisions necessary for the Court’s determination of the issues presented. F. R. App. P. 28(f).

² Plaintiffs initially named Paula T. Dow as defendant in her official capacity as Attorney General of New Jersey. Pursuant to Fed. R. App. P. 43(c)(2), her successor, Jeffrey S. Chiesa, is substituted as a party to this appeal.

During the pendency of the matter in the District Court, one of the plaintiffs, Jeffrey Muller, was granted a permit to carry a handgun after demonstrating justifiable need. As a result, on November 1, 2011, all parties stipulated to his and Defendant Maenza's dismissal. (Defendant Maenza was the judge who presided over Muller's permit application hearing in the Superior Court).

On January 12, 2012, the District Court denied Plaintiffs' motion for summary judgment, granted Defendants' cross-motion to dismiss, and dismissed Plaintiffs' complaint with prejudice. Plaintiffs filed a notice of appeal shortly thereafter.

COUNTERSTATEMENT OF FACTS

A. New Jersey Regulatory Standards

New Jersey's gun-control laws establish a "careful grid" of regulatory provisions." *In re Preis*, 573 A.2d 148, 150 (N.J. 1990). They "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. *Id.*

1. Possession of Firearms in the Home or Place of Business³

Possession of handguns in one's home or place of business is governed by N.J. Stat. Ann. § 2C:39-6e. That law provides an exception to the general rule, found at

³ While Plaintiffs' challenge here is to the right to carry a handgun for self-defense outside the home, New Jersey allows plaintiffs the right to possess handguns in the home where the need to defend themselves, their families, and their property "is most acute." *Heller*, 554 U.S. at 628. Not only that, New Jersey further extends that protection to plaintiffs' place of business. N.J. Stat. Ann. § 2C:39-6e.

N.J. Stat. Ann. § 2C:39-5b, that defines the knowing possession of a handgun without a permit as a criminal offense. N.J. Stat. Ann. § 2C:39-6e explains that nothing in the general rule “shall be construed to prevent a person keeping or carrying about his place of business, residence, premises or other land owned or possessed by him, any firearm.” *Id.*

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. New Jersey defines persons not able to obtain a permit to include:

- Persons convicted of a crime, disorderly persons offense, or act of domestic violence;
- Persons who are drug dependent, confined for a mental disorder, or present habitual drunkards;
- Persons suffering from a physical defect or disease which makes it unsafe to handle firearms, persons who have ever been confined for a mental disorder and alcoholics (unless the court is presented with satisfactory proof, from a medical doctor, psychiatrist, or otherwise, that the person is no longer subject to the disqualifying disability), and those who knowingly falsify any information on application for a purchase permit or firearms ID card;
- Persons under the age of 18 for a purchaser ID card or under the age of 21 for a purchase permit;

- Persons where the determination is made that issuance would not be in the interest of the public health, safety or welfare;
- Persons subject to a domestic violence restraining order;
- Persons adjudicated delinquent as a juvenile where the offense involved the unlawful use or possession of a weapon; and
- Persons whose firearms have been seized and not returned under the State Domestic Violence Law.

[See N.J. Stat. Ann. § 2C:58-3c(1)-(8).]

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. Permits to Carry Firearms

The NJ Permit Carry 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. Persons seeking to obtain a permit to carry firearms must submit an application on a form prescribed by the State Police Superintendent to either the municipal chief of police or the Superintendent, N.J. Stat. Ann. § 2C:58-4b, c, who is required to investigate and approve or disapprove the application, N.J. Stat. Ann. § 2C:58-4c.

Applicants for a permit to carry a handgun 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 (*citing Siccardi v. State*, 284 A.2d 533, 540 (N.J. 1971)). The initial approval or disapproval by the police chief or superintendent must be made within 60 days unless the applicant agrees to an extension. N.J. Stat. Ann. § 2C:58-4c.

Where an application is approved, it must then be presented to a judge of the Superior Court in the county in which the applicant resides or, for a nonresident, the county in which the applicant intends to carry the handgun. 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, by either the Superintendent or local police chief, or the Superior Court, an applicant has the right of appeal. N.J. Stat. Ann. § 2C:58-4e.

B. Parties and Facts

Plaintiffs filed their complaint on November 22, 2010. App. 54. They include individuals Daniel J. Piszczatoski, 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 Club. App. 63. Defendants are the State Defendants (the Attorney General of New Jersey, the Superintendent of the New Jersey Division of State Police, and three judges of the Superior Court of New Jersey, the Honorable Rudolph A. Filko, the Honorable Edward A. Jerejian, and the Honorable Thomas V. Manahan), as well as local Police Chiefs Frank Ingemi and Richard Cook. App. 63, 64.

The individual Plaintiffs each sought a permit to carry a handgun for self-protection purposes, but were denied by Defendants because they failed to demonstrate a justifiable need pursuant to N.J. Stat. Ann. § 2C:58-4c and d. App. 68 - 72.

C. The District Court Decision

The District Court, by the Honorable William H. Walls, U.S.S.D.J., conducted an exhaustive analysis of the issues presented in this matter, employing the two-prong approach set out by this Court in *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010), and issued a persuasive and thoughtful opinion. At the outset, Judge Walls noted that he 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.

[Slip op. at 2-3.]

After that most careful consideration, the District Court found that Plaintiffs failed, as a matter of law, to state a claim. Judge Walls held that:

1. Carrying firearms for self-defense outside of the home is not within the scope of the rights preserved by the Second Amendment because the Amendment does not provide an absolute right to carry a handgun for self-defense outside the home and the NJ Carry Permit Law does not affect one’s ability to legally possess a handgun in one’s home, or place of business. Slip op. at 3, 12-29.

2. The NJ Carry Permit Law is not facially unconstitutional because it can be applied without creating a burden on protected conduct. Slip op. at 3, 10-12.

3. The NJ Carry Permit Law is “a ‘longstanding’ licensing provision of the kind that *Heller* identified as presumptively lawful,” so it is an exception to the Second Amendment. Slip op. at 29-33.

4. The prior restraint doctrine does not apply in this context, and even if it did, the standard controlling official discretion has been clearly stated and applied. Slip op. at 3, 33-36.

5. Even if it is assumed that the burdened conduct falls within the scope of the Second Amendment, the NJ Carry Permit Law passes intermediate scrutiny, and is constitutional. Slip op. at 3, 36-45.

Therefore, on January 12, 2012, the District Court denied Plaintiffs’ motion for summary judgment, granted Defendants’ cross-motion to dismiss, and dismissed Plaintiffs’ complaint with prejudice. App. 2.

COUNTERSTATEMENT OF RELATED CASES AND PROCEEDINGS

There are no related cases or proceedings of which Defendants are aware.

COUNTERSTATEMENT OF THE STANDARD OF REVIEW

This Court exercises plenary review of the District Court’s decision to uphold the constitutionality of N.J. Stat. Ann. § 2C:58-4, to grant Defendants’ motion to

dismiss, and to deny Plaintiffs' motion for summary judgment. *Gallo v. City of Philadelphia*, 161 F.3d 217, 221 (3d. Cir. 1998).

SUMMARY OF ARGUMENT

New Jersey's requirement that a person have a justifiable need in order to carry a handgun beyond his home is a constitutionally permissible regulatory measure to combat the dangers and risks associated with the misuse and accidental use of handguns that are borne not only by the person seeking the permit, but by the citizenry he encounters. A government's foremost function is to ensure the safety of all of its citizenry. The right protected by the Second Amendment thus far only been held to protect the right to possess a handgun in one's home for purposes of self-defense. New Jersey's justifiable need requirement for the issuance of a permit to carry does not implicate that right. But even if it did, the justifiable need requirement is a permissible, reasonable regulatory measure that protects and promotes public safety.

In keeping with the historical understanding of the scope of the Second Amendment, the NJ Carry Permit Law allows for the core right of self-defense in the home, as well as the limited right to carry a weapon outside the home under reasonable restrictions. The regulations do not undermine the intent of the Second Amendment. This country's history and tradition establishes that the right to bear arms has always been subject to reasonable regulation. The NJ Carry Permit Law is part of a longstanding and careful grid of regulatory measures that have remained

virtually unchanged since at least the beginning of the Twentieth Century. Longstanding regulatory measures like New Jersey's are presumptively lawful and outside the scope of the Second Amendment.

Even if the statute implicates the Second Amendment, it withstands constitutional review. Almost every court to consider regulations governing handguns have applied the intermediate scrutiny standard to assess their constitutionality. The NJ Carry Permit Law passes muster under intermediate scrutiny review. Because the justifiable need standard is designed to combat the dangers and risks associated with the misuse and accidental use of handguns, the regulation serves a significant, substantial, and important objective. That objective directly relates to an applicant's demonstrated need to carry a handgun for self-defense and it burdens no more of any alleged right to carry than is necessary for the protection of New Jersey's citizens.

Finally, the prior restraint doctrine does not apply in the Second Amendment context. The doctrine has never before been extended to the Second Amendment. But even if it were to apply, the NJ Carry Permit Law does not vest State officials with uncontrolled discretion. Rather, the handgun permitting laws provide safeguards against arbitrary official action through a carefully constructed regulatory scheme bounded by reasonable, identifiable standards that are grounded in due process. The NJ Carry Permit law is constitutional.

ARGUMENT

In his comprehensive opinion, Judge Walls correctly recognized that “[m]odern Second Amendment doctrine is a relatively new frontier.” Slip op. at 8. It was only in 2008 that the United States Supreme Court explicitly recognized that the Second Amendment preserves an individual right to keep and bear arms for self-defense in the home. *Heller*, 554 U.S. at 595. Then, just two years ago, the Court announced that the Second Amendment applies to the states through the Fourteenth Amendment. *McDonald v. City of Chicago*, ___ U.S. ___, 130 S. Ct. 3020 (2010). But, throughout the judicial navigation of this frontier, courts have emphasized that the right to keep and bear arms is not absolute and is subject to reasonable regulation. *Heller*, 554 U.S. at 626; *McDonald*, 130 S. Ct. at 3047; *Marzzarella*, 614 F.3d at 90.

In *Marzzarella*, this Court explained the two-step approach to evaluating Second Amendment challenges. 614 F.3d at 89. First, a court asks whether the challenged statute or regulation burdens conduct that falls within the scope of the Second Amendment. If not, the inquiry is complete. *See, e.g., United States v. Huet*, 665 F.3d 588, 602 (3d Cir. 2012) (concluding that, because the conduct alleged was beyond scope of Second Amendment, “our inquiry under *Marzzarella* is complete.”). If the answer is yes, the court proceeds to the second step, evaluating the challenged law under “some form of means-end scrutiny.” *Id.* This evaluation could be

“susceptible to several standards of scrutiny” and depends on the type of law challenged and the type of conduct at issue. *Id.* at 96-97.

The regulation at issue here does not severely limit the possession of handguns, but merely regulates the manner in which persons may lawfully exercise their Second Amendment rights. Thus, if this Court determines to proceed to the second step of the *Marzzarella* analysis, it should apply intermediate scrutiny. *Id.* at 98.

POINT I

THE NJ CARRY PERMIT LAW DOES NOT IMPERMISSIBLY BURDEN CONDUCT PROTECTED BY THE SECOND AMENDMENT.

Because the NJ Carry Permit Law does not burden conduct protected by the Second Amendment, the inquiry ends here. As the District Court correctly observed, the Second Amendment “does not protect an absolute right to carry a handgun for self-defense outside the home, even if the Second Amendment may protect a narrower right to do so for particular purposes under certain circumstances.” Slip op. at 10-11. Supreme Court precedent, history and tradition, and longstanding regulation of the right to carry handguns all provide ample support for Judge Walls’ observation and analysis.

A. Heller Only Recognized a Right to Bear Arms For Self-Defense in the Home.

The District Court correctly rejected plaintiffs' insistence that *Heller* recognized a general right to carry handguns outside the home. Slip op. at 12-13. *Heller* made no such pronouncement, and this Court should reject plaintiffs' claims as well.

In *Heller*, the Court found that, "the Second Amendment conferred an individual right to keep and bear arms." 554 U.S. at 595. The Court was equally clear in its caution that the right, "[o]f course," "was not unlimited": while the right of self-defense may be a "central component" of the Amendment, *id.* at 599, the Amendment does not protect the right of citizens "to carry arms for any sort of confrontation," *id.* at 595. Indeed, the Second Amendment is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626.

Neither *Heller* nor *McDonald*, or this Court's decision in *Marzzarella*, have recognized even a general right to carry firearms for self-defense outside the home, let alone an absolute right to do so. In *Marzzarella*, this Court cautioned, "Second Amendment doctrine remains in its nascency, and lower courts must proceed deliberately" in considering challenges to reasonable regulatory measures on Second Amendment grounds. 614 F.3d at 101. The District Court did so here, finding that *Heller* "does not recognize or even suggest a broad general right to carry arms." Slip op. at 15. Rather, courts have cautiously but carefully analyzed Second Amendment claims, all the while cognizant that "to the degree that we push the right beyond what

the Supreme Court in *Heller* declared to be its origin, we circumscribe the scope of popular governance, move the action into court, and encourage litigation in contexts we cannot foresee.” *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir.), *cert. denied*, 132 S. Ct. 756 (2011).

Heller extensively discussed the uncertainty surrounding the Second Amendment’s scope. As the District Court observed, “the historical sources cited by *Heller* do not establish that the individual right necessarily extended to a broad general right to carry for self-defense.” Slip op. at 25. Indeed, *Heller* cites a number of early 19th-century state cases that found the right to be subject to restriction. 554 U.S. at 611. For example, in 1829, the Supreme Court of Michigan said that the Second Amendment 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.” (Emphasis added.) *Heller*, 554 U.S. at 611 (quoting *United States v. Sheldon*, found in 5 Transactions of the Supreme Court of the Territory of Michigan 337, 346 (W. Blume ed. 1940)). *Heller* also acknowledged 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.” 554 U.S. at 626.

Plaintiffs attempt to confuse the issue by distinguishing between carrying a firearm openly or concealed, and suggesting that, because carrying concealed weapons

has historically been disallowed, as set forth in *Heller*, there exists a general right to carry a firearm outside the home for self-protection. The District Court correctly rejected plaintiffs' argument. Slip op. at 23. At most, the court observed, the cases recited by the court in *Heller* "stand for little more than a suggestion that a categorical ban on carrying firearms in public without any alternative could implicate the Second Amendment." Slip op. at 24. These historical cases merely suggest that "such statutes would fail to pass muster only if functioning as complete bans to carrying weapons outside the home under any circumstances." *Id.* (quoting *Kachalsky v. Croce*, 817 F. Supp. 2d 235, 262 (S.D.N.Y. 2011)). As in *Kachalsky*, neither New Jersey law generally, nor the NJ Carry Permit Law specifically, operate as a complete ban on carrying handguns. In fact, the former lead plaintiff in this very action, Jeffrey Muller, received a permit to carry under the NJ Carry Permit Law while this action was pending and withdrew from the case. As the challenged statute here does not operate as a complete ban, the cases cited by plaintiffs are inapposite.

Nor do historical prohibitions on unusual and dangerous weapons confirm the existence of an established right as plaintiffs suggest. Plaintiffs' Br. at 33. To the contrary, "to the extent that the Supreme Court has not yet established a right to carry a handgun for self-defense outside the home, these categorical exceptions are irrelevant and do not establish outer bounds for the scope of Second Amendment rights." Slip op. at 26.

Other forms of gun control have been as much a part of our history as the Second Amendment itself. Adam Winkler, *Gunfight: The Battle over the Right to Bear Arms in America* ix (W. W. Norton & Company, Inc. 2011). To promote the safety of persons and property,⁴ “colonial and early state governments routinely exercised their police powers to restrict the time, place, and manner in which Americans used guns.” 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, 162 (2007).

Early on, laws regulating the storage of gunpowder to protect against fires were common.⁵ States then enacted laws regulating the discharge of guns, particularly in potentially crowded public places. Cities also reacted to curb safety concerns. In 1783, Boston enacted a law punishing any person who took a “fire-arm, loaded with, or having gun-powder” into a building within the city. Act of Mar. 1, 1783, ch. 13, 1783 Mass. Acts 218. New York had similar laws, which “would, as a practical matter, have prohibited the carrying of loaded firearms anywhere in the city” unless the

⁴ The “promotion of safety of persons and property is unquestionably at the core of the State’s police power.” *Kelley v. Johnson*, 425 U.S. 238, 247 (1976).

⁵ *See, e.g.*, Act of June 26, 1792, ch. X, 1792 Mass. Acts 208; Act of Apr. 13, 1784, ch. 28, 1784 N.Y. Laws 672; Act of Dec. 6, 1783, ch. 1059, 11 Pa. Stat. 209.

carrier always stayed outside or unloaded the gun before entering any building.⁶ *Heller*, 554 U.S. at 685 (Breyer, J., dissenting).

In *State v. Workman*, 14 S.E. 9, 11 (W. Va. 1891), the court noted that “[a]s early as the second year of Edward III, a statute was passed prohibiting all persons, whatever their conditions, ‘to go or ride armed by night or by day.’” In *State v. Dempsey*, 31 N.C. 384, 385 (1849), the court referred to an 1840 state law making it a crime for person of a certain race to carry or keep in his house any arms. Similarly, *Fife v. State* upheld a statute prohibiting the carrying of a pistol as a valid “exercise of the police power of the State without any infringement of the constitutional right.” 31 Ark. 455, 461 (1876). Finally, in *Nunn v. State*, a Georgia case discussed at length in *Heller*, the court concluded that prohibiting concealed carrying of weapons “does not come into collision with the Constitution.” 1 Ga. 243, 249 (1846). Although Judge Walls was certainly correct that the *Nunn* court “went far afield” in concluding that the Constitution required states to permit the open carrying of weapons, the Georgia court’s discussion nonetheless underscores that states have historically regulated and constrained the carrying of firearms.

⁶ The State is not arguing that the challenged provisions are valid because similar “bans” were in effect then. Rather, because gun control in the ratification era was pervasive, strict, and onerous, the Framers could not have contemplated a general right to carry in public when they did not apparently condone such a broad application of the Second Amendment.

Plaintiffs ignore the pervasive gun control extant when the Second Amendment was ratified and fail to acknowledge that the scope of the right *preserved* must inextricably have a nexus to the intentions, sentiments, social norms, and even the regulatory actions of the legislature. While the founding generation did not condone a blanket disarmament by the government, *Heller*, 554 U.S. at 593, it endorsed confiscation of arms from certain groups of “unworthy” or “untrustworthy” people. *See Churchill, supra, Gun Regulation*, 160 (on potential of Loyalists being disarmed). Various onerous laws of the era compelled every male reaching majority to maintain a firearm and ready it for inspection by officials. *Id.* Undoubtedly, these types of onerous and even compulsory laws would not be sustained today, but they certainly help paint a picture of the general sentiments of the founding generation toward gun control.

Courts throughout the country properly have heeded the warning of the Supreme Court in *Heller* about the limited nature of its holding. *See, e.g., United States v. Booker*, 644 F.3d 12, 22 (1st Cir. 2012) (“Though announcing a significant new understanding of the Second Amendment, the Court narrowly crafted *Heller*’s actual holding.”); *United States v. Vongxay*, 594 F.3d 1111, 1114-15 (9th Cir. 2010) (restricting right “to register and keep a loaded firearm in [the] home for self-defense” and noting “courts often limit the scope of their holdings, and such limitations are integral to those holdings.”), *cert. denied*, 131 S. Ct. 294 (2010); *Kachalsky*, 817 F.

Supp. 2d at 258 (observing that *Heller* is “actually quite narrow” and upholding New York’s concealed carry law); *United States v. Hart*, 726 F. Supp. 2d 56, 60 (D. Mass. 2010) (dismissing defendant’s contention that *Heller* “extends to the possession of concealed handguns outside one’s home.”); *Young v. Hawaii*, 2009 U.S. Dist. Lexis 28387, at *13 (D. Haw. Apr. 1, 2009) (finding *Heller* inapplicable because challenged statute “pertains only to the carrying of weapons on one’s person and does not constitute a complete ban to the carrying of weapons or pertain to possessing weapons in one’s home.”); *Little v. United States*, 989 A.2d 1096, 1101 (D.C. 2010) (“Appellant concedes that he was not in his own home. Thus, appellant was outside of the bounds identified in *Heller*.”); *People v. Dawson*, 934 N.E.2d 598, 607 (Ill. App. Ct. 2010) (noting that *Heller* and *McDonald* were limited to the right “to keep and bear arms in the home for the purpose of self-defense.”); *Williams v. State*, 10 A.3d 1167, 1177 (Md. 2011) (stating that “prohibition of firearms in the home was the gravamen of the certiorari questions in both *Heller* and *McDonald* ... [and] if the Supreme Court ... meant its holding to extend beyond home possession, it will need to say so more plainly.”).

Contrary to plaintiffs’ claim that the District Court improperly read *Heller* as “limited to its facts,” the majority of courts considering the issue similarly restrict themselves to *Heller*’s limited holding. In *Marzzarella*, this Court opined that “certainly, to some degree, [the Second Amendment] must protect the right of law-

abiding citizens to possess firearms for other, as-yet-undefined, lawful purposes,” for example, for purposes unrelated to self-defense. 614 F.3d at 92. *Marzzarella* specifically acknowledged *Heller’s* discussion of “hunting’s importance to the preratification conception of the right” and “the right to bear arms as a bulwark against potential governmental oppression.” *Id.* (citing *Heller*, 554 U.S. at 599). While this Court has not precluded the possibility that the Second Amendment extends to self-defense outside the home, the District Court correctly observed that such an extension has not yet been recognized or even suggested to date. Slip op. at 17.

Here, the District Court correctly determined that, “where the scope of the historical right to keep and bear arms under the Second Amendment is unclear, this right should be narrowly construed against recognizing an absolute right to carry in public,” slip op. at 28, and declined to expand the scope of the Second Amendment beyond that recognized by *Heller* and *McDonald*. The Fourth Circuit got it right: “This is serious business.” *Masciandaro*, 638 F.3d at 475. Courts should not push the right granted by the Second Amendment beyond what the Supreme Court has declared to be its origin. The District Court here recognized that and declined to extend the scope of the Second Amendment beyond *Heller’s* limits. This Court too should decline to do so.

B. Any Right to Bear Arms Outside of the Home is a Limited Right Subject to Reasonable Regulation.

Outside the home, the scope of the Second Amendment is evolving. The District Court correctly noted that it is “neither unreasonable nor arbitrary” to find a historically constitutional distinction between rights afforded at home and those afforded in public. Such differences abound, for example, in whether there is a duty to retreat before using deadly force for self-defense or the possession of obscene materials. Slip op. at 29. Rights protected under the Second Amendment similarly have differing boundaries.

Whatever the boundaries, however, they are subject to reasonable regulation. *Heller*, 554 U.S. at 626; *McDonald*, 130 S. Ct. at 3047. “[L]ongstanding regulatory measures” are not imperiled by the Court’s decisions. *McDonald*, 130 S. Ct. at 3047. Nor does the Second Amendment protect the right of citizens to carry arms for any sort of confrontation. *Heller*, 554 U.S. at 595. Thus, any right that may exist to carry a weapon outside the home is subject to regulation.

Plaintiffs attempt to convince this Court of a broader absolute right than has been recognized in the past through reference to *United States v. Miller*, 307 U.S. 174 (1939) (discussing right to transport firearms), and discussions in both *Heller* and *McDonald* about early settlers’ need to hunt for food and economic livelihood. Appellants’ Br. at 16-17. This Court should reject plaintiffs’ arguments.

At issue in *Miller* was a provision in the National Firearms Act of 1934 that made it unlawful to “ship, carry, or deliver any firearm in interstate commerce,” namely a sawed off shotgun. 307 U.S. at 175 n.1. A District Court had declared the provision contrary to the Second Amendment. *Id.* at 177. The Supreme Court reversed. In doing so, the Court first rejected the notion that the Second Amendment even conferred a right to have a sawed off shotgun. *Id.* at 178. It explained that “[d]ifferences in the language employed in [the various state provisions touching the right to keep and bear arms] have naturally led to somewhat variant conclusions concerning the scope of the right guaranteed.” *Id.* at 182. These variations aside, however, the Second Amendment did not guarantee the right to keep and transport a sawed off shotgun because the weapon was not part of any ordinary military equipment, its use could not contribute to the common defense, and there was no evidence that possession of such shotgun had any relationship to the preservation of a militia. *Id.* *Miller* stands only for the proposition that the Second Amendment, whatever its nature, extends only to certain types of weapons. *Heller*, 554 U.S. at 623. It does not help plaintiffs here.

Nor does the the Supreme Court’s discussion on the historical need for hunting assist their arguments. New Jersey permits the use and transportation of firearms for hunting, under appropriate regulations. N.J. Stat. Ann. § 2C:39-6f(2); *see generally*, N.J. Stat. Ann. §§ 23:3-1 to -22 and §§ 23:4-1 to -24.6 (laws governing hunting); N.J.

Admin. Code § 7:25-5.1 to -5.39 (game code). It also allows keeping and carrying a firearm on land owned or possessed by that person. N.J. Stat. Ann. § 2C:39-6e. As the use of handguns does not fit within the statutory scheme governing hunting, hunting falls outside the ambit of the NJ Carry Permit Law. *See Kachalsky*, 817 F. Supp. 2d at 263-264 (observing that “hunting does not involve handguns and therefore falls outside the ambit of the challenged statute.”).

New Jersey has no absolute ban on carrying a weapon outside the home. To the contrary, it permits the transportation of firearms, as long as the firearms are secured. N.J. Stat. Ann. § 2C:39-6e-g; N.J. Stat. Ann. § 23:4-24.1a. It is also permissible in this State to keep and carry a firearm as a member of a rifle or pistol club for target practice, N.J. Stat. Ann. § 2C:39-6f(1), and to carry firearms to or from exhibitions or displays, N.J. Stat. Ann. § 2C:39-6f(3)(c).

New Jersey law is consistent with the historical understanding of the scope of the Second Amendment because it allows for the core right of self-defense in the home, as well as the limited right to carry a weapon outside the home under reasonable restrictions. The regulations do not undermine the intent of the Second Amendment, but merely serves to balance the rights of citizens against “the dangers inherent in the carrying of handguns....” Slip op. at 31 (quoting *Siccardi*, 284 A.2d at 538).

C. The NJ Carry Permit Law Reasonably Regulates the Ability to Carry a Weapon.

New Jersey allows, pursuant to its “careful grid” of regulatory measures, citizens to carry handguns outside the home. *In re Preis*, 573 A.2d at 150; N.J. Stat. Ann. § 2C:58-4c. Plaintiffs incorrectly try to compare the NJ Carry Permit Law with a Maryland law found by a district court to be constitutionally infirm. Though the Maryland law places some restrictions on the right to carry a weapon, it is nothing like the NJ Carry Permit Law, and not helpful to plaintiffs’ cause. In fact, the Maryland defendants conceded that the law had no valid regulatory purpose beyond “simply ... reduc[ing] the total number of firearms carried outside the home by limiting the privilege to those who can demonstrate ‘good reason’ beyond a general desire for self-defense.” *Woollard v. Sheridan*, 2012 U.S. Dist. LEXIS 28498, at *31 (D. Md. 2012).

Importantly, the district court in *Woollard*, did not endorse the view urged by plaintiffs here that the right to carry a handgun outside the home was absolute. Instead, the court found that the Maryland statute at issue was constitutionally infirm because it was “overly broad” in seeking to advance the “undoubtedly legitimate end” of public safety and prevention of crime. *Id.* at *30. While the Maryland law required handgun permit applicants to articulate a “good and substantial reason” to carry a handgun, it did not contain any automatic disqualifiers such as those found in N.J. Stat. Ann. § 2C:58-3(c), nor did it require applicants to demonstrate they were thoroughly familiar with the safe handling and use of handguns. As a result, the court

observed, the Maryland law did not ensure that guns were kept out of the hands of criminals and the mentally ill, did not ban handguns from the places where the possibility of mayhem was most acute, did not attempt to reduce accidents by requiring permit applicants complete a safety course, and did not limit the carrying of handguns to persons deemed “suitable.” *Id.* at *30-31. That is not the case here because New Jersey laws address each of these concerns in regulating the carrying of weapons. *See, e.g.*, N.J. Stat. Ann. § 2C:58-3c (limiting purchase permits to persons of “good character and good repute” and enumerating disqualifying disabilities, such as prior conviction and mental health); N.J. Stat. Ann. § 2C:39:-5e (prohibiting possession of firearm in educational institutions); N.J. Stat. Ann. § 2C:58-4c (requiring thorough familiarity with “safe handling and use of handguns”).

To the extent the NJ Carry Permit Law might implicate some right preserved by the Second Amendment, the District Court correctly held that the requirement for a demonstration of justifiable need for a permit to carry a handgun in public is a “longstanding” licensing provision of the kind that *Heller* identified as presumptively lawful. Slip op. at 30. Second Amendment rights are not unlimited. *Heller*, 554 U.S. at 626-27. The Court emphasized that nothing in *Heller* “casts doubt on the 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 or government

buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Id.*

Heller’s list of presumptively lawful exceptions is not exhaustive, and other laws “derived from historical regulations” may very well be outside of the reach of the Second Amendment as well. *Marzzarella*, 614 F.3d at 92-93. A lawful prohibition regulates conduct “fall[ing outside] the scope of the Second Amendment’s guarantee.” *United States v. Barton*, 633 F.3d 168, 172 (3d Cir. 2011). This Court has explained that this is a “better reading, based on the text and structure of *Heller*,” than one that would require “lawful” regulations to satisfy every level of constitutional scrutiny. *Marzzarella*, 614 F.3d at 91. “In other words, the longstanding limitations mentioned by the Court in *Heller* are exceptions to the right to bear arms.” *Huet*, 665 F.3d at 600 (3d Cir. 2012) (citing *Marzzarella*). This fully comports with the Supreme Court’s reasoning in *Robertson v. Baldwin*, that the Bill of Rights was “subject to certain well recognized exceptions” from “time immemorial.” 165 U.S. 275, 281-82 (1897).

Plaintiffs incorrectly characterize *Heller*’s reference to laws prohibiting carrying firearms in sensitive places as an exhaustive list. Slip op. at 26. But the examples of presumptive lawful regulatory measures function as “precautionary language,” not “a comprehensive code” outlining the scope of the Second Amendment. *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (*en banc*). Indeed, *Heller* made clear that it did not intend to undercut legislative action aimed at

confronting gun violence where the legislation did not impermissibly impact the right to keep arms in one's home for self-defense. 554 U.S. at 626-27. Contrary to Plaintiffs' claims, the District Court here properly found that the inclusion of a sensitive places exception in *Heller* does not inextricably lead to "a general right to carry for self-defense in all non-sensitive locations," because that exception could apply to cases having nothing to do with self-defense. Slip op. at 27.

The District Court found that the NJ Carry Permit Law was, without question, a longstanding regulation of the kind *Heller* identified as presumptively lawful. Slip op. at 29-30. A longstanding regulation is one that "has long been accepted by the public," and "concomitantly the activities covered by a longstanding regulation are presumptively not protected from regulation by the Second Amendment." *Heller v. District of Columbia*, 670 F.3d 1244, 1253 (D.C. Cir. 2011) (*Heller II*). In *Heller II*, the court emphasized that the specific registration requirements it upheld were "longstanding in American law, accepted for a century in diverse states and cities and now applicable to more than one fourth of the Nation by population." *Id.* at 1254.

The NJ Carry Permit Law is just such an exception, being the law of New Jersey, virtually unchanged, since at least the 1920s. Slip op. at 31 (citing *Siccardi*, 284 A.2d at 538); *see also In re Preis*, 573 A.2d at 151. "Notably, these statutes were adopted in the same era that states began adopting the felon in possession statutes that *Heller* explicitly recognized as being presumptively lawful longstanding regulations."

Slip op. at 32 (citing *Heller II*, 670 F.3d at 1252). “The dangers inherent in the carrying of handguns and the urgent necessity for their regulation” have been well known by the New Jersey Legislature. Slip op. at 31 (quoting *Siccardi*, 284 A.2d at 538). As the District Court observed, the NJ Carry Permit Law has “been in effect and accepted by the public with substantially similar substance and procedure for almost a century.” Slip op. at 31. The justifiable need requirement is therefore tantamount to the traditional limitation on the right, placing it outside of the scope of the Second Amendment itself. Slip op. at 32.

The District Court correctly found that the challenged provisions of the NJ Carry Permit Law fall outside the scope of the Second Amendment. *Id.* Because the Supreme Court has not recognized any absolute Second Amendment right to carry firearms in public for self-defense, the Court correctly declined to extend *Heller’s* holding here. *Id.* Finally, even if the Second Amendment right might extend outside the home in certain circumstances, New Jersey’s permit requirements are longstanding regulations that are presumptively constitutional. *Id.* The District Court was correct on all counts and this Court should affirm Judge Walls’ well-reasoned decision.

POINT II

EVEN IF THE COURT PERCEIVES UNCERTAINTY ABOUT WHETHER THERE IS AN ABSOLUTE RIGHT TO CARRY OUTSIDE THE HOME FOR SELF-DEFENSE, NEW JERSEY’S CARRY PERMIT LAW IS CONSTITUTIONAL.

Because the justifiable need requirement does not implicate the Second Amendment, it is presumptively lawful and the inquiry ends. However, the District Court correctly held that, even if the NJ Carry Permit Law implicates conduct within the scope of the Second Amendment, the burden imposed by the justifiable need requirement still survives judicial scrutiny under the applicable means-end standard. Slip op. at 36. Judge Wells also properly concluded that the NJ Carry Permit Law is not invalid as a prior restraint because that doctrine does not apply in the Second Amendment context and, even if it did, the Law does not vest New Jersey officials with uncontrolled discretion. Slip op. 34-35.

A. The NJ Carry Permit Law Satisfies the Appropriate Level of Judicial Scrutiny.

In *Marzzarella*, this Court explained that a regulation that was “neither designed to nor has the effect of prohibiting” possession of firearms is “more accurately characterized as a regulation of the manner in which persons may lawfully exercise

their Second Amendment rights.” 614 F.3d at 97. As such, review of any such regulation “should merit intermediate, rather than strict, scrutiny.”⁷ *Id.*

In the Second Amendment context, this Court has explained that review of a challenged regulation requires consideration of (1) whether the asserted governmental objective is significant, substantial, or important, (2) whether the fit between the challenged regulation and the asserted objective is reasonable, and (3) whether the burden on protected conduct is not more than reasonably necessary. *Marzzarella*, 614 F.3d at 98 (citations omitted). Judge Walls accurately determined that the NJ Carry Permit Law satisfied each of these criteria.

1. New Jersey’s objective in regulating permits to carry handguns in public is significant, substantial, and important.

The New Jersey Carry Permit Law satisfies the first step of the intermediate scrutiny analysis because it regulates a governmental interest that is significant, substantial and important. *See Marzzarella*, 614 F.3d at 98.

⁷ *Marzzarella’s* holding and reasoning are consistent with, and have proven persuasive in, the weight of recent judicial authority that has considered the issue. *See, e.g., Heller II*, 670 F.3d at 1265-66 (collecting cases from sister Courts of Appeals and, relying on *Marzzarella*, concluding that intermediate scrutiny is appropriate standard); *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010) (intermediate scrutiny applied to statute prohibiting felon from possessing firearm); *Peruta v. County of San Diego*, 758 F. Supp. 2d 1106, 115-1117 (S.D. Cal. 2010) (rejecting strict scrutiny in review of challenge to requirement of good cause for permit to carry and noting majority of cases employ intermediate scrutiny).

The Legislature “was undoubtedly aware” when it enacted the regulations governing the sale and possession of firearms “of the many disastrous consequences” that had resulted in the absence of such regulation. *Burton v. Sills*, 248 A.2d 521, 524 (N.J. 1968). As the New Jersey Supreme Court explained:

The New Jersey Legislature has long been aware of the dangers inherent in the carrying of handguns and the urgent necessity for their regulation. As early as 1882 it prohibited the carrying of guns by youngsters and almost a half century ago it directed that no persons (other than those specifically exempted such as police officers and the like) shall carry guns except pursuant to permits issuable only on a showing of “need.”

[*Siccardi*, 284 A.2d at 538 (internal citations omitted).]

The Court further observed that the “strict policy” of requiring a demonstration of need “wisely confine[d]” the issuance of carrying permits to persons “who can establish urgent necessity for carrying guns for self-protection.” *Id.* at 540. The Court concluded that “widespread handgun possession in the streets, somewhat reminiscent of frontier days, would not at all be in the public interest.” *Id.* The NJ Carry Permit Law “is explicitly designed to keep firearms from all such persons whose possession would pose a threat to the public health, safety or welfare.” *Burton*, 248 A.2d at 524.

The NJ Carry Permit Law is a regulatory measure designed to combat the dangers and risks associated with the misuse and accidental use of handguns. The dangers and risks are borne not only by the person seeking the permit, but by the citizenry he encounters. *Siccardi*, 284 A.2d at 538; *see also Peruta*, 758 F. Supp. 2d at

1117 (“unlike possession in the home, carrying a concealed firearm in public presents a ‘recognized threat to public order’ and ‘poses an imminent threat to public safety’”) (citations omitted). The regulation also reduces the use of handguns in crimes. *Id.*

A government’s foremost function is to ensure the safety of all of its citizenry. *Kelley v. Johnson*, 425 U.S. at 247. As Judge Walls correctly observed here, New Jersey has not merely a significant but indeed a compelling interest in combating handgun violence, the inherent dangers and risks associated with carrying a handgun, and accidental and other misuses of such a weapon. Slip op. at 41. Similarly, reducing the use of handguns in crimes is also a compelling interest. *Id.* The NJ Carry Permit Law satisfies the first step in the intermediate scrutiny analysis.

2. The fit between the NJ Carry Permit Law and New Jersey’s objective is reasonable.

The challenged statute withstands the second step under the intermediate scrutiny analysis because it reasonably fits the asserted objective of combating the dangers and risks associated with the misuse and accidental use of handguns. *Marzarella*, 614 F.3d at 98. Although the fit need not be perfect, *id.*, the NJ Carry Permit Law precisely fits New Jersey’s interest in assessing the corresponding dangers and risk to the public and to the person seeking to carry a handgun. The Law provides a means to determine whether the increase in risk and danger borne by the public is justified by a demonstrated risk and danger borne to the person seeking to carry a handgun.

The District Court here observed, “New Jersey’s Handgun Permit Law is no political whim.” Slip op. at 41. Rather, “[t]he 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.” Slip op. at 42. The fit between the law and its objective is entirely reasonable and the second prong of the intermediate scrutiny standard is satisfied.

3. The NJ Carry Permit Law does not burden protected conduct more than reasonably necessary.

Finally, the NJ Carry Permit law satisfies the requirement that it not burden protected conduct more than is reasonably necessary. *Marzarella*, 614 F.3d at 98. It need not be the least restrictive means of serving the interest. *Id.*

The “conscientious legislative efforts aimed at keeping firearms out of the hands of all dangerously unfit persons” are valid. *Burton*, 248 A.2d at 525. The Law merely sets regulatory requirements, not prohibitions, “entailing minor inconveniences which members of our society must accept and bear in the public interest.” *Id.* The justifiable need requirement directly corresponds to the alleged right to carry a handgun for self-defense. The alleged right to carry a handgun is grounded—and given *Heller*’s recognition that the need for self-defense is most acute in one’s home, must be grounded—in a need for self-defense. *Heller*, 554 U.S. at 628. The justifiable

need standard is “flexible” and is “applied in light of the particular circumstances and the times.” *Siccardi*, 284 A.2d at 539.

Because the justifiable need requirement is directly related to an applicant’s demonstrated need for a handgun for self-defense, the District Court correctly concluded that the requirement is no more burdensome than necessary. Slip op. at 40. Indeed, other district courts have overwhelmingly found that comparable handgun permit regulations fit the interest in public safety where those regulations require applicants to demonstrate need based on specific circumstances. *See, e.g., Kachalsky*, 817 F. Supp. 2d at 271 (upholding New York’s conditioning a permit on articulable, non-speculative need for self-defense); *Peruta*, 758 F. Supp. 2d at 1117 (upholding “good cause” requirement for concealed carry).

Judge Walls correctly recognized here that, consistent with the Second Amendment, the New Jersey Legislature retains the discretion “to make the reasonable determination that limiting the use of guns leads to fewer incidents of gun-related injury and death.” Slip op. at 44. In the NJ Carry Permit Law, the Legislature crafted a statute “tailored specifically to leave room for the exercise of any alleged right to carry a handgun in public for the sole purpose of self-defense.” *Id.* To that end, the individualized consideration of each applicant under “[t]he justifiable need standard allows permits to be issued only upon a showing of objective rather than

subjective need,” and tailors the consideration of “each applicant’s individual circumstances.” *Id.*

The NJ Carry Permit Law does not unreasonably burden protected conduct any more than necessary. It is constitutional.

B. THE PRIOR RESTRAINT DOCTRINE DOES NOT APPLY IN THE SECOND AMENDMENT CONTEXT.

Finally, the District Court correctly rejected the notion that the prior restraint doctrine applies to Second Amendment cases. The prior restraint doctrine recognizes that “in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.” *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 757 (1988). “[U]nbridled licensing schemes” are subject to facial challenge when the law has “a close enough nexus to expression” “to pose a real and substantial threat of the identified censorship risk.” *Id.* No court, however, has extended the prior restraint doctrine to the Second Amendment context. Indeed, it is unclear how the doctrine could translate in this context where there is no prohibition based upon content. *See United States v. Quattrone*, 402 F.3d 304, 309-10 (2d Cir. 2005).

When courts, including this Court, have looked to First Amendment analysis, it has been for guidance to develop the appropriate standard of review in the Second Amendment context, not to apply the prior restraint framework. *See United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010) (“In the analogous First Amendment

context, the level of scrutiny we apply depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right.”). In *Marzzarella*, this Court specifically cautioned that the First and Second Amendment standards may apply differently, 614 F.3d at 96 n.15, and, as the District Court here correctly noted, this Court has declined to incorporate other First Amendment protections to the Second Amendment. Slip op. at 34; *see Barton*, 633 F.3d at 172 n.3 (rejecting application of the overbreadth doctrine outside of “limited context” of First Amendment to Second Amendment challenge).

The First Amendment presents concerns that are not presented by the Second Amendment, and its regulation does not necessarily translate into the Second Amendment context. *See Peruta*, 758 F. Supp. 2d at 1115-17 (rejecting suggestion that translation of First Amendment analysis into Second Amendment context requires application of strict scrutiny to “good cause” requirement for issuance of permit to carry concealed weapon). The First Amendment is difficult to regulate without materially infringing upon its core rights, and those core rights are not typically expressed through conduct that presents an inherent risk of grievous danger to the general public. In contrast, the Second Amendment can be regulated to further public safety without materially infringing upon the core right to self-defense in one’s home. And a handgun is inherently dangerous such that its reasonable regulation specifically furthers public safety.

Because the prior restraint doctrine has not been extended to the Second Amendment context, the District Court correctly rejected plaintiffs' invitation to apply it here. But even if the prior restraint framework were to apply, said Judge Walls, the NJ Carry Permit Law does not vest State officials with uncontrolled discretion. Slip op. at 35. Thus, the NJ Carry Permit Law pass constitutional muster even if the prior restraint doctrine did apply. *Id.*

Plaintiffs seem to suggest here that the permitting standards are inadequate or insufficient to guide the discretion of the licensor. Plaintiffs' Br. at 42. It is unclear whether their arguments are directed to initial decision-makers—the police chief and State Police Superintendent—or the Superior Court judges who make the final determination to grant or deny a permit. But in either case, their argument is without merit, was rejected by Judge Walls, and should be rejected by this Court too.

The NJ Carry Permit Law plainly sets forth the requirements for issuance of a permit to carry. N.J. Stat. Ann. § 2C:58-4. The applicant submits the standardized application form to the local police chief of the municipality in which the applicant resides or, if certain exceptions apply, to the Superintendent of State Police, for investigation and approval. N.J. Stat. Ann. § 2C:58-4c.

If the application is approved at the first level, the Superior Court “shall issue the permit to the applicant if, but only if, it is satisfied that the applicant is of good character” and “is thoroughly familiar with the safe handling and use of handguns, and

that he has a justifiable need to carry a handgun.” N.J. Stat. Ann. § 2C: 58-4c, d. If the application is denied at either level, the statute provides for a hearing and, ultimately, a right of appeal. N.J. Stat. Ann. § 2C:58-4e.

Plaintiffs incorrectly characterize the issuance of a permit to carry as being conditioned upon a discretionary determination. As Judge Walls observed, the requirement to show “need” before being given a permit to carry a handgun has persisted since at least 1924. Slip op. at 35 (citing *Siccardi*, 284 A.2d at 538). The standard is codified and judiciously applied based upon a factual record developed in accordance with an available hearing. *See* N.J. Stat. Ann. § 2C:58-4; N.J. Admin. Code § 13:54-2.1 to -2.10. In *Siccardi*, the New Jersey Supreme Court explained the protections afforded to applicants by the State’s standards and processes are “safeguards against arbitrary official action [] of greater significance than the details in the statutory standard. Those safeguards are found in ample measure in the provisions for hearing before the County Judge and review before the Appellate Division and, where necessary before [the New Jersey Supreme Court].” 284 A.2d at 539. This is hardly the exercise of unfettered subjective discretion or whimsy but instead a carefully constructed regulatory scheme bounded by reasonable, identified standards and grounded in due process.

In addition to processes and standards, *Siccardi* also explained the meaning of “justifiable need.” “Justifiable need,” the Court explained, required “an urgent

necessity ... for self-protection.” 284 A.2d at 540. “The requirement is of specific threats or previous attacks demonstrating a special danger to the applicant’s life that cannot be avoided by other means.” *In re Preis*, 573 A.2d at 152. “Generalized fears for personal safety are inadequate, and a need to protect property alone does not suffice.” *Id.*; *see also* N.J. Admin. Code § 13:54-2.4(d)(1) (codifying judicially explicated definition of justifiable need). Additionally, “each application must be dealt with on its own merits, on a case-by-case basis.” *In re Borinsky*, 830 A.2d at 516.

Here, the District Court correctly determined here that the standard controlling official discretion has been “clearly laid out and consistently applied.” Slip op. at 35. It is a “specific and clear standard ... and has become part of well-established practice in reviewing permit applications. Slip op. at 36. Judge Walls observed that plaintiffs’ real problem was not the lack of a clear standard, but rather the “results generally reached by the consistent application of this clearly articulated standard.” *Id.* But plaintiffs’ dissatisfaction with the results in certain cases does not make the law itself a prior restraint or constitutionally infirm.

Plaintiffs’ argument that permitting decisions are arbitrary because the State officials deciding the applications cannot predict crime is unavailing and, in fact, supports the conclusion that the justifiable need standard is a reasonable regulation. But the “need” for a handgun for self-defense outside of the home does not stand alone. The carrying of a handgun inherently comes with the dangers and risks of its

misuse or accidental use. These dangers and risks are borne by everyone with whom the person encounters. The State has a significant, indeed compelling, interest in its citizens being kept safe from those inherent dangers and risks. This compelling interest cannot be ignored or dismissed, and it is simply reasonable, in the face of that interest, to require an applicant to show a justifiable need before subjecting his fellow citizens to the possibility of great harm.

In sum, the justifiable need requirement combats the dangers and risks associated with the misuse and accidental use of handguns that are borne, not only by the person seeking the permit, but by the citizenry he encounters. It is a constitutional and integral component of New Jersey's carefully considered and long-standing scheme to reasonably regulate firearms in the furtherance of public safety.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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By: /s/Mary Beth Wood
Mary Beth Wood
Senior Deputy Attorney General

DATED: June 28, 2012

CERTIFICATION OF BAR MEMBERSHIP

I certify that I am an attorney in good standing of the bar of the Third Circuit.

/s/Mary Beth Wood

Mary Beth Wood
Senior Deputy Attorney General

DATED: June 28, 2012

CERTIFICATION OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a)(7)(C)(i) and L.A.R. 31.1(c), I certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) because the brief contains 9,873 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and thus does not exceed the 14,000-word limit.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using a Microsoft Word word-processing program in Times New Roman that is at least 14 points.
3. The text of the brief filed with the Court by electronic filing is identical, except for signatures, to the text of the paper copies.

4. This brief complies with L.A.R. 31.1(c) in that prior to its being electronically mailed to the Court today, it was scanned by the following virus detection software and found to be free from computer viruses:

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/s/Mary Beth Wood
Mary Beth Wood
Senior Deputy Attorney General

DATED: June 28, 2012

CERTIFICATION OF SERVICE

I hereby certify that on June 28, 2012, I caused the foregoing brief to be filed with the Clerk of the United States Court of Appeals for the Third Circuit via electronic filing and by causing an original and nine paper copies of the brief to be sent to the Clerk via postage-prepaid overnight mail. All counsel of record will receive service via the Court's electronic filing system.

By: /s/Mary Beth Wood
Mary Beth Wood
Senior Deputy Attorney General

DATED: June 28, 2012

ADDENDUM

N.J. Stat. Ann. § 2C:39-5: Unlawful Possession of Weapons.

...

- b. **Handguns.** Any person who knowingly has in his possession any handgun, including any antique handgun, without first having obtained a permit to carry the same as provided in N.J.S. 2C:58-4, is guilty of a crime of the third degree if the handgun is in the nature of an air gun, spring gun or pistol or other weapon of a similar nature in which the propelling force is a spring, elastic band, carbon dioxide, compressed or other gas or vapor, air or compressed air, or is ignited by compressed air, and ejecting a bullet or missile smaller than three-eighths of an inch in diameter, with sufficient force to injure a person. Otherwise it is a crime of the second degree.

...

N.J. Stat. Ann. § 2C:39-6: Exemptions.

...

- e. Nothing in subsections b., c. and d. of N.J.S.2C:39-5 shall be construed to prevent a person keeping or carrying about his place of business, residence, premises or other land owned or possessed by him, any firearm, or from carrying the same, in the manner specified in subsection g. of this section, from any place of purchase to his residence or place of business, between his dwelling and his place of business, between one place of business or residence and another when moving, or between his dwelling or place of business and place where such firearms are repaired, for the purpose of repair. For the purposes of this section, a place of business shall be deemed to be a fixed location.

...

N.J. Stat. Ann. § 2C:58-3: Purchase of firearms

- a. Permit to purchase a handgun.** No person shall sell, give, transfer, assign or otherwise dispose of, nor receive, purchase, or otherwise acquire a handgun unless the purchaser, assignee, donee, receiver or holder is licensed as a dealer under this chapter or has first secured a permit to purchase a handgun as provided by this section.
- b. Firearms purchaser identification card.** No person shall sell, give, transfer, assign or otherwise dispose of nor receive, purchase or otherwise acquire an antique cannon or a rifle or shotgun, other than an antique rifle or shotgun, unless the purchaser, assignee, donee, receiver or holder is licensed as a dealer under this chapter or possesses a valid firearms purchaser identification card, and first exhibits said card to the seller, donor, transferor or assignor, and unless the purchaser, assignee, donee, receiver or holder signs a written certification, on a form prescribed by the superintendent, which shall indicate that he presently complies with the requirements of subsection c. of this section and shall contain his name, address and firearms purchaser identification card number or dealer's registration number. The said certification shall be retained by the seller, as provided in paragraph (4) of subsection a. of N.J.S.2C:58-2, or, in the case of a person who is not a dealer, it may be filed with the chief of police of the municipality in which he resides or with the superintendent.
- c. Who may obtain.** No person of good character and good repute in the community in which he lives, and who is not subject to any of the disabilities set forth in this section or other sections of this chapter, shall be denied a permit to purchase a handgun or a firearms purchaser identification card, except as hereinafter set forth. No handgun purchase permit or firearms purchaser identification card shall be issued:

 - (1) To any person who has been convicted of any crime, or a disorderly persons offense involving an act of domestic violence as defined in section 3 of P.L.1991, c.261 (C.2C:25-19), whether or not armed with or possessing a weapon at the time of such offense;
 - (2) To any drug dependent person as defined in section 2 of P.L.1970, c.226 (C.24:21-2), to any person who is confined for a mental disorder to a hospital, mental institution or sanitarium, or to any person who is presently an habitual drunkard;

- (3) To any person who suffers from a physical defect or disease which would make it unsafe for him to handle firearms, to any person who has ever been confined for a mental disorder, or to any alcoholic unless any of the foregoing persons produces a certificate of a medical doctor or psychiatrist licensed in New Jersey, or other satisfactory proof, that he is no longer suffering from that particular disability in such a manner that would interfere with or handicap him in the handling of firearms; to any person who knowingly falsifies any information on the application form for a handgun purchase permit or firearms purchaser identification card;
- (4) To any person under the age of 18 years for a firearms purchaser identification card and to any person under the age of 21 years for a permit to purchase a handgun;
- (5) To any person where the issuance would not be in the interest of the public health, safety or welfare;
- (6) To any person who is subject to a restraining order issued pursuant to the "Prevention of Domestic Violence Act of 1991," P.L.1991, c.261 (C.2C:25-17 et seq.) prohibiting the person from possessing any firearm;
- (7) To any person who as a juvenile was adjudicated delinquent for an offense which, if committed by an adult, would constitute a crime and the offense involved the unlawful use or possession of a weapon, explosive or destructive device or is enumerated in subsection d. of section 2 of P.L.1997, c.117 (C.2C:43-7.2); or
- (8) To any person whose firearm is seized pursuant to the "Prevention of Domestic Violence Act of 1991," P.L.1991, c.261 (C.2C:25-17 et seq.) and whose firearm has not been returned.

d. Issuance. The chief of police of an organized full-time police department of the municipality where the applicant resides or the superintendent, in all other cases, shall upon application, issue to any person qualified under the provisions of subsection c. of this section a permit to purchase a handgun or a firearms purchaser identification card.

Any person aggrieved by the denial of a permit or identification card may request a hearing in the Superior Court of the county in which he resides if he is a resident of New Jersey or in the Superior Court of the county in which his application was filed if he is a nonresident. The

request for a hearing shall be made in writing within 30 days of the denial of the application for a permit or identification card. The applicant shall serve a copy of his request for a hearing upon the chief of police of the municipality in which he resides, if he is a resident of New Jersey, and upon the superintendent in all cases. The hearing shall be held and a record made thereof within 30 days of the receipt of the application for such hearing by the judge of the Superior Court. No formal pleading and no filing fee shall be required as a preliminary to such hearing. Appeals from the results of such hearing shall be in accordance with law.

- e. **Applications.** Applications for permits to purchase a handgun and for firearms purchaser identification cards shall be in the form prescribed by the superintendent and shall set forth the name, residence, place of business, age, date of birth, occupation, sex and physical description, including distinguishing physical characteristics, if any, of the applicant, and shall state whether the applicant is a citizen, whether he is an alcoholic, habitual drunkard, drug dependent person as defined in section 2 of P.L.1970, c.226 (C.24:21-2), whether he has ever been confined or committed to a mental institution or hospital for treatment or observation of a mental or psychiatric condition on a temporary, interim or permanent basis, giving the name and location of the institution or hospital and the dates of such confinement or commitment, whether he has been attended, treated or observed by any doctor or psychiatrist or at any hospital or mental institution on an inpatient or outpatient basis for any mental or psychiatric condition, giving the name and location of the doctor, psychiatrist, hospital or institution and the dates of such occurrence, whether he presently or ever has been a member of any organization which advocates or approves the commission of acts of force and violence to overthrow the Government of the United States or of this State, or which seeks to deny others their rights under the Constitution of either the United States or the State of New Jersey, whether he has ever been convicted of a crime or disorderly persons offense, whether the person is subject to a restraining order issued pursuant to the "Prevention of Domestic Violence Act of 1991," P.L.1991, c.261 (C.2C:25-17 et seq.) prohibiting the person from possessing any firearm, and such other information as the superintendent shall deem necessary for the proper enforcement of this chapter. For the purpose of complying with this subsection, the applicant shall waive any statutory or other right of confidentiality relating to institutional confinement. The application shall be signed by the applicant and shall

contain as references the names and addresses of two reputable citizens personally acquainted with him.

Application blanks shall be obtainable from the superintendent, from any other officer authorized to grant such permit or identification card, and from licensed retail dealers.

The chief police officer or the superintendent shall obtain the fingerprints of the applicant and shall have them compared with any and all records of fingerprints in the municipality and county in which the applicant resides and also the records of the State Bureau of Identification and the Federal Bureau of Investigation, provided that an applicant for a handgun purchase permit who possesses a valid firearms purchaser identification card, or who has previously obtained a handgun purchase permit from the same licensing authority for which he was previously fingerprinted, and who provides other reasonably satisfactory proof of his identity, need not be fingerprinted again; however, the chief police officer or the superintendent shall proceed to investigate the application to determine whether or not the applicant has become subject to any of the disabilities set forth in this chapter.

- f. Granting of permit or identification card; fee; term; renewal; revocation.** The application for the permit to purchase a handgun together with a fee of \$ 2, or the application for the firearms purchaser identification card together with a fee of \$ 5, shall be delivered or forwarded to the licensing authority who shall investigate the same and, unless good cause for the denial thereof appears, shall grant the permit or the identification card, or both, if application has been made therefor, within 30 days from the date of receipt of the application for residents of this State and within 45 days for nonresident applicants. A permit to purchase a handgun shall be valid for a period of 90 days from the date of issuance and may be renewed by the issuing authority for good cause for an additional 90 days. A firearms purchaser identification card shall be valid until such time as the holder becomes subject to any of the disabilities set forth in subsection c. of this section, whereupon the card shall be void and shall be returned within five days by the holder to the superintendent, who shall then advise the licensing authority. Failure of the holder to return the firearms purchaser identification card to the superintendent within the said five days shall be an offense under subsection a. of N.J.S.2C:39-10. Any firearms purchaser identification card may be revoked by the Superior Court of the county wherein the

card was issued, after hearing upon notice, upon a finding that the holder thereof no longer qualifies for the issuance of such permit. The county prosecutor of any county, the chief police officer of any municipality or any citizen may apply to such court at any time for the revocation of such card.

There shall be no conditions or requirements added to the form or content of the application, or required by the licensing authority for the issuance of a permit or identification card, other than those that are specifically set forth in this chapter.

...

N.J. Stat. Ann. § 2C:58-4: Permits to Carry Handguns.

- a. Scope and duration of authority.** Any person who holds a valid permit to carry a handgun issued pursuant to this section shall be authorized to carry a handgun in all parts of this State, except as prohibited by section 2C:39-5e. One permit shall be sufficient for all handguns owned by the holder thereof, but the permit shall apply only to a handgun carried by the actual and legal holder of the permit.

All permits to carry handguns shall expire 2 years from the date of issuance or, in the case of an employee of an armored car company, upon termination of his employment by the company occurring prior thereto whichever is earlier in time, and they may thereafter be renewed every 2 years in the same manner and subject to the same conditions as in the case of original applications.

- b. Application forms.** All applications for permits to carry handguns, and all applications for renewal of such permits, shall be made on the forms prescribed by the superintendent. Each application shall set forth the full name, date of birth, sex, residence, occupation, place of business or employment, and physical description of the applicant, and such other information as the superintendent may prescribe for the determination of the applicant's eligibility for a permit and for the proper enforcement of this chapter. The application shall be signed by the applicant under oath, and shall be indorsed by three reputable persons who have known the applicant for at least 3 years preceding the date of application, and who shall certify thereon that the applicant is a person of good moral character and behavior.
- c. Investigation and approval.** Each application shall in the first instance be submitted to the chief police officer of the municipality in which the applicant resides, or to the superintendent, (1) if the applicant is an employee of an armored car company, or (2) if there is no chief police officer in the municipality where the applicant resides, or (3) if the applicant does not reside in this State. The chief police officer, or the superintendent, as the case may be, shall cause the fingerprints of the applicant to be taken and compared with any and all records maintained by the municipality, the county in which it is located, the State Bureau of Identification and the Federal Bureau of Identification. He shall also determine and record a complete description of each handgun the applicant intends to carry.

No application shall be approved by the chief police officer or the superintendent unless the applicant demonstrates that he is not subject to any of the disabilities set forth in 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. If the application is not approved by the chief police officer or the superintendent within 60 days of filing, it shall be deemed to have been approved, unless the applicant agrees to an extension of time in writing.

- d. Issuance by Superior Court; fee.** If the application has been approved by the chief police officer or the superintendent, as the case may be, the applicant shall forthwith present it to the Superior Court of the county in which the applicant resides, or to the Superior Court in any county where he intends to carry a handgun, in the case of a nonresident or employee of an armored car company. 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. The court may at its discretion 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. At the time of issuance, the applicant shall pay to the county clerk of the county where the permit was issued a permit fee of \$ 20.00.
- e. Appeals from denial of applications.** Any person aggrieved by the denial by the chief police officer or the superintendent of approval for a permit to carry a handgun may request a hearing in the Superior Court of the county in which he resides or in any county in which he intends to carry a handgun, in the case of a nonresident, by filing a written request for such a hearing within 30 days of the denial. Copies of the request shall be served upon the superintendent, the county prosecutor and the chief police officer of the municipality where the applicant resides, if he is a resident of this State. The hearing shall be held within 30 days of the filing of the request, and no formal pleading or filing fee shall be required. Appeals from the determination at such a hearing shall be in accordance with law and the rules governing the courts of this State.

If the superintendent or chief police officer approves an application and the Superior Court denies the application and refuses to issue a permit,

the applicant may appeal such denial in accordance with law and the rules governing the courts of this State.

- f. Revocation of permits.** Any permit issued under this section shall be void at such time as the holder thereof becomes subject to any of the disabilities set forth in section 2C:58-3c., and the holder of such a void permit shall immediately surrender the permit to the superintendent who shall give notice to the licensing authority.

Any permit may be revoked by the Superior Court, after hearing upon notice to the holder, if the court finds that the holder is no longer qualified for the issuance of such a permit. The county prosecutor of any county, the chief police officer of any municipality, the superintendent or any citizen may apply to the court at any time for the revocation of any permit issued pursuant to this section.