

No. 13-827

IN THE
Supreme Court of the United States

JOHN M. DRAKE, ET AL.,

Petitioners,

V.

EDWARD A. JEREJIAN, ET AL.,

Respondents.

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

**BRIEF OF *AMICI CURIAE* CATO INSTITUTE
AND MADISON SOCIETY FOUNDATION IN
SUPPORT OF PETITIONERS**

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QUESTIONS PRESENTED

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

2. Whether state officials violate the Second Amendment by requiring that individuals wishing to exercise their right to carry a handgun for self-defense first prove a “justifiable need” for doing so.

or

Was this Court serious in *District of Columbia v. Heller* when it ruled that the Second Amendment protects the individual right to keep and bear arms?

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INTEREST OF *AMICI CURIAE*¹

Established in 1977, the Cato Institute is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*. Cato filed *amicus* briefs in both *District of Columbia v. Heller* and *McDonald v. Chicago*, as well as in subsequent cases seeking this Court's review of the scope of the right to keep and bear arms.

The Madison Society Foundation is a 501(c)(3) organization founded in 2001 to promote and preserve the Constitution through education and litigation. MSF believes that individual constitutional rights should not be infringed to deny citizens their life, liberty, and pursuit of happiness. The focus of MSF's litigation efforts is challenging violations of the right to keep and bear arms. Information on cases in which MSF has been involved may be found in the litigation section of its website, the www.Madison-Society.org.

This case concerns *amici* because it involves the natural right to armed self-defense, as protected through the Second and Fourteenth Amendments.

¹ No party or counsel for a party authored or contributed monetarily to the preparation or submission of any portion of this brief. Counsels of record for all parties were given timely notice of *amici*'s intent to file this brief and gave consent.

ARGUMENT

THIS COURT MUST START CLARIFYING THE SCOPE OF THE SECOND AMENDMENT RIGHT BECAUSE THE LOWER COURTS ARE HOPELESSLY CONFUSED—MANY ACT AS IF *HELLER* NEVER HAPPENED—AND THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR DOING SO

A. Six Years After *Heller*, Second Amendment Doctrine Is in Disarray

Before *District of Columbia v. Heller*, 554 U.S. 570 (2008), the lower courts primarily relied on this Court’s previous benchmark Second Amendment case, *United States v. Miller*, 307 U.S. 174 (1939), to determine the basic nature of the right protected by the Second Amendment. In the nearly 70 years between *Miller* and *Heller*, they lacked this Court’s guidance on precisely who or what the Second Amendment protected. The understandable result was that numerous circuit and state courts erroneously constrained the right to bear arms to militia service. See *Cases v. United States*, 131 F.2d 916, 923 (1st Cir. 1942); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996); *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992); *United States v. Parker*, 362 F.3d 1279 (10th Cir. 2004); *United States v. Wright*, 117 F.3d 1265, 1274 (11th Cir. 1997).

While *Heller* and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), finally established that the Second Amendment protects an individual’s fundamental right to keep and bear arms for self-defense, recent lower-court rulings—particularly the decision below—have made clear that without

further guidance from this Court, the Second Amendment will not be respected at the same level as its constitutional peers.

Indeed, there is widespread—and growing—disagreement in the lower courts regarding the breadth and depth of the individual right enumerated in the Second Amendment. This disagreement extends far beyond divergent outcomes, to the basic question of how to analyze Second Amendment claims. Some have combined an historical approach to determining the scope of the right with rigorous scrutiny of the restrictions on that right, akin to the doctrines used in the First Amendment context. Others have used approaches that, however labeled, amount to little more than deferential rational-basis review, including a presumption of constitutionality (unheard-of in the context of other fundamental rights). Still others have advocated developing a common-law-style body of rules based on historical practice.

Amicus Cato has previously called to this Court's attention the difficulties the lower courts are having in post-*Heller* interpretation of the Second Amendment. See Br. of Amicus Curiae Cato Institute in Support of the Petition for Writ of Certiorari at 13, *Kachalsky v. Cacace*, 133 S. Ct. 1806 (2013) (No. 12-845); Br. of Amicus Curiae Cato Institute in Support of Petitioners at 3, *Woollard v. Gallagher*, 134 S. Ct. 422 (2013) (No. 13-42). These difficulties are exceedingly evident in the decision below, so *amici* incorporate the points Cato previously raised in its briefs supporting the *Kachalsky* and *Woollard* petitions. Those concerns are even greater here, where the court ruled that the right bear arms, even

if fundamental, could be trumped by longstanding regulation. In *Drake v. Filko*, the Third Circuit “abdicate[d] its duty” of judicial review and disabled the Second Amendment, *Drake v. Filko*, 724 F.3d 426, 457 (3d Cir. 2013) (Hardiman, J., dissenting), thereby amplifying the call for this Court to act.

After all, no other constitutional right has been so left to fend for itself in the lower courts with regard to its scope and the means of assessing restrictions on that right. This Court has not hesitated to seize opportunities to ensure the protection of other constitutional rights—recognizing historically based categorical rules, developing comprehensive methodologies, and announcing robust standards. This Court’s clarification is necessary and urgent because the decision not only misread *Heller* and eviscerated the Second Amendment but betrayed a fundamental misunderstanding of the nature of a constitutional right. It also deepened the circuit split regarding the jurisprudential standards to apply when interpreting the right to keep and bear arms.

B. Confusion in the Lower Courts Severely Impairs the Right to Bear Arms

With the infrequency of this Court’s guidance on matters affecting the Second Amendment, many lower courts have preferred doctrines that treat the Second Amendment as a less-than-fundamental right. Nowhere is that more clear than in the decision below, which “inverts” the right to bear arms, expressing a skepticism that the right exists *at all* outside the home and applying a sham “scrutiny” that acts as a rubber stamp for any gun regulation.

Perhaps the most worrisome part of the lower court's decision is the affirmation of a state's restriction of a fundamental right to only those with a "justifiable need." New Jersey's statute restricts the possession of non-permitted handguns, N.J. Stat. Ann. § 2C:39-5(b), and grants permits only to individuals who can show:

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).

By upholding the statute, the Third Circuit approved the conditioning of the exercise of a fundamental right on a citizen's being able to prove, to a state official's discretionary satisfaction, the special need to exercise it. As *amicus* Cato noted in its briefs supporting the *Woollard* and *Kachalsky* cert. petitions, this is a novel premise that entirely misconstrues the operation of fundamental rights. Br. of Amicus Curiae Cato Institute in Support of the Petition for Writ of Certiorari at 10, *Kachalsky v. Cacace*, 133 S. Ct. 1806 (2013) (No. 12-845); Br. of Amicus Curiae Cato Institute in Support of Petitioners at 4, *Woollard v. Gallagher*, 134 S. Ct. 422 (2013) (No. 13-42). It is inconceivable that other fundamental rights would be subjected to such a regime. For example, a law that conditioned a parade permit on a state official's decision that a particular organization or cause "needs" such a parade would be unquestionably unconstitutional—and so too here.

After all, constitutionalizing a right establishes by the highest law that individuals are entitled to act in certain ways if they wish, and thereby protects such conduct against legislators' prejudices and shifting fads. As this Court said in *Heller*, "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." 554 U.S. at 634. On that logic, allowing this decision to stand nullifies the constitutional guarantee of a right to bear arms in New Jersey. That is so even if state legislators were unsure whether the Second Amendment protected an individual right because they enacted the statute at issue before this Court decided *Heller*.

Moreover, the lower courts have made clear that they are confused about what an individual right to bear arms for self-defense means. While the Court noted in *Heller* that "the need for defense of self, family, and property is *most* acute" in the home, 554 U.S. at 628 (emphasis added), and in *McDonald* that the right exists "*most notably* for self-defense within the home, 130 S. Ct. at 3044 (emphasis added), the decision below somehow finds this language sufficient to negate for all practical purposes the existence of the right outside of the home. The Third Circuit's ruling is the most willfully confused lower-court interpretation of the Second Amendment yet. *Heller*'s establishment of the right to bear arms for self-defense makes little sense when restricted entirely to the home, seeing as confrontations implicating that right are not limited to the home. Such a misreading of the scope of the right to bear arms, like the inversion of the right noted above, severely impairs the right's exercise.

C. This Case Is an Excellent Vehicle to Address the Lower-Court Confusion Because It Presents an Opportunity to Clarify Narrow but Vital Aspects of the Second Amendment

Heller provided much-needed guidance on the basic nature of the right to bear arms, while *McDonald* cemented it as a fundamental right against state infringement. But these landmark pronouncements will be rendered hollow if the lower courts are allowed to stray further. This case provides an excellent vehicle for reining them in. The questions presented by the petitioners are narrow and straightforward, and touch on important, foundational issues regarding the proper scope and analysis of the right to keep and bear arms.

The petitioners' first Question Presented allows the Court to reject the extreme misinterpretation of *Heller* that holds that the Second Amendment lacks *any* application outside the home for individual self-defense. This premise cannot be squared with any reasonable reading of *Heller*, and can be corrected without speculating as to the appropriateness of future time, place, and manner regulations.

The petitioners' second Question Presented offers the Court the chance to strike down cleanly a law that inverts the operation of the Second Amendment. Doing so would signal that the Court is committed to holding the right to armed self-defense on equal footing with other fundamental rights. It would be inconceivable for the First Amendment to be treated as the lower court treated the Second. This Court has no better opportunity to reassert its commitment to protecting constitutional rights by explaining that no

government may condition the exercise of a fundamental right on arbitrary legislative or executive discretion.

If this Court's declaration in *McDonald* that "the Second Amendment should [not] be singled out for special—and specially unfavorable—treatment," 130 S. Ct. at 3043, is to have any weight with the lower courts, this Court must not neglect the persistent confusion regarding that constitutional provision—as it did in the decades between *Miller* and *Heller*. Reviewing the jurisprudential miscarriage in the decision below would be an excellent way to demonstrate the Court's commitment to the normalcy of the Second Amendment. This case presents a simple and clean vehicle for doing so.

CONCLUSION

Whatever analytical approach the Court ultimately employs in defining the scope of the Second Amendment, the time has come to begin filling in the picture that the Court outlined in *Heller*, and to bring harmony to the cacophony below. This Court should therefore grant the petition.

Respectfully submitted,

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