No. 16-894

In the Supreme Court of the United States

EDWARD PERUTA; MICHELLE LAXSON; JAMES DODD; LESLIE BUNCHER, DR.; MARK CLEARY; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION,
Petitioners,

v.

STATE OF CALIFORNIA; COUNTY OF SAN DIEGO; WILLIAM D. GORE, individually and in his capacity as Sheriff,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC.; NEW JERSEY RIFLE & PISTOL CLUBS, INC.; COMMONWEALTH SECOND AMENDMENT, INC.; CONNECTICUT CITIZENS DEFENSE LEAGUE, INC.; MARYLAND STATE RIFLE & PISTOL ASSOCIATION, INC.; AND GUN OWNERS OF CALIFORNIA IN SUPPORT OF PETITIONERS

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INTERESTS OF THE AMICI[1]

The Amici are leading state-level organizations that represent the interests of people living in jurisdictions that, "as things stand, . . . have been judicially empowered to deprive ordinary, law-abiding citizens of any means of exercising" their right to bear arms. Petition, p.19. Specifically, the Amici represent the interests of lawful gun owners in Connecticut, Maryland, Massachusetts, New Jersey, and New York, as well as California. This Court's decision—to grant certiorari, or to continue denying it—will have major ramifications for the Amici's membership.

Amicus New York State Rifle & Pistol Association, Inc. ("NYSRPA") is a nonprofit member organization first organized in 1871 in New York City. NYSRPA is the oldest firearms advocacy organization in the United States, and it is the largest firearms organization in the state of New York. NYSRPA provides education and training in the safe and proper use of firearms, promotes the shooting sports, and supports the right to keep and bear arms through both legislative and legal action.

Amicus Association of New Jersey Rifle & Pistol Clubs, Inc. ("ANJRPC") is a nonprofit membership corporation organized in 1936 to represent the interests of target shooters, hunters, competitors, outdoors people, and other lawful firearms owners in New

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[1] No counsel for any party authored this brief in whole or in part, nor did any counsel or party make any monetary contribution intended to fund the preparation or submission of this brief. All parties' counsel of record received timely notice of the intended filing of this brief, and all consented to its filing.

Jersey. ANJRPC seeks to aid such persons in every way within its power, and to support and defend the people's right to keep and bear arms, including the right of its members and the public to purchase, possess, and carry firearms. ANJRPC is the largest statewide organization that is dedicated to the shooting sports and the right to keep and bear arms.

Amicus Commonwealth Second Amendment, Inc. ("Comm2A") is a Massachusetts nonprofit corporation dedicated to preserving and expanding the Second Amendment rights of individuals residing in Massachusetts and New England. Comm2A works locally and with national organizations to promote a better understanding of the rights that the Second Amendment guarantees. Comm2A has previously submitted amicus curiae briefs to this Court and to state supreme courts, and it has also sponsored litigation to vindicate the rights of lawful Massachusetts gun owners. Comm2A receives and responds to many queries from the public regarding firearms laws and licensing in Massachusetts, and particularly, regarding the implementation of the discretionary standards that govern licenses to carry handguns.

Amicus Connecticut Citizens Defense League, Inc. ("CCDL") is a non-partisan grass roots organization that works to promote Second Amendment rights through legislative action and to educate the public about legal requirements and potential legislative and regulatory developments. CCDL provides resources for individuals seeking to obtain licenses in both Connecticut and in states adjacent to Connecticut, many of which make it difficult or impossible for

Connecticut residents to obtain licensure. In particular, CCDL provides assistance to individuals who, having been denied licenses by local authorities, must accordingly seek relief from the Connecticut Board of Firearms Permit Examiners. CCDL receives numerous queries from applicants throughout the state who have been delayed or denied the issuance of carry permits.

Amicus Maryland State Rifle & Pistol Association, Inc. ("MSRPA") is a nonprofit organization dedicated to promoting safe and responsible marksmanship, competition, and hunter safety throughout Maryland. MSRPA also seeks to educate citizens about responsible firearm ownership. MSRPA advocates on behalf of its members, which include both individual firearm owners and firearm and marksmanship clubs.

Finally, amicus Gun Owners of California ("GOC") is a California nonprofit corporation that was organized in 1974. GOC is a leading voice in California, supporting the rights to self-defense and to keep and bear arms that the Second Amendment guarantee. GOC monitors government activities at the national, state, and local levels that may affect the rights of the American public to choose to own firearms.

SUMMARY OF ARGUMENT

States regulate the carry of handguns in various manners, and most approaches appear consistent with this Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008). But of those states that maintain laws at odds with the right to bear arms, conflicts among the reviewing courts have reached the point of irreconcilability. While courts have generally upheld

laws that condition the ability to carry handguns on discretionary grants of permission, they have done so on rationales that are totally inconsistent. Indeed, if followed in other jurisdictions, these competing rationales would call into doubt laws that other courts have upheld. Amici provide the Court with an overview of pertinent laws outside California and then show how the conflicts that have arisen play out in that context.

ARGUMENT

I. The National Context

Because the distinction between concealed and open carry was an essential part of both the *en banc* panel's reasoning and the reasoning of several other courts, amici begin by providing an overview of the current status of this issue. Amici then discuss the history and current status of the five other states that continue to maintain restrictive, discretionary laws that effectively preclude many or all people from bearing arms.

A. Regulation of Open and Concealed Carry

Every state and the District of Columbia make some provision for concealed carry, but they often treat open carry differently—some allow it without license, some require licensure, and some prohibit it altogether. Over 30% of the U.S. population lives in places that prohibit open carry.

1. Unlicensed Carry in Any Manner—10 States

The states of Alaska, Arizona, Idaho, Kansas, Maine, Mississippi, Missouri, Vermont, and West

Virginia all allow people (otherwise eligible to possess firearms) to carry handguns in any manner, open or concealed, without any requirement to obtain a license.[2] Notably, many of these states issue licenses that, while not required, may enable people to carry guns out-of-state or in additional manners or places.[3]

2. Unlicensed Open Carry and Licensed Concealed Carry—20 States

The most numerically prevalent approach—that of Alabama, Arkansas, Colorado, Delaware, Kentucky, Louisiana, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Dakota, Virginia, Washington, and Wisconsin—is to prohibit the unlicensed carry of concealed guns, but to leave people free to carry guns in open view without a license.[4]

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[2] *See* Alaska Stat. § 11.61.220(a)(1); Ariz. Rev. Stat. § 13-3102(A); Idaho Code Ann. § 18-3302(4)(f); Kan. Stat. Ann. § 75-7c03(a); 25 Me. Rev. Stat. Ann. § 2001-A(2)(A-1); Miss. Code Ann. § 45-9-101(24); Mo. Ann. Stat. § 571.030(1)(1); W. Va. Code Ann. § 61-7-3(a); Wyo. Stat. Ann. § 6-8-104(a)(4).

[3] *See, e.g.*, Alaska Stat. § 18.65.700(a); Ariz. Rev. Stat. §§ 4-244(29), 13-3112(C); Kan. Stat. Ann. § 75-7c03(a); 25 Me. Rev. Stat. Ann. § 2003; Mo. Ann. Stat. § 571.101; Bryan Lowry, *Brownback signs bill that allows permit-free concealed carry of guns in Kansas*, Kansas City Star, Apr. 2, 2015, *available at* http://www.kansascity.com/news/politics-government/article17232419.html (last visited Feb. 15, 2017).

[4] *See* Ala. Code § 13A-11-73(a); Ark. Code Ann. § 5-73-120(a); Colo. Rev. Stat. Ann. § 18-12-105(1)(b); 11 Del. Code Ann. § 1442; Ky. Rev. Stat. Ann. § 527.020(1); La. Rev. Stat. Ann. § 14:95(A)(1); Mich. Comp. Laws Ann. § 750.227(2); Mont. Code Ann. § 45-8-316(1); Neb. Rev. Stat. § 28-1202(1)(a); Nev. Rev. Stat. Ann. § 202.350(1)(d)(3); N.H. Rev. Stat. Ann. § 159:4(I); N.M. Stat. Ann.

Except for Delaware, each of these states issues concealed carry licenses on a nondiscretionary basis, and Delaware, notably, recognizes licenses from several nondiscretionary jurisdictions.[5]

3. Licensed Open or Concealed Carry—14 States

The next most prevalent approach is to prohibit any manner of carry (open or concealed) without a license, but to allow people with licenses to carry in either manner.[6] Ten states—Connecticut, Georgia, Indiana,

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§ 30-7-2(A)(5); N.C. Gen. Stat. § 14-269(a1)(2); Ohio Rev. Code Ann. § 2923.12(A)(2); Or. Rev. Stat. Ann. § 166.250(1)(a); 18 Pa. Cons. Stat. Ann. § 6109(e)(1); S.D. Codified Laws § 22-14-9(1); Va. Code Ann. § 18.2-308(A); Wash. Rev. Code Ann. § 9.41.050(1)(a); Wis. Stat. § 941.23(2)(d); *see also* Op. Ark. Att'y Gen. no. 2015-064 (2015).

[5] *See* Ala. Code § 13A-11-75(a)(1)(a); Ark. Code Ann. § 5-73-309; Colo. Rev. Stat. Ann. § 18-12-203(1); 11 Del. Code Ann. § 1441(d); Ky. Rev. Stat. Ann. § 237.110(4); La. Rev. Stat. Ann. § 40:1379.3(A)(1); Mich. Comp. Laws Ann. § 28.422(3); Mont. Code Ann. § 45-8-321(1); Neb. Rev. Stat. § 69-2430(3)(b); Nev. Rev. Stat. Ann. § 202.3657(3); N.H. Rev. Stat. Ann. § 159:6(I)(a); N.M. Stat. Ann. § 29-19-4(A); N.C. Gen. Stat. § 14-415.11(b); Ohio Rev. Code Ann. § 2923.125(D)(1); Or. Rev. Stat. Ann. § 166.291(1); 18 Pa. Cons. Stat. Ann. § 6109(e)(1); S.D. Codified Laws § 23-7-7; Va. Code Ann. § 18.2-308.04(C); Wash. Rev. Code Ann. § 9.41.070(1); Wis. Stat. § 175.60(2)(a); *see also* Attorney General of Delaware, *Concealed Weapons Reciprocity*, available at http://attorneygeneral.delaware.gov/criminal/concealedweapons.shtml (last visited Feb. 15, 2017).

[6] *See* Ga. Code Ann. § 16-11-126(h)(1); Ind. Code Ann. § 35-47-2-1(a); Iowa Code Ann. § 724.4(1); Minn. Stat. § 624.714, subdiv. 1a; N.D. Cent. Code §§ 62.1-03-01(1)-(2)(a), 62.1-04-02; 21 Okla. Stat. Ann. § 1290.4; Tenn. Code Ann. § 39-17-1307(a)(1); Tex. Penal Code § 46.02(a); Utah Code Ann. §§ 76-10-504(1), 76-10-505(1).

Iowa, Minnesota, North Dakota, Oklahoma, Tennessee, Texas, and Utah—issue the requisite licenses on nondiscretionary terms.[7] Four states—Hawaii, Maryland, Massachusetts, and New Jersey—have discretionary laws (*infra*).[8]

4. Licensed Concealed Carry Only—5 States and D.C.

Several states mandate that firearms be concealed, rather than exposed to view, and one state appears to embody a statutory preference for concealment. Florida, Illinois, and South Carolina all prohibit open carry, but each state allows concealed carry under licenses issued on nondiscretionary terms.[9] Both New York and (in most cases) California also mandate concealed rather than open carry, but they have discretionary laws.[10] In addition, the District of Columbia's recently enacted discretionary scheme (not otherwise addressed in light of its infancy) similarly

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[7] *See* Ga. Code Ann. § 16-11-129(d)(4); Ind. Code Ann. § 35-47-2-3(e); Iowa Code Ann. § 724.7(1); Minn. Stat. § 624.714, subdiv. 2(b); N.D. Cent. Code § 62.1-04-03(1); 21 Okla. Stat. Ann. § 1290.12(A)(13); Tenn. Code Ann. § 39-17-1351(b); Tex. Gov't Code § 411.177(a); Utah Code Ann. § 53-5-704(1)(a). Connecticut provides that local authorities "may" issue a permit, but that a review panel "shall order" issuance of a permit if a person meets the statutory qualifications. *See* Conn. Gen. Stat. §§ 29-28(b), 29-32b(b).

[8] *See* Haw. Rev. Stat. § 134-9(c); Md. Code Ann., Crim. Law § 4-203(a)(1); Mass. Gen. L. ch. 269, § 10(a)(2); N.J. Stat. Ann. § 2C:39-5(b).

[9] *See* Fla. Stat. § 790.06(2); 430 Ill. Comp. Stat. 66/10(a); S.C. Code Ann. § 23-31-215(A).

[10] *See* Cal. Penal Code § 26150(b)(2); N.Y. Penal L. § 400.00(2)(f).

requires that people carry "in a manner that it is entirely hidden from view." D.C. Mun. Regs. tit. 24, § 2344.1. Finally, the territories of Guam and Puerto Rico also require concealment. *See* Guam Code Ann. tit. 10, § 60109.1(*l*)(1); P.R. Laws Ann. tit. 25, § 456a(d)(1). Rhode Island is somewhat unique in that it has two different licensing schemes—one that allows carry in any manner, and one that allows only concealed carry.[11] The licensing scheme governing concealed carry is nondiscretionary, while the license allowing carry in any manner is discretionary, reflecting an apparent legislative preference for concealed carry.[12]

All told, about 30.4% of the U.S. population lives in places that prohibit open carry in favor of concealed carry.[13] And even where open carry is lawful, people may choose to carry concealed to avoid unnecessary alarm or contacts with law enforcement. *See*, *e.g.*, *Northup v. City of Toledo Police Dep't*, 785 F.3d 1128 (6th Cir. 2015).

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[11] *See* R.I. Gen. Laws §§ 11-47-11(a), 11-47-18(a).

[12] *See Mosby v. Devine*, 851 A.2d 1031, 1047 (R.I. 2004).

[13] July 1, 2016 estimates including the District of Columbia, Puerto Rico, and 28 California counties that prohibit open carry. *See* Census Bureau, *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2016*, http://www2.census.gov/programs-surveys/popest/tables/2010-2016/state/totals/nst-est2016-01.xlsx (last visited Feb. 15, 2017); California Dep't of Finance, *E-1 Population Estimates for Cities, Counties and the State—January 1, 2015 and 2016*, http://www.dof.ca.gov/Forecasting/Demographics/Estimates/E-1/documents/E-1_2016_InternetVersion.xls (last visited Feb. 15, 2017).

B. The Five Other States that Continue to Broadly Preclude the Bearing of Arms

1. New York and Massachusetts

New York and Massachusetts have three essential commonalities. First, both states prohibit people from possessing handguns—anywhere and at any time—unless they hold licenses. *See* Mass. Gen. L. ch. 140, § 129C; *id*. ch. 269, § 10(a)(2); N.Y. Penal L. §§ 265.01-b, 265.03(3), 265.20(a)(3). Second, both states delegate licensing decisions to local officials. *See* Mass. Gen. L. ch. 140, §§ 121, 131(d) (chief police officers); N.Y. Penal L. §§ 265.00(10), 400.00(3)(a) (judges and certain police agencies). And finally, both states give these designated local officials broad discretion to issue licenses subject to restrictions, such as "hunting and target shooting," which preclude carrying guns for the purpose of self-defense. *See* Mass. Gen. L. ch. 140, § 131(a); *O'Connor v. Scarpino*, 638 N.E.2d 950, 951, 83 N.Y.2d 919, 921 (1994). The result is a patchwork of different and inconsistent policies and practices that vary as one moves from locality to locality.

Massachusetts has prohibited the unlicensed carry of handguns in any manner (open or concealed) since 1906, the longest such prohibition to remain on the books. *See* 1906 Mass. Acts. ch. 172, § 1. The basic requirement for licensure, both then and now, is that an official "may . . . issue a license . . . if it appears that the applicant has good reason to fear injury to his person or property, and that he is a suitable person to be so licensed." *Id.*; *see also* Mass. Gen. L. ch. 140, § 131(d). Once issued, a license authorizes its holder to "carry" a handgun without regard to whether the gun

is concealed or exposed. Mass. Gen. L. ch. 140, § 131(a).

New York first prohibited unlicensed carry in any manner when it passed the so-called "Sullivan Law" in 1911, which made it illegal to have "possession" of a handgun "without a written license therefor." 1911 N.Y. Laws ch. 195, sec. 1, § 1897. Two years later, the legislature amended the statute to provide for the nondiscretionary issuance of "dwelling" licenses, but to mandate that people could only obtain licenses "to have and carry concealed" if an official found "that proper cause exists for the issuance thereof." 1913 N.Y. Laws ch. 608, sec. 1, § 1897; *see also* N.Y. Penal § 400.00(2)(a), (f). Both then and now, the only license that exists for a private citizen seeking to carry a handgun for protection is one "to . . . have and carry concealed . . . when proper cause exists for the issuance thereof." N.Y. Penal L. § 400.00(2)(f).

To a large extent, both states preclude the bearing of arms by means of "target and hunting" and similar restrictions. Massachusetts law expressly provides that licenses are "subject to such restrictions relative to the possession, use or carrying of firearms as the licensing authority deems proper." Mass. Gen. L. ch. 140, § 131(a). And in New York, notwithstanding a lack of express statutory language, the Court of Appeals has ruled that the "power to determine the existence of 'proper cause' for the issuance of a license necessarily and inherently includes the power to restrict the use to the purposes that justified the issuance." *O'Connor*, 638 N.E.2d at 951, 83 N.Y.2d at 921. In either state, violation of a restriction can result in suspension or revocation of a license, and in Massachusetts a fine is

possible. *See* Mass. Gen. L. ch. 140, § 131(a); *People v. Thompson*, 705 N.E.2d 1200, 1201, 92 N.Y.2d 957, 959 (1998).

The result is that restriction practices vary—sometimes markedly—throughout each state. In Massachusetts, most police chiefs normally issue unrestricted licenses, but some restrict most or all licenses. Information that Amicus Comm2A obtained from the Commonwealth shows that during the year 2015, 345 police chiefs issued licenses, and 238 of those chiefs did not impose restrictions on *any* licenses. On the other hand, police chiefs in 14 localities—including Boston, Lowell, and Springfield—imposed restrictions on more than 50% of licenses. *See Massachusetts License to Carry Summary—2015*, *available at* http://comm2a.org/images/PDFs/ltc_score_card_2015.pdf (last visited Feb. 15, 2017). For the people living in these cities and towns, it is either difficult or impossible to obtain unrestricted licenses—while people living literally one door over across a town line can obtain them with relative ease. As of January 2016, there were 351,103 licenses in force, and 324,147 of them (92.3%) were unrestricted. Massachusetts has an overall carry license rate of 4.8%.[14]

In New York, there is no official source for either the number of licenses or the rate at which counties impose restrictions. *See* General Accounting Office, *States' Laws and Requirements for Concealed Carry Permits Vary Across Nation* 77 n.d (2012). Unofficial sources indicate that about half of New York's 55 counties normally issue licenses without restriction,

[14] *See Annual Estimates*, *supra* note 13.

while roughly 7 counties and the City of New York normally issue restricted licenses to almost all applicants. *See* David D. Jensen, *The Sullivan Law at 100: A Century of "Proper Cause" Licensing in New York State*, 14 NYSBA Gov., L. & Pol'y J. 6, 9-10 (2012). It is notoriously difficult to obtain an unrestricted license in New York City, which defines "proper cause" as "[e]xposure . . . to extraordinary personal danger" either "by reason of employment or business necessity," or else "by proof of recurrent threats to life or safety." N.Y. City R. tit. 38, § 5-03(a)-(b). A 2008 *New York Times* article, relying on information provided by the New York City Police Department, reported that 2,291 New York City residents held "full carry" handgun licenses—which equates to about 0.028% of the City's population.[15] *See* Sewell Chan, *Annie Hall, Get Your Gun*, N.Y. Times, Dec. 2, 2008.

2. New Jersey

New Jersey falls into a class of its own. Like New York and Massachusetts, New Jersey makes it a crime to have "*possession* [of] any handgun . . . without first having obtained a permit to carry." N.J. Stat. Ann. § 2C:39-5(b) (emphasis added). But unlike New York and Massachusetts, New Jersey refuses to issue any permit (even a restricted one) in all but the most extreme of circumstances. Rather, the vast majority of New Jersey citizens can only "possess" handguns by attempting to rely on a separate statute that excepts narrow, delineated activities. *See id.* § 2C:39-6(e)-(f).

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[15] *See* Census Bureau, *QuickFacts—New York City, New York*, http://www.census.gov/quickfacts/table/SEX205210/3651000 (last visited Feb. 15, 2017) (2010 population).

These exceptions allow possession and carry at one's home or business, at a shooting range, or while hunting, but they do not allow bearing arms for the purpose of protection. *See id.* A person who possesses a handgun outside these exceptions, even if unintentionally, commits a crime punishable by imprisonment for 5 to 10 years, and a first-time offender faces a recommended sentence of 7 years. *Id.* §§ 2C:39-5(b), 2C:43-6(a)(2), 2C:44-1(f)(1)(c).

New Jersey first criminalized the unlicensed carry of handguns in any manner (open or concealed) in 1966. *See* 1966 N.J. Laws ch. 60, sec. 32, § 2A:151-41(a); *see also State v. Hock*, 257 A.2d 699, 700, 54 N.J. 526, 529 (1969). Prior to 1966, New Jersey had required a license to carry concealed, but unlicensed people had remained free to carry handguns in open view. *See* 1924 N.J. Acts ch. 137, § 2; 1922 N.J. Acts ch. 138, § 1; *see also State v. Gratz*, 92 A. 88, 89, 86 N.J.L. 482, 483 (1914).

In actual practice, New Jersey has the most restrictive licensing regime in the continental United States. Both regulations and precedent direct officials to withhold licenses unless they find an applicant has "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 § 13:54-2.3(d)(1); *see also In re Preis*, 573 A.2d 148, 151-52, 118 N.J. 564, 570-71 (1990). In litigation, the attorney general's office disclosed that New Jersey had issued a total of 1,285 licenses during the years 2010 and 2011, which

equates with a licensure rate of 0.015%.[16] *See* Dec. of Lt. Joseph Genova at ¶¶ 13-14, *Drake v. Filko*, No. 12-1150 (3d Cir. Feb. 27, 2013).

3. Maryland and Hawaii

In both Maryland and Hawaii, state laws prohibit the act of carrying a gun in any manner without a license, and further, they mandate a restrictive licensing policy that prevents almost everyone from obtaining licensure. Maryland law makes it a crime to "wear, carry, or transport a handgun, whether concealed or open" without a license. *See* Md. Code Ann., Crim. Law § 4-203(a)(1)(i), (b)(2). For a license to issue, state police must find that an applicant "has good and substantial reason to wear, carry, or transport a handgun, such as a finding that the permit is necessary as a reasonable precaution against apprehended danger." Md. Code Ann., Pub. Safety § 5-306(a)(6)(ii); *see also* Md. Code Regs. 29.03.02.03. Officials normally do not issue licenses unless applicants can show "apprehended danger" in the form of specific, documented threats. *See Snowden v. Handgun Permit Review Bd.*, 413 A.2d 295, 297-98, 45 Md. App. 464, 469-70 (Ct. Spec. App. 1980); *accord Scherr v. Handgun Permit Review Bd.*, 880 A.2d 1137, 1148-49, 163 Md. App. 417, 437-38 (Ct. Spec. App. 2005). Maryland first prohibited the unlicensed carry of handguns in any manner in 1972. *See* 1972 Md.

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[16] *See Annual Estimates*, *supra* note 13 (2010 estimates). Each license has a duration of two years. *See* N.J. Stat. Ann. § 2C:58-4(a). The GAO reports a higher number, but this appears to include retired law enforcement licenses. *See States' Laws*, *supra*, at 76; *see also* N.J. Stat. Ann. § 2C:39-6(*l*).

Laws ch. 13, § 3, sec. 36B(b); *see also Smith v. State*, 308 A.2d 442, 445 n.2, 18 Md. App. 612, 616 n.2 (1973).

In Hawaii, it is illegal to carry "concealed or unconcealed on the person a pistol or revolver without being licensed." Haw. Rev. Stat. § 134-9(c); *see also id.* § 134-25. Hawaii law allows license issuance only "[i]n an exceptional case, when an applicant shows reason to fear injury to the applicant's person or property. . . ." *Id.* § 134-9(a). Hawaii first prohibited the unlicensed carry of handguns in any manner, and made the license subject to an official's discretion, in 1927, before statehood. *See* 1927 Haw. Sess. Laws 209-10, §§ 5, 7.

In terms of their actual practices, Maryland issues a few licenses—more than New York City or New Jersey, but fewer than other states—while Hawaii issues virtually none. The difficult of obtaining a license in Maryland appears to vary somewhat with the views of the governor's office, as "the law does allow substantial room for a governor to tip the scales." Editorial, *Hogan and guns*, Baltimore Sun, Apr. 4, 2016; *see also* Mike Lewis, *More Marylanders can get wear-and-carry gun permits*, Herald-Mail Media, Sept. 5, 2016. According to the GAO report, about 12,000 people, or 0.28% of the state's population, held licenses in 2011. *See States' Laws*, *supra*, at 75. This is still much less than the licensure rates in the neighboring states of Pennsylvania and Virginia, where 8.3% and 4.7% of the respective populations held licenses at the time of the report. *See id.* at 75-76.

The prospect of licensure is largely illusory in Hawaii, as there are normally *no* licenses in force anywhere in the state. During 2015, for example, officials denied all 44 of the individuals who applied for

licenses. *See* Department of the Attorney General, *Firearms Registrations in Hawaii, 2015* 9 (2016). There were no licenses in force at the time of the 2012 GAO report. *See States' Laws*, *supra*, at 75.

II. Lower Courts have Reached the Point of Irreconcilable Conflict

While certainly not unanimous, most courts of last resort have ultimately concluded that the right to bear arms protects, at least to *some* extent, the right to carry guns in public. *See, e.g.*, *Bonidy v. United States Postal Serv.*, 790 F.3d 1121, 1131 (10th Cir. 2015) ("Only an unrealistic reading of that language could restrict the right to the home. . . ."). Rather, much of the actual locus of disagreement centers on the restrictive licensing schemes discussed above. While courts reviewing these laws have often reached the same superficial result—that under "intermediate scrutiny" the discretionary scheme is constitutional, even where it disenfranchises nearly everyone subject to its jurisdiction—they have done so on the basis of competing, inconsistent, and irreconcilable constructions of the Second Amendment and *Heller*. Amici detail three areas of disagreement.

A. "History and Tradition do not Speak with One Voice Here"

The Second Circuit upheld New York's "proper cause" requirement in *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012). The core of the Second Circuit's decision was its conclusion that, unlike the issue of possession in the home, "New York's restriction on firearm possession in public has a number of close and longstanding cousins. History and

tradition do not speak with one voice here." *Id.* at 91. The court grounded this conclusion in a predicate conclusion—that notwithstanding numerous authorities against complete bans on carry, three statutes banning the carry of pistols in any form had, in its view, "withstood constitutional challenges." *Id.* at 90-91 (citing *Fife v. State*, 31 Ark. 455 (1876); *English v. State*, 35 Tex. 473 (1871); *Andrews v. State*, 50 Tenn. 165 (1871)).

This historical conclusion is dubious—and it has led to substantial disagreement, at best. *See Drake v. Filko*, 724 F.3d 426, 451 (3d Cir. 2013) (Hardiman, J., dissenting); *Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2013). In two of the three decisions the Second Circuit cited, the courts actually ruled the law was unconstitutional to the extent it applied to handguns "adapted to the usual equipment of the soldier," *Andrews*, 50 Tenn. at 186-88, or "in ordinary use, and effective as a weapon of war, and useful and necessary for 'the common defense,'" *Fife*, 31 Ark. at 460-61. But more fundamentally, all of these cases "interpret the Second Amendment as a militia-based (rather than a self-defense-centered) right," the very view that *Heller* overturned. *Peruta v. County of San Diego*, 742 F.3d 1144, 1174 (9th Cir. 2014), *vacated* 781 F.3d 1106 (9th Cir. 2015).

B. Disagreement Over "Presumptively Lawful," "Longstanding" Restrictions

The Third Circuit relied primarily on a different consideration to uphold New Jersey's restrictive licensing law, and one that is the subject of significant disagreement among the courts—the scope and extent of the "presumptively lawful regulatory measures" that

this Court identified in *Heller*. *See Drake*, 724 F.3d at 431-32.

At the end of its decision in *Heller*, after expounding on the history and meaning of the Second Amendment at length, this Court cautioned that "nothing in our opinion should be taken to cast doubt on" three identified "longstanding prohibitions": (1) "the possession of firearms by felons and the mentally ill;" (2) "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings;" and (3) "laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626-27. In a footnote, the Court explained that it "identif[ied] these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 627 n.26.

This passage from *Heller* has spawned extensive discussion—and inconsistency—among the lower courts. Indeed, almost half of the decisions that cite *Heller* make reference to "longstanding prohibitions" or "presumptively lawful" measures.[17] But courts are all over the place on what this language actually means. Some courts have found that the presumptively lawful, longstanding prohibitions are examples of conduct falling *within* the scope of Second Amendment protection, which presumptively pass muster when reviewed. *See United States v. Smoot*, 690 F.3d 215, 221 (4th Cir. 2012) (presumptively lawful regulations subject to as-applied challenges); *United States v. Torres-Rosario*, 658 F.3d 110, 113 (1st Cir. 2011)

[17] A *Shepards* report on February 12, 2017 indicates 1,703 citing cases, of which 763 (44.8%) reference "longstanding prohibitions" or "presumptively lawful."

(same); *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010) (same). Other courts conclude that the activities lay wholly *outside* Second Amendment protection. *See Jackson v. City & County of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014); *NRA of Am., Inc. v. BATFE*, 700 F.3d 185, 196 n.9 (5th Cir. 2012); *Commonwealth v. McGowan*, 982 N.E.2d 495, 500, 464 Mass. 232, 238 (2013). The Third Circuit previously adopted an intermediate approach, that restrictions on the commercial sale of arms were within the scope of protection, while the other two examples were not. *See United States v. Marzarella*, 614 F.3d 85, 91-92 & n.8 (3d Cir. 2010). And at least one court suggests that other courts may be placing too much importance on this passage in the first place. *See United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc) ("We do not think it profitable to parse these passages of *Heller* as if they contained an answer to the question whether § 922(g)(9) is valid. They are precautionary language.").

In *Drake*, a majority of the Third Circuit panel took things a significant step further by finding that New Jersey's "justifiable need" standard for a license was *itself* a presumptively lawful, longstanding restriction that fell wholly outside the scope of Second Amendment protection. *See Drake*, 724 F.3d at 429. According to the court, "[t]he 'justifiable need' standard Appellants challenge has existed in New Jersey in some form for nearly 90 years." *Id.* at 432. But as discussed *supra* I(B)(2), New Jersey has only restricted the carry of guns in any manner (open or concealed) since 1966, and prior to this date, the requirement of "need" applied only to licenses to carry concealed. *See id.* at 451 (Hardiman, J., dissenting). The end result of

the Third Circuit's approach is incredible—the Court's cautionary statement that it did not intend "to cast doubt on" three types of regulations has been expanded to entirely eclipse the enumerated right to "bear arms" for the vast majority of New Jersey citizens. It is even more incredible when one considers that New Jersey has the lowest rate of licensure of any state in the continental U.S. *Supra* I(B)(2). Here, the exception has swallowed the rule.

C. Disputes Over Concealed and Open Carry

The panel below held that "there is no Second Amendment right for members of the general public to carry concealed firearms in public." *Peruta v. County of San Diego*, 824 F.3d 919, 927 (9th Cir. 2016) (en banc). While observing "[t]here may or may not be" a right "to carry a firearm openly," the right "does not include, in any degree," concealed carry. *Id.* at 939.

The panel was not alone in this conclusion. In *Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013), the Tenth Circuit likewise held that the "activity" of "carry[ing] firearms in a concealed manner" simply did "not fall within the scope of the Second Amendment's protections." *Id.* at 1201. The issue there was the interplay between state laws that prohibited both the unlicensed carry of concealed weapons and the issuance of licenses to nonresidents, and a Denver law that prohibited carrying firearms in any manner (concealed or open) without a state-issued concealed handgun license. *See id.* at 1202. The result was that, while a nonresident could carry a gun in open view in most of Colorado, the person could not carry while in Denver. *See id.* at 1202, 1208. The court's ruling turned largely on the manner in which the nonresident plaintiff had

presented his claim. Because he had disavowed any challenge to the Denver ordinance, the court found he only had standing to challenge the state's refusal to issue concealed carry licenses to nonresidents. *See id.* at 1208. And this claim, the Tenth Circuit ruled, was categorically outside Second Amendment protection. *See id.* at 1211. But the court made an observation that reflected the logical extension of its ruling: "had [the plaintiff] challenged the Denver ordinance [that prohibits open carry], he may have obtained a ruling that allows him to carry a firearm openly while maintaining the state's restrictions on concealed carry." *Id.* at 1209.

In contrast, the Seventh Circuit had little difficulty concluding that the Illinois Firearms Concealed Carry Act—which prohibits open carry in favor of concealed carry, *supra* I(A)(4)—is consistent with the Second Amendment. Shortly after it overturned Illinois' complete ban on carrying guns, the Seventh Circuit described the new law as "[c]onsistent with our decision in the *Moore* case," even though it was "a 'concealed carry' law; that is, in contrast to 'open carry' laws, the gun must not be visible to other persons." *Shepard v. Madigan*, 734 F.3d 748, 749-50 (7th Cir. 2013). The Seventh Circuit has characterized the issue in Illinois as "the right of concealed carry"—a framing that belies any suggestion that the act of concealed carry is categorically outside protection. *See Culp v. Madigan*, 840 F.3d 400, 401 (7th Cir. 2016). And in the only case (known to counsel) to claim a right to open carry in Illinois, the district court denied relief, finding no right to bear arms other than in the concealed manner the state had mandated. *See Southerland v. Escapa*, 176 F. Supp. 3d 786, 791 (C.D. Ill. 2016).

A Florida appellate court has likewise upheld that state's prohibition on open carry on the rationale that the state could, constitutionally, restrict people to carrying guns only in a concealed manner. *See Norman v. State*, 159 So. 3d 205, 226 (Fla. Dist. Ct. App. 2015). The court reasoned that "Florida's ban on open carry, while permitting concealed carry, does not improperly infringe on Florida's constitutional guarantee, nor does it infringe on 'the *central component*' of the Second Amendment—the right of self-defense." *Id.* at 219 (quoting *Heller*, 554 U.S. at 599).

Of similar import is the Supreme Court of Rhode Island's decision in *Mosby v. Devine*, 851 A.2d 1031 (R.I. 2004), which addressed licensing laws in the context of a state constitutional provision protecting "[t]he right of the people to keep and bear arms." R.I. Const. Art. I, § 22. As discussed previously, *supra* I(A)(4), Rhode Island issues two different licenses to carry handguns—a "shall issue" local license, and a discretionary *need*-based one from the state attorney general. *See Mosby*, 851 A.2d at 1047. In *Mosby*, the Rhode Island high court upheld the attorney general's statutory authority to withhold licenses based on "need" on the rationale that the local license, still available to "anyone who meets the conditions of" the statute, "supplies the necessary safeguards to the right to bear arms in this state and vindicates the rights set forth in" the Rhode Island constitution. *Mosby*, 851 A.2d at 1048. Of course, the essential difference between these two licenses is that the attorney general license authorizes carry "whether concealed or not," R.I. Gen. Laws § 11-47-18(a), while the local license authorizes a person only "to carry concealed," R.I. Gen. Laws § 11-47-11(a). Thus, the Rhode Island high court

has found that a statutory entitlement to carry concealed, only, fulfills the state's right to bear arms, a decision that likewise could not be squared with the ruling of the panel below.

CONCLUSION

Both state and federal appellate courts have reached a point of irreconcilable conflict. Final decisions directly conflict, and some would result in the invalidation of laws that other decisions have upheld. The result of this conflict is the ongoing denial of Second Amendment rights to many of the members of the Amici organizations—who respectfully urge that the petition should be granted.

Respectfully submitted,

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