No. 13-827

In The
Supreme Court of the United States

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

Petitioners,

v.

EDWARD A. JEREJIAN, THOMAS D. MANAHAN, JOSEPH R. FUENTES, ROBERT JONES, RICHARD COOK, AND JOHN JAY HOFFMAN,

Respondents.

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

AMICUS BRIEF OF WYOMING, ALABAMA, ALASKA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, KANSAS, KENTUCKY, LOUISIANA, MICHIGAN, MISSOURI, NEBRASKA, NEW MEXICO, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA AND WEST VIRGINIA IN SUPPORT OF THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

INTEREST OF THE AMICI CURIAE[1]

The State of Wyoming and other states file this Brief in support of Petitioners' petition for writ of certiorari because the United States Court of Appeals for the Third Circuit's decision in *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013) threatens to erode the protections provided by the Second Amendment to the United States Constitution. The amici states urge that this Court grant certiorari to provide further guidance on the unanswered questions in the wake of *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. ___, 130 S. Ct. 3020 (2010) (plurality opinion). Since *Heller* and *McDonald* were decided, significant splits of authority have developed in both the federal and state courts as they have tried to answer questions involving the right to keep and bear arms outside of the home. Because this Court's interpretation of federal constitutional rights is binding on the states, citizens of the amici states have an interest in this Court's interpretation of the scope of Second Amendment rights and in the analytical framework that must be used to justify any limits placed on these rights.

[1] In accordance with Rule 37.2(a), on January 31, 2014, counsel for the lead amicus timely informed counsel of record for the parties of its intent to file this brief at least ten days before it was due. Counsel of record were provided this notification by United States Postal Service certified mail and by email.

SUMMARY OF ARGUMENT

The Supremacy Clause dictates that federal law is the supreme law of the land and that any state law that conflicts with federal law must give way. Because of that clause, the federal government sets the minimum protections offered under the United States Constitution, but states may afford their citizens greater or different protections where the federal government has not otherwise preempted the field. Because this Court held that the Fourteenth Amendment incorporated the Second Amendment against the states in *McDonald*, any federal court pronouncement restricting the scope of that right affects the rights of the citizens of the amici states and their current regulatory schemes. Should the Third Circuit's analysis in *Drake* stand, states providing greater protection for their citizens' Second Amendment rights may be preempted by future federal action.

In *Heller* and *McDonald*, this Court declined to fully define the scope of the right to keep and bear arms and the standard of review that must be applied to laws burdening the right, leaving the lower courts to fill these voids. A definitive split among the federal and state courts has developed regarding both the scope of the right and the analytical framework that must be applied if the Second Amendment is implicated. This Court should grant the petition for writ of certiorari to provide guidance in this developing area of law regarding a fundamental right of United States citizens.

ARGUMENT

I. The Third Circuit's decision poses an issue of fundamental importance that stands to shape the future impact of the Second Amendment on all states.

Because the Fourteenth Amendment incorporated the Second Amendment against the states, federal courts' pronouncements may now call into question the future viability of the amici states' chosen schemes for regulating the possession and use of handguns. Should the Third Circuit's interpretation of the Second Amendment and its analysis stand, it could serve as advance judicial endorsement of future congressional action, which could preempt and forever change the protections state legislatures have sought to guarantee to their citizens.

A. The Third Circuit's decision in *Drake* implicates federalism concerns.

Beginning in the early twentieth century, this Court has selectively incorporated many of the rights enumerated in the Bill of Rights as binding upon the states through the Fourteenth Amendment. *McDonald*, 130 S. Ct. at 3034-35 & n.12. Once this Court incorporates a Bill of Rights protection, state governments may not infringe on the rights guaranteed by that protection. *Id.* The Supremacy Clause in Article Six of the United States Constitution ensures that this boundary is respected. U.S. Const. art. VI, cl. 2.

The Supremacy Clause provides that the Constitution "and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby. . . ." *Id.* Therefore, the Bill of Rights and this Court's lines of cases interpreting its provisions serve as minimum guidelines for individual rights guarantees, below which states may not traverse. *Danforth v. Minnesota*, 552 U.S. 264, 279-80 (2008). While respecting these minimum federal boundaries, states may provide more expansive protections. *Id.* at 280.

In *McDonald*, this Court held that the Fourteenth Amendment incorporated the Second Amendment right to keep and bear arms against the states, ensuring that states were also prohibited from infringing on these rights. *McDonald*, 130 S. Ct. at 3035, 3050, 3088. This Court's opinions in *Heller* and *McDonald* provided limited guidance on these Second Amendment protections. *Heller*, 554 U.S. at 576-95; *McDonald*, 130 S. Ct. at 3050, 3088. Except for laws that impose a total ban on handguns, the kinds of regulations on firearms that might offend these minimum federal boundaries have yet to be determined. *Heller*, 554 U.S. at 626-27 & n.26, 634-35.

In addition to setting minimum federal boundaries for constitutional rights, the Supremacy Clause dictates that state laws that "interfere with, or are contrary to, the laws of Congress" must yield because federal law is supreme. *Gibbons v. Ogden*, 22 U.S. 1, 82 (1824). Although the federal government has not yet comprehensively regulated individual handgun

possession or permitting, it has addressed which individuals may possess firearms and at what federally controlled locations. *See, e.g.*, 18 U.S.C. §§ 922(g), 930 (2012); 16 U.S.C. §§ 1(a)-7(b) (2012). Against this sparse backdrop of federal law governing individual handgun possession, each state has adopted laws creating its own regulatory framework. In doing so, the states relied on the established minimum federal boundary.

B. The analysis in *Drake* threatens state permitting schemes that provide greater Second Amendment protection than does New Jersey.

The differences between gun laws in Wyoming and New Jersey illustrate the vastly different approaches taken by the states. In stark contrast to New Jersey's "justifiable need" requirement for the issuance of a permit to carry a handgun, Wyoming law does not require a permit. *Compare* N.J. Stat. Ann. § 2C:58-4(c) (West 2005), *with* Wyo. Stat. Ann. § 6-8-104(a)(iv) (LexisNexis 2013). In fact, Wyoming's approach to regulating guns is so different from New Jersey's that the Wyoming Legislature has proclaimed "that the right to keep and bear arms is a fundamental right. The Wyoming [L]egislature affirms this right as a constitutionally protected right in every part of Wyoming." Wyo. Stat. Ann. § 6-8-401(a) (LexisNexis 2013).

While Wyoming law does not require a permit to carry a concealed handgun, residents may still apply for one. Wyo. Stat. Ann. § 6-8-104(b) (LexisNexis 2013).

Under this optional permitting scheme, 23,127 Wyomingites held valid handgun permits in 2011, which was nearly 6% of the adult population age 21 and over.[2] By contrast, under New Jersey's mandatory permitting scheme, only 1,195 New Jerseyans held valid handgun permits in 2011, which was only .018% of its adult population age 21 and over.[3]

The Third Circuit's decision in *Drake* threatens to give advance judicial endorsement to potential efforts by Congress to establish a minimum federal boundary that would violate Second Amendment rights. That misplaced boundary would shake the foundation on which Wyoming and all other states with gun permitting schemes less restrictive than New Jersey have relied on. While it is obvious that New Jersey's permitting requirement has no direct effect on the laws of states that are more protective of an individual's right to keep and bear arms, the implications of *Drake* are far reaching. If the right to keep and bear arms can constitutionally be so restricted as to require a showing of "justifiable need"

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[2] Affidavit of Heather L. Calvert; Census Bureau, *2010 Demographic Profile Data*, Wyoming, available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_DP_DPDP1 (last visited Feb. 5, 2014).

[3] *See* Genova Decl., Appellants' Suppl. Letter Br. at ¶¶ 13-14 (filed Feb. 27, 2012, reflecting 592 permits issued in 2010 and 603 permits issued in 2011); Census Bureau, *2010 Demographic Profile Data*, New Jersey, available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk (last visited Feb. 5, 2014).

in order for a citizen to exercise it, future federal regulations could effectively preempt the carefully constructed permitting schemes of forty-three states with less restrictive requirements.[4]

Consistent with this Court's role in regulating the relationship between the state and federal governments, this Court should grant the petition for writ of certiorari to determine whether New Jersey has imposed hurdles on the right to carry handguns that excessively burden the Second Amendment. Because New Jersey law restricts the right to keep and bear arms without distinction between carrying a handgun openly or concealed, this case presents this Court with an opportunity to broadly define the scope of the Second Amendment outside of the home. Addressing this issue here and now will serve to answer many other narrow questions that could otherwise be raised regarding individual permitting schemes in numerous cases.

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[4] Only seven states require an applicant to show some kind of need for the issuance of a permit to carry a handgun. Cal. Penal Code § 26170(a)(2) (West 2010); Del. Code Ann. tit. 11, § 1441(a)(2) (West 2010) (individuals may open carry without a gun permit, however, to obtain a permit to conceal a weapon, applicants must show that it is "necessary for protection"); Haw. Rev. Stat. § 134-9(a) (West 2008); Md. Code Ann., Public Safety § 5-306(a)(6)(ii) (Supp. 2013); Mass. Gen. Laws Ann. ch. 140, § 131(d) (Supp. 2013); N.J. Stat. Ann. § 2C:58-4(c) (West 2005); N.Y. Penal Law § 400.00(1)-(2) (McKinney Supp. 2014). The District of Columbia does not allow a handgun to be carried openly or concealed under any circumstances. D.C. Code § 22-4504(a) (Supp. 2013).

II. This Court's interpretation of the Second Amendment in *Heller* and *McDonald* has not prevented splits of authority on the scope of the right to bear arms and the analytical framework that must be applied.

The unavoidable uncertainties following *Heller* and *McDonald* have manifested themselves as multiple splits of authority, both in the federal and state courts. Granting the petition for writ of certiorari in this case will provide the Court with the opportunity to give much-needed certainty as to the constitutionality of requiring an individual to show a "justifiable need" to exercise the right to keep and bear arms. Additionally, this Court should take this opportunity to resolve these uncertainties to ensure that Second Amendment law develops appropriately.

A. *Heller* and *McDonald* only provided limited guidance on the Second Amendment's protections and limitations.

In *Heller*, this Court analyzed the text and the history of the Second Amendment and determined that it protects an "individual right to possess and carry weapons in case of confrontation." *Heller*, 554 U.S. at 576-95. Reaching back to the English roots of the Constitution, this Court found that the ability to have weapons was considered fundamental at the time of the founding of this country and was understood as inextricably related to the right to defend against public and private violence. *Id*. at 593-94.

While setting out the core of the Second Amendment right, this Court did not clearly define its boundaries and contours. *Id*. at 635. Instead, this Court acknowledged that the right to have and carry weapons for self-defense has limitations. *Id*. at 626. While offering a list of presumptively lawful regulations as an illustration of the kinds of limitations that apply to the Second Amendment right to keep and bear arms, this Court also made it clear that the list was not exhaustive. *Id*. at 626-27 & n.26, 635.

Even though this Court invalidated the District of Columbia's handgun ban, it expressly declined to establish the analytical framework that must be applied to such questions. *Id*. at 634-36. Instead, this Court said what the analysis should not be – neither rational basis scrutiny nor an interest balancing inquiry. *Id*. at 629 n.27, 634-35. Specifically, this Court rejected an interest-balancing inquiry because the enumeration of the right took "out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to a future judges' assessment of its usefulness is no constitutional guarantee at all." *Id*. at 634. Because of the nature of the right involved, this Court also made it clear that something more than rational basis scrutiny should be applied. *Id*. at 629 n.26. Thus, while this Court provided some guidance in *Heller*, it explicitly left many questions unanswered. *Id*. at 626-27 & n.26, 629 n.27, 634-35.

In *McDonald*, this Court did not elaborate on the analytical framework that must be applied to Second Amendment questions but instead repeated its rejection of any interest balancing inquiry. *McDonald*, 130 S. Ct. at 3050. In incorporating the Second Amendment against the states, this Court's discussion focused on the fundamental nature of the right. *Id*. at 3036-42, 3050. This Court made it clear that the right to keep and bear arms must be enforced to the same extent as against the federal government, but did not elaborate as to how that would be achieved. *Id*. at 3035.

B. This case presents key unanswered questions that were not directly presented in *Heller* and *McDonald*.

Because *Heller* and *McDonald* were not adequate vehicles for this Court to reach the critical issue of the analytical framework that must be applied to Second Amendment questions, the federal courts have filled this void. Most have adopted a two-step analysis. *Kachalsky v. County of Westchester*, 701 F.3d 81, 89-97 (2d Cir. 2012); *Woollard v. Gallagher*, 712 F.3d 865, 874-75 (4th Cir. 2013) (citing with approval the approach taken by the Third, Fifth, Sixth, Seventh, Tenth, and D.C. Circuits); *Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 346-47 (5th Cir. 2013); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013). First, the reviewing court must determine whether the regulated conduct is within the scope of the Second Amendment's protections.

Woollard, 712 F.3d at 875. Second, the court must determine which level of means-end scrutiny should be applied and then apply it to the challenged regulation. *Id*. While the basic framework created by the lower courts seems reasonable, the questions left unanswered by *Heller* and *McDonald* have made applying it problematic.

Courts applying this two-step analysis have remarked on the pervasive uncertainty regarding the scope of the Second Amendment's protections and the same uncertainty as to how courts should apply means-end scrutiny. *United States v. Booker*, 644 F.3d 12, 22-23, 25 (1st Cir. 2011); *Kachalsky*, 701 F.3d at 88-89; *Woollard*, 712 F.3d at 874; *Nat'l Rifle Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194, 196-97 (5th Cir. 2012); *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010). The lower courts have reached incongruous results – disagreeing about both the scope of protections afforded by the Second Amendment and how infringements on that right should be scrutinized in light of the determination of its scope. *Compare*, *e.g.*, *Moore*, 702 F.3d at 937-38, 941, *with Drake*, 724 F.3d at 429-30. Additionally, several circuits have assumed that the Second Amendment applies and instead focused their analysis on the means-end scrutiny. *See Woollard*, 712 F.3d at 875-76 (citing other circuits that bypassed the question of scope and doing the same). By doing so, those courts

avoided the uncertainty of the scope of the Second Amendment's protections altogether.

State courts have also fallen prey to the reigning uncertainty. Mirroring the federal courts, the highest courts of Georgia and Oregon have looked to the same two-step analysis when determining whether the Second Amendment extends outside the home. *Hertz v. Bennett*, 751 S.E.2d 90, 93 (Ga. 2013); *Oregon v. Christian*, 307 P.3d 429, 442-43 (Or. 2013). However, other state supreme courts have not engaged in the two-step analysis. *Commonwealth v. Gouse*, 965 N.E.2d 774, 787 (Mass. 2012); *Williams v. Maryland*, 10 A.3d 1167, 1177-78 (Md. 2010). In candid moments, some courts of last resort have noted the current uncertainty as to the scope of Second Amendment protections and the appropriate level of means-end scrutiny that must be applied. *Hertz*, 751 S.E.2d at 93-94; *Christian*, 307 P.3d at 442-43; *Mack v. United States*, 6 A.3d 1224, 1235 (D.C. 2010) (commenting on the uncertainty as to the scope of the right); *Williams*, 10 A.3d at 1177 (commenting that if the right "extend[s] beyond home possession, [the Supreme Court] will need to say so more plainly"). The State of Wyoming and the amici states urge that this Court grant the petition for writ of certiorari and take this opportunity to quell the widely acknowledged uncertainty.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

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UNITED STATES SUPREME COURT

JOHN M. DRAKE, *et al.*, Petitioner, vs. THE HON. EDWARD A. JEREJIAN, *et al.* Respondent.	)	**Supreme Court No. 13-827**

AFFIDAVIT OF HEATHER L. CALVERT

Heather L. Calvert, being duly sworn, states as follows:

1) I am at least eighteen years of age.

2) I am currently employed as a Concealed Firearm Permit Analyst for the Division of Criminal Investigation (DCI) in the State of Wyoming. In this capacity, I receive and investigate all permit applications made to the State to carry a concealed firearm.

3) Applications are counted in the calendar year in which they are received. Once received, DCI acts on the application within ninety days.

4) Once issued and unless revoked, a permit to carry a concealed firearm (permit) is valid for five years.

5) In 2001, 860 Wyoming citizens applied for a permit, 763 were acted upon and granted within

that calendar year, while twenty were denied or revoked.

6) In 2002, 1,800 Wyoming citizens applied for a permit, 1,838 were acted upon and granted within that calendar year, while thirteen were denied or revoked.

7) In 2003, 1,655 Wyoming citizens applied for a permit, 1,689 were acted upon and granted within that calendar year, while thirty were denied or revoked.

8) In 2004, 2,266 Wyoming citizens applied for a permit, 2,163 were acted upon and granted within that calendar year, while forty-three were denied or revoked.

9) In 2005, 2,770 Wyoming citizens applied for a permit, 2,815 were acted upon and granted within that calendar year, while thirty were denied or revoked.

10) In 2006, 2,651 Wyoming citizens applied for a permit, 2,643 were acted upon and granted within that calendar year, while thirty-five were denied or revoked.

11) In 2007, 3,104 Wyoming citizens applied for a permit, 3,001 were acted upon and granted within that calendar year, while forty-two were denied or revoked.

12) In 2008, 4,276 Wyoming citizens applied for a permit, 3,928 were acted upon and granted within that calendar year, while eighty-three were denied or revoked.

13) In 2009, 6,172 Wyoming citizens applied for a permit, 6,493 were acted upon and granted within that calendar year, while 128 were denied or revoked.

14) In 2010 5,756 Wyoming citizens applied for a permit, 5,678 were acted upon and granted within that calendar year, while sixty-nine were denied or revoked.

15) In 2011, 3,790 Wyoming citizens applied for a permit, 3,893 were acted upon and granted within that calendar year, while seventy-four were denied or revoked.

16) As of 2011, Wyoming citizens held 23,127 outstanding valid permits.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

/s/ Heather L. Calvert
Heather L. Calvert
Concealed Firearm Permit Analyst
Division of Criminal Investigation
State of Wyoming

The foregoing was subscribed and sworn to before me by Heather L. Calvert this 7th day of February, 2014.

WITNESS my hand and official seal.

[NOTARY STAMP]

My Commission Expires:
09042016

/s/ Heather S. Carlson
Notary Public