No. 18-2366

In The United States Court of Appeals For the Third Circuit

THOMAS R. ROGERS; ASSOCIATION OF NEW JERSEY RIFLE AND PISTOL CLUBS, INC.,

Plaintiffs-Appellants,

v.

ATTORNEY GENERAL NEW JERSEY; PATRICK J. CALLAHAN, in his official capacity as Acting Superintendent of the New Jersey Division of State Police; KENNETH J. BROWN, in his official capacity as Chief of the Wall Township Police Department; JOSEPH W. OXLEY, in his official capacity as Judge of the Superior Court of New Jersey, Law Division, Monmouth County; N. PETER CONFORTI, in his official capacity as Judge of the Superior Court of New Jersey, Law Division, Sussex County,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY (No. 18-cv-1544) (Hon. Brian R. Martinotti, Presiding)

PLAINTIFFS-APPELLANTS' UNOPPOSED MOTION FOR SUMMARY ACTION

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INTRODUCTION

Under Third Circuit Rule 27.4, this Court may dispose of a case through summary action if "no substantial question is presented" in the appeal. New Jersey requires that ordinary citizens demonstrate a "justifiable need" to obtain a permit to carry a handgun in public, and Appellants have brought this action seeking to have this requirement struck down as facially unconstitutional under the Second Amendment. Unfortunately, because this Court's decision in *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), unequivocally rejects Appellants' Second Amendment claim—and because *Drake* is binding on future panels of this Court unless overturned by the Court sitting *en banc* or by the Supreme Court—we concede at this stage of the proceedings that "no substantial question is presented" by the appeal.

Appellants continue to maintain that *Drake*'s decision is wrong, and we reserve the right to argue that it should be overruled by a court competent to do so. But it would be a substantial waste of the Court's and the parties' resources to thoroughly brief, consider, and decide this argument when all agree that at the end of the day the Court is bound to follow *Drake*. Accordingly, Appellants respectfully move for summary action disposing of this case without briefing or argument.

The undersigned certifies that Counsel of Record for all Appellees have consented to this request for summary action.

STATEMENT

1. Under New Jersey law, an ordinary member of the general public who wishes to carry a handgun outside the home must first obtain a permit to do so (a "Handgun Carry Permit"), by applying to the Chief Police Officer of the municipality where he resides. N.J.S.A. 2C:39-5(b), 2C:58-4. If the officer approves the application, it is then presented to the local Superior Court. *Id.* § 2C:58-4(d). If the application is denied, the applicant may also appeal that denial to the Superior Court. *Id.* § 2C:58-4(e). In either case, if the Superior Court independently determines that the applicant has satisfied all statutory requirements, it may then issue a Handgun Carry Permit. *Id.* In reviewing applications and issuing permits, the Superior Court acts as an "issuing authority" and performs "essentially an executive function" that is "clearly non-judicial in nature." *In re Preis*, 573 A.2d 148, 151, 154 (N.J. 1990).

New Jersey imposes objective restrictions and training requirements on eligibility for a Handgun Carry License. For instance, the law forecloses the issuance of a license to anyone convicted of a crime involving domestic violence or addicted to controlled substances, N.J.S.A. 2C:58-4(c), 2C:58-3(c), and it requires applicants to satisfy extensive firearms safety training requirements, N.J.A.C. 13:54-2.4(b). In addition to these objective eligibility requirements, New Jersey also provides that an

applicant must demonstrate "that he has a justifiable need to carry a handgun." N.J.S.A. 2C:58-4(c). For an ordinary "private citizen," this requirement is satisfied only if the applicant can "specify in detail 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.S.C. 2C:58-4(c). "Generalized fears for personal safety are inadequate, and a need to protect property alone does not suffice." *In re Preis*, 573 A.2d at 152.

2. Appellant Thomas R. Rogers applied for a Handgun Carry Permit on January 11, 2017, but on August 15 the Chief of Police, Appellee Brown, denied his application because Rogers "fail[ed] to establish Justifiable Need." Complaint ¶ 31 & Ex. 1 (Feb. 5, 2018), Doc. 1 ("Compl."). Rogers appealed the denial, and on January 2, 2018, a Superior Court Judge, Defendant Joseph W. Oxley, also denied Rogers's application on the basis of his failure to establish justifiable need. *Id.* at Ex. 2.[1]

3. On February 5, 2018, Rogers and the Association of New Jersey Rifle & Pistol Clubs, Inc., filed suit in the District of New Jersey, alleging that New

[1] Defendants have also refused, on the basis of the "justifiable need" requirement, to grant at least one member of associational Plaintiff Association of New Jersey Rifle & Pistol Clubs a license that would allow the member to carry a firearm outside the home for self-defense. *Id.* ¶¶ 35-36.

Jersey's "justifiable need" restriction on the availability of Handgun Carry Permits is facially unconstitutional under the Second Amendment, applicable to New Jersey under the Fourteenth. Their Complaint conceded that this claim was foreclosed by this Court's decision in *Drake*, Compl. ¶ 6, and the Defendants promptly moved to dismiss the case on *Drake*'s authority. *See* Doc. 16-3; Doc. 18. In response, the Plaintiffs again conceded that *Drake* is controlling but argued that it was wrongly decided and should be overruled by a court competent to do so.

4. On May 21, 2018, the district court granted Defendants' motions to dismiss, *see* Order (May 21, 2018) Doc. 27, reasoning that it "has no authority to grant Plaintiffs' requested relief, because the Third Circuit in *Drake v. Filko* explicitly and unequivocally upheld the constitutionality of New Jersey's 'justifiable need' requirement in its gun permit laws," Opinion 6 (May 21, 2018), Doc. 26 ("Opinion"). On June 18, 2018, the Plaintiffs timely noticed this appeal. (Doc. 28).

ARGUMENT

I. *Drake v. Filko* was wrongly decided.

As the district court held, *Drake* upheld New Jersey's "justifiable need" restriction on the issuance of Handgun Carry Permits as consistent with the Second Amendment. And this Court, sitting as a panel, "lacks authority to overrule" *Drake*. *United States v. Franz*, 772 F.3d 134, 144 n.8 (3d Cir. 2014). But *Drake*'s ruling is deeply flawed, and it should be overruled by a court competent to do so.

a. The conduct restricted by New Jersey's "justifiable need" requirement lies at the core of the Second Amendment.

1. Text, precedent, purpose, and history uniformly show that the carrying of firearms outside the home for self-defense is squarely protected by the Second Amendment right.

The text of the Second Amendment—which provides that "the right of the people to keep *and bear* Arms, shall not be infringed." U.S. CONST. amend. II (emphasis added)—leaves no doubt that it applies outside the home. Because "[t]o speak of 'bearing' arms within one's home would at all times have been an awkward usage," the Constitution's explicit inclusion of the "right to bear arms thus implies a right to carry a loaded gun outside the home." *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012). Indeed, interpreting the Second Amendment as confined to the home would read half of its operative clause—protecting the right to *bear* arms—out of the Constitution's text altogether.

Confining the Second Amendment to the home would also be at war with precedent. The Supreme Court's decision in "*Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one's home." *Id.* at 935-36. For instance, *District of Columbia v. Heller* squarely holds that the Second Amendment "guarantee[s] the individual right to possess *and carry* weapons in case of confrontation," 554 U.S. 570, 592 (2008) (emphasis added), and it defines the key constitutional phrase "bear arms" as to " 'wear, bear, or carry … upon the person or

in the clothing or in a pocket, for the purpose … of being armed and ready for offensive or defensive action in a case of conflict with another person,' " *id.* at 584 (alteration in original) (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)); *see also Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (vacating state court ruling that the Second Amendment does not protect the right to carry a stun gun in public). Likewise, two circuit courts have directly held that the Second Amendment right to armed self-defense does not give out at the doorstep. *See Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017); *Moore*, 702 F.3d at 935, 942. And *no* federal court of appeals has held that the Amendment *does not* apply outside the home.

The purposes behind the Second Amendment's codification also show that it must protect the carrying of arms outside the home. As announced by its "prefatory" clause, the Amendment was designed in part "to prevent elimination of the militia." *Heller*, 554 U.S. at 599. A right to bear arms limited to the home would be ill-suited to "rearing up and qualifying a well-regulated militia," *id.* at 612 (quoting *Nunn v. State*, 1 Ga. 243, 251 (1846)), for if citizens could be prohibited from carrying arms in public they simply could not act as the militia at all. And the same reasoning applies with even more force to the "the *central component*" of the Second Amendment right: self-defense. *Id.* "[O]ne doesn't have to be a historian to realize that a right to keep and bear arms for personal self-defense in the eighteenth century

could not rationally have been limited to the home." *Moore*, 702 F.3d at 936. This remains true today. According to the latest nationwide data from the Bureau of Justice Statistics, 18.4% of violent crimes occur at or in the victim's home, while 26.5% occur on the street or in a parking lot or garage.[2]

Finally, the historical understanding of the right to keep and bear arms conclusively confirms that it extends outside the home. As *McDonald v. City of Chicago* explains, "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day." 561 U.S. 742, 767 (2010). Because the need for self-defense may *arise* in public, it was recognized in England long before the Revolution that the right to self-defense may be *exercised* in public. *See* 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 71 (1716) ("[T]he killing of a Wrong-doer … may be justified … where a Man kills one who assaults him in the Highway to rob or murder him."); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES *180. And because the right to self-defense was understood to extend beyond the home, the right to *armed* self-defense naturally was as well. Accordingly, by the late seventeenth century the English courts recognized that it was the practice and privilege of "gentlemen to ride armed for their security." *Rex v. Knight*, 90 Eng. Rep. 330 (K.B. 1686).

[2] BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2008 STATISTICAL TABLES tbl. 61 (2010), http://goo.gl/6NAuIB.

On this side of the Atlantic, "about half the colonies had laws *requiring* arms-carrying in certain circumstances," such as when traveling or attending church. NICHOLAS J. JOHNSON & DAVID B. KOPEL ET AL., FIREARMS LAW & THE SECOND AMENDMENT 106-08 (2012) (emphasis added). As Judge St. George Tucker observed in 1803, "[i]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side." 5 WILLIAM BLACKSTONE, COMMENTARIES App. n.B, at 19 (St. George Tucker ed., 1803). And Tucker made clear that Congress would exceed its authority were it to "pass a law prohibiting any person from bearing arms." 1 *id.* at App. n.D, 289.

The practices of the Founding generation confirm that the right to carry arms was well-established. George Washington, for example, carried a firearm on an expedition into the Ohio Country. WILLIAM M. DARLINGTON, CHRISTOPHER GIST'S JOURNALS 85-86 (1893). And even in defending the British soldiers charged in the Boston Massacre, John Adams conceded that, in this country, "every private person is authorized to arm himself; and on the strength of this authority I do not deny the inhabitants had a right to arm themselves at that time for their defence." John Adams, *First Day's Speech in Defence of the British Soldiers Accused of Murdering Attucks, Gray and Others, in the Boston Riot of 1770*, *in* 6 MASTERPIECES OF ELOQUENCE 2569, 2578 (Hazeltine et al. eds., 1905).

To be sure, as *Heller* itself recognized, the right to bear arms is not a right to "carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 554 U.S. at 626. For example, in the pre-history of the Second Amendment, English courts had read the medieval Statute of Northampton as "prohibiting the carrying of 'dangerous and unusual weapons,' " *id.* at 627—weapons not protected by the right to keep and bear arms, *id.* at 623-24, 627—or otherwise "go[ing] armed to terrify the King's subjects," *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1686). But this was a rule against "*riding* or *going armed*, with dangerous or unusual weapons" and thereby "terrifying the good people of the land." 4 WILLIAM BLACKSTONE, COMMENTARIES *148-49. It was not understood as extending to the ordinary carrying of weapons "usually worne and borne," WILLIAM LAMBARD, EIRENARCHA 135 (1588), unless "accompanied with such circumstances as are apt to terrify the people," 1 HAWKINS, *supra*, at 136; *see also* 3 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON 79 (1804); *State v. Huntly*, 25 N.C. 418, 422-23 (1843); *Simpson v. State*, 13 Tenn. 356, 359-60 (1833).

This reading of the Second Amendment persisted throughout the nineteenth century. For decades before the Civil War, the southern States had schemed to prevent their enslaved and free black populations from bearing arms at every turn. An 1832 Delaware law, for example, forbade any "free negroes [or] free mulattoes to have own keep or possess any Gun [or] Pistol," unless they first received a permit

from "the Justice of the Peace" certifying "that the circumstances of his case justify his keeping and using a gun." Act of Feb. 10, 1832, sec. 1, Del. Laws 180 (1832). Indeed, Chief Justice Taney recoiled so strongly in the infamous *Dred Scott* case from recognizing African Americans as citizens precisely because he understood that doing so would entitle them "to keep and carry arms wherever they went." *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1857).

After the Civil War, these noxious efforts to suppress the rights of former slaves to carry arms for their self-defense continued. Mississippi's notorious "Black Code," for example, forbade any "freedman, free negro or mulatto" to "keep or carry fire-arms of any kind." An Act To Punish Certain Offences Therein Named, and for Other Purposes, ch. 23, § 1, 1865 Miss. Laws 165. But as the Supreme Court explained at length in *McDonald*, the Reconstruction Congress labored mightily to entomb this legacy of prejudice. *See* 561 U.S. at 770-77. Congress's efforts culminated in the adoption of the Fourteenth Amendment, which ensured the right of every American, regardless of race, to "bear arms for the defense of himself and family and his homestead." CONG. GLOBE, 39th Cong., 1st Sess. 1182 (1866) (statement of Sen. Pomeroy); *see also McDonald*, 561 U.S. at 775-76.

2. While acknowledging "that the Second Amendment's individual right to bear arms *may* have some application beyond the home," the *Drake* court concluded that the conduct burdened by New Jersey's "justifiable need" restriction

was outside the Amendment's scope, because that restriction "qualifies as a 'longstanding,' 'presumptively lawful' regulation." 724 F.3d at 431-32. Not so.

Drake's principal piece of evidence for this conclusion was a series of nineteenth-century laws targeting "the carrying of concealed weapons." *Id.* at 433. But while these laws limited the carrying of *concealed* firearms—a practice that was disfavored by the social mores of the day—they did so against the background of *freely allowing* the *open* carrying of arms in common use, thus "le[aving] ample opportunities for bearing arms." *Wrenn*, 864 F.3d at 662. And that distinction was absolutely *critical* to most of the judicial opinions assessing their constitutionality. *See State v. Chandler*, 5 La. Ann. 489, 490 (1850); *Aymette v. State*, 21 Tenn. 154, 160-61 (1840); *State v. Reid*, 1 Ala. 612, 616-17 (1840); *Nunn*, 1 Ga. at 251; *see also Bliss*, 12 Ky. at 91-94.[3] These laws thus provide no historical pedigree for restrictions, like New Jersey's, which prohibit *both* open and concealed carrying and thus "amount[ ] to a destruction of the right" altogether. *Reid*, 1 Ala. at 616.

The *Drake* majority also thought New Jersey's law was sufficiently "longstanding," since "[t]he 'justifiable need' standard … has existed in New Jersey

[3] A few courts from this era upheld concealed carry bans without relying on this distinction, but they did so "on the basis of an interpretation of the Second Amendment … that conflicts with [*Heller*.]" *Kachalsky v. County of Westchester*, 701 F.3d 81, 91 n.14 (2d Cir. 2012). Those outlier decisions are thus "sapped of authority by *Heller*," and cannot be cited as reliable guides to the Second Amendment's scope. *Wrenn*, 864 F.3d at 658.

in some form for nearly 90 years." 724 F.3d at 432 (majority). That argument fails twice over. To begin, New Jersey imposed a "need" requirement on *all* public carrying for only *half* that time—requiring a showing of "need" only for carrying *concealed* handguns until 1966. Second, even setting this point aside and starting the clock in 1924, an outlier law adopted by New Jersey and a handful of other jurisdictions nearly a century and a half after the Founding—and even today adhered to by well under a quarter of the States—hardly constitutes the type of longstanding, traditional limitation that *Heller* characterized as "presumptively lawful." 554 U.S. at 627 n.26.

3. The right to "carry weapons in case of confrontation," *Heller*, 554 U.S. at 592, is not only within the scope of the Second Amendment, it lies at the very core of that guarantee. *Heller* makes clear that the right to individual self-defense is "the *central component*" of the Second Amendment. *Id.* at 599. And because the Second Amendment's text, history, and purposes all show that its protections extend outside the home, the right to carry firearms "for the core lawful purpose of self-defense" necessarily extends beyond those four walls as well. *Id.* at 630. "Thus, the Amendment's core generally covers carrying in public for self-defense." *Wrenn*, 864 F.3d at 659.

Again, *Drake* disagreed with this conclusion. While "[a]ssuming that the Second Amendment individual right to bear arms does apply beyond the home" for

the sake of analysis, the Third Circuit held that "that right is not part of the core of the Amendment." 724 F.3d at 431, 436; *see also Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013); *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012). But because *Drake* refused to engage in any meaningful "historical analysis" of whether the Second Amendment applies outside the home, it simply had *no basis* for concluding that the right to bear arms outside the home "is not part of the core of the Amendment." 725 F.3d at 431, 436. While *Drake*'s decision to assume *arguendo* that the Second Amendment applies in public may have been "meant to be generous to the plaintiffs, by granting a premise in their favor," its effect was to leave the Court's conclusion that the right to bear arms has diminished importance outside the home unmoored from any justification whatsoever. *Wrenn*, 864 F.3d at 663.

b. Under *Heller*, Appellees' requirement that law-abiding citizens demonstrate a special need for self-defense to exercise their Second Amendment rights is categorically unconstitutional.

Because "[t]he very enumeration of the right takes 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," wholesale infringements upon the Amendment's "core protection" must be held unconstitutional categorically, not "subjected to a freestanding 'interest-balancing' approach." *Heller*, 554 U.S. at 634-35. Appellees' demand that applicants show "a

special danger to [their] life," N.J.A.C. 13:54-2.4(d)(1), that is distinguishable from "[g]eneralized fears for personal safety," *In re Preis*, 573 A.2d at 152, *extinguishes* the core Second Amendment rights of *typical* citizens—who by definition cannot make such a showing. Accordingly, it must be struck down categorically. *See Wrenn*, 864 F.3d at 666.

Indeed, the State's demand that its citizens prove to the Government's satisfaction that they have a good enough reason to carry a handgun is flatly inconsistent with the very nature of the Second Amendment right. The existence of that right is itself reason enough for its exercise. It is thus no surprise that courts have rejected this kind of "ask-permission-first" regime across a wide variety of constitutional rights. *See, e.g.*, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 887 (1990); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014).

c. *Drake* was wrong to uphold Appellees' "justifiable need" restriction under intermediate scrutiny.

1. Even if the State's restrictions were not *categorically* unconstitutional, they should at the least be subjected to the highest level of constitutional scrutiny. As the Supreme Court has explained, "strict judicial scrutiny [is] required" whenever a law "impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973).

And the right to bear arms is not only enumerated in the constitutional text; it was also counted "among those fundamental rights necessary to our system of ordered liberty" by "those who drafted and ratified the Bill of Rights." *McDonald*, 561 U.S. at 768, 778.

2. Ultimately, determining the correct standard of scrutiny is immaterial, however, because the "justifiable need" restriction should be struck down under any level of heightened scrutiny. That is so, first, as a matter of law. By design, Defendants' restrictions will reduce firearm violence *only by reducing the quantity of firearms in public*. That is "not a permissible strategy"—even if used as a means to the further end of increasing public safety. *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 148 (D.D.C. 2016), *aff'd sub nom. Wrenn v. District of Columbia*, 864 F.3d 650.

That conclusion follows directly from the Supreme Court's precedents in the secondary-effects area of free-speech doctrine, which make clear that although the Government may seek to reduce the negative "secondary effects" of protected expression—such as the increased crime that occurs in neighborhoods with a high concentration of adult theaters—it may not argue "that it will reduce secondary effects by reducing speech in the same proportion." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 449 (2002) (Kennedy, J., concurring). "It is no trick to reduce secondary effects by reducing speech or its audience; but [the government]

may not attack secondary effects indirectly by attacking speech." *Id.* at 450; *see also Heller v. District of Columbia (Heller III)*, 801 F.3d 264, 280 (D.C. Cir. 2015); *Drake*, 724 F.3d at 455-56 (Hardiman, J., dissenting); *Grace*, 187 F. Supp. 3d at 148.

But that is precisely what Defendants have done here. Their restrictive licensing policies do not regulate the *manner* of bearing arms or impose reasonable training and safety requirements. No, their purpose and effect is to *limit the number of arms borne in public*, and to the extent this leads to a reduction of gun crime, that is only a byproduct of this suppression of the quantity of core Second Amendment conduct. As the state courts have explained, "the overriding philosophy of our Legislature is to limit the use of guns as much as possible." *State v. Valentine*, 124 N.J. Super. 425, 427 (App. Div. 1973). Or as the President of the New Jersey Senate recently stated, "This is New Jersey. It's not some State that thinks everyone should be carrying a gun…. [C]oncealed weapons don't belong in New Jersey." Steve Sweeney, President, New Jersey Senate, Remarks, N.J. Governor and Attorney General Announce Intention to Tighten Restrictions on Handgun-Carry Permits at 12:55 (Jan. 26, 2018), *available at* https://goo.gl/U4iTET.

Deliberately suppressing the amount of constitutionally protected conduct in this way is "not a permissible strategy," *Grace*, 187 F. Supp. 3d at 148, under any level of heightened scrutiny.

3. Even if these objections are set aside, the heightened need requirement still flunks intermediate scrutiny. As Judge Posner concluded after surveying "the empirical literature on the effects of allowing the carriage of guns in public," that data does not provide "more than merely a rational basis for believing that [an outright ban on public carriage] is justified by an increase in public safety." *Moore*, 702 F.3d at 939, 942.

This is confirmed by experience. Forty-two States do not restrict the carrying of firearms to a privileged few. *See Gun Laws*, NRA-ILA, https://goo.gl/Nggx50. Yet the empirical evidence "overwhelmingly rejects" any suggestion that "permit holders will use their guns to commit crimes instead of using their guns for self-defense." David B. Mustard, *Comment*, *in* EVALUATING GUN POLICY 325, 330-31 (Jens Ludwig & Philip J. Cook eds., 2003). As social scientists in favor of gun control have acknowledged, there would be "relatively little public safety impact if courts invalidate laws that prohibit gun carrying outside the home, assuming that some sort of permit system for public carry is allowed to stand," since "[t]he available data about permit holders … imply that they are at fairly low risk of misusing guns." Philip J. Cook et al., *Gun Control After* Heller, 56 UCLA L. REV. 1041, 1082 (2009).

Further, even if laws that more freely grant permits have not been shown to decrease crime, there is no persuasive evidence that they *increase* crime—and that

is the proposition Defendants must support. For instance, in 2004 the National Academy of Sciences' National Research Council ("NRC") conducted an exhaustive review of the relevant social-scientific literature. The NRC concluded that "with the current evidence it is not possible to determine that there is a causal link between the passage of right-to-carry laws and crime rates." NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 150 (Charles F. Wellford, John V. Pepper, & Carol V. Petrie eds., 2005), http://goo.gl/WO1ZNZ. *See also* Robert Hahn et al., *Firearms Laws and the Reduction of Violence: A Systematic Review*, 28 AM. J. PREVENTATIVE MED. 40, 53-54 (2005), http://goo.gl/zOpJFL (CDC study concluding that existing evidence does not establish that more permissive carry regimes "increases rates of unintended and intended injury").

Drake's cursory scrutiny of whether New Jersey's "justifiable need" requirement actually advances its public-safety justification was "heightened" in name only. The sum total of the "evidence" discussed by the court was confined to: (1) a "staff report" evaluating "the utility of firearms as weapons of defense against crime" that was published *in 1968*, and (2) the fact that "[l]egislators in other states, including New York and Maryland, have reached this same predictive judgment and have enacted similar laws as a means to improve public safety." *Drake*, 724 F.3d at 438. But a single study from fifty years ago hardly constitutes "substantial evidence" that New Jersey's restriction can be said, in light of the *current* evidence, to

materially advance public safety *today*. Because New Jersey's restriction "imposes current burdens," it "must be justified by current needs." *Shelby Cty. v. Holder*, 570 U.S. 529, 536 (2013). Nor does the fact that a handful of other jurisdictions have enacted similar restrictions suffice, without at least some analysis of whether *those* laws are effective in preventing violent crime or are themselves supported by substantial evidence. After all, the vast majority of States *do not* restrict their citizens' right to carry in this way.

The lack of evidence that these laws advance public safety should not be surprising. After all, "[d]etermined wrongdoers, already ignoring existing statutes and safety measures, are unlikely to be convinced to [change their conduct] by a new overlay of regulations." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2313-14 (2016). Accordingly, instead of criminals, it is primarily the *law-abiding* who are affected by Defendants' restrictions. Although the number of defensive gun uses is difficult to measure, the leading study on the issue "indicate[s] that each year in the U.S. there are about 2.2 to 2.5 million [defensive uses of guns] of all types by civilians against humans." Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 164 (1995); *see also* Gary Kleck, What Do CDC's Surveys Say About the Frequency of Defensive Gun Uses? (June 11, 2018) (unpublished manuscript) (finding that firearms are used defensively far more often than

criminally). Many of these defensive gun uses involve carrying firearms in public. *See* Gary Kleck & Marc Gertz, *Carrying Guns for Protection: Results from the National Self-Defense Survey*, 35 J. RESEARCH IN CRIME & DELINQUENCY 193, 195 (1998). Any realistic appraisal of existing social-scientific data thus leads inexorably to the conclusion that the "justifiable need" requirement cannot be shown to benefit the public safety—but it may well harm it.

4. Even if Defendants' "justifiable need" restriction did advance public safety, it independently fails heightened scrutiny because it is not properly tailored to that purpose. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2534-35 (2014) (requiring narrow tailoring under intermediate scrutiny). After all, "the fact that a person can demonstrate a heightened need for self-defense says nothing about whether he or she is more or less likely to misuse a gun." *Grace*, 187 F. Supp. 3d at 149; *see also Drake*, 724 F.3d at 454 (Hardiman, J., dissenting).

II. Because this panel is bound by *Drake*, however, it should summarily dispose of this appeal.

For the reasons just described, this Court's decision in *Drake* was wrong on the day it was decided, and it should be overruled by a court with authority to do so. Appellants recognize, however, that this panel does not have such authority. Under well-settled rules of *stare decisis*, "[a] panel of this court is bound by, and lacks authority to overrule, a [precedential] decision of a prior panel." *Franz*, 772 F.3d at 144 n.8 (second alteration in original). While exceptions to this rule exist where, for

example, "intervening authority" calls the previous decision into question, *United States v. Savani*, 733 F.3d 56, 62 (3d Cir. 2013), here we concede that no binding (as opposed to persuasive) authority has called *Drake*'s holding into doubt.

Accordingly, Appellants respectfully submit that this case should be decided summarily, without briefing and without oral argument. Third Circuit Rule 27.4 provides that the Court may, either upon any party's motion or *sua sponte*, take "summary action affirming … a judgment" if "no substantial question is presented." *See also* 3d Cir. I.O.P. 10.6. Here, given that Appellants' claim "is clearly foreclosed" by the binding decision in *Drake*, the appeal "does not present a substantial question" at this stage in the litigation, and summary action is appropriate. *In re Mota-Rivera*, 412 F. App'x 438, 439 (3d Cir. 2011); *see also United States v. Plummer*, 537 F. App'x 71, 72 (3d Cir. 2013). No purpose would be served by having the parties brief and argue, and the court thoroughly consider, arguments that all agree it is currently bound to reject.

CONCLUSION

For the foregoing reasons, *Drake* should be overruled by a court with authority to do so, but this Court lacks such authority and should take summary action on the appeal.

Dated: July 3, 2018

Respectfully submitted,

s/ David H. Thompson

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitations of FED. R. APP. P. 27(d)(2)(A) because it contains 5,192 words, excluding the parts of the motion exempted by FED. R. APP. P. 32(f).

This motion 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 this motion has been prepared in a proportionately spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

Dated: July 3, 2018

s/ David H. Thompson
David H. Thompson
Counsel for Plaintiffs-Appellants

EXHIBIT 1

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THOMAS R. ROGERS and ASSOCIATION OF NEW JERSEY RIFLE & PISTOL CLUBS, INC., Plaintiffs, v. GURBIR GREWAL, PATRICK J. CALLAHAN, KENNETH J. BROWN, JR., JOSEPH W. OXLEY, and PETER CONFORTI Defendants.	Civil Action No. 3:18-cv-01544-BRM-DEA **OPINION**

MARTINOTTI, DISTRICT JUDGE

Before this Court are: (1) Defendants Gurbir Grewal ("Attorney General Grewal"), Patrick J. Callahan ("Callahan"), Joseph W. Oxley ("Judge Oxley"), and N. Peter Conforti's ("Judge Conforti") (collectively, the "State Defendants") Motion to Dismiss (ECF No. 16); and (2) Defendant Kenneth J. Brown's ("Brown") (together with the State Defendants, the "Defendants") Motion to Dismiss, in which he advises he will rely upon the State Defendants' Motion (ECF No. 18). Pursuant to Federal Rule of Civil Procedure 78(b), the Court did not hear oral argument. For the reasons set forth below, Defendants' motions to dismiss are **GRANTED.**

I. BACKGROUND

For the purposes of the motions to dismiss, the Court accepts the factual allegations in the Complaint as true and draws all inferences in the light most favorable to Plaintiff. *See Phillips v. Cty. of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008). The central dispute in this matter is whether New Jersey's "justifiable need" restriction in its handgun permit laws is unconstitutional.

A. New Jersey's Handgun Permit Laws

New Jersey generally forbids a person from possessing any handgun "without first obtaining a permit to carry the same." N.J.S.A. § 2C:39-5(b). The law provides for certain exceptions for

> 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 the firearms are repaired, for the purpose of repair.

N.J.S.A. § 2C:39-6(e). These exceptions, however, do not permit the carrying of a handgun in public, either openly or concealed, without first obtaining a permit.

To seek a handgun permit one must first submit an application to the chief police officer of the municipality in which he or she resides. N.J.S.A. § 2C:58-4(c). If the chief officer determines the applicant meets all statutory requirements and approves the application, the application is then presented to the Superior Court of the county where he or she resides. N.J.S.A.§ 2C:58-4(d).

> 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:58-3x., 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. For a "private citizen," to satisfy the "justifiable need" requirement an applicant must demonstrate there is an "urgent necessity for self-protection, as evidenced by serious threats, specific threats, or previous attacks, which demonstrate a special danger to the applicant's life that cannot be avoided by reasonable means other than by issuance of a permit to carry a handgun." N.J.A.C. § 13:54-2.4(d)(1). However, if the application is denied, the applicant can also appeal the denial to the Superior Court. N.J.S.A. § 2C:58-4(e).

B. The Parties

Plaintiff Thomas R. Rogers ("Rogers") is a New Jersey resident who requested, and was denied, a permit to carry a firearm in public. (Compl. (ECF No. 1) ¶¶ 10, 30-33.) Association of New Jersey Rifle & Pistol Clubs, Inc. ("ANJRPC") (together with Rogers, "Plaintiffs") is a not-for-profit membership corporation that "represents the interest of target shooters, hunters, competitors, outdoors people and other law abiding firearms owners," and is bringing this complaint on behalf of its members. (*Id.* ¶ 11.) Defendants are Attorney General Grewal, the Attorney General of New Jersey; Callahan, the Acting Superintendent of the New Jersey State Police; Brown, the Chief of the Wall Township Police Department; Judge Oxley, a judge for the Superior Court of New Jersey, Law Division, Monmouth County, and Judge Conforti, a judge for the Superior Court of New Jersey, Law Division, Sussex County. (*Id.* ¶¶ 12-16.)

C. Plaintiffs' Challenge

On January 11, 2017, Rogers filed an application for a handgun carry permit with the then-Chief of Police for Wall Township, where he resides. (*Id.* ¶ 30.) While Rogers alleges he "possess[es] all of the qualifications necessary to obtain a [h]andgun [c]arry [p]ermit that are enumerated in N.J.S.A. 2C:58-4; 2C:58-2(c)," he admittedly "does not face any special danger to his life." (*Id.* ¶¶ 28-29.) On August 15, 2017, Brown, who replaced the former Chief of Police,

denied Roger's application for a permit to carry a handgun in public because Rodgers "failed to show a 'justifiable need' to carry." (*Id.* ¶ 31.) Rodgers appealed the denial to the Superior Court of New Jersey. (*Id.* ¶ 32.) On January 2, 2018, Judge Oxley also denied his application for the same reason. (*Id.* ¶ 33.)

ANJRPC "has at least one member who has had an application for [h]andgun [c]arry [p]ermit denied solely for failure to satisfy the 'justifiable need' requirement." (*Id.* ¶ 35.) It also

> has numerous members who wish to carry a handgun outside the home for self-defense but have not applied for a [h]andgun [c]arry [p]ermit because they know that, although they satisfy or can satisfy all other requirements of N.J.S.A. 2C:58-4, they are unable to satisfy the 'justifiable need' requirement.

(*Id.* ¶ 33.) ANJRPC states that, "[b]ut for Defendants' continued enforcement of the New Jersey laws and regulations set forth above, those members would forthwith carry a handgun outside the home for self-defense but refrain from doing so for fear of arrest and prosecution." (*Id.*)

D. Procedural History

On February 5, 2018, Plaintiffs filed a Complaint against Defendants alleging a violation of 42 U.S.C. § 1983 for deprivations of their Second and Fourteenth Amendment rights. (*Id.* ¶¶ 37-42.) On April 3, 2018, Defendants Callahan, Judge Conforti, Attorney General Grewal, and Judge Oxley filed a Motion to Dismiss. (ECF No. 16.) On April 10, 2018, Brown joined in the Motion to Dismiss. (ECF No. 18.) Plaintiffs opposed the motions on April 23, 2018. (ECF No. 22.) The motions were returnable today, May 21, 2018.

II. LEGAL STANDARD

In deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a district court is "required to accept as true all factual allegations in the complaint and draw all inferences in the facts alleged in the light most favorable to the [plaintiff]." *Phillips v. Cty. of*

Allegheny, 515 F.3d 224, 228 (3d Cir. 2008). "[A] complaint attacked by a . . . motion to dismiss does not need detailed factual allegations." *Bell Atl. v. Twombly*, 550 U.S. 544, 555 (2007). However, the Plaintiff's "obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). A court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan*, 478 U.S. at 286. Instead, assuming the factual allegations in the complaint are true, those "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for misconduct alleged." *Id.* This "plausibility standard" requires the complaint allege "more than a sheer possibility that a defendant has acted unlawfully," but it "is not akin to a 'probability requirement.'" *Id.* (quoting *Twombly*, 550 U.S. at 556). "Detailed factual allegations" are not required, but "more than an unadorned, the defendant-harmed-me accusation" must be pled; it must include "factual enhancements" and not just conclusory statements or a recitation of the elements of a cause of action. *Id.* (citing *Twombly*, 550 U.S. at 555, 557).

"Determining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)).

III. DECISION

Plaintiffs' Complaint alleges New Jersey's laws and regulations regarding the right to bear arms in public "violate the Second Amendment." (ECF No. 1 ¶ 42.) As such, they ask the Court to declare unconstitutional the "justifiable need" requirement. (*Id.* ¶ 43.) However, this Court has no authority to grant Plaintiffs' requested relief, because the Third Circuit in *Drake v. Filko* explicitly and unequivocally upheld the constitutionality of New Jersey's "justifiable need" requirement in its gun permit laws, rendering Plaintiffs' claim meritless. 724 F.3d 426, 429 (3d Cir. 2013) (holding that the requirement that applicants demonstrate a "justifiable need" to publicly carry a handgun qualified as a "presumptively lawful," "longstanding" regulation and therefore did not infringe on the Second Amendment's guarantee), *cert. denied sub nom.*, 134 S. Ct. 2134 (2014).

Indeed, this is not the first time an individual has attempted to circumvent the Third Circuit decision and has been denied. *Purpura v. Christie*, No. 15-3534, 2016 WL 1262578, at *4 (D.N.J. Mar. 31, 2016) (finding "the Court is concerned that Plaintiff may not have asserted a federally protected right in his Complaint, to the extent his claim is based on the alleged unconstitutional nature of N.J.S.A. 2C:58-4, because the Third Circuit held that this provision is constitutional"), *aff'd*, 687 F. App'x 208 (3d Cir. 2017), *cert. denied*, 138 S. Ct. 389 (2017); *Stephens v. Jerejian*, No. 14-6688, 2015 WL 4749005, at *2 (D.N.J. Aug. 6, 2015) ("Here, though Plaintiff applied for the proper documents to purchase handguns, as opposed to carry handguns, the Third Circuit's jurisprudence indicates that the herein challenged firearm regulations, which are central to New Jersey's aggregate firearm regulatory scheme, are constitutional under Heller. Therefore, the law provides no remedy for Plaintiff, and his facial challenges are dismissed with prejudice.") (internal citations omitted); *Mirayes v. O'Connor*, No. 13-0934, 2013 WL 6501741, at *8 (D.N.J. Dec. 11,

2013 (finding plaintiff's claim to be meritless because "the Third Circuit has upheld the constitutionality of New Jersey's 'justifiable need' requirement under N.J.S.A. 2C:58–4(c)").

"Decisions of the Court of Appeal for a given circuit are binding on the district courts within the circuit, but are not binding on courts in other circuits." *Villines v. Harris*, 487 F. Supp. 1278, 1279 n.1 (D.N.J. 1980). This Court "does not have the discretion to disregard controlling precedent simply because it disagrees with the reasoning behind such precedent." *Vujosevic v. Rafferty*, 844 F.2d 1023, 1030 n.4 (3d Cir. 1988). This Court may only set aside Third Circuit precedent "[w]hen subsequent Supreme Court decisions implicate Third Circuit precedent" and "the Supreme Court has effectively overruled that precedent or has rendered a decision that is necessarily inconsistent with Third Circuit authority." *Fenza's Auto, Inc. v. Montagnaro's, Inc.*, No. 10-3336, 2011 WL 1098993, at *7 (D.N.J. Mar. 21, 2011). Plaintiffs cite to no subsequent Supreme Court decisions, and the Court finds none, that implicate the precedent set forth in *Drake*. Instead, Plaintiffs argue this Court should follow *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017), a case that is neither binding on nor precedential to this Court and cannot serve to overturn Third Circuit precedent. *See Villines*, 487 F. Supp. at 1279 n.1.

More telling, Plaintiffs concede both in their Complaint and Opposition Brief "that the result they seek is contrary to *Drake*," but argue *Drake* was wrongly decided and should be overturned. (ECF Nos. 1 ¶ 6 and ECF No. 22 at 2.) As explained, this Court does not have the authority or power to grant such a request and therefore, deems this Complaint meritless on its face.

In light of the clear mandate from the Third Circuit that the "justifiable need" requirement in New Jersey's gun permit laws is constitutional and the Supreme Court's refusal to address the

issue by denying certiorari, and for the reasons set forth above, Defendants' motions to dismiss are **GRANTED**.[1]

IV. CONCLUSION

For the reasons set forth above, Defendants' motions to dismiss are **GRANTED**.

Date: May 21, 2018

/s/ Brian R. Martinotti
HON. BRIAN R. MARTINOTTI
UNITED STATES DISTRICT JUDGE

[1] For the reasons set forth in this opinion, the Court will not engage in a merits analysis of the remainder of Plaintiffs' arguments. In addition, Defendants' motions to dismiss further argue Plaintiffs' claims against Judge Oxley and Judge Conforti are barred by the doctrine of judicial immunity. (ECF No. 16-3 at 17-20.) Because the Court has dismissed Plaintiffs' Complaint in its entirety, it need not and will not address this issue.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on July 3, 2018. I certify that service will be accomplished by the appellate CM/ECF system on the following parties or counsel, who are registered as ECF filers:

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Dated: July 3, 2018

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