No. 17-

In the Supreme Court of the United States

DALE LEE NORMAN,

Petitioner

v.

STATE OF FLORIDA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Florida law provides for licenses to carry handguns concealed, but prohibits carrying firearms openly. Petitioner, who had such license, was convicted of openly carrying a firearm on a public street. The majority of the Florida Supreme Court upheld the ban under intermediate scrutiny based on conjecture by counsel about why the legislature may have banned open carry.

The issue is whether a prohibition on peaceably and openly carrying a lawfully-owned handgun infringes on "the right of the people to . . . bear arms" protected by the Second Amendment to the United States Constitution. That issue also involves the extent to which a restriction on a constitutional right may be upheld, under a proper standard of review, on the basis of a post hoc argument of counsel with no foundation in the legislative or factual record.

PARTIES TO PROCEEDING

Petitioner Dale Lee Norman is an individual who, at the time of his conviction for openly carrying a handgun in a public place, was a resident of Fort Pierce, Florida. Respondent is the State of Florida. No corporate entities are involved in this case, and no Rule 29.6 disclosure statement is required.

TABLE OF CONTENTS

Page

APPENDIX

TABLE OF AUTHORITIES

CASES **Page**

CONSTITUTIONS

STATUTES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported as *Norman v. State*, 215 So.3d 18 (Fla. 2017). App. 2a. The opinion of the Fourth District Court of Appeal of Florida is reported as *Norman v. State*, 159 So. 3d 205 (Fla. 4th DCA 2015). App. 59a.

JURISDICTION

On March 2, 2017, the Supreme Court of Florida rendered judgment affirming the decision of the Fourth District Court of Appeal of Florida. App. 2a. The Supreme Court upheld the validity under the Second Amendment of Florida's statute prohibiting the open carrying of a firearm in a public place and affirmed petitioner's conviction thereunder. App. 48a. On April 13, 2017, the Court denied the petition for rehearing. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTION AND STATUTES

The texts of the following are in the Appendix: U.S. Const., Amends. II and XIV, § 1; Fla. Stat. §§ 790.01, 790.06(1), and 790.053.

STATEMENT OF THE CASE

(i) Statutory Scheme

In Florida, "it is unlawful for any person to openly carry on or about his or her person any firearm . . . ." Fla. Stat. § 790.053(1). Violation is a misdemeanor of the second degree, which is punishable by a definite term of imprisonment not exceeding 60 days and/or a fine not to exceed $500. §§ 790.053(3), 775.082(4)(b), 775.083(1)(e). Exemptions exist for persons engaged in activities like shooting practice and hunting or who are at their home or place of business. § 790.25(3). However, no exemption otherwise exists for openly carrying a firearm for self-defense or other lawful purposes.

Further, "a person who is not licensed under § 790.06 and who carries a concealed firearm on or about his or her person commits a felony of the third degree . . . ." § 790.01. A person is eligible to be issued a license under § 790.06 to carry a concealed firearm (handguns only) if such person has no felony conviction, has not had adjudication of guilt withheld or imposition of sentence suspended on any felony or misdemeanor crime of domestic violence unless three years have passed since probation ended, has not been convicted of an offense for controlled substances (including a misdemeanor marijuana offense) within three years, has not been committed to a mental institution, has no other defined legal disabilities, and demonstrates competence with firearms. § 790.06(1), (2). "A license issued under this section does not authorize any person to openly carry a handgun . . . ." § 790.06(12)(a).

In sum, Florida prohibits the open or concealed carrying of any firearm – handgun or long gun (i.e., rifle or shotgun). An exception is provided for a person with a license to carry a handgun concealed. A long gun may not be carried at all, and no license to do so is provided by law.

(ii) Proceedings in the Courts Below

Mr. Norman was charged with Open Carrying of a Weapon (firearm) in violation of § 790.053(1), Florida Statutes (2012), which provides that "it is unlawful for any person to openly carry on or about his or her person any firearm . . . ."

Prior to trial in the County Court of St. Lucie County, Norman filed five motions to dismiss and challenged the constitutionality of § 790.053 under the Second Amendment. The county court reserved ruling on the motions until after the jury trial. App. 5a.

After the jury found Norman guilty, the county court made factual findings and certified the question of whether Florida's statutory scheme related to the open carry of firearms is constitutional to the Fourth District. Order Denying Defendant's Motions and Certifying Issues of Great Public Importance, County Court, 19th Judicial Circuit, St. Lucie County, Florida. App. 100a.

The county court withheld adjudication and imposed a $300 fine and court costs. Judgment and Sentence, App. 104a.

The Fourth District held that § 790.053(1) burdens the right to bear arms, but it does not infringe

on its central component of self-defense, because the law provides for licenses to carry a firearm concealed. App. 83a. Applying intermediate scrutiny, it deferred to the legislature and upheld the statute. App. 90-91a.

The Supreme Court of Florida affirmed, holding that the Second Amendment does not guarantee a right openly to carry a firearm in public and upholding Norman's conviction for openly carrying a firearm on his person. App. 2a. Applying intermediate scrutiny, the majority upheld the open carry ban on the basis that the alternative of concealed carry with a license was available and that the legislature could reasonably conclude that an armed attacker "might be more likely to target an open carrier than a concealed carrier." App. 43a. Since strict scrutiny does not apply, it added, such supposition need not be backed up by evidence and the court would defer to the legislative judgment. App. 43-44a.

Dissenting, Justice Canady averred that the legislature banned open carry in "response to the public opposition generated by the passage of the concealed-carry law." App. 57a. Such concern about public sensibilities cannot justify prohibiting the exercise of the right to bear arms. It was pure speculation that an attacker "might be more likely to target an open carrier than a concealed carrier"; in reality, an attacker might be more likely to leave the scene than confront an armed person. App. 56a.

(iii) Statement of Facts

On February 19, 2012, Mr. Norman received his license to carry a concealed handgun from the State of Florida. He left his home in Fort Pierce on foot with a

.38 caliber handgun and his license. A bystander saw him walking alongside U.S. Highway 1 with his handgun holstered on his waist and not covered by clothing. Officers from the Fort Pierce Police Department, responding to a call, saw him walking down a sidewalk visibly carrying the firearm in a holster outside of his shirt. App. 100-01a.

State's Exhibit A, a videotape recorded in one of the officer's cars, shows Mr. Norman walking down the sidewalk without incident. Police cars approach him from two directions, two officers get out, Mr. Norman raises his hands, and then the officers draw and point pistols at him. Norman dropped to his knees, was thrown to the ground on his stomach and handcuffed, and then was pulled up and frisked.[1] Nothing on the videotape or in the record reflects any misbehavior or threatening conduct by Mr. Norman.

ARGUMENT

THE WRIT SHOULD BE GRANTED TO RESOLVE WHETHER THE SECOND AMENDMENT RIGHT TO "BEAR ARMS" INCLUDES OPENLY CARRYING A FIREARM

I. THE DECISION OF THE FLORIDA SUPREME COURT IS IN CONFLICT WITH THIS COURT'S DECISION IN *HELLER*

A. Introduction

The Second Amendment provides in part that

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[1]The videotape, States Exhibit A, may be viewed at https://www.youtube.com/watch?v=-qKeJ6jd2Ak.

"the right of the people to keep and bear arms, shall not be infringed." This guarantees not only the right to "keep" arms, such as in one's house, but also to "bear arms," which simply means to carry arms without reference to a specific place. When the Framers intended that a provision of the Bill of Rights related to a house, they said so.[2]

Although this Court has specifically ruled only on the right to keep a handgun in the home, it is evident from the Court's analyses and plain statements in *District of Columbia v. Heller,* 554 U.S. 570, 584-87 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742, (2010), that the right to bear arms exists outside the home. Moreover, *Heller* plainly endorsed the established nineteenth-century precedent holding that the Second Amendment protects the right to carry arms openly. Thus, the decision of the Florida Supreme Court that the right does not include the open carrying of a firearm conflicts with this Court's rulings on an important federal question. To the extent that this Court has not resolved a specific case where that was the issue on point, this is an important question of federal law that has not been, but should be, settled by this Court.

In Florida, "it is unlawful for any person to openly carry on or about his or her person any firearm . . . ." Fla. Stat. § 790.053(1). Florida is an outlier in

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[2]U.S. Const., Amend. III ("No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law."); Amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated").

banning the open carry of a firearm. The unlicensed open carrying of a handgun is lawful in thirty States. A handgun may be openly carried in another fifteen States if the person has a license. Only five States prohibit open carry: California, Florida, Illinois, New York, and South Carolina.[3] See State Laws Regarding the Unconcealed Carry of Handguns, App. 109a.

This Court recently denied certiorari in *Peruta v. County of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (*en banc*), *cert. denied*, No. 16-894, 2017 WL 176580 (June 26, 2017), a civil challenge to a restrictive policy in the issuance of permits to carry concealed handguns, which held:

> Because the Second Amendment does not protect in any degree the right to carry concealed firearms in public, any prohibition or restriction a state may choose to impose on concealed carry – including a requirement of "good cause," however defined – is necessarily allowed by the Amendment. *There may or may not be a Second Amendment right for a member of the general public to carry a firearm openly in public*. (Emphasis added.)

The *en banc Peruta* court declined to answer that broad question because the plaintiffs had limited their challenge to the sheriff's "good cause" interpretation, and had not solidly raised the issue of

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[3]Of these, South Carolina limits its open carry ban to handguns, S.C. Code § 16-23-20, while the other four ban open carry of all firearms, including long guns.

whether the Second Amendment protects the right openly to carry a firearm. See 824 F.3d at 942. While that point is arguable, see Slip op. at 3, 2017 WL 176580, *2 (Thomas, J., dissenting from denial of certiorari), that issue does not arise here – Mr. Norman was convicted of the crime of openly carrying a firearm and he clearly challenged the statute as violative of the Second Amendment.

This case is in the same posture as *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1028 (2016) (*per curiam*), which, on Second Amendment grounds, reversed the decision of the Massachusetts Supreme Judicial Court upholding a criminal conviction of a law-abiding citizen for carrying a stun gun. Thus, for this case, no procedural issue arises that would question Justice Thomas' comment in his *Peruta* dissent:

> At issue in this case is whether that guarantee protects the right to carry firearms in public for self-defense. Neither party disputes that the issue is one of national importance or that the courts of appeals have already weighed in extensively.

Slip Op. at 1, 2017 WL 176580, *1.

B. The Florida Supreme Court Relied on Speculation and Conjecture to Uphold the Ban

The Jack Hagler Self-Defense Act, ch. 87-24, Laws of Fla. (1987), established a state-run system for issuing licenses to carry concealed handguns. Shortly after it went into effect, the open carrying of firearms

was prohibited. House Bill 28-B, ch. 87-537, Laws of Fla. (1987). The sponsor of the latter argued that "a problem ha[d] arisen in the minds of the public," and that clarification was needed that "we do not now allow for the open carry of firearms." App. 12-13a.

The Florida Supreme Court acknowledged that "Florida's Open Carry Law, which regulates the manner of how arms are borne, imposes a burden on conduct falling within the scope of the Second Amendment." App. 34-35a. Indeed, "Florida's Open Carry Law is related to the core of the constitutional right to bear arms for self-defense because it prohibits the open carrying of firearms in public where a need for self-defense exists." App. 37-38a, quoting *Moore v. Madigan*, 702 F.3d 933, 937 (7th Cir. 2012) ("To confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*.").

However, the court thought that the ban does not "prevent people from defending themselves," "leaves open an alternative outlet to exercise the right – here, Florida's shall-issue concealed-carry licensing scheme," and thus "does not severely burden the right." App. 38-39a. The court did not address precedent holding that, under the Florida statute, "a license to carry a concealed weapon or firearm is a privilege and not a vested right." *Crane v. Dep't of State, Div. of Licensing*, 547 So.2d 266, 267 (Fla. 3d DCA 1989).

The court applied intermediate scrutiny, under which a law "must be substantially related to an important governmental objective." App. 36a, quoting *Clark v. Jeter*, 486 U.S. 456, 461 (1988). "While the

State still bears the burden under this standard, the relationship between the Legislature's ends and means need only be a 'reasonable fit.'" App. 36a.

The court proceeded to find that the ban "reasonably fits" or "substantially relates" to public safety and reducing gun violence based on an argument of the State's counsel "in briefing before this Court" that the legislature decided that concealed carry is better than open carry for two reasons:

> An armed attacker engaged in the commission of a crime, for example, might be more likely to target an open carrier than a concealed carrier for the simple reason that a visibly armed citizen poses a more obvious danger to the attacker than a citizen with a hidden firearm. . . .
>
> [D]eranged persons and criminals would be less likely to gain control of firearms in public because concealed firearms – as opposed to openly carried firearms – could not be viewed by ordinary sight.

App. 43a.

The above claims were copied, in part word-for-word, from Respondent's Brief on the Merits 22-23 (filed Jan. 20, 2016). Like the court's opinion, the brief cited no evidence or authority whatever in support thereof.

The court goes on to state that "under intermediate scrutiny review, the State is not required

to produce evidence in a manner akin to strict scrutiny review." App. 43a. It added that "[r]eliable scientific proof regarding the efficacy of prohibiting open carry is difficult to obtain." App. 45a, quoting the lower court, 159 So.3d at 223 n.14. The lower court in turn quoted Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1465 (2009) ("There are no controlled experiments that can practically and ethically be run. 'Natural experiments' stemming from differences in policies and in gun ownership rates among different cities, states, or countries are subject to many confounding factors, such as culture and background crime rates."). App. 89-90.

From this perceived lack of evidence, the court concluded: "Therefore, . . . the State's prohibition on openly carrying firearms in public . . . while still permitting those guns to be carried, albeit in a concealed manner, reasonably fits the State's important government interests of public safety and reducing gun-related violence." App. 46a.

Justice Canady, joined by Justice Polston, dissented on the basis that "Florida's generally applicable ban on the open carrying of firearms is unjustified on any ground that can withstand even intermediate scrutiny . . . ." App. 49a (Canaday, J., dissenting). Further, *Heller* is accurately read to hold "that the Second Amendment right is a right to openly carry firearms." App. 49a.

There is "no substantial link between the ban and public safety," as the following demonstrates:

> The suggestion that someone committing a crime "might be more likely to target an open carrier than a concealed carrier," . . . is subject to the rejoinder that a criminal confronted with the presence of an open carrier may be more likely to leave the scene rather than face the uncertain outcome of exchanging gunfire with an armed citizen. In hostile encounters between armed individuals, the outcome is seldom certain, and even criminals can understand that fact. Many – admittedly not all – armed criminals will give a wide berth to someone they know to be armed. Likewise, speculating about the disarming of individuals who are openly carrying firearms by "deranged persons and criminals," . . . is a grasping-at-straws justification.

App. 56a.

Justice Canady found it "highly unlikely that these feeble proffered justifications had anything to do with the adoption of the statute banning open carrying." App. 56a. Instead, the open-carry ban was the legislature's response to political concerns over the concealed carry law. "First, the Legislature acted long before *Heller* was decided and thus at a time when the individual right to keep and bear arms was a hotly contested issue of constitutional law. Second, then – as now – most individuals desiring to bear arms in public likely preferred concealed carrying to open carrying." App. 56-57a.

The reality is that "opposition to open carrying stems not from concrete public safety concerns but from the fact that many people 'are (sensibly or not) made uncomfortable by the visible presence of a deadly weapon.'" App. 57a, quoting Volokh, 56 UCLA L. Rev. at 1523. Justice Canady added:

> Of course, many people are made uncomfortable by the fact that others are permitted to keep and bear arms at all. But contemporary sensibilities cannot be the test. Such sensibilities are no more a basis for defeating the historic right to open carrying than for defeating the understanding that the Second Amendment recognizes the right of individuals to keep and bear arms.

App. 57-58a.

For the above reasons, Justice Canady would have held "that the Second Amendment right is a right to openly carry firearms." App. 49a.

C. This Court Recognized the Right to Bear Arms Openly in *Heller*

Recognition of the right to bear arms was integral to this Court's decision in *Heller*, which found: "At the time of the founding, as now, to 'bear' meant to 'carry.' . . . When used with 'arms,' . . . the term has a meaning that refers to carrying for a particular purpose – confrontation." *District of Columbia v. Heller,* 554 U.S. 570, 584 (2008). The term includes to "wear, bear, or carry . . . upon the person or in the

clothing or in a pocket, for the purpose . . . of being armed . . . ." *Id.* (citation omitted).

Both now and in the 18th century, "'bear arms' was unambiguously used to refer to the carrying of weapons outside of an organized militia." *Id.* A number of states in the early Republic guaranteed a right of citizens to "bear arms in defense of themselves and the state" or "bear arms in defense of himself and the state." *Id.* at 584-85. These provisions "guarantee the individual right to possess and carry weapons in case of confrontation." *Id.* at 592. To be sure, "we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose." *Id.* at 595.

The Second Amendment's prefatory clause declared a well regulated militia as necessary to the security of a free state. "The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting." *Id.* at 599. While arms may be carried for self-defense either openly or concealed, both militia service and hunting necessarily involve the open bearing of arms.

That was borne out in nineteenth century state cases on which *Heller* relied. "In *Nunn v. State*, 1 Ga. 243, 251 (1846), the Georgia Supreme Court construed the Second Amendment as protecting the 'natural right of self-defence' and therefore struck down a ban on carrying pistols openly." *Id.* at 612. This Court's quotation from *Nunn* emphasizes the broad meaning

of "infringe," a term that is inconsistent with weak standards of scrutiny:

> The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State.

Id. at 612-13, quoting 1 Ga. at 251.

As *Nunn* flatly held, "so much of [the statute], as contains a prohibition against bearing arms openly, is in conflict with the Constitution, and void." *Nunn*, 1 Ga. at 251.

Heller further noted another decision which "held that citizens had a right to carry arms openly . . . ." *Id.* at 613, citing *State v. Chandler*, 5 La. Ann. 489, 490 (1850). "This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly assassinations." *Id.*, quoting *Chandler*, 5 La. Ann. at 490.

While the right to open carry was unquestioned, "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed

weapons were lawful under the Second Amendment or state analogues." *Id.* at 626 (citations omitted). However, the right does not extend to carrying a weapon "in any manner whatsoever," and the decision did not cast doubt on "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . . ." *Id.*

In concluding that the District's handgun ban violated the Second Amendment "[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights," this Court compared the ban to earlier prohibitions on open carry:

> Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban. And some of those few have been struck down. In *Nunn v. State*, the Georgia Supreme Court struck down a prohibition on carrying pistols openly (even though it upheld a prohibition on carrying concealed weapons). See 1 Ga., at 251. In *Andrews v. State*, the Tennessee Supreme Court likewise held that a statute that forbade openly carrying a pistol "publicly or privately, without regard to time or place, or circumstances," 50 Tenn., at 187, violated the state constitutional provision (which the court equated with the Second Amendment).[4] That was so even though the statute did not restrict the carrying of long guns. *Ibid.* See also *State v. Reid*,

[4]See *Andrews v. State*, 50 Tenn. 165, 183 (1871).

> 1 Ala. 612, 616-617 (1840) ("A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional").

Id. at 629.

At the Founding, no restrictions existed on the peaceable carrying of arms either openly or concealed.[5] The open-carry restrictions invalidated in the above cases appeared in the nineteenth century. However, slaves were prohibited from carrying arms at all, and "Blacks were routinely disarmed by Southern States after the Civil War." *Id.* 614. For example, "the civil law [of Kentucky] prohibits the colored man from bearing arms," read one report. *Id.*

"The view expressed in these statements was widely reported and was apparently widely held." *Id.* at 615. For instance, *The Loyal Georgian*, Feb. 3, 1866, assured blacks that "[a]ll men, without distinction of color, have the right to keep and bear arms to defend their homes, families or themselves." *Id.*, citing S. Halbrook, *Freedmen, the Fourteenth*

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[5]In America, noted St. George Tucker, the first commentator on the Constitution, "the right to bear arms is recognized and secured in the constitution," and thus: "In 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 St. George Tucker, *Blackstone's Commentaries*, App., Note B, at 19 (1803).

Amendment, and the Right to Bear Arms, 1866-1876, 19 (1998). The same issue of that newspaper printed General D. E. Sickles' General Order No. 1 for the Department of South Carolina (Jan. 1, 1866), which negated the state's prohibition on possession of firearms by blacks and upheld the right to carry openly as follows: "The constitutional rights of all loyal and well disposed inhabitants to bear arms, will not be infringed; nevertheless this shall not be construed to sanction the unlawful practice of carrying concealed weapons . . . ." Halbrook at 18-19.

In this case, the Florida Supreme Court held that it is permissible to ban open carry of firearms because concealed carry of handguns is available. *Heller* rejected the similar argument "that it is permissible to ban the possession of handguns so long as the possession of other firearms (i.e., long guns) is allowed. It is enough to note . . . that the American people have considered the handgun to be the quintessential self-defense weapon." 554 U.S. at 629. By the same token, since the Founding, open carry has been the quintessential mode of bearing arms. Yet Florida prohibits any and all carrying of long guns (rifles and shotguns) whether openly or concealed, and bans any and all carrying of handguns, both openly and concealed, except for concealed carry by license holders as a privilege, not a right.

In sum, while the carrying of firearms was not the narrow issue in *Heller*, its analysis of the meaning of the right to "bear arms" and its description of the early precedents clarify that the Second Amendment protects the right to bear arms openly.

D. This Court Reaffirmed the Right to Bear Arms in *McDonald* and *Caetano*

McDonald began by recalling that in *Heller*, "we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense . . . ." *McDonald*, 561 U.S. at 748. "Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller,* we held that individual self-defense is 'the central component' of the Second Amendment right." *Id.* at 767 (citation omitted). Obviously, the need to defend one's life may arise outside the home.

McDonald specifically addressed prohibitions on the carrying of firearms without a license. At the beginning of its discussion of the infringements the Fourteenth Amendment was designed to remedy, *McDonald* pinpointed state laws prohibiting freed slaves from carrying arms. Typical was the Mississippi law providing that "no freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind . . . ." *Id.* at 771, quoting Certain Offenses of Freedmen, 1865 Miss. Laws p. 165, § 1, in 1 *Documentary History of Reconstruction* 289 (W. Fleming ed.1950).[6]

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[6] *McDonald* further referred to "Regulations for Freedmen in Louisiana," *id.*, which included the following: "No negro who is not in the military service shall be allowed to carry firearms, or any kind of weapons, within the parish, without the written special permission of his employers, approved and indorsed by the nearest and most convenient chief of patrol." 1 *Documentary History of Reconstruction* at 279-80.

McDonald described a resolution from black citizens in South Carolina who petitioned Congress complaining of a law "to deprive us [of] arms" as violative of "the right to keep and bear arms." *Id.* at 771 n.18. Rep. George W. Julian described that law and another in urging adoption of the Fourteenth Amendment:

> Florida makes it a misdemeanor for colored men to *carry* weapons without a license to do so from a probate judge, and the punishment of the offense is whipping and the pillory. South Carolina has the same enactments . . . . Cunning legislative devices are being invented in most of the States to restore slavery in fact.

Cong. Globe, 39th Cong., 1st Sess., 3210 (June 17, 1866). (emphasis added).

"The most explicit evidence of Congress' aim" regarding the Fourteenth Amendment, *McDonald* continued, appeared in its recognition in the Freedmen's Bureau Act of 1866 of "the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms* . . . ." *McDonald*, 561 U.S. at 773 (emphasis in original). *McDonald* rejected the argument that the above Act and the Fourteenth Amendment sought only to provide a non-discrimination rule. The Act referred to the "full and equal benefit," not just "equal benefit." *Id.*

In his *McDonald* concurrence, Justice Thomas referred to states that "enacted legislation prohibiting blacks from *carrying* firearms without a license," and quoted Frederick Douglass as stating that "the black man has never had the right either to keep *or bear* arms," which would be remedied by adoption of the Fourteenth Amendment. *Id.* at 847 (Thomas, J., concurring) (emphasis added).

Having completed its historical analysis, *McDonald* proceeded to restate "our central holding in *Heller*: that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." *Id.* at 780. Again, the right is not limited to the home, and open carry has been the most universally recognized method of bearing arms since the Founding.

While not further discussed in *McDonald*, Florida's historical experiences bear out the above. After the Civil War, it was unlawful for a black person to possess a firearm without a license. Ex. Doc. No. 118, 39th Cong., 1st Sess. 20 (1866). Florida's governor averred: "The [law] in regard to freedmen carrying firearms does not accord with our Constitution, has not been enforced and should be repealed." Fla. Sen. J. 13 (1866). Officials enforcing the law were prosecuted under the Civil Rights Act of 1866.[7] Open carry apparently became the rule.[8]

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[7]Jerrell H. Shofner, *Nor Is it Over Yet: Florida in the Era of Reconstruction, 1863-1877*, at 84 (1974)

[8]John Wallace, a black politician, commented: "We have often passed through the streets of Tallahassee with our gun upon

However, restrictions reappeared in the Jim Crow era. A Florida enactment passed around the turn of the century making it unlawful, without a license, to carry a pistol or repeating rifle "was passed for the purpose of disarming the negro laborers" and "was never intended to be applied to the white population and in practice has never been so applied." *Watson v. Stone*, 148 Fla. 516, 524, 4 So.2d 700 (1941) (Buford, J., concurring).[9]

More recently, this Court in *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1028 (2016) (*per curiam*), reaffirmed that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms . . . ." (Citation omitted.) This Court vacated a state court decision upholding a ban on possession of stun guns as inconsistent with *Heller*. The defendant was an abused woman who possessed a stun gun in a parking lot, not in her home. *Id.* at 1029 (Alito, J., concurring). She had essentially been convicted for "for arming herself with a nonlethal weapon that may well have saved her life." *Id.* at 1033. While the method of carry was not at issue, it was not suggested that she lacked Second Amendment protection because she was carrying outside her home.

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our shoulder, without a license, and were never disturbed by any one during the time this law was in force." J. Wallace, *Carpet Bag Rule in Florida* 35 (1885).

[9] "[T]here had never been, within my knowledge, any effort to enforce the provisions of this statute as to white people, because it has been generally conceded to be in contravention of the Constitution and non-enforceable if contested." *Id.*

E. A Long Line of Precedents by this Court and the State Courts Recognize the Core Right to Carry Arms Openly

While *Heller* was this Court's first in-depth analysis of the meaning of the Second Amendment, it was preceded by a long line of decisions by this Court and especially the State courts, particularly on the right to carry arms openly. *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897), stated what was then a non-controversial principle:

> The law is perfectly well settled that the first 10 amendments to the constitution, commonly known as the 'Bill of Rights,' were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case. In incorporating these principles into the fundamental law, there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed. Thus, . . . the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons . . . .

By obvious implication, the right to bear arms *would* be infringed by laws prohibiting the open carrying of weapons.

In the following period, some State courts continued to hold as unconstitutional prohibitions on carrying firearms openly. *State v. Rosenthal*, 55 A. 610, 611 (Vt. 1903), actually invalidated a prohibition on carrying a pistol, openly or concealed, without a permit as violative of the right to bear arms.

Similarly, *State v. Kerner*, 107 S.E. 222, 225 (N.C. 1921), invalidated the requirement of a license "in order to carry a pistol off his own premises, even openly . . . ." "'[P]istol' ex vi termini is properly included within the word 'arms,' and . . . the right to bear such arms unconcealed cannot be infringed." *Id.* at 225. The court held that "this is void because an unreasonable regulation, and, besides, it would be void because for all practical purposes it is a prohibition of the constitutional right to bear arms. There would be no time or opportunity to get such permit . . . on an emergency." *Id.* at 225.

Employing similar reasoning, *State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139, 144 (W. Va. 1988), invalidated a statute which prohibited carrying a handgun without a license, in that it "operates to impermissibly infringe upon this constitutionally protected right to bear arms for defensive purposes."

Bleiler v. Chief, Dover Police Dep't., 927 A.2d 1216, 1222 (N.H. 2007), upheld the requirement of a license to carry a concealed weapon because it "does not prohibit carrying weapons; it merely regulates the manner of carrying them. . . . Even without a license, individuals retain the ability . . . to carry weapons in plain view." The same cannot be said here.

The above decisions reflect traditional understandings of the right to bear arms openly under both the Second Amendment and the various State bills of rights. Forty-four State constitutions guarantee the right to bear arms. Eugene Volokh, "State Constitutional Rights to Keep & Bear Arms," 11 *Texas Rev. of Law & Politics* 191 (2006). Of these, nine explicitly delegate power to the legislature to restrict the carrying of concealed arms.[10] Only five empower regulation of the carrying of arms without reference to open or concealed carry.[11] Despite that handful, it is noteworthy that neither the Second Amendment nor any of the other thirty-nine States with guarantees explicitly authorize the banning of the open carrying of arms.

In sum, traditionally this Court and the State courts have viewed the right to bear arms as categorically protecting the carrying of firearms openly. Forty-five States today allow open carry, thirty of them without requiring a license and fifteen requiring a license. Florida and the other four States that generally ban open carry are outliers in conflict with American traditions. See App. 109a.

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[10]Colo. Const., Art. I, § 13; Idaho Const., Art. I, § 11; Ky. Const., Art. I, § 1, ¶ 7; La. Const., Art. I, § 11; Miss. Const., Art. III, § 12; Mo. Const., Art. I, § 23; Mont. Const., Art. II, § 12; N. Mex. Const., Art. II, § 6; No. Car. Const., Art. I, § 30.

[11]Fla. Const., Art. I, § 8; Ga. Const., Art. I, § 1, ¶ 8; Okla. Const., Art. II, § 26; Tenn. Const., Art. I, § 26; Tex. Const., Art. I, § 23.

II. THE PETITION SHOULD BE GRANTED TO RESOLVE THE UNSETTLED ISSUE OF THE PROPER STANDARD OF REVIEW FOR RESTRICTIONS ON SECOND AMENDMENT RIGHTS

A. This Court Should Clarify Whether to Review Second Amendment Restrictions Under Strict or Intermediate Scrutiny or Under Text, History, and Tradition

Any restrictions on the right to carry arms openly must be justified on a basis appropriate for a constitutional right, whether the test is a standard of review like strict or intermediate scrutiny, or is text, history, and tradition. While intermediate scrutiny is not the appropriate standard, if applied it should be applied correctly. Florida's ban on open carry does not even pass intermediate scrutiny.

"Since our decision in *Heller*, members of the Courts of Appeals have disagreed about whether and to what extent the tiers-of-scrutiny analysis should apply to burdens on Second Amendment rights." *Jackson v. City & County of San Francisco*, 135 S. Ct. 2799, 2801 (2015) (Thomas, J., dissenting from denial of cert.). Justice Thomas went on to contrast the two approaches in *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011). That court's majority asks whether a provision "impinges upon a right protected by the Second Amendment" and if so, decides "whether the provision passes muster under the appropriate level of constitutional scrutiny." *Id.* at 1252. The dissent opined: "In my view, *Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition,

not by a balancing test such as strict or intermediate scrutiny." *Id.* at 1271 (Kavanaugh, J., dissenting).

Florida's ban on open carry is invalid under any of these approaches, whether under standards of review like strict or intermediate scrutiny, or under the approach of reviewing text, history, and tradition. This Court should clarify the appropriate standard.

The Second Amendment right to bear arms is a fundamental right, restrictions on which are subject to strict scrutiny under this Court's jurisprudence. Blackstone "cited the arms provision of the [English] Bill of Rights as one of the fundamental rights of Englishmen." *Heller*, 554 U.S. at 594. "By the time of the founding, the right to have arms had become fundamental for English subjects." *Id.* at 593.

Indeed, the Second Amendment is incorporated through the Due Process Clause of the Fourteenth Amendment because "the right to keep and bear arms is fundamental to our scheme of ordered liberty," and "is deeply rooted in this Nation's history and tradition . . . ." *McDonald*, 561 U.S. at 767.

A right is "fundamental" if it is "explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17, 33 (1973). No constitutional right is "less 'fundamental' than" others, and "we know of no principled basis on which to create a hierarchy of constitutional values . . . ." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982). "To view a particular provision of the Bill of Rights with disfavor

inevitably results in a constricted application of it. This is to disrespect the Constitution." *Ullmann v. United States*, 350 U.S. 422, 428-29 (1956). If a law impairs the exercise of a fundamental right, it must pass strict scrutiny. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).[12]

Heller rejected the equivalent of intermediate scrutiny when it declined to apply a "judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'" 554 U.S. at 634. Such a test would allow "arguments for and against gun control" and the upholding of a handgun ban "because handgun violence is a problem . . . ." *Id.* However, constitutional rights are not subject to such "interest-balancing":

> Like the First, it [the Second Amendment] is the very product of an interest-balancing by the people . . . . And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

Id. at 635.

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[12]"[C]lassifications affecting fundamental rights . . . are given the most exacting scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

In short, if a standard of scrutiny is applied to the ban on open bearing of arms, it should be strict scrutiny. However, as the following shows, Florida's ban does not even pass intermediate scrutiny, and the lower court did not even purport to rely on evidence that it does.

B. If Intermediate Scrutiny Applies, This Court Should Clarify the Extent to Which a Restriction Must *in Fact* Alleviate Harms in a Direct and Material Way

The Florida Supreme Court's attempt to uphold the open carry ban under intermediate scrutiny falls far short of the mark. Under intermediate scrutiny, the government must "demonstrate that the recited harms are real, not merely conjectural, and that the regulation *will in fact* alleviate these harms in a direct and material way." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994) ("*Turner I*") (emphasis added). "We cautioned that this requirement was critical . . . ." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487 (1995). That said, this Court should further clarify the requirement.

The deference accorded to legislative predictive judgments does not mean that they are "insulated from meaningful judicial review," nor do legislative findings "foreclose our independent judgment of the facts bearing on an issue of constitutional law." *Turner I* at 666 (citation omitted). "This obligation to exercise independent judgment . . . is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence." *Id.* (adding that "the government must be able to adduce either empirical support or at least sound

reasoning on behalf of its measures") (citation omitted).

Based on the "paucity of evidence" that a problem existed, and lacking "any findings concerning the actual effects of" the restrictions, in *Turner I* it could not be determined whether the law was narrowly tailored and whether there were "'constitutionally acceptable less restrictive means' of achieving the Government's asserted interests." *Id.* at 667-68.

The above principles were amplified in *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 195 (1997) (*Turner II*). The expanded record allowed the Court to address whether the "provisions were designed to address a real harm, and whether those provisions will alleviate it in a material way." *Id.* Deference to the legislative judgments applied to this first step of the analysis. *Id.* at 195-96.

Deference is not proper in the second portion of the inquiry, which "concerns the fit between the asserted interests and the means chosen to advance them." *Id.* at 213. A restriction must promote "a substantial governmental interest that would be achieved less effectively absent the regulation," and must not "burden substantially more [activity] than is necessary to further" that interest. *Id.* at 213-14. In determining whether the means were narrowly tailored, *id.* at 215-16, this Court assessed whether "the means chosen are not substantially broader than necessary" and if there was any "adequate alternative" to the restriction. *Id.* at 218 (citation omitted). The decision below in this case fails to meet these standards.

As this Court has emphasized: "There must be a direct causal link between the restriction imposed and the injury to be prevented." *United States v. Alvarez*, 567 U.S. 709, 725 (2012). Here, any link is based on conjecture.

This Court has rejected a plea "to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees . . . ." *McDonald*, 561 U.S. at 780. The court below did just that with its speculative findings instead of conducting an objective analysis of whether the ban "will in fact alleviate the[] harms in a direct and material way." *Turner I*, 512 U.S. at 664.

C. The Speculative "Reasonable Fit" Found Below Failed the Test of Whether a Restriction Will in Fact Alleviate The Harms

Based on the post hoc argument of the State's counsel "in briefing before this Court," the court below found the open carry ban to be a reasonable fit with public safety because "an armed attacker . . . might be more likely to target an open carrier than a concealed carrier" and "would be less likely to gain control of firearms in public because concealed firearms . . . could not be viewed by ordinary sight." App. 43a. Nothing in the legislative or factual records suggested these justifications, which were made without any support in the Respondent's Brief on the Merits at 22-23 and simply copied by the court.

Had the court looked for evidence, it would have encountered the definitive study, James D. Wright & Peter H. Rossi, *The Armed Criminal in America: A Survey of Incarcerated Felons* (National Institute of

Justice 1985). This survey of 1,874 incarcerated felons found that "the majority opinion was that felons are made nervous by the prospect of an encounter with an armed victim." *Id.* at 27. Three-fifths agreed that "a criminal is not going to mess around with a victim *he knows* is armed with a gun." *Id.* (emphasis added). Further, "the strong majority agreed that it is wise to find out in advance if one's potential victims are armed, and *to avoid them if they are*." *Id.* (emphasis added). Over a third thought often about the possibility of getting shot by the police and by one's victim. *Id.* at 28. Regarding how "a felon would come to find out that his potential victim was armed and choose not to commit a crime," Wright and Rossi conclude:

> Unless a victim were a policeman, a security guard, or *carrying his weapon in a very obvious way*, it would normally be rather difficult to make the determination, most of all in committing a conventional crime (robbery, burglary, assault) against a conventional victim.

Id. at 29 n.27 (emphasis added).

These empirical facts directly contradict the Florida court's speculation that "an armed attacker . . . might be more likely to target an open carrier than a concealed carrier . . . ." App. 43a. Reality is the other way around – an armed attacker is *less* likely to attack an open carrier because the firearm can be seen, but is *more* likely to attack a concealed carrier since the criminal has no way of knowing that such person is armed.

Having repeated the arguments of counsel with no evidentiary basis, the court added that "the State is not required to produce evidence in a manner akin to strict scrutiny review." App. 43a. Its above speculation is not "evidence" in any sense of the word, but is more akin to the rational-basis standard of whether one can imagine *any* basis that might conceivably have motivated the legislature to act. But rational basis "could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms." *Heller*, 554 U.S. at 628 n.27.

Instead of being a "reasonable fit," there is no fit at all between the ban on open carry and the government interests. As Justice Canady noted, "a criminal confronted with the presence of an open carrier may be more likely to leave the scene rather than face the uncertain outcome of exchanging gunfire with an armed citizen." App. 56a (Canady, J., dissenting). The majority only offered a "grasping-at-straws justification." App. 56a. The Wright-Rossi study verifies Justice Canady's position.

The reality, Justice Canady continued, is that "opposition to open carrying stems not from concrete public safety concerns but from the fact that many people 'are (sensibly or not) made uncomfortable by the visible presence of a deadly weapon.'" App. 57a (citation omitted). "But contemporary sensibilities cannot be the test. Such sensibilities are no more a basis for defeating the historic right to open carrying than for defeating the understanding that the Second Amendment recognizes the right of individuals to keep

and bear arms." App. 57-58a. That is no more justifiable than, as this Court recently held, banning speech because it is offensive to some. *Matal v. Tam*, 137 S.Ct. 1744, 2017 WL 2621315, *19 (2017).

CONCLUSION

This Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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July 10, 2017