No. 17-68

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a state that broadly allows responsible, law-abiding adults to carry handguns and other weapons in public for self-defense may, consistent with the Second Amendment, require that those weapons generally remain concealed.

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STATEMENT

1. Florida law "permits individuals to carry firearms in public, so long as the firearm is carried in a concealed manner." Pet. App. 3a. That regulatory regime is the practical result of several laws, taken together. In general, one set of laws makes it unlawful for an individual to carry a weapon or firearm in public. Fla. Stat. §§ 790.01, 790.053; *but see, e.g.*, *id.* § 790.01(3)(a) (authorizing concealed carry during a mandatory evacuation in a declared state of emergency); *id.* § 790.25(3), (5) (specifying other exceptions to carry prohibitions). However, other laws allow an individual to carry a concealed weapon or firearm if he possesses a concealed weapon license ("CWL") issued by Florida or a recognized out-of-state equivalent. *Id.* §§ 790.015, 790.06(1).

To obtain a Florida CWL, applicants must submit a completed form, a license fee of up to $55.00, a set of fingerprints, an approved training course certificate, and a passport-style photograph. Fla. Stat. § 790.06(5). "[W]ithin 90 days after" it receives a complete application packet, the State "shall issue" a CWL if the applicant meets the objective statutory criteria. *Id.* § 790.06(2), (6)(c). These criteria—such as lack of felony convictions, adjudications of incapacity, or domestic-violence injunctions—are calculated to ensure that applicants are both responsible and law-abiding, and they are the only criteria by which issuance decisions are made. "[T]o carry out the constitutional right to bear arms for self-defense," Florida law prohibits the issuing authority from "regulat[ing] or restrict[ing] the issuing of licenses," and "[s]ubjective or arbitrary actions or rules which en-

cumber the issuing process by placing burdens on the applicant beyond those" procedures and criteria specified in the statute "are prohibited." *Id.* § 790.06(15). Under Florida's "shall-issue" model, "essentially all adults who pass[ ] a background check and safety test [can] qualify for a permit to carry a concealed handgun[.]" Clayton E. Cramer & David B. Kopel, *"Shall Issue": The New Wave of Concealed Handgun Permit Laws*, 62 Tenn. L. Rev. 679, 680, 690 (1995).

With certain exceptions, the open carrying of weapons and firearms is prohibited. *See* Fla. Stat. §§ 790.25(3), 790.053. A CWL "does not authorize any person to" flout this prohibition. *Id.* § 790.06(12)(a). Nor does it authorize concealed carry within fifteen specified sensitive locations. *Id.* Otherwise, however, license-holders may carry a weapon or firearm in public so long as it generally remains hidden.

2. On February 19, 2012, Petitioner Dale Lee Norman received a Florida CWL. Pet. App. 4a–5a That afternoon, he left his home in Fort Pierce and went for a walk, armed with his license and a handgun. *Id.* at 5a. A bystander soon alerted local police that Petitioner was walking alongside U.S. Highway 1 with a holstered, exposed handgun. *Id.* Officers arrived several minutes later, confirmed that Petitioner was openly carrying a handgun in an outside-the-waistband holster, and arrested him. *Id.* Video footage of the arrest "showed that [Petitioner's] gun was completely exposed to public view, in its holster, and not covered by [his] shirt." *Id.* "[T]here was no credible evidence . . . that the firearm had been concealed before [Petitioner's] arrest, or that it could have been, considering his manner of dress." *Id.* at 101a.

3. Petitioner was charged under section 790.053, Florida Statutes, with Open Carrying of a Weapon (firearm), a second-degree misdemeanor. Before trial, Petitioner "filed five motions to dismiss and challenged the constitutionality of section 790.053 on various grounds." *Id.* at 5a. After a jury found Petitioner guilty of the charged offense, the trial court denied his motions, but it certified three questions to the Florida Fourth District Court of Appeal. *Id.* at 100a–102a. One question concerned the constitutionality of "Florida's statutory scheme related to the open carry of firearms." *Id.* at 102a. The other two concerned a state-law issue and a due-process issue, neither of which Petitioner pursues before this Court. *Id.* The trial court withheld adjudication, imposing a $300 fine and court costs. *Id.* at 104a.

The Fourth District Court of Appeal affirmed the trial court's rulings. *Id.* at 61a. As to the Second Amendment question, it reasoned that in light of Florida's permissive concealed-carry system, the open-carry statute does not infringe the core right of self-defense and survives intermediate scrutiny. *Id.* at 81a–91a, 93a–96a. It specifically noted that this Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), relied upon "several nineteenth-century cases holding that certain modes of public carry can be prohibited when other modes are allowed." 159 So. 3d at 225 n.17 (citing *Heller*, 554 U.S. at 610–14).[1] Petitioner then

[1] This footnote appears to have been unintentionally omitted from Petitioner's Appendix.

sought and obtained review in the Florida Supreme Court.

4. The Florida Supreme Court affirmed. The court began with the observation that "Florida's Open Carry Law is a provision within Florida's overall scheme regulating the use of firearms . . . but still allowing the possession of firearms in most instances." Pet. App. 2a. The court therefore declined to evaluate the open-carry statute in the abstract, instead choosing to review it "within the context of" Florida's overall regulatory scheme. *Id.* at 4a.

The court stressed that Florida's shall-issue concealed-carry system "leaves no discretion to the State in issuing concealed-carry licenses, provided the applicant meets certain objective, statutory criteria." *Id.* at 12a. In other words, "Florida's Open Carry Law does not diminish an individual's ability to carry a firearm for self-defense, so long as the firearm is carried in a concealed manner and the individual has received a concealed-carry license." *Id.* at 15a–18a.

This "statutory scheme for regulating the manner of carrying firearms," *id.* at 11a, the court held, does not offend the Second Amendment, *id.* at 46a. It reasoned that this Court in *Heller* "explicitly noted that the Second Amendment's individual right is not unlimited, and, historically, the right has been subject to laws prohibiting how firearms are carried, including antebellum laws prohibiting the concealed carrying of weapons." *Id.* at 21a (citing *Heller*, 554 U.S. at 626–27). Moreover, this Court "has not further defined the scope of the Second Amendment to preclude laws regulating the *manner* of how arms are borne." *Id.* at 25a

(emphasis in original). And since *Heller*, the court explained, "federal circuit courts have found restrictions on the public carrying of firearms as not only surviving intermediate scrutiny, but, in some instances, not even implicating the Second Amendment right at all." *Id.* at 28a.

For a doctrinal framework, the court looked to the "two-step analysis" that most federal courts of appeals have applied to post-*Heller* Second Amendment claims. *Id.* at 33a. Following this approach, the court concluded 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" because it implicates "the right of self-defense." *Id.* at 34a–35a. It therefore proceeded to the second step of the inquiry: determining "the appropriate level of scrutiny." *Id.* at 35a.

Because *Heller* "foreclosed . . . rational basis review" for burdens on the right to keep and bear arms, the court believed it faced a choice "between strict and intermediate scrutiny." *Id.* (citing *Heller*, 554 U.S. at 628 n.27). Examining "how close the [open-carry] law comes to the core of the Second Amendment right" of armed self-defense and "the severity of the law's burden on that right," *id.* at 37a (internal quotation marks omitted), it selected the latter, *id.* at 41a. The court explained that the open-carry law "is not so close to the 'core' of this right," considering the State's permissive shall-issue concealed-carry system. *Id.* at 38a. For the same reason, the law does not severely burden the right, as Florida's firearms laws "leave[ ] open an alternative outlet to exercise" it; namely, concealed carry. *Id.* at 38a–39a.

Applying intermediate scrutiny, the court concluded that "the government's interest in ensuring public safety by reducing firearm-related crime is undoubtedly critically important." *Id.* at 42a. And the open-carry law is sufficiently tailored to address that interest, the court concluded, because Respondent offered examples of situations in which open carry poses a greater risk to the carrier and the public than concealed carry. *Id.* at 43a. The court rejected Petitioner's contention that Respondent must support such arguments with "data or statistical studies," noting that "federal courts have upheld gun regulations" under intermediate scrutiny without requiring such evidence, and this Court has done likewise in other areas of constitutional doctrine. *Id.* at 44a–45a. The court added that a "review of the post-*Heller* jurisprudence" shows that "courts have traditionally been more deferential to the legislature" when reviewing "laws regulating the manner of how firearms are borne," especially given the difficulty of obtaining "[r]eliable scientific proof regarding the efficacy" of such laws. *Id.* at 45a (quotation marks omitted).

Accordingly, the court held that the open-carry law "survives intermediate scrutiny review and is not unconstitutional under the Second Amendment." *Id.* at 46a. The court further held, "under the same standard," that the law is consistent with the Florida Constitution's arms-bearing guarantee. *Id.* at 48a.

Justice Canady, joined by Justice Polston, dissented. He agreed with the majority that the right *Heller* recognized "necessarily encompasses the right to carry arms in public." *Id.* at 50a (Canady, J., dissenting). He went further than the majority, however,

by reading *Heller*'s favorable citations of two antebellum state-court decisions—*Nunn v. State*, 1 Ga. 243 (1846) and *State v. Chandler*, 5 La. Ann. 489 (1850)—to "establish[ ] that the Second Amendment right is a right to *openly* carry firearms." *Id.* at 49a, 51a–53a (emphasis added).

Nunn struck down a total ban on public carry but upheld it insofar as it prohibited concealed carry, while *Chandler* upheld a concealed-carry ban where open carry was permitted. *Id.* at 51a–52a. "[B]oth cases," Justice Canady opined, indicate "that the constitutional right is best understood historically as a specific right to carry arms openly." *Id.* at 52a. Justice Canady considered it important, for purposes of defining the Second Amendment right, to "'refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.'" *Id.* at 53a (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989)). That most specific tradition, in Justice Canady's view, was not the longstanding tradition of regulating the manner of arms-bearing, but rather the antebellum period's particular preference for open carry over concealed carry. *Id.* As Justice Canady appeared to recognize, however, this calcified understanding of what constitutes "bear[ing]" is in tension with *Heller*'s rejection of "an ossified understanding of what constitutes 'arms.'" *See id.* at 53a n.19 (citing *Heller*, 554 U.S. at 582).

In Justice Canady's view, Florida's open-carry law fails intermediate scrutiny. He rejected the majority's explanation of how the law furthers public-safety goals. *Id.* at 56a. As he saw it, "public opposition generated by the passage of the concealed-carry law,"

rather than public-safety concerns, motivated the enactment of the open-carry law. *Id.* at 57a. "But contemporary sensibilities," Justice Canady reasoned, "cannot be the test." *Id.* Because he read *Heller* and the antebellum state-court cases it cited to establish a right to open carry, and because he disagreed with the majority's approach in scrutinizing the open-carry law, Justice Canady would have held the statute unconstitutional under the Second Amendment. *Id.* at 58a.

REASONS FOR DENYING THE PETITION

The petition should be denied for at least three reasons.

First, Petitioner points to no decision of this Court or any other court addressing the question presented here—*i.e.*, whether a state violates the Second Amendment when it broadly allows concealed carry but generally disallows open carry. Still less does he establish a division of authority sufficiently important to merit this Court's review.

Second, the narrow question presented does not otherwise warrant this Court's consideration. That question is likely to be of practical significance in only two other states. In addition, it is undisputed that Florida law affords responsible, law-abiding citizens the ability to carry firearms for self-defense outside the home. Thus, the modest restriction Petitioner challenges does not meaningfully implicate, much less violate, what this Court has characterized as the "central component" of the Second Amendment right to keep and bear arms. What is more, this Court has recently and repeatedly denied certiorari in cases

presenting a much more important issue: whether the Second Amendment protects *any* right to carry firearms outside the home. This case does not supply a good vehicle for resolving that logically antecedent question, which should be addressed before this Court considers the narrower and far less consequential question at issue here.

Third, the decision below is correct. This Court has never held that the Second Amendment protects a right to openly carry firearms in public, and the reasoning set forth in pertinent caselaw supports the proposition that states fully accommodate the right to bear arms when they make available to responsible, law-abiding citizens some meaningful form of public carry. That is precisely what Florida has done here. Thus, Florida's law is valid under any arguably applicable analytical framework.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT.

Petitioner asserts a conflict with this Court's decision in *Heller*, and suggests a conflict with several other decisions of this Court. Pet. 5–8, 13–23. These purported conflicts are based on a misreading of this Court's cases. Since *Heller*, the lower courts have divided over whether the Second Amendment guarantees any meaningful right to bear arms in public. *See infra* Part II. But even decisions that have ruled in favor of right-to-carry claims have acknowledged that this Court "has not yet addressed the question whether the Second Amendment creates a right of self-defense outside the home." *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012); *accord*

Peruta v. Cty. of San Diego, 742 F.3d 1144, 1150 (9th Cir. 2014), *vacated and superseded*, 824 F.3d 919 (9th Cir. 2016) (en banc).

Because this Court has not directly addressed the Second Amendment's application beyond the home—not to mention the narrower question presented here—the decision below does not and cannot conflict with this Court's decisions. Regardless, the decision below is fully consistent not only with the holdings, but also the guidance, of this Court's Second Amendment jurisprudence.

1. This Court's modern Second Amendment cases have addressed weapon bans, not carry restrictions. In *Heller*, this Court held that the Second Amendment protects a responsible, law-abiding citizen's right to keep operable firearms—including handguns—at home for self-defense. 554 U.S. at 635. *Heller* invalidated the District of Columbia's handgun ban and requirement that home-stored long guns remain locked or disassembled, reasoning that under any form of heightened scrutiny, this "severe restriction" was incompatible with the Second Amendment right. *Id.* at 628–29.

Two years later, this Court held in *McDonald v. Chicago* that the individual right *Heller* recognized fully applies to the states via the Fourteenth Amendment, and it invalidated a Chicago gun ban that closely resembled the District's. 561 U.S. 742, 750 (2010). And in *Caetano v. Massachusetts*, this Court vacated a decision that had upheld a stun-gun ban under reasoning that *Heller* had expressly foreclosed. 136 S. Ct. 1027, 1028 (2016).

These three cases represent the sum total of this Court's modern Second Amendment decisions. As Judge O'Scannlain has observed, "[i]t doesn't take a lawyer to see that straightforward application of the rule in *Heller* will not dispose of" right-to-carry claims, and "[i]t should be equally obvious that neither *Heller* nor *McDonald* speaks explicitly or precisely to the scope of the Second Amendment right outside the home . . . ." *Peruta*, 742 F.3d at 1150; *accord Moore*, 702 F.3d at 935. Because this Court has not confronted a carry ban, the decision below does not and cannot conflict with any holding of this Court.

2. The reasoning set forth in this Court's cases likewise does not support the conclusion that the Second Amendment protects the right to any particular method of carry. Only *Heller* discussed carry-method regulations, and what it said supports the decision below.

Heller expressly approved regulations on the manner of carrying weapons, stating that the Second Amendment right is "not a right to keep *and carry* any weapon whatsoever *in any manner whatsoever* and for whatever purpose." 554 U.S. at 626 (emphases added). It also approved "longstanding" regulations, *id.* at 626–27 & n.26, of which carry-method regulations are an example, *see infra* Part II. Indeed, *Heller* observed that "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, while some courts struck down total carry bans insofar as they related to open carry, *id.* at 629.

Petitioner seizes on these cases to argue that he has a right to open carry, Pet. 14–17, but they don't lend the support he attributes to them; that states may opt for open over concealed carry does not speak to whether they may make the opposite choice. *See infra* Part II. In any event, this Court did not cite those cases for the proposition that the Second Amendment protects a right to open carry, and that was not the issue this Court confronted in *Heller*.

3. Finally, Petitioner suggests conflict with one pre-*Heller* decision of this Court, *Robertson v. Baldwin*, 165 U.S. 275 (1897). Pet. 23. But *Robertson* is not a Second Amendment decision. Instead, it addressed the constitutionality of a statute authorizing "justices of the peace to apprehend deserting seamen, and return them to their vessel." 165 U.S. at 277.

The dictum that Petitioner quotes is entirely consistent with the decision below. At one point in its discussion, the *Robertson* Court opined that "the right of the people to keep and bear arms (article 2) is *not infringed* by laws prohibiting the carrying of *concealed* weapons." *Id.* at 281–82 (emphases added). That statement is of no help to Petitioner here, as the Court did not say or imply that the Second Amendment *would be infringed* by laws prohibiting only the *open* carrying of weapons.

II. THE DECISION BELOW DOES NOT CONFLICT WITH LOWER COURT CASES.

Ultimately, Petitioner asserts a conflict not so much with this Court's decisions, but rather with several pre-*Heller* state-court cases. These asserted conflicts do not withstand scrutiny. Petitioner points

to no case in which a court has prevented a state from opting for concealed over open carry. Rather, the cited cases either invalidated total bans on public carry or upheld bans on concealed carry where open carry was permitted. Such holdings do not conflict with the decision below. In addition, post-*Heller* judicial opinions looking favorably on right-to-carry claims have widely—and correctly—understood such cases to establish that states accommodate the right to bear arms when they make available *some* form of carry, just as Florida has done here. Thus, the decision below is just as consistent with the rationales of these cases as it is with their holdings.

1. Petitioner recounts *Heller*'s favorable citations of two antebellum state-court decisions that upheld concealed-carry bans where open carry was permitted—*State v. Reid*, 1 Ala. 612 (1840), and *State v. Chandler*, 5 La. Ann. 489 (1850). Pet. 15–17. Because they upheld the laws they reviewed, they cannot conflict with the decision below. Indeed, each case expressly affirmed the pertinent state's authority to regulate the manner of arms-bearing. And in each case, the court's main rationale for upholding the concealed-carry ban was that the state had left open a channel for armed self-defense—the same basic rationale the decision below employed in upholding Florida's open-carry ban.

In *Reid*, the court explained that the Alabama Constitution's right-to-arms guarantee did not deprive the legislature of "the right to enact laws in regard to the manner in which arms shall be borne . . . . as may be dictated by the safety of the people and the advancement of public morals." 1 Ala. at 616. This

legislative prerogative, the court explained, had limits. "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 616–17. But a law that merely prohibits one manner of bearing arms thought to "exert an unhappy influence upon the moral feelings of the wearer, by making him less regardful of the personal security of others," the court held, "does not come in collision with the constitution." *Id.* at 617.

Similarly, *Chandler* upheld a regime prohibiting concealed carry but allowing open carry. While *Chandler* did state that open carry was "the right guaranteed by the Constitution," 5 La. Ann. at 490, *Chandler* tied that statement to the antebellum period's particular social customs. In that court's nineteenth-century view, concealed carry resulted in "bloodshed and assassinations committed upon unsuspecting persons," while open carry "places men upon an equality" and "is calculated to incite men to a manly and noble defence of themselves . . . without any tendency to secret advantages and unmanly assassinations." *Id.* But, as in *Reid*, the court's central rationale for upholding the concealed-carry ban was that it left open an alternative channel for armed self-defense. *Id.* (noting the ban "interfered with no man's right to carry arms" openly). Indeed, the Louisiana Supreme Court later interpreted *Chandler* to establish the broader principle that "prohibiting only *a particular mode* of bearing arms" is constitutionally permissible. *State v. Jumel*, 13 La. Ann. 399, 400 (1858) (emphasis in original).

Petitioner's reliance on *Bleiler v. Chief, Dover Police Department*, 927 A.2d 1216 (N.H. 2007), is similarly misplaced. Pet. 24. Just like the antebellum cases that *Heller* cited, *Bleiler* upheld a concealed-carry restriction because it did not "prohibit carrying weapons; it merely regulates the manner of carrying them." *Id.* at 1223. As the decision below explained, that is exactly what Florida has done here.

2. Petitioner next relies on five state cases that invalidated total or near-total bans on public carry, two of which *Heller* favorably cited. Pet. 14–16, 24. The decision below is consistent not only with the holdings, but also the rationales, of these cases as well.

In *Nunn v. State*, the Georgia Supreme Court invalidated a total ban on public carry of pistols but upheld it insofar as it prohibited concealed carry. 1 Ga. 243, 251 (1846). The court's principal rationale was that a total carry ban "deprive[d] the citizen of his *natural* right of self-defence" and "his constitutional right to keep and bear arms," but a concealed-carry ban did not. *Id.* (emphasis in original). *Heller* favorably cited *Nunn*. 554 U.S. at 612.

Similarly, the Tennessee Supreme Court struck down a complete ban on public carry in *Andrews v. State*, 50 Tenn. 165 (1871). Yet again, it was the sweeping nature of the ban that spelled its demise. "The power to regulate, does not fairly mean the power to prohibit," the court reasoned. *Id.* at 181. But in a passage that *Heller* quoted, *Andrews* signaled that the right to keep and bear arms is limited, with an eye toward prevailing social customs. "[T]he right to keep

arms involves, necessarily, the right to use such arms for all the ordinary purposes, *and in all the ordinary modes usual in the country*, and to which arms are adapted, limited by the duties of a good citizen in times of peace . . . ." *Id.* at 178–79 (emphasis added); *see Heller*, 554 U.S. at 614 (quoting this passage). Thus, while the court struck down the total carry ban, it made clear that the right to arms "is limited by the duties and proprieties of social life," and the legislature may impose a "restriction on the mode of using or carrying" weapons in accordance with social customs. *Andrews*, 50 Tenn. at 181, 186.

Both of these cases hold that total carry bans are incompatible with the right to bear arms. However, both also make clear that legislatures may prescribe a carry method without violating that right. Thus, they are consistent with the decision below.

The same is true of the twentieth-century state cases that Petitioner cites. Pet. 24. In each of these cases, the court confronted a regime that banned all public carry of pistols unless one first received an expensive or otherwise difficult-to-obtain permit at the discretion of government officials. *See State ex rel. City of Princeton v. Buckner*, 377 S.E.2d 139, 145 n.7 (W. Va. 1988) (issuing authority "may grant" the required license); *State v. Kerner*, 107 S.E. 222, 225 (N.C. 1921) (deeming the permit requirement "for all practical purposes" a "prohibition of the constitutional right to bear arms"); *State v. Rosenthal*, 55 A. 610, 611 (Vt. 1903) ("special permission" of local authorities required to carry); *see also* Cramer & Kopel, *supra*, at 681 (describing "broadly discretionary" twentieth-century permitting regimes). And in each case, the

court invalidated the ban because it amounted to a total prohibition of the right to bear arms outside the home for self-defense. *Buckner*, 377 S.E.2d at 144; *Kerner*, 107 S.E. at 225; *Rosenthal*, 55 A. at 611.

3. Petitioner's state-court cases are thus best understood to establish that states may regulate the manner of public carry without violating the right to bear arms. Indeed, even jurists looking favorably on post-*Heller* right-to-carry claims have agreed with that reading.

As Justice Thomas has observed, these kinds of cases "suggest that, although some regulation of public carry is permissible, an effective ban on all forms of public carry is not." *Peruta v. California*, 137 S. Ct. 1995, 1998 (2017) (Thomas, J., dissenting from denial of certiorari). Or in the words of Judge Hardiman, "courts have long . . . [held] that although a State may prohibit the open *or* concealed carry of firearms, it may not ban *both* because a complete prohibition on public carry violates the Second Amendment and analogous state constitutional provisions." *Drake v. Filko*, 724 F.3d 426, 449 (3d Cir. 2013) (Hardiman, J., dissenting) (emphases in original); *accord Peruta*, 742 F.3d at 1172.

Because the state cases upon which Petitioner ultimately relies do not conflict—in either holding or principle—with the decision below, they do not provide a basis for a grant of certiorari.

4. The decision below also does not conflict with the post-*Heller* decision of any other court. Some post-*Heller* lower courts have held that the Second

Amendment protects a right to carry arms in public for self-defense. *E.g.*, *Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017); *Moore*, 702 F.3d at 942. Other courts have either rejected that position or otherwise upheld severe restrictions that effectively deny any right of armed self-defense beyond the home. *E.g.*, *Peruta v. Cty. of San Diego*, 824 F.3d 919, 924 (9th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 1995 (2017); *Drake*, 724 F.3d at 440, *cert. denied sub nom. Drake v. Jerejian*, 134 S. Ct. 2134 (2014); *Woollard v. Gallagher*, 712 F.3d 865, 882 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 422 (2013); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 101 (2d Cir. 2012), *cert. denied sub nom. Kachalsky v. Cacace*, 133 S. Ct. 1806 (2013); *Hightower v. Boston*, 693 F.3d 61, 65 (1st Cir. 2012); *Commonwealth v. Gouse*, 965 N.E.2d 774, 802 (Mass. 2012); *Williams v. State*, 10 A.3d 1167, 1169 (Md. 2011), *cert. denied sub nom. Williams v. Maryland*, 565 U.S. 815 (2011); *Wooden v. United States*, 6 A.3d 833, 841 (D.C. 2010). Still others have upheld restrictions on concealed carry while being careful not to signal approval for total carry bans. *E.g.*, *Peterson v. Martinez*, 707 F.3d 1197, 1209 (10th Cir. 2013).

No post-*Heller* court, however, has held that a state broadly allowing concealed carry also must allow open carry. Indeed, aside from the dissenting opinion below, post-*Heller* opinions recognizing a meaningful right to carry have conspicuously acknowledged that states may regulate the manner of carry without violating the Second Amendment. *Wrenn*, 864 F.3d at 662–63 & n.5; *Moore*, 702 F.3d at 938, 942; *see also Peruta*, 137 S. Ct. at 1997–98 (Thomas, J., dissenting from denial of certiorari); *Peruta*, 742 F.3d at 1172; *Drake*, 724 F.3d at 449 (Hardiman, J., dissenting).

In short, the decision below is consistent with this Court's jurisprudence, the pre-*Heller* state cases cited by Petitioner, and every post-*Heller* decision confronting right-to-carry claims. Accordingly, there is no split in authority on the question presented, much less one that would warrant this Court's review.

III. THE QUESTION PRESENTED DOES NOT OTHERWISE WARRANT THIS COURT'S REVIEW.

Even putting aside the absence of any conflict, the question whether the Second Amendment prohibits states from choosing concealed carry over open carry does not warrant this Court's review. At least three considerations support that conclusion.

First, the question will arise only in the very small number of jurisdictions that broadly allow concealed carry but disallow open carry. Petitioner asserts that "[o]nly five States prohibit open carry." Pet. 7. Of those five, three have shall-issue concealed-carry regimes. *See* Fla. Stat. § 790.06(2); 430 Ill. Comp. Stat. 66/10(a); S.C. Code Ann. § 23-31-215(A). Petitioner thus asks this Court to confront an issue that could arise in only three jurisdictions.

Second, this case does not meaningfully implicate what this Court has characterized as the "central component" of the Second Amendment's guarantee—i.e., the right of armed self-defense. *Heller*, 554 U.S. at 599 (emphasis omitted). Under Florida's shall-issue regime, "essentially all adults who pass[] a background check and safety test [can] qualify for a permit to carry a concealed handgun" for purposes of self-defense. Cramer & Kopel, *supra*, at 680. Petitioner

does not argue otherwise, nor does he dispute that concealed carry effectuates the core purpose of the Second Amendment.

Third, this Court repeatedly has denied certiorari in cases presenting a direct and entrenched split on the question whether there is any meaningful right to bear arms outside the home at all. *See Peruta*, 824 F.3d 919, *cert. denied*, 137 S. Ct. 1995; *Drake*, 724 F.3d 426, *cert. denied sub nom. Drake v. Jerejian*, 134 S. Ct. 2134; *Woollard*, 712 F.3d 865, *cert. denied*, 134 S. Ct. 422; *Kachalsky*, 701 F.3d 81, *cert. denied sub nom. Kachalsky v. Cacace*, 133 S. Ct. 1806; *Williams*, 10 A.3d 1167, *cert. denied sub nom. Williams v. Maryland*, 132 S. Ct. 93. At a minimum, this Court should settle that logically antecedent question before it turns to the narrower—and far less important—question presented here.

This case would offer a poor vehicle for resolving that issue. As Petitioner's quarrel with the lower court's decision makes clear, the dispute in this case does not turn on whether the Second Amendment protects defensive carry outside the home. Indeed, both the majority and dissenting opinions below agreed with Respondent's (and Petitioner's) position on the issue. *See* Pet. App. 34a–35a; *id.* at 49a (Canady, J., dissenting). In addition, the parties to this litigation do not disagree on that question, since the State has consistently recognized a right to carry weapons for self-defense outside the home. *See, e.g.*, Amicus Brief of Alabama and 25 Other States as Amici Curiae in Support of Petitioners, *Peruta v. California*, No. 16-894 (Feb. 16, 2017); *see also* Fla. Stat. § 790.06(15) (declaring that Florida's shall-issue concealed-carry

law "carr[ies] out the constitutional right to bear arms for self-defense" and therefore "shall be liberally construed" to achieve that purpose). In short, this Court should wait for a case in which the issue is likely to be dispositive, and in which it will have the benefit of adversarial briefing, before it considers the Second Amendment's applicability beyond the home.

IV. THE DECISION BELOW IS CORRECT.

1. The Second Amendment protects a right to "bear" arms, which this Court in *Heller* identified as distinct from the right to "keep" them and defined as the right to "*carry* weapons in case of confrontation," 554 U.S. at 591–92 (emphasis added), but its text does not specify a particular manner of bearing. *Heller* didn't, either. *Heller*'s statements about carry-method regulations summarized the antebellum state cases Petitioner relies upon here. And as already explained, these cases simply establish that states may allow either open carry or concealed carry; the only thing they may not do is prohibit both. *See supra* Part II.

Heller's basic reasoning accounts for why this is so. This Court invalidated the District's ban because it "ma[de] it impossible for citizens to use [handguns] for the core lawful purpose of self-defense." 554 U.S. at 630. This Court then distinguished between slight and "severe" or "absolute" burdens on self-defense, *id.* at 632, and it recognized "longstanding" regulations on the right to keep and bear arms as "presumptively lawful," *id.* at 626–27 & n.26. A system that generally allows responsible, law-abiding adults to carry hidden handguns and other weapons in public—and that expands the castle doctrine and provides immunities

and procedural protections to those who assert lawful-use-of-force claims, *see* Fla. Stat. §§ 776.012, 776.013, 776.032—does not significantly burden the right of armed self-defense. And as the foregoing review of antebellum case law shows, *see supra* Part II, regulations on the manner of bearing arms are quite longstanding—more so than many of the other "longstanding" regulations that *Heller* itself immunized. *See* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 696–98 (2009).

Petitioner correctly observes that over a century-and-a-half ago, open carry was the preferred carry method, but that is beside the point. The way that states have accommodated the right of armed self-defense in public has always depended on prevailing social customs, and for that reason it has changed over time.

As Judge O'Scannlain has explained, "[h]istorically, the preferred form of carry has depended upon social convention: concealed carry was frowned upon because it was seen as 'evil practice' that endangered 'the safety of the people' and 'public morals' by 'exert[ing] an unhappy influence upon the moral feelings of the wearer[and] making him less regardful of the personal security of others.'" *Peruta*, 742 F.3d at 1172 (quoting *Reid*, 1 Ala. at 616–17). But the Second Amendment does not prevent states today from taking "a different course than most nineteenth-century state legislatures" by "expressing a preference for concealed rather than open carry." *Id.* Rather, "as the historical sources have repeatedly noted, the state has a right to prescribe a particular manner of carry,

provided that it does not 'cut[ ] off the exercise of the right of the citizen altogether to bear arms, or, under the color of prescribing the mode, render[ ] the right itself useless.'" *Id.* (quoting *Nunn*, 1 Ga. at 243). In other words, a state's "favoring concealed carry over open carry does not offend the Constitution, so long as it allows one of the two," because "insistence upon a particular mode of carry" does not violate the right to bear arms. *Id.*; *accord Peruta*, 137 S. Ct. at 1998 (Thomas, J., dissenting from denial of certiorari); *Drake*, 724 F.3d at 449 (Hardiman, J., dissenting).[2]

The notion that contemporary norms have at least some role to play in the adjudication of Second Amendment questions finds additional support in *Heller*, as the dissenting opinion below itself recognized. *See* Pet. App. 53a n.19 (Canady, J., dissenting). For example, *Heller* rejected as "bordering on the frivolous" the suggestion that "only those arms in

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[2] Some scholarship has contended that *Heller*'s reasoning requires more rigid adherence to antebellum practices. *E.g.*, Note, Jonathan Meltzer, *Open Carry for All:* Heller *and Our Nineteenth-Century Second Amendment*, 123 Yale L.J. 1486 (2014). This scholarship takes too cramped a view of *Heller*'s methodology. *Heller* rejected the suggestion that the Second Amendment froze in time every arms-related social custom. *See* Pet. App. 53a n.19 (Canady, J., dissenting). That approach is consistent with the originalist methodology expounded by some contemporary scholars. *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 Fordham L. Rev. 453 (2013); Randy E. Barnett, *Interpretation and Construction*, 34 Harv. J.L. & Pub. Pol'y 65 (2011).

existence" upon ratification of the Bill of Rights are protected. 554 U.S. at 582. Instead, *Heller* instructed that just as the First Amendment protects more than the spoken word, the quill, and the printing press, the Second Amendment keeps apace with evolving ownership trends and extends to modern weapons. *Id.* Moreover, *Heller*'s test for whether a weapon qualifies as a protected "arm"—whether it is "in common use . . . for lawful purposes," *id.* at 624—focuses explicitly on contemporary social customs. The same is true for *Heller*'s explanation of why handguns are protected. *See id.* at 628, 629 (explaining that Americans "overwhelmingly" choose handguns as the "quintessential" weapon for self-defense).

The modern proliferation of nondiscretionary concealed-carry permitting systems, *see* Cramer & Kopel, *supra*, at 680—and the apparent preference of most gun carriers to avail themselves of the concealment method, *see* Pet. App. 57a (Canady, J., dissenting)—stem from just the type of social customs to which legislatures and courts have historically deferred. Nineteenth-century sensibilities may have favored open carry as the more "manly" and "noble" form of self-defense that prevents "secret advantages" and "unmanly assassinations." *Chandler*, 5 La. Ann. at 490. But in the modern era, both state policies and personal preferences have overwhelmingly moved toward concealed carry as the method of choice. As Professor Volokh has observed, "[t]oday, open carrying is uncommon, and many law-abiding people naturally prefer to carry concealed (in the many states where it is legal)." Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 U.C.L.A. L.

Rev. 1443, 1523 (2009). Even the dissenting opinion below agrees. Pet. App. 57a (Canady, J., dissenting).

Professor Volokh has further noted that "any discussion of open carry rights has a certain air of unreality" because, in contrast to concealed carry, "carrying openly is likely to frighten many people, and to lead to social ostracism as well as confrontations with the police." Volokh, *supra*, at 1521. Moreover, "the historical hostility to concealed carry" is "inapt today," as modern society is less concerned with notions of "manl[iness]" and "chivalr[y]" than with being "respectful to one's neighbors," and "[c]oncealed carrying is no longer probative of criminal intent." *Id.* at 1522–23. These observations even led Professor Volokh to conclude that today, open-carry-only regimes are "likely to deter many people from carrying a gun," *id.* at 1522, and could therefore be constitutionally suspect (in a way that concealed-carry-only regimes presumably would not be), *id.* at 1523–24.

In any event, legislatures can and do disagree on whether to allow concealed carry, open carry, or both, as they consider the unique circumstances and cultures of their respective states. Nothing in the Second Amendment's text or history, as *Heller* construed it, dictates a choice either way, and properly understood, the case law upon which Petitioner relies doesn't, either. Legislatures remain free to choose for themselves which method(s) of carry to allow, based on an evaluation of factors that they are uniquely po-

sitioned to weigh, so long as they give meaningful effect to the right of armed self-defense.[3]

2. While text, history, and judicial authority firmly support the Florida Supreme Court's conclusion, the precise doctrinal framework that *Heller* provides to reach it is less clear. Perhaps the most straightforward route is a categorical one: regulations on the manner of carry that leave open a meaningful avenue for armed self-defense do not infringe the Second Amendment right and are therefore categorically valid—no form of judicial scrutiny necessary. *Heller*'s text- and history-focused analysis, rejection of "free-standing interest-balancing," and emphasis on the unchanging "scope" of constitutional rights strongly indicate a preference for this kind of categorical approach. *See Heller*, 554 U.S. at 634–35; *see also Heller v. District of Columbia*, 670 F.3d 1244, 1271–85 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("*Heller II*"); *Houston v. New Orleans*, 675 F.3d 441, 451–52 (5th Cir. 2012) (Elrod, J., dissenting), *superseded on reh'g*, 682 F.3d 361 (5th Cir. 2012). This is especially so for "severe restriction[s]," *Heller*, 554 U.S. at 629, on the one hand, which might merit categorical invalidation, *see Wrenn*, 864 F.3d at 665, and "longstanding" or minimally burdensome regulations, *Heller*, 554 U.S.

[3] To the extent Petitioner appears to argue that Florida's license requirement for concealed carry is unconstitutionally restrictive, Pet. 9, 18, 24, he lacks standing to do so as he has obtained a Florida CWL. Moreover, the Florida Supreme Court determined that he failed to preserve the argument, and it declined to address it. Pet. App. 10a n.4.

at 626, on the other hand, which might merit categorical acceptance. Florida's regulation of the manner of carry, which leaves ample room for armed self-defense and fits within a long tradition of such regulations, falls into the latter category.

Another possible route is the one that the Florida Supreme Court took. The court concluded, consistent with Respondent's concession in briefing, that the open-carry ban burdens the right to armed self-defense and intermediate scrutiny applies. Indeed, *Heller* ruled out rational-basis review for Second Amendment burdens, *see* 554 U.S. at 628 n.27, so if the open-carry law constitutes a burden, some form of heightened scrutiny must apply. Between the available options, intermediate—rather than strict—scrutiny is surely the appropriate one. Courts analyzing post-*Heller* Second Amendment claims generally have understood *Heller* to require, in most cases, a two-step scope-and-scrutiny approach. And for the second step—selecting the appropriate level of scrutiny—they have widely understood *Heller* to require an examination of the extent of the burden and its proximity to the Second Amendment's core protected activity (armed self-defense). *See, e.g.*, *Heller II*, 670 F.3d at 1252, 1257; *Ezell v. Chicago*, 651 F.3d 684, 700–04, 706–08 (7th Cir. 2011); *United States v. Marzzarella*, 614 F.3d 85, 89, 97 (3d Cir. 2010).[4]

[4] Although *Heller* can be read to favor a categorical approach to both severe and *de minimis* (or longstanding) regulations, some scholars have argued that closer cases may call for a hybrid methodology. *See* Joseph Blocher,

As the Florida Supreme Court observed, where a state liberally allows concealed carry, an open-carry ban constitutes a *de minimis* burden on the right to armed self-defense because it allows an ample channel for exercising it. Pet. App. 37a–39a. And this is as much a reason for selecting intermediate scrutiny as it is for upholding Florida's open-carry law. *See, e.g.*, *Heller*, 554 U.S. at 630 (holding the District's ban unconstitutional because it "ma[de] it impossible for citizens to use [handguns] for . . . self-defense"); *Wrenn*, 864 F.3d at 662 (observing that "[t]he idea that the government must leave ample channels for keeping and carrying arms explains much of the analysis in" *Heller*, including "why the Court favorably treated cases allowing bans on concealed carry only so long as open carry was allowed"); *see also* Volokh, *supra*, at 1443, 1454–55, 1458, 1460 (arguing for application of an ample-alternative-channels analysis in Second Amendment cases).

As for the Florida Supreme Court's conduct of the intermediate-scrutiny analysis, Petitioner objects that it upheld the open-carry law without empirical studies or legislative findings. Pet. 31–33. However, when applying heightened scrutiny, this Court does not always require such evidence, especially where the harm and the cure are obvious. *See Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (citing cases in which speech restrictions survived heightened scrutiny based on "studies and anecdotes pertaining to

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Categoricalism and Balancing in First and Second Amendment Analysis, 84 N.Y.U. L. Rev. 375 (2009).

different locales altogether" or merely "history, consensus, and simple common sense" (internal quotation marks omitted)). Such is the case here. The decision below offers some of the plainly intuitive reasons why legislatures may conclude that concealed carry is safer than open carry, and that should suffice.

For what it's worth, there are self-defense and firearms-tactics experts who agree with the Florida Supreme Court's analysis. Massad Ayoob, for instance, has explained that "those who advocate open carry need to realize some of the other things they might be opening themselves up to," such as "gun snatchers." Massad Ayoob, *Five Real-Life Cases that Show the Complexities of Open Carry*, Personal Defense World, Jan. 24, 2017, *available at* http://www.personaldefenseworld.com/2017/01/massad-ayoob-open-carry/#massad-ayoob-open-carry-1. Ayoob supports his warning with examples in which open carriers were injured or killed with their own firearms after assailants targeted and gained access to them. *Id.* And Ayoob has provided additional examples of the phenomenon elsewhere. *See, e.g.*, Massad Ayoob, *Open Carry Part II: The Case Against*, Guns Magazine, *available at* https://gunsmagazine.com/open-carry-part-ii-the-case-against/. Other experts have agreed that at least in some circumstances open carriers are more likely to be targeted by armed criminals, and they add that concealed carry offers certain other valuable advantages. *See, e.g.*, Brandon Curtis, *Why I Will Never Open Carry: 5 Reasons*, Concealed Nation, Aug. 16, 2015, *available at* http://concealednation.org/2015/08/why-i-will-never-open-carry-5-reasons/.

But the larger point is that the decision below is correct regardless of the doctrinal framework. Either Florida's open-carry prohibition passes constitutional muster because the burden on the right to bear arms is minimal (as Respondent argued and the court concluded below), or no judicial scrutiny should be applied at all because Florida's shall-issue concealed-carry system fully protects the right, and the regulation on the manner of carry is not an infringement (perhaps qualifying as one of *Heller*'s presumptively valid "longstanding" regulations).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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