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

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

Introduction

Florida is an outlier state in banning the open bearing of all firearms. As with other jurisdictions with gun laws that are outside the norm, that is all the more reason for this Court's review. The decision below upholding the ban conflicts with this Court's precedents on the Second Amendment as well as with state court precedents, including nineteenth-century decisions relied on in this Court's precedents.

This case presents two issues in need of this Court's guidance with wide ramifications that extend to broader areas of the criminal law. First, to what extent may recognized constitutional rights – here, the open carrying of a firearm – be extinguished by changes in "social customs"? Second, to what extent may post hoc litigation arguments be the sole basis to show that a prohibition – here, again, the open carrying of a firearm – will in fact alleviate harms under intermediate scrutiny?

Florida states the issue to be whether a state that "broadly allows" persons "to carry handguns and other weapons" may require them to be concealed. Brief in Opposition ("BO") i. Florida law is not so broad, in that it only allows the carrying of handguns but not rifles or shotguns, only by licensed persons, and only concealed at that. Fla. Stat. § 790.06(1).

Since the Founding through today, in most states one may bear arms openly, in most cases without a license. A license is more often required to

carry a firearm concealed. In Florida, open carry is a crime. Concealed carry requires a license, payment of fees, fingerprints and photograph, training, and a 90-day wait.[1] Licensed concealed carry is thus 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).[2]

Florida argues that the issue here lacks practical significance in that only five states prohibit open carry, and three of them have licensing schemes authorizing concealed carry. BO 8, 19. But they include California, Florida, and New York, which are among the most populous states.

Far fewer were affected by the nation's only handgun bans in two cities, Washington, D.C., and Chicago, and the Village of Oak Park, Illinois. That did not prevent this Court from deciding *District of Columbia v. Heller,* 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010).

Similarly, that only five states banned stun guns did not prevent this Court from deciding *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (*per curiam*). See *id*. at 1032 (Alito, J., concurring) (stun guns lawful in 45 states). Like Florida here (BO 20),

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[1]If an applicant's background check shows no final disposition on a disqualifying crime, the license need not ever be issued. Fla. Stat. § 790.06(6)(c)(3).

[2]That Petitioner has a license does not deprive him of standing to point to limitations in the licensing scheme that show it to be a privilege and not a right. See BO 26 n.3.

Massachusetts argued that *Caetano* was not a proper vehicle for this Court's review.

Florida's outlier status takes it beyond the historical, constitutional mainstream on this issue. Restrictions on concealed – but not open – carry are historically among the "longstanding prohibitions" that are "presumptively lawful." *Heller*, 554 U.S. at 626-67 & n.26. That makes Florida's scheme all the more worthy of review.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS

This Court's decision in *Heller* was inexorably bound up with the meaning of the right to "bear arms." While the actual challenge in that case concerned a ban on possession of handguns in the home, deciphering whether the right was held by "the people" – real individuals – depended on whether "bear arms" meant to carry arms generally or merely to serve in the militia. 554 U.S. at 584-92. Florida is incorrect to argue that the decision below does not conflict with *Heller*. BO 9-12.

Florida argues that "*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 . . . .'" BO 11, quoting 554 U.S. at 626. But *Heller* continued 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.*, citing *State v. Chandler*, 5 La. Ann.

489, 489-90 (1850), & *Nunn v. State*, 1 Ga. 243, 251 (1846).

Florida insists that "this Court did not cite those cases for the proposition that the Second Amendment protects a right to open carry . . . ." OD 12. Yet if the right to bear arms did not include carrying them concealed, the only alternative was that it included carrying arms openly.

Florida neglects the understanding in *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (*per curiam*), that the right to bear arms extends to public places. BO 10. Otherwise it would have been superfluous to reaffirm that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms . . . ." 136 S. Ct. at 1028 (citation omitted.) *See id.* at 1029 (Alito, J., concurring) (weapon possessed in parking lot).

Justice Alito pointed to a decision holding that stun guns are commonly possessed by law-abiding persons for self-defense. *Id.* at 1032, citing *People v. Yanna*, 297 Mich. App. 137, 144, 824 N.W.2d 241, 245 (2012). Not coincidentally, *Yanna* reversed a conviction for carrying a stun gun as follows:

> *Heller* stated that concealed weapons may be banned, but made no such statement regarding openly carried arms. 554 U.S. at 626-627. Indeed, *Heller* cited with approval two state cases that struck down laws prohibiting the public carrying of handguns. *Id.* at 629. The Second Amendment explicitly protects

> the right to "carry" as well as the right to "keep" arms. . . . We therefore conclude that a total prohibition of the open carrying of protected arms . . . is unconstitutional.

Id. at 146.

Had this Court in *Caetano* not been convinced that the Second Amendment protects the right to bear arms outside the home, the issue about the nature of the arm would have been moot. The lower court had held that petitioner's conduct fell outside the "core" of the Second Amendment because she did not carry the weapon "in her home." *Commonwealth v. Caetano*, 470 Mass. 774, 779, 26 N.E.3d 688 (2015).

Caetano sought review by this Court in part to make clear that the Amendment protects the right to "carry a bearable instrument . . . for self defense in case of confrontation, and that this right may exist outside the home." Petition for Writ of Certiorari, *Commonwealth v. Caetano*, No. 14-10078, at 9. Respondent there urged this Court not to grant the writ as it would have to decide whether "the Second Amendment protects possession of arms outside the home." Brief in Opposition at 17-18. This Court assumed exactly that when it disposed of *Caetano*.

Robertson v. Baldwin, 165 U.S. 275, 281-82 (1897), did not involve a law about carrying arms. See BO 12. However, it affirmed that the "guaranties and immunities which we had inherited from our English ancestors" that are incorporated into "the fundamental law" include "the right of the people to keep and bear

Florida Carry

arms," which is "not infringed by laws prohibiting the carrying of concealed weapons . . . ." *Id.* It was unquestioned at the time that a law prohibiting the open carrying of arms would violate the right.

II. THE DECISION BELOW CONFLICTS WITH STATE COURT PRECEDENTS

Florida seeks to rewrite various lower court decisions, particularly the nineteenth-century cases on which *Heller* relied, to mean that one mode of carry could be banned if the other mode is not, and it does not matter which is which. BO 13-16. The decisions are more principled than that – they flatly held that open carry may not be banned, but that concealed carry may be.

State v. Reid, 1 Ala. 612, 616 (1840), stated that the legislature could "enact laws in regard to the manner in which arms shall be borne" (BO 13), but it held that "the Legislature cannot inhibit the citizen from bearing arms openly, because it authorizes him to bear them for the purposes of defending himself and the State, and it is only when carried openly, that they can be efficiently used for defence." *Id.* at 619.

State v. Chandler, 5 La. Ann. 489, 490 (1850), held that open carry "is the right guaranteed by the Constitution of the United States . . . ." *Accord*, *State v. Jumel*, 13 La. Ann. 399, 400 (1858). Florida would tie this "to the antebellum period's particular social customs." BO 14. But the decision is not remotely based on such constitutional relativism.

Cases that involved a total carry ban held that

open carry could not be banned. *Nunn v. State*, 1 Ga. 243, 251 (1846), held that "a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void* . . . ." See BO 15. *Andrews v. State*, 50 Tenn. 165, 178-79 (1871), stated that a citizen has "the right to use such arms for all the ordinary purposes," but that meant not using them "for violation of the rights of others . . . ." Nothing is said about "prevailing social customs," BO 15-16.

State v. Kerner, 107 S.E. 222, 225 (N.C. 1921), invalidated the requirements of a permit and a fee in order to carry a firearm at all as a "prohibition of the constitutional right to bear arms." BO 16. Requiring a license for open carry failed to take into account emergencies: "Should there be a mob, is it possible that law-abiding citizens could not assemble with their pistols carried openly and protect their persons and their property from unlawful violence without going before an official and obtaining license and giving bond?" *Id.*

Similarly, *Bleiler v. Chief, Dover Police Dep't.*, 927 A.2d 1216, 1222 (N.H. 2007), upheld the requirement of a license to carry concealed only because "without a license, individuals retain the ability . . . to carry weapons in plain view." That is certainly not "exactly what Florida has done here." BO 15.

Based on the statement in *Heller* that concealed weapons may be banned, its lack of such statement about open carry, and its reliance on the above nineteenth-century decisions, *Yanna* held that "a total prohibition of the open carrying of protected arms . . .

is unconstitutional." 297 Mich. App. at 146.

This Court's granting of the petition in this case is all the more warranted based on its denial in *Peruta v. County of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (*en banc*), *cert. denied*, 137 S. Ct. 1995 (2017), which held that the Second Amendment does not protect a right to carry concealed, but did not opine on whether open carry is protected. This case presents that very question. See 137 S. Ct. at 1997 (Thomas, J., dissenting from denial of cert.); BO 17.[3]

As Florida points out, a circuit split exists between courts holding that the people at large have a Second Amendment right to carry arms in public for self-defense, and those denying any such right. BO 18. No reason exists why that could not be decided in the context of this case.

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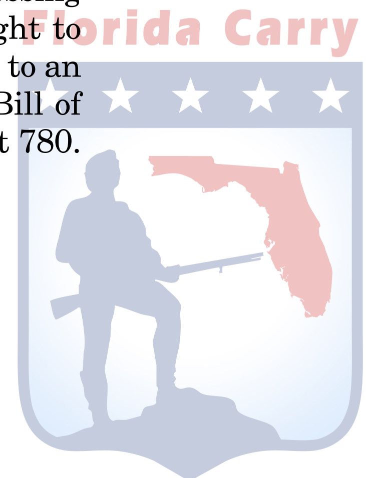
[3]Florida joined in an amicus brief supporting Peruta. BO 20, citing Amicus Brief of Alabama & 25 Other States as Amici Curiae in Support of Petitioners, *Peruta v. California*, No. 16-894 (Feb. 16, 2017).

III. THIS COURT SHOULD CLARIFY THAT CONSTITUTIONAL RIGHTS ARE NOT EXTINGUISHED BY CHANGES IN "SOCIAL CUSTOMS"

Florida minimizes any floor on what the Bill of Rights protects by arguing that infringements do not count if not "severe" enough and that rights ebb and flow with the "social customs" of majorities. Such constitutional relativism is inconsistent with the concept that the Constitution embodies definite meanings.

Florida suggests that the ban is not a "severe" burden and is a "longstanding" restriction that is presumably valid. OD 21-22. "There are no *de minimis* violations of the Constitution – no constitutional harms so slight that the courts are obliged to ignore them." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 36-37 (2004) (O'Connor, J., concurring). Nor is a ban on open carry "longstanding," as is indicated by the scarcity of states with such bans in the past or now.

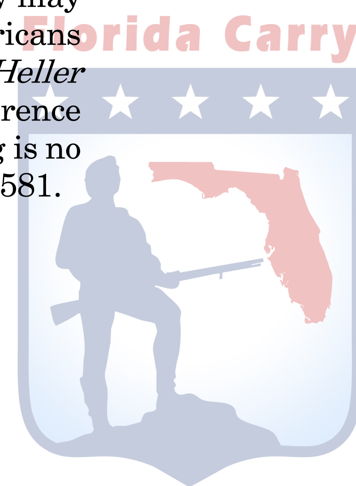
Florida makes the following argument for constitutional relativism: "The way that states have accommodated the right of armed self-defense in public has always depended on prevailing social customs, and for that reason it has changed over time." BO 22. That reasoning would never be allowed in assessing other guarantees in the Bill of Rights. The right to bear arms is not "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.



Majorities in society at large may prefer open or concealed carry in different historical periods. BO 22, citing *Peruta v. County of San Diego*, 742 F.3d 1144, 1172 (9th Cir. 2014) (panel decision). But the Bill of Rights does not bend with the shifting preferences of majorities. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

Heller demonstrates how the Second Amendment accommodates historical changes, rather than recedes in its protections, as Florida suggests. BO 23-24. It bordered on the frivolous to argue that the Amendment protects only those arms in existence in 1791, in the same manner as to suggest that the First Amendment is limited to the spoken word, the quill, and the printing press. *Heller*, 554 U.S. at 582. The prevailing social customs in favor of the internet and electronic communication do not mean that the old methods are no longer protected. What was guaranteed in 1791 is the floor on which greater, not lesser, protections build.

Florida mistakes *Heller*'s reference to whether an arm is in common use for lawful purposes as support for the theory that what is a right today may be gone tomorrow. BO 24. No doubt many Americans choose handguns for self-protection. But *Heller* broadly dissected the Amendment's textual reference to "arms" and found: "The 18th-century meaning is no different from the meaning today." 554 U.S. at 581.



Florida also suggests a "sensibilities" test for constitutional rights, juxtaposing nineteenth-century sensibilities favoring open carry with modern preferences for concealed carry. BO 24-25. Justice Canady identified the actual issue involving sensibilities – some are uncomfortable at the sight of a gun, just as some are uncomfortable with the idea that there is a right to bear arms at all. App. 57-58a.

This Court soundly rejected the equivalent of a sensibilities test for constitutional rights that have "controversial public safety implications." *McDonald*, 561 U.S. at 783. That test would mean the death of the First Amendment. *See Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (the disparagement clause in trademark law violates the First Amendment).[4]

IV. THIS COURT SHOULD CLARIFY WHETHER LITIGATION ARGUMENTS SUFFICE TO SHOW THAT A RESTRICTION WILL ALLEVIATE HARMS UNDER INTERMEDIATE SCRUTINY

Florida correctly notes that "*Heller*'s text- and history-focused analysis, rejection of 'free-standing interest-balancing,' and emphasis on the unchanging 'scope' of constitutional rights" requires a categorical approach. BO 26, citing *Heller*, 554 U.S. at 634-35. However, it then retreats into intermediate scrutiny to assess open carry. BO 27.

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[4]A subjective, judicially-determined "meaningful effect" test of Bill of Rights freedoms, BO 26, fares no better.

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). "The justification must be genuine, not hypothesized or invented post hoc in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996). The latter occurred here.

Florida fails to articulate any factual justification for the ban. BO 28-29. The court below simply repeated counsel's post-hoc litigation arguments that a attacker "might be more likely to target an open carrier" and ""would be less likely" to seize a concealed firearm. App. 43a. These are said to be "intuitive reasons why legislatures may conclude that concealed carry is safer than open carry, and that should suffice." BO 29. While that might suffice for rational-basis review, such speculation about what the legislature could have imagined is dead-on-arrival "to evaluate the extent to which a legislature may regulate a specific, enumerated right . . . ." *Heller*, 554 U.S. at 628 n.27.

While previously not offering *any* facts, Florida for the first time cites an expert who articulated certain risks of open carry. BO 29. Yet the very same expert, in the cited articles and a prior article, also discussed the advantages of open carry. Massad Ayoob, *The Case Of Open Carry, Pt I: The Argument For*.[5] He described instances in which open carry

[5]https://gunsmagazine.com/the-case-of-open-carry/.

"deters criminals, who generally seek easy marks and don't want to get shot."[6] He recommends retention holsters to prevent gun snatching. The fact that police officers carry openly refutes Florida's suggestion that open carry is dangerous.

If Respondent's belated suggestion of facts relevant to intermediate-scrutiny review is to be taken seriously, this case should be remanded to the lower courts for consideration of whether Florida can show that its "regulation will *in fact* alleviate these harms in a direct and material way." *Turner*, 512 U.S. at 664 (emphasis added).

CONCLUSION

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

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[6]That is verified in James D. Wright & Peter H. Rossi, *The Armed Criminal in America: A Survey of Incarcerated Felons* 27, 29 & n.27 (NIJ 1985).

Respectfully submitted,

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