No. 19-114

In The

Supreme Court of the United States

DOUGLAS F. CIOLEK,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Petition For Writ Of Certiorari To The Superior Court Of New Jersey Appellate Division

REPLY BRIEF FOR PETITIONER

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August 28, 2019

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ARGUMENT

Respondent states that "resolution of whether *Heller* extends beyond the home is not necessary for this Court to address in order to reach the issue upon which petitioner seeks review." BIO.15. Not so. Based on the issue presented, the Court must first decide if the Second Amendment applies outside the home, and if so, then decide whether the justifiable need statute violates Petitioner's Second Amendment rights.

Second, Respondent presumes that levels of scrutiny must apply, BIO.15-16, and devotes much of its brief advocating for intermediate scrutiny. *Id.* at 16-17, 22-30. It may have presumed too much. *District of Columbia v. Heller*, 554 U.S. 570 (2008) does not require, let alone suggest that such tiers of review are applicable. It did not perform the necessary assessments under strict or intermediate scrutiny. In fact, it rejected them. *Id.* at 634. Moreover, it also rejected the functional equivalent of intermediate scrutiny advocated by the dissent. *Id.* at 634-35, 689-90.

Indeed, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) expressly rejected judicial assessment of the "costs and benefits of firearms restrictions" and also stated that courts applying the Second Amendment would not have to engage in "difficult empirical judgments" about the efficacy of particular gun regulations. *Id.* at 790-91.

Furthermore, it is already known that at least one Justice would likely reject any such balancing test for a standard predicated on text, history and tradition.

Heller v. District of Columbia, 670 F.3d 1244, 1282 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). What the standard really is, and how it is to be applied is yet another important reason to grant this Petition. The fact that the majority of courts employ some type of intermediate scrutiny in assessing Second Amendment rights outside the home – and are doing so erroneously if public carriage is a core Second Amendment right – only underscores the importance of reviewing this matter.

Third, Respondent cites *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) and *Robinson v. Baldwin*, 165 U.S. 275, 281-82 (1897) for the proposition that concealed carry prohibitions do not violate the Second Amendment. The glaring error with Respondent's argument is that the pertinent citation in *Robinson* only relates to concealed carriage.[1] Petitioner was denied the right to open carriage as well, and argued this in his summary judgment motion and on appeal. Respondent's statutory scheme does not differentiate between them and it is also a crime to open carry in public without a permit. N.J. STAT. ANN. § 2C:39-5(b); *Drake v. Filko*, 724 F.3d 426, 433, 440 (3d Cir. 2013). Based on Petitioner's review of *Heller* and its review of nineteenth century case law, a statute that allows open but denies concealed public carriage

[1] The aforementioned citation in *Robinson* is not the holding but *dicta*, and there is some doubt about its validity. *See* Craipo, Betty J., *Judicial Toleration for Negative Externalities of Bearing Arms in Public: Addressing the Second Amendment Circuit Split*, 14 SETON HALL CIR. REV. 209, 221 (2018).

does not offend the Second Amendment. But a statute like New Jersey's, which precludes both open and concealed public carriage is unconstitutional. 554 U.S. at 629 (citations omitted).

In the preceding paragraph, Petitioner asserted that Respondent's statute "precludes" public carriage. Notwithstanding Respondent's argument that on paper, a very tiny privileged group may be able to obtain a carry permit, this statutory scheme results in a *de facto* ban for the ordinary person. Petitioner has used the phrase "ordinary person" in relation to public carriage rights because *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017) held that this right applies to "responsible, law abiding citizens", *id.* at 664, without additional qualifications, which is consistent with a natural right of self-defense. *Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018) noted that individual rights such as the Second Amendment apply to the "ordinary citizen". *Id.* at 1071. Indeed, in an interview, Chief Justice Roberts stated that "[b]y ensuring that no one in government has too much power, the Constitution helps protect *ordinary* Americans every day against abuse of power by those in authority". www.scholastic.com/browse/article.jsp?id=7479 (last accessed 8/17/19) (emphasis added). In short, the Second Amendment applies to ordinary citizens, not a special subset of people. Respondent's justifiable need statute unconstitutionally embraces the latter and excludes the former.

Fourth, Respondent also attempts to differentiate its licensing scheme from the District of Columbia's. BIO.21. That is no more than a distinction without a

difference. *Compare* D.C. CODE § 7-2509.11(1)(A) *with* N.J. STAT. ANN. § 2C:58-4(c). Minor legal distinctions aside, just like the citizens in the District of Columbia prior to *Wrenn*, the ordinary New Jersey citizen can never, ever engage in public carry for general self-defense due to the justifiable need requirement.

Last, it is inconceivable that Petitioner's appeal is moot. The minor amendment referred to by Respondent is irrelevant because as it admits, during both Petitioner's initial application and the appellate process, justifiable need was a necessary requirement for a carry permit. BIO.12-13. The purpose of the amendment was simply to codify the definition of justifiable need that was already contained in N.J. ADMIN. CODE 13:54-2.4(d). This is noted in Assembly Bill No. 2758 cited by Respondent. *See also In re Wheeler*, 81 A.3d 728, 739 (N.J. Super. Ct. App. Div. 2013) (indicating that N.J. ADMIN. CODE 13:54-2.4(d) initially codified the case law definition of "justifiable need"). If the Court accepted Respondent's argument, any "defendant could moot a case by" amending "the challenged statute and replacing it with one that differs only in some insignificant respect". *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993). Such actions do not moot a case or affect standing. *Ibid.*

CONCLUSION

The Court should grant the writ.

August 28, 2019

Respectfully submitted,

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