No. _____

In the
Supreme Court of the United States

MARK CHEESEMAN,
Petitioner,
v.

JOHN POLILLO, CHIEF OF THE GLASSBORO, NEW JERSEY POLICE DEPARTMENT; and KEVIN T. SMITH, SUPERIOR COURT JUDGE, GLOUCESTER COUNTY, NEW JERSEY,
Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey Appellate Division

---

PETITION FOR WRIT OF CERTIORARI

DAVID D. JENSEN
Counsel of Record
DAVID JENSEN PLLC
111 John Street, Suite 420
New York, New York 10038
(212) 380-6615
david@djensenpllc.com

Counsel for Petitioner

June 28, 2019

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

The State of New Jersey broadly prohibits people from carrying or otherwise possessing handguns for the purpose of personal protection—anywhere but in their homes, businesses or on their own property—unless they obtain a permit. But to obtain this permit, an individual must be able to demonstrate "justifiable need to carry a handgun," which the State defines as "the urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun." Except for the miniscule number of people who are able to meet this standard, the "need" requirement stands as a ban to bearing handguns in New Jersey. The question presented is whether States can limit the ability to bear handguns outside the home to only those found to have a sufficiently heightened "need" for self-protection.

PARTIES TO THE PROCEEDING

Petitioner Mark Cheeseman applied to local authorities in Glassboro, New Jersey for a permit to carry a handgun. After they denied his application, he appealed the determination pursuant to New Jersey law.

Respondent John Polillo is the Chief of the Glassboro, New Jersey Police Department. Chief Polillo is the successor to former Chief Franklin S. Brown, Jr., who denied Petitioner's application on September 27, 2017.

Respondent Judge Kevin T. Smith is a judge of the Superior Court for Gloucester County, New Jersey. Pursuant to New Jersey law, which requires applicants to submit their applications to both police officials and a court, Petitioner submitted his application to Judge Smith after Chief Brown had denied it. Judge Smith denied Petitioner's application on December 13, 2017.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES, REGULATIONS

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Over a decade ago, this Court ruled that the right to keep and bear arms protects the right to "possess and carry" modern small arms, including (specifically) handguns. *See District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). Yet, during the ensuing years only two of the Circuit Courts of Appeals have faithfully upheld this Court's ruling by striking down broad preclusions on the ability to carry handguns in public for the purpose of self-defense. *See Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017); *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012). The other Circuit Courts of Appeals, as well as many State high courts, have refused to enjoin these types of prohibitions, notwithstanding their obvious conflict with a constitutional right to "carry" guns. *See, e.g., United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) ("The whole matter strikes us as a vast terra incognita that courts should enter only upon necessity and only then by small degree."); *Williams v. State*, 10 A.3d 1167, 1177, 417 Md. 479, 496 (2011) ("If the Supreme Court, in this dicta, meant its holding to extend beyond home possession, it will need to say so more plainly.").

This Court granted certiorari in *New York State Rifle & Pistol Ass'n v. City of New York*, No. 18-280, only to have the New York legislature enact legislation that may result in that controversy becoming moot. In the interim, this Court declined to grant or deny certiorari in two petitions that challenge the constitutionality of discretionary "need" and "reason" standards that prevent the bearing of arms in public in

Massachusetts and New Jersey: *Rogers v. Grewal*, No. 18-824, and *Gould v. Lipton*, No. 18-1272.

In this Petition, we explain that—if this Court is indeed ready to resolve the lower courts' conflict—New Jersey is the ideal State for this Court to review. It is highly unlikely that the "need" requirement will change, as New Jersey law firmly embraces it, and change would require legislative action that is highly unlikely to occur. Moreover, New Jersey laws govern the general act of carrying a gun, not just the specific act of concealed carry, so potential distinctions based on concealment will not unduly complicate this Court's review. Finally, there is no realistic possibility that the Supreme Court of New Jersey will take action to change the substantive parameters of the "need" requirement—to the extent it even could—as this very court turned down the opportunity to review the case at bar not even two months ago.

This Petition is also the ideal vehicle for this Court to review New Jersey's "need"-based scheme. This case was fully litigated in the courts below. Furthermore, no interest group or other organization has control over this case, which was instead crowdfunded—with the support of hundreds of New Jersey citizens who seek for this Court to vindicate their constitutional right to bear arms.

OPINIONS BELOW

The Atlantic Reporter does not contain the decision of the Supreme Court, Appellate Division, but it is available at 2018 N.J. Super. Unpub. LEXIS 2471 (App. Div. Nov. 8, 2018) and is reproduced at App.2-8. The order of the Supreme Court of New Jersey denying certification is available at 2019 N.J. LEXIS 575 (May 3, 2019) and is reproduced at App.1.

JURISDICTION

The Supreme Court of New Jersey denied certification on May 3, 2019. This Court has jurisdiction under 28 U.S.C. §1257 to review the constitutionality of the "need" component of New Jersey's handgun permit law under the Second and Fourteenth Amendments to the Constitution.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant portions of Amendments II and XIV to the United States Constitution, as well as of the relevant statutes and regulations of the State of New Jersey, are reproduced beginning at App.11. Pertinently, New Jersey law broadly prohibits the "possession" of handguns in the absence of a "permit to carry." N.J. STAT. ANN. §2C:39-5(b). While exceptions to this prohibition allow people to keep guns at home and take them to gun ranges, *see id.* §2C:39-6(e)-(f), it is impossible, in the absence of a permit, to carry (or even possess) a handgun outside the home for the purpose of self-protection. In turn, it is impossible to obtain a permit unless one shows "justifiable need,"

which is defined as "the urgent necessity for self-protection" in the following terms:

> [A] private citizen[] shall specify in detail the urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun. Where possible, the applicant shall corroborate the existence of any specific threats or previous attacks by reference to reports of the incidents to the appropriate law enforcement agencies.

Id. §2C:58-4(c); *see also* N.J. ADMIN. CODE §13:54-2.4(d)(1).

STATEMENT OF THE CASE

A. New Jersey Broadly Prohibits the "Possession" of Handguns Outside the Home

New Jersey prohibits the "possession" of handguns in the absence of a "permit to carry." N.J. STAT. ANN. §2C:39-5(b). Without a permit, a person can possess a handgun only within the parameters of a separate statute that sets forth "exemptions" from the general prohibition. *See id.* §2C:39-6(e)-(g). Those exemptions include possession at one's home or business or at a target range, but they do not otherwise allow people to carry guns for their own protection. *See id.* §2C:39-6(e)-(f). Indeed, a person transporting a handgun to a gun range or a new residence must transport the gun "unloaded and contained in a closed and fastened case, gunbox, securely tied package, or locked in the trunk of

the automobile . . . , and . . . the course of travel shall include only deviations as are reasonably necessary under the circumstances." *Id.* §2C:39-6(g).

A person charged with the crime of Unlawful Possession of Weapons is not entitled to a jury instruction explaining the existence and potential application of an exemption unless evidence in the case already indicates that the exemption may apply. *See State v. Moultrie*, 816 A.2d 180, 186, 357 N.J. Super. 547, 555-56 (App. Div. 2003); *see also State v. Pompey*, No. A-1003-13T1, 2015 N.J. Super. Unpub. LEXIS 2155, *6 (App. Div. Sept. 9, 2015). If there is no such evidence, then the jury will be instructed to decide the case based on N.J. STAT. ANN. §2C:39-5(b) alone—which provides, simply, that it is a felony to possess a handgun without a permit to carry. *See, e.g.*, *Pompey*, 2015 N.J. Super. Unpub. LEXIS 2155 at *10-16. Thus, for all practical purposes, this means that people who chooses to own or use handguns anywhere in New Jersey must be prepared to affirmatively establish that they fall within one of the exemptions—unless, of course, they have a permit.

The consequences of being unable to place one's self within an exemption are severe. A person who runs afoul of these restrictions (even inadvertently) commits the crime of Unlawful Possession of Weapons, which is a crime (felony) of the second degree. *See* N.J. STAT. ANN. §2C:39-5(b). The sentence is a prison term of five to ten years, even with no criminal history, *see id.* §2C:43-6(a)(2), and the presumptive sentence is seven years, *see id.* §2C:44-1(f)(1)(c).

The risk of prosecution and incarceration is far from theoretical. Rather, the broad sweep and harsh blow of New Jersey's handgun laws have repeatedly attracted national attention. For example, authorities in Mount Laurel, New Jersey drew national attention when they arrested and prosecuted Brian Aitken for unlawful handgun possession in 2009. Mr. Aitken had three unloaded handguns in the trunk of his car, which he had purchased lawfully and could lawfully possess in his home. But none of this was any defense: he received a seven year sentence. *See* Jason Nark, *Family: New Jersey Man Serving 7 Years for Guns he Owned Legally*, PHILADELPHIA INQUIRER (Nov. 30, 2010).[1] New Jersey authorities also drew national attention when they arrested and prosecuted Shaneen Allen in 2013. Allen, a single mother from Pennsylvania, did not realize that her Pennsylvania permit was no good in New Jersey and voluntarily told a police officer that she had her gun with her. While Governor Christie ultimately pardoned her, she spent 48 days in jail. *See* Radley Balko, *Shaneen Allen, Race and Gun Control*, WASHINGTON POST (Jul. 22, 2014). And notably, while former Governor Chris Christie provided some commutations and pardons, current Governor Phil

---

[1] Governor Chris Christie commuted Aitken's sentence to time served, and a New Jersey appellate court subsequently determined that the trial court should have instructed the jury on the exemption that applies to moves between residences. *See State v. Aitken*, No. A-0467-10T4, 2012 N.J. Super. Unpub. LEXIS 696, *27-32 (App. Div. Mar. 30, 2012); *see also* Chris Megerian, *Gun Owner Brian Aitken is Released from Prison After Gov. Christie Commutes Sentence*, NJ.COM (Dec. 21, 2010), *available at* https://www.nj.com/news/2010/12/gun_owner_brian_aitken_is_rele.html (last visited Jun. 26, 2019).

Murphy took office with a gun control agenda and (to our knowledge) has yet to pardon anyone for running afoul of these laws.

B. New Jersey's Preclusion of Carry in Any Form Dates to 1966

The State of New Jersey first restricted the ability (of adults) to carry guns in 1905, when it made it a crime to "carry any revolver, pistol or other . . . weapon . . . concealed in or about his clothes or person" in the absence of "a written permit." *See* 1905 N.J. LAWS ch. 172, §1. People remained free to carry guns in a manner that was not concealed, and indeed, proof of concealment was needed to sustain a conviction. *See State v. Gratz*, 92 A. 88, 89, 86 N.J.L. 482, 483 (1914); *State v. Rabatin*, 95 A.2d 431, 434, 25 N.J. Super. 24, 30 (App. Div. 1953). The New Jersey legislature amended this law several times over the next 60 years, but the scope of restricted conduct stayed the same: "carry[ing] . . . concealed in or about his clothes or person." 1927 N.J. LAWS ch. 96, §1; *see also* 1928 N.J. LAWS ch. 212, §1; 1925 N.J. LAWS ch. 207, §1; 1924 N.J. LAWS ch. 137, §1; 1922 N.J. LAWS ch. 138, §1; 1912 N.J. LAWS ch. 225, §1.

This changed in 1966, when New Jersey's legislature expanded the statute to cover "any person who carries, holds or possesses" a handgun "on or about his clothes or person, or otherwise in his possession, or in his possession or under his control in any public place or area." 1966 N.J. LAWS ch. 60, sec. 32, §2A:151-41(a). The result of this was to eliminate any requirement to prove that a gun had been concealed. *See State v. Hock*, 257 A.2d 699, 700 & n.1, 54 N.J. 526,

529 & n.1 (1969). Rather, by its terms the statute prohibited "possession or . . . control in any public place or area" in the absence of a permit. Thus, it was not until 1966 that New Jersey began to require licenses in order to bear arms in any manner. *See Drake v. Filko*, 724 F.3d 426, 448-49 (3d Cir. 2013) (Hardiman, J., dissenting).

The parameters of the 1966 law are clear on their face, but secondary sources also confirm that the legislature's intent was to prohibit both concealed and unconcealed carry. Most notable are the statements of New Jersey Attorney General Burton Sills, who "close[ly] participat[ed] in the drafting and presentation of the [1966] Gun Control Law," and whose views the Supreme Court of New Jersey has relied upon to decide close interpretive questions concerning that legislation. *See Service Armament Co. v. Hyland*, 362 A.2d 13, 18, 70 N.J. 550, 560 (1976). In the lead-up to the 1966 Gun Control Law, Attorney General Sills had publicly explained that there was presently "no law against walking down the street with a weapon in your hand or on your body so long as it isn't concealed," and that individuals without permits were free to carry guns "in plain view." *Sills Demands Curbs on Sale of Firearms*, ASBURY PARK EVENING NEWS, Dec. 5, 1963, at 27. According to Attorney General Sills, the 1966 Gun Control Law would "close[] a loophole which makes it a crime to carry a concealed pistol without a permit but does nothing about a person walking down the street with the pistol carried openly." *Gun Lobby's Loss Seen as Sills' Gain*, ASBURY PARK PRESS, November 18, 1965, at 6.

C. The Restrictive "Justifiable Need" Standard is Nearly Impossible to Satisfy

While the risk of arrest and prosecution disappears if one is able to obtain a permit, this is nearly impossible for just about anyone to do. New Jersey's current "justifiable need" standard is—put simply—the *most* restrictive carry permitting scheme that is currently in force anywhere in the continental United States. The miniscule fraction of New Jersey citizens who are able to obtain permits is so insubstantial that, in practice, the system operates as the near equivalent of a ban. Most recently, in 2016 and 2017, the State issued a total of 1,090 two-year permits—and that number includes both private citizens and those with occupational reasons (like armed guards), as well as both residents and nonresidents of New Jersey.[2] But even if one assumes that this number consists only of private citizens who reside in New Jersey, the licensure rate is still an extremely low 0.012%. And this is not a recent development. Rather, New Jersey's licensure rates have been low (and trending lower) for years. In 2010 and 2011, for example, the State issued a total of 1,195 permits—which would extrapolate to a 2011 licensure rate of about 0.0135%, using the same simplifying assumptions. And in 2001, the rate was

---

[2] The New Jersey State Police provided the number of permits on December 14, 2018, in response to a public records request. *See* Letter from Div. of State Police to Mark Cheeseman (Dec. 14, 2018) (on file with author), available at https://www.cnjfo.com/resources/Documents/w139606%20Cheeseman_Redacted.pdf (last visited Jun. 26, 2019). Population figures obtained from http://factfinder.census.gov (last visited Jun. 26, 2019).

about 0.0179%, again using the same assumptions.[3] In contrast, the average rate throughout the United States is about 7.14%. *See* JOHN R. LOTT, CONCEALED CARRY PERMIT HOLDERS ACROSS THE UNITED STATES: 2018 p. 3 (Aug. 14, 2018) [hereinafter "CONCEALED CARRY REPORT"].

New Jersey's rates—very low, and getting even lower—press the distinction between policies that function as bans and policies that are merely restrictive. When the Seventh Circuit overturned Illinois's general ban on carrying handguns, Judge Williams's dissent argued that the scheme in Illinois was not materially different from the one in place in New York City because, "while technically a 'may issue' location where the city may issue permits for handgun carry outside the home, New York City rarely does so and so has been characterized as maintaining a virtual ban on handguns." *Moore*, 702 F.3d at 953 (Williams, J., dissenting) (citation omitted). But licensure rates in New York City are actually *higher* than they are in New Jersey. According to a 2008 New York Times article, 2,291 New York City residents held "full carry" handgun licenses——which equates to about 0.028% of the City's population. *See* Sewell Chan, *Annie Hall, Get Your Gun*, N.Y. TIMES (Dec. 2, 2008); *cf. In re Friedman*, No. A-0269-11T4, 2012 N.J. Super. Unpub. LEXIS 2649, *3-4 (App. Div. Dec. 6, 2012) (applicant qualified in New York City, but not in New Jersey).

---

[3] In litigation, the Attorney General and State Police of New Jersey have advised that 603 permits were issued in 2011, 592 in 2010, 781 in 2001 and 739 in 2000. *See* Dec. of Lt. Joseph Genova *in Drake v. Filko*, no. 12-1150 (3d Cir. Feb. 27, 2013).

New Jersey's licensure rate is still incredibly low when compared with other jurisdictions that have restrictive licensing policies. For example, California's licensure rate of 0.37% is 31 times higher than New Jersey's, while Maryland's rate (0.46%) is 38 times higher, and New York State's rate (0.67%) is 56 times higher. *See* CONCEALED CARRY REPORT, *supra*, at 16. The only State with a lower licensure rate is Hawaii. *See id.* at 17. And indeed, a Ninth Circuit panel recently found Hawaii's system unconstitutional on the rationale that the discretionary standard served to "disguise an effective ban on the public carry of firearms." *Young v. Hawaii*, 896 F.3d 1044, 1072 (9th Cir. 2018), *reh'g en banc granted*, 915 F.3d 861 (9th Cir. 2019).

It is significant that the laws at issue in both *Heller* and *McDonald* did not actually operate as *complete* bans, as both allowed individuals to continue registering and keeping handguns they had lawfully registered in the past. *See McDonald v. Chicago*, 561 U.S. 742, 750 (2010); *Parker v. District of Columbia*, 478 F.3d 370, 376 (D.C. Cir. 2007), *aff'd sub nom. Heller*, 554 U.S. 570. Yet, because those laws prohibited everyone who did not qualify for this exception from keeping handguns, they were "bans." *See McDonald*, 561 U.S. at 750 (Chicago law "effectively ban[s] handgun possession by almost all private citizens"). This is the same scheme in place here—the right to bear arms is foreclosed to all, unless a special, highly unlikely exception applies.

D. All Three Branches of New Jersey Government have Decisively Adopted the Restrictive "Need" Standard

The highly restrictive "need" standard that is currently in places traces back to policy changes that police and court officials implemented in the wake of the 1966 Gun Control Law. The original 1905 law (on concealed weapons) had not provided any standard to govern the issuance of permits. *See* 1905 N.J. LAWS ch. 172, §1. In 1922, the State began to require "good cause" (undefined), and in 1924, the legislature replaced "good cause" with "need" (again undefined). *See* 1924 N.J. LAWS ch. 137, §2; 1922 N.J. LAWS ch. 138, §1. The 1966 legislation did not make any change to the statutory requirement of "need," nor did it provide a definition for "need"—but nevertheless, this legislation marked the beginning of a much more restrictive licensing standard.[4]

The Supreme Court of New Jersey upheld this new restrictive standard in *Siccardi v. State*, 284 A.2d 533, 539-40, 59 N.J. 545, 556-57 (1971). As articulated by the New Jersey high court, it was "a strict policy which wisely confines the issuance of carrying permits to persons specifically employed in security work and to such other limited personnel who can establish an urgent necessity for carrying guns for self-protection."

---

[4] While the legislature changed the terminology from "need" to "justifiable need" in 1979, this was part of a statutory recodification that did not change the law's substantive meaning. *See* 1979 N.J. LAWS ch. 95, §2C:58-4(c)-(d); *Doe v. Dover Twp.*, 524 A.2d 469, 470, 216 N.J. Super. 539, 540 (App. Div. 1987); *see also Drake*, 724 F.3d at 448 (Hardiman, J., dissenting).

Id. at 540, 59 N.J. at 557. Under this rule, "[o]ne whose life is in real danger, as evidenced by serious threats or earlier attacks, may perhaps" have an "urgent necessity" sufficient to obtain a permit. *Id.* However, "one whose concern is with the safety of his property, protectible by other means, clearly may not so qualify." *Id.*

The *Siccardi* decision established a restrictive "need" standard as a matter of State law. "Prior to *Siccardi*, only two cases had mentioned the need requirement, and neither had ascribed any meaning to it." *Drake*, 724 F.3d at 448 n.15 (Hardiman, J., dissenting) (*citing McAndrew v. Mularchuk*, 162 A.2d 820, 33 N.J. 172 (1960); *State v. Neumann*, 246 A.2d 533, 103 N.J. Super. 83 (Monmouth County Ct. 1968)). Moreover, the court in *Siccardi* recognized that this new standard was more restrictive than prior practices, explaining that individuals who had qualified "under earlier circumstances or earlier approaches" might no longer qualify. *See Siccardi*, 284 A.2d at 539-40, 59 N.J. at 556. Indeed, on the same day the New Jersey high court decided *Siccardi*, it issued two other rulings—both upholding the denial of *renewal* applications. *See Reilly v. State*, 284 A.2d 541, 542, 59 N.J. 559, 561 (1971); *In re Application of "X"*, 284 A.2d 530, 531, 59 N.J. 533, 534 (1971). The court explained that even though "the word 'need' has appeared without alteration through all the pertinent legislation since 1924[,] . . . '[n]eed' is a flexible term which must be read and applied in the light of the particular circumstances and the times." *Siccardi*, 284 A.2d at 539, 59 N.J. at 555 (citations omitted). "[D]etermination[s] must be made in the light of . . .

sound current approaches on the issue of 'need.'" *Id.* at 539, 59 N.J. at 556.

The Supreme Court of New Jersey re-affirmed the restrictive "urgent necessity" standard in *In re Preis*, 573 A.2d 148, 152, 118 N.J. 564, 571 (1990). There, the Court concluded that licensed private detectives had no "preferred right" and could obtain permits only if they "establish[ed] an urgent necessity for protection of self or others" like other applicants. *See id.* at 149, 118 N.J. at 566; *see also 515 Associates, LP v. City of Newark*, 623 A.2d 1366, 1373, 132 N.J. 180, 193 (1993). The court concluded by directing lower courts "to consider whether applicants establish 'justifiable need' to carry handguns on a case-by-case basis." *Preis*, 573 A.2d at 154, 118 N.J. at 576.

The executive branch has also decisively adopted the restrictive "need" standard. At some point after the 1966 Gun Control Law, the New Jersey State Police began applying "stricter measures concerning the issuance of permits," as the *Siccardi* decision recounted in 1971. *See Siccardi*, 284 A.2d at 537, 59 N.J. at 551 (quoting testimony). In 1991, the State Police codified the restrictive "need" standard into the State's administrative code, using the language from *Siccardi* and *Preis* requiring an "urgent necessity for self-protection, as evidenced by specific threats or previous attacks." *See* 23 N.J. REG. 3521(a), §13:54-2.4(d)(1) (Nov. 18, 1991); *see also* N.J. ADMIN. CODE §13:54-2.4(d)(1). Governor Christie's administration attempted to *slightly* relax the standard to include "serious threats" as a ground for licensure, *see* 49 N.J. REG. 668(a) (Mar. 2, 2017), but Governor Murphy's

administration nixed this proposal, *see* 50 N.J. REG. 2240(b) (Nov. 5, 2018). The executive branch has thus been resolute in its determination that no one (or almost no one) should be able to bear arms in New Jersey.

The New Jersey legislature remained silent on the definition of "need" for years. That silence was significant, as some historical authorities indicate that the legislature did not in fact intend to change the "need" standard when it enacted the 1966 Gun Control Law.[5] Indeed, in *Siccardi* the court had responded to the applicant's argument that the legislature had not countenanced a policy change by inviting the legislature to "take appropriate action through amendment of the Gun Control Law" if it "at any point differs with the approach adopted by the judges."

---

[5] Notably, Attorney General Sills had opined that the 1966 law would impart "no change in the requirement for a permit to buy or carry a pistol." *See Shore Assemblymen Differ On New Gun Bill's Merits*, ASBURY PARK EVENING PRESS, Jan. 25, 1966, at 6. And in testimony before a legislative committee, the Attorney General explained that "[f]or those who wish to carry a pistol or revolver, permits will be required as they are under present law." PUBLIC HEARING BEFORE THE ASSEMBLY COMMITTEE ON STATE GOVERNMENT, AB 165, 190th Leg. (Mar. 2, 1966), at 5. In response to a question about whether private detectives would be able to obtain permits, the Attorney General expressed the view that "any man who can pass the State Police . . . and be fingerprinted and be licensed as a private detective would have no difficulty in getting a permit to purchase or to carry." *Id.* at p. 67A. Of course, this is exactly the opposite of what the Supreme Court of New Jersey would ultimately decide in *Preis*—that private detectives needed to "establish 'justifiable need' to carry handguns on a case-by-case basis" just like other applications. *See Preis*, 573 A.2d at 154, 118 N.J. at 576.

Siccardi, 284 A.2d at 540, 59 N.J. at 557. The court reiterated that suggestion in *Preis*, where it raised the possibility of "other legislative direction." *See Preis*, 573 A.2d at 154, 118 N.J. at 575-76. But the legislature was silent, a tacit indication that it did not disagree with the direction taken.

The legislature took action only after the Christie administration had suggested a slight relaxation of the standard (to include "serious threats"). Following that, the legislature expressly codified the requirement of "urgent necessity for self-protection, as evidenced by specific threats or previous attacks" into the carry permit law. *See* 2018 N.J. LAWS ch. 37, §1; *see also* N.J. STAT. ANN. §2C:58-4(c). And in doing so, it acted decisively, with the Assembly voting 48-26 in favor, and the Senate voting 24-13 in favor—ratios of nearly two-to-one in both houses. *See* A. 2758, 218th Leg. (N.J. 2018). Thus, whatever doubt there might have been in the past, New Jersey's statutory law now squarely embraces the "urgent necessity" definition of "need."

E. History of the Case at Bar

Petitioner applied to Chief Franklin S. Brown, Jr. of the Glassboro, New Jersey Police Department for a permit in 2017. Chief Brown denied his application on September 27, 2017, stating that Petitioner "ha[d] not demonstrated a justifiable need to cary a handgun." App.24. Except for the requirement of "need," Petitioner met all of the requirements for a permit, and the sole ground Chief Brown relied upon to deny Petitioner's application was his lack of "need." *See* App.24-25.

Petitioner then submitted his application to the Hon. Kevin T. Smith, a judge of the Superior Court for Gloucester County, New Jersey. (And to reiterate, regardless of how Chief Brown had decided Petitioner's application, Petitioner would still have needed to convince Judge Smith to issue the permit.) At a hearing held on December 13, 2017, Petitioner argued (*inter alia*) that "it is my Second Amendment and constitutional right to protect myself and family outside of the home." Judge Smith acknowledged that Petitioner was a "law-abiding citizen," but responded that "the reality is you live in New Jersey. New Jersey has significant restrictions on carry permits. And, those restrictions have been upheld numerous times by the courts." Judge Smith denied Petitioner's application in an order issued that same day. App.9-10.

In accordance with New Jersey law, Respondent then appealed the denial of his application to the Superior Court, Appellate Division. In his briefing, Petitioner argued that the restrictive "need" standard that the New Jersey Supreme Court had embraced in *Siccardi* could not stand in light of *Heller* and *McDonald*, as this Court had "thrown out case-by-case determinations for permits concerning the exercise of Second Amendment rights." Nonetheless, on November 8, 2018 the Appellate Division affirmed the denial of Petitioner's permit in an unpublished decision. App.2-8. The Appellate Division recounted that "the trial court [had] upheld the Chief's denial, finding that [Petitioner] failed to demonstrate 'a justifiable need' to

carry a handgun." App.5. The court rejected Petitioner's argument "that New Jersey's system of either granting or denying carry permits 'on a case-by-case basis' is contrary to the Supreme Court's holding in" *Heller*. App.5. The court also declined Petitioner's invitation to "sever the *Siccardi* rule and" the administrative code provision from the statute so as to avoid coming into conflict with the Second Amendment. App.5 (alterations omitted). Rather, the Appellate Division concluded that given "the lack of clarity that the Supreme Court in *Heller* intended to extend the Second Amendment right to a state regulation of the right to carry outside the home," New Jersey's "case-by-case schema, requiring a showing of justifiable need, withstands constitutional scrutiny post-*Heller* and its progeny." App.8 (*quoting In re Pantano*, 60 A.3d 507, 514, 429 N.J. Super. 478, 490 (App. Div. 2013)).

Up until this point, Petitioner had pursued his application and appeal pro se. But Petitioner now turned to crowdfunding and social media to raise funds. Petitioner then used those funds to retain counsel and prepare a petition for certification to the Supreme Court of New Jersey. In his certification petition, Petitioner pointed out that it was the New Jersey high court that had originally adopted the restrictive "need" standard, and he argued that the court should "use 'judicial surgery' to excise the constitutional defect" present in the "need" requirement (quotation and alteration omitted). On May 3, 2019, the New Jersey high court denied certification in a one-line order. App.1.

This Petition presents, cleanly and squarely, the question of whether States can condition the right to bear arms on a discretionary determination of one's "need" for self-defense. Moreover, this Petition is unique in that there are no interest groups or other organizations that have control or can claim the case as an organizational victory. To Petitioner's knowledge, this is the only Petition before this Court that raises the bearing-arms issue and is independent of interest groups and other organizations.

REASONS FOR GRANTING THE WRIT

I. The Circuit Courts and State High Courts are in Irreconcilable Conflict over the Scope of the Right to Bear Arms

At this point, there is no reasonable disagreement that the Circuit Courts of Appeals, as well as the State courts of last resort, are in hopeless and irreconcilable conflict over the scope of the right to bear arms. The primary point of disagreement is over whether the right to bear arms applies outside the home (or applies with any weight outside the home), but there are also at least two other related conflicts that have developed in the bearing arms context.

A. Whether the Right to Bear Arms is a "Limited" (or Nonexistent) Right Outside the Home

The core of the split boils down to one key question: Does the right to bear arms—that is, the right to carry weapons for the purpose of confrontation, *see Heller*, 554 U.S. at 584—exist everywhere, or is it confined to, or most prominent in, the home? Courts taking the

former view reject broad preclusions on the right to bear arms, while courts taking the latter view uphold them.

Both the Seventh Circuit and the D.C. Circuit have squarely taken the first view—that the right to bear arms is *not* a home-bound right, and that broad preclusions on the ability to carry guns in public are accordingly untenable. *See Wrenn v. District of Columbia*, 864 F.3d 650, 663 (D.C. Cir. 2017) ("[T]he rights to keep and bear arms are on equal footing—that the law must leave responsible, law-abiding citizens some reasonable means of exercising each."); *Moore*, 702 F.3d at 937 ("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*."). The Seventh Circuit struck down the State of Illinois's general ban on carrying guns in public, and the D.C. Circuit struck down the District's "good reason" requirement for obtaining a permit to carry a gun. *See Wrenn*, 864 F.3d at 667; *Moore*, 702 F.3d at 942.

The First, Second and Fourth Circuits have squarely taken the latter approach—that any right to bear arms is "limited" outside the home, to the extent it even exists. *See Gould v. Morgan*, 907 F.3d 659, 671 (1st Cir. 2018) ("the core Second Amendment right is limited to self-defense in the home."); *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) ("we merely assume that the Heller right exists outside the home" because, in any event, "the good-and-substantial-reason requirement passes constitutional muster under what we have deemed to be the

applicable standard—intermediate scrutiny"); *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) ("[T]he [Second] Amendment must have *some* application in the very different context of the public possession of firearms. Our analysis proceeds on this assumption." (footnote omitted)). These courts all upheld discretionary "need," "cause" and "reason" based requirements. *See Gould*, 907 F.3d at 674-75; *Woollard*, 712 F.3d at 879-80; *Kachalsky*, 701 F.3d at 100-01.

B. Whether the "Presumptively Lawful Regulatory Measures" are Inside or Outside the Scope of the Second Amendment

Reviewing the same New Jersey "need" requirement that is at issue here, the Third Circuit took a somewhat different approach. In *Drake v. Filko*, the panel majority reasoned that because "[t]he 'justifiable need' standard . . . has existed in New Jersey in some form for nearly 90 years," 724 F.3d at 432, it was "a longstanding regulation that enjoys presumptive constitutionality . . . [and] regulates conduct falling outside the scope of the Second Amendment's guarantee," *id.* at 434. But the court also conducted an alternative analysis that (relying largely on *Kachalsky* and *Woollard*) upheld the "need" restriction on the rationale that it "withstands intermediate scrutiny." *Id.* at 440. The Third Circuit dismissed any need for narrow tailoring or less restrictive means and found instead that "the 'justifiable need' standard [does] not burden more conduct than is reasonably necessary" because, rather than banning the bearing of arms, "the

New Jersey Legislature left room for public carrying by those citizens who can demonstrate a 'justifiable need' to do so." *See id.* at 439-40. The court reached this conclusion without acknowledging that, in application, New Jersey's "need" requirement comes but a hair's width from being a complete ban.

In hanging its decision primarily on this Court's discussion of "presumptively lawful" restrictions, the Third Circuit exposed another significant split of authority that has developed during the past decade of Second Amendment litigation. In *Heller*, this Court provided three examples of laws it did not intend "to cast doubt on." *Heller*, 554 U.S. at 626. They were "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27; *see also McDonald*, 561 U.S. at 786. In a footnote, the Court explained that it "identif[ied] these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Heller*, 554 U.S. at 627 n.26.

Courts have split over whether these "presumptively lawful" examples illustrate things that fall inside or outside the scope of constitutional protection. The Third, Sixth, Ninth and Eleventh Circuits have concluded that these examples are generally outside the scope of protection, meaning that there is no need to subject these types of measures (or things considered their analogues) to any constitutional

review at all. *See Jackson v. City & County of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (*citing United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013)); *United States v. Greeno*, 679 F.3d 510, 520-21 (6th Cir. 2012); *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010); *United States v. White*, 593 F.3d 1199, 1206 (11th Cir. 2010). In addition, both the Fifth and Eighth Circuits have suggested they would "likely" take this view. *See NRA of Am. v. BATFE*, 700 F.3d 185, 197 (5th Cir. 2012); *United States v. Bena*, 664 F.3d 1180, 1183 (8th Cir. 2011).

On the other hand, the Fourth, Sixth and Seventh Circuits have all rejected this view and instead concluded that the "presumptively lawful regulatory measures" are examples of things that are within the scope of protection, but are likely to pass muster on review. *See Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 837 F.3d 678, 686-87 (6th Cir. 2016) (subject to as-applied challenge) (en banc) (op. of Gibbons, J.); *United States v. Chester*, 628 F.3d 673, 679 (4th Cir. 2010) (same); *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010) (same). The Tenth and D.C. Circuits have taken a somewhat hybrid approach under which there is a rebuttable presumption that the "presumptively lawful" examples are outside the scope of the Second Amendment. *See Bonidy v. United States Postal Serv.*, 790 F.3d 1121, 1129 (10th Cir. 2015); *Heller v. District of Columbia*, 670 F.3d 1244, 1253 (D.C. Cir. 2011).

In addition, some courts place less significance on the "presumptively lawful" examples than others. The Seventh Circuit reasoned that it did "not think it profitable to parse these passages of *Heller* as if they

contained an answer." *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc). Likewise, in *Kachalsky* the Second Circuit remarked that it did "not view this language as a talismanic formula for determining whether a law regulating firearms is consistent with the Second Amendment." *Kachalsky*, 701 F.3d at 90 n.11.

The Third Circuit's resolution of *Drake* takes this split of authority to the extreme it can ultimately reach—where the Court's cautionary identification of regulatory "examples" that are "presumptively lawful" becomes justification for entirely denying any ability to bear arms to 99.99% of the population. At this extreme, the exception literally swallows the rule.

C. Whether Carry in a Concealed Manner is Categorically Outside the Scope of the Second Amendment

The final split that has developed in the bearing-arms context concerns the question of whether concealed carry—vis-à-vis carrying guns in open view—has any claim to constitutional protection at all. While there was a suspicion of weapons concealment in the past, today there may be a preference for carrying handguns concealed. *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytic Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1523 (2009). "*Heller* noted that a majority of nineteenth-century courts upheld prohibitions on carrying concealed weapons in favor of carrying weapons openly, but open carrying of firearms in our modern society can be intimidating and even disruptive." *Moore v. Madigan*, 708 F.3d 901, 904 (7th

Cir. 2013) (Hamilton, J., dissenting from denial of rehearing en banc) (*citing Heller*, 554 U.S. at 626).

Indeed, several States and the District of Columbia have made the policy choice to prohibit the carry of guns in open view and instead mandate that people carry guns unconcealed. *See* D.C. CODE §7-2509.07(e); FLA. STAT. §790.053; 720 ILL. COMP. STAT. 5/24-1(a)(4), (10); 5/24-2(a-5); N.Y. PENAL L. §400.00(2)(f) (only available license is to "carry concealed"); S.C. CODE ANN. §23-31-210(5). Other states have adopted regulatory schemes that do not absolutely prohibit open carry, but still reflect a legislative preference for concealed carry. *See* CAL. PENAL CODE §26150(b) (open carry licenses are available only in counties with populations below 200,000, but concealed carry licenses available statewide); HAW. REV. STAT. §134-9(a) (open carry licenses only for those "engaged in the protection of life and property"); R.I. GEN. LAWS §§11-47-11(a), 11-47-18(a); *Mosby v. Devine*, 851 A.2d 1031, 1047 (R.I. 2004) (concealed carry license issued on non-discretionary terms, while license to carry in any manner requires "need").

Yet, both the Ninth and Tenth Circuits have concluded that people can never assert a constitutional right to carry guns in a concealed manner—even where a jurisdiction has prohibited open carry and the only license available is one to carry concealed. In *Peterson v Martinez*, 707 F.3d 1197 (10th Cir. 2013), the Tenth Circuit concluded that carry in a concealed manner "does not fall within the scope of the Second Amendment's protections." *Id.* at 1201. Likewise, in *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir.

2016) (en banc), the Ninth Circuit concluded that "the Second Amendment right to keep and bear arms does not include, in any degree, the right of a member of the general public to carry concealed firearms in public." *Id.* at 939; *see also People v. Salgado*, No. B282368, 2018 Cal. App. Unpub. LEXIS 1328, *15-17 (Cal. Ct. App. Feb. 28, 2018), *review denied*, No. S247955, 2018 Cal. LEXIS 3916 (Cal. May 23, 2018), *cert. denied*, 139 S. Ct. 603 (2018). In both cases, it did not matter that the laws at issue did not allow for carry in an open manner and instead made only concealed carry licenses available. *See Peruta*, 824 F.3d at 949 (Callahan, J., dissenting); *Peterson*, 707 F.3d at 1202.

Going the other way, the Second Circuit concluded that the concealed carry of handguns likely fell within the scope of protection, at least where the State of "New York bans carrying handguns openly." *Kachalsky*, 701 F.3d at 86. Likewise, the D.C. Circuit concluded that concealed carry was within the scope of protection in the circumstance where governing law allowed only for concealed carry. *Wrenn*, 864 F.3d at 663 n.5.

II. This Petition Presents an Ideal Opportunity to Review Discretionary "Need"-Based Standards that Broadly Preclude the Bearing of Arms in Public

New Jersey's "need" standard is an ideal subject for review by this Court because the standard is firmly entrenched in New Jersey law and is not realistically subject to change. Moreover, this Petition was fully litigated in the courts below, and the Supreme Court of New Jersey has just declined Petitioner's petition for

certification. And again, there are no interest groups or other organizations running this case—just an average private citizen, who turned to crowdfunding from other private citizens in this attempt to vindicate his (and their) constitutional rights.

A. In New Jersey, Officials Cannot Readily Change the Restrictive "Need" Standard

Only six States—California, Hawaii, Maryland, Massachusetts, New Jersey and New York—actually use discretionary standards to deny their citizens the right to bear arms. *See* CAL. PENAL CODE §26150(a)(2) ("good cause"); HAW. REV. STAT. §134-9 ("reason to fear injury"); MD. CODE ANN., PUB. SAFETY §5-306(a)(6)(ii) ("good and substantial reason"); MASS. GEN. L. ch. 140, §131(d) ("good reason"); N.J. STAT. ANN. §2C:58-4(c)-(d) ("justifiable need"); N.Y. PENAL L. §400.00(2)(f) ("proper cause"). But in three of these States, local officials administer these standards as they see fit, resulting in practices that vary widely between localities—and are also subject to change at the stroke of a pen. *See Gould*, 907 F.3d at 663-64; *Peruta*, 824 F.3d at 924; David D. Jensen, *The Sullivan Law at 100: A Century of "Proper Cause" Licensing in New York State*, 14 NYSBA GOV., L. & POL'Y J. 6, 9-10 (2012). Indeed, officials in both California and Massachusetts have changed their licensing policies in the midst of litigation, with the result that Second Amendment claims became moot. *See, e.g.*, Defendant's Motion to Dismiss, *Davis v. Grimes*, No. 1:13-cv-10246 (D. Mass. Jun. 15, 2015); Stipulation and Order, *Richards v. Prieto*, No. 2:09-cv-01235 (E.D. Cal. Nov. 5, 2010).

Here, in contrast, all three branches of New Jersey government have affirmatively embraced the State's restrictive "need" standard. Changing that standard (*i.e.* making a controversy moot) would require action from the same legislature that just codified it into statute by a two-to-one margin. Moreover, a State judicial "fix" is particularly unlikely in the context presented here—where the Supreme Court of New Jersey has already declined Petitioner's request to review *this* matter, and has done so notwithstanding Petitioner's explicit argument that it ought to "use 'judicial surgery' to excise the constitutional defect" present in the "need" requirement. *See supra* p. 18.

B. This Petition Addresses Two of the Three Splits, While Avoiding the Potentially Problematic Split Regarding Concealment

While this Petition plainly raises the issue of the scope of the right to bear arms, it also raises the issue of the import of the "presumptively lawful regulatory measures"—but does not raise the potentially problematic issue of concealment.

This Petition brings in the scope and import of the "presumptively lawful" restrictions because one of these restrictions was "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Heller*, 554 U.S. at 626-27. The Court's resolution of this controversy will almost certainly require the Court to provide guidance regarding the import of these examples. Was it "presumptively lawful" to restrict carry "in sensitive areas" because restrictions on discrete sensitive areas

pass review—or is it because there is no right to carry guns in public in the first place?

The issue of concealment has the potential to result in a divided ruling by this Court. One or more members of the Court might agree with the analysis of the Ninth and Tenth Circuits in *Peruta* and *Peterson* and find that, other issues aside, there is no degree of protection for carry in a concealed manner. Thus, if a State has mandated concealed carry to the exclusion of open carry, the result could be a fractured ruling without a clear majority opinion.

This risk is present in both California and New York, since in both jurisdictions the license that is generally available specifically authorizes carry in only a "concealed" manner. *See* CAL. PENAL CODE §26150(b)(1); N.Y. PENAL L. §400.00(2)(f). And the risk is also present (perhaps to a lesser extent) in Hawaii, since Hawaii law authorizes both "concealed" and "unconcealed" carry licenses, but makes open carry licenses available only to those "engaged in the protection of life and property." *See* HAW. REV. STAT. §134-9(a). But the risk is nonexistent in New Jersey, since a New Jersey permit broadly authorizes "possession" in public without regard to whether guns are concealed or in open view. *See* N.J. STAT. ANN. §2C:39-5(b), *see also Drake*, 724 F.3d at 433.

And significantly, the need for this Court to review this issue may never arise. Both the District of Columbia and Illinois, once forced to revise their statutory schemes to allow "normal" private citizens to bear arms in public, enacted schemes that required licensed individuals to carry their guns concealed,

rather than in open view. *See* D.C. CODE §7-2509.07(e); 720 ILL. COMP. STAT. 5/24-1(a)(4), (10). And courts have, thus far, permitted States to make this policy choice. The Supreme Court of Florida rejected a challenge to that State's ban on open carry, reasoning that there was "an alternative outlet to exercise the right—here, Florida's shall-issue concealed-carry licensing scheme." *See Norman v. State*, 215 So. 3d 18, 37 (Fla. 2017). Similarly, the Seventh Circuit had little difficulty concluding that Illinois's ban on open carry in favor of concealed carry was by all appearances consistent with the Second Amendment. Shortly after it overturned Illinois's complete ban on carrying guns, the Seventh Circuit described the new Illinois law as "[c]onsistent with our decision in the *Moore* case," even though it was "a 'concealed carry' law; that is, in contrast to 'open carry' laws, the gun must not be visible to other persons." *Shepard v. Madigan*, 734 F.3d 748, 749-50 (7th Cir. 2013) (*citing Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012)). And in the only case (known to counsel) to claim a right to open carry in Illinois, the district court denied relief, finding no right to bear arms other than in the concealed manner the State had mandated. *See Southerland v. Escapa*, 176 F. Supp. 3d 786, 791 (C.D. Ill. 2016).

C. New Jersey's "Case-by-Case" Rationale for Doling Out the Right to Bear Arms Directly Contravenes One of *Heller*'s Key Rationales

Another consideration that weighs in favor of granting the Petition in this case is the manner in which New Jersey's "need" standard runs counter to this Court's rejection of "case-by-case" determinations

in *Heller*. There, the Court responded to Justice Breyer's proposal to balance the "protected interest" against "other important governmental interests" by explaining that "[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634.

But when the Supreme Court of New Jersey embraced the "urgent necessity" definition for "need" in *Siccardi*, this is exactly what it did—it looked to the opinions of police officials and academics about the supposed usefulness of carrying guns for protection and then drew the conclusion that, in the normal case, the right to bear arms was not really worth insisting upon. *See Siccardi v. State*, 284 A.2d 533, 536-38, 59 N.J. 545, 549-53 (1971). The court reasoned that, "as all of the expert testimony indicates, [a permit would] afford hardly any measure of self-protection and would involve [the applicant] in the known and serious dangers of misuse and accidental use." *Id.* at 540, 59 N.J. at 558. Thus, the court's view was that "the public interest" weighed against "widespread handgun possession in the streets." *Id.* Indeed, the Third Circuit understood that the rationale of the "urgent necessity" requirement was to "determine when the individual benefit outweighs the increased risk to the community through careful case-by-case scrutiny of each application." *Drake*, 724 F.3d at 439; *accord In re Wheeler*, 81 A.3d 728, 759, 433 N.J. Super. 560, 613 (App. Div. 2013). But as the Judge Hardiman's dissent in *Drake* noted, "[b]y deferring to New Jersey's judgment that . . . the individual right to keep and bear

arms 'outweighs' the increased risk to the community that its members will be injured by handguns, the majority employs an 'interest-balancing inquiry'" like the one this Court rejected in *Heller*. *Drake*, 724 F.3d at 457 (Hardiman, J., dissenting) (quoting *Heller*, 554 U.S. at 634). And as this Court aptly observed in *Heller*, "[a] constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all." *Heller*, 554 U.S. at 634.

Not only did New Jersey's adoption of the "urgent necessity" definition take place in precisely the manner that *Heller* rejected—as the product of a judicial interest-balancing that weighed a constitutional right against putative public safety concerns—the scheme itself contravenes *Heller* in its individualized operation. The Court's rejection of interest-balancing was not limited to across-the-board policies, but also included individual applications. Indeed, as part of its discussion of the interest-balancing point, the Court looked to its previous decision in *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977). *See Heller*, 554 U.S. at 635. There, local officials had enjoined a neo-Nazi group from conducting a parade, and this Court had summarily reversed the lower courts in a short per curiam opinion. *See National Socialist Party*, 432 U.S. at 43-44. The Court in *Heller* observed that, in the First Amendment context, it had refused to "apply an 'interest-balancing' approach to the prohibition of a peaceful neo-Nazi march through Skokie." *Heller*, 554 U.S. at 635 (*citing National Socialist Party*, 432 U.S. 43). "The Second Amendment is no different. Like the

First, it is the very product of an interest balancing by the people[.]" *Id.*

But deciding individual applications "on a case-by-case basis" is the *express* mode of operation of the "urgent necessity" standard. *In re Preis*, 573 A.2d 148, 154, 118 N.J. 564, 576 (1990). Intermediate appellate courts in New Jersey have repeatedly recognized that "the 'justifiable need' component of the carry permit law is best understood as accommodating, on a case-by-case basis, those who have a reason[.]" *Wheeler*, 81 A.3d at 739, 433 N.J. Super. at 579; *see also In re Pantano*, 60 A.3d 507, 510, 429 N.J. Super. 478, 484 (App. Div. 2013) (*citing Preis*, 573 A.2d at 154, 118 N.J. at 576); *In re Borinsky*, 830 A.2d 507, 517, 363 N.J. Super. 10, 26 (App. Div. 2003) ("each application must be dealt with on its own merits, on a case-by-case basis"). This Court recognized in *Heller* that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U.S. at 636. And a case-by-case determination of one's "need" to exercise his or her rights is just the sort of policy choice that is gone.

New Jersey is not unique in its attempt to curtail the right to bear arms by using "case-by-case" determinations of need—that is the same basic approach that all of the States with restrictive discretionary laws take. *See, e.g.*, *Kachalsky*, 701 F.3d at 97 ("New York's elected officials determined that a reasonable method for combating these dangers was to limit handgun possession in public to those showing proper cause for the issuance of a license."). But the standard adopted in New Jersey uncannily parallels

the very approach this Court articulated and rejected in *Heller*—both in its original judicial adoption, as well as in its day-to-day operation. This is yet another consideration that weighs in favor of granting the Petition.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

DAVID D. JENSEN
Counsel of Record
DAVID JENSEN PLLC
111 John Street, Suite 420
New York, New York 10038
(212) 380-6615
david@djensenpllc.com

Counsel for Petitioner