No. 19-27

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

REPLY BRIEF FOR PETITIONER

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

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

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Examined closely, Respondents' opposition brief actually shows why this Petition presents an ideal case for the Court to review. This Petition squarely presents the question of whether States can broadly proscribe the bearing of arms in public, and it does so without raising the potentially divisive issue of concealment. Indeed, while Respondents attempt to characterize the issue as "concealed carry," *see* Opp. pp. 5, 8, they do nothing to rebut the showing in the Petition, *see* Pet. pp. 4-5, 7-8. And, significantly, the opposition reveals no dispute that the Petitioner raised his Second Amendment claim in the court below, as well as that the decision below turned entirely, and only, on New Jersey's discretionary "justifiable need" requirement. *See* Pet. pp. 16-18; Opp. p. 3. Thus, this Petition squarely presents the question of whether the Second Amendment tolerates the "need" requirement.

This reply addresses Respondents' claims that a factbound record is necessary, that the conflict among the appellate courts is "overstated" and that historical laws justify the "need" requirement. Contrary to Respondents' claim, the record is more than adequate, and the conflict among the appellate courts is irreconcilable, not "overstated." Moreover, Respondents' historical laws concerned breaches of the peace and are inapposite to broad preclusions on the peaceful bearing of arms in any manner.

I. The Record—Which Need Not Include Legislative Facts—is Ample

Respondents take issue with the Petition's showing that New Jersey's current permit rate is about 0.012%, a tiny fraction of the rates in other States. This

conclusion comes from an affidavit from a New Jersey State Police official, a freedom-of-information response from another New Jersey State Police official and a third-party publication. *See* Pet. pp. 9-10 & nn.2-3. Respondents do not dispute the *accuracy* of this information, but they instead claim (p. 8) that these facts require a record containing "testimony or evidence." Respondents contend (pp. 8-9) that "meaningful review" of the New Jersey scheme is "impossible" because "[n]o data was offered regarding the number of applications received, . . . [n]or is there any meaningful discussion of the differences between those that are granted and those that are denied."

Of course, the explanation for the differences is that people cannot show "specific threats or previous attacks which demonstrate a special danger," as New Jersey law requires, so few apply and even fewer obtain permits. And while it is unclear what difference it would make to know the number of applications, this information is in fact available. For example, the cited State Police affidavit includes the number of applications received from 2000 through 2011: 7,850. *See* Dec. of Lt. Joseph Genova *in Drake v. Filko*, no. 12-1150 (3d Cir. Feb. 27, 2013). And, notably, the December 2018 freedom-of-information response shows that people in New Jersey are indeed interested in exercising their right to keep and bear arms. During 2016 and 2017, New Jersey authorities issued about 55 times as many firearms purchaser identification cards (which do not authorize carry and do not expire) as they did permits to carry (which expire after two

years).[1] *See* Letter from Div. of State Police to Mark Cheeseman (Dec. 14, 2018) (on file with author); *see also* Pet. p. 9 & n.2. Setting all this aside, the raw contrast between the New Jersey rate (0.012%) and the national rate (7.14%) speaks for itself. *See* Pet. p. 10. The national rate is 595 times higher.

More fundamentally, Respondents' argument confuses the distinction between adjudicative facts and legislative facts. "Adjudicative facts are simply the facts of the particular case." Advisory Committee Note on subiv. (a) of Fed. Rule Evid. 201. Legislative facts, in contrast, "are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." *Id.* Courts have considerable latitude to take notice of legislative facts, which do not need to be developed in evidentiary hearings. *See* Fed. Rule Evid. 201(a); *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1162-63 & n.24 (D.C. Cir. 1979). And contrary to Respondents' tacit claim, it is well established that legislative facts, including "documents emanating from the executive and legislative departments of the Government," do not need to appear in the record, with the real question being "whether they have the bearing claimed." *See, e.g., New York Indians v. United States*, 170 U.S. 1, 32 (1898) (citation omitted). Respondents had an obligation to identify any pertinent misstatements of fact in their opposition brief, *see* SUP. CT. R. 15.2, but they never contend this information is inaccurate.

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[1] *See* N.J. Stat. Ann. §§2C:58-3(f), 2C:58-4(a).

Building from the errant premise that the record in this case is lacking, Respondents next contend that the petition in *Gould v. Lipson*, No. 18-1272, is a better case to review because it has "a far more developed record." Opp. p. 9. But in reality, the very fact that *Gould* needs a fact-based record shows why the case at bar is the better one to review. As the Petition shows, the carry-licensing laws in California, Massachusetts and New York require applicants to show "cause" or "reason"—but do not define the terms, leaving them to the discretion of local officials. *See* Pet. p. 27. Thus, it is not even possible to articulate the parameters of any particular local official's policy without fact-based discovery to figure out what it is.

It is much more straightforward to review the "need" standard in New Jersey because New Jersey law expressly adopts the restrictive approach—making a factual record unnecessary.[2]

II. The Split of Appellate Authority is Irreconcilable

The Petition shows that there is an irreconcilable conflict between federal courts of appeals and State courts of last resort that boils down, most essentially, to the question of whether the right to bear arms is "limited" or nonexistent outside the home, or whether the "core" of the Second Amendment includes bearing arms in public. *See* Pet. pp. 19-21. In response, the Respondents try to harmonize *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), and to minimize *Wrenn v.*

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[2] We do not mean to suggest that the Court should deny certiorari in *Gould*.

District of Columbia, 864 F.3d 650 (D.C. Cir. 2017). *See* Opp. pp. 6-8. The attempts fail.

It is true that *Moore* observed that the policy the Second Circuit had upheld in *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012), "although one of the country's most restrictive such laws," was still "less restrictive" than that of Illinois, as Illinois did not allow for any licenses at all. *See Moore*, 702 F.3d at 941. But the core of *Moore* was the Seventh Circuit's conclusion that the Second Amendment right to bear arms "implies a right to carry a loaded gun outside the home." *Id.* at 936. "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*." *Id.* at 937. Indeed, the Seventh Circuit expressly disagreed with the Second Circuit's "suggestion that the Second Amendment should have much greater scope inside the home than outside." *Id.* at 941. Rather, "the interest in self-protection is as great outside as inside the home." *Id.* The dissent, in contrast, relied on *Kachalsky* as support for the position that "[a]ny right to carry firearms in public for potential self-defense, if there is one, is not at the 'core' of the Second Amendment." *See id.* at 943, 946-47 (Williams, J., dissenting) (*citing Kachalsky*, 701 F.3d at 93). The dissent also observed that any real distinction between a highly restrictive policy and a ban was likely illusory, offering that New York City's restrictive policy was "in effect like" the ban in Illinois. *Id.* at 953-54 (Williams, J., dissenting) (citation omitted).

Respondents' claim (p. 6) that "the Seventh Circuit made clear that its reasoning did not extend to laws like the one in New Jersey" does not stand up. *Moore* turns on "a right to carry a loaded gun outside the home" and disclaims the position that "the Second Amendment should have much greater scope inside the home than outside." *Id.* at 936, 941. This reasoning is fatal to the position that restrictions on carrying guns in public "fall[] outside the core Second Amendment protections identified in *Heller*," *Kachalsky*, 701 F.3d at 94, as both opinions in *Moore* observe. Indeed, even the court below "acknowledged that the Seventh Circuit Court of Appeals *extended* the Second Amendment right to carry a handgun outside the home in *Moore*." App. 7 n.1 (emphasis added). This stood in contrast with other courts, which had ruled "that the application of the Second Amendment to possession of firearms outside the home is at least uncertain." App. 7 (*quoting In re Pantano*, 60 A.3d 507, 513, 429 N.J. Super. 478, 489 (App. Div. 2013)).

Equally indefensible is Respondents' claim (p. 6) that the Third Circuit's decision in *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), "was entirely consistent with the Seventh Circuit's ruling in *Moore*." Rather, the Third Circuit's ruling was that "the Seventh Circuit in *Moore* may have read *Heller* too broadly" in finding "a right to *publicly* carry arms for self-defense." *Id.* at 431. The dissent, in contrast, explicitly disagreed that the Seventh Circuit had "read *Heller* too broadly," and instead cited *Moore* as a precedent that did not support

the majority's conclusion. *See id.* at 445-46 (Hardiman, J., dissenting).[3]

And as to the D.C. Circuit's decision in *Wrenn*, Respondents concede conflict, but claim that the conflict is "overstated" because "*Wrenn* did not consider the reasoning that lay at the heart of *Drake*-reasoning that was consistent with the D.C. Circuit's own prior decisions." *See* Opp. p. 6. Respondents suggest that the en banc D.C. Circuit might overturn *Wrenn* on the basis of "intra-circuit tension between [*Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) ("*Heller II*")] and *Wrenn* on this issue[.]" *See id.* at 7. But these mental gymnastics fall flat.

But the D.C. Circuit already declined to review *Wrenn* en banc, *see Wrenn v. District of Columbia*, No. 16-7025, 2017 U.S. App. LEXIS 18881 (D.C. Cir. Sept. 28, 2017), and the court in *Heller II* did not propose to use a "longstanding" analysis to review laws that broadly proscribed the core conduct of "keeping" or "bearing" arms. In *Heller II*, the D.C. Circuit reasoned that, under *Heller*, "'longstanding' regulations are 'presumptively lawful,' that is, they are presumed not to burden conduct within the scope of the Second Amendment." *Heller II*, 670 F.3d at 1253 (*quoting Heller*, 554 U.S. at 626-27 & n.26) (other citations omitted). The rationale was that a "longstanding" regulation "has long been accepted by the public, [and]

[3] Contrary to Respondents' claim (p. 13), the court below did not "incorporate[] the Third Circuit's reasoning in" *Drake*, but instead relied on the reasoning of its prior decision in *Pantano*, which predated *Drake*.

is not likely to burden a constitutional right[.]" *Id.* But significantly, this presumption was subject to rebuttal "by showing the regulation does have more than a de minimis effect upon [one's] right." *Id.* Thus, the D.C. Circuit's *Heller II* decision pointedly did not adopt a "longstanding" analysis that could be used to justify a broad preclusion on the basic ability to "keep" or "bear" arms. And indeed, the requirement the D.C. Circuit upheld using this approach was a requirement to register guns. *See id.* at 1253-55. A law requiring registration, but otherwise allowing the keeping of guns, is a far cry from a law that presumptively denies the right to bear them in any manner. When the D.C. Circuit later decided *Wrenn*, which did concern a broad denial of the right to bear arms, it characterized "the [Second] Amendment's core as including a law-abiding citizen's right to carry common firearms for self-defense beyond the home (*subject again to relevant 'longstanding' regulations* like bans on carrying 'in sensitive places')." *Wrenn*, 864 F.3d at 657 (*quoting Heller*, 554 U.S. at 626) (emphasis added).

And while the D.C. Circuit did not spend a lot of time discussing *Drake* when it decided *Wrenn*, it assuredly rejected *Drake*'s "longstanding" approach. *See id.* at 659-61. Specifically, the court rejected the District's argument that "two 'longstanding' practices . . . so shrank the right later enshrined by the Amendment as to leave good-reason laws beyond its reach: so-called Northampton laws and surety laws." *Id.* at 659. We address the merit of the Northampton and "surety" arguments below, but it suffices here to say that, contrary to Respondents' claim, the D.C.

Circuit did not fail to consider the issue of "longstanding" regulations when it decided *Wrenn*.

What is perhaps more important is that this entire line of argument exemplifies the second conflict that the Petition identifies: the import of the Court's discussion of "presumptively lawful" regulations in *Heller* and *McDonald*. *See* Pet. pp. 21-24. The circuit courts of appeals are in irreconcilable conflict about whether the "longstanding" nature of a regulation, or its degree of analogy to a restriction that the Court described as "presumptively lawful," has any significant bearing at all. *See id.* And if it does have bearing, there is still conflict about whether any presumption is conclusive or subject to rebuttal. *See id.* at 22-23. Any decision that addresses the right to carry guns is likely to address the import of this Court's previous description of "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" as "presumptively lawful," *see Heller*, 554 U.S. at 626-27 & n.26, but a decision arising out of New Jersey is particularly likely to engender a discussion of *Drake*'s approach of relying substantially, and conclusively, on a "longstanding" analysis.

III. The Decision Below was Not Correct

Respondents argue against granting certiorari on the ground that the decision below was correct. *See* Opp. pp. 9-16. The argument relies largely on Respondents' characterization of historical laws, *see id.* at 10-12, which, notably, the court below did not address.

The first is the Statute of Northampton, a 1328 English law that forbade all:

> to come before the King's justices, or other of the King's ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armour to the King, and their bodies to prison at the King's pleasure.

2 Edw. III, ch. 3 (1328). Per Blackstone, this statute provided that "[t]he offence of *riding or going armed*, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land[.]" 4 WILLIAM BLACKSTONE, COMMENTARIES *148-49; *see also* WILLIAM LAMBARD, EIRENARCHA 135 (1588) (weapons "which [are] not usually worne and borne"). This understanding continued into the twentieth century. One particular example is *Rex v. Smith*, 2 Ir. Rep. 190, 204 (K.B. 1914), where the court reversed a conviction for carrying a loaded revolver on a public road because there had been no proof that the defendant had acted "*in terrorem populi*" (to the terror of the people). And indeed, in *Heller* this Court construed the Statute of Northampton as a piece of "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Heller*, 554 U.S. at 627. Contrary to Respondents' claim, the Statute of Northampton does not stand as support for the claim that there is a historical tradition of precluding the bearing of arms in a peaceful and lawful fashion.

Respondents' next historical authority is the English Declaration of Rights 1689, 1 William & Mary Sess. 2, ch. 2. But it is difficult to understand how this adds any support whatsoever to Respondents' argument. Article VII of the Declaration of Rights codified the right to arms for personal defense for the first time in English law—"the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law"—but how this would support a prohibition on bearing arms in any manner is unclear.

Finally, Respondents cite to an early Massachusetts law that authorized a court to require an individual to provide sureties if the person "shall go armed . . . without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property"—but, significantly, a court could only do this "on complaint of any person having reasonable cause to fear an injury, or breach of the peace[.]" MASS. REV. LAWS ch. 134, §16 (1836). By its terms, this law did not preclude anything unless a complainant first established "reasonable cause" that harm would occur. *See Wrenn*, 864 F.3d at 661. And indeed, English authorities construed the Justices of the Peace Act 1361, 34 Edw. III ch. 1, to require "an act of the defendant, the natural consequence of which, if his act be not unlawful in itself, would be to produce an unlawful act by other persons." *See Wise v. Dunning*, 1 K.B. 167 (K.B. 1902). (The Justices of the Peace Act is the statutory genesis of civil peace bonds. *See Tucker v. State*, 168 So. 2d 258, 261 n.2, 42 Ala. App 477, 480 n.2 (Ala. Ct. App. 1964) (Cates, J., concurring).) When used in this country, peace bonds likewise required proof of

"a just reason . . . to fear the commission of violence on the part of" the restrained party. *See Murray v. State*, 25 So. 2d 704, 704, 32 Ala. App. 305, 307 (Ala. Ct. App. 1946). Peace bonds are apples and oranges from broad preclusions that apply to all.

IV. Conclusion

If this Court is ready to review the constitutionality of broad preclusions on the bearing of arms, then this Petition—funded directly by the very people who seek to vindicate their rights—is the ideal case for review.

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