

7/18/19

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

PETITION FOR WRIT OF CERTIORARI

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JULY 18, 2019

## QUESTION PRESENTED

In order to obtain a permit to carry a handgun in the public, the State of New Jersey requires a showing of “justifiable need” which, as defined, does not include general self-defense, and thus precludes the ordinary citizen from obtaining such a permit. The question presented is whether the legislative requirement of “justifiable need” for a permit to carry a handgun in public violates the Second Amendment.

## PARTIES TO THE PROCEEDING

### Petitioner

- Douglas F. Ciolek, whose application for a permit to carry a handgun in public was denied by the Denville, N.J. Chief of Police, and then by the Law Division judge who conducted a hearing.

### Respondent

- State of Jersey by and through the Morris County Prosecutor's Office. Because the Morris County Prosecutor's Office was involved in the investigation of this application and allowed to oppose Petitioner's application and summary judgment motion, N.J. Stat. Ann. § 2C:58-4e, it is considered an agent of the State. *Wright v. State*, 778 A.2d 443, 463-64 (N.J. 2001). Moreover, the State Attorney General's Office was noticed and had the right to intervene but declined to do so, allowing the Prosecutor's Office to defend on its behalf.

LIST OF ALL PROCEEDINGS

*In the Matter of the Appeal of the Denial of a New Jersey Permit to Carry a Handgun in the Name of Douglas F. Ciolek, Esq.,*  
Superior Court of New Jersey,  
Law Division, Criminal Part  
Docket No. MRS-L-17-22  
Decision Date: March 14, 2018

*In the Matter of the Appeal of Douglas F. Ciolek's Application for a Firearms Purchaser,*  
Superior Court of New Jersey, Appellate Division  
Docket No. A-3510-17T2  
Decision Date: February 1, 2019

*In the Matter of the Appeal of Douglas F. Ciolek's Application for a Firearms Purchaser,*  
Supreme Court of New Jersey  
Docket No. 082561  
Decision Date: May 3, 2019

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## OPINIONS BELOW

The Law Division caption was *In the Matter of the Appeal of the Denial of a New Jersey Permit to Carry a Handgun in the Name of Douglas F. Ciolek, Esq.* The Law Division judge's oral opinion and his March 14, 2018 order denying Petitioner's permit and denying his summary judgment motion are reproduced at App.29a & 7a, respectively.

The New Jersey Appellate Division changed the caption to *In the Matter of the Appeal of the Denial of Douglas F. Ciolek's Application for a Firearms Purchaser.* App.2a, 2019 N.J. Super. Unpub. LEXIS 257. Its February 1, 2019 opinion, affirming the Law Division judge's order, is reproduced at App.2a.

The New Jersey Supreme Court denied Petitioner's petition for certification by Order dated May 3, 2019, 206 A.3d 957, reproduced at App.1a.



## JURISDICTION

After the New Jersey Appellate Division issued its opinion, the New Jersey Supreme Court entered an Order denying Petitioner's petition for certification on May 3, 2019. This Court has jurisdiction to review this matter pursuant to 28 U.S.C. § 1257(a).



## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

- U.S. Const. amend. II

A well regulated Militia, being necessary to the security of a Free State, the right of the people to keep and bear Arms, shall not be infringed.

- U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

- The relevant portions of the New Jersey Statutes Annotated and the New Jersey Administrative Code relating to “justifiable need”, N.J. Stat. Ann. § 2C:58-4(c), (d) and N.J. Admin. Code § 13:54-2.4(d) are reproduced in the Appendix beginning at App. 31a.



## STATEMENT OF THE CASE

### A. New Jersey's "Justifiable Need" Requirement

Any ordinary person who wishes to carry a handgun in the public in New Jersey must first obtain a permit. N.J. Stat. Ann. §§ 2C:39-5(b), 2C:58-4. Initially, a person must apply to the Chief of Police of the municipality where one resides. *Id.* § 2C:58-4(c). If the application is denied, the applicant may appeal the denial to the Superior Court, Law Division. *Id.* § 2C:58-4(e). In both scenarios, among numerous other requirements, the applicant must demonstrate "that he has a justifiable need to carry a handgun." *Id.* §§ 2C:58-4(c)&(d). This requirement is satisfied only if the applicant can "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." *Id.*; see also N.J. Admin. Code 13:54-2.4(d). "Generalized fears for personal safety are inadequate, and a need to protect property alone does not suffice." *In re Preis*, 573 A.2d 148, 152 (N.J. 1990).

### B. Proceedings Below

Petitioner completed an application for a permit to carry a handgun in public for "general self-defense". App.9a. Petitioner's application for a carry permit was rejected by the Denville Police Department for only one reason; lack of "justifiable need". App.8a, 34a. Petitioner requested a hearing before the Law

Division judge, App.35a-36a, and the State of New Jersey, by and through the Morris County Prosecutor's Office, opposed the application solely due to lack of justifiable need. App.8a. The State of New Jersey itself was also properly noticed but never intervened. App. 36a, 37a. Petitioner also filed for summary judgment, App.37a, seeking to declare the relevant statutory and regulatory provisions unconstitutional pursuant to both the Second Amendment of the United States Constitution and the New Jersey Constitution. App.11a. The Law Division judge denied Petitioner's summary judgment motion and affirmed the rejection of Petitioner's application, finding that he was bound by the New Jersey Appellate Division case of *In re Wheeler*, 81 A.3d 728 (N.J. Super. Ct. App. Div. 2013), App.16a-17a, which held that the justifiable need provisions survived an intermediate scrutiny analysis. 81 A.3d at 753-60. Petitioner appealed to the Appellate Division and raised the same arguments. App.2a. The Appellate Division affirmed substantially for the reasons set forth by the Law Division judge, relying primarily on *Wheeler* and also the non-binding case of *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013). App.6a. The New Jersey Supreme Court denied Petitioner's petition for certification on the Second Amendment issue and dismissed a separate Appeal as of Right relating to the state constitutional claim. App.1a.



## REASONS FOR GRANTING THE WRIT

### I. REVIEW IS NECESSARY DUE TO A CONFLICT IN THE FEDERAL CIRCUIT COURTS OVER THE CONSTITUTIONALITY OF THE JUSTIFIABLE NEED/GOOD REASON TYPE RESTRICTIONS ON THE RIGHT TO BEAR ARMS IN THE PUBLIC.

The Third Circuit upheld the constitutionality of the justifiable need provision based on intermediate scrutiny because it was a longstanding valid regulation and because public carriage for self-defense was not a core right identified in *District of Columbia v. Heller*, 554 U.S. 570 (2008). *Drake*, 724 F.3d at 431-32 (also finding the Second Amendment does not even apply to New Jersey's justifiable need requirement because the latter is a presumptively lawful, longstanding licensing provision). The First, Second and Fourth Circuits have upheld substantively similar provisions ("good reason" type requirements). *See Kachalsky v. County of Westchester*, 701 F.3d 81, 94, 95 (2d Cir. 2012) ("proper cause" standard for public carry because public carry is "qualitatively different in public than in the home", and the need for public safety outweighs individual self-defense, and as such, reviewed the matter under intermediate scrutiny). *U.S. v. Masciandaro*, 638 F.3d 458, 470-71 (4th Cir. 2011) (holding that intermediate scrutiny applies to laws that burden the right to keep and bear arms outside the home because public safety interests often outweigh individual interests in self-defense). *Gould v. Morgan*, 907 F.3d 659, 671-72 (1st Cir. 2018) (finding the Second Amendment's

core is limited to home self-defense and thus, intermediate scrutiny was applicable).

However, in *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017) the D.C. Circuit struck down a “good reason” requirement for public carry. Contrary to the “longstanding regulation” arguments presented by the other circuit courts, *Wrenn* held that the ordinary individual’s right to public carry for self-defense, even in densely populated areas, fell within the core of the Second Amendment’s protections. 864 F.3d at 661. In differentiating its opinion from the other circuit courts, *Wrenn* held that those courts did not use *Heller*’s historical method to determine how rigorously the Second Amendment applied beyond the home. *Id.* at 663.

The Ninth Circuit, in *Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018) detailed the Second Amendment’s text and historical understanding, and concluded that the right to bear arms in public must guarantee some right to public self-defense, through open or concealed carry. *Id.* at 1068. Because Hawaii “entirely foreclosed” the “typical, law-abiding citizen” from bearing arms outside the home, it concluded that it “eviscerates a core Second Amendment right-and must therefore be unconstitutional.” *Id.* at 1048, 1071 (emphasis added).

In *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) the Seventh Circuit struck down an Illinois ban on the public carry of handguns by ordinary citizens. *Moore* interpreted *Heller* to include public carriage on the same level of importance as inside the home. *Id.* at 942. In addition, the court’s review of empirical literature on public carriage did not support Illinois’s ban based on public safety. *Id.* at 939, 942.

Thus, some circuit courts have held that public carriage falls within the core purpose of the Second Amendment which foreclose restrictions based on “good cause” requirements, while other circuit courts rely on intermediate scrutiny in rejecting constitutional challenges to public carriage restrictions based on the need to prove some type of good cause/justifiable need.

## II. THE QUESTION PRESENTED IS IMPORTANT.

It is a legal fiction to say that New Jersey permits ordinary citizens to carry handguns in non-sensitive public areas. The State’s official legal newspaper acknowledged it. *See* N.J.L.J., *Christie, Lawmakers Battle Over Handgun Deregulation*, Vol. 222 No.27, July 4, 2016 at p.1 (“Virtually no one, except retired law enforcement officers and armed security guards, received permission to carry a concealed weapon”). New Jersey’s former governor, Chris Christie officially admitted same while in office. *See* [www.njleg.state.nj.us/2016/Bills/A4000/3689\\_V1.PDF](http://www.njleg.state.nj.us/2016/Bills/A4000/3689_V1.PDF), last accessed June 1, 2019, at p. 1 (“This [justifiable need] standard . . . has made it nearly impossible for a civilian in New Jersey to obtain a concealed carry permit”). Thus, if such a deprivation is unconstitutional, great damage is being done on a systematic and continuous basis to the population at large because “the loss of constitutional freedoms, ‘for even minimal periods of time, unquestionably constitutes irreparable injury.’” *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976).



**III. THIS CASE IS PROPER FOR RESOLVING THE CONFLICT  
IN THE CIRCUIT COURTS OVER THE QUESTION  
PRESENTED**

This case is proper for resolving the conflict in the circuit courts on this Second Amendment issue. Petitioner's permit application was denied solely for lack of justifiable need, and he has therefore satisfied all other requirements. Petitioner's Second Amendment challenge to the justifiable need provision has been raised and argued at each level, *see supra* at Proceedings Below, so there can be no claim of waiver.

**IV. REVIEW IS NECESSARY BECAUSE THE DECISION  
BELOW IS DIRECTLY CONTRARY TO THIS COURT'S  
DECISIONS IN *HELLER* AND *MCDONALD*.**

The New Jersey Appellate Division's opinion relied primarily upon *Wheeler*, which held that any restrictions of the Second Amendment right to carry a handgun in public is reviewed under an intermediate scrutiny standard. 81 A.3d at 753-60. Essentially, intermediate scrutiny was based on the purported greater need to protect the public. *Id.* at 754. In short, application of intermediate scrutiny places public protection above the individual constitutional right. However, subjecting the core protection of this right to any type of interest-balancing was expressly foreclosed by *Heller*. 554 U.S. at 634.

Moreover, *Wheeler* held that use of intermediate scrutiny is proper because the right to control public carriage is a longstanding licensing measure of the type acknowledged by *Heller*. 81 A.3d at 743, 758. But again, *Wheeler*'s erroneous reliance on it is self-evident. In *Heller*, traditional longstanding measures

were those narrowly defined exceptions that did not adversely affect the core rights of the ordinary citizen, *e.g.*, restrictions against the mentally ill and violent persons/felons from keeping arms, bearing arms in sensitive places, etc. 554 U.S. at 626. Nothing in the majority of our case law from the eighteenth and nineteenth centuries justified the restriction of all types of public carriage unless “good cause” or “justifiable need” was satisfied. In fact, *Heller’s* review of nineteenth century case law on public carriage proves just the opposite; a state law can preclude open or concealed carry but cannot preclude both. Any attempt to do so would be unconstitutional. 554 U.S. at 627, 629.

In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Court reaffirmed *Heller* by noting that self-defense is the core right of the Second Amendment, and that self-defense is a basic right. *Id.* at 767. As such, the right to keep and bear arms was fundamental to our scheme of ordered liberty. *Ibid.* Thus, the right to self-defense does not end at the end of one’s property, and must include non-sensitive public areas. *McDonald* and *Heller* are in conflict with a New Jersey statute which so restricts the core right as to render it useless. When the two are in direct conflict, it is the statute that must give way.

In addition, *Wheeler* admitted in *dicta* that the Second Amendment applies to public areas, 81 A.3d at 749, yet refused to decide that question. Other courts have also sidestepped this issue, ruling against public carry permit challenges based solely on an intermediate scrutiny review.

Nevertheless, *Heller* undertook a thorough analysis revealing the historical right to carry arms in public. 554 U.S. at 594, 599, 607.

Moreover, *Heller* further held that the right to bear arms does not bar “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.” 554 U.S. at 626. The obvious and inescapable implication is that there is a right to carry firearms in public places which are not “sensitive”.

Furthermore, while the Court noted that “the need for defense of self, family, and property is most acute” in the home, 554 U.S. at 628 (emphasis added), that doesn’t mean it is not acute outside the home. Instead, it suggests that some form of the right applies where that need is not most acute. Were it otherwise, there would be no need for the modifier “most”. This reasoning is consistent with the Supreme Court’s historical understanding of the right to keep and bear arms as “an individual right protecting against both public and private violence,” such as in cases of armed resistance against oppression by the Crown. 554 U.S. at 594 (emphasis added); *see also id.* at 592-95.

Self-defense is at the core of the right to keep and bear arms. *A fortiori*, the right applies in the public arena as well as the home.

#### V. REVIEW IS NEEDED DUE TO THE LOWER COURTS’ ANIMOSITY OR INDIFFERENCE TO SECOND AMENDMENT LAW.

Too many courts, when dealing with the Second Amendment, refuse to rule on the matter presented to them. *See, e.g., Hightower v. City of Boston*, 693 F.3d 61, 72, n.8 (1st Cir. 2012) (declining to resolve

the issue of whether the Second Amendment extends beyond the home); *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (stating “[t]here may or may not be a Second Amendment right in some places beyond the home,” and that “[o]n the question of *Heller’s* applicability outside the home environment, we think it prudent to await direction from the Court itself”); *Piszczaatoski v. Filko*, 840 F.Supp.2d 813, 829 (D.N.J. 2012) (“Given the considerable uncertainty regarding if and when the Second Amendment rights should apply outside the home, this Court does not intend to place a burden on the government to endlessly litigate and justify every individual limitation on the right to carry a gun in any location for any purpose”).

In fact, the New Jersey Supreme Court has denied multiple petitions for certification challenging the justifiable need provision, including one in which certification was initially granted but subsequently denied as “improvidently granted”. *In re Pantano*, 60 A.3d 507 (N.J. App. Div.), *certif. granted* 69 A.3d 117 (N.J. 2013), *appeal dismissed as improvidently granted* 134 A.3d 956 (N.J. 2014).

Other novel constitutional issues are routinely heard by the courts. *Women’s Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 193 (6th Cir. 1997) (abortion); *Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff*, 533 F.3d 780, 799 (9th Cir. 2008) (abortion and First Amendment); *Victoria W. v. Larpenster*, 2001 U.S. Dist. LEXIS 3044 at pp. 14-15 (E.D. LA 2001) (abortion); *Stuart v. Walker-McGill*, 2016 U.S. Dist. LEXIS 7976 (M.D.N.C. Jan. 25, 2016) (abortion and First Amendment).

Moreover, at least one justice on this Court has already acknowledged the “lower courts’ general failure to afford the Second Amendment the respect due an enumerated constitutional right”. *Silvester v. Becerra*, 138 S.Ct. 945, 945 (2018), (Thomas, J., dissenting from denial of certiorari).

This type of hostility towards the Second Amendment requires the Court’s intervention because “[i]t is hard to conceive a task more appropriate for federal courts than to protect civil rights guaranteed by the Constitution against invasion by the states.” Henry J. Friendly, *Federal Jurisdiction: A General View*, p.90 (1973).



## CONCLUSION

Where, as in this matter, an enumerated constitutional right has been subjected to such statutory regulation, or where case law has so narrowly construed the right that no ordinary citizen can exercise it, it has been unconstitutionally regulated out of existence. It amounts to what Justice Scalia called a “parchment guarantee”, *see* [www.c-span.org/video/?c4464175/scalia-separation-powers](http://www.c-span.org/video/?c4464175/scalia-separation-powers) (last accessed June 1, 2019), *i.e.*, nothing more than words on paper.

For the reasons set forth above, the Court should grant the petition for certiorari.

Respectfully submitted,

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