

In the Supreme Court of the United States



DOUGLAS CIOLEK,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the
New Jersey Supreme Court

**BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI**

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QUESTIONS PRESENTED

Whether the legislative requirement of “justifiable need” for a permit to carry a handgun in public violates the Second Amendment.

PARTIES TO THE PROCEEDINGS

- Douglas F. Ciolek is the petitioner, whose application for a permit to carry a handgun in public was denied, and who was the pro se plaintiff in the proceedings below. Petitioner is an admitted member of the bar of New Jersey.
- The State of New Jersey was represented in the judicial proceedings below by Prosecutor Fredric M. Knapp, Morris County Prosecutor, in his capacity as Chief Law Enforcement Officer for Morris County. N.J. Stat. Ann. § 2A:158-5 (West 2019).
- The Attorney General of New Jersey has been provided proper notice, and the Morris County Prosecutor's Office continues to represent respondent through counsel.

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OPINIONS BELOW

The verbal decision of the Superior Court of New Jersey, Law Division, entitled *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.*, Morris County Superior Court Dkt. No. MRS-L-17-22, in which the Hon. Salem Vincent Ahto, J.S.C. (Retired, Temporarily Assigned on Recall) denied the application for the permit to carry a handgun, and denied petitioner's Motion for Summary Judgment, is reproduced at Pet.App.7a-28a.¹ The contents of the conforming Order, issued on March 14, 2018, is reproduced at Pet.App. 29a-30a.

The opinion of the Superior Court of New Jersey, Appellate Division, captioned *In the Matter of the Appeal of Douglas F. Ciolek's Application for a Firearms Purchaser*, App. Div. Dkt. No. A-003510-17 (decided February 1, 2019), is not published, but can be found at 2019 Westlaw 406129 and is reproduced at Pet. App.2a-6a.²

On May 3, 2019, the New Jersey Supreme Court denied certification, and dismissed the Notice of Appeal. *In the Matter of the Appeal of Douglas F.*

¹ "Pet." equals Brief in support of the Petition for a Writ of Certiorari. "Pet.App." equals Appendix to the Petition for a Writ of Certiorari.

² The record is unclear why the caption was changed at the time of issuance of the Appellate Division decision, but the issue clearly was addressed on appeal in the context of a permit to carry a firearm.

Ciolek's Application for a Firearms Purchaser, 237 N.J. 561, 206 A.3d 957 (2019). The contents of the Order is reproduced at Pet.App.1a.³



JURISDICTION

The Order of the New Jersey Supreme Court denying certification was entered on May 3, 2019. (Pet.App.9a).

On July 18, 2019, the Petition for a Writ of Certiorari was timely filed.

Although respondent originally filed a Waiver of its right to file a response, the Court has requested that a response be filed by September 4, 2019.

The jurisdiction of this court is invoked under 28 U.S.C. § 1257a.



CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. amend. II

The Second Amendment to the United States Constitution provides:

³ Respondent notes a scrivener's error in Pet.App.1a. The Clerk of the New Jersey Supreme Court is Heather Joy Baker.

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

The Fourteenth Amendment to the United States Constitution provides, in pertinent part,

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . [.]

N.J. Stat. Ann. § 2C:39-5b(1)

N.J. Stat. Ann. § 2C:39-5b(1) reads, in pertinent part:

Any person who knowingly has in his possession any handgun . . . without first having obtained a permit to carry the same as provided by (N.J. Stat. Ann. § 2C:58-4), is guilty of a crime of the second degree.

N.J. Stat. Ann. § 2C:39-6e

N.J. Stat. Ann. § 2C:39-6e reads, in pertinent part:

Nothing in (N.J. Stat. Ann. § 2C:39-5b to 5d) shall be construed to prevent a person keeping or carrying about his place of business, residence, premises or other land owned or possessed by him, any firearm, or from carrying the same, in the manner specified in (N.J. Stat. Ann. § 2C:39-6g) from any place of purchase to his residence or place of business, between his dwelling and his place of business, between one place of business or

residence and another when moving, or between his dwelling or place of business and place where the firearms are repaired, for the purpose of repair. For the purposes of this section, a place of business shall be deemed to be a fixed location.

N.J. Stat. Ann. § 2C:58-4

The version of N.J. Stat. Ann. § 2C:58-4 (1981 N.J. Laws, c. 135, § 1), which was in effect at the time of the initial denial of the permit to carry a firearm, read, in pertinent part:

a. Scope and Duration of Authority

Any person who holds a valid permit to carry a handgun issued pursuant to this section shall be authorized to carry a handgun in all parts of this State, except as prohibited by (N.J. Stat. Ann. § 2C:39-5e). One permit shall be sufficient for all handguns owned by the holder thereof, but the permit shall apply only to a handgun carried by the actual and legal holder of the permit . . . [.]

b. Application Forms

All applications for permits to carry handguns, and all applications for renewal of such permits, shall be made on the forms prescribed by the superintendent . . . The application shall be signed by the applicant under oath, and shall be indorsed by three reputable persons who have known the applicant for at least 3 years preceding the date of application, and who shall certify thereon that the applicant is a person of good moral character and behavior.

c. Investigation and Approval

Each application shall in the first instance be submitted to the chief police officer of the municipality in which the applicant resides . . . No application shall be approved by the chief police officer or the superintendent unless the applicant demonstrates that he is not subject to any of the disabilities set forth in (N.J. Stat. Ann. § 2C:58-3c), that he is thoroughly familiar with the safe handling and use of handguns, and that he has a justifiable need to carry a handgun . . . [.]

d. Issuance by Superior Court; Fee

If the application has been approved by the chief police officer or the superintendent, as the case may be, the applicant shall forthwith present it to the Superior Court of the county in which the applicant resides, or to the Superior Court in any county where he intends to carry a handgun, in the case of a nonresident or employee of an armored car company. The court shall issue the permit to the applicant if, but only if, it is satisfied that the applicant is a person of good character who is not subject to any of the disabilities set forth in section (N.J. Stat. Ann. § 2C:58-3c), that he is thoroughly familiar with the safe handling and use of handguns, and that he has a justifiable need to carry a handgun. The court may at its discretion issue a limited-type permit which would restrict the applicant as to the types of handguns he may carry and where and for what purposes such handguns may be carried . . . [.]

e. Appeals from Denial of Applications

Any person aggrieved by the denial by the chief police officer or the superintendent of approval for a permit to carry a handgun may request a hearing in the Superior Court of the county in which he resides or in any county in which he intends to carry a handgun, in the case of a nonresident, by filing a written request for such a hearing within 30 days of the denial. Copies of the request shall be served upon the superintendent, the county prosecutor and the chief police officer of the municipality where the applicant resides, if he is a resident of this State. The hearing shall be held within 30 days of the filing of the request, and no formal pleading or filing fee shall be required. Appeals from the determination at such a hearing shall be in accordance with law and the rules governing the courts of this State.

N.J. Stat. Ann. § 2C:58-4c

By 2018 N.J. Laws, c. 37, N.J. Stat. Ann. § 2C:58-4c was amended, effective June 18, 2018, to add the following requirement for inclusion in the application for a permit to carry a firearm:

. . . Each application form shall be accompanied by a written certification of justifiable need to carry a handgun, which shall be under oath and, in the case of 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.⁴

N.J. Admin. Code § 13:54-2.4(d)

N.J. Admin. Code § 13:54-2.4(d) (2017), in effect at the time of the initial denial of the permit to carry, read:

(d) Each application form shall also be accompanied by a written certification of justifiable need to carry a handgun, which shall be under oath and which:

1. In the case of a private citizen shall specify in detail the urgent necessity for self-protection, as evidenced by serious threats, specific threats, or previous attacks, which demonstrate a special danger to the applicant's life that cannot be avoided by reasonable 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 such incidents to the appropriate law enforcement agencies[.]

⁴ The statutory amendment codified the administrative standard then found at N.J. Admin. Code § 13:54-2.4(d) (2017). The regulation has since been amended so as to remove the requirement of showing serious threats. *See* 50 N.J. Reg. 2240(b), eff. November 5, 2018. Petitioner concedes he does not meet any of these standards. (Pet.App.13).

N.J. Stat. Ann. § 2C:39-5e

N.J. Stat. Ann. § 2C:39-5e reads:

e. Firearms or Other Weapons in Educational Institutions

(1) Any person who knowingly has in his possession any firearm in or upon any part of the buildings or grounds of any school, college, university or other educational institution, without the written authorization of the governing officer of the institution, is guilty of a crime of the third degree, irrespective of whether he possesses a valid permit to carry the firearm or a valid firearms purchaser identification card.

(2) Any person who knowingly possesses any weapon enumerated in (N.J. Stat. Ann. § 2C:39-1r(3), r(4)) or any components which can readily be assembled into a firearm or other weapon enumerated in (N.J. Stat. Ann. § 2C:39-1r) or any other weapon under circumstances not manifestly appropriate for such lawful use as it may have, while in or upon any part of the buildings or grounds of any school, college, university or other educational institution without the written authorization of the governing officer of the institution is guilty of a crime of the fourth degree.

(3) Any person who knowingly has in his possession any imitation firearm in or upon any part of the buildings or grounds of any school, college, university or other educational institution, without the written authorization of the governing officer of the institution, or while on any school bus is a disorderly person, irrespective of whether he

possesses a valid permit to carry a firearm or a valid firearms purchaser identification card.



STATEMENT OF THE CASE

On or about October 18, 2017, Douglas Ciolek (*hereinafter* petitioner) filed an application in the Township of Denville, New Jersey for a permit to carry a handgun. Petitioner conceded that he did not meet the “justifiable need” standard as required by the statutory law of New Jersey. (Pet.App.7a-9a). In the certification which accompanied his application to carry a handgun, dated October 27, 2017, he stated he was requesting a permit to carry a handgun for purposes of general self-defense and that he was not aware of any specific threats of harm directed at him.

On November 21, 2017, Chief of Police Christopher Wagner, of the Township of Denville Police Department, denied petitioner’s application. In his denial letter, Chief Wagner concluded that petitioner did not demonstrate a justifiable need to carry a firearm in the State of New Jersey. (Reproduced at Pet.App. 34a).

Petitioner timely requested a hearing in the Superior Court of the State of New Jersey, Law Division, to appeal, as of right, the denial of his application for a permit to carry a handgun, pursuant to N.J. Stat. Ann. § 2C:58-4e. (Pet.App.9a-10a). Shortly after, petitioner also filed for summary judgment, challenging the constitutionality of New Jersey’s justifiable need requirement. (Pet.App.37a-38a). He claimed it violated

the Second Amendment of the United States Constitution and Article 1, Paragraph 1 of the New Jersey State Constitution. (Pet.App.11a-15a).

On March 14, 2018, a hearing was held before the Hon. Salem Vincent Ahto, J.S.C. (Retired, Temporarily Assigned on Recall). At the conclusion of the hearing, Judge Ahto denied petitioner's applications (Pet.App.7a-28a), and issued a conforming Order. (Reproduced at Pet.App.29a-30a).

During the course of his ruling, Judge Ahto noted this Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), applying the Second Amendment, was made applicable to the States through the due process clause of the Fourteenth Amendment, citing this Court's opinion of *McDonald v. City of Chicago*, 561 U.S. 742, 767-80 (2010). (Pet.App.10a-14a). Judge Ahto noted many state and federal courts have struggled to identify the proper reach of *Heller*, and whether its holding regarding the Second Amendment extends beyond the home. (Pet.App.25). However, he ruled that as a trial court, he was bound by controlling state appellate precedent that intermediate scrutiny was appropriate to apply for the determination of whether the justifiable need requirement withstood federal constitutional challenge under the Second Amendment. (Pet.App.27a-28a).

Relying upon the Appellate Division decision of *In Re Wheeler*, 433 N.J. Super. 560, 81 A.3d 728 (App. Div. 2013), he found the justifiable need requirement passed federal and state constitutional muster, and that the application for a permit to carry was properly denied. (Pet.App.16a-17a).

Petitioner appealed to the Superior Court of the State of New Jersey, Appellate Division, limiting his challenge to the constitutionality of the “justifiable need” requirements of New Jersey’s regulatory scheme. (Pet.App.2). In an unpublished, *per curiam* opinion, the Appellate Division affirmed. (Pet.App.2a-6a).

The Appellate Division rejected the constitutional arguments, affirming substantially for the reasons expressed by Judge Ahto. (Pet.App.2a). The Court found the arguments to be without sufficient merit to warrant discussion in a written opinion, citing N.J. CT. R. 2:11-3(e)(1)(E). The Court did add that New Jersey’s regulatory scheme requiring a justified need be shown in order for a permit to carry to issue had been upheld as comporting with the Second Amendment in its own published case of *Wheeler*, and by the Third Circuit in *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), *cert. denied sub nom., Drake v. Jerejian*, 582 U.S. 1100 (2014). (Pet.App.6).

On May 3, 2019, the New Jersey Supreme Court denied a petition for certification. N.J. CT. R. 2:2-1(b). It also dismissed defendant’s notice of appeal regarding the state constitutional issues raised. (Pet.App.1).



REASONS FOR DENYING CERTIORARI

I. MOOTNESS

As a threshold consideration, petitioner fails to address a significant mootness issue that arose during the pendency of the matter in the state courts.

On June 13, 2018, New Jersey amended N.J. Stat. Ann. § 2C:58-4c by enacting L. 2018, c. 37, § 1.⁵ The stated purpose of the amendment was to codify the definition of a “justifiable need to carry a handgun” that had been previously contained in the New Jersey Administrative Code. *See*, Assembly Committee Statement (218th Legislature), Assembly Bill No. 2758, Assembly Judiciary Committee (February 28, 2018) (A2758).

Thus, the version of the statute, as enacted in 1981,⁶ which petitioner claims violated the Second Amendment, would no longer be applicable to any future applications made by him, or by others, for a permit for public carriage of a handgun in New Jersey.

Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies. *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). To invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision. *Allen v. Wright*, 468 U.S. 737, 750-751 (1984). Article III denies federal courts the power to decide questions that cannot affect the rights of litigants in the case before them. This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990).

⁵ 2018 N.J. Laws, c. 37.

⁶ 1981 N.J. Laws, c. 135, § 1.

Respondent notes, however, that this Court has held that the repeal of a statute may not render a proceeding regarding the former statute moot under every circumstance. For example, if the statute disadvantages a plaintiff in the same fundamental way, this Court has considered the matter to remain a live controversy. *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville, Fla.*, 508 U.S. 656, 660-63 (1993). Respondent also recognizes that the “justifiable need” requirement remains a central feature of N.J. Stat. Ann. § 2C:58-4c, even after its amendment in 2018, which petitioner has not met.

II. THIS INTERMEDIATE APPELLATE COURT OPINION DOES NOT DEEPEN THE SPLIT IN FEDERAL CIRCUIT COURTS TO AN EXTENT TO WARRANT THIS COURT’S INVOLVEMENT

The decision in this case was issued by the Appellate Division of the Superior Court of New Jersey, which is an intermediate appellate court. N.J. Const. Art. VI, § 5. Although petitioner is correct that the N.J. Supreme Court has not yet addressed the constitutional issues raised in this petition, the holding in the Appellate Division published opinion of *Wheeler* is controlling precedent upon the trial judges of the Superior Court. N.J. CT. R. 1:36-3.

New Jersey is served by the United States Court of Appeals for the Third Circuit. There is no state court holding that is inconsistent with the Third Circuit *Drake* decision, which held that the justified need standard for a carry permit, as contained in N.J. Stat. Ann. § 2C:58-4, passes constitutional muster.

Review is not necessary in the case due to a conflict in the federal circuit courts, contrary to petitioner's contention. *See* Pet.5. The lower courts have exhibited a consistent analytical approach to the determination of whether the justifiable need/good reason category of restrictions violate the Second Amendment.

In *Heller*, this Court held that a “ban on handgun possession in the home violates the Second Amendment, as does [a] prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.” 554 U.S. at 635. The Court explained that “home [is] where the need for defense of self, family, and property is most acute,” and therefore, the Second Amendment “elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” *Id.* at 628, 635. The Court further clarified that, “[l]ike most rights, the right secured by the Second Amendment is not unlimited” and is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Id.* at 626.

In *McDonald*, this Court relied upon its holding in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873) to reject the premise that the Privileges and Immunities clause of the Fourteenth Amendment should be a font of power to apply the Second Amendment to the States. *McDonald*, 561 U.S. at 758. However, this Court held the Second Amendment was made applicable to the States, through the due process clause of the Fourteenth Amendment. *McDonald*, 561 U.S. at 786.

Respondent agrees that most courts have found it unnecessary to determine whether the *Heller* holding extends beyond the home in order to address the

validity of justified need/good cause regulations. *See* Pet.10-11. However, resolution of the proper scope of *Heller* is not necessary for adjudication of the instant petition. The Appellate Division of New Jersey has assumed that the Second Amendment protected “the right of law-abiding and responsible citizens (those protected by the Amendment under *Heller*) to carry a handgun (a firearm protected by the Amendment under *Heller*), in public places for lawful defensive use (the only protected purpose for carrying a handgun under *Heller* in public places where the obligation to show justifiable need pertains[.]” *Wheeler*, 433 N.J. Super. at 603-04, 81 A.2d at 753-54.⁷ Thus, resolution of whether *Heller* extends beyond the home is not necessary for this Court to address in order to reach the issue upon which petitioner seeks review.

Since *Heller* and *McDonald*, the lower courts have addressed similar licensing regimes similar to the one challenged here. “Neither the Supreme Court nor any court of appeals has held that laws burdening Second Amendment rights evade constitutional scrutiny. Rather, when faced with an as-applied Second Amendment challenge, they agree that some form of heightened scrutiny is appropriate after it has been determined that the law in question burdens protected conduct.” *Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336, 344 (3d Cir. 2016), *cert. denied*, 137 S.Ct. 2323 (2017).

Three levels of scrutiny are potentially available when assessing whether a constitutional guarantee is burdened by legislative or executive action: rational

⁷ The Third Circuit has done likewise. *Drake*, 724 F.3d at 431.

basis review, intermediate scrutiny, and strict scrutiny. *Heller*, however, made clear that rational basis review was unavailable to save a law that burdens protected Second Amendment conduct. *Heller*, 554 U.S. at 628 n.27.

Strict scrutiny demands that the statute be “narrowly tailored to promote a compelling Government interest . . . [;] [i]f a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.” *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000).

In between sits intermediate scrutiny, under which the government’s asserted interest must be more than just legitimate, but need not be compelling. It must be “significant, substantial, or important.” Additionally, “the fit” between the asserted interest and the challenged law need not be “perfect,” but it must be “reasonable” and “may not burden more [conduct] than is reasonably necessary.” *Drake*, 724 F.3d at 435-36. (*internal citations omitted*).

The lower courts’ decisions, both federal and state, are broadly consistent that justified need/good cause regulations governing the issuance of a carry permit withstand intermediate scrutiny so as to be constitutional under the Second Amendment.

In *Kachalsky v. County of Westchester*, 701 F.3d 81, 100-01 (2d Cir. 2012), *cert. denied*, 569 U.S. 918 (2013), the Second Circuit upheld New York’s “proper cause” standard after applying intermediate scrutiny.

The Third Circuit has upheld N.J. Stat. Ann. § 2C: 58-4, the same statute which is the subject of the

instant petition, after applying intermediate scrutiny. *Drake*, 724 F.3d at 436-40 (3d Cir. 2013).⁸

The Fourth Circuit applied intermediate scrutiny, and then upheld, Maryland’s “good and substantial reason” standard. *Woollard v. Gallagher*, 712 F.3d 865, 878-881 (4th Cir.), *cert. denied*, 571 U.S. 972 (2013).

The First Circuit has held that intermediate scrutiny was appropriate to evaluate a “good reason” standard as found in the Massachusetts firearms licensing statute, and as implemented by the communities of Boston and Brookline. *Gould v. Morgan*, 907 F.3d 659, 672-77 (1st Cir. 2018). The First Circuit determined the core Second Amendment right to be limited to self-defense in the home. *Id.* at 672. The panel concluded the public carriage of firearms fell outside that core right, but that it was appropriate to determine if the “good reason” standard burdened “the periphery of the Second Amendment right.” *Ibid.* It concluded that intermediate scrutiny was satisfied. *Id.* at 673-77.

A petition for certiorari is pending before this Court. *Gould v. Morgan*, Sup. Ct. Dkt. No. 18-1272.⁹

⁸ A petition for certiorari has been filed in *Rogers et al. v. Grewal, Attorney General of New Jersey, et al.*, Sup. Ct. Dkt. No. 18-824. In that case, the Third Circuit summarily affirmed the U.S. District Court of New Jersey’s dismissal of plaintiff’s suit, which was seeking to have the justified need standard declared unconstitutional under the Second Amendment.

⁹ On January 22, 2019, this Court granted a petition for a writ of certiorari in *New York State Rifle & Pistol Association, Inc., v. The City of New York*, Sup. Ct. Dkt. No. 18-0280. The Second Circuit, after applying intermediate scrutiny, upheld the licensing regiment established by the City of New York against a Second

Petitioner cites to cases from the Ninth, Seventh, and D.C. Circuit in support of his argument that there is a split in circuit authority sufficient to warrant this Court's grant of certiorari. *See* Pet.5-7. The starkness of the split is not as evident if those cases are placed in proper context of the landscape relating to Second Amendment jurisprudence in 2019.

First, it must be noted that the Ninth Circuit has upheld California's "good cause" requirement to obtain a license to carry a concealed firearm in public in *Peruta v. County of San Diego*, 824 F.3d 919, 924 (9th Cir. 2016) (*en banc*), *cert. denied*, 135 S. Ct. 1995 (2017). The seven-judge majority opinion concluded that "there is no Second Amendment right for members of the general public to carry concealed firearms in public." *Id.* at 939. The *Peruta* majority detailed an in-depth canvass of the extensive history relevant to both the understanding of the Second Amendment at the time of its ratification, and its understanding at the time of the ratification of the Fourteenth Amendment. *Id.* at 929-39. The Court also observed, "Finally, and perhaps most importantly" that this Court's opinion in *Robinson v. Baldwin*, 165 U.S. 275 (1897), observed, "(T)he right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons[.]" *Id.* at 281-82.¹⁰

Amendment challenge. *New York State Rifle & Pistol Association, Inc., v. The City of New York*, 883 F.3d. 45 (2d Cir. 2018), *cert. granted* 139 S.Ct. 1647 (2019).

¹⁰ The use of history, and resort to historical references, in the various judicial opinions, whether majority or concurring or dissenting, which have strove to divine the meaning of the Second Amendment, both at the time of its enactment, and at the time

Thus, *Peruta* held “any prohibition or restriction a state may choose to impose on concealed carry—including a requirement of ‘good cause’, however defined—is necessarily allowed by the Amendment.” *Peruta*, 824 F.3d at 939.

However, petitioner cites to the Ninth Circuit three-judge panel decision of *Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018) for the proposition that the Second Amendment guaranteed some right to public self-defense, and the right to bear arms extended beyond the home. *Id.* at 1068.¹¹ The *Young* majority, over a dissent, concluded that Hawaii’s statute impermissibly “amounted to a destruction” of the core right of self-defense. *Id.* at 1070-71. The majority concluded the statute did not meet any level of scrutiny, expressly rejecting application of the intermediate level of scrutiny. *Id.* at 1071-74.

However, petitioner does not note that *Young* has since been ordered to be re-heard *en banc*, and that the Ninth Circuit has subsequently ordered that the “three-judge panel disposition shall not be cited as precedent by or to any court of the Ninth Circuit.” *Young v. Hawaii*, 915 F.3d 681 (9th Cir. 2019) (*reh’g en banc granted*). Thus, *Peruta* remains controlling

of the ratification of the Fourteenth Amendment, is not without its own debate. See Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Three: Critiquing the Circuit Courts Use of History-in-Law*, 67 CLEV. ST. L. REV. 197 (2019).

¹¹ See Pet.6.

authority in the Ninth Circuit, consistent with the First, Second, Third and Fourth Circuit.¹²

Petitioner's reliance upon the Seventh Circuit case of *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012), *reh'g en banc denied*, 708 F.3d 901 (7th Cir. 2013) does not support as much weight as asserted. *Moore* must be placed in the proper context of the broad Illinois statute at issue, a statute which was much more restrictive of the right to carry than its New Jersey counterpart.

In *Moore*, the Seventh Circuit reviewed an Illinois law that imposed a near-categorical prohibition on the carrying of guns in public. *Id.* at 934. In striking down the statute, the Seventh Circuit held that the Second Amendment right to “bear arms” extends beyond the home, to some degree. *Id.* at 936. It went on to conclude the “sweeping ban” could not be upheld by the State’s generalized reliance on “public safety,” as Illinois had ample room to “limit the right to carry a gun to responsible persons rather than to ban public carriage altogether.” *Id.* at 940-942. *But cf. Culp v. Raoul*, 921 F.3d 646, 649-656 (7th Cir. 2019) (Provision relating to out-of-state applicants in the newly-enacted Illinois law regarding concealed firearms subject to intermediate scrutiny).

¹² The Ninth Circuit has left open whether there was a Second Amendment right to openly carry a firearm in public. *Peruta*, 824 F.3d at 939. That issue need not be addressed in the instant petition as the New Jersey courts, as well as the Third Circuit, have assumed for the purposes of the constitutional analysis undertaken that the Second Amendment provided some conditional right of self-defense for public carriage of a firearm outside the home, whether concealed or otherwise.

Petitioner relies upon the D.C. Circuit case of *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017). *See* Pet.6. The *Wrenn* majority, over a dissent, concluded that the individual right to carry common firearms beyond the home for self-defense fell within the core of the Second Amendment. *Id.* at 661. It then determined that the District of Columbia’s “good reason” requirement, as promulgated through the D.C. Code and municipal regulations, was invalid. *Id.* at 657-68.

Wrenn is distinguishable from the decision below and does not create a split warranting this Court’s involvement. First, *Wrenn* addressed a licensing scheme that was far more restrictive than New Jersey’s scheme. In the District of Columbia, the plaintiffs’ failure to demonstrate a “special need for self-defense” meant that they were denied altogether a license to carry a handgun in public. *Id.* at 655-56.¹³

New Jersey allows a person to possess or carry a handgun in his/her “place of business, residence, premises or other land owned or possessed[,]”, or to transport the firearm, unloaded, and in a delineated fashion “from any place of purchase to his residence or place of business, between his dwelling and his place of business, between one place of business or residence and another when moving, or between his dwelling or place of business and place where the

¹³ The District of Columbia handgun regulations did not permit a system in which a handgun carry license could issue to individuals. *See* Elizabeth Beaman, *Who Gets to Determine If You Need Self Defense?: Heller and McDonald’s Application Outside the House*, 12 SETON HALL CIRCUIT REVIEW 139, 158 (2015).

firearms are repaired, for the purpose of repair.” N.J. Stat. Ann. § 2C:39-6e.

Almost all of the federal circuits have adopted a two-step approach to address Second Amendment challenges since *Heller*. First, the court asks whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee. If it does, the law is then evaluated under a level of scrutiny commensurate with the extent to which the law burdens the right. *See Gould*, 907 F.3d at 668-69; *Kachalsky*, 701 F.3d at 89-97; *Drake*, 724 F.3d at 429; *Woollard*, 712 F.3d at 874-75; *National Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, and Firearms*, 700 F.3d 185, 194-95 (5th Cir. 2012); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *Ezell v. City of Chicago*, 651 F.3d 684, 701-04 (7th Cir. 2011); *United States v. Chovan*, 735 F.3d 1127, 1136-37 (9th Cir. 2013); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010); *GeorgiaCarry.org, Inc. v. Georgia*, 687 F.3d 1244, 1260 n.34 (11th Cir. 2012); *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011) (*Heller II*).¹⁴

The appellate courts of New Jersey have basically followed the same two-step approach to determine Second Amendment issues since *McDonald*. *See Wheeler*, 433 N.J. Super. at 603-604, 81 A.3d at 753.¹⁵

¹⁴ The Eighth Circuit has not yet done so. *United States v. Adams*, 914 F.3d 602, 607 (8th Cir. 2019) (Kelly, J., concurring in judgment).

¹⁵ New Jersey does not have an express state constitutional provision regarding the individual right to keep and bear arms. Some state constitutions explicitly protect the right to bear arms for self-defense. *See* Del. Const. (1897), Art. I, § 20 (Delaware).

III. THE JUSTIFIABLE NEED STANDARD SURVIVES INTERMEDIATE SCRUTINY

New Jersey has enacted a “careful grid” of regulatory provisions relating to the possession of firearms. *In re Preis*, 118 N.J. 564, 568, 573 A.2d 148, 150 (1990), quoting *State v. Ingram*, 98 N.J. 489, 495 n.1, 488 A.2d 545, 548 n.1 (1985). The laws “draw careful lines between permission to possess a gun in one’s home or place of business, and permission to carry a gun.” *Ingram*, 98 N.J. at 569, 573 A.2d at 568 (*internal citations omitted*). The knowing possession of a handgun “without first having obtained a permit to carry the same as provided in (N.J. Stat. Ann. § 2C:58-4) is unlawful.” *Id.* § 2C:39-5b(1). However, other statutory provisions render *Id.* § 2C:39-5b inapplicable in a wide range of circumstances. “As a practical matter, the exceptions make the prohibition against carrying a handgun applicable only in public places.” *Wheeler*, 433 N.J. Super. at 576, 81 A.3d at 737 (emphasis in original).

In New Jersey, one does not need a carry permit to keep, carry or use a handgun about one’s home, business premises, or land (N.J. Stat. Ann. § 2C:39-6e), or while lawfully hunting or shooting at a range or in an authorized exhibition, *Id.* § 2C:39-6f(1)-(3), or while transporting a handgun, unloaded and secured, between those places and places where guns are sold or repaired. *Id.* § 2C:39-6e, f, and g.

Some state constitutions state the self-defense right does not extend to carrying concealed weapons. *See* Colo. Const. (1876), Art. II, § 13 (Colorado).

A person may also be eligible to carry a firearm based on enumerated employment, with some having the caveat that the permit is limited to times when on duty. *Id.* § 2C:39-6a, b. The exceptions for some in the public sector are not limited to times when they are on duty or on call, but those officers have statutory duties and police powers not limited to performance of duty. *Wheeler*, 433 N.J. Super at 576-77, 81 A.3d at 737-38.

The carry permit requirement has long been construed by the N.J. Supreme Court to have serve the purpose of addressing the “serious dangers of misuse and accidental use” inherent in a person carrying a handgun. *Siccardi v. State*, 59 N.J. 545, 558, 284 A.2d 533, 540 (1971). Yet an ordinary citizen still may be eligible for a permit to carry a firearm if certain conditions are met.

The applicant must show that he or she is “thoroughly familiar with the safe handling and use of handguns” and that he or she has “a justifiable need to carry a handgun.” N.J. Stat. Ann. § 2C:58-4d.

Petitioner concedes that he meets no statutory exemption. He solely sought a permit to carry a firearm based on principles of general self-defense, which he asserted fell within the core of the Second Amendment. *See* Pet.6-9. Petitioner is wrong.

The Second Amendment did not create a new right, but rather codified a preexisting right subject to the limitations and regulations that existed at the time. *Heller*, 554 U.S. at 592. (Emphasis in original)). “From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever

in any manner whatsoever and for whatever purpose.” *Id.* at 626. Thus, such “longstanding” laws are “presumptively lawful” and do not implicate or interfere with the Second Amendment’s guarantees. *Id.* at 626-627 & n.26.

It is evident that the Second Amendment is not offended by New Jersey’s limited justified need requirement, as the New Jersey courts have concluded in the aftermath of *McDonald*. The Third Circuit likewise concluded in *Drake*.

The Third Circuit upheld New Jersey’s justified need requirement on two independent, but admittedly, related grounds.

First, after noting that this Court stated in *Heller* that “(N)othing in our opinion should be taken to cast doubt on 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,”¹⁶

Drake held that the “justified need” standard qualified as a long-standing presumptively lawful regulation that *Heller* identified as the type of regulation which would fall outside the Second Amendment protection. *Id.* at 431-32.

Similarly, the Appellate Division cited favorably to this analysis in reaching its own conclusion that “the acceptance of prohibitions against concealed carrying as an indication that regulation of the manner

¹⁶ *Heller*, 554 U.S. at 626-27.

of carrying bearable arms in public places—at least the concealed carrying—was understood to be part” of the Second Amendment right. *Wheeler*, 433 N.J. Super. at 600, 81 A.3d at 751.

The justified need requirement was also then determined by the Third Circuit, to be subject to, and ultimately to survive, intermediate scrutiny. *Drake*, 724 F.3d at 435-440.

As petitioner concedes, New Jersey state courts also have concluded that the justified need standard survives intermediate scrutiny. *See* Pet.8-9. The Appellate Division in the instant petition below did likewise based on the controlling precedent. (Pet.App.6a).

This Court has recognized, in the context of intermediate scrutiny as brought to bear under the First Amendment, that courts should give “substantial deference to the predictive judgments” of a state legislature engaged in the enactment of state laws. *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180, 195 (1997).

This degree of deference forecloses a court from substituting its own appraisal for a reasonable appraisal made by the legislature. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010). This deferential standard should be applied to the Second Amendment.

The Third Circuit aptly described why N.J. Stat. Ann. § 2C:58-4d and its justifiable need requirement survived intermediate scrutiny.

First, the State of New Jersey has, undoubtedly, a significant, substantial and important interest in protecting its citizens’ safety. *Drake*, 724 F.3d at

437, citing *United States v. Salerno*, 481 U.S. 739, 745 (1987).

The Third Circuit went on to conclude that there was a “reasonable fit” between this interest in safety and the means chosen by New Jersey to achieve it: the permit to carry law and its “justifiable need” standard. *Drake*, 724 F.3d at 437. The Court gave deference to the “predictive judgment of New Jersey’s legislators” that limiting the issuance of permits to carry a handgun in public to only those who can show a “justifiable need” would further its substantial interest in public safety. *Id.* at 437-440.

The Fourth Circuit also refused to substitute its own views for “the considered judgment” of the Maryland legislature that the good-and-substantial reason standard struck an appropriate balance that did not burden the Second Amendment right. *Woollard*, 712 F.3d at 881.

The legislative branch, and not the judicial branch, is entrusted with the power to make policy judgments as to how to best handle public carriage issues, and to strike its considered balance among competing proposals, divergent philosophies and various regimens. The judiciary’s constitutional responsibility remains to ensure the resulting legislative choice serves a significant governmental interest. *Id.* at 881-882. The judicial role is not to second-guess the legislative choice. *See also National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 531-32 (2012) (“We do not consider whether the Act¹⁷ embodies sound policies.

¹⁷ Patient Protection and Affordable Care Act of 2010, Pub. L. No., 111-148, 124 Stat. 119 (2010).

That judgment is entrusted to the Nation’s elected leaders. We ask only whether Congress has the power under the Constitution to enact the challenged provisions.”); *Kachalsky*, 701 F.3d at 99.

Drake noted New Jersey’s legislature had made the reasonable inference, that given the “obviously dangerous and deadly nature of handguns,” that a “particularized need for a permit to carry one publicly serves the State’s interests in public safety.” *Id.* at 439 (*internal citation omitted*).¹⁸

In *Siccardi*, the New Jersey Supreme Court, while interpreting the predecessor permit to carry statute, N.J. Stat. Ann. § 2A:151-44, which was enacted as part of the Gun Control Law of 1966, noted that:

As early as 1882, (New Jersey) prohibited the carrying of guns by youngsters (1882 N.J. Laws, c. IV) and almost a half century ago it directed that no persons (other than those specifically exempted such as police officers and the like) shall carry handguns except pursuant to permits issuable only on a showing of ‘need.’ (1924 N.J. Laws, c. 137, § 1; N.J. Rev. Stat. § 2:176-41-44 (1937)). Under the terms of the 1924 statute the application for permit was submitted to the local chief of police for approval and, on approval, to the Justice of the Supreme Court holding

¹⁸ New Jersey’s first carry permit law was enacted in 1905. *See* 1905 N.J. Laws, c. 137, § 43a. The showing of need was first enacted in 1924. *See* 1924 N.J. Laws, c. 137, § 1. N.J. Stat. Ann. § 2C:58-4 was codified in the New Jersey Code of Criminal Justice, which was enacted by 1978 N.J. Laws, c. 95, and repealed 1966 N.J. Laws, c. 60.

the circuit for the county in which the applicant was a resident. If, after investigation, the Justice was satisfied with the sufficiency of the application and ‘the need of such person carrying concealed upon his person, a revolver, pistol or other firearm’ he would issue the permit.¹⁹

Drake noted the N.J. Supreme Court in *Siccardi* quoted the following passage from a staff report to the National Commission on the Causes and Prevention of Violence:

(The report) evaluated the utility of firearms as weapons of defense against crime. They found that private possession of a handgun is rarely an effective means of self-protection; and so far as the carrying of handguns is concerned, they noted that “no data exist which would establish the value of firearms as a defense against attack on the street” though “there is evidence that the ready accessibility of guns contributes significantly to the number of unpremeditated homicides and to the seriousness of many assaults.”²⁰

Drake noted that “New Jersey legislators, however, have made a policy judgment that the state can best protect public safety by allowing only those qualified individuals who can demonstrate a ‘justifiable need’ to carry a handgun to do so. In essence, New Jersey’s

¹⁹ *Siccardi*, 59 N.J. at 553, 284 A.2d at 538.

²⁰ *Siccardi*, 59 N.J. at 552, 284 A.2d at 537 (citing George D. Newton and Franklin E. Zimring, *Firearms and Violence in American Life*, p. 67 (1968)).

schema takes into account the individual's right to protect himself from violence as well as the community at large's interest in self-protection." *Drake*, 724 F.3d at 439. "Furthermore, New Jersey has decided that it can best determine when the individual benefit outweighs the increased risk to the community through careful case-by-case scrutiny of each application, by the police and a court." *Ibid.* Thus, the fit between "New Jersey's individualized, tailored approach and public safety" was deemed reasonable as a means to achieve the legislative goal to limit public carriage of firearms. *Ibid.*

Under intermediate scrutiny, in order to pass constitutional muster, it is not required that the justified need legislative standard be narrowly tailored, or be the least restrictive alternative. Therefore, the objective evaluation on a case-by-case basis of an individual's application to carry a firearm does not run afoul of the Second Amendment.

Certain arguments made by petitioner need only be briefly addressed. He quotes from the Conditional Veto to Assembly Bill No. 3689 (First Reprint) (217th Legislature) made by the former Governor of New Jersey, Chris Christie, which returned the Bill for reconsideration to the New Jersey Assembly on September 8, 2016. (Pet.6). He does not note that the identical text of the bill, A3689 which was vetoed in 2016, was subsequently introduced in 2018 by Assembly Bill No. 2758, and then enacted into law on June 13, 2018 by the passage of 2018 N.J. Laws, c. 37 (codified at amended N.J. Stat. Ann. § 2C:58-4c).

IV. NO SPECIAL REASONS EXIST FOR CERTIORARI

The instant decision of the Appellate Division of New Jersey is not reported. It does not conflict with any decision from this Court. As such, no further review is warranted.



CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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