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

BRIEF IN OPPOSITION

DANA R. ANTON
ON THE BRIEF
GLOUCESTER COUNTY
PROSECUTOR'S OFFICE
P.O. BOX 623
WOODBURY, NJ 08096
(856) 384-5569
DANTON@CO.GLOUCESTER.NJ.US

SHANNON M. CORNELIUS
COUNSEL OF RECORD
GLOUCESTER COUNTY
PROSECUTOR'S OFFICE
P.O. BOX 623
WOODBURY, NJ 08096
(856) 384-5664
SCORNELIUS@CO.GLOUCESTER.NJ.US

SEPTEMBER 13, 2019 *COUNSEL FOR RESPONDENTS*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTION PRESENTED

The State of New Jersey, along with several other States, has long required that citizens who wish to carry a loaded firearm in public to demonstrate a justifiable need to do so. The question presented is whether the Second Amendment prevents New Jersey from maintaining such a law.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES—Continued

STATEMENT OF THE CASE

A. Legal Background

New Jersey jurisprudence has long recognized the rights endowed by the Second Amendment.

Under New Jersey law, any New Jersey resident who is over 18 and is not otherwise prohibited from possessing firearms may generally keep and carry a loaded handgun in his or her home or place of business. *See* N.J. Stat. Ann. § 2C:39-6(e). Residents may also transport a firearm, unloaded and properly secured, to and from any place where they may lawfully keep and carry it. *Id.* New Jersey law also permits members of rifle and pistol clubs to have weapons with them when engaging in actions like traveling to and from target practice and participating in certain competitions. N.J. Stat. Ann. §§ 2C:39-3j, 2C:39-6(f). Finally, members of the military, federal, state, and local law enforcement, and other delineated groups may all carry firearms while on duty. *Id.* §§ 2C:39-3g, 2C:39-6(a)(1)-(11).

New Jersey law reflects, however, that the right to carry is not without limits. New Jersey has historically recognized the dangers inherent in the carrying of loaded firearms in public. *See, e.g., In re Preis*, 573 A.2d 148, 150 (N.J. 1990). In light of "the known and serious dangers of misuse and accidental use" of weapons, New Jersey has found that additional safeguards are necessary and that an unfettered right to carry in public would pose a serious danger to its citizens. *Siccardi v. State*, 284 A.2d 533, 538 (N.J. 1971). It is important to distinguish that New

Jersey has placed limits on the right to carry; it has not created an outright ban. In order to protect its citizens from the inherent risks of carrying a loaded firearm, New Jersey has required that those seeking to do so have a justifiable need.

Any examination of New Jersey's law on carrying firearms must include the genesis of such regulation. The first law to require permits in New Jersey dates back to 1905 and restricted the carrying of concealed firearms to those with special permits to do so. 1905 N.J. Laws, ch. 172 at 324. In 1924, New Jersey began to require a showing of need in order to carry in public. *See Siccardi*, 284 A.2d at 553. Although there have been various changes over the years, New Jersey has continued to require that need be shown prior to the issuance of a permit to carry in public. *Id.* At 554. The current requirement of "justifiable need" was first codified in 1978. N.J. Stat. Ann § 2C:58-4d.

Under its current scheme, New Jersey law applies an "objective standard for issuance of a public carry permit." *Drake v. Filko*, 724 F.3d 426, 434 n.9 (CA3 2014). This law requires that the ultimate responsibility for the issuing of carry permits is entrusted to a neutral arbiter, a Superior Court judge. The decision by the Superior Court judge is only made after a preliminary approval by the local chief law enforcement officer. N.J. Stat. Ann. § 2C:58-4d; *In Re Preis*, 573 A.2d at 571. An applicant must show that he/she is not subject to any statutory disabilities (mental illness, addiction, criminal convictions), that he/she is proficient in the safe use of handguns, and has a justifiable need to carry a handgun in public. N.J. Stat. Ann. §§ 2C:58-

4c, d. The statute also provides a right to appeal if rejected. *See id.* § 2C:58-4e; N.J. Court R. 2:2-3.

After the Court addressed the Second Amendment issue in *District of Columbia v. Heller*, 554 U.S. 570 (2008), challenges to New Jersey's justifiable need statute argued that the *Heller* decision required the abrogation of New Jersey's current statutory scheme. New Jersey Courts and the Third Circuit have addressed this issue and held that *Heller* did not affect New Jersey's justifiable need requirement for permits to carry. *See In re Pantano*, 60 A.3d 507 (N.J. App. Div. 2013) *certif. denied* 134 A.3d 956 (2014); *In re Dubov*, 981 A.2d 87 (N.J. App.Div. 2009).

B. Factual and Procedural Background

Mark Cheeseman, a New Jersey resident, submitted an Application for a Permit to Carry a Handgun to the Borough of Glassboro Police Department. After a thorough investigation, Chief Brown of the Glassboro Police Department denied Cheeseman's application on September 27, 2017. (Pet.App.24). The rejection was based on a lack of justifiable need. (Pet.App.24).

Cheeseman appealed this rejection to the New Jersey Superior Court, Law Division. At a testimonial hearing on December, 13, 2017, Chief Brown testified to the lack of justifiable need. (Pet.App.4). Cheeseman argued that his justifiable need was personal protection and cited what he believed was an increasing amount of crime in his town. (Pet.App.4). Cheeseman did not proffer any specific threats to him or his family. (Pet. App.4). The Superior Court, Law Division also denied the permit stating a lack of justifiable need. (Pet.App. 5, 9).

Cheeseman appealed this decision to the New Jersey Superior Court, Appellate Division. The Appellate Division issued a written opinion on November 18, 2018, affirming the decision of the Law Division. (Pet.App.2).

Cheeseman petitioned for certification before the New Jersey Supreme Court; the petition was denied on April 30, 2019. (Pet.App.1).

REASONS FOR DENYING THE PETITION

For 95 years, New Jersey has allowed individuals to publicly carry firearms throughout the state, but only where they have a need to do so. In recent years, The Court has denied petitions challenging other state laws that similarly restrict public carry permits to applicants with such a need. *See Peruta v. California*, No. 16-894 (cert. denied June 26, 2017); *Woollard v. Gallagher,* No. 13-42 (cert. denied October 15, 2013); *Kachalsky v. Cacace*, No. 12-845 (cert. denied April 15, 2013). In fact, the Court has denied a petition involving an identical challenge to this law. *See Drake v. Filko*, No. 13-827 (cert. denied May 5, 2014). There is no reason to take a different approach here for several reasons: 1) Petitioner overstates the claimed split; 2) this case is a poor vehicle to advance the arguments made; and 3) the decision below is correct.

I. PETITIONER'S CLAIMED SPLIT IN AUTHORITY IS OVERSTATED, AND IS NOT IMPLICATED BY THE DECISION BELOW.

Petitioner argues that certiorari is warranted because certain Circuit Courts have taken opposing views on whether or not the Second Amendment applies outside the home. (Pet.19). Specifically, Petitioner claims that *Drake v. Filko*, upholding New Jersey's justifiable need standard, cannot be reconciled with decisions from the Seventh and D.C. Circuits. Petitioner further notes that New Jersey jurisprudence is aligned with decisions from the First, Second, and Fourth Circuits. However, Petitioner is wrong about the split from the Seventh Circuit and overstates the discord with the D.C. Circuit.

In *Moore v. Madigan*, 702 F.3d 933 (CA7 2012), the Seventh Circuit stuck down an outright ban on the public carrying of firearms. *Moore*, 702 F.3d at 942 (noting the state law at issue entirely forbade a person from carrying a firearm in public). This total prohibition on public carrying did not permit individuals to argue they had a justifiable need to carry a firearm, as residents in New Jersey are able to do. That was central to the Seventh Circuit's decision; the court noted Illinois was "the only state with "a flat ban on carrying ready-to-use guns outside the home," *id.* At 940, and distinguished state laws that require "a permit to carry a concealed handgun in public" and that "placed the burden on the applicant to show that he needs a handgun to ward off dangerous persons." *Id.* At 941. If anything, the Seventh Circuit suggested that a law that "impose[d] reasonable limitations" on the public carrying of firearms would be constitu-

tional. *Id.* at 941-42. So even as the panel struck down Illinois's law on account of its "failure to justify the most restrictive gun law of any of the 50 states," *id.* at 941, the Seventh Circuit made clear that its reasoning did not extend to laws like the one in New Jersey.

Indeed, the Third Circuit recognized that its decision to uphold New Jersey's law was entirely consistent with the Seventh Circuit's ruling in *Moore*. The Third Circuit agreed *Moore* held only that a "law containing a flat ban on carrying a handgun in public was unconstitutional" which the Third Circuit had no occasion to consider. *Drake*, 724 F.3d at 430 n. 6. Furthermore, "the Seventh Circuit gave the Illinois legislature time to come up with a new law that would survive constitutional challenge, implying that some restrictions on the right to carry outside the home would be permissible." *Id.* The Third and Seventh Circuit's decisions on two different public carry laws are consistent.

Petitioner also articulates disagreement between the D.C. Circuit in its ruling in *Wrenn v. District of Columbia*, 864 F.3d 650 (CADC 2017) and decisions from other circuits upholding other states' public carry laws. This disagreement, however, is overstated. Admittedly, the D.C. Circuit did invalidate a law requiring a finding of special need prior to being granted the right to carry in public. *Wrenn*, 864 F.3d at 655. But *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.

Both the Third Circuit and D.C. Circuit have agreed that "certain longstanding regulations are 'exceptions' to the right to keep and bear arms." *Drake*,

724 F.3d at 431; *accord Wrenn*, 864 F.3d at 657. Applying that principle, the Third Circuit explained that "a firearms regulation may be 'longstanding' and 'presumptively lawful' even if it was only first enacted in the 20th century, citing *Heller*'s approving view of two laws that were deemed "longstanding" which restricted firearm possession by felons and the mentally ill that dated back to that same period. *Drake*, 724 F.3d at 434 & 434 n. 11. The D.C. Circuit has agreed with that mode of analysis in prior cases, recognizing that firearms statutes dating back to this time period are "rooted in our history" and benefit from the presumption that they are constitutional. *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1253-54 (CADC 2011). This reasoning provided one basis for upholding New Jersey's law: public carry restrictions have "existed in New Jersey in some form for nearly 90 years" and are thus "longstanding" and lawful under *Heller*. *Drake*, 724 F.3d at 432.

Perhaps because the law the D.C. Circuit was reviewing dated back only to 2015, or for whatever other reason, *Wrenn* did not ask whether a public carry regime could be longstanding on the basis that it dates back a century or more. *Wrenn*, 864 F.3d at 657. *Wrenn* did not address that part of *Drake*'s reasoning, nor did it address the D.C. Circuit's own prior analysis on this point. Any intra-circuit tension between *Heller II* and *Wrenn* on this issue, however, could eventually be resolved by the D.C. Circuit en banc, and is not a suitable basis on which to grant certiorari. If anything, the inchoate legal analysis within the D.C. Circuit cuts in favor of allowing this issue to further percolate. And at a minimum, it con-

firms the lack of any square split between the decision below and the D.C. Circuit.

II. THIS CASE IS A POOR VEHICLE FOR CONSIDERING THE CONSTITUTIONALITY OF CONCEALED CARRY PERMITS.

The Court has already denied a petition for certiorari challenging New Jersey's 95-year-old public carry permitting system. *See Drake v. Filko*, No. 13-827 (cert. denied May 5, 2014). This Petition is a repeat attempt to gain review; however, this particular case is not equipped to address one of Petitioner's main arguments-that New Jersey's justifiable need requirement acts constructively as an outright ban on the public carrying of firearms.

Petitioner alleges that "[t]he 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." (Pet. 9). This case would not be the appropriate vehicle for addressing that argument. The record is void of any testimony or evidence to support this conclusion. In Petitioner's brief, he cites the number of permits denied compared to the New Jersey population in support of the premise that only a fraction of the population is granted the right to carry. (Pet.9). Putting aside that this is the first time this data is proffered, it is inherently unreliable and misleading. The entire population of New Jersey did not apply for a permit to carry a firearm in public. No data was offered regarding the number of applications received, which would be the appropriate denominator. Nor is there any meaningful discussion of the differences between those that are granted and those that are denied. As

a result, it would be impossible for the Court to engage in any meaningful review of New Jersey's justifiable need requirement.

The Court should not be saddled with such a poor vehicle for addressing this question, which has far reaching implications. There is another pending petition for certiorari, *Gould v. Morgan*, No. 18-1272, raising the same questions and relying on a far more developed record. The decision below in *Gould*, which involves a challenge to the Massachusetts public carry law, followed extensive discovery, including permit grant rates. That information bore on the First Circuit's ultimate conclusions in that case as noted in *Gould v. Morgan*, 907 F.3d 659, 662 (CA1 2018), and likely would prove useful to the Court. So should the Court wish to take up the issue presented, the Court can do so with the benefit of a robust record.

III. THE DECISION BELOW WAS CORRECT.

A. History and Well Settled Jurisprudence Show that New Jersey Law Is Consistent with the Second Amendment.

In *Heller*, the Court found that "the right secured by the Second Amendment is not unlimited," and does not allow a person to "keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 624, 626. The Court thus noted that its decision should not "be taken to cast doubt on longstanding prohibitions," such as the prohibitions "on the possession of firearms by felons and the mentally ill" or the "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Id.* at 626-27 & n.

26. The Court added that this list of longstanding laws was not "exhaustive" and that such measures are "presumptively lawful." *Id.*; *see also Heller II*, 670 F.3d. at 1274 (Kavanaugh, J., dissenting) (agreeing that "history and tradition show that a variety of gun regulations have co-existed with the Second Amendment right and are consistent with that right").

As the Third Circuit laid out, "[f]irearms have always been more heavily regulated in the public sphere." *Drake*, 724 F.3d at 430 n.2; *see also Peterson v. Martinez*, 707 F.3d 1197, 1201 (CA10 2013) (describing "our nation's extensive practice of restricting citizens' freedom to carry firearms in a concealed manner."); *United States v. Masciandaro*, 638 F.3d 458, 470 (CA4 2011) (explaining that, "outside the home, firearms rights have always been more limited" because the public safety interests are significantly greater in this context).

Indeed, public carrying laws date back to fourteenth century England and seventeenth century colonial America. *See Peruta v. County of San Diego*, 824 F.3d 919, 929-33 (CA9 2016) (providing thorough discussion of historic public carrying laws). Such laws include the Statute of Northampton in 1328, the English Bill of Rights in 1689, and multiple colonial laws in America. *See id.* They were hardly outliers and could be found in (among other states) Delaware, Maine, Massachusetts, New Mexico, North Carolina, South Carolina, Tennessee, and Virginia. *See e.g.*, Eric M. Ruben & Saul Cornell, *Firearm Regionalism & Public Carry: Placing S. Antebellum Case Law in Context*, 125 YALE L.J. FORUM 121, 129 n. 43 (2015) (finding "constables, magistrates, or justices of the

peace had the authority to arrest anyone who traveled armed"). The same was true via the common law in New Jersey, Connecticut, Maryland, and New York. *A Bill for the Office of Coroner & Constable* (Mar. 1, 1882) (N.J. Constable Oath); John M. Niles, *Conn. Civil Officer: In Three Parts* . . . , 2d ed., ch. 14 (Hartford, Conn. 1833); Md. Const. of 1776, art. III § 1 (adopting English common law).

Most notably, that approach continued uninterrupted after passage of the Second and Fourteenth Amendments—and especially throughout the nineteenth century. *See Heller II*, 670 F.3d at 1274 n. 6 (Kavanaugh, J., dissenting) ("It is not uncommon for courts to look to post-ratification history and tradition to inform the interpretation of a constitutional provision."). At that time, "most states enacted laws banning the carrying of concealed weapons," and some states "went even further . . . bann[ing] concealable weapons . . . altogether whether carried openly or concealed." *Kachalsky v. County of Westchester*, 701 F.3d 81, 95-96 (CA2 2012); *see also Drake*, 724 F.3d at 433. In other words, state laws that "directly regulat[ed] concealable weapons for public safety became commonplace and far more expansive in scope" over two hundred years ago. *Kachalsky*, 701 F.3d at 95. And, as the Court has noted, "the majority of the 19th century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *Heller*, 554 U.S. at 626.

The notion of limiting the right to carry outside the home, including New Jersey's justifiable need statute, is well grounded in history. In 1836, Massa-

chusetts barred the public carrying of firearms except by those who had a "reasonable cause to fear an assault or other injury. Or violence to his person, or to his family or property." 1836 Mass. Laws 748, 750, ch. 134 § 16. In 1906, Massachusetts adopted a licensing law permitting an applicant to receive a public carry permit only if he could show a "good reason to fear an injury to his person or property." 1906 Mass. Laws. 150. This is basically the same test Massachusetts, New Jersey, and other states use today. New York's "legislative judgment concerning possession in public was made one-hundred years ago," in 1913, when it "limit[ed] handgun possession in public to those showing proper cause." *Kachalsky*, 701 F.3d at 97. Additionally, Hawaii barred public carrying without "good cause" the same year, 1913. Haw. Laws 25, act 22, § 1. New Jersey has maintained a similar test for public carry applications since 1924, *see Drake*, 724 F.3d at 432. The historical record thus establishes that these public carry laws cohere with the history and tradition of the Second Amendment, and should be upheld on that basis—exactly as the Third Circuit concluded in *Drake*. *Id.* at 434.

B. New Jersey's Law Is Substantially Related to the State's Compelling Interest in Public Safety and Is Thus Consistent with the Second Amendment Right.

Although the foregoing is a sufficient basis to uphold the decision below, the Court should uphold New Jersey's law because it is substantially related to the state's interest in public safety. Fundamental principles of federalism dictate this result.

The court below in this case recognized that the Third Circuit has addressed this issue and incorporated the Third Circuit's reasoning in its decision.

As a threshold matter, the Third Circuit has distinguished between laws that infringe on the "core" of the right and those that do not. *See Drake*, 724 F.3d at 434-35; *Heller II*, 670 F.3d at 1257. As the Third Circuit found, the core does not include public carrying of firearms. As detailed above, public carrying has "always been more heavily regulated." *Drake*, 724 F.3d at 430 n.2. *Heller* itself held that an individual's self-defense need is most acute in the home. Thus, consistent with every other court to have considered the scrutiny applicable to laws burdening non-core Second Amendment rights, intermediate scrutiny applies and New Jersey's law readily meets that standard.

In *Drake*, cited by the court below, the Third Circuit held "New Jersey has, undoubtedly, a significant, substantial and important interest in protecting its citizens' safety." *Drake*, 724 F.3d at 437; *see also United States v. Salerno*, 481 U.S. 739, 755 (1987) (noting the "primary concern of every government" is "concern for the safety and indeed the lives of its citizens"). The question then becomes whether the regulation at issue is sufficiently tailored to the furtherance of that interest, without burdening more conduct than is reasonably necessary. *Id.* at 436-37.

As the Third Circuit held, New Jersey's legislature "has continually made the reasonable inference that given the obviously dangerous and deadly nature of handguns, requiring a showing of particularized need for a permit to carry one publicly serves the State's interests in public safety." *Drake*, 724 F.3d at 438.

Indeed, "studies and data demonstrat[e] that widespread access to handguns in public increases the likelihood that felonies will result in death and fundamentally alters the safety and character of public spaces." *Kachalsky*, 701 F.3d at 99; *see also Woollard*, 712 F.3d at 879 (citing a significant body of evidence that "limiting the public carrying of handguns protects citizens and inhibits crime by, *inter alia*, [d]ecreasing the availability of handguns to criminals via theft [and] [l]essening the likelihood that basic confrontations between individuals would turn deadly").

This is a concern for law enforcement officers. From 2007 to 2016, "concealed-carry permit holders have shot and killed at least 17 law enforcement officers and more than 800 private citizens—including 52 suicides." *Peruta*, 824 F.3d at 943 (Graber, J., concurring). Unrestricted public carry exacerbates the issue; "civilians without sufficient training to use and maintain control of their weapons, particularly under tense circumstances, pose a danger to officers and other civilians." *Woollard*, 712 F.3d at 880 (citation omitted). That will, of course, impact "routine police-citizen encounters"; "[i]f the number of legal handguns on the streets increased significantly, officers would have no choice but to take extra precautions . . .effectively treating encounters between police and the community that now are routine, friendly, and trusting, as high risk stops, which demand a much more rigid protocol." *Id.* Thus, as the Third Circuit held, "[t]o require applicants to demonstrate a 'justifiable need' is a reasonable implementation of New Jersey's substantial, indeed critical, interest in public safety." *Drake*, 724 F.3d at 438.

Finally, observing that "New Jersey engages in an individualized consideration of each person's circumstances" and each person's "need to carry a handgun in public," *id.* at 439-40, the Third Circuit, upholding the statute, held that New Jersey's law does not burden more conduct than "reasonably necessary." *Id.* at 439.

New Jersey's actions are not unique, and instead align with the view of legislatures from similarly situated and densely populated states, which agree that public carry laws are a necessary way to combat firearm violence within their borders. While not every state adopts this approach, the Constitution embraces the right of States to make different choices based on local needs. That is the idea federalism. Even as *McDonald v. City of Chicago*, 561 U.S. 742 (2010), confirmed the Second Amendment "creates individual rights that can be asserted against state and local governments," the Court did not "define the entire scope of the Second Amendment—to take all questions about which weapons are appropriate for self-defense out of the people's hands." *Friedman v. Highland Park*, 784 F.3d 406, 412 (CA7 2015). That is because, as Judge Easterbrook put the point, "the Constitution establishes a federal republic where local differences are cherished as elements of liberty, rather than eliminated in a search for national uniformity." *Id.* Although no State can trample the rights that *McDonald* set forth, the Second Amendment "does not foreclose all possibility of experimentation." *Id.*

States thus must be free to canvas the evidence on public safety and make tough calls on how to protect residents from the epidemic of gun violence.

See, e.g., Heller, 554 U.S. at 636 ("We are aware of the problem of handgun violence in this country, and . . . [t]he Constitution leaves . . . a variety of tools for combating that problem, including some measures regulating handguns."); *Kolbe v. Hogan*, 849 F.3d 114, 150 (CA4 2017) (en banc) (Wilkinson, J., concurring) ("To say in the wake of so many mass shooting in so many localities across this country that the people themselves are now to be rendered newly powerless, that all they can do is stand by and watch as federal courts design their destiny—this would deliver a body blow to democracy as we have known it since the very founding of this nation.").

Petitioner asks the Court to upset American jurisprudence by a categorical decision that is not dictated by the Constitution. Petitioner seeks to establish an unlimited right to carry firearms publicly at any time for any reason, rather than respect the rights of the States to protect its citizens when such a result is not mandated by the United States Constitution.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DANA R. ANTON
ON THE BRIEF
GLOUCESTER COUNTY PROSECUTOR'S OFFICE
P.O. BOX 623
WOODBURY, NJ 08096
(856) 384-5569
DANTON@CO.GLOUCESTER.NJ.US

SHANNON M. CORNELIUS
COUNSEL OF RECORD
GLOUCESTER COUNTY PROSECUTOR'S OFFICE
P.O. BOX 623
WOODBURY, NJ 08096
(856) 384-5664
SCORNELIUS@CO.GLOUCESTER.NJ.US

COUNSEL FOR RESPONDENTS

SEPTEMBER 13, 2019