

No. _____

In The
Supreme Court of the United States

—◆—
REB RUSSELL, II,

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
—◆—

LOUIS P. NAPPEN, ESQ.
EVAN F. NAPPEN
ATTORNEY AT LAW PC
21 Throckmorton Avenue
Eatontown, NJ 07724
(721) 389-8888
louis@evannappen.com

EVAN F. NAPPEN, ESQ.
Counsel of Record
EVAN F. NAPPEN
ATTORNEY AT LAW PC
21 Throckmorton Avenue
Eatontown, NJ 07724
(721) 389-8888
evan@evannappen.com

Counsel for Petitioner

April 2, 2021

QUESTIONS PRESENTED

In *District of Columbia v. Heller*, this Court held that the Second Amendment protects “the individual right to possess and carry weapons in case of confrontation,” 554 U.S. 570, 592 (2008), and in *McDonald v. City of Chicago*, it determined that this right “is fully applicable to the states,” 561 U.S. 742, 750 (2010). The Courts of Appeals for the District of Columbia and Ninth Circuits have concluded that the right to carry a firearm extends outside of the home and that licensing restrictions that require citizens to show a special need for carrying a firearm effectively “destroy[] the ordinarily situated citizen’s right to bear arms” and therefore are categorically unconstitutional. *Wrenn v. District of Columbia*, 864 F.3d 650, 666 (D.C. Cir. 2017); accord *Young v. Hawaii*, 896 F.3d 1044, 1074 (9th Cir. 2018). Contrarily, the First, Second, Third, and Fourth Circuits have upheld substantively indistinguishable “good reason”-based licensing restrictions under a diluted “intermediate scrutiny” analysis, and the state courts below upheld New Jersey’s “justifiable need” restriction absent any apparent scrutiny analysis.

The Questions Presented are:

1. Whether the Second Amendment protects the right to carry arms outside of the home for self-defense.
2. Whether the government may deny law-abiding citizens their exercise of the right to carry a handgun outside of their homes by conditioning the exercise of the right on showings of need.

PARTIES TO THE PROCEEDING

Petitioner Reb Russell, II, was the petitioner regarding his application for a New Jersey Permit to Carry a Handgun before the New Jersey Superior Court, the New Jersey Superior Court – Appellate Division, and the New Jersey Supreme Court.

Respondent State of New Jersey was the respondent before the New Jersey Superior Court, the New Jersey Superior Court – Appellate Division, and the New Jersey Supreme Court.

RELATED CASES

In Re: Carry Permit for Reb Russell, II, No. GP-HNT-19-001, Superior Court of New Jersey. Judgment entered July 25, 2019.

In the Matter of the Application of Carry Permit for Reb Russel, II, No. A-5414-18T2, Superior Court of New Jersey – Appellate Division. Judgment entered June 25, 2020.

In the Matter of the Application of Carry Permit for Reb Russell, II (Reb Russell, II – Petitioner), No. 084796, Supreme Court of New Jersey. Judgment entered November 6, 2020.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING.....	ii
RELATED CASES	ii
TABLE OF AUTHORITIES.....	v
PETITION FOR WRIT OF CERTIORARI.....	1
INTRODUCTION	1
OPINIONS BELOW.....	5
JURISDICTION.....	6
CONSTITUTIONAL AND STATUTORY PROVI- SIONS.....	6
STATEMENT OF THE CASE.....	9
REASONS FOR GRANTING THE PETITION ...	14
I. Review is needed to resolve the conflict in the circuits and states over the constitu- tionality of “need”- and “good reason”- based restrictions on the right to bear arms outside of the home	15
A. The federal courts of appeals and state high courts are intractably divided over whether the Second Amendment protects the right to carry firearms outside of the home for self-defense....	16
B. New Jersey criminalizes the exercise of the right at issue	22

TABLE OF CONTENTS – Continued

	Page
II. New Jersey firearm law runs counter to this Court’s decisions in <i>Heller/McDonald</i> and to the history of carrying firearms outside of the home.....	24
A. A legal history of carrying firearms outside of the home	24
B. Basing a fundamental, individual right upon a showing of “good reason” or “need” is historically repugnant.....	25
III. Review is needed to correct the lower courts’ resistance to this Court’s decisions in <i>Heller</i> and <i>McDonald</i>	28
CONCLUSION.....	29

APPENDIX

Opinion, Superior Court of New Jersey, Appellate Division (June 25, 2020)	App. 1
Statement of Reasons for Denial, Superior Court of New Jersey, Criminal Division (July 25, 2019)	App. 15
Denial of Petition for Certification, Supreme Court of New Jersey (November 6, 2020).....	App. 27

TABLE OF AUTHORITIES

	Page
CASES	
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).....	<i>passim</i>
<i>Drake v. Filko</i> , 724 F.3d 426 (3d Cir. 2013).....	17, 19, 20, 21, 25
<i>Dred Scott v. Sandford</i> , 19 How. (60 U.S.) 393 (1857).....	26
<i>Gonzalez v. Village of W. Milwaukee</i> , 2010 WL 1904977 (E.D. Wis. May 11, 2010), <i>aff'd</i> , 671 F.3d 649 (7th Cir. 2012).....	28
<i>Gould v. Morgan</i> , 907 F.3d 659 (1st Cir. 2018).....	17, 18, 19, 20
<i>Heller v. District of Columbia</i> , 670 F.3d 1244 (D.C. Cir. 2011).....	24, 27
<i>In re Preis</i> , 573 A.2d 148 (N.J. 1990).....	11, 12, 27
<i>In re Wheeler</i> , 433 N.J. Super. 560 (App. Div. 2013).....	2
<i>Jennings v. McCraw</i> , 2012 WL 12898407 (N.D. Tex. Jan. 19, 2012), <i>aff'd sub nom. NRA v. McCraw</i> , 719 F.3d 338 (5th Cir. 2013).....	28
<i>Kachalsky v. Cacace</i> , 817 F. Supp. 2d 235 (S.D.N.Y. 2011), <i>aff'd sub nom. Kachalsky</i> , 701 F.3d 81 (2d Cir. 2012).....	18, 19, 20, 28
<i>Martin v. Hunter's Lessee</i> , 1 Wheat. (14 U.S.) 304 (1816).....	5
<i>McDonald v. City of Chicago</i> , 561 U.S. 742 (2010).....	<i>passim</i>

TABLE OF AUTHORITIES – Continued

	Page
<i>Moore v. Madigan</i> , 702 F.3d 933 (7th Cir. 2012).....	20, 21, 24, 28
<i>Moore v. Madigan</i> , 842 F. Supp. 2d 1092 (C.D. Ill. 2012), <i>rev'd</i> , 702 F.3d 933 (7th Cir. 2012)	28
<i>Moreno v. New York Police Dep't</i> , 2011 WL 2748652	28
<i>Muscarello v. United States</i> , 524 U.S. 125 (1998)	25
<i>Peruta v. California</i> , 582 U.S. ____ (2017).....	22
<i>Rogers v. Grewal</i> , 590 U.S. ____ (2020) ...	15, 16, 17, 19, 24
<i>Shepard v. Madigan</i> , 863 F. Supp. 2d 774 (S.D. Ill. 2012), <i>rev'd sub nom. Moore v. Madigan</i> , 702 F.3d 933 (7th Cir. 2012).....	28
<i>Siccardi v. State</i> , 59 N.J. 545 (1971).....	2
<i>State v. Moultrie</i> , 357 N.J. Super. 547 (App. Div. 2003)	10, 23
<i>United States v. Masciandaro</i> , 638 F.3d 458 (4th Cir. 2011)	4
<i>Williams v. State</i> , 10 A.3d 1167 (Md. 2011)	28
<i>Woollard v. Gallagher</i> , 712 F.3d 865 (4th Cir. 2013)	18, 19, 20
<i>Wrenn v. District of Columbia</i> , 864 F.3d 650 (D.C. Cir. 2017)	3, 19, 20, 22
<i>Young v. Hawaii</i> , 896 F.3d 1044 (9th Cir. 2018)	3, 21, 22

TABLE OF AUTHORITIES – Continued

	Page
CONSTITUTIONAL PROVISIONS	
U.S. CONST. amend. I.....	24
U.S. CONST. amend. II.....	<i>passim</i>
U.S. CONST. amend. IV.....	24
U.S. CONST. amend. XIV.....	6
STATUTES	
28 U.S.C. § 1257(a).....	6
Act of Feb. 10, 1832, sec. 1, Del. Laws 180 (1832).....	26
Cannel, New Jersey Criminal Code Annotated, N.J.S.A. § 2C:1-13 (2002).....	10, 23
N.J.A.C. § 13:54-2.4(b).....	11
N.J.S.A. § 2C:39-5.....	7
N.J.S.A. § 2C:39-5.b.....	4, 10, 22
N.J.S.A. § 2C:39-6.....	8, 10, 23
N.J.S.A. § 2C:43-6.....	9, 23
N.J.S.A. § 2C:43-6.c.....	4, 10, 11
N.J.S.A. § 2C:58-4.....	4, 7, 23
N.J.S.A. § 2C:58-4.c.....	4, 10, 11, 12
N.J.S.A. § 2C:58-4.d.....	10, 21
N.J.S.A. § 2C:58-4.e.....	10

TABLE OF AUTHORITIES – Continued

	Page
OTHER AUTHORITIES	
<i>New Jersey with 8.983 Million Residents, Only Issued 496 Concealed Carry Permits, https:// www.ammoland.com/2015/12/251102/#axzz6qc 4IOo3n</i>	27

PETITION FOR WRIT OF CERTIORARI

Reb Russell, II, respectfully petitions for a writ of certiorari to review the Opinion of the New Jersey Superior Court – Appellate Division, which was denied certification by the New Jersey Supreme Court.

**INTRODUCTION**

In *District of Columbia v. Heller*, this Court held that the Second Amendment protects “the individual right to possess and carry weapons in case of confrontation” for “the core lawful purpose of self-defense.” 554 U.S. 570, 592, 630 (2008). In *Heller*, this Court held that the right to self-defense is “the *central component*” of the Second Amendment. *Id.* at 599. In *Heller*, this Court held that the Second Amendment takes “off the table” the policy choice of flatly banning core Second Amendment conduct. 554 U.S. at 636; *see also McDonald*, 561 U.S. at 767-68. And, in *Heller*, this Court held that the government lacks “the power to decide on a case-by-case basis whether the right [to bear arms] is *really worth* insisting upon.” 554 U.S. at 634.

Despite the above, the state of New Jersey reserves for itself the prerogative to determine on a case-by-case basis whether citizens have sufficiently compelling reasons to exercise their right to carry handguns. In the present case, the New Jersey Superior Court below held:

Although the applicant [for a permit to carry a handgun] has demonstrated that he is of

good character, suffers from no impediments to owning or carrying a firearm and is knowledgeable about the safe and proper use of a firearm, the court finds that he has not shown he has a justifiable need to carry a firearm. In essence the applicant failed to establish that he will be subjected to a substantial threat of serious bodily harm and carrying a handgun is necessary to reduce the threat of unjustifiable serious bodily injury. App. 26.

And, the New Jersey Superior Court – Appellate Division below clarified:

Under the rule established by our Supreme Court in *Siccardi v. State*, 59 N.J. 545, 557 (1971), and reaffirmed in *Preis*, an applicant must “establish an urgent necessity for carrying guns for self-protection” under the statute. “The requirement is of specific threats or previous attacks demonstrating a special danger to the applicant’s life that cannot be avoided by other means.” *Preis*, 118 N.J. at 571. The law is well settled that “[g]eneralized fears for personal safety are inadequate” to establish the need for a carry-permit in this State. *Ibid*; *In re Wheeler*, 433 N.J. Super. 560, 614 (App. Div. 2013). App. 12.

The above opinions contradict this Court’s decisions in *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

In simplest terms, the question presented in this case is: Does the Second Amendment protect the right

to keep arms *and*, as it says, *bear* arms for all Americans?

The lower courts have split over the constitutionality of laws that categorically bar typical, law-abiding citizens from carrying handguns outside the home for self-defense. The D.C. Circuit has seen these laws for what they are – “necessarily a total ban on most [citizens’] right to carry a gun” – and it has struck down the D.C.’s requirement that citizens show a “good reason,” *other than self-defense*, before carrying a handgun outside the home as categorically unconstitutional. *Wrenn v. District of Columbia*, 864 F.3d 650, 666 (D.C. Cir. 2017); *see also, Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018).

Left unchecked, emboldened states such as New Jersey enacted and upheld “need”- or “good reason”-type requirements to exercise the right to bear arms. For instance, in 2018, New Jersey amended its carry permit statute to reflect requirements that were previously only administrative code:

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. N.J.S. 2C:58-4.c. (Emphasis added.)

Under this law, an ordinary member of the general public who wishes to carry a handgun in New Jersey must first obtain a New Jersey Permit to Carry a Handgun to do so. N.J.S.A. §§ 2C:39-5.b, 2C:58-4. A person carrying a handgun outside of New Jersey's narrow exemptions faces a second-degree criminal charge with a minimum mandatory sentence of 3.5 years and potential 10 years in State prison. N.J.S.A. § 2C:43-6.c.

The First, Second, Third, and Fourth Circuits have upheld materially indistinguishable laws and, like the New Jersey courts below, these courts have refused to follow this Court's reasoning to where it clearly leads as applied to the right to bear arms.

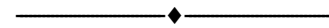
The Fourth Circuit has stated that it will not extend "*Heller* beyond its undisputed core holding" until this Court tells them they must: "If the Supreme Court . . . meant its holding to extend beyond home possession, it will need to say so more plainly." *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011).

While this Court spoke plainly enough in *Heller*, the time has come to give the lower courts the explicit direction they request.

One of the principal functions of this Court is to resolve fundamental disagreements among the lower

courts over the basic contours of constitutional rights. “If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity . . . the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states.” *Martin v. Hunter’s Lessee*, 1 Wheat. (14 U.S.) 304, 348 (1816). That is precisely the condition the Second Amendment stands in today: a resident of the District of Columbia or Hawaii has a right to bear arms for self-defense (as does a resident of the vast majority of states that respect the right to bear arms), but a resident of New York or Maryland does not. A citizen in Pennsylvania may exercise his right to bear arms in Pennsylvania, but not if he crosses the Delaware River into New Jersey. Such is the condition of the present Petitioner who is being denied a license to exercise his right by the state of New Jersey because he does not meet New Jersey’s need-based standard.

It is time for this Court to harmonize the discord between the states.



OPINIONS BELOW

On July 25, 2019, the New Jersey Superior Court denied Petitioner’s application for a New Jersey Permit to Carry a Handgun. App. 15. On June 25, 2020, the Superior Court of New Jersey – Appellate Division affirmed the Superior Court’s denial. App. 14.

On November 2, 2020, the Supreme Court of New Jersey denied Petitioner's petition for certification. App. 27.



JURISDICTION

On November 2, 2020, the Supreme Court of New Jersey denied Petitioner's petition for certification. This Court has jurisdiction under 28 U.S.C. § 1257(a).



CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment 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.

United States Constitution, Amendment XIV:

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.

N.J.S.A. § 2C:58-4 Permits to Carry Handguns:

c. . . . No application shall be approved by the chief police officer or the superintendent unless the applicant demonstrates that he . . . has a justifiable need to carry a handgun.

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. . . .

d. Issuance by Superior Court . . . The court shall issue the permit to the applicant if, but only if, it is satisfied that the applicant . . . has a justifiable need to carry a handgun in accordance with the provisions of subsection c. of this section. . . .

N.J.S.A. § 2C:39-5 Unlawful possession of weapons:

b. Handguns. (1) Any person who knowingly has in his possession any handgun, including any antique handgun, without first having obtained a permit to carry the same as provided

in N.J.S. 2C:58-4, is guilty of a crime of the second degree. . . .

N.J.S.A. § 2C:39-6 Exemptions:

e. Nothing in subsections b., c. and d. of N.J.S. 2C:39-5 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 subsection g. of this section, 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 such 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.

. . . .

g. All weapons being transported under paragraph (2) of subsection b., subsection e., or paragraph (1) or (3) of subsection f. of this section shall be carried unloaded and contained in a closed and fastened case, gunbox, securely tied package, or locked in the trunk of the automobile in which it is being transported, and in the course of travel shall include only such deviations as are reasonably necessary under the circumstances. . . .

2C:43-6 Sentence of imprisonment for crime; ordinary terms; mandatory terms.

c. A person who has been convicted under . . . subsection a., b. or c. of N.J.S. 2C:39-5, . . . who, while in the course of committing or attempting to commit the crime, . . . shall be sentenced to a term of imprisonment by the court. The term of imprisonment shall include the imposition of a minimum term. The minimum term shall be fixed at, or between, one-third and one-half of the sentence imposed by the court or three years, whichever is greater, or 18 months in the case of a fourth degree crime, during which the defendant shall be ineligible for parole.

◆

STATEMENT OF THE CASE

Petitioner holds a Ph.D. in the sciences and works in the pharmaceutical industry. Petitioner resides in Pennsylvania but spends several days a week in New Jersey where his parents and girlfriend live. Petitioner has held a concealed-carry permit in Pennsylvania for twenty years. New Jersey, however, does not recognize any license to carry a handgun except those issued by New Jersey, so Petitioner applied for a New Jersey Permit to Carry a Handgun. Thereby, Petitioner has the legal means to protect himself in Pennsylvania and seeks the same “sense of safety and peace” in New Jersey. App. 4.

Under N.J.S.A. § 2C:39-5.b.:

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

The few exemptions to the above (such as for home possession under N.J.S.A. § 2C:39-6) are narrowly construed and constitute mere defenses under which defendants are required to show a “rational basis in the facts before [such] a defense will be charged to the jury.” *State v. Moultrie*, 357 N.J. Super. 547, 555-56 (App. Div. 2003); Cannel, New Jersey Criminal Code Annotated, comment 3 on N.J.S.A. § 2C:1-13 (2002). Any finding of guilt for bearing a firearm outside of the minimal exemptions incurs a mandatory, minimum 3.5 years and potential 10 years in State prison. N.J.S.A. § 2C:43-6.c.

Applicants seeking a New Jersey Permit to Carry a Handgun must first apply, depending on their residences, to their municipal Police Chief or to the Superintendent of State Police. *Id.* § 2C:58-4.c. If the Chief or Superintendent concludes, after investigation, that an applicant meets all statutory requirements, the application is presented to the Superior Court. *Id.* § 2C:58-4.d. If the application is denied, the applicant may appeal that denial to the Superior Court. *Id.* § 2C:58-4.e. In either case, if the Superior Court independently determines that the applicant has satisfied all statutory requirements, it may then issue a New Jersey Permit to Carry a Handgun. *Id.* In reviewing

applications and issuing permits, the Superior Court acts as an “issuing authority” and performs “essentially an executive function” that is “clearly non-judicial in nature.” *In re Preis*, 573 A.2d 148, 151, 154 (N.J. 1990).

New Jersey imposes some initial, objective restrictions on eligibility for a Handgun Carry Permit. For example, an applicant: must not have been convicted of any crime or offense involving an act of domestic violence; must not be addicted to controlled substances, mentally infirm, or an alcoholic; must not be subject to certain restraining orders; and must not be listed on the FBI’s Terrorist Watchlist. N.J.S.A. §§ 2C:58-4.c, 2C:58-3.c. An applicant must also pass criminal and mental health background checks, *id.* § 2C:58-4.c, and must have satisfied extensive firearms safety training requirements, N.J.A.C. § 13:54-2.4(b)

New Jersey, however, also imposes that a carry permit applicant must demonstrate “that he has a justifiable need to carry a handgun.” N.J.S.A. § 2C:58-4.c. For an ordinary “private citizen,” 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.* “Where possible, the applicant shall corroborate the existence of any specific threats or previous attacks by reference to reports of the incidents to the appropriate law enforcement agencies.” *Id.*

“Generalized fears for personal safety are inadequate, and a need to protect property alone does not suffice.” *In re Preis*, 573 A.2d at 152. Accordingly, typical law-abiding citizens – the vast majority of responsible citizens who cannot “demonstrate a special danger to [their] life,” N.J.S.A. § 2C:58-4.c – effectively remain subject to a ban on carrying handguns for self-defense outside of their homes in New Jersey.

Although the present Petitioner’s application was approved by the Superintendent of New Jersey State Police, the New Jersey Superior Court denied Petitioner’s application finding:

The code requires the applicant to 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.” The applicant has not satisfied that burden. Therefore, the court does not find the applicant’s described fear of his ex-wife provides a justifiable need to carry a firearm in this state as he has not demonstrated an urgent threat exists. App. 24.

The court finds that there is no justifiable need for applicant to conceal carry a handgun to Ewing, NJ. Based on this testimony, it would merely be a convenience to the applicant for him to travel directly from work to the range. However this is not a justifiable need. Therefore, the courts [sic] finds that the applicant’s self-employment as a firearm instructor does not establish a justifiable need to carry in this state. App. 25.

The court denies the applicant's request for a permit to carry because of the lack of specific detail provided in his application and testimony of justifiable need, the generalized nature of the threats, the lack of immediacy or urgency of any threats, and the lack of supporting documents. Although the applicant has demonstrated that he is of good character, suffers from no impediments to owning or carrying a firearm and is knowledgeable about the safe and proper use of a firearm, the court finds that he has not shown he has a justifiable need to carry a firearm. In essence the applicant failed to establish that he will be subjected to a substantial threat of serious bodily harm and carrying a handgun is necessary to reduce the threat of unjustifiable serious bodily injury. App. 25-26.

Petitioner appealed, and on June 25, 2020, the Superior Court of New Jersey – Appellate Division found that the trial court's conclusion that Petitioner "did not establish justifiable need for a carry-permit is in accord with well-settled law" and affirmed the Superior Court. App. 14.

Petitioner petitioned for certification to the New Jersey Supreme Court, wherein he raised:

Presently at issue is the interest of justice regarding the Due Process and fundamental fairness afforded licensing applications, as well as, ultimately, the constitutional right to keep and bear arms since the license at issue provides the means by which citizens may

exercise that fundamental, individual, constitutional right.

On November 2, 2020, the Supreme Court of New Jersey denied Petitioner's request for certification. App. 27.

Petitioner challenges New Jersey's "justifiable need" restriction to the exercise of his constitutional right to bear arms.



REASONS FOR GRANTING THE PETITION

This Court's review is necessary in this case for three main reasons: 1. to resolve the direct conflict in the circuits and states over the constitutionality of handgun carry laws, 2. because basing a fundamental, individual right upon a showing of "need" is historically repugnant, and 3. to end the lower courts' open resistance to *Heller* and *McDonald* generally and as applied to the Petitioner.

In other words, this case gives this Court an opportunity to provide lower courts with much-needed guidance, ensures adherence to this Court's precedents, and resolves the divide among the lower courts and states.

The Second Amendment protects the rights to keep *and bear* arms. *Heller* and *McDonald* specifically addressed the right to keep arms. It is past time to address the other right confirmed under the Second Amendment.

I. Review is needed to resolve the conflict in the circuits and states over the constitutionality of “need”- and “good reason”-based restrictions on the right to bear arms outside of the home.

The text of the Second Amendment protects “the right of the people to keep and bear Arms.” We have stated that this “fundamental righ[t]” is “necessary to our system of ordered liberty.” *McDonald v. Chicago*, 561 U.S. 742, 778 (2010). Yet, in several jurisdictions throughout the country, law-abiding citizens have been barred from exercising the fundamental right to bear arms because they cannot show that they have a “justifiable need” or “good reason” for doing so. One would think that such an onerous burden on a fundamental right would warrant this Court’s review. This Court would almost certainly review the constitutionality of a law requiring citizens to establish a justifiable need before exercising their free speech rights. And it seems highly unlikely that the Court would allow a State to enforce a law requiring a woman to provide a justifiable need before seeking an abortion. But today, faced with a petition challenging just such a restriction on citizens’ Second Amendment rights, the Court simply looks the other way.

Rogers v. Grewal, 590 U.S. ____ (2020) (Thomas, J., dissenting from the denial of certiorari) (slip op., at 1).

Like former Petitioner Rogers, present Petitioner Russell is a law-abiding citizen who applied for a New

Jersey permit to carry his handgun for self-defense. App. 2-4. Petitioner Russell has held a concealed-carry permit from Pennsylvania for twenty years; however, New Jersey does not recognize any license to carry a handgun except those issued by New Jersey. *Id.* Thus, Petitioner applied for a New Jersey Permit to Carry a Handgun so that he may exercise his right when he visits his parents and girlfriend in New Jersey. *Id.*

When an enumerated constitutional right is at stake – and when the lower courts and states are divided as to whether a core part of the right even exists – this Court should not stay its hand and let the conflict fester.

A. The federal courts of appeals and state high courts are intractably divided over whether the Second Amendment protects the right to carry firearms outside of the home for self-defense.

The federal circuits are divided over whether laws that ban ordinary, law-abiding citizens from carrying handguns outside the home can be squared with the Second Amendment right to keep and bear arms. As a result, whether a U.S. citizen may lawfully bear arms for “the core lawful purpose of self-defense,” *Heller*, 554 U.S. at 630, largely depends on which state or federal circuit he or she happens to be within. Such inconsistency is intolerable, and this Court should grant the writ to resolve this vital question.

Since this Court's decisions in *Heller* and *McDonald*, the lower courts have struggled over the extent to which the Second Amendment "individual right to possess and carry weapons in case of confrontation" applies outside the confines of the home. *Id.* at 592. The lower courts have ultimately coalesced around two distinct – and directly contrary – answers to the question.

The New Jersey Courts below, as well as the Third Circuit in *Rogers v. Grewal*, 590 U.S. ____ (2020), and *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), have upheld New Jersey's "justifiable need" restriction on Permits to Carry a Handgun. The Courts of Appeals for the First, Second, and Fourth Circuits, have also upheld substantively identical "good reason"-type requirements. The *Rogers* and *Drake* decisions upholding New Jersey's "justifiable need" restriction follow this same approach. Notably, *Drake* further concluded that the Second Amendment *does not even apply* to New Jersey's limits, because "the requirement that applicants demonstrate a 'justifiable need' to publicly carry a handgun for self-defense is a presumptively lawful, longstanding licensing provision." 724 F.3d at 432. According to the Third Circuit then, a state may effectively ban ordinary citizens – those without special self-defense needs – from carrying handguns in public *without even implicating the Second Amendment. Id.*

In *Gould v. Morgan*, the First Circuit upheld Massachusetts' "good reason" restriction, as applied by Boston and Brookline, by: (a) "proceed[ing] on the assumption" that the restriction burdened conduct within the scope of the Second Amendment, 907 F.3d

659, 670 (1st Cir. 2018); (b) concluding “that the core Second Amendment right is limited to self-defense in the home” and thus merely intermediate scrutiny was necessary, *id.* at 671; and (c) determining that the restriction passed intermediate scrutiny, *id.* at 673-77.

In *Kachalsky v. County of Westchester*, the Second Circuit upheld New York’s requirement that ordinary citizens demonstrate “proper cause” to carry handguns outside the home – a standard the defendants defined as demanding “a special need for self-protection distinguishable from that of the general community.” 701 F.3d 81, 86 (2d Cir. 2012). The *Kachalsky* court concluded that even assuming the Second Amendment applies in public, “[t]he state’s ability to regulate firearms . . . is qualitatively different in public than in the home.” *Id.* at 94, 95. Accordingly, it analyzed New York’s “proper cause” restriction under merely intermediate scrutiny. And reasoning that “[i]t is the legislature’s job, not ours, to weigh conflicting evidence and make policy judgments,” it upheld the law. *Id.* at 99.

In *Woollard v. Gallagher*, the Fourth Circuit held that Maryland’s similar requirement that citizens demonstrate a “good and substantial reason” to carry handguns is consistent with the Second Amendment. 712 F.3d 865, 868 (4th Cir. 2013). Like the Second Circuit, the court in *Woollard* “assume[d] that the *Heller* right exists outside the home,” but held that restrictions on the right to bear arms in public need satisfy only “intermediate scrutiny.” *Id.* at 876. *Woollard* determined that Maryland’s law survives this level of scrutiny since it “advances the objectives of protecting

public safety and preventing crime because it reduces the number of handguns carried in public.” *Id.* at 879.

Other circuits have coalesced around an approach that is diametrically opposed to the above decisions – and have struck down laws that are functionally indistinguishable from the ones upheld in *Kachalsky*, *Woollard*, *Gould*, *Drake* and *Rogers* as categorically unconstitutional.

In *Wrenn v. District of Columbia*, the D.C. Circuit struck the District’s requirement that ordinary citizens must show a “good reason” to obtain a permit to carry handguns outside the home. *Wrenn*’s conclusions flatly contradict the reasoning of the First, Second, Third, and Fourth Circuits at every step of the analysis. While *Gould*, *Kachalsky*, *Woollard*, and *Drake* determined that “good reason”-type restrictions “fit[] comfortably within the longstanding tradition of regulating the public carrying of weapons for self-defense,” *Drake*, 724 F.3d at 433, *Wrenn* drew precisely the opposite conclusion that “the individual right to carry common firearms beyond the home for self-defense – even in densely populated areas, even for those lacking special self-defense needs – falls within the core of the Second Amendment’s protections.” 864 F.3d at 661.

Similarly, while the Third Circuit, along with the First, Second, and Fourth, upheld the substantively identical restrictions before them under merely intermediate scrutiny, *Wrenn* recognized a higher scrutiny. This Court’s decision in *Heller*, the D.C. Circuit explained, adopted a “categorical approach,” deeming

“complete prohibitions of Second Amendment rights” to be “always invalid.” *Id.* at 665 (brackets and quotation marks omitted). And the *Wrenn* court determined that the District of Columbia’s “good reason” requirement “is necessarily a total ban on most . . . residents’ right to carry a gun in the face of ordinary self-defense needs.” *Id.* at 666. After all, by requiring the demonstration of “needs ‘distinguishable’ from those of the community,” the “good reason” requirement necessarily “destroys the ordinarily situated citizen’s right to bear arms.” *Id.*

The D.C. Circuit recognized that its decision directly conflicts with the holdings of its sister circuits; but those courts had gone off-course, *Wrenn* explained, by “declin[ing] to use [*Heller*’s] historical method to determine how rigorously the [Second] Amendment applies beyond the home.” *Id.* at 663. Accordingly, the D.C. Circuit declined to follow an errant path. The District petitioned the full Court of Appeals to rehear the case *en banc* and eliminate the split in authority, but the court declined to do so.

In *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), the Seventh Circuit struck down an Illinois ban on the public carrying of handguns by ordinary citizens, finding: “The Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside.” *Id.* at 942. “To confine the right to be armed to the home is to divorce the Second Amendment from the right to self-defense described in *Heller* and *McDonald*.” *Id.* at 937. While *Gould*, *Kachalsky*, *Drake*, and *Woollard*

held that any right to carry handguns outside the home was peripheral at best, *Moore* explained why that result cannot be squared with the constitutional text, history, and purpose. *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012). And while *Drake* and the others deferred to legislative allegations that limiting the carrying of firearms in public would increase public safety, after exhaustively surveying “the empirical literature on the effects of allowing the carriage of guns in public,” Judge Posner in *Moore* concluded that the available data did not “provide . . . more than merely a rational basis for believing that [Illinois’s] ban is justified by an increase in public safety.” *Id.* at 939, 942.

Indeed, for instance, under N.J.S.A. § 2C:58-4.d., “The Court shall issue the [carry] permit to the applicant if, but only if, it is satisfied that the applicant is . . . thoroughly familiar with the safe handling and use of handguns.” Yet, no safety training is required for New Jerseyans to purchase firearms or to possess firearms in their homes. Presumably, firearms are safer under the control of trained, carry permit holders regardless of whether their firearms are being carried inside or outside of their homes.

After a detailed inquiry into the Second Amendment’s text and historical understanding, the Ninth Circuit’s *Young v. Hawaii* also concluded that “the right to bear arms must guarantee *some* right to self-defense in public” – whether through carrying a handgun openly or concealed. 896 F.3d at 1068. And because Hawaii’s law “entirely foreclosed” the “typical, law-abiding citizen” from bearing arms outside the home,

Young concluded that it “eviscerates a core Second Amendment right – and must therefore be unconstitutional.” *Id.* at 1048, 1071.

Plainly, the lower courts have split into two diametrically opposed camps over the question of whether a state may effectively ban ordinary, law-abiding citizens from carrying arms in public for self-defense. This petition presents an ideal vehicle for this Court to take up the constitutionality of “need”-type laws for the exercise of a right and resolve the intractable division that has developed in the lower courts over this issue.

B. New Jersey criminalizes the exercise of the right at issue.

The plain text of the Second Amendment places “the rights to keep and bear arms . . . on equal footing,” *Wrenn*, 864 F.3d at 663. The Second Amendment declares that these rights shall not be infringed. Of course, “The most natural reading of this definition encompasses public carry.” *Peruta v. California*, 582 U.S. ___, ___ (2017) (Thomas, J., dissenting from denial of certiorari) (slip op., at 5).

The state of New Jersey is so divergent from the Second Amendment’s guarantee of the right to bear arms that it mandates, *ab initio*, that exercising the right is a criminal offense. Under N.J.S.A. § 2C:39-5.b.:

- (1) Any person who knowingly has in his possession any handgun, including any antique handgun, without first having obtained a permit to carry the same as provided in

N.J.S. 2C:58-4, is guilty of a crime of the second degree. . . .

The few exemptions to the above (such as for home possession under N.J.S.A. § 2C:39-6) are narrowly construed and constitute mere defenses under which defendants are required to show a “rational basis in the facts before [such] a defense will be charged to the jury.” *State v. Moultrie*, 357 N.J. Super. 547, 555-56 (App. Div. 2003); Cannel, *New Jersey Criminal Code Annotated*, comment 3 on N.J.S.A. § 2C:1-13 (2002). Any finding of guilt for bearing a firearm outside of the minimal exemptions incurs a mandatory, minimum 3.5 years and potential 10 years in state prison. N.J.S.A. § 2C:43-6.

New Jersey’s required “permit to carry” to exercise the right is impossible for any average citizen to obtain since applicants must prove 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.”

The Second Amendment is not a right of last resort.

The questions presented in this case do not lie at the periphery of constitutional law. As soon as ordinary citizens step outside of their New Jersey residences, New Jersey effectively bans them from exercising “the *central component* of [the Second Amendment]” – the right to “use [firearms] for the core lawful purpose of self-defense.” *Heller*, 554 U.S. at 599, 630.

II. New Jersey firearm law runs counter to this Court’s decisions in *Heller/McDonald* and to the history of carrying firearms outside of the home.

A. A legal history of carrying firearms outside of the home.

The Second Amendment protects “the right of the people to keep and bear Arms.” In *Heller*, this Court held that the scope of the right “is determined by reference to text, history, and tradition.” *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1269, 1272-73 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). Historical analysis was presented in *Heller*; and a further specific analysis of the right to *bear* arms was presented last year in Justice Thomas’ dissent from denial in *Rogers v. Grewal*, 590 U.S. ___ (2020) (slip op., at 1).

In brief: This Court recognizes that keeping and bearing arms as part of the “natural right” of self-preservation and defense. *Heller*, 670 F.3d at 2793. This Court recognizes that the Second Amendment (like the First and Fourth Amendments) did not codify a right, but merely recognized it as a pre-existing right. *Id.* at 2797.

By protecting both the keeping *and bearing* of arms, the text of the Second Amendment leaves no doubt that it applies outside the home. This is clear from *Heller*, which (a) “repeatedly invokes a broader Second Amendment right than the right to have a gun in one’s home,” *Moore*, 702 F.3d at 935-36; (b) squarely holds that the Second Amendment “guarantee[s] the

individual right to possess *and carry* weapons in case of confrontation,” *Heller*, 554 U.S. at 592 (emphasis added); and (c) defines the key constitutional phrase “bear arms” as to “‘wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for’ potential ‘conflict with another person,’” *id.* at 584 (alterations in original) (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

“[A]t the time of the founding, as now, to ‘bear’ meant to carry.” *Heller* at 584. “When used with ‘arms,’ . . . the term has a meaning that refers to carrying for a particular purpose – confrontation.” *Ibid.* Lastly, by the plain text of the provision, the right belongs to “the people,” U.S. CONST. amend. II, and not some subset of individuals who have a heightened need for self-defense. *See id.* at 580.

B. Basing a fundamental, individual right upon a showing of “good reason” or “need” is historically repugnant.

While *Drake* acknowledged “that the Second Amendment’s individual right to bear arms may have some application beyond the home,” the majority concluded that the conduct burdened by New Jersey’s “justifiable need” restriction was outside the Amendment’s scope, because that restriction “qualifies as a ‘longstanding,’ ‘presumptively lawful’ regulation.” 724 F.3d at 431-32.

Denial of the right to carry may be “longstanding” in New Jersey, yet, as Thomas Paine put it, “A long habit of not thinking a thing wrong, gives it a superficial appearance of being right[.]” The traditional, post-ratification understanding of the right to bear arms confirms that it applied outside the home.

The closest historical analogues to the “good reason”-type restrictions like New Jersey’s are the ante- and post-bellum efforts of the Southern States to prevent their enslaved and free black populations from carrying firearms in public. An 1832 Delaware law, for example, forbade any “free negroes and free mulattoes to have, own, keep or possess any Gun [or] Pistol,” unless they first received a permit from “the Justice of the Peace” certifying “that the circumstances of his case justify his keeping and using a gun.” Act of Feb. 10, 1832, sec. 1, Del. Laws 180 (1832).

In the infamous *Dred Scott* case, Chief Justice Taney recoiled so strongly from recognizing African Americans as citizens precisely because he understood that doing so would entitle them “to keep and carry arms wherever they went.” *Dred Scott v. Sandford*, 19 How. (60 U.S.) 393, 417 (1857).

In declining to adopt an “interest-balancing” scrutiny regarding the constitutional review of firearm laws, this Court found that: “A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all” and that “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them,

whether or not future legislatures or (yes) even future judges think that scope too broad.” *Heller*, 670 F.3d at 2821.

In theory, New Jersey allows people to carry firearms but, in practice, applicants for the permit must prove 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,” which blocks issuance so that no ordinary person may exercise the right.¹ New Jersey demands that applicants show a special danger to their lives that is distinguishable from “[g]eneralized fears for personal safety,” *In re Preis*, 573 A.2d at 152. This extinguishes the core Second Amendment rights of typical citizens who, by definition, cannot make such a showing.

For those who have already been victims of violent crime, it is cold comfort to know that they could have carried a firearm and defended themselves if only they had been able to precognitively document – as if in a Philip K. Dick novel – the “urgent necessity for self-protection” they require. Rather, someone who was once attacked may never be attacked again, and someone who has never been attacked could need protection any minute now yet not even know it.

¹ Based on an OPRA data request to the New Jersey State Police, in New Jersey, a state with 8.983 million residents, only 496 concealed carry permits were issued in 2014. *New Jersey with 8.983 Million Residents, Only Issued 496 Concealed Carry Permits*, <https://www.ammoland.com/2015/12/251102/#axzz6qc4IOo3n>.

III. Review is needed to correct the lower courts' resistance to this Court's decisions in *Heller* and *McDonald*.

Since the decisions in *Heller* and *McDonald*, many lower courts have stubbornly and deliberately ignored those decisions, narrowing them to their specific facts and making a hollow mockery of the Second Amendment's promise that law-abiding citizens must be allowed "to use [firearms] for the core lawful purpose of self-defense." *Heller*, 554 U.S. at 630. This Court's review is necessary to correct the lower courts' resistance to its instructions.

This behavior is nowhere more apparent than in cases addressing the right to carry firearms outside the home. Many courts have flatly ruled that "the Second Amendment does not confer a right that extends beyond the home." *Jennings v. McCraw*, 2012 WL 12898407, at *5 (N.D. Tex. Jan. 19, 2012), *aff'd sub nom. NRA v. McCraw*, 719 F.3d 338 (5th Cir. 2013); *see also, e.g., Kachalsky v. Cacace*, 817 F. Supp. 2d 235, 264-65 (S.D.N.Y. 2011), *aff'd sub nom. Kachalsky*, 701 F.3d 81 (2d Cir. 2012); *Moreno v. New York Police Dep't*, 2011 WL 2748652, at *3 (S.D.N.Y. May 7, 2011); *Gonzalez v. Village of W. Milwaukee*, 2010 WL 1904977, at *4 (E.D. Wis. May 11, 2010), *aff'd*, 671 F.3d 649 (7th Cir. 2012); *accord Shepard v. Madigan*, 863 F. Supp. 2d 774, 782 & n.7 (S.D. Ill. 2012), *rev'd sub nom. Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012); *Moore v. Madigan*, 842 F. Supp. 2d 1092, 1102 (C.D. Ill. 2012), *rev'd*, 702 F.3d 933; *Williams v. State*, 10 A.3d 1167, 1177 (Md. 2011). And many of those courts that have assumed that the

Second Amendment has *some* application beyond the home have gutted it of any force.

McDonald considered and rejected the view that the Second Amendment was somehow “a second-class right,” 561 U.S. at 780 (plurality opinion). Yet the lower courts have thumbed the nose at these directions, upholding limitations on Second Amendment conduct that would be unimaginable towards any other constitutional right.

The Second Amendment identifies and protects two rights – the right to keep arms and the right to bear arms. Both are a fundamental, individual rights belonging to all U.S. citizens. It is time for this Court to clarify that the right to bear arms – like the right to keep arms – shall not be infringed.

◆

CONCLUSION

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

Respectfully submitted,

LOUIS P. NAPPEN, ESQ.
EVAN F. NAPPEN ATTORNEY AT LAW PC
21 Throckmorton Avenue
Eatontown, NJ 07724
(721) 389-8888
louis@evannappen.com

EVAN F. NAPPEN, ESQ.

Counsel of Record

EVAN F. NAPPEN ATTORNEY AT LAW PC

21 Throckmorton Avenue

Eatontown, NJ 07724

(721) 389-8888

evan@evannappen.com

Counsel for Petitioner

April 2, 2021