

No. 21-175

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In the  
Supreme Court of the United States

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P.Z.,  
*Petitioner,*  
v.

STATE OF NEW JERSEY,  
*Respondent.*

\_\_\_\_\_  
ON PETITION FOR WRIT OF CERTIORARI TO THE  
SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

\_\_\_\_\_  
**BRIEF IN OPPOSITION**  
\_\_\_\_\_

Scott A. Coffina  
*Burlington County Prosecutor*  
Rachel M. Conte\*  
*Assistant Prosecutor*  
Jennifer B. Paszkiewicz  
*Assistant Prosecutor*  
Burlington County Prosecutor's Office  
49 Rancocas Road, 2<sup>nd</sup> floor  
Mount Holly, NJ 08060  
(609) 265-5035  
rconte@co.burlington.nj.us  
*\*Counsel of Record*

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## STATEMENT OF THE CASE

1. New Jersey's Prevention of Domestic Violence Act of 1991, N.J. Stat. Ann §§ 2C:25-17 to -35, authorizes the seizure of any weapon in the possession of a person against whom a temporary restraining order has issued. Specifically, N.J. Stat. Ann. § 2C:25-28(j) provides that a court may issue an order "forbidding the defendant from possessing any firearm or other [enumerated] weapon" and requiring a search for "any such weapon at any location where the judge has reasonable cause to believe the weapon is located and the seizure of any firearms purchaser identification card or permit to purchase a handgun issued to the defendant and any other appropriate relief."

Pursuant to a state-court order dated May 25, 2018, Petitioner P.Z.'s personal firearms and New Jersey firearms purchaser identification card were seized pursuant to the Domestic Violence Act after P.Z.'s former girlfriend, J.S., sought and obtained a temporary restraining order against him. Pet. App. 1-2, Pet. App. Div. brief 1, 4-5. Petitioner and J.S. were involved in a dating relationship from 2006 through 2014 and have a child together, who was born in 2010. Pet. App. Div. brief 2. J.S. has residential custody of the child. After dissolution of their relationship, Petitioner and J.S. were initially able to resolve any issues regarding the child amicably; however, their relationship deteriorated.

J.S. filed for the temporary restraining order after Petitioner was tracking her movements and those of their child, was covertly filming their parenting exchanges, and used offensive language towards her. She also alleged that Petitioner: threatened not to let her see their child again, threatened to ruin her husband's

career, had abused animals, had untreated post-traumatic stress disorder, and had tried to commit suicide during a military deployment. J.S. also alleged that in 2010, while she was pregnant with their child, Petitioner pointed a loaded firearm in her face. Pet. App. 2-3, Pet. App. Div. brief 4-6.

J.S. filed in the Superior Court of New Jersey, Chancery Division, Family Part, for a temporary restraining order that was granted on May 25, 2018, and amended on June 1, 2018. Pet. App. 2, Pet. App. Div. brief 1. The temporary restraining order authorized seizure of any weapons in Petitioner's possession, as well as his New Jersey firearms purchaser identification card. Twenty-seven weapons and Petitioner's firearms purchaser identification card were seized from Petitioner's home in Ocean County, New Jersey. Pet. App. 3, Pet. App. Div. brief 7.

2. On June 5, 2018, after a hearing, the Family Part judge dismissed the temporary restraining order and declined to issue a final restraining order against Petitioner. Pet. App. 3. On September 6, 2018, the Burlington County Prosecutor's Office served Petitioner with notice of its intention to obtain title of the seized weapons and revoke defendant's ability to own or use the weapons in the future. Pet. App. 3, Pet. App. Div. brief 7. In an order issued on August 7, 2019, *nunc pro tunc* to June 3, 2019, the Superior Court of New Jersey, Chancery Division, Family Part, granted the State's petition for forfeiture of Petitioner's weapons and firearms purchaser identification card for two reasons. First, the court found that pursuant to New Jersey Stat. Ann. § 2C:58-3(c)(5), Petitioner's posses-

sion of firearms is “contrary to the interest of the public health, safety, and welfare” as “one of the weapons seized in this matter, specifically the Century Arms semi-automatic firearm (s/n 29NC12685), is a prohibited assault firearm pursuant to [New Jersey Stat. Ann.] § 2C: 39-1w(2), and [Petitioner] knowingly possessed same.” Second, the court ordered forfeiture of Petitioner’s weapons and firearms purchaser identification card pursuant to New Jersey Stat. Ann. § 2C:58-3c(3) “as he admittedly has post-traumatic stress disorder (PTSD)” and “[t]he court finds that PTSD would make it unsafe for [Petitioner] to handle firearms and [Petitioner] has failed to produce a certificate of a medical doctor or psychiatrist licensed in New Jersey, or other satisfactory proof, that he is no longer suffering from that disability in a manner that would interfere with or handicap him in the handling of firearms.” Pet. App. 3, 12-13, 28.

3. Petitioner filed a Notice of Appeal to the Superior Court of New Jersey, Appellate Division. In his brief before the Appellate Division, Petitioner raised a number of state-law claims. Pet. App. Div. brief 1-65. Petitioner did not raise any Fourth Amendment Claim. Pet. App. Div. brief 1-65. As to the Second Amendment, Petitioner purported to raise a Second Amendment claim but expressly acknowledged that he had failed to raise that claim in the Family Part. See Pet. App. Div. brief 59 (Petitioner acknowledging that his Second Amendment claim was “Not Raised Below”).

The Appellate Division affirmed the Family Part, rejecting all of Petitioner’s claims. Pet. App. 1-26. The court first concluded that probable cause supported

the search and seizure of Petitioner's weapons and firearms purchaser identification card pursuant to New Jersey Stat. Ann. § 2C:25-28(g) because the search and seizure "were necessary to protect the life and well-being of J.S." The court noted that this probable cause does not support a search for evidence of criminality but is intended to protect the victim of domestic violence from further acts of violence. Pet. App. 6-11. Second, the court concluded that the Family Part properly considered evidence of Petitioner's untreated post-traumatic stress disorder, a diagnosis he concedes. Pet. App. 11-13. Third, the court held that the Family Part judge properly took judicial notice of the definition of post-traumatic stress disorder, as defined by the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, in rendering its decision on the State's forfeiture application. Pet. App. 13-15.

The court also concluded that the Century Arms rifle seized from Petitioner was properly found to be a prohibited assault rifle, that Petitioner possessed the rifle knowing it was an illegal assault firearm, and that the forfeiture action was properly filed. The court next held that the Family Part properly excluded evidence of an ongoing custody matter and a DCPD investigation regarding J.S.'s husband. Pet. App. 15-25

The Appellate Division declined, however, to consider Petitioner's various arguments that New Jersey Stat. Ann. §§ 2C:58-3(c)(5) and 3(c)(8) violate the Second Amendment because Petitioner failed to raise any such argument in the Family Part. Pet. App. 25-26 (Petitioner "failed to raise this argument below, and therefore we decline to address it"). In any event, the



Appellate Division noted that the New Jersey Supreme Court had “recently addressed [Petitioner’s Second Amendment] argument and rejected it,” citing *In re Forfeiture of Pers. Weapons and Firearms Identification Card belonging to F.M.*, 139 A.2d. 67, 78-80 (2016), and *In re. Dubov*, 981 A.2d. 87, 91-92 (2009). Pet. App. 25-26, Pet. App. Div. brief 59.

The Supreme Court of New Jersey denied Petitioner’s petition for certification without comment. Pet. App. 33.

### **REASONS FOR DENYING THE PETITION**

This Court should decline to exercise jurisdiction because Petitioner did not properly present any Second or Fourth Amendment claims in state court. This Court has “almost unfailingly refused to consider any federal law challenge to a state court decision” that was not “addressed by or properly presented to the state court that rendered the decision we have been asked to review,” *Howell v. Mississippi*, 543 U.S. 440, 445 (2003), and it should do the same here. Even if this Court had jurisdiction, it should hold this case pending review of a case raising a substantially similar question: *New York State Rifle & Pistol Association Inc. et. al. v. Keith M. Corlett*, No. 20-843.

#### **I. This Court Should Decline Jurisdiction Because Petitioner Did Not Raise A Second Amendment Challenge or Fourth Amendment Challenge At The State Level.**

Although the Petition purports to raise questions under the Second and Fourth Amendments, Petitioner did not properly preserve these issues below,

and the New Jersey courts did not rule upon them. This Court thus lacks jurisdiction to review the questions presented.

28 U.S.C. § 1257(a) give this Court the power to review “final judgments or decrees rendered by the highest court of a State in which a decision could be had...where any ... right is *especially set upon or claimed* under the Constitution of the treaties or the statutes...of the United States.” Here, the rights Petitioner claims under the Second and Fourth Amendments were not “especially set up or claimed” in the courts below. Petitioner acknowledged that he made no Second Amendment claim before the trial court, Pet. App. Div. brief 59. And his attempt to raise a Second Amendment claim for the first time on appeal was soundly rejected by the state Appellate Division, which noted that Petitioner “failed to raise this argument below, and therefore we decline to address it.” Pet. App. 25-26. Despite declining to reach the merits of the issue, the Appellate Division noted that N.J. Stat. Ann. § 2C:58-3(c)(5) and (c)(8) have been upheld against Second Amendment challenge. Pet. App. 26.

Additionally, Petitioner made no Fourth Amendment claim before the trial court, nor to the Appellate Division. Indeed, Petitioner acknowledges in his petition that in New Jersey, a party may not raise a Fourth Amendment claim in a civil matter or where he has not been arrested or charged and no penal consequences are contemplated. Pet. 31-32. Instead, Petitioner advanced state law, case-specific factual claims—namely, that there was no probable cause demonstrating that the search and seizure of his weapons was proper under N.J. Stat. Ann. § 2C:25-

28(j), a provision of New Jersey's Prevention of Domestic Violence Act. Petitioner did not raise this issue on petition for certification to the New Jersey Supreme Court. Pet. App. 33.

The New Jersey Supreme Court, for its part, denied Petitioner's petition for certification without comment. Pet. App. 33.

As a result, Petitioner did not properly preserve, and no court below passed upon, any of the questions upon which Petitioner seeks certiorari. That failure is fatal to the Petition because this Court has "almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim was either addressed by or properly presented to the state court that rendered the decision we have been asked to review." *Howell*, 543 U.S. at 443. In these circumstances, this Court has a "long line of cases clearly stating" that the failure to present a federal claim in state court is a jurisdictional bar. *Howell*, 543 U.S. at 445; *Lee v. Kemna*, 534 U.S. 362, 388 (2002); *Exxon Corp. v. Eagerton*, 42 U.S. 176, 181 n. 3 (1983); *Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969). As the *Cardinale* Court noted, the Judiciary Act of 1789 does not vest the Supreme Court with jurisdiction unless a federal question was raised and decided in the state court below. "If both of these do not appear in the record, the appellate jurisdiction fails." *Cardinale*, 394 U.S. at 438 (citing *Oswings v. Norwoods Lessee*, 5 Cranch 344 (1809)). That is true here.

The burden of proving that the issues were properly presented rests upon the petitioner. See *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997) (dismiss-

ing writ of certiorari as improvidently granted because “Petitioners have failed to establish that they properly presented the issue to [the state] court). Here, the decisions of the trial court and the Appellate Division, as well as the denial of certification by the New Jersey Supreme Court, are all devoid of substantive decisions respective Petitioner’s Second and Fourth Amendment claims. Thus, “when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.” *Street v. New York*, 394 U.S. 576, 582 (1969). Petitioner has made no such showing.

Prudential reasons also favor denial of certiorari. As the *Cardinale* Court noted, there are “sound reasons” to reject petitions where the question presented was not raised below.” 394 U.S. at 439. “Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind.” *Id.* Although this Court has reserved its right “only in exceptional cases, and then only in cases coming from the federal courts” to “consider[] questions urged by a Petitioner or appellant not pressed or passed upon in the courts below,” *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940), this case is neither an exceptional one nor one that came from the federal courts.

When, as here, a state statute is challenged, the requirement that the challenge be properly raised in the state courts is even more crucial. “[I]t is important

that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way that saves their constitutionality.” *Cardinale*, 394 U.S. at 439. The Court added that it is possible that “the issue may be blocked by an adequate state ground,” and although “States are not free to avoid constitutional issues on inadequate state grounds, they should be given the first opportunity to consider them.” *Id.* As this Court has repeatedly admonished, comity requires that challenges first be presented to the state court, as “it would be unseemly in our dual system of government’ to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider.” *Adams*, 520 U.S. at 90 (quoting *Webb v. Webb*, 451 U.S. 493, 500 (1981)).

That the state court presentation and review requirement is critical is evident in *Illinois v. Gates*, 462 U.S. 213 (1983), where this Court requested—after briefing and argument—the parties to address an additional question regarding the application of the exclusionary rule to a Fourth Amendment case. But after review of the record, the Court concluded that this additional question “was not presented to the Illinois courts and, accordingly,” could not be reviewed by the Court. *Id.* at 217. The Court so held even though the plaintiffs in *Gates* “expressly raised, at every level of the Illinois judicial system, the claim that the Fourth Amendment had been violated by the actions of the Illinois police and that the evidence seized by the officers should be excluded from their trial.” *Id.* at 220. However, because the State- which petitioned for certiorari- did not “raise[] or address[] the question

whether the federal exclusionary rule should be modified” in the courts below, this Court could not review the issue. *Id.* (“Whether the ‘not pressed or passed upon below’ rule is jurisdictional, as our earlier decisions indicate, or prudential, as several of our later decisions assume, nor whether its character might be different in cases like this from its character elsewhere, we need not decide.”) In the instant petition, no party raised the Second or Fourth Amendment issues in the state courts below.

Whether this Court relies upon jurisdictional or prudential grounds, the result should be the same: the Petition should be denied due to Petitioner’s failure to present his Second and Fourth Amendments claim to the very state courts whose judgment he now seeks to reverse.

## **II. In The Alternative, This Petition Should Be Held Pending *Corlett*.**

The jurisdictional defect in this case requires denial of the petition; however, even if the defect did not exist, this Court should not grant the Petition because similar Second Amendment issues are presented in a case where certiorari has already been granted.

On April 26, 2021, this Court granted a petition for a writ of certiorari in *New York State Rifle & Pistol Association Inc. et.al. v. Keith M. Corlett*, No. 20-843. The Court limited the grant to the following question: “Whether the State’s denial of Petitioners’ application for concealed carry-licenses for self-defense violated the Second Amendment.” That case is pending this Court’s review.

The resolution of *Corlett* could guide the decision in this case, which among other things asks what level of scrutiny should apply to state restrictions on a person's Second Amendment rights. See Pet. i. Since *Corlett* may provide guidance on this question, this Court should hold this case pending its disposition of *Corlett*. After *Corlett* is decided, the Court could issue an order disposing of this matter in light of the Court's decision in that case.

### CONCLUSION

This Court should deny the petition.

Respectfully submitted,

Scott A. Coffina

*Burlington County Prosecutor*

Rachel M. Conte\*

*Assistant Prosecutor*

Jennifer B. Paszkiewicz

*Assistant Prosecutor*

Burlington County Prosecutor's Office

49 Rancocas Road, 2<sup>nd</sup> floor

Mount Holly, NJ 08060

(609) 265-5035

rconte@co.burlington.nj.us

*\*Counsel of Record*

November 29, 2021      \*Counsel of record