

No. 18-824

In the Supreme Court of the United States

THOMAS ROGERS, *et al.*,
Petitioners,

v.

GURBIR GREWAL, ATTORNEY GENERAL OF NEW JERSEY, *et al.*,
Respondents.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit*

**BRIEF OF AMICI CURIAE COALITION OF NEW
JERSEY FIREARMS OWNERS, SECOND AMENDMENT
FOUNDATION, JOHN JILLARD, MARK CHEESEMAN,
JAY FACTOR, GEORGE GRECO, AND JEFFREY
MULLER IN SUPPORT OF PETITIONERS**

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CORPORATE DISCLOSURE STATEMENT

The Coalition of New Jersey Firearms Owners is a nonprofit corporation with no parent corporation, and no publicly held corporation owns its stock.

The Second Amendment Foundation, Inc. is a nonprofit corporation with no parent corporation, and no publicly held corporation owns its stock.

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INTERESTS OF THE AMICI¹

The Amici represent the interests of individuals who seek to exercise their right to bear arms in the handful of jurisdictions that have adopted discretionary and restrictive permitting schemes—and particularly those living in New Jersey. This Court’s decision—to grant certiorari, or to continue denying it—will have major ramifications for the Amici.

Amicus Coalition of New Jersey Firearms Owners (“CNJFO”) is a nonprofit member organization based in Sewell, New Jersey that was formed to educate the public about the “need” standard, as well as to advocate for lawful, safe and responsible firearms ownership in New Jersey. CNJFO strives to restore the basic human right of self-defense for the people of New Jersey—a right that, while guaranteed by the Constitution to all citizens, all three branches of New Jersey government have worked to effectively obliterate.

Amicus Second Amendment Foundation is a nonprofit member organization with over 650,000 members and supporters nationwide, including in New Jersey. SAF promotes the constitutional right to own and use firearms through education, research, publishing and legal action. SAF has sponsored and been a party to many cases that recognize key aspects of the right to keep and bear arms, including *McDonald v. Chicago*, 561 U.S. 742 (2010), which held the Second

¹ No counsel for any party authored this brief in whole or in part, nor did any counsel or party make any monetary contribution intended to fund the preparation or submission of this brief. All parties’ counsel of record received timely notice of the intended filing of this brief, and all consented to its filing.

Amendment's protections applicable against the States, and *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), which overturned Illinois's ban on carrying handguns for self-protection. SAF sponsored and was a party to *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), which the courts below relied upon to reject the Petitioner's claim.

Amicus John Jillard, who lives in Gloucester County, New Jersey, applied for a permit to carry in August 2017, after prison authorities released a man who had assaulted an immediate family member of his to live in a nearby area. Local police authorities denied his application, and he sought review before the Gloucester County Superior Court. At the hearing, the prosecutor conceded that Mr. Jillard's fear of the man was "reasonable" and that "[i]f I were in his shoes, I'm certain that I would as well." The prosecutor said that Mr. Jillard's circumstances made "a very compelling argument and I wish the laws in the State of New Jersey were different." The judge denied his application for lack of "need," and the Appellate Division rejected his pro se appeal in an unpublished opinion. *See In re Jillard*, no. A-2346-17T1, 2018 N.J. Super. Unpub. LEXIS 2455 (App. Div. Nov. 5, 2018).

Amicus Mark Cheeseman lives in Gloucester County, New Jersey and applied for a permit to carry in 2015, which local police denied for lack of "need." After police officials denied his second application in 2017, he unsuccessfully sought review in the Superior Court. Mr. Cheeseman then also pursued a pro se appeal, which the Appellate Division also rejected in an unpublished decision. *See In re Cheeseman*, no. A-2412-17T2, 2018 N.J. Super. Unpub. LEXIS 2471 (App. Div. Nov. 8, 2018).

Amicus Jay Factor lives in Monmouth County, New Jersey and applied for a permit to carry in 2006. After a lengthy delay, police officials denied his application in 2008. Mr. Factor also sought review in the Superior Court, and he also pursued a pro se appeal when the Superior Court denied relief. The Appellate Division rejected his claims in another unpublished decision. *See In re Factor*, no. A-5202-08T4, 2010 N.J. Super. Unpub. LEXIS 865 (App. Div. Apr. 21, 2010). Mr. Factor provided historical research used in the preparation of this brief.

Amicus George Greco lives in New York City and runs a construction company with operations in both New York and New Jersey. This position requires him to carry significant amounts of cash. He is also the New York City director for the New York State Rifle & Pistol Association. In 2005, Mr. Greco applied for a permit to carry in New Jersey. Both police officials and a Superior Court judge denied his application for lack of “need.”

Finally, Amicus Jeffrey Muller lives in Sussex County, New Jersey. He is unique in that he actually was able to (ultimately) obtain a permit. In 2010, in a case of mistaken identity, three men attacked and kidnapped Mr. Muller to the Midwest. Quite fortunately, Mr. Muller was able to escape and summons help when the assailants’ car broke down in Missouri—but he then became the key witness in the State’s case against his attackers. While New Jersey State Police approved his application for a permit to carry, a Superior Court judge then denied his application without providing a hearing. After Mr. Muller joined the *Drake v. Filko* lawsuit, the original

judge recused himself, and a subsequent judge granted his application. Mr. Muller continues to live in fear of retaliation—and he never knows whether authorities will deny renewal of his permit for lack of “need.”

SUMMARY OF ARGUMENT

This Amici brief shows that the Petition presents an *ideal* case for this Court’s review. While there are five other States that condition the ability to carry handguns in any manner on discretionary determinations of “need,” “cause” or “reason,” New Jersey’s scheme is particularly appropriate for review for several reasons. The first is that the activity at issue is carrying handguns in any manner, not just in a concealed manner, so by reviewing New Jersey’s scheme this Court avoids unnecessarily bringing in the issue of concealment, which has the potential to send the case in another direction. *See Peruta v. County of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (concluding that “the Second Amendment right to keep and bear arms does not include, in any degree, the right of a member of the general public to carry concealed firearms in public,” without addressing whether open carry is protected). The second reason is that New Jersey’s restrictive “need” standard is firmly established in State law—literally, the product of all three branches of New Jersey government. The standard is not subject to change, and officials cannot moot the Petition by announcing a sudden change in policy. Finally, aside from being substantial, the burden in New Jersey is widespread. It exemplifies the manner in which discretionary licensing standards destroy the rights of typical, law-abiding citizens. The Petition accordingly presents a real and substantial

controversy, with a direct impact that is clear and significant. Put simply, in the context of bearing arms, New Jersey presents one of the best (if not the best) statutory schemes for this Court to review. This brief begins by detailing the background and development of the laws and policies at issue.

ARGUMENT

I. New Jersey Has Prohibited Unlicensed Carry in Any Form Since 1966

A. Prior to 1966, New Jersey Restricted Only Concealed Carry and Carry by Minors

New Jersey's first restrictions on the ability to carry guns in public concerned minors and the act of concealment. In 1898, the State made it illegal for those under 15 years of age to carry or use guns unsupervised, *see* 1898 N.J. Laws ch. 235, § 95, and in 1905, the State made it illegal for anyone to carry a gun "*concealed* in or about his clothes or person" in the absence of a permit, *see* 1905 N.J. Laws ch. 172, § 1 (emphasis added).

The State amended this concealed-carry law several times prior to 1966. *See* 1928 N.J. Laws ch. 212, § 1; 1927 N.J. Laws ch. 96, § 1; 1925 N.J. Laws ch. 207, § 1; 1924 N.J. Laws ch. 137, § 1; 1922 N.J. Laws ch. 138, § 1. But each time, the law still restricted only the act of carrying a gun "*concealed* on or about his person[.]" *E.g.*, 1928 N.J. Laws ch. 212, § 1 (emphasis added). People without permits were free to carry guns in open view. *See State v. Rabatin*, 95 A.2d 431, 434, 25 N.J. Super. 24, 30 (App. Div. 1953); *State v. Gratz*, 92 A. 88,

89, 86 N.J.L. 482, 483 (Sup. Ct. 1914); *see also Drake*, 724 F.3d at 448-49 (Hardiman, J., dissenting).

B. The 1966 Gun Control Law Prohibited Unlicensed Carry in Any Manner

The 1966 Gun Control Law changed all this by expanding the scope of proscribed conduct to include anyone who “carries, holds or possesses [a handgun] . . . on or about his clothes or person, or otherwise in his possession, or in his possession or under his control in any public place or public area.” 1966 N.J. Laws ch. 60, § 32. Thus, subject to a few exceptions (such as possession in the home or at a target range), any form of carry, possession or control was illegal in the absence of a permit. *See id.* §§ 32-33; *see also State v. Hock*, 257 A.2d 699, 700 & n.1, 54 N.J. 526, 529 & n.1 (1969). And the New Jersey legislature was well aware that it was expanding the scope of the statute in this manner. For example, New Jersey Attorney General Arthur Sills “close[ly] participat[ed] in the drafting and presentation of the [1966] Gun Control Law,” and the Supreme Court of New Jersey has relied upon his views to decide close interpretive questions concerning that law. *See Service Armament Co. v. Hyland*, 362 A.2d 13, 18, 70 N.J. 550, 560 (1976). In the lead-up to the 1966 Gun Control Law, Attorney General Sills had publicly explained that there was presently “no law against walking down the street with a weapon in your hand or on your body so long as it isn’t concealed,” and that individuals without concealed-carry permits were free to carry guns “in plain view.” *Sills Demands Curbs on Sale of Firearms*, *Asbury Park Evening News*, Dec. 5, 1963, at 27. According to Attorney General Sills, the 1966 Gun

Control Law would “close[] a loophole which makes it a crime to carry a concealed pistol without a permit but does nothing about a person walking down the street with the pistol carried openly.” *Gun Lobby’s Loss Seen as Sills’ Gain*, Asbury Park Press, November 18, 1965, at 6.

Under the 1966 law, carrying without a permit was a misdemeanor. *See* 1966 N.J. Laws ch. 60, § 32. The State has escalated the severity of violations three times since then. In 1968, violation became a high misdemeanor, and in 1978 it became a “crime” (felony) of the third degree. *See* 1978 N.J. Laws ch. 95, § 2C39-5(b); 1968 N.J. Laws ch. 307, § 1. Finally, in 2007, the State made it a second-degree crime to carry a gun without a permit—the same level of criminality that attaches to (for example) aggravated assault causing serious bodily injury. *See* 2007 N.J. Laws ch. 284, § 1; *see also* N.J. Stat. Ann. §§ 2C:12-1(b)(1), 2C:39-5(b). Thus, a person who uses an unlawfully carried handgun to (justifiably) stop a burglary in progress is literally committing a more serious crime than the one he or she is stopping. *See* N.J. Stat. Ann. § 2C:18-2 (burglary is normally a third-degree crime).

II. All Three Branches of New Jersey Government have Decisively Adopted the Restrictive “Need” Standard

A. New Jersey’s Courts Laid Down the Current Standard After Enactment of the 1966 Gun Control Law

The original 1905 law prohibiting the unlicensed carry of concealed weapons did not provide a standard to govern the issuance of licenses, providing instead

just that local officials were “hereby authorized to grant” permits. 1905 N.J. Laws ch. 172, § 1. The State first provided a standard in 1922, when it amended the law to require “good cause shown,” but did not define “good cause.” *See* 1922 N.J. Laws ch. 138, § 1. In 1924, the legislature replaced “good cause” with “need,” which it again left undefined. *See* 1924 N.J. Laws ch. 137, § 2. The 1924 legislation adopted a two-step application procedure under which individuals seeking permits would apply first to local police officials, and second (if approved) to a judge. *See id.* This basic framework of a two-step application to police and the courts, predicated on a showing of “need,” remained in place when the legislature enacted the 1966 Gun Control Law, and indeed, it remains in place today. *See* N.J. Stat. Ann. § 2C:58-4(c)-(d); 1966 N.J. Laws ch. 60, § 35. (But again, until 1966 people were free to carry guns in open view. *Cf. State v. Reid*, 1 Ala. 612, 616-17 (1840).)

While the 1966 Gun Control Law did not make any change to the statutory requirement of “need,” the courts of New Jersey began to look at “need” differently after its enactment. In *Siccardi v. State*, 284 A.2d 533, 59 N.J. 545 (1971), the Supreme Court of New Jersey upheld a new “need” policy that the Superior Courts had adopted following the 1966 legislation. *See id.* at 539-40, 59 N.J. at 556-57. It was “a strict policy which wisely confines the issuance of carrying permits to persons specifically employed in security work and to such other limited personnel who can establish an urgent necessity for carrying guns for self-protection.” *Id.* at 540, 59 N.J. at 557. Under this rule, “[o]ne whose life is in real danger, as evidenced by serious threats or earlier attacks, may perhaps” have an “urgent

necessity” sufficient to obtain a permit. *Id.* However, “one whose concern is with the safety of his property, protectible by other means, clearly may not so qualify.” *Id.*

The *Siccardi* decision established a restrictive “need” standard as a matter of State law. “Prior to *Siccardi*, only two cases had mentioned the need requirement, and neither had ascribed any meaning to it.” *Drake*, 724 F.3d at 448 n.15 (Hardiman, J., dissenting) (citing *McAndrew v. Mularchuk*, 162 A.2d 820, 33 N.J. 172 (1960); *State v. Neumann*, 246 A.2d 533, 103 N.J. Super. 83 (Monmouth County Ct. 1968)). Moreover, the court in *Siccardi* recognized that this new standard was more restrictive than prior practices, explaining that individuals who had qualified “under earlier circumstances or earlier approaches” might no longer qualify. *See Siccardi*, 284 A.2d at 539-40, 59 N.J. at 556. Indeed, on the same day the New Jersey high court decided *Siccardi*, it issued two other rulings—both upholding the denial of *renewal* applications. *See Reilly v. State*, 284 A.2d 541, 542, 59 N.J. 559, 561 (1971); *In re Application of “X”*, 284 A.2d 530, 531, 59 N.J. 533, 534 (1971). The court explained that even though “the word ‘need’ has appeared without alteration through all the pertinent legislation since 1924[,] . . . ‘[n]eed’ is a flexible term which must be read and applied in the light of the particular circumstances and the times.” *Siccardi*, 284 A.2d at 539, 59 N.J. at 555 (citations omitted). “[D]etermination[s] must be made in the light of . . . sound current approaches on the issue of ‘need.’” *Id.* at 539, 59 N.J. at 556.

The Supreme Court of New Jersey re-affirmed the restrictive “urgent necessity” standard in *In re Preis*, 573 A.2d 148, 152, 118 N.J. 564, 571 (1990). There, the Court concluded that licensed private detectives had no “preferred right” and could obtain permits only if they “establish[ed] an urgent necessity for protection of self or others” like other applicants. *See id.* at 149, 118 N.J. at 566. The New Jersey high court re-affirmed the restrictive standard again in *515 Associates, LP v. City of Newark*, 623 A.2d 1366, 1373, 132 N.J. 180, 193 (1993). The restrictive “urgent necessity” standard is thus firmly and solidly established in the caselaw of New Jersey.

B. The Executive Branch has Expressly Adopted the Restrictive Standard

The New Jersey State Police had already begun applying “stricter measures concerning the issuance of permits” when the Supreme Court of New Jersey decided *Siccardi* in 1971. *See Siccardi*, 284 A.2d at 537, 59 N.J. at 551 (quoting testimony). In 1991, the agency added language to the State’s administrative code that incorporated the language used in *Siccardi* and *Preis*, requiring an “urgent necessity for self-protection, as evidenced by specific threats or previous attacks.” 23 N.J. Reg. 3521(a), § 13:54-2.4(d)(1) (Nov. 18, 1991); *see* N.J. Admin. Code § 13:54-2.4(d)(1). While Governor Christie’s administration attempted to *slightly* relax the standard to include “serious threats” as a ground for licensure, *see* 49 N.J. Reg. 668(a) (Mar. 2, 2017), Governor Murphy’s administration nixed the proposal, *see* 50 N.J. Reg. 2240(b) (Nov. 5, 2018). And as discussed *infra* III(C), New Jersey’s permit rate has

remained consistently low for years, including through the year 2017.

Thus, the executive branch has also unequivocally adopted the restrictive “urgent necessity” standard.

C. The New Jersey Legislature Has Also Adopted the “Urgent Necessity” Standard

Until recently, the New Jersey legislature had remained silent on the definition of “need.” It changed the terminology from “need” to “justifiable need” in 1978, but this was part of a statutory recodification that was not intended to change the law’s substantive meaning. *See* 1978 N.J. Laws ch. 95, § 2C:58-4(c)-(d); *Doe v. Dover Twp.*, 524 A.2d 469, 470, 216 N.J. Super. 539, 540 (App. Div. 1987); *see also Drake*, 724 F.3d at 448 (Hardiman, J., dissenting). The legislature took action only after the Christie administration suggested a slight revision. Following that, the legislature expressly codified the requirement of “urgent necessity for self-protection, as evidenced by specific threats or previous attacks” into the carry permit law. *See* 2018 N.J. Laws c. 37, § 1; *see also* N.J. Stat. Ann. § 2C:58-4(c).

The legislature’s silence up until this point was somewhat surprising. In *Siccardi*, the court had responded to the applicant’s argument that the legislature had not countenanced a policy change by inviting the legislature to “take appropriate action through amendment of the Gun Control Law” if it “at any point differs with the approach adopted by the judges.” *Siccardi*, 284 A.2d at 540, 59 N.J. at 557. And in *Preis*, the court had also suggested the possibility of

“other legislative direction.” *See Preis*, 573 A.2d at 154, 118 N.J. at 575-76. But the legislature was silent, a tacit indication that it did not disagree with the direction taken by the courts.²

When the legislature did finally intervene, it acted decisively. The New Jersey Assembly voted 48-26 in favor of the 2018 amendment, and the Senate voted 24-13 in its favor—a ratio of nearly two-to-one in both houses. *See* A. 2758, 218th Leg. (N.J. 2018). Other issues aside, New Jersey’s statutory law now squarely embraces the “urgent necessity” definition of “need.”

² Notably, there were some indications that the New Jersey legislature had not intended to change the “need” requirement when it enacted the 1966 Gun Control Law. Attorney General Sills had opined that the 1966 law would impart “no change in the requirement for a permit to buy or carry a pistol.” *See Shore Assemblymen Differ On New Gun Bill’s Merits*, Asbury Park Evening Press, Jan. 25, 1966, at 6. And in testimony before a legislative committee, the Attorney General had explained that “[f]or those who wish to carry a pistol or revolver, permits will be required as they are under present law.” *Public Hearing Before the Assembly Committee on State Government*, AB 165, 190th Leg. (Mar. 2, 1966), at 5. In response to a question about whether private detectives would be able to obtain permits, the Attorney General expressed the view that “any man who can pass the State Police . . . and be fingerprinted and be licensed as a private detective would have no difficulty in getting a permit to purchase or to carry.” *Id.* at p. 67A. Of course, this is exactly the opposite of what the Supreme Court of New Jersey would ultimately decide in *Preis*—that private detectives needed to “establish ‘justifiable need’ to carry handguns on a case-by-case basis” just like other applications. *See Preis*, 573 A.2d at 154, 118 N.J. at 576. Whatever the legislature thought in 1966, it did not respond to the court in either 1971 or 1990.

III. The New Jersey Permit Scheme Presents an Ideal Case to Review Discretionary “Need,” “Cause” and “Reason” Based Carry Laws

A. New Jersey’s Standard is Solidly Established in State Law and Not Susceptible to Change at the Whim of an Official

There are only a handful of States that condition the ability to bear arms on discretionary “need,” “cause” or “reason” standards—and among them, New Jersey is one of the even smaller number that have memorialized a restrictive definition of the standard into State law. Notably, California, Massachusetts and New York all have laws that condition the ability to carry a handgun on “cause” or “reason.” *See* Cal. Penal Code § 26150(a)(2) (“Good cause”); Mass. Gen. L. ch. 140, § 131(d) (“good reason”); N.Y. Penal L. § 400.00(2)(f) (“proper cause”). But in these states, local officials administer these standards as they see fit, resulting in practices that vary between localities and are subject to change. *See Gould v. O’Leary*, 907 F.3d 659, 663-64 (1st Cir. 2018); *Peruta v. County of San Diego*, 824 F.3d 919, 924 (9th Cir. 2016); David D. Jensen, *The Sullivan Law at 100: A Century of “Proper Cause” Licensing in New York State*, 14 NYSBA Gov., L. & Pol’y J. 6, 9-10 (2012). Indeed, officials in both California and Massachusetts have changed their policies for issuing licenses to carry handguns in the midst of litigation, with the result that Second Amendment claims became moot. *See, e.g.*, Defendant’s Motion to Dismiss, *Davis v. Grimes*, No. 1:13-cv-10246 (D. Mass. Jun. 15, 2015); Stipulation and Order,

Richards v. Prieto, No. 2:09-cv-01235 (E.D. Cal. Nov. 5, 2010).

But there is no significant risk that the pertinent policies will change in New Jersey. The restrictive “urgent necessity” requirement is a matter of State law, not local policy, and it is one that all three branches of New Jersey government have conclusively adopted. This makes the New Jersey permit scheme particularly appropriate for this Court’s review.

B. The Burden is Substantial and Clearly Identified

The substantial majority of States (44) do not condition the ability to carry guns on discretionary licensing standards. In 10 States, people (otherwise qualified to possess firearms) do not need to obtain licenses to carry handguns,³ and in 20 States people can carry guns in open view without a license.⁴ In the

³ See Alaska Stat. § 11.61.220(a)(1); Ariz. Rev. Stat. § 13-3102(A); Idaho Code Ann. § 18-3302(4)(f); Kan. Stat. Ann. § 75-7c03(a); 25 Me. Rev. Stat. Ann. § 2001-A(2)(A-1); Miss. Code Ann. § 45-9-101(24); Mo. Ann. Stat. § 571.030(1)(1); W. Va. Code Ann. § 61-7-3(a); Wyo. Stat. Ann. § 6-8-104(a)(4).

⁴ See Ala. Code § 13A-11-73(a); Ark. Code Ann. § 5-73-120(a); Colo. Rev. Stat. Ann. § 18-12-105(1)(b); 11 Del. Code Ann. § 1442; Ky. Rev. Stat. Ann. § 527.020(1); La. Rev. Stat. Ann. § 14:95(A)(1); Mich. Comp. Laws Ann. § 750.227(2); Mont. Code Ann. § 45-8-316(1); Neb. Rev. Stat. § 28-1202(1)(a); Nev. Rev. Stat. Ann. § 202.350(1)(d)(3); N.H. Rev. Stat. Ann. § 159:4(I); N.M. Stat. Ann. § 30-7-2(A)(5); N.C. Gen. Stat. § 14-269(a1)(2); Ohio Rev. Code Ann. § 2923.12(A)(2); Or. Rev. Stat. Ann. § 166.250(1)(a); 18 Pa. Cons. Stat. Ann. § 6109(e)(1); S.D. Codified Laws § 22-14-9(1); Va. Code Ann. § 18.2-308(A); Wash. Rev. Code Ann. § 9.41.050(1)(a); Wis. Stat. § 941.23(2)(d); see also Op. Ark. Att’y Gen. no. 2015-064 (2015).

remaining 20 States and the District of Columbia, people must obtain licenses to carry guns in any manner, but only six of these States—California, Hawaii, Maryland, Massachusetts, New Jersey and New York—have licensing standards that are discretionary.⁵

Yet, these six States do not all present precisely the same set of circumstances. In New York and (for the most part) California, the only type of carry allowed is carry in a concealed manner.⁶ Thus, cases from either of these States have the potential to sidetrack to the question of whether States can prohibit open carry in

⁵ See Cal. Penal Code § 26150(a)(2); Fla. Stat. § 790.06(2); Ga. Code Ann. § 16-11-129(d)(4); Haw. Rev. Stat. § 134-9(a); 430 Ill. Comp. Stat. 66/10(a); Ind. Code Ann. § 35-47-2-3(e); Iowa Code Ann. § 724.7(1); Md. Code Ann., Crim. Law § 4-203(a)(1); Mass. Gen. Laws ch. 269, § 10(a)(2); Minn. Stat. § 624.714, subdiv. 2(b); N.J. Stat. Ann. § 2C:39-5(b); N.Y. Penal L. § 400.00(2)(f); N.D. Cent. Code § 62.1-04-03(1); 21 Okla. Stat. Ann. § 1290.12(A)(13); S.C. Code Ann. § 23-31-215(A); Tenn. Code Ann. § 39-17-1351(b); Tex. Gov't Code § 411.177(a); Utah Code Ann. § 53-5-704(1)(a). While Connecticut law provides that local authorities “may” issue a permit, we consider it nondiscretionary because it further provides that a review panel “shall” issue a permit if a person meets the statutory requirements. See Conn. Gen. Stat. §§ 29-28(b), 29-32b(b). In the District of Columbia, a “good reason” requirement remains on the books, but federal courts have enjoined its enforcement. See D.C. Code § 22-4506(a); *Hooks v. United States*, 191 A.3d 1141, 1145 (D.C. 2018). Rhode Island has two licensing schemes—a discretionary one that allows carry in any manner, and a non-discretionary one that allows only concealed carry. See R.I. Gen. Laws §§ 11-47-11(a), 11-47-18(a); *Mosby v. Devine*, 851 A.2d 1031, 1047 (R.I. 2004).

⁶ See Cal. Penal Code § 26150(a)(2); N.Y. Penal L. 400.00(2)(f). In California, open carry licenses are available only in counties with populations below 200,000. See Cal. Penal Code § 26150(b)(2).

favor of concealed carry—on a path like the Ninth Circuit took. *Compare Peruta*, 824 F.3d at 939 (no protection “in any degree” of concealed carry, even if concealed carry prohibited), *with Norman v. State*, 215 So. 3d 18, 41 (Fla. 2017) (States can prohibit open carry in favor of concealed carry).

In New Jersey, in contrast, a person needs a permit that is subject to a discretionary “need” standard in order to carry a handgun in any manner (open or concealed). Thus, the issue in New Jersey cannot be characterized as being strictly about the question of concealed carry. The Petition thus present an opportunity to address the “bearing arms” issue in a case where the issue is clear and further questions are unlikely to arise. Again, this makes a Petition challenging New Jersey’s permit scheme especially suitable for this Court’s review.

C. The New Jersey Scheme’s Impact is Widespread and Severe

In application, New Jersey’s scheme exemplifies the fact that discretionary licensing standards tend to destroy the right for most people. Because the “urgent necessity” standard applies statewide, it burdens everyone living in New Jersey—and does so severely. According to the most recent numbers available (2016-2017), there are a total of 1,090 permits in force in New Jersey, which amounts to 0.012% of the State’s

population.⁷ And notably, New Jersey's permit numbers have been relatively static since at least 2000,⁸ which belies any suggestion that there has been any meaningful change in policy or practice.

While there are more extreme examples—such as Hawaii, which issued *no* licenses during the same period, *see Young v. Hawaii*, 896 F.3d 1044, 1070-71 & n.21 (9th Cir. 2018)—New Jersey's licensure rate still reflects a burden that is very widespread. For example, the overall licensure rate is 0.37% in California, 0.46% in Maryland and 0.67% in New York State.⁹ Compared

⁷ The New Jersey State Police provided the number of permits on December 14, 2018, in response to a public records request. *See* Letter from Div. of State Police to Mark Cheeseman (Dec. 14, 2018) (on file with author), *available at* https://www.cnjfo.com/resources/Documents/w139606%20Cheeseman_Redacted.pdf. This figure is actually an overstatement because it includes both armed car and armed guard licenses, as well as nonresidents. In the middle of 2017, New Jersey's population was 9,005,644. *See* U.S. Census Bureau, *Quick Facts: New Jersey*, *available at* <https://www.census.gov/quickfacts/nj> (last visited Jan. 29, 2019).

⁸ According to an affidavit from the New Jersey State Police, the State issued between 462 and 781 permits in each year between 2000 and 2011. On average, the State issued 614 permits per year, which equates to a total of 1,228 permits in force at any one time. *See* Dec. of Lt. Joseph Genova, *Drake v. Filko*, No. 12-1150 (3d Cir. Feb. 27, 2013).

⁹ *See* John R. Lott, *Concealed Carry Permit Holders Across the United States: 2018* at 16 (Aug. 14, 2018), *available at* <https://poseidon01.ssrn.com/delivery.php?ID=126024068112007094069125077125099098039053020046074058007068124088084122006089002108037124118022010007121003119112097075096067012058074010000095117091123022122058036046071117083102110073097078127010004022108123105021103067113109027125003098083113&EXT=pdf> (last visited Jan. 29, 2019).

to a national average of 7.14%,¹⁰ these rates are all *very* low. Just the same, there is no avoiding the conclusion that the New Jersey scheme’s impact is very widespread. It destroys the right for almost everyone.

At some point, the distinction between a “ban” and a highly restrictive policy becomes illusory. For example, when the Seventh Circuit overturned Illinois’s “ban” on carrying guns as unconstitutional, Judge Williams’s dissent argued that the scheme in Illinois was not materially different from the one in place in New York City because, “while technically a ‘may issue’ location where the city may issue permits for handgun carry outside the home, New York City rarely does so and so has been characterized as maintaining a virtual ban on handguns.” *Moore v. Madigan*, 702 F.3d 933, 953 (7th Cir. 2012) (Williams, J., dissenting) (citation omitted). But between New York City and New Jersey, it is not even clear which is more restrictive. According to a 2008 New York Times article, 2,291 New York City residents held “full carry” handgun licenses—a number that is basically congruous with New Jersey.¹¹ *Cf. In re Friedman*, no. A-0269-11T4, 2012 N.J. Super. Unpub. LEXIS 2649, *3-4 (Dec. 6, 2012) (applicant qualified in New York City, but not in New Jersey).

The New Jersey permit scheme’s clear and widespread impact is another factor that makes it especially appropriate for this Court’s review.

¹⁰ *See id.* at 3.

¹¹ *See* Sewell Chan, *Annie Hall, Get Your Gun*, N.Y. Times (Dec. 2, 2008).

**D. The “Need” Standard is Just the Sort of
“Case by Case” Determination that this
Court Disclaimed in *Heller***

Another consideration that weighs in favor of granting the Petition is the manner in which New Jersey’s “need” standard runs counter to this Court’s rejection of “case-by-case” determinations in *District of Columbia v. Heller*, 554 U.S. 570 (2008). In *Heller*, the Court responded to Justice Breyer’s proposal to balance the “protected interest” against “other important governmental interests” by explaining that “[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.” *Id.* at 634 (emphasis in source).

But when the Supreme Court of New Jersey embraced the “urgent necessity” definition for “need” in *Siccardi*, this is exactly what it did—it looked to the opinions of police officials and academics about the supposed usefulness of carrying guns for protection and then drew the conclusion that, in the normal case, the right to bear arms was not really worth insisting upon. *See Siccardi v. State*, 284 A.2d 533, 536-38, 59 N.J. 545, 549-53 (1971). The court reasoned that, “as all of the expert testimony indicates, [a permit would] afford hardly any measure of self-protection and would involve [the applicant] in the known and serious dangers of misuse and accidental use.” *Id.* at 540, 59 N.J. at 558. Thus, the court’s view was that “the public interest” weighed against “widespread handgun possession in the streets.” *Id.* Indeed, the Third Circuit understood that the rationale of the “urgent necessity”

requirement was to “determine when the individual benefit outweighs the increased risk to the community through careful case-by-case scrutiny of each application.” *Drake v. Filko*, 724 F.3d 426, 439 (3d Cir. 2013); accord *In re Wheeler*, 81 A.3d 728, 759, 433 N.J. Super. 560, 613 (App. Div. 2013). But as the dissent noted, “[b]y deferring to New Jersey’s judgment to determine whether . . . the individual right to keep and bear arms ‘outweighs’ the increased risk to the community that its members will be injured by handguns, the majority employs an ‘interest-balancing inquiry’” like the one this Court rejected in *Heller*. *Drake*, 724 F.3d at 457 (Hardiman, J., dissenting) (quoting *Heller*, 554 U.S. at 634). And as this Court aptly observed in *Heller*, “[a] constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.” *Heller*, 554 U.S. at 634.

Not only did New Jersey’s adoption of the “urgent necessity” definition take place in precisely the manner that *Heller* rejected—as the product of a judicial interest-balancing that weighed a constitutional right against putative public safety concerns—the scheme itself contravenes *Heller* in its individualized operation. The Court’s rejection of interest-balancing was not limited to across-the-board policies, but also included individual applications. Indeed, as part of its discussion of the interest-balancing point, the Court looked to its previous decision in *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977). See *Heller*, 554 U.S. at 635. There, local officials had enjoined a neo-Nazi group from conducting a parade, and the Court had summarily reversed the lower courts in a short per curiam opinion. See *National Socialist Party*, 432 U.S.

at 43-44. The Court in *Heller* observed that, in the First Amendment context, it had refused to “apply an ‘interest-balancing’ approach to the prohibition of a peaceful neo-Nazi march through Skokie.” *Heller*, 554 U.S. at 635 (citing *National Socialist Party*, 432 U.S. 43). “The Second Amendment is no different. Like the First, it is the very product of an interest balancing by the people[.]” *Id.*

But deciding individual applications “on a case-by-case basis” is the *express* mode of operation of the “urgent necessity” standard. *In re Preis*, 573 A.2d 148, 154, 118 N.J. 564, 576 (1990). Intermediate appellate courts in New Jersey have repeatedly recognized that “the ‘justifiable need’ component of the carry permit law is best understood as accommodating, on a case-by-case basis, those who have a reason[.]” *Wheeler*, 81 A.3d at 739, 433 N.J. Super. at 579; *see also In re Pantano*, 60 A.3d 507, 510, 429 N.J. Super. 478, 484 (App. Div. 2013) (citing *Preis*, 573 A.2d at 154, 118 N.J. at 576); *In re Borinsky*, 830 A.2d 507, 517, 363 N.J. Super. 10, 26 (App. Div. 2003) (“each application must be dealt with on its own merits, on a case-by-case basis”). This Court recognized in *Heller* that “the enshrinement of constitutional rights necessarily takes certain policy choices off the table.” *Heller*, 554 U.S. at 636. And a case-by-case determination of one’s “need” to exercise his or her rights is just the sort of policy choice that is off the table.

New Jersey is not unique in its attempt to curtail the right to bear arms by using “case-by-case” determinations of need—that is the same basic approach that all of the States with restrictive discretionary laws take. *See, e.g., Kachalsky v. County*

of Westchester, 701 F.3d 81, 97 (2d Cir. 2012) (“New York’s elected officials determined that a reasonable method for combating these dangers was to limit handgun possession in public to those showing proper cause for the issuance of a license.”). But the standard adopted in New Jersey uncannily parallels the very approach this Court articulated and rejected in *Heller*—both in its original judicial adoption, as well as in its day-to-day operation. This is yet another consideration weighing in favor of granting the Petition.

CONCLUSION

If this Court is ever to address the scope and extent of the right to bear arms, it would be hard pressed to find a scheme that is more appropriate for review than New Jersey. The Petition should be granted.

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