No. 20-843

In the
Supreme Court of the United States

NEW YORK RIFLE & PISTOL ASSOCIATION, INC., ROBERT NASH, BRANDON KOCH,

Petitioners,

v.

KEVIN P. BRUEN, in His Official Capacity as Superintendent of the New York State Police, RICHARD J. MCNALLY, JR., in His Official Capacity as Justice of the New York Supreme Court, Third Judicial District, and Licensing Officer for Rensselaer County,

Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

Does the Second Amendment allow the government to prohibit a law-abiding person from carrying handguns outside the home for self-defense?

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JURISIDICTION

This case comes to the Court on writ of certiorari from the Second Circuit. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FACTS OF THE CASE

In September of 2014, Petitioner Robert Nash applied for a concealed carry license in the state of New York. Nash's license was denied, on the basis that he could not demonstrate a "special need" for a gun permit, and therefore lacked the proper cause to be issued one. Nash, who was motivated to carry a gun because of a series of robberies in his neighborhood, had recently participated in a gun-training course and had no criminal history.

New York laws N.Y. Penal Law §§ 265.01–04, 265.20(a)(3); N.Y Penal Law § 400.00, says that individuals are not permitted to carry a gun outside of the home or store guns in the home without a license. Said law states that "[n]o license shall be issued or renewed" unless the applicant can prove to the officer that they do not have a criminal or mental-illness record, that the applicant has good moral character, and that "no good cause exists for the denial of the license." See N.Y. Penal Law § 400.00(1)(a)–(n).

Also in September of 2014, Petitioner Brandon Koch of New York applied for a concealed carry license. Koch, who pursued a concealed carry license for purposes of self-defense, and who had an extensive background in the use of firearms, was also denied under the same New York law.

Together, Koch and Nash sued NY state officials Justice Richard McNally and Superintendent of New York State Policy Kevin P. Bruen. Koch and Nash were joined by gun-rights advocacy group New York State Rifle and Pistol Association (an affiliate of the NRA), on behalf of all other New Yorkers who had been denied a license on the grounds of a lack of a proper cause.

The Petitioners filed with the United States District Court for the Northern District of New York, and their case was dismissed; agreeing with the Respondents in that neither Nash nor Koch "satisf[ied] the 'proper cause' requirement because they do not 'face any special or unique danger to [their] life.'" App. 6. Nash and Koch appealed their case to the Second Circuit, which again affirmed this dismissal. They then appealed to the Supreme Court, where certiorari was granted on August 26, 2021.

SUMMARY OF ARGUMENT

This Court's past precedents, in conjunction with the strict and intermediate scrutiny tests, lead to the determination that the "May Issue" clauses found within New York State Laws §§265.01–04, §400.00 regarding the issuance of firearms is a violation of the Second Amendment, and is therefore unconstitutional. These laws bring us to the conclusion that they violate the Second in that they A: Violate the operative and prefatory clauses of the Amendment (by preventing the establishment of a militia, which is necessary for the security of a free state; and by infringing on the individual right to keep and bear arms, which is a fundamental right delegated within the Constitution itself); B: invalidate centuries of historical precedent that back the rights enshrined in the Second Amendment; C: fail to prove (scientifically or otherwise) any form of a government interest in which these laws could be justified; D: prove that the law is narrowly tailored in order to best achieve said interest; or E: prove that this law is the least restrictive means for achieving this interest. As a result of these failures, the State of New York unequivocally fails to legitimize the existence of these controversial laws and therefore provides clear reasoning to the Court as to why these statues are undeniably unconstitutional. Therefore, ruling for Petitioner follows precedent while also recognizing the Second Amendment's duty to protect both individual rights and liberties as well as the safety and security of the state.

FOREWARD

This section holds additional information and context for the discourse that takes place within the Argument.

Before delving into the nuances of this precedent supporting the right to keep and bear arms, we must first understand both the meaning behind the phrase "keep and bear arms" and the intent behind the second amendment itself. The text of the Second Amendment reads that "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." (US Const. amend. II). The text of the amendment establishes both the operative clause and the prefatory clause of the amendment, with "A well-regulated militia, being necessary to the security of a free State" serving as the prefatory clause and "the right of the people to keep and bear Arms shall not be infringed" serving as the operative clause.

These clauses clearly illustrate the intent behind the Second Amendment, and what it establishes as a result. In this case, the prefatory clause introduces the government interest of maintaining "the security of a free State", as well as the structure in which this interest will be maintained ("A well-regulated militia"). The operative clause, here, introduces the fundamental right in question, as well as what we as "the people" are required to uphold and protect ("the right of the people to keep and bear Arms shall not be infringed").

To understand the meaning of the term "arms", there is a greater amount of necessary historical context surrounding the literal meaning of these words, and how they are interpreted both in the past

and today. In "A New and Complete Law Dictionary (1771)" written by Timothy Cunningham, "arms" is defined as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." In this case, while "arms" does not directly refer to a traditional firearm in the text, a firearm as we know it would still fall under this definition; meaning that firearms do have legitimate historical standing and were recognized as fundamentally the same tools we refer to today. In the words of Supreme Court Justice Antonin Scalia in his opinion for *District of Columbia v. Heller*, "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding". District of Columbia v. Heller, (hereinafter *DC v. Heller,* or *Heller*) 554 U.S. 570 (2008).

As for the phrase "keep and bear arms"— in Noah Webster's American Dictionary of the English Language (1828), "keep" is defined as "[t]o hold; to retain in one's power or possession." "Bearing" arms, conversely, referred to carrying these arms on one's person rather than storing them in their home.

ARGUMENT

I. The history and tradition of the regulation of firearms in the United States supports petitioner.

Using past precedents to guide its analysis, this Court will find that a state's denial of a qualified individual's application for a concealed-carry permit for the purposes of self-defense is unconstitutional.

A. The court has recognized in the past that qualified individuals possess the right to keep and bear arms.

The second amendment protects the fundamental right of gun ownership for the purposes of establishing "A well-regulated militia" (US Const. amend. II). How far this right extends, however, has been a fiercely debated topic that has persisted throughout the history of this country. When we look back to historical precedent, it is evident that the right to keep and bear arms, both for the purposes of a militia and for self-defense, is one that historically has been protected, supported, and upheld throughout centuries of legal litigation.

In the eyes of the Petitioner, the Second Amendment protects the fundamental right of armed self-defense, for our nation, state, and people by militia and individuals. In the Supreme Court case *District of Columbia vs. Heller* (2008), Justice Scalia wrote that the Second Amendment could be rephrased as "Because a well-regulated Militia is necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed". By this, Scalia meant that while it is not directly stated, the Second Amendment inherently puts significant emphasis on

the right to keep and bear arms, specifically for the purposes of maintaining and upholding the security of the free state. The security of the free state, from this point of view, is dependent on this right for people to keep and bear arms; and without this emphasis on the right to keep and bear arms, our ability to ensure the security of the free state would be greatly impaired. Also in *Heller*, Scalia wrote that "It [being the second amendment] protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home". In writing this, Scalia links the individual right to keep and bear arms with the purpose of self-defense and establishes the idea that the possession and usage of arms for the purposes of self-defense falls under the jurisdiction of the second amendment; and is therefore constitutionally protected.

D.C. v. Heller established the precedent that "The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home." *D.C. v. Heller*, 554 U.S. 570 (2008). In inscribing the individual right to keep and bear arms "unconnected with service in a militia" and providing the example of "self-defense within the home", *Heller* strengthens this fundamental right by clearly solidifying the bounds in which it operates and ensuring that its meaning and purpose would be retained over time.

This is not to say, however, that the Second Amendment is unlimited in this regard, or that it delegates the right to bear arms to individuals whose access would come to the detriment or otherwise harm

of the people around them. In reserving this right for "traditionally lawful purposes", *Heller* ensures that it is limited to fulfill the basic governmental interests of public safety and promoting the wellbeing of society, while also maintaining and upholding access to individual rights and liberties. In dicta, *Heller* tentatively suggested a list of "presumptively lawful" regulations, including bans on the possession of firearms by felons and the mentally ill, bans on carrying firearms in "sensitive places" such as schools and government buildings, laws restricting the commercial sale of arms, bans on the concealed carry of firearms, and bans on weapons "not typically possessed by law-abiding citizens for lawful purposes."

Heller's interpretation of the Second Amendment was reaffirmed in *McDonald v. Chicago*, 561 U.S. 742 (2010), solidifying the Court's interpretation of the right to self-defense being encompassed under the Second Amendment. In *McDonald v. Chicago,* several lawsuits were filed against the city of Chicago in the aftermath of *Heller*, arguing that the common law produced by *Heller*'s decision rendered many arms regulations in the city of Chicago unconstitutional. It was clear that the second amendment was applicable to *Heller* because the law in question was under the jurisdiction of the federal government; however, the question of whether this interpretation was applicable to the states remained unanswered. *McDonald v. Chicago* not only upheld the conclusion arrived at in *Heller*, but also determined that this decision applied to the states as well, furthering this interpretation of the right of self-defense being secured under the Second Amendment.

B. History & Tradition also supports the right to keep and bear arms

Heller and *McDonald* are not the only Supreme Court cases to support the idea that qualified individuals possess the right to keep and bear arms. The case *United States v. Hayes*, 555 U.S. 415, (2009) (hereinafter *Hayes*) reinforced the precedent that individuals with domestic violence convictions could not legally own guns; strengthening existing protections for those who had been abused in a domestic violence situation by prohibiting their attackers from being able to legally purchase and possess firearms while within the United States. In doing so, *Hayes* affirms the precedent set by *Heller* that the Second Amendment is not an unlimited right free of restrictions and limitations. *Hayes* also supports the decisions made in *McDonald* and *Heller* by making certain that only *qualified* individuals, i.e. citizens who are law-abiding and who would likely use these arms for law-abiding purposes, can legally keep and bear arms.

Similarly, in *United States v. Cruikshank*, 92 U.S. 542 (1875) (hereinafter *Cruikshank*), the Court established that "[the Second Amendment] has no other effect than to restrict the powers of the national government." *Cruikshank*, 92 U.S. 542 (1875). In doing so, *Cruikshank* affirms the precedent set in *Heller* and *McDonald* in that the Second Amendment exists for the purposes of protecting the constituents against a tyrannical government overreach, and that the right to keep and bear arms is unequivocally necessary to uphold and protect the "Security of the free state".

II. Petitioner also prevails when looking at the questions using intermediate and strict scrutiny

By utilizing both the intermediate and strict tests for scrutiny, this Court will find that New York's May Issue policy will not pass either, illustrating a lack of constitutional support. For a law or policy to pass the test for intermediate scrutiny, they must adhere to the following prongs:

A. It must further an important government interest.

New York's law, rather than furthering the interest of the state, is in complete opposition. As found in the Second Amendment, the state's interest is "the Security of a free state," which is taken away when the right to personal defense with a firearm only exists inside the home, and the right to Security is lost outside the home.

B. It must do so by means that are substantially related to said interest.

There is no social science research that proves a direct causal relationship between New York's pistol permitting regimen and public safety. Therefore, it would be nearly impossible to prove a substantial relationship exists between New York's policy and the state's interest of security, along with the fact that, as shown by the unfulfillment of the first prong, the law does not even promote the state's interest.

If this Court should prefer to adhere to the guidance in *Heller*, it should note that it found that the right to bear arms is fundamental and should therefore turn to strict scrutiny as the instrument to assess the constitutionality of New York's firearms

regulations. Justice Scalia noted that: "By the time of the founding, the right to have arms had become fundamental for English subjects." See Malcolm 122–134. Blackstone, whose works, we have said, "constituted the preeminent authority on English law for the founding generation," Alden v. Maine, 527 U. S. 706, 715 (1999), cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen. See 1 Blackstone 136, 139–140 (1765). His description of it cannot possibly be thought to tie it to militia or military service. It was, he said, "the natural right of resistance and self-preservation," id., at 139, and "the right of having and using arms for self-preservation and defense," id., at 140; see also 3 id., at 2–4 (1768)."

We then proceed to analyze New York's "special need" requirement in concealed carry permitting using the prongs of strict scrutiny:

First, New York's law does not provide the fulfillment of a compelling state interest. *Heller* found the belief that arms keep us safe is deeply rooted in our history and tradition which has shown that said interest is the security of a free state. Taking away the right to bear firearms makes for the deprivation of self-defense for the people of the state.

Secondly, strict scrutiny requires that a policy be narrowly tailored to achieve the interest, meaning the law must be written to specifically fulfill only its intended goals. Many are victims of crimes committed by first-time offenders, though criminals do not give their victims a chance to prove a "special need" to a state official before committing a crime. This proves such that it should not exist for the other end where

the victim is now unable to defend themselves due to a law that disarms them.

Lastly, New York's law must be the least restrictive means for achieving the interest of the state. This is not the case for New York's law and has further withdrawn more of our rights as it would be less restrictive to have a Right-To-Carry "shall issue" regime as the majority of the states already do. The state of Minnesota has one of the lowest firearm mortality rates in the United States according to the Centers for Disease Control and Prevention, though they have a "shall issue" policy for licensing.

CONCLUSION

The precedents of the Court, along with the intermediate and strict scrutiny tests, give clear reasoning as to why prohibiting a law-abiding citizen from carrying a handgun outside the home for self-defense is unconstitutional. New York State cannot go against the principles outlined by the Framers, the fundamental rights outlined in our Constitution, and centuries of historical precedent and reasoning. This Court should strike down the unconstitutional statues found within the State of New York, and either replace them with a statute that abides by the law, principles, and precedent found within our country, or abandon these regulations entirely.

Respectfully submitted,

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