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/RESPONDENTS

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[12/14/21]

QUESTIONS PRESENTED

Whether the Second Amendment allows the government to prohibit a law-abiding person from carrying handguns outside the home for self- defense.

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SUMMARY OF ARGUMENT

In September 2014 Robert Nash and Brandon Koch both applied for a concealed carry license. The state found that they did not demonstrate special needs and thus lacked proper cause. Under New York law an applicant must demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession. This means that most New Yorkers cannot self-defend themselves when in threat or serious danger. We will first explain how the text of the Second Amendment secures the right for the people to keep and bear arms unrelated to a militia. Second, history confirms that the Second Amendment upholds the peoples pre-existing right to bear arms beyond the home. Third, the right should be a privilege protected under the privileges and immunities clause if it is not recognized as a right under the due process clause. Lastly, placing a de facto prohibition on concealed carry only allows

guns in the hands of criminals, and out of the hands of law-abiding citizens.

ARGUMENT

I. The text of the Second Amendment secures "the right of the people to keep and bear arms" untied to a militia, because Heller rules that the prefatory clause does not limit the operative clause.

The Second Amendment states, "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". This structure divided the amendment into two parts, the prefatory clause and the operative clause. Justice Scalia in the majority opinion of *District of Columbia v. Heller,* 554 U.S. 570 (2008) gave no attention to the prefatory clause holding that, "The Amendment's prefatory clause announces a purpose, but does not limit or expand the scope of the second part, the operative clause. The operative clause's text and history demonstrate that it connotes an individual right to keep and bear arms". The right of the

people to keep and bear arms is an individual right unconnected with the service of a militia.

The distinction between "keeping" and "bearing" arms makes clear that a law-abiding person reserves the right to "keep" a gun in their home, and "carry" a gun elsewhere. The Constitution was written using words best suitable for the general public to understand the contents meaning. To bear is defined as "to carry as a mark of authority" and keep as "to have in custody", Johnson, Samuel. *A Dictionary of the English Language*. 1755, 1773. The Founding Fathers showed no intent to define "keep and bear arms" as the right to carry an arm "from the bedroom to the kitchen." *Peruta v. California,* 137 S. Ct. 1995, 1998 (2017). It should already be implied by "keep" that a person shall possess the gun within their home, whichever room they choose too. With this understanding of the text, law- abiding people do reserve a Constitutional right to "carry" arms outside the bounds of the home.

II. History confirms that the fundamental values of the Second Amendment are to uphold the people's pre-existing right to bear arms beyond the home.

Even before this nation's founding, people reserved the right to carry arms outside the home. The 1328 Statute of Northampton, 2 Edw. 3 (Eng. 1328) is widely understood as limited to the carrying of "dangerous weapons and unusual weapons, in such a manner as will naturally cause a terror to the people". Northampton implies the right to keep and bear arms with moderate exceptions. In modern times this is seen when states ban arms in sensitive places to prevent causing terror to the people, such as a school, or even some states banning of open carry.

The English Bill of Rights codified our pre-existing right to carry arms. "[T]he subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law", 1 W. & M., c. 2, 7, in 3 Eng. Stat. at Large 441 (1689). It has long been recognized to be the predecessor to our Second Amendment right. Joseph Story.

Commentaries on the Constitution of the United States. 3 vols. Boston, 1833, §§ 1890–91, identifies the rights from the English right to our Second Amendment as "a similar provision". The English right did not strictly restrain the right to have arms connected to a militia nor did it prohibit carrying outside the home.

Even Washington, Adams, Jefferson and so forth all exercised this pre-existing right to carry arms well beyond the boundaries of the home. The sole reason we are afforded our Bill of Rights was to come to a compromise with the Anti-Federalists. Anti- Federalists feared a large central government would be too powerful stating that the Constitution did not single out their fundamental individual rights. Fundamental rights such as bearing arms for self-defense to law- abiding people.

III. This court's precedent establishes the Second Amendment extends beyond the home.

Heller recognizes the state's right to forbid arms in sensitive places. Justice Scalia specifically notes, “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings…”. With Heller's conclusion of the right “to possess and carry weapons in case of confrontation”, it is only logical to say the court applies the right to carry arms outside the home to non-sensitive places. You are less likely to face confrontation in a school setting which is a sensitive place, rather than walking the streets of Chicago.

McDonald v. City of Chicago, 561 U.S. 742 (2010) written two years after *Heller*, reaffirmed that “individual self-defense is ‘the central component’ of the Second Amendment right”. Blackstone’s Commentaries were able to process our deeply rooted history and assert that the right to keep and bear arms was one of the fundamental rights of

Englishmen. "..right of the subject,... is that of having arms for their defense, suitable to their condition and degree, and such as are allowed by law… and is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation". The fundamental right to keep and bear arms for the lawful purposes of self-defense is consistent with the analysis of Blackstone's work in *Heller* and *McDonald,* and should be upheld by this court.

Caetano v. Massachusetts, 136 S.Ct. 1027 (2016) strongly implies that by the Supreme Court striking down a law that prohibited stun guns outside the home, stun guns are protected in and outside the home.

IV. If this court does not wish to recognize the right to carry outside the home as a fundamental liberty under the due process clause, it should recognize the right as a privilege protected by the Fourteenth Amendment.

The privilege and immunities clause states that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." In

McDonald v. Chicago the court held that the Second Amendment right to keep and bear arms for self defense in the homes applied to the States. The court applied this through the Due Process clause in the Fourteenth Amendment. The court ruled that the right to keep a gun for self defense in the home is a substantive right but did not rule on whether carrying a gun outside the home is a fundamental liberty under the due process clause. If this court were to decide that it is not a fundamental liberty under due process, it is still a right that has been preserved for citizens. Therefore this court should determine that the right to keep and bear arms outside the home is a right reserved for the privileges and immunity clause.

The right to keep and bear arms has always been a fundamental right preserved for citizens. This can be dated all the way back to post-civil war. The court held in Dred Scott v. Sandford 19 How. 393 (1857) that slaves were not citizens and because of this they do not enjoy the “privileges and

immunities afforded to them under the constitution.” These privileges include the right to keep and bear arms. It was not until Reconstruction when African Americans were afforded the ability to keep and bear arms. During Reconstruction, the Civil Rights Act of 1866 was passed. It stated that all persons born in the United States were citizens. The act then proceeded to say that such citizens, of every race and color, . . . shall have the same right” along with the “ full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens.” This Act essentially granted slaves citizenship and then afforded them the same rights as white people, who were already deemed citizens. This included the fundamental right to keep and bear arms.

Following the passing of the Civil Rights Act of 1866, the Freedmen's Bureau Act(Act of July 16, 1866, ch. 200, §14, 14 Stat. 176.) was passed. The law granted citizens “full and equal benefit of all laws and proceedings concerning

personal liberty" and "personal security." While the respondents may want to argue that these laws were only passed to prevent racial discrimination, they are ignoring the text of these acts. The Freedmen Bureau Act and the Civil Rights Act both emphasized the constitutional right that they were granting to freed slaves. These laws emphasized the constitutional right for individuals to keep and bear arms. While these laws passed did help prevent discrimination, they also granted freed slaves, who were not considered citizens originally, the fundamental right to keep and bear arms,

It is clear from the passing of these two legislative acts and the commentary from those who passed it that the right to keep and bear guns outside the home is a right only given to citizens. Before the Civil War, slaves were not given the right to own guns, in fact they were penalized for it. Following the Civil War and Reconstruction, when they were deemed citizens, they were able to keep and bear arms for self-defense. This court must look at the history of the 2nd

amendment as it relates to citizenship. From there this court must realize how the 2nd amendment has always been a right for citizens and incorporate it into the Privileges and Immunities clause of the Fourteenth Amendment.

V. Prudential considerations suggest that placing a de facto prohibition on concealed carry only allows guns in the hands of criminals, and out of the hands of law-abiding citizens.

By placing a prohibition on concealed carry it will only prevent law-abiding citizens from obtaining guns. This leaves those citizens unprotected while criminals are able to get their hands on guns. Cesare Beccaria in his book titled "An Essay on Crimes and Punishment" stated that "Laws that forbid the carrying of arms ... disarm only those who are neither inclined nor determined to commit crimes. Such laws make things worse for the assaulted and better for the assailants; they serve rather to encourage than prevent homicides, for an unarmed man may be attacked with greater confidence than an armed one." Laws that prohibit the use of

concealed carry will only dissuade those who obey the law, making it much easier for them to fall victim to crimes. The right to self-defense is fundamental to the Nations scheme of ordered liberty and is deeply rooted in our history. It would be (....) for this court to deprive law abiding citizens one of their fundamental rights that essentially protects them. By "providing only a few people with the broad "proper cause" standard for obtaining a license, public safety (outside the home) is left defenseless."

We can date back all the way to the American Revolution. Samuel Adams, a key and influential part of the Revolution and founding of America, believed in the rights of the colonist's duty of self-preservation. The idea of self-preservation and self-defense were essential in developing the second amendment. By allowing this prohibition we are harming law abiding citizens and infringing on their right to self-defense. We would instead be empowering criminals by giving them the advantage. Those who obey the law will not

carry, leaving them defenseless for crimes such as robbery and murder.

CONCLUSION

Since the Second Amendment does not allow for the government to prohibit a law-abiding person from carrying handguns outside the home for self- defense, Petitioner prays this court will find in favor of the petitioners and reverse the lower courts ruling.

Respectfully submitted,

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