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

Whether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment.

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SUMMARY OF ARGUMENT

The Second Amendment states 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." However, when examining N.*Y. Penal Law §§ 265.01–04, 265.20(a)(3); N.Y Penal Law § 400.00*, it is clear that it violates the Second Amendment, as its "special need" requirement prevents it from being analyzed under any form of judicial scrutiny, strays from historical precedent and legal tradition of bearing arms in self-defense, and establishes a slippery slope that contradicts the precedent established in *Heller*.

ARGUMENT

I. The existence of the "special need" requirement causes *N.Y. Penal Law §§ 265.01–04, 265.20(a)(3)* to be unconstitutional as it cannot be examined by any form of judicial scrutiny.

The wording of the Second Amendment is plain - "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" - but yet is consistently debated. As the court has noted in

District of Columbia v. Heller and *McDonald v. City of Chicago*, the amendment has been socially accepted as a right given to the individual, not the state or nation. However, the dissenting opinion of *McDonald v. City of Chicago* raises a valid point that the states historically have been able to regulate firearms due to their purview of police powers. However, in that same vein, legislative restrictions on firearms can only be imposed under the pretense of "experimentation" (see *New State Ice, 285 U.S., at 311, 52 S.Ct. 371 (Brandeis, J., dissenting)*. "These measures cannot be "arbitrary, capricious or unreasonable" (see *Smith v. Robbins*); *N.Y. Penal Law §§ 265.01–04, 265.20(a)(3)* directly contradicts this experimental requirement by instituting a proper cause requirement.

Historically no firearm legislation has had any level of scrutiny higher than intermediate (see *Friedman*, see *Heller*, see *Miller*) and the courts have instead looked to other tests. Under every single form of analysis, *N.Y. Penal Law §§ 265.01–04, 265.20(a)(3)* is unconstitutional. *Friedman v. City of Highland Park* offers a different test for firearm legislation that falls out of traditional levels of scrutiny: if a law would be deemed constitutional in the eyes of the framers and still propels the spirit of self-defense, it is constitutional. In the late 18th-century, there would be no "special need" that citizens could demonstrate

beyond the need to protect property to justify needing a firearm. By restricting this right to self-defense, *N.Y. Penal Law §§ 265.01–04, 265.20(a)(3)* fails the test proffered by *Friedman*. In *U.S. v. Marzzarella*, a similar test to that of Heller was used which required the law(s) in question to be reviewed under multiple types of scrutiny; the more restrictive the law, the higher the judicial scrutiny. For *N.Y. Penal Law §§ 265.01–04, 265.20(a)(3)*, the efficacy of the law under a strict scrutiny review due to its extreme regulation is minimal at best. The law is so generic in defining what "probable cause" or "special need" is in relation to firearms that it is not nearly "narrowly tailored" enough to pass that level of review. No specific instances of what would fulfill the "special need" requirement are listed in *N.Y. Penal Law §§ 265.01–04, 265.20(a)(3)*, so, as written, the law is unconstitutionally vague as it limits as a constitutional right.

Even the lowest level of scrutiny, the rational basis test, would not be fulfilled as *N.Y. Penal Law §§ 265.01–04, 265.20(a)(3)* restricts a constitutional amendment, and as defined rational basis: "is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee

against double jeopardy, the right to counsel, or the right to keep and bear arms" See *United States v. Carolene Products Co*., sub-cited in *District of Columbia v. Heller*).

Although the court argued in the past that *N.Y. Penal Law§ 400.00* can fall under intermediate scrutiny and pass in *Kachalsky v. County of Westchester*, *N.Y. Penal Law §§ 265.01–04, 265.20(a)(3)* extra provision requiring "special need" to be demonstrated prevents it from falling under the lower level of scrutiny. New York State courts have defined this just cause as target practice, hunting, or self-defense (see *O'Connor v. Scarpino*, cited in *Kachalsky v. County of Westchester*); cause demonstrated by the plaintiffs. By restricting rights even further through this "special need" clause, the state forfeits the right to a lesser review as the restriction now goes beyond the generalization that *Heller* allows for; the general applicability that allows other legislation to be reviewed under intermediate scrutiny.

I. English common law tradition and American laws enacted in both the days of the founding fathers and the 19th-century firmly establish the right to bear arms in self-defense.

A. English common law established the right of the people to use arms for various purposes.

The right to bear arms was a foundational principle of English common law from its early onset. The primal instance of this explicit right is in the 1689 English Bill of Rights which states "[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).* However, as one 1843 parliament member once stated, "by the bill of rights, the right to carry arms for self-defence was not created, but declared as of old existence." *Hansard's Parliamentary Debates, ser. 3, 1151 (May 30, 1843) (M.J. O'Connell).* Thus, as a continuation of the English Bill of Rights, the Second Amendment merely codified what early Americans recognized as a preexisting right.

We can trace the existence of the English right to self-defense to the legendary King Alfred the Great who, always afraid of the possibility of invasion by Danish Viking raiders, initiated the formation of an English militia, which was founded on the idea that "all the freemen were to be armed, trained, and ready to fight to defend their local and national communities." *The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law*

Enforcement (2015). As part of this effort, Alfred vested new powers into the people and the sheriffs he assigned to keep the peace and protect the kingdom, in which English citizens were legally enabled and obliged to defend themselves and their property (self-defense), aid sheriffs in maintaining the peace when called upon (posse comitatus), pursue fleeing criminals (hue and cry), and conduct regular patrols (watch and ward). In order to properly fulfill these new duties, policies were enacted to ensure that citizens were supplied with weapons that they were "bound to keep" and "expert in the use of the arms they were obliged to possess… men were to practice first with longbow, [and] later the musket." *Id, 104 J. Crim. L. & Criminology at 788-89.* These pre-Norman, Anglo-Saxon traditions and institutions recorded as early as 878 AD are what *United States v. Miller (1939)* recognizes as the historical basis of the "well-regulated militia" clause of the Second Amendment.

While certain decrees like the Statute of Northampton of 1328 state that only "...no man great nor small, of what condition soever he be may come before the King's justices, or other of the King's ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices

or other ministers, nor in no part elsewhere" *2 Edw. 3, c. 3 (1328)*, it is widely established that this rule has no effect on English common law or the Second Amendment. As *Rogers v. Grewal, 140 S. Ct. 1865, 1869 (2020)* plainly states, "From the beginning, the scope of the Statute of Northampton was unclear… while [o]n its face, one clause of the statute could be read as a sweeping ban on the carrying of arms . . . both the history and enforcement of the statute reveal that it created a far more limited restriction." The Statute of Northampton was issued in a period of English history rife with political violence and domestic unrest and was aimed to quell these violent insurrections from occurring and not to inhibit the common man from bearing a weapon to defend himself. In fact, most at the time routinely carried the "most common arm, a knife" for a myriad of purposes, and knives were "necessarily available for self-defense in an emergency." *David B. Kopel, The First Century of Right to Arms Litigation, 14 Geo. J.L. & Pub. Pol'y 127, 134 (2016).* As the Statute of Northampton was hardly enforced in England at the time of its enactment, there is little reason as to why it should dictate the discussion surrounding American Second Amendment law today.

The totality of English common law tradition throughout its history clearly demonstrates the

protection of the right to bear arms, especially with regard to self-defense.

B. Colonial and Founding-Era American law affirmed and expanded the English right to arms.

The English common law tradition mentioned previously also had a significant impact on the Founding Fathers' interpretation of the right to bear arms as well. In order to best understand the Founders' interpretation and understanding of individual rights, we must turn to William Blackstone's *Commentaries on the Laws of England (1765)* in which he boils down fundamental English rights to three core principles: "the right of personal security, the right of personal liberty; and the right of private property." He goes on to elaborate, claiming that "other auxiliary subordinate rights of the subject—like the right to possess and carry arms—serve principally as barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property." *Id.* Blackstone's work was highly influential as "his work immediately became the great authority on English common law in both England and America" and "constituted the

preeminent authority on English law for the founding generation." *Alden v. Maine, 527 U.S. 706, 715 (1999).*

As a result, no American law during either the colonial or founding period outlawed the wielding of firearms. The strictest measures enacted during this period either prohibited the carry of weapons other than firearms (see *23 The Grants, Concessions, and Original Constitutions of the Province of New Jersey 289-90 (1758); Richard Lederer, Jr., Colonial American English 175 (1985))* or only banned the use of armaments to incite violence and unrest, not for peaceful self-defense (See *1699 N.H. Laws 1* and *1692 Mass. Laws No. 6, at 11-12).* If anything, many colonies and states required the use of firearms by law, a fact that *District of Columbia v. Heller* acknowledges ("[m]any colonial statutes required individual arms-bearing for public-safety reasons.")

This right to bear arms in their own defense, one ingrained in them by their status as Englishmen, was one of the foundational reasons for the American Revolution. The *Declaration of Independence (1776)* lists the presence of "Standing Armies without the Consent of our legislatures" and the threat that they impose on the colonists as one of the most significant grievances they have against the British crown and the *Massachusetts Declaration of Rights (1780)*

expresses the colonists' understanding that "the people have a right to keep and to bear arms for the common defense."

This sentiment was carried through after the Revolutionary War and made its way into the debates that occurred during the framing of the Constitution and thereafter; James Madison said "The ultimate authority … resides in the people alone. … [T]he advantages of being armed, which the Americans possess over the people of almost every other nation … forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of." in his *Federalist No. 46 (1788).* The unnamed author of *Anti-Federalist No. 28 (1788)* stated that "[A] well regulated militia, composed of the Yeomanry of the country, have ever been considered as the bulwark of a free people." Jefferson later declared that the "it is their [the people's] right and duty to be at all times armed," *Thomas Jefferson to Major John Cartwright, June 5, 1824, in 7 The Writings of Thomas Jefferson 356 (H.A. Washington ed., 1855)* while James Wilson declared that in the Pennsylvanian Constitution, "the great natural law of self-preservation" constitutes the "right of the citizens to bear arms in the defence of themselves." *The Works of the Honourable James Wilson 84 (1804)*, sentiments encapsulated by Chancellor Kent: "The right of

self-defense . . . is founded on the law of nature, and is not and cannot be superseded by the law of society." *Commentaries on American Law (1826).*

While influenced heavily by English tradition, the American Founding Fathers went even further and expanded the right to bear arms beyond the extent of their English forefathers. Thomas Cooley notes that the Second Amendment "was adopted with some modification and enlargement from the English Bill of Rights," *Thomas Cooley, The General Principles of Constitutional Law in the United States 270 (1880)* and as First Federal Congress Representative James Jackson once said, "every citizen was not only entitled to carry arms but also in duty bound to perfect himself in the use of them." *14 Documentary History of the First Federal Congress 95 (1995).*

And ultimately, the Founding Fathers' themselves enjoyed this liberty to carry arms in their everyday lives. John Adams took a hunting rifle with him to school (*Diary and Autobiography of John Adams 257-59 (1961))*, Patrick Henry carried a musket on his way to court (*Harlow Giles Unger, Lion of Liberty: Patrick Henry and the Call to a New Nation 30 (2010)),* and Thomas Jefferson holstered Turkish pistols in his carriage (*The Papers of Thomas Jefferson, Retirement Series 320-21 (2004)).*

Through this wealth of evidence, it is abundantly apparent that not only did the Founders continue the tradition of the English right to arms but expanded upon it, from merely *having* arms to *keeping and bearing* them as well (emphasis added).

C. 19th-Century American precedent further established this legal tradition and respected the bounds of the 2nd Amendment

Despite the clear historical tradition established by both English practice and the Founding Fathers, the first challenges to the 2nd Amendment came in 1813, where the states of Kentucky and Louisiana banned concealed carry. The Kentucky ban in particular eventually was contested all the way to the Kentucky Supreme Court which held in *Bliss v. Commonwealth 12 Ky. 90 (1822)* that "[I]n principle, there is no difference between a law prohibiting the wearing concealed arms, and a law forbidding the wearing such as are exposed; and if the former be unconstitutional, the latter must be so likewise." An Alabama state court case *State v. Reid 1 Ala. 612, 616 (1840),* which did uphold a concealed carry ban only did so on the basis that "the right to enact laws in regard to the manner in which arms shall be

borne…as may be dictated by the safety of the people and the advancement of public morals" and clearly stated that any "statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional." A Louisiana state case *State v. Chandler 5 La. Ann. 489, 490 (1850)* consider open carry to be protected by the Second Amendment, later cases such as *State v. Jumel 13 La. Ann. 399, 400 (1858)* interpreted the former's holding as only "prohibiting only a particular mode of bearing arms which is found dangerous to the peace of society."

The aforementioned 19th-century cases, all cited in *Heller*, concur with the overarching theme seen throughout English and American legal tradition: the right to bear arms is not to be hindered.

III. Under a pre-ratification review, the home and hearth requirement of *Heller* is not constitutionally applied, does not employ a proper definition of self-defense, and creates a slippery slope fallacy. Regardless of constitutionality, the requirement is still dicta.

A. The right to self-defense is inalienable and applies in all places at all times under a post-ratification review.

Under the purview of citizens at the time of ratification, defense, and the resulting idea of self-defense, are rights that must always be guaranteed by the government. *Heller*'s establishment of a time, place, and manner restriction on defense does not uphold the intention of the framers.

Under a pre-ratification definition, the right to defend oneself is inalienable. As referenced under the pseudonym Brutus in the *New York Journal*, as collected by *New York's Ratification of Constitution with Proposed Amendments (1788)*, "the right of enjoying and defending life… are of such a nature that they cannot be surrendered." Defense, in a general sense, was considered a power that the government could not infringe upon; self-defense, being an extension of that broader umbrella term, would therefore be the unregulable defending life of the individual, as discerned from the etymology of self and the prior analyzation of the right to protect.

The Second Amendment, as designed, is therefore meant to guarantee the right of protection as it is the only piece of the Constitutional body that deals with

the aforementioned rights of the physically endangered. Since *Heller* creates a time, place, and manner restriction on the Second Amendment through the use of a firearm for self-defense purposes being delegated to only the home, in a time where a perceived threat exists, and with only a weapon that could be easily utilized by the military (see *Caetano v. Massachusetts*), the intended right to self-defense that is meant to be protected by the government is not upheld. Under that analysis, *Heller*'s in-the-home restriction does not fall in line with constitutional intention and therefore should not apply in any regard.

Translating this idea into *N.Y. Penal Law§ 400.00*, self-defense would be a valid reason for owning and operating a firearm in a public capacity. The need to defend oneself at all times is something that cannot be restricted without going against constitutional aims, and therefore *N.Y. Penal Law§ 400.00*, if the *Heller* restriction did not apply, reaches beyond the boundaries between individual and state discerned from the history behind the Second Amendment.

B. Under a post-ratification definition, the home and hearth requirement overly burdens the historically accepted right of self-defense.

Self-defense as applied in *Heller* does not match a post-ratification definition of self-defense implied in multiple historical documents. As a result, the very same opinion found in *Heller* that influenced the Respondent's merit brief is unfounded.

District of Columbia v. Heller established the precedent that the Second Amendment has specific restrictions in and outside the home. More specifically, a:

"ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense."

Under a textual analysis of *Heller*, a self-defense exception to carrying and holding a firearm only applies to the home in the case of immediate self-defense. However, the meaning of self-defense is not established in *Heller*. Looking to a post-ratification definition of self-defense, it is the combination of protecting oneself from an oncoming threat as elaborated on in *Commentaries on American Law* and the *Constitution of Pennsylvania*; self-defense lives within the grounds of self-preservation as the ability to defend oneself from a perceived threat is a natural right. Under that definition, self-defense is only restricted to not be

excessive to the point where it goes beyond protecting and inflicts harm, and it must explicitly relate to only the protection of one's own body, regardless of spatial location.

Respondent's Merit Brief is correct in the assertion that:

"Like all constitutional rights, the right to carry firearms for self-defense is "not unlimited," id. at 595, but rather incorporates the limitations embedded within the "historical understanding of the scope of the right," id. at 625."

Heller attributing self-defense to be only the protection of oneself in one's homestead does not fall within the confines of the prior historical definition. Instead, it is solely a restrictor that amalgamates personal and property interests: one can only protect themselves if they are tangentially protecting the physical space in which they reside. Under this definition, self-defense, as it pertains to *Heller*, is not "self-defense" in the sense of the word. Instead, it is a form of property protection. The limitation imposed is nowhere near what self-defense has been historically assumed to constitute, and therefore incapable of being a Second Amendment restriction under *Heller*'s own definition of self-defense limitations that

Respondent employs the justify *N.Y. Penal Law §§ 265.01–04, 265.20(a)(3).*

C. Heller's home & hearth requirement creates a slippery slope fallacy.

The Second Amendment guarantees the right to bear arms to all people; *Heller*'s home and hearth requirement categorically excludes those with property interests, thereby making that requirement and the fruit of that ruling at conflict with the amendment itself.

In the U.S, there are roughly 600,000 homeless men and women, with 39% of those being unsheltered (*U.S. Housing and Department of Urban Development 2020 Census*). Specifically, the state of New York has the second-highest homeless population, with roughly 466 people per 100,000 citizens. *Heller*'s home requirement excludes all these naturalized or U.S.-born citizens.

The nearly 600,000 homeless people living in the U.S. have no property interest in any form. As defined, the home and hearth requirement requires an interest or ownership in the property to exist before a firearm can be used in self-defense. By instituting a property right for something guaranteed by the Constitution, a similar situation of categorical ignorance akin to that

of the pre-Civil War era is established: people are denied certain rights that establish a higher quality of life via discrimination stemming from factors they cannot control.

The "in the home" requirement for self-defense firearms does discriminate against the homeless population and therefore is against the Equal Protection Clause of the Fourteenth Amendment. As a result, that limitation on the Second Amendment is unconstitutional, and future rulings hinged on the existence of a requirement - such as *Kachalsky v. County of Westchester* that the Respondent uses to justify *N.Y. Penal Law §§ 265.01–04, 265.20(a)(3)* that restricts firearm usage in public - is based on an inherently unconstitutional and inapplicable line of reasoning.

This also creates a slippery slope fallacy with sweeping restrictions on the right to bear arms. If the property requirement cannot apply, other broad restrictions on firearm ownership in all public spaces cannot apply either. If there is no sweeping restriction, firearms can be carried for the purposes of self-defense. This does not necessarily mean they can be carried in all places at all times. The state still has full purview to restrict aspects of firearms, but as established in *Jackson v. City of San Francisco* the state only has the right to establish restrictions that

curb local gun violence and the relative danger of firearms. *N.Y. Penal Law §§ 265.01–04, 265.20(a)(3)* does neither; instead, it exists solely to prevent gun ownership, not lethality. The fallacy, therefore, fractures the law in question, and, as written, *N.Y. Penal Law §§ 265.01–04, 265.20(a)(3)* establishes excessive restrictions that are not logically supported via *Heller* and the rulings it inspired.

D. The home and hearth language in *Heller* is non-binding dicta.

Dicta, as defined by the tenth circuit in *In re Tuttle, 291 F.3d 1238, 1242 (10th Cir. 2002)*, is:

"statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case at hand."

In the court opinion for *Heller*, any mention of restrictions on where firearms can and cannot be held is dicta under that definition. In *Heller*, the only issue presented to the court was whether the law implemented by D.C. requiring unlicensed firearms to be made inoperable in the home violated the Second Amendment. Ownership of firearms was not contested in this case, rather, the restrictions placed on said ownership.

Generating a broad ruling that firearms, for the use of self-defense, can only be present in the home is not tangentially related to the question of if those additional restrictions were constitutional. With all this considered, the home and hearth rule would be considered dicta under this very definition that was affirmed in *Humphrey's Executor v. United States 295 US 602 (1935)* and *Central Virginia Community College v. Katz, 546 U.S. 356, 363 (2006)*; therefore, the requirement does not have to be adhered to in any regard.

CONCLUSION

The precedents established by this court regarding this matter are apparent: the government *cannot* infringe on the right to bear arms in self-defense, as per the Second Amendment. The historical precedent established all the way from English common law tradition to American legal policies enacted from the founding onwards adamantly defend the right to bear arms in self-defense, one that *Heller* established in this court's precedent.

If this court were to overturn existing precedent and go against centuries of well-established legal tradition, it would create a slippery slope in the issue of self-defense, in a time at which violent crime

proves to be a pertinent threat to many, especially for traditionally marginalized minorities (See *Brief of amici curiae, The DC Project Foundation; Operation Blazing Sword—Pink Pistols; Jews for the Preservation of Firearms Ownership in support of Petitioners*) and hindering individuals from bearing weapons may, in turn, do more harm than good. As Cesare Beccaria puts it: "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." *Cesare Beccaria, An Essay on Crimes and Punishments (1764).*

Therefore, it is our contention that *N.Y. Penal Law §§ 265.01–04, 265.20(a)(3); N.Y Penal Law § 400.00* is in clear violation of the Second Amendment and should be deemed unconstitutional by this court.

Respectfully submitted,

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