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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QUESTIONS PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

STATEMENT OF THE CASE

Brendan Koch of New York applied for a concealed-carry license in September of 2014, motivated by his extensive experience with firearm use, as well as his desire for self-defense. Koch's application for a permit was denied because he did not demonstrate a special need for a firearm, and did not demonstrate proper cause to carry one. "Proper cause" is required by N.Y. Penal Law §§ 265.01–04, 265.20(a)(3); N.Y Penal Law § 400.00 in order to obtain a concealed-carry license. Also in September of 2014, Robert Nash of New York applied for a concealed-carry license. Nash had participated in a gun-training course, and was motivated to carry a gun for fear of robberies that had been occurring in his neighborhood. Like Koch's application, Nash's permit application was denied. Neither Nash nor Koch had any criminal history. Both sued Justice Richard McNally and Superintendent of New York State Policy, Kevin P. Bruen in their official capacities. Koch and Nash are joined in their suit by the New York State Rifle and Pistol Association (NYSRPA), representing all residents of the state of New York who cannot obtain a concealed-carry permit because they cannot demonstrate a special need for a firearm, and therefore do not have "proper cause" to carry one.

SUMMARY OF ARGUMENT

The Constitution enshrines a generalized right to bear arms outside of the home for self defense, unrelated to military activity. Legal scholars and lawmakers have interpreted the second amendment to be an individual right as long as the second amendment has existed, and at the time the Constitution was written, to 'bear arms' meant to take them outside of the home, and Supreme Court precedent codifies the above interpretation of the second amendment. The New York statute infringes upon this right to bear arms by making it illegal for ordinary citizens to exercise it at all, and also fails to pass any level of scrutiny that this Court has used to analyze laws that regulate enumerated rights due to it's overly broad nature and failure to further the state's interest in public safety. Furthermore, there is no precedent that supports the passage of a total ban on bearing firearms for the average citizen and second amendment restrictions that have traditionally been allowed to persist, are all extremely different from, and substantially less restrictive than the law at bar today.

ARGUMENT

I. The Constitution enshrines a generalized right to bear arms for self defense unrelated to military activity which the New York law overtly violates.

A. The history surrounding the second amendment indicates that it confers a right that extends beyond the home and is unconnected with military service.

The right to keep and/or bear arms has historically both extended beyond simple gun ownership, and has been unconnected to either militia or military service. There is a long history of the right to keep and bear arms extending to the common people. The English Bill of Rights of 1689 inspired the Bill of Rights, the 8th amendment being taken wholesale from it. In the English Bill of Rights, Protestants were given the right to "arms for their defense," meaning the document that inspired the Bill of Rights directly referred to the right to arms in terms of self defense, not military or militia service. In 1716, the Disarming Act was passed by the British Parliament. It forbade people living in specific areas of Scotland from having "in his or their custody, use, or bear, broad sword or target, poignard, whinger, or durk, side pistol, gun, or other warlike weapon" without permission. This act did not prevent people from wielding weapons as part of a militia; it prevented them from possessing or using them at all. Blacksone's commentaries, which were widely read in the colonies and influenced the founders, show that the idea of keeping arms for personal defense was present before the Constitution was even written.

He wrote, in 1765, of the right of Englishmen to "[have] arms for their defence" only in terms of personal protection, not militia service. George Tucker wrote, only 15 years after the Constitution was ratified, that "The right of self defense is the first law of nature … Wherever standing armies are kept up, and the right of the people to keep and bear arms is … prohibited, liberty, if not already annihilated, is on the brink of destruction." His commentary shows that he, as a legal scholar, and later a federal judge, interpreted the right to keep and bear arms as primarily a right to tools of self defense. It also shows that "standing armies" and "the people" were considered completely separate groups, at odds with each other, not the same entity, as respondent claims. In 1828, Chief Justice Parker of the Massachusetts Supreme Court held in *Commonwealth v. Blanding* that "The liberty of the press was to be unrestrained, but he who used it was to be responsible in cases of its abuse; like the right to keep fire arms, which does not protect him who uses them for annoyance or destruction." His analogy would have made no sense if the right to keep (and bear) arms was not "unrestrained," and couldn't be exercised for "individual purposes," such as self defense, as held in *Heller*. In the three decades following the ratification of the Constitution, nine states ratified second amendment analogues. Kentucky's, Ohio's, Indiana's, and Missouri's all protected the right of their people to "bear arms in defence of themselves and the State." Similarly, Mississippi's, Connecticut's, and Alabama's all protected the right of their people to "right to bear arms in defence of himself and the State." Tennessee's guaranteed "that the free men of this State have a right to keep and to bear arms for their common defence," and Maine's guaranteed "every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned." In seven out of the nine state constitutions, the right to keep and/or bear arms was explicitly an individual right. The founder's contemporaries clearly

understood the second amendment to protect an individual right. In a 1866 joint congressional report, the Joint Comm. on Reconstruction said "seizing all fire-arms found in the hands of the freemen … is in clear and direct violation of their personal rights as guaranteed by the Constitution of the United States, which declares that 'the right of the people to keep and bear arms shall not be infringed.' The freedmen … need [arms] to kill game for subsistence, and to protect their crops from destruction by birds and animals." In the view of the Joint Comm. On Reconstruction, freedmen's Constitutional rights were not being violated because they were being prevented from bearing arms in a militia, their rights were being violated because they could not use arms to hunt and protect crops. The interpretation of the right to bear arms as an individual right, unrelated to service in a militia, arose immediately after the ratification of the Constitution and continued until *Heller*.

At the time of the writing of the Constitution, to bear arms meant to bring outside of the home, and the Constitution was immediately interpreted as such. Samuel Johnson's Dictionary of the English Language, published in 1773, defined 'bear' as "[t]o carry ... [s]o we say, to bear arms in a coat," and Noah Webster's American Dictionary of the English Language defined it as "[t]o wear ... as, to bear a sword, ... to bear arms in a coat" in 1828. 'Bearing arms' during the writing of the Constitution was clearly an activity separate from keeping, and was most often done outside of the home, as coats are not often worn indoors. George Tucker also wrote "the right to bear arms is recognized and secured in the Constitution itself … In many parts of the United States, a man no more thinks of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side." When speaking about the right to bear arms only 15 years after the ratification of the Constitution, a legal scholar spoke explicitly

and only of leaving the house with the arms of the time, rifles and muskets.

B. This Court's legal precedent codifies our interpretation of the second amendment.

This Court has set the conclusive precedent that the right of the people to keep and bear arms is unrelated to militia service and extends beyond the home in a multitude of cases. The most notable case is *District of Columbia v. Heller*. This Court held that "The [prefatory clause] does not limit the [operative clause] …, but rather announces a purpose. The Amendment could be rephrased, 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." (internal quotation marks omitted) And there is "a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans," not just those part of or eligible to be in a militia, and "the inherent right of self-defense has been central to the Second Amendment right." As ruled in *United States v. Verdugo-Urquidez,* and cited in *Heller*, "The … phrase 'the people' seems to be a term of art used in select parts of the Constitution … [and], 'the people' refers to a class of persons who are part of a national community." The second amendment confers the right to keep and bear arms upon the people, not militia members, for the purposes of self defense, not militia service.

Heller also held that to 'keep arms' and to 'bear arms' are two separate actions, both of which the people have a right to. This Court ruled that "the most natural reading of 'keep Arms' in the Second Amendment is to 'have weapons,'" and that to 'bear arms' is to "wear, bear, or carry … upon the person or in the clothing or in a pocket, for the purpose … of being armed and ready for offensive or defensive action in a case of conflict with another person." The people of the United States have the right

to both keep arms inside their homes and bear arms outside of their homes.

This Court has continued to uphold the conclusions of *Heller*. In *McDonald v. Chicago*, this Court held that "individual self-defense is "the central component" of the Second Amendment right."

C. The New York law infringes upon that right as it makes it illegal for ordinary citizens to exercise it at all.

The second amendment guarantees the right to keep and bear arms to the people, and the New York Statute prevents the vast majority of the people from exercising their Constitutional right. The statute reads, in part, "No license shall be issued or renewed pursuant to this section except by the licensing officer, and then only after investigation and finding that all statements in a proper application for a license are true … of good moral character … [and] proper cause exists for the issuance [of a license]. To have proper cause for the issuance of a license, a person "must 'demonstrate a special need for self protection distinguishable from that of the general community or of persons engaged in the same profession," and "generalized desire to carry a concealed weapon to protect one's person and property does not constitute 'proper cause.'" New York City had 468 murders last year, whereas many towns in New York had no murders. A person living in Lake Placid and a person living in New York City would have very different levels of day-to-day danger, and yet without any special need, neither of them may acquire a license to carry a gun. The New York Statute does not simply prevent felons and the mentally ill from carrying guns, which is permissible under the second amendment, as held in *Heller* "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill." The New

York statute prevents all but a special class who have a "special need for self protection" from carrying guns, and the vast majority of 'the people' who are protected under the second amendment, such as Mr. Nash, cannot bear arms, in a clear violation of the second amendment and the Constitution.

II. The New York law fails to pass any level of scrutiny that this Court may use to evaluate the extent to which a legislature may regulate constitutional rights.

A. In keeping with *D.C v. Heller*, The New York law must be analyzed using strict or intermediate scrutiny.

In *Heller* this Court held that only strict and intermediate scrutiny can be used to analyze "legislation [that] appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments." The *Heller* court declared that rational basis scrutiny cannot be "used to evaluate the extent to which a legislature may regulate a specific, enumerated right" and that "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate Constitutional prohibitions on irrational laws, and would have no effect." As the New York law, through imposing in practice what amounts to a total ban on the carrying of firearms for the average law abiding citizen, is blatantly within the second amendment's prohibition on government infringement of the right to bear arms, only strict and intermediate scrutiny can be used to determine its Constitutionality. The New York law fails to satisfy both of these as it cannot be found to further a state

interest in public safety, nor can it be found to be narrowly tailored to serving that end.

B. The New York law's denying of law-abiding citizens the ability to exercise their second amendment rights cannot be found to further a governmental interest in public safety, as empirical data overwhelmingly suggests that individuals with licenses to carry are not a significant threat to public safety.

Statistically it is not the individuals who obtain lawful permits that commit violent crimes, it's the ones that don't. According to the Violence Policy Center, America's 18 million concealed-carry permit holders accounted for 801 firearm-related homicides over a 15-year span … roughly 0.7% of all firearm-related homicides during that time. Furthermore, data from an expansive study conducted by David P Kopel (Pretend "Gun-Free" School Zones: A Deadly Legal Fiction), found that licensees commit violent crimes at extremely low rates, and in the vast majority of states, at lower rates than the general public. For example, the study found 161 charges involving handguns in Michigan out of approximately 190,000 licensees in 2007 and 20008, while the general population produced 1,018 violent crimes per 190,000 people during that same time frame. The study also found that even in Texas, a state with some of the least restrictive gun laws in the country, licensees are 79% less likely to be convicted of a crime than non-licensees. Generally there were also extremely low rates of firearm misconduct among licensees with Ohio, for example, having only 639 license revocations out of 142,732 permanent licenses issued from 2004 to 2009, Louisiana having a firearm misuse rate of just over 1 in 1,000 licensees, Minnesota having one handgun crime per 1,423 licensees, and Florida having only 27 firearm crimes per 100,000 licenses. The statistics also

overwhelmingly suggest that transitioning from a highly restrictive licensing system to a less restrictive one does not cause a significant increase in violent crime. According to the Violence Policy Center (VPC), since 2008, the year that *Heller* struck down D.C's total ban on handguns, there have only been 12 victims of an unlawful homicide that was perpetrated by an individual with a concealed-carry license. When that number is compared to the 1,804 total victims of homicides that have occured in D.C since 2008, according to the D.C Metropolitan Police department's year end crime data, we find that individuals with concealed-carry permits have been responsible for .0066%, or roughly two-thirds of 1%, of deaths from homicide in D.C since *Heller*.

Furthermore, according to the VPC , since 2017, the year that a decision concluding that "the individual right to carry common firearms beyond the home … falls within the core of the Second Amendment" in *Wrenn v. District of Columbia*, there has not been a single unlawful death caused by a permit holder in Washington, D.C.

Not only does the data overwhelmingly support the assertion that licensees do not increase rates of violent crime, it also suggests that having laws that leave an avenue to obtain weapons actually reduces it. As recognized in *McDonald v. City of Chicago*, after a Chicago law that essentially instituted a total ban on handguns was passed, "Chicago Police department statistics… reveal that the city's handgun murder rate has actually increased…" and that " Chicago residents now face one of the highest murder rates in the country and rates of other violent crimes that exceed the average in comparable cities" as a result.

All this data supports one conclusion: that not only are licensed individuals not a threat to public safety, but the presence of laws that prevent people from exercising their second amendment rights are. Therefore the New York law, which outright prevents

the average person from obtaining a license to carry, cannot be found to further a state interest in public safety.

C. The New York law is not narrowly tailored as, in seeking to prevent a dangerous minority of people from bearing handguns, it prevents every average, law-abiding citizen from bearing one as well, thereby imposing a restriction that is just as broad as the one imposed by the law struck down by *D.C v. Heller.*

This Court has repeatedly established that in order to satisfy intermediate scrutiny a law must be narrowly tailored to serve a substantial governmental interest." This was held most recently in *Americans for Prosperity Foundation v. Bonta*, but it has been held numerous times in earlier cases such as *Packingham v. North Carolina*, 137 S.Ct. 1730, 1736 (2017) (intermediate scrutiny requires narrow tailoring), and *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (same). New York's law cannot be found to satisfy the narrow tailoring requirement for the same reason that the law in *Heller* wasn't: in its attempt to prevent the small minority of people who would abuse handguns from doing so, it prevents the average law-abiding citizen from using them in a Constitutionally protected way. In *Heller* this Court acknowledged that the second amendment states that the right to "keep and bear arms" belongs to "the people" and defined "the people" as the " class of persons who are part of [the] national community or who have otherwise developed sufficient connection with this country to be considered part of that community." In other words, *Heller* interpreted "the people" as it is used in the second amendment to refer to the average citizen of the United States outright stating that the second amendment confers a right that "belongs to all Americans". Specifically stating that their opinion did not cast doubt on longstanding prohibitions on the possession of firearms by small and specific subsects of people like felons and the

mentally ill, this Court struck down a law that imposed a de facto ban on the possession of handguns because it prevented the average member of the "national community," from exercising their their second amendment right to keep arms. Just like the D.C law imposed a total ban for the average person on the Constitutionally protected activity of keeping handguns within the home, the New York law imposes a total ban on the Constitutionally protected activity of bearing handguns outside the home.

This Court in *D.C v. Heller* held that "on the basis of both text and history, the Second Amendment conferred an individual right to keep and to bear arms." They did not say that it conferred a right to keep and a lesser right to bear, they did not say that it conferred a core right to keep and a periphery right to bear, they said that it conferred a right to keep and bear arms; the implication of this being that the right to keep and the right to bear are equal rights that are subject to the same protections from infringement. As such, just like the law in *Heller* was considered to not have "Constitutional muster under any level of scrutiny" due to its total ban on the keeping of handguns for the average citizen being overbroad, the New York law at bar should also be considered to be overbroad due to its total ban on the bearing of arms and also not have any "Constitutional muster".

III. There is no historical tradition or Supreme Court precedent for a law that completely prevents the average person from exercising a Constitutional right that is currently respected by this Court.

A. There is no court precedent that supports the passage of a total ban on bearing firearms for the average citizen.

Very few laws have come close to imposing the level of restriction that the New York law places on the second amendment, and the few laws that did were overturned by lower

courts. One such law was the one at bar in *Nunn* v. *State*, which, similarly to the New York law's total ban on the carrying of handguns, attempted to impose a prohibition on the open carrying of pistols. It was overturned by the Georgia Supreme Court on the grounds that it placed too great of a burden on individuals' second amendment rights.
Furthermore, in *Andrews* v. *State*, the Tennessee Supreme Court likewise held that a statute that forbade openly carrying a pistol "publicly or privately, without regard to time or place, or circumstances," violated the state Constitutional provision (which the court equated with the Second Amendment). The court held that to be so even though it acknowledged that, like the New York law at bar in this case, the statute did not restrict the carrying of other types of guns in the same way. In contrast to the lack of precedent in support of total prohibition laws there is plenty of Supreme Court precedent that opposes total prohibition laws. In addition to the previously referenced *Heller*, this Court in *State* v. *Reid* held that "A statute which, under the pretense 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 defense, would be clearly unconstitutional." Laws like the New York statute at bar, which impose total prohibitions on the exercising of second amendment rights by definition amount to a destruction of second amendment rights and are therefore unconstitutional pursuant to *Reid*. While there is no historical precedent or tradition that supports laws that impose total prohibitions on the exercising of second amendment rights, the laws that impose restrictions that have been allowed to persist are all extremely different from and substantially less restrictive than the law at bar today.

B. The Surety laws, sensitive places restrictions, and prohibitions of the keeping and bearing of arms for

small subsects of people, all second amendment restrictions that have traditionally been allowed to persist, are extremely different from and substantially less restrictive than the law at bar today.

Under the surety laws courts were empowered to demand a surety, a fine, from individuals who abused their second amendment rights and restrict their right to carry arms if the surety was not paid. This is very different from the law at bar today as under the early "surety" laws, "everyone started out with robust carrying rights," *Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017), and a surety could be demanded only upon proof of "reasonable cause" to believe someone was going to abuse that right. Even then, those who had a surety claim sustained against them were free to continue carrying arms, so long as they paid the surety. In contrast, under the New York law at bar today, every average citizen begins with no carrying rights outside the home and must demonstrate an atypical need to carry that distinguishes them from their law-abiding peers. Furthermore, the surety laws only imposed a burden on individuals who had proven themselves a potential danger to society, and gave them an avenue to alleviate that burden through paying the surety. In contrast, the New York law by definition imposes a burden on the overwhelming majority of law abiding people who have done nothing that indicates that they would pose a danger to society if given firearms and provides them with no avenue to alleviate that burden so long as they remain average citizens.

Similarly, sensitive laws and laws that impose prohibitions on the bearing of arms for certain people, like felons and the mentally ill, are also very different from the New York law as their restriction only applies to a narrow subset of people. The prohibitions imposed by sensitive place laws only apply to the narrow subset of people who wish to enter a small and defined

location such as a school. Similarly, laws that prevent people with traits that would make them a danger to society if entrusted with firearms only apply to the narrow subset of people who possess those traits. In contrast, the New York law prohibits the majority of people in the entire state of New York from bearing arms outside of their home. Due to this massive discrepancy of scope between the New York law and the types of second amendment restrictions that have traditionally been upheld, the law at bar cannot be considered to be analogous to them and therefore cannot rest on them as a historical basis for its existence.

CONCLUSION

In conclusion, this Court should reverse the second circuit's decision and find in favor of the petitioner. Both tradition and Supreme Court precedent recognizes that the second amendment confers a generalized right to bear arms outside of the home for self defense, unrelated to military activity. The New York statute infringes upon this right to bear arms by making it illegal for ordinary citizens to exercise it at all. This infringement fails to pass any level of scrutiny that this Court has used to analyze laws that regulate enumerated rights due to it's overly broad nature and failure to further the state's interest in public safety. Furthermore, there is no precedent that supports the passage of a total ban on bearing firearms for the average citizen and second amendment restrictions that have traditionally been allowed to persist, are all extremely different from, and substantially less restrictive than the law at bar today. Not only does this law possess no basis in precedent, it also has no basis in tradition.

Prayer

For these reasons, we pray that this court reverses the decision of the lower court and rules in favor of the Petitioner.

Respectfully submitted,

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