

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 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.

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SUMMARY OF CASE

IN SEPTEMBER 2014, ROBERT NASH AND BRANDON KOCH OF NEW YORK APPLIED FOR A CONCEALED CARRY LICENSE. NASH WAS MOTIVATED TO CARRY A GUN BECAUSE OF RECENT ROBBERIES IN HIS NEIGHBORHOOD. HE HAD RECENTLY PARTICIPATED IN A GUN-TRAINING COURSE. KOCH EXPLAINED THAT SELF-DEFENSE AND EXTENSIVE FIREARM EXPERIENCE MOTIVATED HIS DESIRE TO CARRY A GUN. BOTH NASH AND KOCH HAD NO CRIMINAL HISTORY. HOWEVER, BOTH LICENSES WERE DENIED. THE GOVERNMENT CONCLUDED THAT BOTH NASH AND KOCH LISTED NO REASON OTHER THAN SELF-DEFENSE, AND THUS LACKED PROPER CAUSE.

NASH AND KOCH SUED TWO NEW YORK STATE OFFICIALS: SUPERINTENDENT OF NEW YORK STATE POLICE, KEVIN P. BRUEN, AND JUSTICE RICHARD McNALLY. NEW YORK STATE RIFLE AND PISTOL ASSOCIATION JOINED THIS LAWSUIT ON BEHALF OF ALL NEW YORKERS WHO CANNOT CARRY A GUN BECAUSE THEY LACK THE REQUISITE PROPER CAUSE.

SUMMARY OF ARGUMENT

The case presented revolves around the issue of whether or not the State's denial of Petitioner's applications for concealed-carry licenses for self-defense violated the Second Amendment. It is the respondent's contention that the State's denial of application does not violate the Second Amendment as similar prohibitions on the Amendment have been in effect at all relevant points in time, analogous limitations are seen in other Amendments, and the Petitioner's remedy does not align with the interest they assert.

ARGUMENT

I. In all relevant points in time, States had similar prohibitions on the Second Amendment's protections in effect.

According to the Second Amendment of the Constitution, “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.” Laws and regulations similar to New York’s licensing law have been apparent in time after the adoption of the Second Amendment. Such laws have also been in effect during the passing of the Fourteenth Amendment and this Court’s incorporation of the Second Amendment in *McDonald v. City of Chicago, 561 U.S. 742 (2010)*. These three points in time illustrate the consistency of such laws limiting Second Amendment rights through various interpretations of the Amendment. The consistency in history solidifies the reliability of New York’s law as it is cohesive to the Second Amendment and how it has been incorporated throughout all relevant points in time.

A. Close in time to the Second Amendment’s passage.

Three years after the Second Amendment was passed, the true intent of the Amendment was revealed through George Washington’s response to the Whiskey Rebellion of 1794. This rebellion entailed the stockpiling of firearms by citizens in retaliation to the newly passed tax on whiskey in 1791.

George Washington responded by sending 12,000 troops to put an end to the rebellion without firing a single shot; he was successful. This represents the founding fathers' intention of regulating gun use which parallels the framers' intention to restrict the use of firearms to only the militia. In doing so, the misuse of firearms would be significantly lower as only the "well-regulated" militia would have the right to keep and bear arms.

Additionally, Federalist No. 29, written by Alexander Hamilton, illustrates the framers' intention of granting only the militia express Second Amendment rights as "in times of insurrection, or invasion, it would be natural and proper that the militia of a neighboring State should be marched into another, to resist a common enemy, or to guard the republic against the violence of faction or sedition." Hamilton's paper extensively demonstrates the need for regulation of firearms in groups and the Second Amendment intent to provide military service, not individual use of the benefit or self-defense.

Both Federalist No. 29 and Washington's response to the Whiskey Rebellion establish that firearms were intended to be regulated and used only in groups, such as militia, to prevent violence rather than to instigate it.

B. Close in time to the Fourteenth Amendment's passage.

The Fourteenth Amendment of the Constitution states that "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The purpose of this amendment was to provide equal protection to all citizens after slavery had been abolished during the Reconstruction Era. The Fourteenth Amendment's relevance to today's case concerns Equal Protection Clause in conjunction with the Second Amendment rights.

Proximate in time to the Fourteenth Amendment's passing, there were multiple regulations in States' constitutions distinguishing the right to firearms inside the home from the lack of such a right outside of one's property. For example, Florida, Texas, Colorado, and Georgia constitutions all specified, in text, how there is a general right to bear arms; however, the state legislature has the power to regulate the extent of the right. " (*Fla. Const. of 1885, art. I, § 20. La. Const. of 1879, art. III. Ga. Const. of 1877, art.*

I, § 22. Tex. Const. of 1876, Art. I, § 23) This power vested into the States by the Tenth Amendment (“*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*”) aligns with Hamilton’s concerns in *Federalist No. 78* in 1788. As he stated, “To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them.” The purposes of this paper demonstrate the general necessity of state regulation over certain topics, such as ownership of firearms, in order for there to be consistency and reliability when setting a new precedent. New York’s gun regulation law is consistent with this idea, as it upholds the numerous ideals of our Founding Fathers and the framers of the Constitution.

Additionally, the true purpose of the Second Amendment is revealed through Article I, Section 8, Clause 15&16 as they illustrate the use of firearms for the defense of territory, and not for the defense of oneself. Both clauses highlight the constant need to “for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;” and for “organizing, arming, and disciplining, the Militia, as they may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the

Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.” The First Article in its entirety emphasizes the framer’s intention of the right to bear arms within the militia or for the purposes of protecting territory.

C. Close in time to McDonald’s ruling

McDonald v. City of Chicago is this Court’s most recent and compelling case pertaining to the incorporation of the Second Amendment within a home. Near the time of *McDonald’s* ruling, California passed a law that banned the manufacturing and sale of a specific type of caliber firearm in 2005. Additionally in 2008, President Bush passed the *National Instant Criminal Background Check Improvement Act* which held that those who are mentally ill could not obtain a license for firearms. Both instances demonstrate how States have continued to use rights granted by the Tenth Amendment which have been previously upheld in *McDonald* and *Heller*. In 2005, California depicted how States are able to regulate the purchasing, manufacturing, and use of firearms. The instance in 2008 represents the continuous right that States have been granted to manage who can and cannot obtain a license for a firearm.

To this day, there are 8 states who still enforce the requirement of licensing for concealed carry. These states include California, Connecticut, Hawaii, Florida, Delaware, Maryland, Massachusetts, and New

Jersey. All of these states have similar laws to New York's requiring "good" or "proper cause" for the issuance of a license to concealed carry.

Both the laws made close in time to *McDonald's* holding and the States' modern regulations show how New York's law is consistent with preceding regulations in all relevant points in time pertaining to the incorporation of the Second Amendment. Regulations on Amendments such as these are in the constitutional provisions that the Tenth Amendment grants States' legislatures.

II. Other Amendments contain similar limitations to New York's licensing restrictions.

Multiple Amendments in the Constitution have restrictions and limitations set on how each can be applied to a law-abiding citizen. The First, Fifth, and Fourth Amendments demonstrate how this Court has continuously accepted a limitation on rights granted in other amendments as long as it meets the respective scrutiny analysis under the Equal Protection and Due Process Clauses, with which New York's licensing restrictions are in alignment with such requirements.

A. First Amendment regulations on the right to freedom of speech.

The First Amendment was ratified in 1791 and states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to

assemble, and to petition the Government for a redress of grievances.” Protections listed in the First Amendment text have been consistently and indisputably upheld in this court, however, there are various regulations set on the types of speech and location in which these certain types can be delivered. For example, this court in *Brandenburg* held that states are able to restrict speech that "is directed to inciting or producing imminent lawless action, and is likely to incite or produce such action."*Brandenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d. 430 (1969)* *Brandenburg* is a clear example of one instance where this court regulated the freedom of speech that the First Amendment intends to protect. Additionally, this court held in *Near* that statements made that include "malicious, scandalous and defamatory newspaper, magazine or other periodical," are considered unprotected under the First Amendment, unless the publisher can prove "the truth was published with good motives and for justifiable ends." *Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931)* *Near* presents this court with another instance where the First Amendment protections are denied in certain types of speech and shows how amendment regulations are within States' rights.

Both precedents set by this court exemplify how States have consistently regulated the protection of First Amendment rights and how limitations on such rights can

be made as long as they pass under the respective level of scrutiny. In First Amendment cases, strict scrutiny analysis applies as each limitation must be viewpoint and content-neutral to be narrowly tailored to the government's interest in upholding the Equal Protection Clause under the Fourteenth Amendment.

B. The Fifth Amendment includes rights that must be invoked before they are fully protected.

The Fifth Amendment was ratified in 1791 and states, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Although the protections listed in the Fifth Amendment right have been widely recognized, similarly to the First Amendment, there are also recognized restrictions on the ways these rights are protected.

One of the rights guaranteed in the Fifth Amendment is the right to an attorney in

which an individual must invoke. Although the Amendment itself guarantees the right to an attorney, the right was limited so that it required an individual to act upon and ask for counsel during their trial process. By speaking to law enforcement about the facts of a case without an attorney being present, the rights guaranteed in the Fifth Amendment are waived.

Additionally, this court held in *Salina* that the Fifth Amendment's privilege against self-incrimination does not extend to defendants who simply decide to remain mute during questioning. This requirement ensures that the government is put on notice when a defendant intends to claim this privilege and allows the government to either argue that the testimony is not self-incriminating or offer immunity. *Salinas v. Texas, 570 U.S. 178 (2013)* To prevent the expansion of the rights listed in the Fifth Amendment, this Court set restrictions to when the rights apply.

Furthermore, the Fifth Amendment must be invoked in certain situations to limit the rights guaranteed in the amendment and to prevent people from extrapolating the rights guaranteed in the Fifth Amendment. An individual can only invoke the Fifth Amendment in response to a communication that is compelled, such as through a subpoena or other legal process. Additionally, the communication must be testimonial in nature and the testimony must be self-incriminating

for the Fifth Amendment to be invoked. The limitations on the Fifth Amendment itself exemplify how states have a compelling interest in preventing the rights guaranteed in the Constitution from becoming too powerful.

C. Fourth Amendment Limitation on citizen's protections

The Fourth Amendment was also ratified in 1791 and states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." Although the rights listed in the Fourth Amendment have widely been recognized in many different instances, the Court has set many limitations that restrict the rights guaranteed in the Fourth Amendment.

The Court in *Peyton* held that without exigent circumstances, the Fourth Amendment would prohibit the police from making a warrantless and nonconsensual entry into a suspect's home to make an arrest. *Peyton v. New York*, 445 U.S. 573 (1980) Furthermore, the Court defined exigent circumstance as follows: "probable cause to arrest and a reasonable belief that the suspect is in his home, exigent circumstances for a warrantless and nonconsensual entry into a suspect's home to effect this arrest exists when a reasonably prudent man in the circumstances would be warranted in the belief that delaying arrest to

secure the warrant would pose a significant risk of danger to life or property, of the escape of the suspect, or of the destruction of evidence.” *Peyton* clearly limits the rights listed in the Fourth Amendment to specific instances in which exigent circumstances do not exist. Although the reasonable expectation of privacy listed in the Fourth Amendment has been recognized as a crucial right of the people, the Court set restrictions that would prevent the Fourth Amendment right to apply in all cases.

The Court in *Cady* also provided another limitation set on the Fourth Amendment. Articulating the community caretaking exception to the search warrant requirement, this Court described certain functions of the police that have nothing to do with the detection or investigation of crimes. *Cady v. Dombrowski*, 413 U.S. 433 (1973) This Court turned to the case of *Harris* which used the justification of safeguarding the owner’s property for the initial intrusion into the vehicle and the case in *Cooper*, justifying the search in that case as a means for guaranteeing the safety of the custodians. *Cooper v. California*, 386 U.S. 58, 59 (1967) *Harris v. United States*, 390 U.S. 234 (1968) *Cady*, following the precedent that *Cooper* and *Harris* set, presented this Court with another instance where the Fourth Amendment protections are denied in certain circumstances and shows how Amendment regulations are still within States’ rights. This Court clearly

demonstrates that different circumstances in each individual case affect the application of the rights listed in the Amendment. Therefore the Court set limitations that regulate the protection of the Fourth Amendment.

The Framers of the Fourth Amendment have given us only the general standard of “unreasonableness” as a guide in determining whether searches and seizures meet the standard of that Amendment in those cases where a warrant is not required. By providing several exceptions to the warrant requirement, States have exercised their right to regulate the Fourth Amendment.

The First, Fourth, and Fifth Amendments all have limitations over the rights that are guaranteed in each respective Amendments. The limitations set on these rights meet the respective scrutiny analysis under the Equal Protection and Due Process Clauses, and as New York’s licensing restrictions are in alignment with such requirements it is reasonable to have restrictions on the Second Amendment, the right to keep and bear arms.

III. Petitioner’s remedy is inconsistent with the proposed interest of a safer society

Petitioner’s remedy claims to support the proposed interest of self-defense and a safer society. However, according to various studies, it is clear that the proposed remedy is inconsistent with the

Petitioner's interests. By having fewer guns and strict gun laws, it has been shown that there are less gun violence and a substantially reduced number of gun deaths.

A. Studies show that increased gun ownership results in increased gun violence

According to Giffords Law Center, it is indubitable that fewer guns and stronger gun laws are directly correlated to fewer deaths and gun violence. Giffords Law Center gives each state a letter grading to determine whether or not the state's respective gun laws have an impact on the number of cases for gun violence. The states with the most restrictive gun laws are given the highest grading of an A or a B while in contrast, the states with the least restrictive gun laws are given a grading of anywhere from a C to an F. California has the strongest gun laws in the United States and studies have shown that it has the seventh-lowest gun death rate in the country. Additionally, when looking at states that ranked an F in the annual gun law scorecard, 90% exceeded the national average gun death rate per 100 thousand. There is an undeniable correlation between gun violence and gun laws as gun death rates increase as grades worsen for each state.

Miller Matthew also supports this conclusion in his book, *Reducing Gun Violence in America*, (Johns Hopkins University Press), that gun availability greatly increases the risk

of violent death in America because many acts of gun violence involve spontaneous altercations that result in death or serious injury when a gun is readily available. He additionally articulates the fact that there is a substantial gap in federal gun control laws. Papers by Webster et al. and Wintemute provide evidence of state laws that fill this gap by having stricter gun regulating laws and requiring universal background checks reduce diversions of guns to criminals. By regulating the number of guns and prohibiting firearm purchase and possession by high-risk groups decreases violence.

Furthermore, according to the Harvard Injury Control Center, from Hemenway, David, *American Journal of Lifestyle Medicine*, it was concluded again that there are more gun deaths in areas with more guns and that the differences are substantial. Citing data from the Centers for Disease Control(CDC), “between 2003 and 2007, the typical resident from the 15 states with the most guns (WY, MT, AK, SD, AR, WV, AL, ID, MS, ND, KY, TN, LA, MO, and VT) was 6 times more likely to die in a gun accident than a typical resident from the 6 states with the fewest guns (HI, NJ, MA, RI, CT, and NY).”

When analyzing the trend between gun violence and the number of guns, it is evident that there’s a correlation between the two in that more guns lead to increased gun violence.

B. The common law of self-defense and holding of *District of Columbia v. Heller* provides guidance over when self-defense should be applied.

The common law principle of the “Castle Doctrine” states that individuals have the right to use reasonable force, including deadly force, to protect themselves against an intruder in their home. This principle has been codified and expanded by state legislatures but has remained in the scope of one’s home unless there were stricter laws implemented outside the home.

However, the Castle Doctrine has been recognized by individual states to apply outside of the home. For example, Pennsylvania’s law, amended in 2011, distinguishes the use of deadly force outside one’s home or vehicle. It provides that in such locations one cannot use deadly force unless he has a reasonable belief of imminent death or injury, and either he or she cannot retreat in safety or the attacker displays or uses a lethal weapon. Idaho’s law, passed in 2018, expanded the definition of justifiable homicide to include not only defending one’s home against an intruder but also defending one’s place of employment or an occupied vehicle.

It’s crucial to note that the issue of self-defense inside the home and outside the home is an issue of state rights, not an

individual right. The right to self-defense applies in the home as an individual right, recognized by the Federal government, while when applied outside of the home, states are the sole decision-makers in granting that right to individuals. These laws passed by the state granted individuals the right to self-defense outside of the home and these rights were not guaranteed by the Federal government unless a further law was passed by the States.

CONCLUSION

In conclusion, this Court should affirm. Alternatively, the Court should remand for further factual development.

Respectfully submitted,

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