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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[Dec. 15, 2021]

## QUESTION 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

### Case Law



### Constitutional Provisions

**Statutes, Laws, & Codes**



**Other Authorities**

## JURISDICTION

The Second Circuit issued its judgement on August 26, 2020. The petition for certiorari was timely filed on December 17, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

7

## Constitutional Provisions

U.S Constitution Amendments I, II, IV, V, and XIV

## FACTS OF THE CASE

The individual petitioners of this case, Branden Koch and Robert Nash, were both denied concealed carry licenses after submitting the necessary documentation and monetary deposit in September of 2014.

N.Y Penal Law § 400.00 requires that "a proper cause exists for the issuance thereof" for a concealed carry license regardless of occupation or place. Sensitive zones such as schools, government buildings, and the entirety of New York City are not included in such a license. The "applications shall be made and renewed, in the case of a license to carry or possess a pistol or revolver, to the licensing officer in the city or county, as the case may be, where the applicant resides, is principally employed…" For Koch and Nash, that meant Rensselaer County.

Nash was motivated by a recent string of robberies in his neighborhood, and with a background in gun training, he was a strong candidate to receive a general concealed carry license as he had both a reason and a dependable history. Nash had no criminal history. However, he was denied a license on the basis that he did not prove a special need or unique threat in order to warrant proper cause.

Koch cited his concern for self defense and his extensive firearm usage and training in his application for a concealed carry license. He had no criminal history. Koch was denied for the same reason as Nash; he did not provide a special need that met the proper cause requirement.

Both petitioners had previously gained a license to carry arms outside of the house for hunting and target shooting (known as a restricted license), however, they applied for this license with the desire to carry outside the home in self defense as well. Having proved not only that they are law-abiding citizens, trust-worthy of previous carrying licenses, but also that they have the necessary training and experience to skillfully and carefully wield firearms, these models of American virtue were still denied their constitutional right.

Koch and Nash are both members of the New York Pistol and Rifle Association, which joined in the lawsuit against Kevin Bruen and Richard McNally Jr. in their official capacities. The three filed jointly in the U.S District Court for the Northern District of New York, where it was dismissed based on the 2nd Circuit case *Kachalsky v. County of Westchester*. They then appealed to the 2nd Circuit Court of Appeals, which affirmed the lower court decision, after which

this case was submitted for review to the Supreme Court.

## SUMMARY OF ARGUMENT

District of Columbia v. Heller established a right to bear arms in self defense within the home, and we ask the Court to acknowledge the legal precedent, historical text, and modern understanding indicate that right exists outside of the home as well under the Second Amendment. There is no precedent heretofore that N.Y. Penal Law § 400.00 could require a "proper cause," excluding regular self-defense, to exist for the issuance of a handgun license. N.Y. Penal Law § 400.00 is unconstitutional under strict scrutiny as it is neither narrowly tailored nor does it have a compelling purpose. This law creates a standard of licensing that is excessively restrictive and subjective to the biases of judges. More narrowly tailored laws directed with the same compelling purpose exist in 37 other states. N.Y. Penal Law § 400.00 is unconstitutional under intermediate scrutiny as it lacks a substantial relationship with an important government purpose. The purpose of public safety in this instance unnecessarily undermines the value of equality. The respondent's arguments fail on the premise of lacking historical precedent, constitutional support, and failing to prove that New York Penal Law §400.00 is constitutional under any degree of scrutiny. A ruling in favor of the Respondents would result in the extreme limitation of private citizen's liberties, whereas a ruling for the Petitioners would allow private citizens to access their Constitutional rights while still allowing reasonable regulation by the government.

## ARGUMENT

### I. N.Y Penal Law § 400.00 is unconstitutional.

#### A. Heller sets the precedent to use Text, Tradition, and History to determine the constitutionality as related to the Second Amendment.

The Court established precedent in *District of Columbia v. Heller* to rely on historical text to interpret the verbiage and meaning of the Second Amendment. It would be inconsistent with the Court's precedent to judge this case in any other way.

In Heller, the Court recognized that a "well-regulated militia" was intended as a prefatory clause to the operative section of the Second Amendment and that the right of the people "unambiguously refer[s] to individual rights" given textual understanding of similar terminology within the Constitution (see First Amendment's Assembly-and-Petition Clause and Fourth Amendment's Search-and-Seizure Clause).

The function of a militia during the Founding era was to ensure the ability of the common citizen to defend themselves and their community against any threat that arised. Every able bodied man within an age range was eligible to participate in a militia, with no restrictions on who could carry except for felons, the mentally ill, and the youth. In order to properly

participate in a militia, there is an implied ability to carry arms outside of the home in defense of themselves and their community. There was no requirement to have a fear or threat greater than any other citizen to utilize this right.

Acknowledging *United States v. Miller*, the Second Amendment applies only to weapons with a reasonable relationship to the preservation of a militia, essentially including all military grade firearms. There is no doubt that the handgun is a firearm in use within the military, both in the United State and worldwide. Precedent given in Heller confirmed there cannot be a total ban of the possession and usage of handguns.

The Second Amendment unequivocally declares the people's individual right to defend themselves both in and out of the home. During the late 18th century and early 19th century, nine state constitutional provisions specifically enshrined the right to bear arms "in defense of themselves and the state." The Pennsylvania Constitution of 1776 and the Virginia Constitution of 1777 used that exact language, clearly indicating that historical text supports the understanding that the Second Amendment protects the use of arms in self defense outside of the home. Heller has already confirmed that the Second Amendment protects an individual right to carry firearms in self defense inside the home and alluded to a larger Second Amendment right as it "guarantee[s] the individual right to possess and

carry weapons in case of confrontation." There is no rational argument to assume that the Second Amendment only applies to the home, as this is to completely remove it from the right of self defense described in Heller and McDonald. Indeed, there is more often a need for self defense outside of the home rather than inside, both in historical context and modern times. Early 19th century Americans often faced dangerous situations such as animal or hostile individuals outside of their home and therefore carried a loaded firearm with them. Nowadays, there is still danger outside of the home, even with a larger police presence, which strengthens the fact that self defense remains necessary, and therefore so is the right to bear arms outside of the home. Around 50% of murders and 40% of assault charges occur outside of the home. These are certainly substantial percentages and warrant a fear and need for self defense outside of the home. Additionally, the majority of robberies occur outside of the home, with residential robberies only accounting for only 16.5% of all robberies in 2019 (FBI 2019 UCR Report). Several Circuit courts have agreed that there is an established right to carry arms in self defense outside of the home [see *Moore v. Madigan, Wrenn v. District of Columbia*]; we are asking the Court to undeniably declare so.

The heart of the Second Amendment is the phrase "to keep and bear Arms." Samuel Johnson's Dictionary of the English Language, written in 1773, defines arms as "Weapons of offence, or armour of defence." The Court has elaborated on this definition

in Heller to include "all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." Noah Webster's American Dictionary of the English Language published in 1828 (hereinafter Webster) defined to keep primarily as "to hold; to retain in one's power or possession," especially for means of "security or preservation." Furthermore, Webster's definition established the meaning of to bear as "to support; to sustain, to carry, etc." It is impossible to ignore the distinction between the two verbs. In order to comprehend the proper definition of bear, it is essential to place the word within the context of arms. It is ludicrous to argue that the Second Amendment included the words "bear" with the simple intent of allowing Americans to carry firearms around their home. The act of bearing implies that the right to carry arms, and therefore the right to use them in self defense, extends outside of the home. Heller declared that the Second Amendment intended specifically that to bear entailed "carrying for a particular purpose - confrontation." Confrontation does not merely happen inside the home.

The American legislature has a tradition of regulating military grade weapons and restricting who can own a gun. However, the New York law does neither, as it is entirely unspecific in who its licensing regime affects. On a federal level, the first gun control law was the National Firearms Act of 1934 which banned access to fully automatic firearms, sawed-off shotguns and silencers. There should be a limit of what military grade weapons are available to

the common public - there is no tradition of American citizens using grenades, rocket-launchers, or bazookas. There is a general understanding that unusual firearms and firearms that pose an exorbitant danger to the public are not needed for the preservation of a militia, and therefore are not protected under the Second Amendment. Handguns do not meet the criteria for extraordinarily dangerous or unusual, as 72% of gun owners own a handgun (Pew Research). The Gun Control Act of 1968 officially prohibited arms sales to felons and the mentally ill, creating clear boundaries of what reasoning is demanded to ban entire categories of people from utilizing a constitutional right. These acts show that large societal consensus was and remains needed to place restrictions on an important right such as the Second Amendment. A 2015 Gallup poll shows that 56% of Americans would feel safer if more people were able to carry concealed, compared to 41% who would feel less safe. Not only is there societal consensus, but with Heller, there is a legal understanding that restrictions to the Second Amendment cannot be overarching or arbitrary. History demands that restrictions be based upon general consensus and legal precedent, of which the New York law has neither. Clearly, this law is in violation of the Second Amendment and must be declared unconstitutional through analysis of text, tradition and history of the Second Amendment.

**B. N.Y. Penal Law §400.00 is unconstitutional under strict scrutiny.**

If the Court utilizes strict scrutiny as opposed to text, history, and tradition to decide the outcome of this case, they will still find that New York Penal Law §400.00 is unconstitutional. Under strict scrutiny, the burden is on the respondents to prove that the law they are defending both has a compelling purpose and is as narrowly tailored as possible to achieve that purpose. The law only needs to fail on one of these premises to be unconstitutional, and in this situation it fails on both.

New York Penal Law §400.00 lacks compelling purpose. New York has no compelling purpose in regards to gun control that differs from the other 49 states in the United States of America. Gun violence exists in all 50 states, creating a universal compelling purpose to combat gun violence throughout the United States of America. While the same compelling purpose exists throughout the country, the law New York created to address this problem is much less narrowly tailored than other effective laws created by other states.

New York Penal Law §400.00 fails on the premise of being narrowly tailored as the law affects a broad subset of the population by arbitrarily denying them access to their Second Amendment rights, despite the fact that less restrictive but equally effective methods of gun control exist. The implementation of this law also clearly violates the Fourteenth Amendment which states that no state shall, "deny to any person within its jurisdiction the equal protection of the laws." New York Penal Law §400.00 (2)(f) states that there is a right to "have and carry concealed, without

regard to employment or place of possession, by any person when proper cause exists for the issuance thereof." This means that law-abiding citizens need a judge, county sheriff, or other approved magistrate depending on the county they live in to approve that they have a "proper cause" that sets them apart from their fellow law-abiding peers in order to obtain a permit to carry concealed. New York courts have interpreted "proper cause" to mean "a legitimate reason, a circumstance or combination of circumstances justifying the granting of a privilege" and that an individual needs to "demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." This process allows some people to access their Second Amendment rights while denying the privilege to many of their peers, which shows that New York is clearly not providing the people within its jurisdiction "equal protection of the laws" as the Fourteenth Amendment requires.

The whims and biases of a judge decide the fate of a law-abiding citizens' constitutionally enumerated Second Amendment right to "keep and bear arms." In *Kachalsky v. County of Westchester,* one plaintiff was a transgender women who was denied a New York concealed carry handgun permit simply because she did not face a larger threat than the entirety of all transgender people, who have become increased victims of violence as tracked by the Human Rights Campaign. The New York law has a disparate impact on minority communities who face higher risk of violence because individuals requesting licenses will be denied based on the fact that their demographic as a whole is simply at a higher crime risk. The

subjective manner by which licenses are permitted blatantly violates the Fourteenth Amendment's requirement that all residents of a state be treated equally under the law. There is no compelling purpose that New York can claim to have that justifies such a broad restriction of people's constitutional rights. While New York attempts to portray this law as specific to each individual, in reality the law forces the magistrates to pigeonhole citizens into singular demographics, which allows and even encourages both conscious and subconscious discrimination.

Following the COVID-19 pandemic, there was a 48% increase in concealed carry licenses compared to 2016. From 2020 to 2021, the amount increased by 10.5%. Washington, Tennessee, Texas, North Dakota, Oklahoma, North Carolina, Louisiana, Indiana, Florida, Connecticut, and Arizona have all experienced rising percentages of females with concealed carry licenses. Additionally, Oklahoma, Texas, and North Carolina tracked the racial percentage of concealed carry license holders in the years 2015 to 2020/21, and found a higher increase in African Americans, Native Americans, and Asian Americans as compared to Caucasians (Crime Prevention Research Center). As more and more minorioties attempt to exercise their Second Amendment right, N.Y Penal Law §400.00 allows for the possibility of disparate racial and gender discrimination as the law is applied unfairly across different counties and by different magistrates. The Constitution applies to all individuals in the United States of America, yet New York Penal Law §400.00 denies individuals a constitutionally enumerated

right in a process that invites discrimination, whether intential or not. There should not be exceptions in order to use a Second Amendment right, there should be narrow restrictions on small and targeted groups. Currently, the overly broad restriction resulted in only around 60% of civilians being approved for a concealed carry permit (Guns to Carry). That means 40% of New York gun owners are denied access to their Second Amendment right for no reason other than a singular official's opinion that they do not have a greater threat than their peers. The New York Penal Law §400.00 can in no way count as narrowly tailored when it is impeding upon the Second and Fourteenth Amendment rights of people across ages, races, genders, and socio-economic conditions.

Alternative measures of gun control used by other states have been proven effective at their goal of regulating concealed and open carry permits while being much more narrowly tailored than N.Y. Penal Law §400.00. One of the most widespread and effective examples are the 37 states that use "shall issue" laws. "Shall issue" laws ensure that if an individual is able to meet an objective set of criteria (such as a background check and proof of training) as required by the law, they receive a permit to carry, although states maintain discretion between concealed or open carry. This prevents a judge or authority from being able to deny a citizen access to their Second Amendment right based on personal bias. "Shall issue" laws still work in the favor of public safety as individuals must meet the universal standards set by their state, they simply eliminate personal bias from the issuing process. "Shall issue"

laws are narrowly tailored as they are designed to uphold public safety in a manner that doesn't leave room to discriminate against specific demographics or individuals. On the contrary, New York's use of "may issue" licensing provides room for judges and other authorities to deny an individual access to their Second Amendment right to "keep and bear Arms" on the premise of not having an abnormal need to carry a gun or due to personal bias. This subjective manner of regulation is by no means narrowly tailored, as the existence and functionality of "shall issue" laws proves that less restrictive but equally effective ways of managing guns exist. Comparing Chicago, which is located in a shall issue state, and New York City, both had had decreasing crime rates in the past decades. In fact, between 2017 and 2018, the Illinois Uniform Crime Report showed a higher decrease (5.2%) in total crime than New York did that year (4.6%). Both Chicago and New York City have reputations as high crime cities, yet both are decreasing in crime rates. Public safety can be achieved without the restriction of constitutional rights.

As demonstrated by the previously mentioned effectiveness of less restrictive "shall issue" laws, the New York law does not address this universal compelling purpose in the most narrowly tailored manner possible. As New York has no unique compelling purpose it needs to address, there is no justifiable reason for their laws on concealed carry permits to be excessively restrictive and subject to bias in comparison to other laws that have been created to address the same compelling purpose.

The law the respondents are defending is not narrowly tailored to achieve a compelling purpose. In order for a law to be constitutional it must achieve both of these components, and this law fails to meet either. Therefore, New York Penal Law §400.00 is indubitably unconstitutional.

### C. N.Y. Penal Law 400.00 is unconstitutional under intermediate scrutiny.

If the court decides to use intermediate scrutiny to determine the outcome of this case, the court must still rule in favor of the petitioners as the respondents lack an important government objective and there is no substantial relationship between their objective and the action they are taking to reach it.

The important government objective of public safety that is being claimed by the respondents pales in comparison to the more important principle of equality that the United States of America was founded on. New York Penal Law §400.00 undermines the principle of equality that is essential to the preservation of our country as a whole. It is unacceptable for a state to claim to work towards the goal of safety while blatantly violating the Second and Fourteenth Amendments of the Constitution. The Fourteenth Amendment includes the requirement that no state shall, "deny to any person within its jurisdiction the equal protection of the laws," but N.Y. Penal Law provides authorities with the jurisdiction to decide if an individual is able to access their Second Amendment right to "keep and

bear arms" based on their own whims and biases. This method of gun control strips individuals of their constitutionally enumerated right to have the same protection of the law as their peers. N.Y. Penal Law §400.00 impedes upon individuals' Fourteenth Amendment rights despite the fact that alternative methods of gun control that are equally effective exist. Any claim New York makes of having an "important government purpose" is irrelevant, as the 37 states that utilize "shall issue" permitting have proven that the government purpose of regulating guns and promoting public safety can be obtained in a manner that promotes equality instead of working against it.

N.Y. Penal Law §400.00 also fails on the premise that there is no evidence to support a substantial relationship between concealed carry permits and crime rates. On the contrary, there is much more data that proves the opposite. For the past two decades, both the homicide and violent crime rates have been steadily declining, while the percentage of Americans with a concealed carry license grows exponentially, from 1.3% in 1988 to 8.3% in 2020 (Crime Prevention Research Center). The majority of gun violence is caused by illegal guns, which are not affected by the N.Y. law. Law-abiding citizens are suffering due to the erroneous belief that legal guns are a cause of gun violence.

Under intermediate scrutiny, the burden is on the respondents to prove that their law has both an important government purpose and a substantial relationship with the purpose it is meant to accomplish. If a law fails to meet either of these

requirements it is unconstitutional, and in this situation N.Y. Penal Law §400.00 fails to meet both, which proves it is clearly unconstitutional.

## II. Respondents' Arguments Fail

Respondent's arguments regarding previous history and tradition are invalid due to the erroneous belief that the Second Amendment did not apply to the states. *City of Chicago v. McDonald* rectified this mistake and clearly established under the Due Process Clause the application of the Second Amendment to the states. Early New York gun regulation related only to the licensing of minors and prohibition of "dangerous and unusual" firearms (The New York Justice by John Dunlap). This type of long-standing regulation is well within the reasonable scope of the Second Amendment. The regulation expanded only in 1911 with the Sullivan Law to include the licensing of all persons who carried a "pistol, revolver, or any other firearm." and was amended in 1913 to first create discretionary licensing. This law is far too recent to be considered the history and tradition needed to interpret the Second Amendment. The law stated the magistrate could issue a license for at home possession if he was "satisfied of the good moral character of the applicant" and "no other good cause exist[ed to deny it]." The Sullivan Law began the New York tradition that a license to conceal carry in public was only granted if "proper cause exists for the issuance." Additionally, as the current law evolved from the

Sullivan Law, there is weak historical precedent notwithstanding the Sullivan Law, which evolved directly into the current law and therefore should not be considered historical precedent.

The respondent's use of the Statue of Northampton in 1328 as the first recorded law regarding any type of gun control is also invalid to this case. The Statue of Northampton declared that none but the King's servants could "ride armed by night nor by day." While the respondent's may point to this as historical precedent to support their argument, they are simply mistaken. The Statue of Northampton should be viewed as a motivator for why the American Constitution enshrines the right to keep and bear arms in the Second Amendment, as a safeguard against governmental tyranny by ensuring the ability of the individual to act against threats to themselves and their community. Furthermore, the Statute heavily implies that such regulation is on hostile bearing of arms, rather than typical peaceful carrying. Concealed carry licenses protect an individual's right to peacefully carry outside of the home without disturbing the greater public. The open carrying of firearms may cause more distress to the public, which is why states have the ability to determine which type of carrying works best for their population.

The respondent's case is a gross imbalance of public interest and individual liberties. New York's interest in lowering gun violence and crime rates does not override the need for equal application of the law. There is no consistency within New York's system, as decisions are made by state court judges

and police commissioners, rather than by having a standard set of requirements in order to obtain a license. The alternative, "shall issue" licensing, is utilized in 37 states, many of which have large metropolitan areas similar to New York City. The respondent's are mistaken in assuming this does not address public safety or negates broad swathes of law related to carrying restrictions, as guns are still banned from sensitive areas such as schools and government buildings. This case is not addressing gun laws limiting carrying in specific public places because the New York Law is not an example of such because this is an issue of licensing regime. Shall issue laws are exemplaires of a balance between public interest and individual liberties. Furthermore, with Heller, the Court declared that total or effectively total bans on handguns were unconstitutional. New York already has a total ban on open carry, and New York Penal Law § 400.00 denies a large subset, 40%, of the population who want to carry outside of the home, from carrying. This constitutes enough of a burden on the citizens to require the Court to examine the text, tradition, and history of the Second Amendment to determine the unconstitutionality of N.Y. Penal Law §400.00. Under both strict and intermediate scrutiny, New York law fails to satisfy the criteria.

## CONCLUSION

This Court should reverse the decision of the Court of Appeals in the Second Circuit, and declare N.Y. Penal Law §400.00 unconstitutional.

Respectfully submitted,

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