

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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FACTS OF THE CASE

Petitioners Robert Nash and Brandon Koch both applied for a concealed carry license. Under New York law, open carry of firearms is explicitly forbidden. The New York statute allows the issuing of a concealed-carry license for applicants who demonstrate “proper cause.” The petitioners requested an unrestricted permit, and such a permit is at the discretion of the government officials; the request was declined. Both petitioners do have concealed carry licenses under specific circumstances, where they were able to prove a need for self-defense. But in this case, they were unable to meet the required standard so were not permitted a license for unrestricted concealed-carry.

SUMMARY OF ARGUMENT

History and Supreme Court precedent affirms the constitutionality of the New York Law. New York is within their plenary authority to restrict the use of firearms in public spaces. The 2nd Amendment protects the right to keep and bear arms, yet that right has never been viewed as limitless. Before and after the Bill of Rights was ratified, the government has placed restrictions on gun ownership, specifically citing public safety. Under English rule, traveling armed in populated areas was restricted and was commonplace and ensured public safety. The Founders felt it imperative that they include the right yet they understood that it would not apply to every and all cases.

Supreme Court Precedent in *US v Heller* ensured the individual right to own a gun within the home but still allowed states the discretion to regulate arms outside of the home. The court is not bound by the Second Circuit decision in *Kachalsky v. County of Westchester*; but it does define "proper cause under the New York law. Applicants must exhibit a "an actual and articulable-rather than merely speculative or specious-need for self-defense". The petitioners had no identifiable threat to their safety that warranted an unrestricted license; so, their request was denied. Governments are duty-bound to act according to the Constitution to ensure the safety of their citizens. The New York government is not attempting to infringe upon people's right to "keep and bear arms" for self-defense but rather establish public safety as a necessary interest of the state.

ARGUMENT

I. The New York Law is consistent with the Second Amendment based on historical laws and legal precedent set by the Supreme Court.

New York Penal Code § 400.00 restricts the issuing of unrestricted firearm licenses to residents who can prove “proper cause”. Similar laws were found in many Founder-era statutes and was commonplace.

A. No right is absolute.

The Second Amendment under *DC v Heller* gives people the right to own firearms with limitations. Although many pro-gun advocates claim that no other Amendment is restricted in the same manner, other constitutional rights do in fact have similar exceptions and restrictions. For example, students in schools have limited 1st and 4th Amendment rights. Students may be punished for using profane language, wearing distracting T-shirts, ridiculing their teachers, etc. Furthermore, under certain circumstances, schools may search and seize without a warrant. Outside of the educational sphere, the First Amendment does not protect the rights of citizens to speak on any topic at any time. Similarly, hate speech is protected but child pornography is not protected under the Bill of Rights. The commonality between these examples is public safety, which the courts have ruled as a legitimate interest of the state.

The Second Amendment, like many other amendments in the Bill of Rights, is not unlimited. The

restriction and regulation of the amendments in the Bill of Rights means that the right to carry concealed arms for any form of confrontation is not guaranteed.

B. When the Bill of Rights was ratified the 2nd Amendment was not understood as limitless.

Long before the Revolutionary War, English Law prohibited “carrying arms in fairs, markets, nor in the presence of the justices or other ministers” (2 Edw. 3, c.3). (The Statute of Northampton.) Although The Statute of Northampton’s legal implications are highly debatable, many scholars and historians agree that it was a general ban on arms in public spaces. An interpretation consistent with later rulings offered by the English court, issuing writs to armed citizens.

Through the Statute of Northampton, the Founders understood the importance of limitations on the Second Amendment and were also aware of the consequences if the Amendment were left unrestricted. A discriminatory example of a restriction on the Second Amendment would be the Uniform Militia Act of 1792. The Uniform Militia Act effectively banned Black men from possessing a gun. This law and others like it were common at the time because the Founders viewed Black men as a threat to society. This notion has grave racial denotations and connotations to it and exemplifies the Founders’ interpretations of the possible limitations of the Second Amendment. Moreover, it is important to acknowledge the racism that drove several of these laws yet since they’ve been adapted modern day, safeguards have been put in place to prevent such laws from having the same

impact. The Equal Protection Clause in the 14th amendment ensures the protection of Black and Indigenous communities. Thus, it was generally understood that the limitations on firearms and other weapons protected by the 2nd Amendment are necessary.

Both English and American laws banned traveling armed in populated areas, to ensure the safety of the general public. The Statute of Northampton and its later American successors applies equally to all of its citizens regardless of race.

Furthermore, registering Militia weapons on government scrolls was extremely common in the eighteenth century. At least twelve states imposed various gun laws dealing with gun registration. Registration was customary, yet is often one of the more question practices modern day.

C. The precedent set in *DC v Heller* allows states to restrict the right to firearms consistent with the historical interpretation of the right.

The Second Amendment protects “the right of law abiding, responsible citizens to use arms in defense of hearth and home” (*DC v Heller*). *District of Columbia v Heller* solidifies the right to own a gun for self-defense; however, it did not rule on the right to carry a gun in public. Because of the vagueness in this decision regarding the interpretation of the 2nd Amendment, excluding the possession of arms, the exact limitations in public have been left up to the discretion of the state and local governments. An

empirical example of an exerciser of the authority and jurisdiction *DC v Heller* grants would be New York law enforcement. The New York law is well within the standard set by *Heller*. The limitation of public carry of firearms has been at the forefront of many historical laws. American laws, in existence during the late 17th-18th centuries, similar to the New York law in question, also restricted the possession of firearms under specific circumstances. Those laws did provide an exception to self-defense, provided that they prove “good cause” to fear for their safety, as does the New York law. This law in essence has existed for over a century and despite its criticism is perfectly constitutional considering the conditions when the Bill of Rights was ratified.

D. New York has an interest in public safety and this law is well within reasonable for achieving that goal.

The interest of the New York State Government is to protect its constituents through legislation, law enforcement, and the courts. In order to balance the interests between the Second Amendment and state governments, like New York, this Court has a tradition of protecting both the people and their rights. This “tradition” entails preserving the flexibility of the Second Amendment. Thus, the New York government can abide by the limitations of the Constitution while furthering the safety of the public.

Gun safety laws are known to correspond with safer communities and generally lower rates of gun

violence. Gun violence is an issue nationwide and New York is infamous for high crime rates, although their crime has vastly dropped since the 1990's. This law allows citizens to carry a handgun or other appropriate firearm in circumstances where their safety is in an imminent threat. It does so in a tailored manner, by allowing them to carry in times and places for which they have established identifiable need for armed self-defense, hunting, or target shooting. Yet these regulations still keep the general public safe. Although many gun activists claim the solution to violence is for more people to have guns this logic is flawed. If that argument was accurate the United States would be one of the safety's countries in the world, yet our homicide rate is 25 times higher than peer nations. The need to carry firearms for self-defense is a legitimate yet that claim does need to have backing to it. The petitioners argue that this law employs "you haven't gotten hurt yet so you don't need a gun" logic. Yet it simply requires the applicant to prove they have a rational fear for their safety.

With *Kachalsky v. County of Westchester* the second circuit concluded the right to keep and bear arms are subject to intermediate scrutiny. The standard set by the court rules the statute has to further an important government interest, as shown above New York has a legitimate investment in the safety and well-being of its citizens. Gun violence is by far the deadliest form of violent death, so restricting dangerous citizens from gaining access to firearms is a

preventative measure.

II. The law allows law enforcement to assess the risk of allowing a citizen to carry a handgun, and allow for a personable check to ensure the safety of the general population.

Allowing law enforcement officials to have discretion in issuing licenses create a safer system. Regardless on your stance on the 2nd amendment it is a universal truth that there are just some people who shouldn't have firearms. Law enforcement is trained to understand and see those red flags so are qualified to provide that assessment. Their intended role is to keep society safe. New York is justified giving discretion to law enforcement officers.

III. The Petitioners argument that the law is unconstitutional and discriminatory is flawed.

The petitioners disregard the protections offered by the equal protection clause, and thousands of other state and federal laws protecting against discrimination. The safeguards in place function as they were designed, and if an applicant feels their race, sexuality or other identity was the reason they were defined they can bring up a case, but to eliminate the system as a whole, when there has been little to no evidence of discrimination is extreme. The law under several 2nd circuit decisions within the precedent set by the Supreme Court has been found constitutional.

A. The petitioners argue that the law makes it impossible for a law-abiding citizen to gain a license.

O'Connor v. Scarpino a 2nd circuit decision relating to the same law allows states to restrict the circumstances for which citizens are allowed to carry their firearms under self-defense. This argument blatantly ignores the petitioners' licenses, both men have concealed carry licenses that applied to under specific circumstances. They can carry a firearm to and from work. As normal law-abiding citizens both men were able to obtain a concealed carry license. Their complaint then lies with the inability to obtain an unrestricted concealed carry license. The rights given to the people by the Bill of Rights don't come without restrictions.

B. There are existing checks on the government to take such a drastic approach to an issue with safeguards in place, puts public safety at risk.

The petitioners misinterpret the extant stalwart protections in place to prevent discriminatory practices. Racially discriminatory practices have already been ruled unconstitutional by the Court, such as *Brown v. Board of Education*. In this case, the Court ruled that separate facilities are inherently unequal and violate the Equal Protection Clause of the 14th Amendment. Through this ruling, legislative, administrative, and judicial bodies can extend the protections afforded by the Equal Protection Clause to prevent discriminatory practices of any kind.

Through these existing protections, the

concerns of the Petitioners regarding the discriminatory enforcement of New York penal code 400 are redundant. Furthermore, the overwhelming history, text, and precedent still supports the position of respondents.

CONCLUSION

The Second Circuit was correct in their dismissal of the petitioner's request, and should affirm their decision.

Respectfully submitted,

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