No. 20-843

IN THE
SUPREME COURT OF THE UNITED STATES

NEW YORK RIFLE & PISTOL ASSOCIATION, INC., ROBERT NASH, BRANDON KOCH,

Petitioners,

v.

KEVIN P. BRUEN, in His Official Capacity as Superintendent of the New York State Police, RICHARD J. MCNALLY, JR., in His Official Capacity as Justice of the New York Supreme Court, Third Judicial District, and Licensing Officer for Rensselaer County,

Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

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

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FACTS OF THE CASE

In 2016 Mr. Robert Nash of Rensselaer County, New York applied for a concealed carry license from the appropriate licensing officer in his county. He cited a recent string of robberies in his neighborhood as his motivation to carry a firearm for his own self-defense. Mr. Nash already had a restricted firearm license which permitted him to own a firearm and use it for hunting and target shooting. He had recently taken an advanced firearm training course, and had no criminal history. However, Mr. Nash was denied a concealed carry license because, according to the licensing officer, he did not have "proper cause" to carry a weapon for self-defense.

Likewise, in 2017 Mr. Brandon Kosh requested that the restrictions on his license be lifted so that he would be able to conceal carry a firearm outside his home for the purposes of self-defense. Mr. Kosh also had extensive experience and training in the safe usage of firearms, and he also had no criminal history. His concealed carry license was also denied.

Under New York law, openly carrying a firearm is prohibited, but licenses for concealed carrying may be granted if the applicant meets many specific criteria, one of which is having "proper cause" for the issuing of a license. N.Y. Penal Law § 400.00(2)(f). What exactly "proper cause" constitutes is unclear, but by nature of the licensing process, proper cause or lack thereof is to be defined and identified by whomever handles the concealed carry application. In the opinion of respondent McNally, a desire to legally carry a firearm for the purpose of self-defense does not constitute proper cause.

The petitioners Nash and Kosh brought their case to both the local district court and the Second Circuit respectively. Both courts have dismissed their case because neither of the petitioners were in a special circumstance that put them in immediate danger, and therefore they did not have proper cause for obtaining a concealed carry license.

SUMMARY OF ARGUMENT

The New York government's denial of two law-abiding citizens' right to self-defense is an egregious violation of the Second Amendment. A person's right to defend themselves against another's attempt to harm or rob them has long been understood to be not merely a privilege, but a fundamental right. The founding fathers believed this, and so did many others before and after them. This very Court has made rulings which affirm this right. The language, phrasing, the historical understanding of the Second Amendment, and this Court's own rulings all show that the average citizen's right to own and carry weapons such as concealed firearms for their own protection is not to be taken away. New York's "proper cause" law does not go so far as to completely ban all concealed carry weapons, but it makes it nearly impossible for the average citizen to exercise his or her fundamental right to self-defense. Because the Fourteenth Amendment applies the Bill of Rights to the states, as ruled in *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010), New York's denial of law-abiding citizens' fundamental right to self-defense is unconstitutional, and the petitioners entreat the Court to rule in their favor.

ARGUMENT

I. Self-defense, including the keeping and bearing of arms for self-defense, is a fundamental right.

A. History and tradition affirm the right to keep and bear arms for self-defense

Long before New York's current restrictions on firearms were put in place, self-defense has been considered one of the most central rights an individual can have. Tucker's Blackstone called the right of self-defense "the first law of nature." St. George Tucker, *Blackstone's Commentaries* (William Young Birch & Abraham Small eds. 1803). According to many founders of this nation and others before them, keeping and bearing arms for the purpose of self-defense is a vital part of the right to self-defense. Blackstone himself named "the right of having and using arms for self-preservation and defense" as one of the things absolutely necessary to keep a man free. William Blackstone, *Commentaries on the Laws of England* 139-40 (1765). John Locke, upon whose philosophy the founding fathers heavily relied during the construction of of their nation's government, also advocated this right of self-preservation, saying that it is "[t]he first and strongest desire God planted in men, and wrought into the very principles of their nature . . . that is the foundation of a right to the creatures, for the particular support and use of each individual person himself." John Locke, *Two Treatises of Government* §88 (1690). During America's founding, both Federalists and Anti-federalists

agreed that an armed people was absolutely necessary to the nation's freedom and security. *See* Anti-Federalist No. 28 (1788); Federalist No. 46 – Madison (1788). The framers of the Constitution and Bill of Rights demonstrated their belief in the importance of self-defense when they included the right to keep and bear arms in the Second Amendment. In fact when the Constitution was being ratified, New York itself proposed that the right to keep and bear arms be included, adding that the militia is composed of "the body of the People capable of bearing arms." *New York's Ratification of Constitution with Proposed Amendments* (1788). In addition to the nation's Bill of Rights, multiple states' bills of rights recognize self-defense and the keeping and bearing of arms as a fundamental right. *See Massachusetts Declaration of Rights*, Article XVII (1780); *Kansas Territory Wyandotte Constitution* §4 (1859). The petitioners acknowledge that restrictions on keeping and bearing arms have also been commonly implemented throughout this nation's history. They do not contest prudent measures like background checks, licensing, and training requirements such as are required by many states that allow concealed carry. The confliction with the Second Amendment arises when, as in New York's concealed carry provisions, only a select group of people earn the right to keep and bear arms by being in a special situation that sets them apart from their community. *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012) (*See Klenosky v. N.Y City Police Dep't*, 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980)). This kind of classification which grants a right to some, but not most, citizens, effectively turns a fundamental right into a privilege.

B. *Caetano v. Massachusetts* supports the fundamental right to keep and bear arms for self-defense

The Court's per curiam decision in *Caetano v. Massachusetts* affirmed that self-defense is a fundamental right, and that convicting someone for exercising this right is both unconstitutional and inconsistent with *District of Columbia v. Heller*. *See Caetano v. Massachusetts,* 577 U.S. 411, 412, 422 (2016). This case even took for granted the right to keep and bear arms; the debated point was not whether Caetano was right in using a weapon to defend herself from her abusive ex-boyfriend, but whether a non-lethal stun gun was protected by the Second Amendment in addition to a more commonly carried handgun. "If the fundamental right of self-defense does not protect Caetano," Justice Alito said in his concurring opinion, "then the safety of all Americans is left to the mercy of state authorities who may be more concerned about disarming the people than about keeping them safe."[1] *Id*. at 422.

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[1] Justice Alito's remark brings up another point. Licensing officers are necessary for reviewing applications and granting concealed carry licenses; however, considering the nature of the licensing system, the vagueness of New York's proper cause clause creates a host of problems. A "proper cause" could perhaps be defined as acceptable qualifications for and a legitimate desire to exercise one's right to self-defense. If this were the common interpretation and usage, then the petitioners would not have a complaint. Local licensing officers have not been counting this as proper cause. In the case of the petitioners, not even a verifiable threat of robbery or assault was considered to be proper cause for obtaining a concealed carry license. Only a "special need for self-protection distinguishable from that of the general community or of

II. The fundamental right to keep and bear arms for the purpose of self-defense is protected by the Second Amendment

A. *District of Columbia v. Heller* considers at length the meaning and implications of the Second Amendment

1. The definitions of "keep," "bear," and "arms"

For clarity's sake, the petitioners turn to the meaning and implications of the Second Amendment as outlined in *District of Columbia v. Heller*. Justice Scalia noted in this case that the meanings of "keep" and "bear" have not changed since they were first penned in the Second Amendment. Both the original 1755 edition and subsequent editions of Samuel Johnson's dictionary define "keep" as "to retain" or "to have in custody." Samuel Johnson, *Dictionary of the English Language* (1st ed. 1755). The current version

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persons engaged in the same profession" qualifies an applicant as having proper cause. *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012) (quoting *Klenosky v. N.Y City Police Dep't,* 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980)). In other words, a law-abiding upper class businessman in a wealthy neighborhood receives a death threat, according to the evident application of this law he would qualify to be granted a license. If, however, a blue-collar worker in a rough neighborhood where robberies and shootings were commonplace applied for the same license, he would not qualify for a license because his profession and degree of safety is no different from anyone else in his community. His clean criminal record and firearm safety training would make no difference. New York's statute creates classes of citizens.

of Webster's dictionary defines "keep" as "to retain in one's power or possession." *Merriam-Webster Dictionary* (11th ed. 2016). Likewise, Johnson's 1755 dictionary defines "bear" as "to convey or carry" or "to support," with the 1785 edition giving the example of bearing arms as in a coat. Samuel Johnson, *Dictionary of the English Language* (1st ed. 1755; 6th ed. 1785). Webster's modern dictionary defines "bear" as "to move while holding up and supporting" or "to be equipped or furnished with." *Merriam-Webster Dictionary* (11th ed. 2016). In essence, "the right to keep and bear arms" means "the right to possess arms and carry arms on one's person." In *Heller*, the opinion delivered by Justice Scalia goes further to say that "bear arms" in its usage here is *not* an idiomatic expression exclusively referring to military use. *District of Columbia et al. v. Heller*, 554 U.S. 570, 586-588 (2008). The next term that begs to be defined is "arms." Generally speaking, arms are any kind of defensive weapon carried on one's person which may be used for military purposes but are not exclusively so. As established in *Caetano v. Massachusetts*, arms that did not exist during the founding era are included in the Second Amendment's protections. (*Caetano v. Massachusetts*, 577 U.S. 411, 420 (2016)). The only longstanding and common prohibitions on a certain kind of arm were statutes banning weapons that cause "terror to the people." William Hawkins, *A Treatise of the Pleas of the Crown* 71, §21 (1716). Charles Humphreys, *Compendium of the Common Law in Force in Kentucky* 482 (1822). Suffice it to say that concealed handguns certainly do not cause terror to the people. Justice Scalia summarized in *Heller* that "the Second Amendment extends, prima facie, to all instruments

that constitute bearable arms, even those that were not in existence at the time of the founding." 554 U.S. at 570, 582.

2. The significance of the phrase "right of the people"

Another point necessary to consider in the Second Amendment is the operative clause's wording, "right of the people." As acknowledged in *Heller*, these exact words appear in both the First and Fourth Amendments. The Ninth Amendment, also, uses very similar wording: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. The rights outlined these amendments "unambiguously refer to individual rights, not 'collective' rights, or rights that may be exercised only through participation in some corporate body." *District of Columbia et al. v. Heller,* 554 U.S. 570, 579 (2008). Hence, the people's right to keep and bear arms cannot be presumed to apply only to a militia, as the respondents may contend. Likewise, since "the right of the people" in the Bill of Rights never refers to anything other than an individual right that *every person has*, the Second Amendment should not be presumed to apply only to a select group of citizens who have earned their right by being in a special circumstance.

B. The meaning of "militia"

In order for the respondents' argument to carry much weight, they must hold the assumption that a "well-regulated militia" refers exclusively to the nation's organized armed forces and does not include the average citizen. Therefore, the respondents argue, the prefatory clause of the Second Amendment restricts the operative clause. An examination of the Second Amendment and its history shows the inconsistencies in the respondents' assumption. To again refer to Justice Scalia's reasoning in *Heller*: "The Second Amendment is naturally divided into two parts: its prefatory clause and its operative clause. The former does not limit the latter grammatically, 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.'" *Id.* at 570, 577.

It is worth noting that the Second Amendment does not say that keeping and bearing arms should be exclusively used for military purposes. Nor does the provision of one good reason for the right to keep and bear arms negate all other good reasons, such as the fundamental right to self-defense. But as for the specific reason given in the Second Amendment, the main controversy is over that one word, "militia." For practical modern purposes, the question is whether a militia is the organized armed forces of the military, or the collective body of citizens equipped to defend themselves and their nation. It is gathered from the historical understanding of "militia" that the latter meaning is correct. Thomas Jefferson equated the militia of the state with "every man in it able to bear arms." Letter to Destutt de Tracy (Jan. 26, 1811). In

Federalist 29, Alexander Hamilton spoke of the militia and the military as two separate entities, saying that the presence of an armed militia does not lessen the need for military establishments, and that a militia is the best security against a standing army. *Federalist No. 29* – Hamilton (1788). Anti-Federalist No. 28 stated that a "well regulated militia, composed of the Yeomanry of the country, have ever been considered the bulwark of a free people." *Anti-Federalist No. 28* (1788). This term "yeomanry" referred to the average middle-class landowner, not to military men. In Federalist No. 46, James Madison maintained that "the ultimate authority . . . resides in the people alone," and that an armed people protects against intrusions on liberty, from inside the country as well from without. (*Federalist No. 46* – Madison (1788).

The Supreme Court case *United States v. Miller*, too, spoke of the militia in similar terms. In the opinion delivered by Justice McReynolds, the militia was said to be primarily composed of "civilians" who were "physically capable of acting in concert for the common defense," and added that "ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *United States v. Miller*, 307 U.S. 174, 179 (1939).

C. *Heller* allows for a broader interpretation of the Second Amendment than just keeping and bearing arms within the home.

Even though *Heller* was pivotal to the understanding and interpretation of the Second Amendment, the petitioners acknowledge that the Court's ruling in that case only affirmed the right to have firearms for self-defense in the home. As noted in *Moore v. Madigan*, although *Heller* advocated that the need for self-defense is most acute in the home, the need for self-defense outside the home is not negated by this position. *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012). "Heller repeatedly invokes a broader Second Amendment right than the right to have a gun in one's home, as when it says that the amendment 'guarantee[s] the individual right to possess and carry weapons in case of confrontation.' 554 U.S. at 592, 128 S.Ct. 2783. Confrontations are not limited to the home." *Id.* at 935-36.

The petitioners draw attention to the fact that, in *Caetano v. Massachusetts*, Caetano used a stun gun for self-defense outside the home. By their per curiam decision in Caetano's favor, the Court acknowledged that the fundamental right to bear arms for self-defense is still preserved outside the home. To visit two cases from further back in history, *Nunn v. State* held that the people should be allowed to carry pistols openly, saying that any law opposing the right to bear arms for self-defense should be considered "void" and "repugnant to the Constitution." Ga. 243, 251 (1846). The word "openly" is key here, since a weapon can only be carried openly in the open, or in other words not in the privacy of one's own home. *State v. Chandler* also held that the Constitution protects the right of the people to openly

carry arms for self-defense. La. Ann. 489, 490 (1850). English legal scholar Sir Matthew Hale also wrote on the subject of using weapons for self-defense outside the home. "If a thief assault a true man either *abroad* or in his house to rob or kill him, the true man … may kill the assailant, and it is not felony." Matthew Hale, *Historia Placitorum Coronae* 481 (Sollom Emlyn ed. 1736) (emphasis added).

IV. As held in *McDonald v. Chicago*, the Fourteenth Amendment applies the Bill of Rights, including the rights outlined in the Second Amendment, to the states.

The petitioners conclude by noting that, although the States of course have authority to establish their own legislations in many areas, the Fourteenth Amendment prevents the States from making laws that "abridge the privileges or immunities of citizens of the United States," "deprive any person of life, liberty, or property" or "deny to any person within its jurisdiction the equal protection of the laws." New York's proper cause law violates all three of these provisions. As aforementioned, the right to keep and bear arms is a fundamental right, which is of greater importance than a privilege, but the Second Amendment renders American citizens immune to having their right to keep and bear arms infringed upon. The proper cause law has infringed upon the petitioners' right to keep and bear arms. The same right is a liberty protected by the Bill of Rights, and the petitioners have been deprived of this liberty. Because New York's proper cause law only allows a select group of people under special circumstances to exercise their right to keep and bear arms for self-defense, the petitioners have been denied equal protection under the laws that apply to all

American citizens. Affirming this, *McDonald v. City of Chicago* ruled that "the Second Amendment right is fully applicable to the States." *McDonald v. City of Chicago*, No. 08-1521, 1-2 (2010).

CONCLUSION

For the foregoing reasons, we pray that the Court reverses and holds that the State's denial of petitioners' applications for concealed-carry licenses for self-defense violates the Second Amendment.

Respectfully submitted,

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