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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QUESTION PRESENTED

Plaintiffs want to carry handguns outside of their homes for self defense. Plaintiffs have licenses to keep firearms in their homes in New York State. Plaintiffs were denied licenses to carry firearms for self defense outside of the home.

The question presented is whether the State's denial of Petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment

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The Second Circuit's order affirming the dismissal by the district court of this case is not published but is available at 818 F.App'x 99 and is reproduced at Pet. App. 1-2. The opinion of the district court is reported at 354 F.Supp.3d 143 and reproduced at Pet.App. 3-13

JURISDICTION

This case comes to the Court on writ of certiorari from the Second Circuit. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Second Amendment to the US Constitution, provides:

> A well regulated Militia, being necessary for the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const., amend. II

The Second Amendment is incorporated through the Fourteenth Amendment against the state of New York. *Mcdonald v City of Chicago*, 561 U.S. 742, 750, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010)

STATEMENT OF FACTS

At least 43 states today respect the rights of the people to keep and bear arms by allowing their law-abiding citizens to carry firearms outside of the home for self defense. New York is one of the exceptions. New York denies a license to carry firearms to normal law-abiding citizens if no "proper cause exists for the issuance thereof" N. Y. Penal Law §400.00(2)(f). Petitioners are law-abiding citizens who were denied licenses for the concealed carry of firearms under the statute. J.A. 100. Petitioners already possess "restricted" licenses to keep firearms inside their home as well as to carry firearms outside the home for hunting and target shooting but not for self defense. J.A. 35. Petitioner Robert Nash, after describing recent robberies in his neighborhood to the appropriate licensing officer (respondent McNally), was denied a license to carry for the purpose of self defense because he "failed to show 'proper cause' to carry a firearm in public for the purpose of self-defense, because he did not demonstrate a special need for self-defense that distinguished him from the general public." J.A. 122, Pet. App. 7. Petitioner Brandon Koch was denied a license for the carrying of a firearm for self defense after describing "his extensive experience in the safe handling and operation of firearms and the many safety training courses he had completed.' Pet. App. 8 (citing J.A. 125). Koch was denied a license because he "failed to show 'proper cause' to carry a firearm in public for

the purpose of self-defense, because he did not demonstrate a special need for self-defense that distinguished him from the general public." Pet. App. 7. Nash and Koch, as well as many members of the NYSRPA failed to satisfy New York's requirement for a "proper cause" therefore they did not receive a license to carry a firearm outside the home for self defense.

Petitioners brought suit under 42 U.S.C. § 1983. The trial court granted New York's motion to dismiss applying Intermediate Scrutiny. *New York State Rifle & Pistol Association, Inc. v. Beach*, 354 F.Supp.3d 143, 148 (N.D. N.Y. 2018) (citing *Kachalsky v. County of Westchester*, 701 F.3d 81, 83, 100-01 (2d Cir. 2012)). Petitioners filed an appeal; the Second Circuit affirmed the trial court. *New York State Rifle & Pistol Association, Inc. v. Beach*, 818 Fed.Appx. 99, 100 (2d Cir 2020)

SUMMARY OF ARGUMENT

The rights of the Second Amendment is an individual right unconnected to the militia. The Second Amendment is incorporated against the states. New York's denial of Petitioner's license to carry firearms violates the fundamental rights of the Second Amendment to bear arms. This conclusion is confirmed by the test based on the text, history, and tradition of the Second Amendment.

The Second Amendment guarantees the "right of the people" to both "keep" and "bear" firearms. U.S. Const. amend. II. The verb to "bear" clearly demonstrates the preexisting right to "carry weapons in case of confrontation." *Heller*, 554 U.S. at 592. Petitioners wish to carry firearms outside the home

in case of confrontation. The right to carry firearms can obviously not be limited to the home because confrontation can be present outside the home as well as inside. The Second Amendment uses the two different verbs of "keep" and "bear". As no clause in the constitution is "intended to be without effect" there must be a separation between the two distinct verbs in the Constitution *Marbury v. Madison*, 5 U.S. 137, 174 (1803).

New York's statute is inconsistent with the history and tradition of the Second Amendment. The history and tradition overwhelmingly supports the right to carry firearms outside of the home for self defense.

Furthermore, New York's discretionary and cause-based restriction upon the fundamental and individual right to carry firearms invalidates the regulation. The statute allows the licensing officer to determine the 'proper cause' of citizens.

ARGUMENT

I. The Second Amendment guarantees a right to carry firearms outside of the home for self defense.

The Second Amendment provides "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." U.S. Const., amend. II. This court held, in *Heller*, the "Second Amendment confers an individual right to keep and bear arms" *District of Columbia v Heller* 554 U.S. 570, 622, 128 S.Ct. 2783, 171 L.Ed.2d 637. (2008) "[T]he Second Amendment right is fully applicable to the States"

Mcdonald v City of Chicago, 561 U.S. 742, 750, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010).

A. This court should evaluate N.Y. Penal Law §400 under a test based on text, history, and tradition.

New York's Statute should not be examined under intermediate or strict scrutiny. This court applied neither strict nor intermediate scrutiny in both *Heller* and *Mcdonald*. This court stated, in *Heller*, that the Second Amendment protects an individual right "on the basis of both text and history". *Heller*, 554 U.S. at 595. The test of text, history, and tradition is a "proper Second Amendment test" for being "much less subjective" because "it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor." *McDonald v City of Chicago*, 561 U.S. 742, 804 (Scalia, J., concurring)(citing *Heller v. District of Columbia*, 670 F.3d 1244, 1273 (D.C. Cir. 2011) (Heller II) (Kavanaugh, J., dissenting)

1. Text

This court relies on "the text of the [Second] Amendment". *Heller,* 554 U.S. 592, 637. The Second Amendment provides that the right "to keep and bear [a]rms" belongs to "the people." U.S. Const. amend. II. The Second Amendment uses both verbs "keep" and "bear" to describe the scope of the "the right of the people". "[K]eep" means "[t]o retain; not to lose," or "[t]o have in custody." Samuel Johnson, *Dictionary of the English Language* 1095 (4th ed. 1773) (reprinted 1978), (*cited in Heller*, 554 U.S. at 584.)

The most "natural reading" of "keep" is to "have weapons". *Id.* 554 U.S. at 584. "[B]ear", has a different meaning than the verb "keep". At the time of the founding, "bear" was a synonym to "carry" therefore "bear arms" is the the equivalent to "carry arms." Johnson 161 (citing *Heller,* 554 U.S. 587). "It cannot be presumed that any clause in the constitution is intended to be without effect" therefore, an interpretation that deletes any terms of the US Constitution is "inadmissible." See, e.g., *Marbury v. Madison*, 5 U.S. 137, 174 (1803). In other words, "keep" and "bear" are two distinct and separate rights. The right to "bear arms" therefore has a purpose in the Constitution as distinct as to "keep arms". The term "arms" meant, in the time of the founding, "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." (*see* Timothy Cunningham, *A New and Complete Law Dictionary* 174 (1783)(*available online at*: https://books.google.je/books?id=lhMCvgAACAAJ&pg=PP1&source=gbs_selected_pages&cad=2#v=onepage&q=a%20man%20wears%20for%20his%20defence%2C&f=false)) As stated in *Heller,* "bear arms" can mean; carry "anything that a man wears for his defense". (*Heller,* 554 U.S. 582).

Moreover, this court, in *Heller,* held that the right of the Second Amendment is an individual right and describes the purpose of the right as "the right secured in 1689 ... was by the time of the founding understood to be an individual right protecting against both public and private violence." *Heller,* 554 U.S. at 594. The use of public therefore shows how the right extends beyond the home because the word "public" means "open to all" or "open to common use". *Austin v. Soule,* 36 Vt. 650 (VT, 1863), *see also:*

0'IIara v. Miller, 1 Kulp (Pa.) 295. Since the home is a private area, the individual right for protection of "both public and private violence" would insist on extending that right outside of the home because the right of the Second Amendment protects against public violence by providing the right to carry firearms outside of the home for self defense.

Furthermore, the notion that the individual right to self defense does not extend beyond the home, is incompatible with the premise of *Heller* and *Mcdonald*. As *Heller* explains, "the inherent right of self-defense has been central to the Second Amendment right" *Heller*, 554 U.S. at 628. Self defense is an important part of the right as the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Heller,* 554 U.S. at 592. Mcdonald also explains, quoting *Heller*, "in *Heller*, we held that individual self defense is 'the central component' of the Second Amendment right." McDonald v. City of Chicago 561 U.S. at 767-68 (quoting *Heller*, 554 U.S. at 599, 630)

2. History and Tradition

Well before the founding and the ratification of the Fourteenth Amendment, authority overwhelmingly affirmed the Second Amendment's right of "the people" to both "keep" and to "bear" firearms. U.S. Const. amend II. This Court emphasized in Heller that the constitutionality of a statute that infringes upon a Second Amendment right is determined by "historical justifications". *Heller*, 554 U.S. at 635. Tradition is also a "critical tool of constitutional interpretation." because it provides an "examination of a variety of legal and

other sources to determine the public understanding of a legal text in the period after its enactment or ratification" *Id.* at 605. The history and tradition shown in America, as well as England, have made it abundantly clear that the Second Amendment protects the right to carry firearms outside the home for self defense.

As Heller shows, the English Bill of Rights protected the carrying of firearms. The English Bill of Rights provides that Protestants, "may have Arms for their Defense suitable to their Conditions, and as allowed by Law." *Heller,* 554 U.S. at 593 (*quoting* 1 W. & M., ch. 2, §7, in 3 Eng. Stat. at Large 441). The historical piece of the English Bill of rights shows how history consistently stated the rights to carry firearms outside the home for self defense. The "right of having and using arms for self-preservation and defence," is, in no way, confined to the home. William Blackstone, *Commentaries on the Laws of England* 140 (1765) (cited in *Heller*, 554 U.S. at 594).

Also, the statue of Northampton was confirmed from the king's bench that it was only to "[t]errify the King's subjects", but it did not interfere with the true rights to carry firearms for self defense as provided in the English Bill of rights. *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1686). Moreover, *Heller* put a provision of the English Bill of rights as "the predecessor to our Second Amendment" *Heller,* 554 U.S. at 593. The right to carry firearms outside of the home for self defense was the history of English law. Since, the US constitution followed the original rights of the English Bill of Rights, the right to carry firearms outside of the home for self defense is also a part of the historical rights.

In addition, the same understanding of the right to carry firearms outside of the home was enshrined in early laws of the early Republic. In the early Republic, no state or colony prohibited the rights to carry firearms as they understood the useful and fundamental right that is to carry a firearm. The "right of having and using arms for self-preservation and defense," is, in no way, confined to the home *Proceedings of the Virginia Assembly*, 1619, in *Narratives of Early Virginia*, 1606-25, at 273 (Lyon Gardiner Tyler ed., 1907) (*available online at:* https://content.wisconsinhistory.org/digital/collection/aj/id/4868). In fact, the right to carry firearms outside of the home for self defense was a necessity in the early Republic. "Exposed as our early colonists were to the attacks of savages, the possession of arms became an indispensable adjunct to the agricultural implements employed in the cultivation of the soil. Men went armed into the fields, and went armed to church. There was always public danger." John Ordronaux, *Constitutional Legislation in the United States: Its Origin, and Application to the Relative Powers of Congress, and of State Legislatures* 241-42 (1891), *cited in Heller*, 554 U.S. at 619.

Once the United States of America became a country, the right to self defense was almost immediately adopted to nine states between 1789 and 1820. As stated in *Heller* Kentucky, Ohio, Indiana, and Missouri "referred to the right of the people" as "bear arms in defense of themselves and the State." Mississippi, Connecticut, and Alabama used "individualistic phrasing" as the "right to bear arms in defense of himself and the State."*See Tenn. Const., Art. XI*, §26 (1796), in 6 Thorpe 3414, 3424 (*citing Heller* 554, U.S. at 603). As shown, the individual

right to self defense was historically present, and, in 19th century courts, these state constitutional provisions were viewed to the perspective that the constitutional provisions "protect an individual right to use arms for self-defense." *Simpson v. State*, 5 Yer. 356, 360 (Tenn. 1833) (*citing Heller,* 554 U.S. at 603). The few restrictions of firearms were only targeted to misuse of a firearm. One Massachusets law authorized the peaceful arrest of citizens, "all affrayers, rioters, disturbers, or breakers of the peace, and such as shall ride or go armed offensively, to the fear or terror of the good citizens." 1795 *Mass. Laws* 436, ch. 2.(*available online at:* https://firearmslaw.duke.edu/laws/1795-mass-laws-436-ch-2-an-act-for-repealing-an-act-made-and-passed-in-the-year-of-our-lord-on-ethousand-six-hundred-and-ninty-two-entitled-an-act-for-punishing-criminal-offenders-and-for-r/). The Massachusetts law restricts only the offensive citizens to the right to carry therefore the law can be perceived that the "good citizens" already have the right to carry firearms outside the home for self defense.

Throughout the history of the country, the restrictions to carry firearms placed on citizens were placed on disfavored groups. One example is Black people in the south. As Justice Stevens suggests in *Heller*, "free blacks in Virginia had been required to muster without arms." Siegel, *The Federal Government's Power to Enact Color-Conscious Laws*, 92 Nw. U. L. Rev. 477, 497 (1998) (*cited in Heller,* 554 U.S. 600) That requirement to "muster without arms" would show that normal citizens would have had the right to carry firearms or else the contrary would not have to be said. As *Heller* states, "Antislavery advocates routinely invoked the right to bear arms

for self-defense." *Id. at* 609. Joel Tiffany, an atislavery advocate, wrote, "the right to keep and bear arms, also implies the right to use them if necessary in self defense; without this right to use the guarantee would have hardly been worth the paper it consumed." Joel Tiffany, *A Treatise on the Unconstitutionality of American Slavery* 117–118 (1849) (*cited in Heller,* 554 U. S. 609).

Historically, the right to carry firearms to use for self defense has been sought after by the oppressed. In the "predecessor" to the US Constitution, The English Bill of Rights (1698) provided "'[t]hat the Subjects which are Protestants, may have Arms for their Defense suitable to their Conditions, and as allowed by Law.'" *Heller*, 554 U.S. at 593 (quoting 1 W. & M., ch. 2, §7, in 3 Eng. Stat. at Large 441)

B. New York's Statute is unconstitutional because it is inconsistent with text, history, and tradition.

In this case, Plaintiff Nash was denied the license to carry a firearm for self defense. The licensing officer denied Nash of his license because he "failed to show 'proper cause' to carry a firearm in public for the purpose of self-defense, because he did not demonstrate a special need for self-defense that distinguished him from the general public." Pet. App. 7. New York requires a "proper cause" in order to obtain a concealed carry license while completely restricting the right to openly carry firearms outside of the home for self defense throughout the entire state of New York §400.00(2)(c-f). As shown, the Second Amendment's text clearly provides the right "of the people" to carry firearms outside of the for self

defense U.S. Const. amend II. New York's statute has restricted that right to only citizens who can show a proper cause instead allowing normal, harmless, and law-abiding citizens, such as Plaintiff Nash, Koch, and members of the NYSRPA, to carry firearms outside of the home for self defense.

Moreover, New York's statute is not consistent with the history or tradition. The right to carry firearms is shown to be consistently established throughout history as well as traditionally. In addition, the right to carry arms outside of the home was restricted to the oppressed, so it can therefore be concluded that normal, non-oppressed, and law-abiding citizens were free to exercise the right to carry firearms outside the home for self defense. The Second Amendment guarantees the right to carry firearms outside of the home for self defense. N. Y. Penal Law §400.00(2)(f) is unconstitutional because it is not consistent with the text, history, and tradition of the Second amendment's rights.

II. New York's restrictive and discretionary carry regime violates the fundamental right to to carry firearms outside the home for self defense.

New York's statue restricts the right to carry firearms for self defense. The statute not only severely restricts the individual right to carry firearms outside the home for self defense, but it leaves discretionary action for whomever the right is restricted upon.

A. Discretion and heavy restriction invalidate an individual right.

"The Second Amendment protects an individual right to possess a firearm unconnected with service in a militia" *Heller,* 554, U.S. 570. In then Judge Barret's Dissent in *Kanter v Barr* the issue at hand was the regulation of the Second Amendment rights for felons. The rights of the Second Amendment were being restricted upon as virtue-based restrictions. There was no introduced evidence that "founding-era legislatures imposed virtue-based restrictions on the right; such restrictions applied to civic rights like voting and jury service, not to individual rights like the right to possess a gun." *Kanter v Barr,* 919 F.3d 437, 451, (7th Cir 2019). Historically, civil rights and individual rights can have different restrictions placed upon them. For example, states are allowed to restrict the civil right to vote. "This 'equal right to vote,' is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways." *Dunn v Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972)(citing *Evans v. Cornman, supra,* 398 U.S., at 426, 90 S.Ct., at 1756) The states do not have the right to regulate an individual right. The First Amendment's right to freedom of speech is an individual right. There is an "individual's right to freedom of speech" as stated in *Mcchutcheon v Federal Election Com'n* 572 U.S. 185, 206, 134 S.Ct. 1434 (2014). "[T]hat is why freedom of speech is protected against censorship or punishment. There is no room under our Constitution for a more restrictive view." *Cox v State of La.*, 379 U.S. 536, 552, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965). The Second Amendment cannot restrict individual rights, such as the First Amendment, like civil rights. Content, or intent based regulations also have similar

rules for restriction. This court has held that "Content-based regulations are presumptively invalid" *R. A. V. v St. Paul*. 505 U.S. 377, 382, 112 S.Ct. 2538 (1992), (citing *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd*., 502 U. S. 105, 115 (1991)) Therefore, "we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose." *District of Columbia v Heller,* 554 U.S 570, 595.

Moreover, discretion causes a regulation to become invalid. The court has "consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places" *Shuttlesworth v. City of Birmingham, Ala*, 394 U.S. 147, 153, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969).

Here, New York's statute restricts the right to carry firearms outside the home for self defense based on cause. As *District of Columbia v Heller* holds the Second Amendment to be an "individual right" Similar regulations must apply because the First Amendment is also an individual right,. *Heller,* 554 U.S. 595. Content-based regulations and cause-based regulations would be invalid to the right of the Second Amendment. New York's statute has a cause-based requirement. The statute requires a 'proper cause' to obtain a concealed carry license. The statute directly invalidates itself from the individual rights of the Second Amendment by having a cause-based regulation. In addition, the statute furthermore invalidates itself because it allows for discretion. The licensing officer can leave room for

discretion as "[n]o 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." N. Y. Penal Law §400.00. The licensing officer can exercise discretion because the officer has the ability to determine that a "good cause exists for the denial of the license" good moral character and no history of crime as well as other things *Id*. §400.00(1)(a)-(n). Therefore, New York's statute is invalidated because it severely and discretionarily restricts the right to carry firearms outside of the home.

CONCLUSION

For the foregoing reasons, the decision of the Second Circuit should be reversed.

CONCLUSION

Respectfully submitted,

STUDENT #1 *COUNSEL OF RECORD* SCHOOL NAME SCHOOL ADDRESS CITY, STATE ZIP	STUDENT #2 School Name School Address City, State Zip [Date]