No. 20-843

In the

Supreme Court of the United States

New York State Rifle & Pistol Association, Inc., et al.

Petitioners,

V.

Kevin P. Bruen, in His Official Capacity as Superintendent of New York State Police, et al.

Respondents.

Respondent's Brief

Counsel of Record

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Question Presented:

Does the Second Amendment allow the government to prohibit a law-abiding person from carrying handguns outside the home for self-defense?

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BACKGROUND

New York state has a long-standing requirement that applicants must show "proper cause" to be granted concealed carry permits, which has been used in their application process for over 100 years in New York.[1]
The permits are evaluated by state officers ("licensing officers") who are given the discretion to grant them. Officers have to record their reason for making decisions, which can be appealed by applicants. If a judge believes that the applicant's claim has been unfairly denied, it can be overturned. This process was upheld as constitutional by the United States Court of Appeals for the Second Circuit in *Kachalsky v. Cacace* and by the United States Court of Appeals for the Ninth Circuit in *Peruta v. San Diego.*[2][3]

In September 2014, the petitioners, Robert Nash and Brandon Koch, applied for concealed carry permits. Both requests were restricted solely to hunting and target practice. The petitioners then appealed their permit decisions, which were upheld by Justice Richard McNally in November 2016 and January 2018, respectively. The petitioners filed a case against then-superintendent George P. Beach II of the New York State Police and Justice Richard McNally at the Northern District of New York, and the case was dismissed in 2018. The petitioners

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[1] New York Penal Law § 400.00
[2] Kachalsky v. Cacace 817 F.Supp.2d 235 (2011)
[3] Peruta v. San Diego 824 F.3d 919 (2016)

appealed to the Second Circuit and it affirmed the District Court's dismissal in August of 2020. The petitioners then filed for a writ of certiorari, which was granted in April 2021. Kevin P. Bruen replaced the previous superintendents of the New York State Police and was therefore established as the defendant and respondent in the case.

STATEMENT OF ARGUMENT

The Court held in *District of Columbia v. Heller* that an individual's Second Amendment right is grounded in their right to self-defense.[4] The precedent and historical support strongly connect the Second Amendment to the safety it provides citizens.[5] The Court should look to evaluate the New York law under intermediate scrutiny, based on its promotion of the government interest in public safety. For an individual, the constitutional right to bear arms is linked to self-defense. The expectation of safety in public greatly increases, so firearms are not necessary for all law-abiding citizens. Historically, the right to bear arms

[4] District of Columbia v. Heller, 554 U.S. 570 (2008)
[5] District of Columbia v. Heller, 554 U.S. 570 (2008)

in public has been restricted to maintain safety and order. There are dozens of long-standing, state-imposed restrictions on concealed carry permits, including the New York law. These laws maintain the established scope of the Second Amendment while recognizing the authority of states to impose restrictions on carrying weapons in public spaces.

ARGUMENT I: The Increased Expectation of Safety in Public and the Reduced Need for Self-Defense

The Second Amendment right to "keep and bear arms" is directly tied to "the core lawful purpose of self-defense".[6] [7] The law in question is regarding concealed carry in public, where the expectation of safety is significantly increased and the need to carry a weapon for self-defense is significantly decreased. Under this framework, restrictions on concealed carry guns in public are constitutional because they maintain the self-defense oriented framework of the Second Amendment, which is in line with both the Court's precedent and long-standing history.

A. The Second Amendment Link to Self-Defense

The Court wrote extensively in *Heller* regarding the links between self-defense and the Second Amendment.[8] It determined that an individual's Second Amendment

[6] U.S. Const. amend. II
[7] District of Columbia v. Heller, 554 U.S. 570 (2008)
[8] District of Columbia v. Heller, 554 U.S. 570 (2008)

right is dependent on self-defense due to the historical precedent.[9]

The Court, however, also recognized the limits to the right of self-defense in *Heller*, stating, "we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation."[10] With the direct link between self-defense and the Second Amendment, the restrictions on self-defense also play a crucial role in regulating the Second Amendment.

The most important restriction on self-defense is the "law of necessity." This is the principle that a man who employed lethal force in self-defense would not be punished only if he proved a "necessity"; an explicit lethal threat to an individual.[11] This has also been a long-standing precedent in U.S. law. In *State v. Wells*, the first documented case of self-defense in the judicial system, a manslaughter conviction was upheld because the necessity requirement had not been met.[12]

[9] District of Columbia v. Heller, 554 U.S. 570 (2008)
[10] District of Columbia v. Heller, 554 U.S. 570 (2008)
[11] Matthew Hale, *Historia Placitorum Coronae* (1736)
[12] State v. Wells, 1 N.J.L 424 (1790)

Self-defense, and therefore the scope of the Second Amendment, is based on the danger posed.

B. Expectation of Safety

An individual's safety is protected by the government in public spaces. Security ranges from emergency responders to video surveillance, so there is an increase in perceived safety in the public sphere. Therefore, the necessity of arms for self-defense decreased. Discretionary regimes, such as the New York system, act as a way to determine one's right to bear arms based on the impact of a firearm on public safety. The petitioner's license was granted for "off road back country" and "to and from work", but not in areas "typically open to and frequented by the general public" because of the perceived danger the guns would pose.[13] The carry of weapons in the public hurts the expectation of safety for the individual by undermining the peacekeeping efforts of the police. A 2015 study, "Firearm Prevalence and Homicides of Law Enforcement Officers in the United

[13] Joint Appendix 41, 114

States," discovered a direct correlation between firearm ownership rates and homicides of law enforcement officers, showing an inverse link between bearing arms and one's expectation of safety.[14]

C. History and Legal Precedent

There is a long history of case precedent and both common and case law that support discretionary regimes and the "proper cause" requirement of the New York law.

In 1836, Massachusetts regulated arms, including pistols, by requiring "reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property," to bear arms.[15] This requirement, the "Massachusetts Model", was continued in similar laws in Minnesota in 1851 and Virginia in 1847.[16][17]

The courts have repeatedly upheld the proper cause requirement. In *Peruta v. San Diego,* the United States Court of Appeals for the Ninth Circuit considered the constitutionality of San Diego's policy requiring

[14] David I. Swedler et al., Firearm Prevalence and Homicides of Law Enforcement Officers in the United States, 105 Am. J. Pub. Health 2042, 2045-46 (2015)
[15] 1836 Mass. Acts 748, 750, ch. 134, §16
[16] 1851 Minn. Laws 526, 527-28, ch. 112 §§2
[17] 47 Va. Laws 127, 129, §16

applicants for a concealed carry permit to demonstrate "proper cause" before acquiring such a permit.[18] The Ninth Circuit's *en banc* opinion "[held] only that there is no Second Amendment right for members of the general public to carry concealed firearms in public." In *Kachalsky v. Cacace,*[19] The United States Court of Appeals for the Second Circuit upheld the constitutionality of "proper cause" requirements, which started in New York under the 1911 Sullivan Act.[20]

ARGUMENT II: Maintains Public Order and Safety

Public order and safety play a crucial role in the Second Amendment and the Court should recognize that there are other stakeholders when a citizen gets a concealed carry permit. While it is often argued that law-abiding citizens solely use weapons for self-defense, the reality is that concealed permit licenses have implications for the public that must be accounted for.

[18] Peruta v. San Diego, 824 F.3d 919 (9th Cir. 2016)
[19] Kachalsky v. Cacace, 817 F.Supp.2d 235 (2011)
[20] 1911 N.Y. Laws ch. 195, sec. 1, 1897 and N.Y. Penal L. 1897 (1909)

A. Background Framing and History

Restrictions on the right to bear for public safety have a long history in English-American tradition, predating the U.S. constitution. In *Young v. Hawaii*, "more than 700 years of English and American legal history reveals a strong theme: the government has the power to regulate arms in the public square."[21] In 1299, Edward I ordered sheriffs to prohibit anyone "from tourneying, tilting ... or otherwise going armed within the realm without the king's special license."[22] This interest in public safety was furthered with the Statute of Northampton, which forbade citizens from "rid[ing] armed by night nor by day, in fairs, markets."[23] This principle, called the King's Peace, remained even after the Glorious Revolution, where many prohibitions like the Statute of Northampton continued.[24]

Throughout the history of the U.S., the principle of the "people's peace" (based on the King's Peace) has been

[21] Young v. Hawaii 992 F. 3d 765, 813 (9th Cir. 2021) (en banc)
[22] 4 Calendar of the Close Rolls, Edward I, 1296-1302, at 318 (Sept. 15, 1299, Canterbury) (Henry Church Maxwell Lyte ed., 1906)
[23] Statute of Northampton 2 Edw. 3, ch. 3 (1328)
[24] Harris The Right to Bear Arms in English and Irish Historical Context, in A Right To Bear Arms? The Contested Role of History in Contemporary Debates on the Second Amendment 28 (Jennifer Tucker, ed. 2019)

reflected in state law. In the late 17th century, New Hampshire, New Jersey, and Massachusetts all placed restrictions on bearing arms and breaching the peace.[25] [26] [27] In 1795, Massachusetts continued to make it a crime to "go armed offensively, to the fear or terror of the good citizens of this Commonwealth."[28] Similar laws were created throughout the 19th century; New Mexico passed a law prohibiting "any person [to] carry about his person, either concealed or otherwise, any deadly weapon."[29] Delaware allowed arrests of "all who go armed offensively to the terror of the people."[30]

B. Public Order and Safety

The New York law and license system reduce crime and save lives, which is relevant because the Second Amendment right has clear restrictions to protect lives. Regardless of what standard of scrutiny is applied, restrictions such as those implemented in New York reduce gun deaths. It is important to note the value of

[25] 1699 N.H. Laws 1
[26] 1686 N.J. Laws 289, 289-290, ch. 9
[27] 1692 Mass. Laws 10, no. 6
[28] 1795 Mass. Acts 436, ch. 2
[29] 1859 N.M. Laws 94, §2
[30] 1852 Del. Laws 330, 333, ch. 97, §13

empirical evidence; the Court has a precedent of using empirical evidence to fulfill scrutiny standards. This has been seen in case after case: *Holder v. Humanitarian Project, City of Los Angeles v.* Alameda Books Inc., Nixon v. Shrink Missouri *Government PAC,* and *City of Renton v. Playtime Theatres, Inc.,*[31] all confirm the use of data for scrutiny standards.[32] [33] [34] [35] The use of data has even been used to fulfill scrutiny for the Second Amendment, in the case of *Gould v. Morgan*, where a Massachusetts firearm licensing statute was upheld on the basis that it statistically saved lives. In terms of gun regimes, the data is clear.[36] In 2019, the comprehensive study "Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis" concluded "there is not even the slightest hint in the data from any econometrically sound regression that RTC [Right to Carry] laws reduce violent crime."[37] It found that "the

[31] City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)
[32] Holder v. Humanitarian Law Project, 561 US 1 (2010)
[33] City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425 (2002)
[34] Nixon v. Shrink Missouri Government PAC, 528 U.S. 377 (2000)
[35] City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)
[36] Gould v. Morgan, No. 17-2202 (1st Cir. 2018)
[37] John J. Donohue et al., Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis, 16 J. Empirical Legal Stud. 198, 200 (2019)

adoption of RTC laws substantially raises overall violent crime in the 10 years after adoption" and that "states that passed RTC laws experienced 13–15 percent higher aggregate violent crime rates than their synthetic controls after 10 years."[38] The increase in violence comes from a variety of different scenarios, which are outlined within the study. They arise from situations like road rage, unintentional shootings, elevating crimes and being shot by the criminal, and shooting innocent parties. They also lead to an increase in the use of lethal force by the police because of the increased prevalence of weapons in day-to-day activity. When all law-abiding citizens can carry concealed weapons in public, the violence and danger in communities increases, rather than seeing a decrease from supposed self-defense.

C. Relation to Constitutional Rights

The right to carry concealed weapons in public also has important implications for other constitutional rights

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[38] John J. Donohue et al., Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis, 16 J. Empirical Legal Stud. 198, 200 (2019)

that must be considered, namely the First Amendment. The First Amendment, broadly the right of free expression, is the most important constitutional right; it was called "the essence of self-government" in Snyder v. Phelps.[39] The First Amendment is directly linked to the Second Amendment because of the role of safety and peace in the "exercise of rights so vital to the maintenance of democratic institutions."[40] The self-expression that is so vital to our democracy is only possible under confidence of safety and protection. Because of the safety established in the public, even when citizens "stand up in public for their political acts" and engage in "harsh criticism" of politics, they can ensure their physical safety.[41] There is an empirical link between the First and Second Amendment; controversial expression and gun violence. An analysis of more than 30,000 public demonstrations between January 2020 and June 2021 found that demonstrations in which people are carrying arms are more than six times as likely to escalate into violence or destruction as unarmed

[39] Snyder v. Phelps, 562 U.S. 443, 452 (2011)
[40] Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147, 161 (1939)
[41] Doe v. Reed, 561 U.S. 186, 228 (2010)

demonstrations.[42] The following are just three examples of many exercises of First Amendment rights that were directly interrupted and harmed from concealed carry permits in 2020 alone: On May 30, Jeffrey Long fired shots into the air at a protest calling for the removal of a statue of a Confederate general in Salisbury, North Carolina;[43] On August 29, a Black Lives Matter protest in Tallahassee, Florida, was disrupted when a counter-protester pulled out a handgun. The counter-protestor argued with some of the 150 protestors and subsequently raised a gun at multiple protestors, inducing panic;[44] On October 10, 2020, attendees of a "BLM- Antifa Soup Drive" and a "Patriot Rally" converged in downtown Denver. The confrontation resulted in homicide when Matthew Dolloff, a security guard for a news crew, shot Lee Keltner, an attendee of the "Patriot Rally."[45]

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[42] Roudabeh Kishi et al., Armed Assembly: Guns, Demonstrations, and Political Violence in America , Armed Conflict Location & Event Data Project (Aug. 2021)
[43] Josh Bergeron, Men charged after 'Fame' protests get probation, Salisbury Post (Feb. 17, 2021)
[44] Tori Lynn Schneider & Alicia Devine, TPD: Man who pulled gun on protesters was 'lawfully defending himself, ' will not face charges, Tallahassee Democrat (Aug. 30, 2020)
[45] Brian Maass, Suspected Protest Shooter Matthew Dolloff Had Valid Concealed Weapons Permit , CBS (Oct. 12, 2020)

First Amendment self-expression is tied directly to safety, both in principle and application and because of the repeated threats that concealed carry poses to the First Amendment, states should be able to have discretionary regulation over the permits.

D. Intermediate Scrutiny is the Review Standard that Should be Applied

To pass the test of intermediate scrutiny, which the respondents suggest, the law in question must promote an important government interest and be implemented in a way that is significantly related to that interest. In *Heller*, Justice Scalia wrote "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."[46] This case requires a level of review stricter than that of rational-basis review. *Heller*, then, establishes a paradox between the use of

[46] District of Columbia v. Heller, 554 U.S. 570 (2008)

intermediate scrutiny and strict scrutiny in its identification of "presumptively lawful regulatory measures" in relation to regulating guns.[47] Under strict scrutiny, "[W]hen the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed."[48] The statement, made about a First Amendment issue, can be applied to the Second Amendment as well. Because firearm restrictions and other gun regulations are "presumptively lawful"[49], they cannot be reviewed under the standard of strict scrutiny wherein such laws are "presumptively invalid".[50] The conflicting arguments about the level of scrutiny in *Heller* can be rectified with the application of intermediate scrutiny. This maintains the presumptive legality of the non-exhaustive list of gun regulations in heller while recognizing individual states' authority to restrict the carrying of firearms in public places, such as in the law in New York state.[51]

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[47] District of Columbia v. Heller, 554 U.S. 570 (2008)
[48] United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000)
[49] District of Columbia v. Heller, 554 U.S. 570 (2008)
[50] United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000)
[51] New York Penal Law § 400.00

CONCLUSION

The Supreme Court should affirm and uphold the New York law as constitutional.

Respectfully submitted,

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