No. 20-843

IN THE

Supreme Court of the United States

NEW YORK STATE RIFLE AND PISTOL ASSOCIATION, INC., ET AL.,

Petitioner,

v.

KEVIN P. BRUEN, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF NEW YORK STATE POLICE, ET AL.

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE PETITIONER

AUSTIN O'CONNELL
GREENWICH HIGH SCHOOL
10 Hillside Rd,
Greenwich, CT 06830
austin.oconnell@greenwichschools.org

ROMAN SOFMAN
GREENWICH HIGHSCHOOL
10 Hillside Rd,
Greenwich, CT 06830
roman.sofman@greenwichschools.org

QUESTION PRESENTED

Whether the Second Amendment allows the government to prohibit a law-abiding person from carrying handguns outside the home for self-defense.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Past and Current Legal Commentary

Criminology Research

ANON ……. 9
In-text: (2021)
Your Bibliography: Researchbriefings.files.parliament.uk. 2021. [online] Available at: <https://researchbriefings.files.parliament.uk/documents/SN01940/SN01940.pdf> [Accessed 14 December 2021].

KLECK, G. ……. 9
Macro-Level Research on the Effect of Firearms Prevalence on Suicide Rates: A Systematic Review and New Evidence*
In-text: (Kleck, 2019)
Your Bibliography: Kleck, G., 2019. Macro-Level Research on the Effect of Firearms Prevalence on Suicide Rates: A Systematic Review and New Evidence*. ***Social Science Quarterly*, 100(3), pp.936-950.**

LII / Legal Information Institute. 2021. *Intermediate Scrutiny*.[online] Available at: <https://www.law.cornell.edu/wex/intermediate_scrutiny> [Accessed 14 December 2021]. In-text: **(Intermediate Scrutiny, 2021) …… 10**

LII / Legal Information Institute. 2021. *Rational Basis Test*. [online] Available at: <https://www.law.cornell.edu/wex/rational_basis_test> [Accessed 14 December 2021]. In-text: **(Rational Basis Test, 2021) …… 10**

LII / Legal Information Institute. 2021. *Strict scrutiny*. [online] Available at: <https://www.law.cornell.edu/wex/strict_scrutiny> [Accessed 14 December 2021]. In-text: (Strict scrutiny, 2021) …… 10

LII / Legal Information Institute. 2021. *28 U.S. Code § 1254 - Courts of appeals; certiorari; certified questions*. [online] Available at: <https://www.law.cornell.edu/uscode/text/28/1254> [Accessed 14 December 2021]. In-text: **(28 U.S. Code § 1254 - Courts of appeals; certiorari; certified questions, 2021) …….. 10**

Congressional Research Service, 2021. *Post-Heller Second Amendment Jurisprudence*. [online] Congressional Research Service, pp.2,4-6. Available at: <https://sgp.fas.org/crs/misc/R44618.pdf> [Accessed 14 December 2021]. In-Text: (Congressional Research Service, 2021) ……. 11

JURISDICTION

This case first came to the United Stated District Court for the Northern district of New York where it was dismissed. The petitioners then appealed the decision to the Second Circuit which also dismissed the case. This case comes to this court on writ of certiorari from the Second Circuit. This court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Second Amendment, U.S. Const. amend II, 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.

The Fourteenth Amendment, U.S. Const. amend XIV, provides:

Section 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2: Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years

of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3: No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4: The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

FACTS OF THE CASE

In September of 2014, Robert Nash applied for a concealed carry license in response to the recent robberies in his neighborhood. Nash had no criminal history and had just participated in a gun

training course. Yet his license was denied. New York State concluded that Nash did not demonstrate a “special need” for a

gun, as mandated by the Sullivan Act (1911), and thus could not obtain a concealed carry license.

In September of 2014, Brandon Koch also applied for a concealed carry license in New York. Koch explained that self-defense and extensive firearm experience motivated his desire to carry a gun. Koch, like Nash, had no criminal history but also had his permanent membership denied.

Nash and Koch, the petitioners, sued two New York State officials: superintendent of New York State policy, Kevin P Bruen, and Justice Richard Mcnally. New York State rifle and pistol association joined the lawsuit on behalf of all New Yorkers who could not carry a gun because they failed to meet the requisite “proper cause”

SUMMARY OF ARGUMENT

Though, the Second Amendment protects the right of a “militia” to provide for“the security of the free state.” It has a much broader context than many modern readers realize. Akhil Reed Amar writes ”any band of paid, semi-professional, part-time volunteers” fell under the classification militia. Or as stated in the majority opinion in U.S v Miller (1934), the Amendment protects “all males physically capable of acting in concert for the common defense.” (Adams, 2013) The Civil Rights Act of 1866 describes the 2nd Amendment as a “personal liberty” that cannot be violated by state or federal governments. Much of the legal precedent on the Second Amendment that says otherwise rests on illegitimate grounds because of a failure to apply the Fourteenth Amendment’s Privileges and Immunities Clause. If the Court is to take the use of selective incorporation for the 2nd Amendment seriously, as it has only recently begun to with McDonald v Chicago (2010), it must protect the right to bear arms against state encroachments like New York’s Sullivan Act-a law that requires citizen demonstrate “special need” to exercise their Second Amendment right. The Second Amendment protects a military right as well as an individual right to bear arms. 561 U.S. 742.

ARGUMENT

I. The Second Amendment, and the Bill of Rights more generally, was meant to protect states and individual rights.

A. The Second Amendment protects the right to bear arms in military and individual contexts.

The Bill of Rights more generally was created not just to protect state sovereignty but also individual liberty as shown by the Third and Fourth Amendments' prohibition of the quartering of troops and unwarranted search and seizure respectively. U.S. Const. amend.III. U.S. Const. amend.IV. The Second Amendment protects both state sovereignty and individual liberty by providing a counterbalance to standing armies as well as giving people the means to defend themselves within their own homes. In fact, the State Constitutions of Pennsylvania (1776), Vermont (1777), and Massachusetts (1780) which were to serve as much of the basis for the Second Amendment define the right to bear arms in the context of among other things "defending property" or "themselves". P.A. Const (1776). art. 1, § 21. V.T. Const (1777). art 16. Massachusetts (1780), Article 17. The protection of an individual right to bear arms in these documents is far from an anomaly. According to Corpus of Founding Era American English, a database that contains about 140 million words in American founding documents from 1760-1799, though the word "bear" was used in a military context 90% of the time, the use of words "keep" and "arms" (and their variants) referred to a military right to bear arms 40% of the time, an individual right 30% of the time, and neither in the remaining context (James C. Phillips, 2021). When arms are looked at in the context of rights: 40% of the time they are used in a military context, 25% of the time in an individual context, 30% in both military and individual context, the remaining uses are ambiguous. It is also worth noting that Madison originally intended for the Amendments to be placed throughout the Constitution instead of at the end as it was in the final document. As David Hardy writes,'' If Madison had seen the right to bear arms as primarily restricting federal power over state militia, he probably would have designated it as an amendment to

Article 1, sec.8, which contains the federal power to organize and call out the militia. Instead, he [intended to] put the right to keep and bear arms with freedom of speech and similar rights after Article 1, sec 9." (Adams, 2013)

B. Even when looked at in a military context, the Second Amendment still refers to the populace at large, not exclusively select military guards, having the right to bear arms.

In Federalist 29**,** where Alexander Hamilton advocates for select military guards, he does so in the context of the general population at large having arms. The English Bill of Rights, by contrast, only gives English men the right to "have arms...suitable to their condition". (Hamilton, Jay, Madison and Wright, n.d.) England limited the right to bear arms to upper-classmen by putting a high cost on hunting licenses. As James Madison writes in Federalist 46," Notwithstanding the military establishments in the several kingdoms of Europe...the governments are afraid to trust the people with arms...were the people to possess the additional advantages of [a militia]...it may be affirmed with the greatest assurance, that the throne of every tyranny in Europe would be speedily overturned in spite of the legions which surround it." Madison's words were not just based on history or abstract theory but personal experience with the 20,000 Hessian mercenaries to the colonies in 1775. Had the United States limited the right to bear arms to a fraction of the population then as leading Anti-Federalist Richard Henry Lee writes one class of people would be "render[ed] of no importance…[and] will be defenseless" as the colonists were to the British soldiers. In "The Journal of Occurrences," the colonists recorded regular instances of abuse by British soldiers. (Adams, 2013) They were therefore wary of state-sponsored armies and gave the people not just the right to bear arms, but a civic obligation to do so; not just for military defense but also for community safety as evidenced by the fact the U.S did not create a police force until 1845. John Adams also echoed these sentiments when he stated, "arms in the hands of citizens [may] be used at individual discretion...in private self-defense." (Adams, 2013)

C. **When looked at as a collective and individual right the Second Amendment can have reasonable limits.**

In United States v Miller (1934) the Court would correctly assert,"[The historical sources] show plainly that the Militia compromised all males physically capable of acting in concert for the common defense...And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use today." 307 U.S. 174. Nonetheless, the Court would uphold the National Firearms Act of 1934 on the basis that the guns the act banned could not plausibly have a military use. This ruling is inherently problematic because if the only limit on military practicality this would allow civilians to use rocket launchers and grenades. The Founders certainly realized as Antonin Scalia writes in D.C v Heller (2008) that the "right [to bear arms] was not unlimited just as we do not read the First Amendment to protect the right of citizens to speak for any purpose." 554 U.S. 570. Even though the Court defined arms in Caetano v Massachusetts (2016), a case that expanded on the Heller precedent, as a "thing that a man wears for his defense, or takes into his hands," that is "carr[ied] . . . for the purpose of offensive or defensive action." 577 U.S. The fact that all weapons are arms does not mean that certain types of arms can't be banned or regulated. Even though weapons technology has evolved since the Founding, one can still look to see if certain types of gun restrictions are long-standing. During the Founding era, for example, New York, Boston, and all cities in Pennsylvania prohibited firing guns within city limits which can serve as a basis for gun restrictions in sensitive places (Adams, 2013). Moreover, as Scalia points out in Heller, the Founders also respected the ancient practice of giving a misdemeanor for affrighting-a practice of openly carrying a weapon to scare people; thus the basis for regulating open carry is much stronger than for regulating concealed carry. What must be protected by the Court is the right to get a gun license that can be obtained by mentally stable, law-abiding citizens in a reasonably speedy process that does not violate the Fourteenth Amendment's Privileges and Immunities and Equal Protection clauses. The aforementioned Black Codes in the South would fail to meet these criteria because they acted as "de-facto" bans on the right of black Americans to own guns even if they are seemingly race-neutral.

II. The Supreme Court's failure to implement the 14th Amendment's Equal Protection and Privileges and Immunities clauses in much of its precedent on the Second Amendment creates unequal restrictions on the right of black Americans to have guns.

A. The Supreme Court historically failed to implement the 14th Amendment's Equal Protection and Privileges and Immunities Clauses prior to Heller, leading to rise of discriminatory practices.

In Dredd Scott v Sanford (1857) the Supreme Court ruled that the right to bear arms was a right of citizenship that like all rights of citizenship does not apply to black Americans. 60 U.S. 39 The Fourteenth Amendment was deliberately written to overrule the Dredd Scott ruling by giving the rights of citizenship to "[a]ll persons born or naturalized in the United States" and establishing that "[N]o state shall make or enforce any law which shall abridge the privileges and immunities of the United States".U.S. Const.amend.XIV. The Civil Rights Act of 1866 added that all Americans have the right to bear arms among the other rights guaranteed in the first 8 Amendments of the Constitution in the context of defending "personal liberty." 1866 (Civil Rights Act), Public Law 39-26, 14 STAT 27. However, in the Slaughter-House Cases (1873), the Supreme Court would radically reinterpret the Privileges and Immunities Clause of the 14th Amendment to only limit federal power. 83 U.S. 36. Upon this precedent, the Court ruled in United States v Cruikshank (1876) the Second Amendment "means no more than that it shall restrict the powers of the national government." 92 U.S. 542. Presser v Illinois (1886) would selectively incorporate this precedent and serve as the foundation for the Court's rulings in Miller v Texas (1894) and Roberston v Baldwin (1897). 153 U.S. 535 . 165 U.S. 275. Just as the Court's failure to selectively incorporate the 15th Amendment gave rise to Jim Crow laws, the failure to selectively incorporate the Second Amendment would lead to the Black Codes, which stripped blacks of

the right to bear arms, and left them prey to white mobs (Adams, 2013).

B. The Sullivan Act creates a disparate impact on the right of black Americans to get guns.

The Sullivan Act is similar in both intent and affect to the Southern Black Codes. As late as 1956 Martin Luther King was denied a permit to carry a gun from the Montgomery, Alabama sheriff. As King told protestors shortly thereafter "in substance he [the shiref] was saying 'You are at the disposal of hoodlums." (Sullum et al., 2021) In the same way that the former Alabama law requires "good reason" for a person to be allowed to exercise their Second Amendment Right, the New York Sullivan Act (1911) mandates "proper cause" be shown to obtain a concealed carry gun license. (1911 N.Y Laws 195) According to the petitioner's brief in the pending New York State Rifle & Pistol Association, Inc. v. Bruen, the Sullivan Act was passed after "the years of hysteria over violence that the media and the establishment attributed to racial and ethnic minorities-particularly Black people and Italian immigrants." 20-843.

Whatever the current intent of the Sullivan Act, it must be evaluated by its effects which as the petitioners also note has deprived hundreds of people, mostly blacks and Hispanics, of their right to bear arms. This is mainly because of New York's strenuous regulatory process to obtain a gun license. John Stossel, a reporter who tried to obtain a gun license recalls having to fill out a 17-page test on a 60-page booklet that talked about things like 'metal knuckle knives and 'kung fu stars', and then paying $430 to be questioned and fingerprinted only to learn 6 months later that he was denied access to a gun. (Stossel, 2021)

III. Taking away the right of law-abiding citizens to bear arms actively harms public safety.

Many gun laws like the Sullivan Act are motivated by a belief that more legal gun ownership leads to more gun crime and suicide. This is simply untrue, a 2013 study ordered by the CDC and conducted by the National Research Council found guns are used in self-defense 500,000-3 million times a year, compared to about 300,00 gun uses a year to commit crimes (Hsieh, 2021). Furthermore, gun crimes are only committed with legally purchased guns 3-11 percent of the time (Scarborough and Joe, 2021). Stripping law-abiding citizens of their right to bear arms only leaves them more vulnerable to criminals. And while it is true that many suicides are committed with guns, taking away guns will only lead to suicides by a different medium. As Flordia State criminologist Gary Kleck points out, suicide by gun has the same success rate as suicide by hanging (Kleck, 2019). It is also said that the U.S's high rate of gun ownership causes it to have more gun homicides than other developed nations. While there is a correlation between a developed countries rate of gun ownership and gun crime and suicide, it is inherently imprecise to compare countries with different histories, cultures, populations, and urban densities to reach any sort of conclusion on the sources of their differing crime rates (America's unique gun violence problem, explained in 16 maps and charts, 2021). Instead of trying to correlate a country's gun crime to its homicide and suicide rate when so many different variables are at play, it would be easier and more insightful to look at the same country before and after a large-scale gun restriction. Such as Great Britain's 1996 gun ban that was followed by a crime spike that took 10 years to go down. (Berman, 2012) When gun crime in Britain finally did decrease, it went down at the same rate as the U.S. While suicide rates did go down in Britain after the gun ban they had been decreasing at a constant rate years before (Suicides in England and Wales - Office for National Statistics, 2021). Since the U.S has a larger population and concentration of guns, the effects of a comparable gun ban would likely be more devastating because it would take much longer for the illegal gun supply to begin to dry up.

IV. Court's should give states broad discretion to implement gun control laws as long as they pass the necessary measures of legal scrutiny to ensure they are Constitutional.

None of this is to say that all gun restrictions are arbitrary and unconstitutional. In fact, there have been a few gun control laws at the state level that have been quite successful in protecting public safety and allowing qualified citizens to obtain arms. Contrarily some states have enacted less successful gun control measures, but the primary virtue of the American political system is experimentation. As the 20th Century Supreme Court Justice Louis Brandeis put it, American states are "laboratories of Democracy''. 285 U.S. 262. Before policies are implemented on the extremely macro federal level their effects can be most clearly observed, and potentially reversed, on the local and state level. A slow federal legislative process is another advantage of the Constitutional system because as James Madison observed in Federalist 62 an "excess of law-making seem to be the [root of] diseases which our governments are most liable…" (Hamilton, Jay, Madison and Wright, n.d.) An activist Supreme Court, that seeks to be a legislative instead of a supervisory branch of government, not only creates more undesirable policies but also undermines its authority to protect individual liberties by putting itself in the middle of partisan clashes that will inevitably strip it of its independence. However, as Hamilton writes in Federalist 78, the Supreme Court plays an essential role in intervening when government policy acts in open defiance of the Constitution. Fortunately, the Supreme Court has a variety of mechanisms at its disposal to enforce the Constitution without being an activist branch of government.

Strict scrutiny, intermediate scrutiny, and rational basis review are all methods by which the Courts conduct judicial review. The Courts decide to use them based on the contents and facts of a case. The Courts utilize strict scrutiny when the plaintiff sues on a basis of discrimination. This form of scrutiny is the most difficult for a law to pass and it must truly further "compel governmental interest" (Strict scrutiny, 2021) in order to survive. Next in order of severity is intermediate scrutiny which is used when the state or federal government passes a law that interferes with a protected clause. This form of judicial review is less rigorous than strict scrutiny and in order to pass a law must "further an important government interest" and "do so by means that are substantially related to that interest" (Intermediate Scrutiny, 2021). The last and least rigorous form of judicial review

is the rational-basis test. This test is used to determine the Constitutionality of a law in cases where there are no "fundamental rights or suspect classifications" (Rational Basis Test, 2021) in question. After the monumental decision of District of Columbia v. Heller (Oyez), where the Supreme Court had for the first time interpreted the Second Amendment in an individual rather than a collective sense, the Courts had to develop a framework by which they would review Second Amendment cases. The Courts first ask whether the law burdens a core Second Amendment activity such as the use of a firearm for self-defense in the home, in which case they would utilize strict scrutiny to review the case. Otherwise, most other Second Amendment cases fall within the boundaries of intermediate scrutiny and determine whether regulation actually supports an important government interest. Though, sometimes Courts use a different approach and see if, "challenged regulation falls within a category deemed "presumptively lawful" by Heller"(Congressional Research Service, 2021). In these cases, the law is not a violation of the Second Amendment.

CONCLUSION

This court should reverse the judgment of the United States District Court for the Northern District of New York and The United States Court of Appeals for the Second Circuit and strike down the Sullivan Act.

Respectfully Submitted,

Austin O'Connell
Greenwich High School
10 Hillside Rd, Greenwich,
CT 06830
(203) 551-4718
austin.oconnell@greenwichschools.org

Roman Sofman
Greenwich High School
10 Hillside Rd,
Greenwich, CT 06831
(203) 551-0414
roman.sofman@greenwichschools.org

December 14, 2021