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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QUESTION PRESENTED

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

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SUMMARY OF ARGUMENT

We contend that yes, the Second Amendment does allow the government to prohibit a law-abiding person from carrying handguns outside the home for self-defense, and thus the New York law is constitutional and should be upheld.

District of Columbia v. Heller established that the the Second Amendment protects individual right to keep and bear arms for self defense, with the core of the right being "defense of hearth and home". Additionally, the Amendment is not unlimited in application. The Court has long upheld concealed carry bans, bans on the possession of firearms by felons and the mentally ill, laws forbidding the carrying of firearms in sensitive places such as schools and government buildings**,** and conditions on the commercial sale of arms.

The New York Law passes intermediate scrutiny: the government has an important interest in protecting public safety, and the law is closely related to this objective by creating specific measures to limit the number of firearms in public places. The New York law does not substantially burden the core of the Second Amendment because it only requires proper cause for concealed carry in public, and does not burden the right to keep and bear arms in the home. The proper cause requirement for public concealed carry is an acceptable reflection of the longstanding and constitutional bans on concealed carry and carrying of firearms in sensitive, public places.

ARGUMENT

I. The Second Amendment protects an individual but not unlimited right to keep and bear arms.

A. As established by *District of Columbia v. Heller*, the Second Amendment protects an individual right to keep and bear arms.

When considering the Second Amendment, *District of Columbia v. Heller* is the most relevant precedent on the court's current interpretation of the amendment. *Heller* established that the Second Amendment guarantees "the individual right to possess and carry weapons". *District of Columbia v. Heller,* 554 U.S. 570, at 19 (2008).

The court justified this conclusion through the important distinction that the Second Amendment's prefatory clause ("A well regulated Militia, being necessary to the security of a free State") does not limit the operative clause ("the right of the people to keep and bear Arms, shall not be infringed") to only the context of a militia.

To gain context on why the prefatory clause was included at all, we look to the Founding. Each state regulated a militia consisting of every white, male citizen from ages 16 to 60. The Constitution states the purpose of these militias as "to execute the laws of the union, suppress insurrections, and repel invasions". U.S. Const. art. I, § 8.When looking back at historical sources from before and during the Framing, it becomes clear that a major concern, especially among anti-Federalists, was that the federal government would disarm and neutralize these state militias and replace

them with standing armies, which would then impose tyrannical military rule similar to British occupation before the Revolutionary War. The Declaration of Independence itself contains the lines (in reference to the King of Great Britain): "He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures" and "He has affected to render the Military independent of and superior to the Civil power." Concerns about standing armies and military power can also be found in state constitutions, such as those of New York ("That standing Armies in time of peace are dangerous to Liberty, and ought not to be kept up, except in Cases of necessity; and that at all times the Military should be under strict subordination to the civil Power") and Kansas ("...standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination").[1] New York's Ratification of

[1] For further historical sources on standing armies and military power, see John Adams, "Essay on Man's Lust for Power" (August 29, 1763) ("Was there ever, in any Nation or Country, since the fall, a standing Army that was not carefully watched and controlled by the State so as to keep them impotent, that did not, ravish, plunder, Massacre and ruin, and at last inextricably inslave the People"); Massachusetts House of Representatives, Letter to Benjamin Franklin (November 6, 1770) (" . . . so wretched is the State of this Province, not only to be subjected to absolute Instructions given to the Governor to be the Rule of his Administration, whereby some of the most essential Clauses of our Charter vesting in him Powers to be exercised for the Good of the People are totally rescinded, which is in reality a State of Despotism; but also to a Standing Army, which being uncontrouled by any Authority in the Province, must soon tear up the very Foundation of civil Government"); and Thomas Jefferson, Letter to Secretary of State James Madison (December 20, 1787) (. . . I will now add what I do not like. First the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of press, protection against standing armies, restriction against monopolies, the eternal and unremitting

Constitution with Proposed Amendments, 3 (1788); Kans. Const. sec. 4.

The Second Amendment was created in the context of these specific fears. However, it is not inextricably linked to this context; as *Heller* states, "the prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the [right to keep and bear arms]". *Heller,* 554 U.S. at 26.

This stance was affirmed by this court in *Caetano v. Massachusetts* (per curiam), which held that bans on stun guns violated the Second Amendment, even though stun guns are not military or military-related weapons. *Caetano v. Massachusetts*, 136 S.Ct. 1027 (2016) (per curiam).

It is also important to note that *Heller's* interpretation of the Second Amendment, which was first applied in the District of Columbia, also applies to state governments as well through the Fourteenth Amendment's incorporation doctrine, which was the holding in *McDonald v. City of Chicago. McDonald v. City of Chicago*, 561 U.S. 742 (2010).

B. There are clear and longstanding limitations on the Second Amendment right to keep and bear arms.

When the government has a compelling or important interest, it can impose constitutional limitations on the right to keep and bear arms. *Heller*, which lists examples of certain

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force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land and not by the laws of Nations").

longstanding, acceptable limitations, which are prohibitions on concealed weapons, possession of firearms by felons and the mentally ill, and carrying of firearms in sensitive places such as schools and government buildings, as well as laws imposing conditions on the commercial sale of arms.

It should be noted for clarity that the most frequently cited quote from *Heller* on acceptable gun regulations only includes the latter three restrictions. However, when read in context, *Heller* clearly implies that bans on concealed carry of firearms fall into the same category. The full passage reads as follows:

> "Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts rou- tinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. [citation omitted] For exam- ple, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. [citation omitted] Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws impos- ing conditions and

> qualifications on the commercial sale of arms." *Heller,* 554 U.S. at 54.

The first sentence establishes the main topic as limitations on the right secured by the Second Amendment. *Heller* goes on to argue that these limitations are rooted in history and uses the example of concealed carry bans to support that claim. The three prohibitions listed in the next sentence, therefore, are further examples of longstanding limitations and in the same category as concealed carry bans. A possible reason for their separation is the fact that concealed carry bans are "longstanding" in the sense that they date back to the Founding and early 19th century, whereas the other three prohibitions (felons and mentally ill carrying firearms, carry in sensitive places, and regulations on commercial sale of arms) were not clearly established until the early 20th century.[2] Despite this difference, it is clear that the court considers *all* of these prohibitions "longstanding". Therefore, whether a provision is "longstanding" is not dependent on if it dates back to the Founding or not; rather, the whole history and tradition of our country is considered.

C. The core right of the Second Amendment is to keep and bear arms for self-defense in the home.

[2]For a comprehensive analysis of originalist justifications for these prohibitions, see Carlton F. W. Lawson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit,* 60 Hastings L.J. 1371 (2009). Lawson ultimately concludes that there is not sufficient historical evidence to justify originalist reasoning for labeling these prohibitions "longstanding", and proposes that *Heller* used some form of intermediate scrutiny instead.

Heller also established the core of this Second Amendment as "the right of law-abiding, responsible citizens to use arms in defense of hearth and home". *Heller,* 554 U.S. at 63. This interpretation has been upheld by numerous lower court decisions, most prominently in *Hightower v. City of Boston*, 693 F.3d 61 (1st Cir. 2012), which cites *United States v. Greeno*, 679 F.3d 510, 517 (6th Cir.2012) ("The core right recognized in Heller is 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" (quoting *Heller*, 128 S.Ct. at 2821)); *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1259 (11th Cir. 2012) (noting that the Heller Court "went to great lengths to emphasize the special place that the home—an individual's private property—occupies in our society"); *United States v. Barton*, 633 F.3d 168, 170 (3d Cir.2011) ("At the 'core' of the Second Amendment is the right of 'law-abiding, responsible citizens to use arms in defense of hearth and home.'" (quoting *Heller*, 128 S.Ct. at 2821)); *United States v. Staten*, 666 F.3d 154, 158 (4th Cir.2011) ("According to the Court, the core right of the Second Amendment is 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" (quoting *Heller*, 128 S.Ct. at 2821)); and *United States v. Reese,* 627 F.3d 792, 800 (10th Cir.2010) ("[T]he Court suggested that the core purpose of the right was to allow 'law-abiding, responsible citizens to use arms in defense of hearth and home.'" (quoting *Heller*, 128 S.Ct. at 2821)) as other cases which affirm that the core of the Second Amendment is defense of the home.

This is not to say that the Second Amendment only protects the possession and use of firearms in the home, simply that defense of the home is at

the *core* of the right and should thus be prioritized when examining it. [3]

We now turn to the specific law in question: The 1911 Sullivan Act (N.Y. Penal Law §400.00(1)(a)-(n)).

II. The New York law is constitutional and passes under intermediate scrutiny.

A. Intermediate scrutiny should be applied to analyze the constitutionality of the law.

Heller does not specify the precise level of scrutiny to be used when evaluating gun control regulations, instead asserting that the challenged law would fail under any level of scrutiny. However, it does rule out rational basis review for evaluating gun control regulations:

> "But rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. [citation omitted] In those cases, "rational basis" is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right". *Heller,* 554 U.S. at 56.

[3] See Jonathan Taylor, *The Surprisingly Strong Originalist Case for Public Carry Laws*, 43 Harv. J.L. & Pub. Pol'y 347 (2020) ("So the core of the right is self- defense in the home. To be clear, that is not necessarily the *only* right the Second Amendment protects, but it is the core of the right").

Heller also rejects Justice Breyers' proposed freestanding "interest-balancing" approach (which "asks whether the statue burdens a protected interest in a way or to an extend that is out of proportion to the statute's salutary effects upon other important governmental interests") on the grounds that it grants judges the inappropriate power to decide on a case-by-case basis whether a government interest outweighs a constitutional right. *Id.* at 62.

These rejections leave two options for the level of scrutiny to be applied: strict scrutiny and intermediate scrutiny.

For a law to be constitutional under strict scrutiny, the government must be pursuing a compelling interest, and the means used by the government must be narrowly tailored to achieve this interest. In his article *Four Exceptions in Search of a Theory,* Carlton F. W. Lawson expounds how strict scrutiny is not an option because the restrictions *Heller* established as longstanding and constitutional would not pass under it. In the case of the bans on possession of firearms by felons and the mentally ill and bans on carry of firearms in sensitive places, it can be assumed that the governmental interest is promoting public safety and preventing gun violence, which is certainly compelling. However, the means are not narrowly tailored to achieve this end. Banning all felons from possessing firearms is over-inclusive; it also deprives nonviolent felons of their Second Amendment rights, who cannot be reasonably said to be more likely to commit acts of gun violence than ordinary citizens. The ban on mentally ill firearm possession is similarly broad and over-inclusive; "mental illness" encompasses a wide range of

conditions, many of which do not make a citizen more likely to commit acts of gun violence.

Likewise, it is flawed to assume that every person entering a "sensitive place" with a gun (which is a vague term and never specifically defined to begin with) has an intent to commit violence, and thus the sensitive place ban is too broad to be narrowly tailored. And finally, the commercial

aspect of regulations on the sale of arms cause it to fail strict scrutiny (as do other similar measures, such as restrictions on the commercial sale of contraceptive devices). Carlton F.W. Lawson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 Hastings L.J. 1371 (2009).

Heller's approved restrictions, however, all pass under intermediate scrutiny; therefore, intermediate scrutiny should be applied to analyze gun control regulations such as the New York law in question today.

B. The New York law passes under intermediate scrutiny.

For a law to pass under intermediate scrutiny, the government must be pursuing an important interest, and the means the government uses must be closely related to this interest.

The governmental interest in this case is to protect public safety and prevent gun violence in public places. This interest is undoubtedly important (and perhaps one of *the most* important interests our government can have, which is protecting the health and lives of American citizens).

The means the government uses, which is the requirement that citizens wishing to receive an

unrestricted concealed carry license must demonstrate "proper cause", are closely related to the interest of protecting public safety. It is important to note that the New York law does not restrict concealed carry altogether, and in fact provides a multitude of avenues and situations in which a law-abiding citizen can carry a concealed weapon for the purposes of self-defense *without* proper cause. Under the law, homeowners may keep and bear arms in their homes; storekeepers may keep and bear arms in their places of business; and judges, government employees, bank employees, and people employed by state institutions may keep and bear arms during employment.

In fact, Petitioner Koch's license already allows him to carry a concealed handgun while traveling to and from work, while both Petitioners Nash and Koch are permitted to carry handguns in unpopulated areas where there are subsequently less available law enforcement officers. The one situation which requires "proper cause" is concealed carry in public spaces outside of specific employment needs, which is indeed closely related to the government interest of public safety. The law is a clear and reasonable measure to protect public spaces where large amounts of people tend to gather, such as subways, malls, airports, stadiums, and schools.

Additionally, the New York law does not even substantially burden the core of the Second Amendment right, which has been established to be defense of the *home* (for which no "proper cause" is required). It is also longstanding, as concealed carry bans date back historically to the founding, and the law itself is older than other, relatively recent prohibitions held by *Heller* to be

longstanding as well (the felon and mentally ill bans, sensitive place carry bans, and regulations on commercial sale of arms). It is a clear, reasonable extension of the approved Second Amendment limitation on carrying concealed weapons in public, sensitive places.

Respectfully submitted,

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