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/RESPONDENTS

LIGHTHOUSE WU
Counsel of Record
The Baldwin School
701 Montgomery Avenue
Bryn Mawr, PA 19010
484-985-2878
ywu@baldwinschool.org

WYNNE CONGER
The Baldwin School
701 Montgomery Avenue
Bryn Mawr, PA 19010
484-985-2878
gconger@baldwinschool.org

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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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SUMMARY OF ARGUMENT

Under *Heller*, the textual language of the Second Amendment dictates the "individual right to possess and carry weapons in case of confrontation" as, like the First and Fourth Amendments, it principally codifies a pre-existing right in English Common Law: the right to self-defense, *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). Since the Founding, the right to "keep and bear arms" has been enshrined as the right of the People in the original interests of "the security of a free State" U.S. Const. amend. II. New York's Sullivan Law violates this Constitutional liberty.

Under New York State legislation, "[n]o license shall be issued or renewed" unless, under the licensing officer's discretion, the applicant is morally upright, has clean records, and "no good cause exists for the denial of the license." Penal Law § 400.00(1). However, despite their satisfaction of the requirements, both Petitioners were denied their license. The foundational right of all Americans, the usage and carry of arms for self-defense is directly restricted, thus severely burdening the Petitioners' exercise of their Constitutional right and directly infringing upon the Second Amendment's codified duty.

Under the jurisprudence of *Heller*, all citizens are entitled to their individual right to use their arms for "traditionally lawful purposes, such as self-defense within the home" 554 U.S. at 600. In accordance with this precedent, every law-abiding citizen is entitled to the carry of arms both within and outside the home under their inalienable right to self-defense and the Second Amendment's protection.

I. Since the Founding, the Second Amendment unequivocally established the codified right to keep and bear arms for self-defense.

In accordance with its original purpose of "[a] well regulated Militia, being necessary to the security of a free State," the Second Amendment principally establishes the ultimate "the right of the people to keep and bear Arms" under Constitutional legislation. It protects the fundamental right of all citizens of America to maintain and carry arms, unconnected with military service, for the people's protection. As *District of Columbia v. Heller*, 554 U.S. 570 (2008) clarifies:

> "Putting all of these textual elements together we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right."

The fundamental employment of arms as a means of security is indistinguishable from the Second Amendment's historical protection and even well-established in English Common Law. As noted in the 1689 English Bill of Rights, the possession of arms was historically enabled under the purpose of "defense suitable to their conditions and as allowed by law." 1 W. & M., c. 2, 7, in 3 Eng. Stat. at Large 441 (1689). Blackstone's commentaries on English Common Law

further support the extension of this codified right, dictating that "the right of having and ufing arms for felf-prefervation and defence" as among the principal entitlements of English citizens 1 William Blackstone, *Commentaries on the Laws of England* 139-40 (1765). However, it is the institution of the militia and its 'call to arms' for public defense which most notably formalized this right's implications within the American public.

Originally, the practice of the militia was in response to the perceived Federalist threat of European standing armies. The force would constitute any citizen with the ability to wield a firearm in the name of public defense. Under common jurisdiction, the right of militia self-defense was recognized as the right of all citizenry in arms, and therein, as the right of the people. Thomas Jefferson so far as likened "[T]he militia of the State, that is to say, of every man in it able to bear arms." Thomas Jefferson, Letter to Destutt de Tracy (January 26, 1811). Given the common threats to the public defense (insurrection or invasion, for instance) Hamilton notes that "it would be natural and proper that the militia of a neighboring State should be marched into another, to resist a common enemy, or to guard the republic against the violence of faction or sedition." Federalist No. 29 – Hamilton (1788). Veritably, the Founding Fathers saw the right of the militia of the armed citizenry as imperative in preserving the common defense. As *McDonald v. City of Chicago* later summarizes, the emphasis of the Second Amendment's militia was significant. At the time of the Founding, the case clarifies that "[i]t is clear that the Framers and ratifiers … counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty", *McDonald v. City of*

Chicago, 561 U.S. 742. Thus, the aforementioned 'Fundamental rights' which the militia initially embodied in American practice were later enshrined in the Second Amendment under American law. In the practice of militia, arms ownership remained the primary duty of the citizenry or the citizens in arms, and therein, the Second Amendment codifies this inherent right as the principal protection of the people.

A. The Second Amendment unquestionably designates the individual right to "keep and bear arms" as unrestricted by militia service.

Since the Founding, the United States of America has long acknowledged the duty of gun ownership as one not required solely by militia enrollment, and the Framers' language reflects this interpretation. The terms of the article are undeniably well-established in their long standing usage and interpretation, after all.

In consideration of the 1773 edition of Samuel Johnson's dictionary, the term "arms" has historically denoted "weapons of offence, or armour of defence", leaving no indication that the term "arms" is connotative of military weaponry 1 *Dictionary of the English Language* 107 (4th ed.) (hereinafter Johnson). *Caetano v. United States*, quoting *Heller*, upholds a similar definition under modern Court precedent, where the Second Amendment's jurisdiction "'extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.'" *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (per curiam) (quoting District of Columbia v. Heller, 554 U.S. 570, 582 (2008)). Notably however, *Miller*

also designates "dangerous or unusual weapons" as the exception.

Concerning the keeping of arms, the Court once again defers to *Johnson* for the reference as to the Framers' intent. Here, the term "keep" is defined as "[t]o retain; not to lose," and "[t]o have in custody", and "bear" indicates the ability "to carry" accordingly. Therefore, in the framers' interpretation, the right to "keep and bear arms" is therefore equivalent with the American individual's right "to have arms in one's possession and carry them" for the Second Amendment's fundamental purpose of self-defense, fully independent of militia service.

Under *Heller*, the court recognizes that the prefatory clause of the Second Amendment merely "announces a purpose, but does not limit or expand the scope of the operative clause". Therefore, in accordance with its original jurisdiction, all citizens within a free state are entitled to maintain and carry arms because of their principal right to self-defense: as embodied by, but not restricted to, the practice of the militia. In the practice of militia, arms ownership remained the primary duty of the citizenry or the citizens in arms after all, and therein, the Second Amendment codifies this principal protection as the inherent individual right of the people.

II. The right of an individual to self-defense should not be violated.

In Blackstone's commentaries, it is stated:

> "(This may be considered as the true palladium of liberty……) The right of self-defense is the first

> law of nature…… [when] the right of the people to keep and bear arms is, under any color or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction." (St. George Tucker, 1803)

Thus, long standing common law already establishes a person's natural right to seek self-protection. Under these initial intentions, the state-regulated **Militia** served as a common interest of self-defense at the time the Second Amendment was first written. Although no institution of Militia still stands in the modern day, the initial purpose of the clause "the right of the people to keep and bear Arms" to protect people's safety remains an inalienable right. Just like how the militia was created to shield the People from external invasion, the Second Amendment's interpretation fundamentally acts as an extension of the same concern in modern day--protecting public safety.

Therefore, legislations which employ gun control and regulation of arms must always be in accordance with the purpose of protecting people's fundamental rights to self-defense. The right to bear arms is strictly defined in many cases under the Court's precedent (in *Heller*).

A. To protect public safety, gun control laws must stand to define the broader lines of its limitations without infringing on the Second Amendment.

To ensure public safety, the law strictly defines the capabilities of a person to both keep and bear arms. Since the Founding, the Second Amendment has upheld long standing limits to ban certain groups of people from

carrying weapons in public. Only by limiting the Second Amendment can the laws ensure that everyone's right to public safety is secured.

For instance, as Justice Scalia established in *Heller* that the people who can carry arms is limited to citizens who are not "felons and the mentally ill" along with other notable prohibitions of the Founding Era, such as "forbidding the carrying of firearms in sensitive places such as schools and government buildings, or imposing conditions and qualifications on the commercial sale of arms". In conjunction with these long standing limitations, the Court also recognizes the stark difference between open and concealed carry "through "concealed weapons prohibitions [that] have been upheld under the Amendment or state analogues" in *Heller*. However, even while the Court recognizes the potential Constitutionality of concealed carry prohibitions, the state regime of New York's "for cause" law is unnecessarily burdensome in this regard, and is not narrowly written enough for law-abiding citizens to exercise their right. Therein, although the Second Amendment does not go unlimited, its fundamental liberty to keep and bear arms shall not be infringed.

Additionally, under the holding of *United States v. Miller*, the Court recognizes the sole significance which the Second extends to "weaponry strictly tied to militia purposes" in its original context, limiting the arms protected under the Second Amendment "to the kind in common use at the time". In *Heller*'s consideration of this judgment, the Court concluded that "the early English law did not guarantee an unrestricted right to bear arms" as prohibitions against "dangerous or

unusual weapons" (military-grade weaponry, for example) have long been upheld under legal jurisdiction.

As technology advances, increasingly more decisions on the new variety of weaponry are made based on whether the weapon in question is threatening the public safety, or protecting one's own. In *Caetano v. Massachusetts*, the court determined that a stun gun, as a kind of modern weapon, can be carried in public spaces. Because the nature of stun guns is solely for self-defense, arms with the designated protection are allowed and protected under the Second Amendment.

The basis of the Second Amendment's protection is that every regulation is made out of the principle of public safety. While the Second Amendment's foundational right to arms for the common defense is maintained, the Court acknowledges that every right needs limitations.

B. The New York law hinders individuals access to self-defense, which violates the Second Amendment and should be struck down

Heller states that the Second Amendment protects the individual right of firearm possession (independent of militia service), for "traditionally lawful purposes, such as self-defense within the home". *District of Columbia v. Heller*, 554 U.S. 570 (2008) Pp. 2–53. Following this decision, the Court recognizes that it is necessary to have the right regulation on keeping and

carrying arms. The New York state law puts burden on the individual right to self-defense by requiring a "good cause" and a good moral character when requesting for gun holding permission, or "[n]o license shall be issued or renewed". Because of such exclusive standards, any citizen applying for a license fundamentally faces the threat of being unjustly refused. The people's right is infringed upon.

The absurdity of this restriction is further revealed, given the petitioners' qualifications for gun-carrying. The Sullivan Law directly impacts the core of the Second Amendment (the codified right of every person to keep and bear arms for self-defense) as a deeply exclusive regulation for the average law-abiding citizen, and it. The fact that, under this law, a law-abiding citizen who has a motivation for self-defense cannot obtain the necessary permission to protect themselves in public poses a direct and severe burden on the core of the 2nd Amendment right.

Under New York's discretionary standard, law-abiding American citizens like Petitioners Nash and Koch are explicitly prevented from exercising their Constitutional right, and therefore, there is a compelling governmental interest to be pursued in the scrutiny of this law.

Given the critical extent to which the New York 'proper cause' law burdens the People's exercise of the Second Amendment, the case implies the application of heightened scrutiny. In consideration of the standards of scrutiny applied in *Heller*'s precedent, the law fails constitutional muster accordingly, and the government has a compelling reason to strike down the law.

CONCLUSION

In the Federalist papers of Alexander Hamilton, the practice of the militia is most succinctly characterized as "the most natural defense of a free country." Federalist No. 29 – Hamilton (1788). Throughout the centuries of American democracy, this definition has upheld the inherent right of every citizen to "keep and bear arms" in both legal and historical precedent. U.S. Const. amend. II. Concerning long standing prohibitions, the Court acknowledges that the Second Amendment is not unlimited. However, the individual right to security of person and property (unqualified by militia service) is inherent to the American People in arms.

As we remain representative of the petitioners, we pray that the Court principally distinguish the Second Amendment's protection under *Heller* precedent, that the Second Amendment prohibits states from denying a law-abiding person a license to carry a handgun outside the home.

This court should affirm the decision of the Second Circuit Court of Appeals and rule in favor of the Petitioners, New York State Rifle & Pistol Association, Inc., et al.

Respectfully submitted,

LIGHTHOUSE WU *COUNSEL OF RECORD* THE BALDWIN SCHOOL 701 MONTGOMERY AVENUE BRYN MAWR, PA 19010	WYNNE CONGER THE BALDWIN SCHOOL 701MONTGOMERY AVENUE BRYN MAWR, PA 19010 [December 15, 2021]