In the Supreme Court of the United States

NEW YORK STATE RIFLE AND 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 Tenth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

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

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JURISDICTION

This case comes to the Court on writ of certiorari from the United States District Court for the Northern District of New York, arising under jurisdiction granted by 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.

FACTS

In September of 2014, Robert Nash and Brandon Koch applied for concealed-carry firearms licenses in the state of New York. Robert Nash desired the license on account of the recent uptick of crime and robberies in his neighborhood. Brandon Koch wanted the license for general self defense. Both men had completed gun safety courses and had no criminal history or history of mental illness. New York denied them licenses to carry in public under the "proper cause" requirement of New York Penal Law §400. They met the proper cause standard to receive restricted licenses to hunt and carry in places not open to the general public. New York law further requires good moral character as well as proper cause for earning a license.

To meet the "proper cause" required for a license to carry in public, one must "show any facts demonstrating a need for self-protection distinguishable from that of the general public." *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 88 (2d Cir. 2012). Mr. Nash's example of recent robberies in his neighborhood did not meet that standard. Mr. Koch's desire for general self defense also did not meet that standard. The decision of who has a distinguishable danger and good moral character falls into the hands of licensing officers. If the applicant is not satisfied with their decision, they may appeal to the decision to a higher court.

This case was dismissed in the District Court and Second Circuit, both of which cited Kachalsky's "proper cause" definition stated above to be binding.

SUMMARY OF ARGUMENT

The right of citizens to bear arms outside the home for self defense is enshrined in the Second Amendment, and New York's requirements for a concealed carry license violate this right.

The Founders recognized that bearing arms was a natural right, and sought to protect that right partially in response to its limitation in England. The carrying of weapons outside the home was an integral part of life in founding- and framing-era America; the Framers supported gun-carrying for self defense. When framing-era laws limited the use of guns, they prohibited unusual weapons and their use to terrify the people, not the carrying of weapons by law-abiding citizens for the purpose of personal safety.

The right to "bear" arms is distinct from the right to "keep" arms, as established by *District of Columbia v. Heller,* and the right to "bear" arms includes the right to carry them in a public place for the purpose of self defense.

The New York law that prevents this type of carrying should be analyzed under strict scrutiny because it violates a fundamental right. It fails strict scrutiny analysis: it neither achieves a compelling state interest nor uses the least restrictive means necessary to achieve this interest.

Regardless of what other types of handgun ownership and use the state of New York allows, prohibiting handgun carrying outside the home for self defense violates the core purpose of the Second Amendment, and is therefore constitutionally prohibited.

This Court should reverse the judgment of the Court of Appeals.

ARGUMENT

I. The historic purpose of the Second Amendment was to protect the right of the people to bear arms outside their homes for self-defense.

A. In the era of the Second Amendment's enactment, to "bear arms" meant to carry outside the home for self-defense.

The core right protected in the Second Amendment is the right to self defense. We see this proven and supported throughout many common law and historical sources. The Second Amendment was created in direct response to British actions that limited the colonists' right to self defense. The right to arms, as this Court wrote in *McDonald v. Chicago*, is not a "second-class right, " and the founders did not view it as such. 561 U.S. 742 (2010). As Samuel Adams wrote, citizens have "a right to support and defend" life, liberty and property, and a "duty of self-preservation." Samuel Adams, *The Rights of the Colonists* (1772). One way the right to defend is executed is through the right to self defense. The Kansas Territory Wyandotte Constitution codified the right to arms for self-defense, declaring that "[t]he people have the right to bear arms for their defense and security." (1859). Additionally, many of the state constitutions that addressed the right to arms described it specifically as a right to personal defense. In *Blackstone's Commentaries*, Blackstone explained citizens "hav[e] arms for their defence." *Commentaries on the Laws of England,* 139-40 (1765). The rights to keep and to bear arms are enshrined in the Constitution for the core purpose of

protecting the individual right to self defense.

That right, the right to self defense, has always been recognized and treated as fundamental. In 1803, St. George Tucker wrote that "[t]he right of self defence is the first law of nature." *Blackstone's Commentaries* (1803). The right to bear arms for self defense was not restricted to the home. The word "bear" itself means to "carry." Historical reference further shows that citizens frequently carried arms in public spaces. A trial judge informed a British officer near the time of the Boston Massacre "that the inhabitants carried weapons concealed under their clothes, and would destroy them [Redcoats] in a moment, if they pleased." *The Annual Register, of a View of the History, Politics, and Literature, for the Year 1766*, at 215 (4th ed. 1785). In 1736, Tucker explained that "the right to bear arms is recognized and secured in the constitution itself. In many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side." *Commentaries*, at 19. Rep. Harrison Gray Otis said in 1798, "The law of Nature and of Nations authorize the right of carrying arms for self defence, by sea as well as by land, and no law of the United States has ever prohibited to our citizens the exercise of this right." *Letter from the Hon. Harrison G. Otis . . . for Petitioning Congress, Against Permitting Merchant Vessels to Arm,* at 11 (Apr. 1798). The core of the Second Amendment is self defense. Citizens do not need to earn or prove that they have this right; it is protected in the Second Amendment and applicable to all citizens.

Founding-era common law does provide some examples of gun regulations. However, these laws only banned public carry when guns are carried *offensively*. For example, in 1692, a Massachusetts law read, "such as shall Ride, or go Armed Offensively before any of Their Majesties Justices, or other Their Officers or Ministers doing their Office, or elsewhere, by Night or by Day, in Fear or Affray of Their Majesties Liege People." 1692 Mass. Laws No. 6, at 11-12. This law only punished those holding guns if the guns were brandished offensively and caused fear or affray. In New Hampshire "affrayers, rioters, disturbers or breakers of the peace, or any other who shall go armed offensively. . . ." could be arrested for infractions. 1699 N.H. Laws 1. Once again, the issue occurred if individuals attempted to terrorize citizens or break the peace.

B. Heller clarified the right to "keep… Arms" as individual and not tied to the militia.

The case *District of Columbia v Heller* synthesized hundreds of years of gun laws into one decision: the right to keep arms is an individual right which cannot be infringed. The court in *Heller* wrote that, "Putting all of these textual elements together we find that they guarantee the *individual* right to possess and carry weapons in case of confrontation." 554 U.S. 570 (2008). Heller specifically addressed the "keep" part of the Second Amendment by deciding guns may be kept in the home. A similar line of reasoning should be applied to the word "bear."

The court in *Heller,* in fact, did address the right of the people to "bear" arms. The court wrote that, "At the time of the founding, as now, to 'bear'

meant to 'carry.' When used with "arms," however, the term has a meaning that refers to carrying for a particular purpose—confrontation." (*internal citations omitted) Id.* This reasoning was used to build a foundation for the conclusion that the Second Amendment was an individual right for self defense rather than one which was only invoked in a militia sense.

In that same line of reasoning, this Court said "the phrase implies that the carrying of the weapon is for the purpose of offensive or defensive action." *Id*. Restricting the right to bear arms in the way which the New York law does, effectively nullifies the phrase "bear arms." While the *Heller* court clarified that "nothing in our opinion should be taken to cast doubt on … laws forbidding the carrying of firearms in sensitive places such as schools and government buildings," the New York concealed-carry laws effectively define all public spaces as "sensitive places." This is not consistent with the founding-understanding of where guns can be carried. Historically, citizens frequently bore firearms in public spaces for self defense. A *de facto* blanket ban on guns in public spaces is not in line with the founding era understanding of the right to bear arms.

C. Because the Second Amendment protects an individual right to self defense, and because keep means own, "bear" means carry for self defense.

It is a tenet of constitutional interpretation that each word used by the Framers has meaning and should be treated as such. Failing to protect the meaning of parts of the Constitution harms the

Framers' intent. Preventing citizens from carrying guns outside the home restricts the meaning of the word "bear" beyond its founding-era understanding, and would render the phrase "keep *and bear* arms" superfluous. The Constitution places both keep and bear on the same level and affords them equal power. Thus, they should be treated equally under the Second Amendment.

II. The Second Amendment's purpose is to protect a broad, individual right to self-defense.

A. The Second Amendment protects a broader right than the English Bill of Rights.

The English Bill of Rights said "'[t]hat the Subjects which are Protestants, may have Arms for their Defence 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). Both English and American citizens understood the right to keep and bear arms as fundamental. A member of Parliament wrote, "by the bill of rights, the right to carry arms for self-defence was not created, but declared as of old existence." 69 *Hansard's Parliamentary Debates*, ser. 3, 1151 (May 30, 1843). *Heller* also analyzed the historical English view of the right to bear arms, finding that, "By the time of the founding, the right to have arms had become fundamental for English subjects."*Heller*, 554 U.S. at 593. The Framers looked at the right to keep and bear arms for self defense as fundamental.

However, as with the Fourth Amendment—which was created in response to British officers' invasion of citizens' homes and ships

using writs of assistance—the Second Amendment was a response to abridgments of the right to bear arms that the Framers saw in English laws. In Heller, this Court explicitly recognized that, "the right protected by the Second Amendment was decidedly broader than the one protected in the English Bill of Rights." *Heller*, 554 U.S. at 593. Earlier, Justice Joseph Story wrote in his Commentaries on the Constitution of the United States, "under various pretences the effect of this provision [the English right] has been greatly narrowed; and it is at present in England more nominal than real, as a defensive privilege." *Commentaries on the Constitution of the United States,* 747 (1833). James Madison also discussed the right to bear arms in Federalist No. 46, where he described "[T]he advantage of being armed, which the Americans possess over the people of almost every other nation." *Federalist No. 46*, (1788). Madison saw the Second Amendment as protecting a broader right than other nations. The Framers recognized flaws and loopholes in the English Bill of Rights and prided themselves on protecting a broader right in the Second Amendment, protecting the same right but removing restrictions.

While the Second Amendment covers a broader right than the English Bill of Rights, it also covers everything the English Bill of Rights covered. The Second Amendment allows the same rights but removed restrictions and requirements. Therefore, the rights explicitly protected in the English Bill of Rights are also protected by the Second Amendment. English common law has provided insight to the meaning of "self defense." William Hawkins wrote, "the killing of a Wrong-doer … may be justified …

where a Man kills one who assaults him in the Highway to rob or murder him." *A Treatise of the Pleas of the Crown* 71, §21 (1716). Matthew Hale wrote, "[i]f a thief assault a true man either *abroad or in his house* to rob or kill him, the true man … may kill the assailant, and it is not felony."Matthew Hale, *Historia Placitorum Coronae* 481 (Sollom Emlyn ed. 1736) (emphasis added) Both go to demonstrate the right to self defense but Matthew Hale further shows that the right to self defense was not restricted to the house.

B. The Statute of Northampton does not conflict with this interpretation of the Second Amendment.

The Statute of Northampton is often used to defend the Constitutionality of prohibitions of guns in public places. However, that was not the accepted understanding of the law in the founding era, and it was not the *Heller* court's understanding. The statute states,

> [N]o man great nor small, of what condition soever he be, except the king's servants in his presence, … nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armour to the King

The Statute of Northampton, 2 Edw. III, ch. 3 (1328).

The North Carolina Supreme Court's decision in *State v. Huntly* explained the common understanding of this piece of law, stating it prohibited "riding or

going about armed with unusual and dangerous weapons, to the terror of the people." 25 N.C. 418, 420 (1843). There is also a historical tradition of treating the Statute of Northampton as applying only to "dangerous and unusual Weapons, in such a Manner as will naturally cause a Terror to the People," *Hawkins*, 134-35, §§1, 4. Finally, in St. George Tucker's edition of *Blackstone's Commentaries*, he wrote, "[t]he offence of riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land, and is particularly prohibited by the Statute of Northampton." *Blackstone's Commentaries*, at 148-49 (1803). The Statute of Northampton was not a ban on carrying guns in public but rather a ban on carrying guns to terrorize citizens.

III. The appropriate level of analysis for the New York concealed-carry law is strict scrutiny.

To determine the appropriate level of scrutiny for the analysis of New York's law, two factors must be analyzed. In a similar Second Amendment case, the Second Circuit Court of Appeals explained these factors: "we consider…(1) how close the law comes to the core of the Second Amendment right and (2) the severity of the law's burden on the right." *NYSRP v. Cuomo*, 804 F.3d at 258.

The right to bear arms outside the home for self defense is at the core of the Second Amendment. In *Heller,* this court wrote that the right to self defense was "the *central component* of the [Second Amendment] right itself." 554 U.S. 570, 599 (2008). This "core lawful purpose of self-defense" applies to carrying handguns outside the home. The right to

"bear" arms is given equal place with the right to "keep" arms in the text of Second Amendment, and is just as closely tied to the Amendment's "core purpose" as keeping arms within the home. 554 U.S. 570, 599 (2008). Thus, preventing citizens from carrying handguns outside the home for the purpose of self-defense infringes upon the core of the right protected by the Second Amendment.

This restriction also places a severe burden on the right. By leaving citizens' ability to carry a gun up to the discretion of individual officers, the New York gun regulation prevents citizens from legally carrying "an entire class of 'arms' that Americans overwhelmingly choose for the lawful purpose of self-defense." *Heller,* 554 U.S. 570, 599. Even if citizens show that they are in good moral standing and have a significant fear for their personal safety, their Second Amendment right to bear arms still may be denied in New York.

The natural right enshrined in the Second Amendment is not a privilege that must be earned. While *Heller* acknowledged that in some situations this right may be limited—such as in "sensitive places"—the underlying principle in the *Heller* court's decision was that "law-abiding, responsible citizens" have a right to arms for self defense. 554 U.S. 570, 599 (2008). The New York law violates this right, preventing even law-abiding citizens from bearing arms in nearly all locations.

Taken together, these two factors indicate that strict scrutiny is the appropriate level of scrutiny to analyze New York's gun regulation law because the right to bear arms in public places is a fundamental

constitutional right and because New York's law severely limits this right.

Thus, for the law to be constitutional, it must *achieve* the governmental interest of a reduction in violent crime and it must be narrowly tailored to—or at least use the least restrictive means necessary to achieve—that interest. The New York law fails on both counts.

A. The law does not achieve a compelling state interest.

As has been recognized for centuries, "Laws that forbid the carrying of arms … disarm only those who are neither inclined nor determined to commit crimes." Cesare Beccaria, An Essay on Crimes and Punishments (1764). Respondents argue that placing limitations on concealed-carry licenses will lead to fewer gun crimes. Because there is significant controversy in the literature examining the effects of substantial restrictions on the ability of citizens to concealed-carry[1], the state has not met its burden to demonstrate that its firearm regulations *achieve* the state interest that they set out to.

B. The law does not use the least restrictive

[1] See *Concealed Carry Permit Holders Across the United States,* 2019 Crime Prevention Research Center (finding that less than 1% of individuals holding concealed-carry permits commit firearms violations and that "[t]he overwhelming majority of peer-reviewed academic research by economists and criminologists concludes that ownership of permitted concealed handguns causes a reduction in violent crime.") and *State Level Firearm Concealed-Carry Legislation and Rates of Homicide and Other Violent Crime*, Journal of the American College of Surgeons (2018) (finding that there is not a significant association between violent crime rates and concealed carry laws)

means necessary to achieve that interest.

There is a legitimate government interest to reduce crime rates and protect citizens. The court in *Heller* acknowledged that some restrictions on firearm ownership—such as "prohibitions on the possession of firearms by felons and the mentally ill," preventing firearm carry "in sensitive places such as schools and government buildings"—may be constitutional. *Heller,* 554 U.S. 570. Preventing law-abiding citizens from carrying weapons in any public place is not.

Where lower courts found laws analogous to New Yorks' to be constitutional, they ignored this Court's fundamental assumption about the nature of the Second Amendment: because it invokes the phrase "the people," it applies to all persons, not an unspecified subset. *Heller,* 554 U.S. 570. In one representative case, the court upheld a law in which a permit for a handgun for the purpose of self-defense will only be granted if there are "documented threats, restraining orders and other related situations where an applicant can demonstrate they are a specific target at risk." *Peruta v. County of San Diego,* 824 F.3d 919 (2016).

The court justified this law by cataloging historical prohibitions of concealed carrying of weapons, yet conflated the prohibition of only concealed-carry with the prohibition against carrying weapons at all. In California, open carry is illegal while concealed-carry licenses are near-impossible for the average citizen to obtain. As in New York, then, the sum of California's regulation on handguns amounts to a near-total ban on "bearing" them in

public—a violation of the Second Amendment.

The Second Amendment protects the right of common citizens to keep and bear weapons in common use. Following this reasoning, it also protects citizens with a common—not an exceptional—need for self-defense. In *Wrenn v. District of Columbia,* the D.C. Circuit applied the reasoning of the court in *Heller* to a case involving concealed carry of weapons in public places. The same reasoning applies here.

The Court in *Heller* reasoned that "the term [the people] unambiguously refers to all members of the political community, not an unspecified subset," wherever it is used in the Constitution, and that the same definition applied to the Second Amendment. *Heller,* 554 U.S. 570, 580. Additionally, the court in *Heller* held that the Second Amendment applies to weapons "in common use for lawful purposes." *Id,* citing *United States v. Miller*, 307 U.S. 174. The court in *Wrenn* applied this logical progression to the need for self-defense: "the class of citizens who can wield them [arms] must include those with common levels of competence and responsibility—and need." 864 F. 3d 650, 665 (2017).

The New York law does not allow citizens with "common levels of…need" to bear arms; following the reasoning in *Heller,* this violates the Second Amendment. *Id.* While *Heller* allows for some restrictions on an individual's right to bear arms, a near-total ban on this right—and a complete ban on the ability of an average citizen, with an average need for self-defense to bear a weapon—is much more restrictive than the limits outlined by *Heller.*

Additionally, the court in *Peruta* emphasized the exceptions to the prohibition—for persons such as "peace officers," "guards or messengers of common carriers of banks or financial institutions while employed in the shipping of things of value," "armored vehicle guards," or "zookeepers," for example—yet this, again, contradicts *Heller's* emphasis and the Founder's conception of the right to bear arms as a right for all persons, not a right granted to only a few subsets of the population. 824 F.3d 919 (2016).

CONCLUSION

Based on both common law and case law, the Second Amendment is an individual right for self defense which is not confined to the home. New York violates the Second Amendment by restricting citizen's ability to carry firearms for self defense. For the foregoing reasons, this Court should reverse.

Respectfully submitted,

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