

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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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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FACTS OF THE CASE

In New York, a person seeking to conceal carry a firearm must acquire a license from the state. In order to get the license, one must show a special need for self-protection and the state will determine whether or not to grant the person that license. Robert Nash and Brandon Koch, two law abiding citizens with no criminal history, applied for the license in the state of New York for self-defense purposes and were denied because they did not demonstrate a special need. The two sued Kevin P. Bruen and Justice Richard Mcnally with the help of the New York State Rifle and Pistol Association, stating that there was no “proper cause” to deny them the licenses

SUMMARY OF ARGUMENT

The New York state law, N.Y. Penal Law § 400.00(1)(a)–(n), constitutionally prohibits the license of a concealed gun for anyone that does not have a “proper cause” for the public use under the second amendment. With the precedent of “Kachalsky v. City of Westchester”, this law has been tried in the second circuit and defined of its importance for “the proper cause requirement would survive constitutional scrutiny even if it implicated the Second Amendment.” as well as, “New York State courts have defined the term [“proper cause”] to include carrying a handgun for target practice, hunting, or self-defense.” (Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 86 (2d Cir. 2012)). The record must be known that this case is of a

self-defense license of the 2nd amendment case in public, therefore, the plaintiffs must have a special need for self-protection outside of their home.

Self-defense in a home and outside of a home are divergent as presented in “District of Columbia v Heller”, which came to the conclusion that the second amendment protects the right of a firearm in one’s home, not outside. With the appliance of intermediate scrutiny, for the safety of the citizens of New York, without a “proper cause”, under no circumstances shall a citizen be given the opportunity to for a concealed gun carry outside of a home.

ARGUMENT

I. Origins of the Second Amendment

A. The Original intentions of the Second Amendment

As determined in “District of Columbia v. Heller (2008)”, it was illegal to carry an unregistered firearm and prohibited the registration of handguns, though the chief of police could issue one-year licenses for handguns. The Code also contained provisions that required owners of lawfully registered firearms to keep them unloaded and disassembled or bound by a trigger lock or other similar device unless the firearms were located in a place of business or being used for legal recreational activities. The ruling was later reversed in the court of appeals, one the Second Amendment protects the right to keep firearms in the home for the purpose of self-defense, and the District of Columbia’s requirement that firearms kept in the home be nonfunctional violated that right. The English Bill of Rights which was the forefront for

creating the constitution states “[T]he subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law.”. In New York’s Ratification of Constitution with Proposed Amendments (1788) it is stated that “That the People have the right to keep and bear arms; that a well-regulated Militia, including the body of the People capable of bearing arms, is the proper, natural and safe defense of a Free State; that the Militia should not be subject to martial law, except in times of War, Rebellion, and Insurrection.”, which stands to what the second amendment is defined as in the Constitution which is that “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.”, and militia in that sense includes the people. The definition of the phrase a well-regulated militia was understood by the Kansas Territory Wyandotte Constitution (1859), which stated that “The people have the

right to bear arms for their defense and security, but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power.”, hence that it is the right of the people and the military, who some define as the militia, to “bear arms for their defense”, meaning that is within the people’s right to protect themselves and not just the military, in fact it is the military who should be dependent on the civil power. The second amendment and its meaning are therefore stretched across the country because of the fourteenth amendment’s privileges or immunities clause which protects the fundamental rights of individual citizens and restrains state efforts to discriminate against out-of-state citizens. Furthermore, to deny an individual’s privileges and immunities you are denying them of all of their rights, which contradicts the meaning of the constitution.

B. Historical Definition of the Word “Bear”

The second amendment states that Americans have the right to bear arms, in which a bear, in this case, means to have a weapon and not necessarily carry the weapon on one's person. By having the words keep and bear conjoined by the word arms, it is signifying that the two central ideas are correlated. By correlating the idea of a weapon in one's ownership is what is meant by the right to keep and bear arms and not being able to have the possession of a gun and carrying it on one's person.

The second amendment is clarified more in the *District of Columbia v. Heller* which made it illegal to carry an unregistered firearm and prohibited the registration of handguns. Although the ruling was in favor of Heller, judge Breyer in his dissent argued that the court should adopt an interesting balancing, essentially that they can confirm/uphold the restrictions for the benefit of the people in the state. It was

shown that in colonial times, specifically from William Blackstone and John Locke who had a major influence on the founding fathers, the constitution and what is in regulated the storage and use of firearms in the home. William Blackstone's commentaries on the law of England on the right to keep and bear arms “serve to protect and maintain to inviolate the three great and primary rights, of personal security, personal liberty, and private property” which makes no distinction on whether the government can control this right or not.

John Locke, the true father of our declaration of independence stated that “They are ready to tell you that it deserves death only to ask after safety. Betwixt subject and subject, they will grant, there must be measures, laws, and judges, for their mutual peace and security; but as for the ruler, he ought to be absolute and is above all such circumstances; because he has more power to do hurt and wrong, it is right when he does it. To ask how you may be

guarded against harm or injury on that side where the strongest hand is to do it, is presently the voice of faction and rebellion, as if when men, quitting the state of nature, entered into society, they agreed that all of them but one should be under the restraint of laws, but that he should still retain all the liberty of the state of nature, increased with power and made licentious by impunity.” John Locke in his previous statement states that the government and subjects need laws and judges for their mutual peace and security, and essentially that the government when needed would need to step in order for the people’s safety.

James Madison, the founder who proposed the second amendment, wanted to prevent standing militia, due to what they thought about the military at the time, therefore by allowing the people to bear a weapon, they will be able to protect themselves in case of any danger, however, because it

says “being necessary to the security of a free state”, it is meant to protect the united states in times of need.

John Locke, Two Treatises on Government, “Second Treatise of Government,” ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), ch. 4 ¶ 93.

II. Interpretation of “proper cause”

A. Definition of Proper Cause and What it is Meant to Establish.

Under the New York Penal Law § N.Y Penal Law § 400.00, requires an individual to show “proper cause” to evoke the right to carry a concealed gun, regardless of their character. This law and precedent of ‘proper cause’ has been apparent in New York since 1913. The purpose of this law is to figure out one’s true intent behind owning a gun, instead of just claiming it’s for self-defense, as anyone else could do that would meet the rest of the requirements like showing good

character. The record must show that proper cause includes target practice, hunting, or self-defense means of license, but the license that was registered for under the New York law was a full-carry license, which would permit the user to freely use their concealed firearm in the highly densely populated state of New York. This idea can be seen in *Matter of Moore v. Gallup*, in which good character and proper gun training is not enough for someone to get a gun license. Therefore, Koch and Nash's reasons for getting a gun license of evident training and good character are not enough to get a gun license. As presented in *Kachalsky v. Cnty. of Westchester*, 'proper cause' is meant to be "a special need for self-protection" (*Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 86 (2d Cir. 2012)). This special need is directed towards people who have a clear reason that is different from just crime. The applicant must "demonstrate a special need for self-protection distinguishable from that of the general

community or of persons engaged in the same profession.”

This precedent is seen in *Klenosky v. N.Y City Police Dep't*, 75 A.D.2d 793, 793, 428 N.Y.S.2d 256 (1st Dep't 1980). This precedent is what license officers deem someone’s application to have a “proper cause”. In *Matter Bernstein v. Police Dep't of City of New York*, they stated “[a] generalized desire to carry a concealed weapon to protect one's person and property does not constitute ‘proper cause.’ ” (citing *Bernstein v. Police Dep't of City of New York*, 85 A.D.2d 574, 574, 445 N.Y.S.2d 716 (1st Dep't 1981)). The purpose of self-defense in and out of a home is not enough to allow someone to have a full-carry license. While *District of Columbia v Heller* deemed that the second amendment right covers the right to defend oneself in their home, it does not cover both inside and outside the house, nor does it cover concealed gun carry. While this case of the *NRA v. Bruen* questions a full-carry

license that would allow someone for a concealed gun, inside and outside their home.

Kachalsky v. Cnty. of Westchester and NEW YORK STATE RIFLE & PISTOL ASSOCIATION INC. V. BRUEN, both include Plaintiffs that are restricted by the same New York Penal Law for the same reason; failure to demonstrate “proper cause” to obtain a full-carry license. It has already been deemed by the second circuit that the proper cause is necessary under intermediate scrutiny. Proper cause must be enunciable, rather than conjectural.

B. Intent of Proper Cause of Regulation under the Second Amendment

One may argue that the New York Penal Law restricts another’s 2nd amendment right to ‘bear arms’, though, the right to regulate who controls weapons has been evident since the Gun Control Act of 1968, which basically bans most felons of their 2nd amendment right of a firearm. The New

York Penal Law § 400.00, restricts people the use of gun for (a) underage of 21, (b) lack of good moral character, (c) conviction of a felony of serious charges, (d) a fugitive from the law, (e) an addict to any controlled substances, (f) being an alien that entered the United States of America illegally or unlawfully, (g) dishonorably discharged from the military, (h) no longer a citizen of America, (i) failure of stating a mental illness, (j) been involuntarily committed to a facility of mental hygiene, (k) has had a license of some kind like a gun license revoked are all sections of the law that can limit or restrict the right to bear arms based off a background check. The Brady Handgun Violence Prevention Act (the Brady Act) in 1994, which imposed federal background checks on individuals to own weapons or license for weapons and would lead to more universal background check laws in the federal and state government. It was recorded by the FBI that gun violence had significantly gone down because of the Brady Act; from 1993

to 2006, gun-related homicides reduced by 32% as well. It was also reported that Brady Law stopped two million firearms sales to ineligible individuals ("Gun Control." Opposing Viewpoints Online Collection, Gale (2018)).

It was replaced by the modernized National Instant Check System, which basically did the same. The purpose of these background checks is to make sure that whoever applies for a license or purchasing of a gun, will be checked and held liable for their past misfortunes. The purpose of “proper cause” is to restrict someone from obtaining a gun-license so easily, just like the background check does so. Both of which regulate people’s 2nd amendment to inhabit protection among other citizens and make sure only rightful owners of firearms own them. Proper cause has a more ‘recent’ study of what the person needs the gun for. People can change for the worse, where their background will mean nothing like the El Paso, Texas shooting on Aug. 3, 2019 that resulted in 23

Dead. Patrick Crusius, who legally purchased a gun, passed the background check, but his reason to own a gun was for clear violence towards Mexicans. People who can show good moral character, can obtain a gun easier, and therefore use it to commit violence effortlessly. Therefore, the purpose of proper cause is to study the person's means and business on a regular basis that makes them different from the average person, that will cause them to be targeted by violence. This can include jobs like merchants, storekeepers, bankers and people who move large amounts of money, with the need of means to defend oneself from people who may target them to rob, just as shown in Matter of Klenosky v. N.Y. City Police Dept, which defines that people need to have high amounts of money transfered, to demonstrate a proper cause.

III. Counter Argument, Why the Petitioner is Incorrect

**A. The Privileges or Immunities Clause of the
Fourteenth Amendment was not Violated in this
case.**

One can argue that because of the privileges or immunities clause in the fourteenth amendment that “no state shall make or enforce any law which shall abridge the privileges or immunities of citizens in the United States” meaning from their rights from the government; however in the United States v. Cruikshank(1876) the supreme court rejected this interpretation. The term militia is also interpreted to be among the people, however it was initially meant for the military, but as the constitution was written it was later written towards the people; without saying by using the word militia one is not limiting.

**B. How the Court Should View the Case in
Scrutiny**

The petitioner may claim that this case must be looked under strict scrutiny of the 2nd amendment. One may argue that strict scrutiny must be applied due to past precedents of having applied strict scrutiny on the second amendment such as "*District of Columbia v. Heller*". In "*District of Columbia v. Heller*", the D.C. law consisted almost as a ban on handguns rather than a restriction, which denied citizens of their second amendment. The handgun had to be unloaded, disassembled and locked up in a safe, if one was even to acquire a license for the gun which was difficult already, as individuals were denied to own a firearm inside their home for self-defense. While one could argue that strict scrutiny was used, it was debated whether they use a specific level of scrutiny upon determination of the court. The respondent asked the court to examine

it with a strict scrutiny test, as they believed the law benefited the government rather than the people.

This precedent was seen in *Abrams v. Johnson*, which concluded “the districting plan must be narrowly tailored to serve a compelling governmental interest in order to survive.” Continuing in the court of *Heller*, the court denied the use of strict scrutiny because it was under the second amendment which restrictions are meant to entail under the second amendment for public safety. The court also did not cite a specific level of scrutiny in making its decision. However, Justice Breyer wanted to examine the case without any form of scrutiny, and instead based upon a “interest-balancing inquiry” that would go off a “rational basis” standard, that would rationalize the purpose of the law to save people’s lives vs. the constitutional right itself. Strict scrutiny would

jeopardize the end-court ruling, by avoiding what the benefactor of the law is in the first place. Therefore, the standard of strict scrutiny should be avoided if possible to hold a true decision of the court in terms of the Second Amendment, as it is meant for protection of the people, but also destruction of the people when not regulated or restricted in particular cases.

In the current case, "*New York State Rifle & Pistol Association INC. v. Bruen* " the New York Penal Law has the purpose of restrictions for the protection of the people from gun violence; it should not be examined under strict scrutiny, but instead intermediate scrutiny. This idea can be seen in the Second Amendment case with the same New York law of proper cause, "*Kachalsky v. Cnty. of Westchester*" where " 'some form of heightened

scrutiny would be appropriate,' strict scrutiny was not necessary, and instead applying intermediate scrutiny" as well as "Holding intermediate scrutiny is appropriate where a firearm regulation does not burden the core protection of self-defense in the home." As depicted in *Kachalsky*, "*New York State Rifle & Pistol Association INC. v. Bruen*" should not be held under strict scrutiny as it does not take away a core value of the second amendment of stopping an individual from self-defense that was defined in *District of Columbia v. Heller*, but instead finds the means to regulate the second amendment for firearms to be in the hands of rightful owners, for the protection of the citizens of New York.

CONCLUSION

The historical understanding of the Second Amendment has been defined under common law to be the right to have a weapon and not necessarily carry the weapon on one's person which is clarified more in the District of Columbia v. Heller. Although that case ruled in favor of Heller it was stated in a dissent that the courts should be able to have restrictions for the benefit of the people in the state, New York Penal Law § N.Y Penal Law § 400.00 contained provisions that the second amendment protects gives you the right to have a weapon but not necessarily carry it out of the home, which is referenced in the District of Columbia vs. Heller. The right of the person to bear arms is not infringed upon by the law in New York; it is simply stating that people need to have a proper cause to carry that weapon outside of the home.

“Proper cause” has been defined under the Penal Law to be a “special need” for defense other than just self defense. This is because the license is a non-restrictive license that admits the right to use a concealed gun in the public. This is the purpose behind the “proper cause”, which is to make sure that the user is kept in check within their background check, of their purpose to wield a weapon, other than high crime rate. To add on, intermediate scrutiny should be applied as the entire Second Amendment is not being violated, but instead regulated for the protection of the people of New York, as it has a good reason to be there.

Respectfully submitted,

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