No. 20-843

IN THE
Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ROBERT NASH, BRANDON KOCH,

Petitioners,

v.

KEVIN P. BRUEN, in His Official Capacity as Superintendent of New York State Police, RICHARD J. MCNALLY, JR., in His Official Capacity as Justice of the New York Supreme Court, Third Judicial Circuit, and Licensing Officer for Rensselaer County,

Respondents.

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

BRIEF OF AMICI CURIAE REPRESENTATIVE CLAUDIA TENNEY AND 175 ADDITIONAL MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici curiae are Representative Claudia Tenney and 175 additional members of the United States House of Representatives. A complete list of amici is set forth in the Appendix. Amici have sworn an oath to uphold the U.S. Constitution and have an obligation to defend and uphold the rights recognized in the document, including the right to keep and bear arms. Amici also have been elected to represent their respective constituents. Those constituents are now in danger of criminal prosecution should they attempt to exercise their inalienable right to bear arms in the State of New York.

SUMMARY OF ARGUMENT

There is no serious argument that the pre-existing right to keep and bear arms, as recognized and preserved by the Second and Fourteenth Amendments, does not extend beyond the home. But the state law at issue here, New York's infamous Sullivan Law, infringes on that right and effectively eliminates any meaningful exercise of the right outside a person's domicile. The framers of the Fourteenth Amendment intended to prevent states from disarming disfavored and marginalized citizens—at

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[1] Under Supreme Court Rule 37.6, counsel for amici represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than amici or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners filed a blanket consent to the filing of amicus briefs. Respondents consented to the filing of this brief.

that time the recently freed slaves. When New York passed the Sullivan Law in 1911, it was motivated by animus against another marginalized group in society—recent immigrants from Europe. For many years New York has gotten away with barring all but a privileged few of its citizens from exercising their right to keep and bear arms outside the home, and this case presents a chance to right that Constitutional wrong.

In upholding the Sullivan Law, the Second Circuit incorrectly evaluated the law using intermediate scrutiny. That improper standard of review violated this Court's dictate in *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008), that interest-balancing tests are not to be used in Second Amendment cases.

The Court should reverse the Second Circuit's decision and clarify that the Second Amendment guarantees a fundamental right to carry a handgun outside the home, and that this right is not subject to interest balancing.

ARGUMENT

The question "whether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment" requires the Court to decide whether a government authority can arbitrarily ration a Constitutional right, by allowing only a privileged few to exercise it. The very nature of rights is that they operate as guarantees against certain government policy choices.

Respondents have conceded that the Second Amendment right to keep and bear arms extends beyond the home. Brief in Opp. to Cert. at 1 ("[T]he Second Circuit proceeded from an understanding that the Second Amendment protects an individual right to carry firearms outside the home for self-defense."). Startlingly, however, Respondents argue that this fundamental right can only be exercised with prior government permission. Under New York's Sullivan Law, now codified at N.Y. Penal Law § 400.00, citizens can only carry a handgun outside their homes if they satisfy a government official that they have "proper cause."

Respondents concede that such officials have essentially unfettered discretion: "To determine whether 'proper cause' exists for the issuance of an unrestricted license, licensing officials consider an open universe of person- and locality-specific factors bearing on the applicant's need for self-defense." Brief in Opp. to Cert. at 5-6; *see also Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 87 (2d Cir. 2012) ("Licensing officers, often local judges, are 'vested with considerable discretion' in deciding whether to grant a license application, particularly in determining whether proper cause exists for the issuance of a carry license." (footnote omitted)).

In other words, the decision is arbitrary. Such a scheme is anathema to ordered liberty.

Amici urge the Court to consider the bias underlying the Sullivan Act, which is no secret, and to clarify that any government attempt to abridge the right to keep and bear arms, whether inside or outside the home, is subject to review under the text, history, and tradition standard set forth in *Heller.*

I. The Second Amendment Must Apply to Everyone—Not Just the Privileged Few.

New York's regulation of Second Amendment rights smacks of elitism. It transforms a fundamental right guaranteed to the people into a special privilege to be enjoyed by only an elite few deemed worthy by a government official exercising unbridled discretion. But that is the opposite of what the framers of the Fourteenth Amendment intended.

This Court acknowledged in *McDonald v. City of Chicago* that it was the intent of those legislators to guarantee the right to keep and bear arms to the most disadvantaged segment of society at that time: the recently freed slaves.

> In debating the Fourteenth Amendment, the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection. Senator Samuel Pomeroy described three "indispensable" "safeguards of liberty under our form of Government." 39th Cong. Globe 1182. One of these, he said, was the right to keep and bear arms:
>
> "Every man . . . should have the right to bear arms for the defense of himself and

> family and his homestead. And if the cabin door of the freedman is broken open and the intruder enters for purposes as vile as were known to slavery, then should a well-loaded musket be in the hand of the occupant to send the polluted wretch to another world, where his wretchedness will forever remain complete." *Ibid.*

McDonald v. City of Chi., 561 U.S. 742, 775–76 (2010). The freedmen lacked wealth, power, and status. They had none of the privileges which might have enabled them to gain the favor of a government licensing officer. As Senator Henry Wilson commented on the Senate floor: "In Mississippi rebel State forces, men who were in rebel armies, are traversing the state, visiting the freedmen, disarming them, perpetrating murders and outrages on them; and the same things are done in other sections of the country . . . ." Cong. Globe, 39th Cong., 1st Sess. 40 (Dec. 6, 1865).

It is rarely, if ever, the affluent and privileged members of society who need protection against overreach, but rather the disenfranchised, the poor, and the weakest. The New York statutory scheme challenged here frustrates that very purpose by limiting the right to bear arms to a privileged few.

> If the Government wishes to burden a right guaranteed by the Constitution, it may do so provided that it can show a satisfactory justification and a sufficiently adapted method. The showing,

> however, is always the Government's to make. A citizen may not be required to offer a "good and substantial reason" why he should be permitted to exercise his rights. The right's existence is all the reason he needs.

Woollard v. Sheridan, 863 F. Supp. 2d 462, 475 (D. Md. 2012), *rev'd sub nom. Woollard v. Gallagher,* 712 F.3d 865 (4th Cir. 2013).

II. New York's Sullivan Law Was Designed to Limit the Right to Bear Arms to the Elite.

The Sullivan Act turns the purpose of the Second Amendment—to protect the many rather than the few—on its head. The history of the Act confirms that it was designed to exclude non-elite immigrants and disfavored minorities from gun ownership. Respondents concede that N.Y. Penal Law § 400.00 is the current codification of the Sullivan Law. Brief in Opp. to Cert. at 3–5. The Act was passed in 1911, and amended in 1913. *Id.* at 3; *see also Kachalsky*, 701 F.3d at 85.

Speaking on the floor of the New York Senate in support of his bill, Senator Timothy Sullivan is reported to have told the following anecdote:

> A great big fellow driving a truck in one of the crowded streets of New York City only four days ago ran over a little Italian boy and killed him. The father in a burst of anger lost control of his temper and shot the poor truckman dead.

Bar Hidden Weapons on Sullivan's Plea: Only Five Senators Vote Against His Bill Making it a Felony to Carry Them, N.Y. TIMES (May 11, 1911). The mention of the father's Italian ethnicity was a not-so-subtle appeal to nativist sentiment and anti-immigrant bias. As two scholars have noted:

> If the white South saw blacks as a threat, the country as a whole saw southern and eastern Europeans in similar terms. For this reason, in part, the numbers of such immigrants were subject to significant limits. Beyond this, these immigrants were associated with mental deficiency, with crime, and most dangerously, with the sort of anarchist inspired crime that was feared in Europe, such as political assassination and politically motivated robberies.
>
> In New York, these fears found expression in the passage of the Sullivan Law in 1911. Of statewide dimension, the Sullivan Law was aimed at New York City, where the large foreign born population was deemed [] peculiarly susceptible and perhaps inclined to vice and crime. The statute went beyond the practice of many gun control statutes by not only prohibiting the carrying of concealed weapons, but also requiring a permit for ownership or purchase of weapons. It is not without significance that the first person

> convicted under the statute was a member of one of the suspect classes, an Italian immigrant.

Robert J. Cottrol & Raymond T. Diamond, *Never Intended to Apply to the White Population: Firearms Regulation and Racial Disparity - The Redeemed South's Legacy of a National Jurisprudence*, 70 CHI.-KENT L. REV. 1307, 1333–34 (1995).

Besides the social circumstances surrounding the passing of the Sullivan Law, the enforcement of the law after its enactment provides more evidence of its goal of keeping firearms beyond the reach of recent immigrants from Italy and elsewhere in Europe. Marino Rossi, the first person sentenced to prison under the Sullivan Act, was an Italian man who carried a .38 caliber revolver in his pocket for self-protection. *First Conviction Under Weapon Law*, N.Y. TIMES (Sept. 28, 1911). Rossi, who maintained that he had no intention of using the weapon wrongfully, was sentenced to prison for a year. *Id.* During the trial, the judge echoed stereotypes about Italian immigrants and infamously declared, "It is unfortunate that this is the custom with you and your kind, and that fact, combined with your irascible nature, furnishes much of the criminal business in this country." *Id.*

A contemporary editorial appearing in the New York Times confirmed the bias behind the law. The paper of record stated that "the police have suitably impressed the minds of aliens in New York that **the Sullivan law forbids their bearing arms**[.]"

The Rossi Pistol Case, N.Y. TIMES (Sept. 29, 1911) (emphasis added).

The animus is clear. The Court should strike down the Sullivan Law, so that all New Yorkers can exercise their fundamental right to bear arms.

III. Interest-Balancing Tests Are Inappropriate in Second Amendment Jurisprudence Because the Government Always Wins.

Since *Heller* and *McDonald*, lower courts have largely ignored this Court's admonition against interest-balancing and done exactly that. *See, e.g.*, *Young v. Hawaii*, 992 F.3d 765, 784 (9th Cir. 2021).[2]

Interest-balancing tests borrowed from other areas of law are poorly suited for the Second Amendment because the government always wins, thus rendering the right to keep and bear arms largely illusory.

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[2] The Ninth Circuit stated the following complex of balancing tests in its en banc decision in *Young*: "If the challenged restriction burdens conduct protected by the Second Amendment—either because the regulation is neither outside the historical scope of the Second Amendment, nor presumptively lawful—we move to the second step of the analysis and determine the appropriate level of scrutiny. We have understood *Heller* to require one of three levels of scrutiny: If a regulation amounts to a destruction of the Second Amendment right, it is unconstitutional under any level of scrutiny; a law that implicates the core of the Second Amendment right and severely burdens that right receives strict scrutiny; and in other cases in which Second Amendment rights are affected in some lesser way, we apply intermediate scrutiny." 992 F.3d at 784 (cleaned up).

The Government will always be able to articulate public policy arguments and governmental interests contrary to allowing citizens to bear arms outside their homes. Those policy choices are, however, off the table given the adoption of the Second and Fourteenth Amendments. Such arguments deserve no weight. *Heller*, 554 U.S. at 636 ("[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table.").

The majority opinion in *Heller* was explicit on this point, but most lower courts have simply declined to follow it:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an "interest-balancing"

> approach to the prohibition of a peaceful neo-Nazi march through Skokie.

Heller, 554 U.S. at 634-35.

The decision below likewise ignored *Heller*'s admonition against interest-balancing. The Second Circuit wrote: "As this Court has recently reaffirmed, New York's proper cause requirement does not violate the Second Amendment." *N.Y. State Rifle & Pistol Ass'n v. Beach*, 818 F. App'x 99, 100 (2d Cir. 2020). The court relied on its prior decision in *Kachalsky*, 701 F.3d 81, without elaboration. *Kachalsky* provides a fine example of why interest balancing serves only to stack the deck in favor the state. The court first arbitrarily decided to apply intermediate scrutiny, then jumped to the obligatory conclusion that the state indeed had an "important government interest":

> Because our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public, *we conclude that intermediate scrutiny is appropriate in this case*. The proper cause requirement passes constitutional muster if it is substantially related to the achievement of an important governmental interest.
>
> As the parties agree, New York has substantial, indeed compelling, governmental interests in public safety and crime prevention. The only question then is whether the proper

> cause requirement is substantially related to these interests. We conclude that it is.

Id. at 96–97 (citations omitted and emphasis added). Needless to say, the Second Circuit concluded that the Sullivan law is in fact sufficiently related. *Id.* at 98 ("Restricting handgun possession in public to those who have a reason to possess the weapon for a lawful purpose is substantially related to New York's interests in public safety and crime prevention.").

The Second Circuit's decision to apply intermediate scrutiny effectively ended the case. That shows why such an interest-balancing approach is unworkable if the right to keep and bear arms is to be a meaningful restriction on government power. *See Young*, 992 F.3d at 784; *Woollard v. Gallagher*, 712 F.3d 865, 882 (4th Cir. 2013) ("[U]nder the applicable intermediate scrutiny standard, the State has demonstrated that the good-and-substantial-reason requirement is reasonably adapted to Maryland's significant interests in protecting public safety and preventing crime.").

IV. The Court Should Reiterate That the Second Amendment Test Turns on Text, History, and Tradition.

Because no balancing test can protect Second Amendment rights, the Court should clarify that the correct standard of review for Second Amendment challenges is the "text, history, and tradition" test set forth in *Heller*. Justice Kavanaugh's dissent in *Heller II* makes the case quite cogently:

> In short, I do not see how *Heller* and *McDonald* can be squared with application of strict or intermediate scrutiny to D.C.'s gun laws. The majority opinion here refers to the levels of scrutiny as "familiar." Maj. Op. at 40. As one commentator has stated, however, "the search for the familiar may be leading courts and commentators astray: The central disagreement in *Heller* was a debate not about strict scrutiny and rational basis review but rather about categoricalism and balancing." Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. at 379. That disagreement in *Heller* was resolved in favor of categoricalism — with the categories defined by text, history, and tradition — and against balancing tests such as strict or intermediate scrutiny or reasonableness.

Heller v. District of Columbia, 670 F.3d 1244, 1282 (D.C. Cir. 2011) (footnote omitted) (Kavanaugh, J., dissenting).

New York's Sullivan law is effectively a blanket ban on bearing arms outside home. Such a ban must fall under any "text, history, and tradition" analysis. *Wrenn v. District of Columbia,* 864 F.3d 650, 663 (D.C. Cir. 2017) ("Indeed, all of the circuits settling on a level of scrutiny to apply to good-reason laws explicitly declined to use *Heller I*'s historical method to determine how rigorously the Amendment

applies beyond the home."). Justice Alito's concurrence in *Caetano v. Massachusetts*, where he followed the text, history, and tradition approach to conclude that the Massachusetts ban on possession of a stun gun violated the Second Amendment provides further support:

> The state court repeatedly framed the question before it as whether a particular weapon was in common use at the time of enactment of the Second Amendment. In *Heller*, we emphatically rejected such a formulation. We found the argument that only those arms in existence in the 18th century are protected by the Second Amendment not merely wrong, but bordering on the frivolous. Instead, we held that the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not inexistence at the time of the founding. It is hard to imagine language speaking more directly to the point. Yet the Supreme Judicial Court did not so much as mention it.

Caetano v. Massachusetts, 577 U.S. 411, 136 S. Ct. 1027, 1030 (2016) (cleaned up).

The Court should expressly reaffirm its prior ruling and make it clear that no form of balancing test is ever appropriate to adjudicate a challenge brought under the Second Amendment.

CONCLUSION

The Court should reverse the judgment of the Second Circuit and restore the Second Amendment to its rightful place as a guarantee for all Americans.

Respectfully submitted,

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July 20, 2021

APPENDIX

THOSE JOINING IN AMICI CURIAE BRIEF

The following members of the United States House of Representatives join in this brief:

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