No. 20-843

IN THE
Supreme Court of the United States

·NEW YORK STATE RIFLE & PISTOL ASSOCIATION, ET AL.,

Petitioners,

v.

KEVIN P. BRUEN, ET AL.,

Respondents.

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

BRIEF OF *AMICUS CURIAE* ALABAMA CENTER FOR LAW AND LIBERTY IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae ACLL is a conservative public-interest firm based in Birmingham, AL, dedicated to the defense of limited government, free markets, and strong families. ACLL's parent nonprofit organization, the Alabama Policy Institute ("API"), was founded in 1989 by Congressman Gary Palmer and Chief Justice Tom Parker of the Alabama Supreme Court. API has fought for conservative causes in the public policy arena for over 30 years.

ACLL has an interest in this case because it believes that the right to keep and bear arms is essential to the American system of liberty. The rights to life and self-defense are antecedent to the formation of civil society and civil government. While we are grateful for and support our police, they cannot always respond with the speed that a person might need to save himself from someone trying to kill him, which is why the right to keep and bear arms is necessary. Finally, as James Madison wrote in *The Federalist* No. 46, the right to keep and bear arms is a necessary check on the power of government, lest it come to

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[1] All parties have consented to the filing of this brief. Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

oppress the people. Consequently, ACLL has a strong interest in seeing this case resolved in Petitioners' favor.

Furthermore, in 2013, Alabama changed its concealed carry law from "may issue" to a "shall issue." While ACLL is grateful for this change, it also believes that the right to keep and bear arms is guaranteed by the Second Amendment instead of being subject to the grace of the legislature. Consequently, ACLL moves to file the attached amicus brief not only to assist Petitioners in securing their Second Amendment rights but also in helping the people of Alabama have their right to bear arms permanently secured.

Finally, in 2014, ACLL's counsel of record wrote a law review article that attempted to explore the contours of the Second Amendment in light of the background against which the Second Amendment was framed. His research uncovered some points that he believes would be useful to the Court in deciding the present matter, and he will incorporate them here.

SUMMARY OF THE ARGUMENT

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court issued a masterful opinion that explored the scope of the Second Amendment. However, it contained dicta implying that the Court's decision should not be construed to override a state's prerogative to regulate the concealed carry of firearms. In this case, the Court has the opportunity to reexamine that point, and it should take it.

The historical record does not provide any material evidence that the right to bear arms did not protect the right to carry concealed weapons. While the common law prohibited going armed with *dangerous or unusual* weapons, that has no bearing on common weapons that are used for self-defense, such as handguns. The reason for the common law's prohibition of bearing dangerous or unusual weapons was that the public should not have to be terrified. Consequently, if this rule has any bearing on the concealed-carry debate, it shows that the common law favored concealed carry over open carry.

To the extent that the historical record before 1791 is silent on this particular question, it can be answered by analyzing the text, structure, and nature of the Second Amendment. *Heller* correctly noted that the Second Amendment did not *create* a right but rather protected a *pre-existing* right. The text itself says that the right includes a right to *bear* arms; therefore concealed carry laws can be unconstitutional as applied if they cut off the right of a person to bear arms altogether, as New York does.

Moreover, Blackstone and the Founders believed that the rights to life and self-defense were inalienable, God-given rights, and therefore it was necessary for the people to have the means to secure them. This is all the more reason why the right to bear arms may not be lightly disregarded.

Finally, if the Court must resort to a judicial test to evaluate the issue in this case, then it should adopt a test similar to the time, place, and manner test from *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) in the First Amendment context. *Ward* did an excellent

job of recognizing the First Amendment's limits regarding time, place, and manner without running afoul of the First Amendment itself.

In a similar way, when evaluating whether denying a concealed carry license is a valid time, place, or manner restriction of the right to bear arms, the Court should consider the same elements as it did in *Ward*. Applying those elements here, the Court should find that denying Petitioners' request for concealed carry permits (1) was more of a restriction on the right of self-defense than a time, place, or manner restriction, (2) was not justified without regard to the right of self-defense, (3) was not narrowly tailored to achieve important government interests, and (4) most importantly, failed to leave ample alternative forms of self-defense (such as open carry) available to Petitioners.

ARGUMENT

I. The Constitution Forbids a State from Cutting Off a Person's Right to Carry Arms for Self-Defense, and Therefore Laws Like New York's Concealed Carry Law Can Be Unconstitutional

In *Heller*, the Court noted that "the right secured by the Second Amendment is not unlimited." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). The Court then noted that "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." *Id.* Consequently, the Court concluded

that its holding in *Heller* should not be taken to cast doubt on "longstanding prohibitions" of certain kinds of firearm restrictions. *Id.* at 626-27. While carrying concealed firearms was not explicitly named in that list of longstanding prohibitions, the discussion of nineteenth century court holdings strongly implies that prohibiting the concealed carry of firearms is constitutional. However, the Court should reconsider that notion in this case.

A. The historical record before 1791 provides no material evidence indicating that the right to bear arms did not include the right to carry concealed arms.

As Chancellor James Kent noted, "it has been a subject of grave discussion … whether a statute prohibits persons, when not on a journey, or as travelers, from *wearing or carrying concealed weapons*, be constitutional." *Heller*, 554 U.S. at 618 (quoting 2 James Kent, *Commentaries on American Law* *340 n.2 (O. Holmes ed., 12th ed. 1873)). In his discussion of that issue, Chancellor Kent cited six court decisions that were split evenly on the question, but none of them were decided before 1791. *See* Kent, *supra*, at *340 n.2.

Likewise, Justice Story makes no mention of such limitations in his commentary on the Second Amendment. 3 Joseph Story, *Commentaries on the Constitution of the United States* §§ 1890-91 (1833). If legal giants like James Kent and Joseph Story, who typically exhausted the available sources in their

treatises, did not find any cases before 1791 holding that carrying concealed weapons was not within the scope of the right to bear arms, it is probably because they did not exist.

Thus, the lack of evidence leading up to the Second Amendment's ratification and the fact that the question was being hotly debated shortly thereafter shows that early Americans were not settled on the question. Consequently, it should not be presumed that the Second Amendment does not protect the right to carry concealed handguns.

The common law likewise does not lend support to the proposition that the states may ban concealed carry without running afoul of the Second Amendment. Blackstone writes:

> The 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, 2 Edw. III. c. 3, upon pain of forfeiture of the arms and imprisonment during the king's pleasure: in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armour.

4 William Blackstone, *Commentaries* *149.

Several observations must be made about Blackstone's rule. First, the common law did not prohibit carrying arms. Instead, it prohibited riding or

going armed with *dangerous* or *unusual* weapons. Thus, the common law did not prohibit the kinds of weapons that were "'in common use at the time,' for lawful purposes like self-defense," regardless of whether the arms were used "in defense of the person [or] home …." *Heller*, 554 U.S. at 624-25 (citations omitted). Blackstone says nothing about forbidding people from carrying these arms concealed. On the contrary, if this passage could be construed as applying to ordinary weapons like handguns, then there would be a stronger case for concealed carry than there would be for open carry. Thus, not only does the historical record fail to produce evidence against concealed carry, but if anything it slightly supports it.

B. Under the text, structure, and nature of the Second Amendment, the government may not prohibit carrying concealed weapons if it doing so would cut off his right to bear arms altogether.

Overall, however, it would be fairer to say that "the historical record [is] more silent" than dispositive one way or another. *Fulton v. City of Philadelphia*, No. 19-123, slip op. at 20 (U.S. June 17, 2021) (Barrett, J., concurring). Consequently, the "textual and structural arguments" will likely be "more compelling," in addition to understanding the nature of the right itself. *Id.*

As *Heller* noted, the operative clause of the Second Amendment is, "the right of the people to keep and

bear arms shall not be infringed." *See Heller*, 554 U.S. at 579-92. These words "guarantee the individual right to possess *and carry* weapons in case of confrontation." *Id.* at 592 (emphasis added). Thus, if banning the concealed carry of weapons would necessarily cause an individual to lose that right, then that would violate the Second Amendment.

Understanding the nature of the Second Amendment further reinforces this conclusion. The Court has stated correctly:

> "[T]he Second Amendment, like the First and Fourth Amendments, codified a pre-existing right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.' As we said in *United States v. Cruikshank*, 92 U.S. 542, 553, 23 L. Ed. 588 (1876), "[t]his is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed . . . ."

Heller, 554 U.S. at 592 (second alteration in original).

To the founding generation, this was not a pre-existing right that was granted by the will of government, but instead a pre-existing natural right that was necessary to preserve the unalienable rights of life and self-defense. As Blackstone said, "Life is the immediate gift of God, a right inherent by nature in every individual." 1 William Blackstone,

Commentaries *129. Consequently, "the life and limbs of man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed *se defendendo*, or in order to preserve them." *Id.* at *130.

The American founding generation likewise professed, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." *The Declaration of Independence* para. 2 (U.S. 1776). Given that the Founders shared Blackstone's view that life is an unalienable right given by God, there is no reason to believe that they would have disagreed with Blackstone that killing in self-defense would be permissible as well.

But just like other rights, the God-given, unalienable right to self-defense would exist in name only if the means to secure that right was not available. From the founding generation until now, the best way for one to protect his unalienable right to life in case of confrontation is carrying a handgun. Since the rights to life and self-defense are God-given unalienable rights, the means of securing those rights must be unalienable as well.[2] Consequently, while the government may be able to place reasonable regulations on the methods of bearing arms, it cannot

[2] For further discussion of bearing arms as a natural right, see Matthew J. Clark, *Second Amendment Jurisprudence According to the Laws of Nature and of Nature's God and the Original Second Amendment*, 8 Liberty U. L. Rev. 715 (2014).

do so in a way that would deprive a person of the right that Blackstone and the Founders called "unalienable."

C. Application: New York Violated the Second Amendment by Cutting off Petitioners' Right to Carry Arms for Self-Defense

Consequently, the Second Amendment prohibits the government from imposing regulations that deprive a person of the right to carry arms for the purpose of self-defense. The text, structure, and nature of the Second Amendment might not necessarily provide that concealed carry is constitutionally protected in every case. However, if the government forbids concealed carry in a way that deprives a person of his ability to carry a handgun for self-defense altogether, then it violates the Second Amendment.

Such is the case here. Under New York law, only certain persons are granted the right to carry concealed weapons, while the rest of the People (including Petitioners) are at the mercy of a government official who must determine if they have "proper cause." N.Y. Penal Law § 400.00(2). Not only is concealed carry illegal in most instances, but open carry is illegal in New York as well. *See* N.Y. Penal Code § 265.03(3). Consequently, by denying their application for concealed carry permits, the State has cut off Petitioners' ability to carry firearms for self-

defense altogether. Thus, the State violated the Second Amendment by denying their applications.

On one last note, even if the government categorically allows one form of carrying a firearm but restricts the other, it can still violate the Second Amendment. For instance, if a state permits open carry but forbids concealed carry, then it would make criminals out of nearly all its citizens when winter comes and every reasonable person would be forced to wear coats that cover their arms. At that point, complying with the restrictions would become nearly impossible. Likewise, if a state forbade open carry but liberally allowed concealed carry (as Texas did until 2015),[3] then it could still violate the Second Amendment if it a particular citizen did not have the means to conceal the firearm.

In conclusion, while the historical, textual, structural, and natural-right arguments may not be dispositive of whether the government may prohibit concealed carrying *altogether*, the Second Amendment still requires the states to allow its people to carry firearms for self-defense. If the government cuts off a citizen's means of doing that, as New York has done here to Petitioners, then those concealed carry laws are unconstitutional as applied.

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[3] *See* Daniel Costa-Roberts, *Texas Approves Open Carry Law for Handguns*, PBS (May 30, 2015), https://www.pbs.org/newshour/politics/texas-verge-passing-open-carry-law.

II. Time, Place, and Manner Precedents from First Amendment Cases Would Require Reversal if Applied Here.

One of *Heller*'s strengths was its avoidance of judicial balancing tests, deciding the case instead on the Constitution's text, history, and structure. With all due respect to the Court, ACLL agrees with the concerns Justice Kavanaugh has articulated about judicial balancing test, comparing them to an umpire trying to call balls and strikes without a defined strike zone. *See* Brett M. Kavanaugh, *Two Challenges for the Judge as an Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 Notre Dame L. Rev. 1907 (2017). Thus, if at all possible, this Court should resolve this case by looking to the text, structure, history, and nature of the Second Amendment rather than by judicial balancing tests.

However, if this Court needs to resort to some kind of test, it may be helpful for the Court to look at its First Amendment precedents concerning time, place, and manner restrictions. Those precedents have discovered how to protect the State's interests without running afoul of the constitutional right itself. Consequently, those decisions may be of service in deciding the present case.

In *Ward v. Rock Against Racism*, 491 U.S. 781 (U.S. 1989), the Court held:

> "[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content

> of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'"

491 U.S. at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

Ward correctly recognized that the right to free speech does not necessarily mean that a person can exercise that right at unusually and unnecessarily high volumes; the government may protect the people from those harms. On the other hand, *Ward*'s restatement of the time, place, and manner precedents protected the speakers by forbidding the government from being so heavy-handed with its restrictions that it crushed the people's right to speak.

Any restriction recognized on the right to bear arms should at least provide the same level of protection for the right of self-defense as it did in *Ward*. Thus, applying *Ward* to the Second Amendment, the Court should ask the following questions:

(1) Is the restriction on the right to bear arms a time, place, or manner restriction?

(2) Is it justified without regard to the right of self-defense? In other words, if the evil the government seeks to prevent is the carrying of arms for self-defense, then that's not good enough.

(3) Is the restriction narrowly tailored to serve a significant government interest? Because the right of self defense is just as important (if not more so) than

the right to free speech, it deserves at least as much protection as free speech gets in similar cases. Rational basis review is not good enough.

(4) Does the restriction leave open ample alternative means of self-defense? If under the totality of the circumstances the citizen is left defenseless, then the government has crossed the line from imposing reasonable time, place, and manner restrictions to abridging the right of self-defense itself.

Applying these principles to the case at hand, N.Y. Penal Law § 400.00(2) regulates who may carry handguns, as well as when and where. Thus, while it partially addresses when and where guns may be carried, it does not allow an average citizen to carry a weapon without good cause. See § 400.00(2)(g) (allowing licenses to be issued for everyone else only for "proper cause."). Thus, the law in question is more than just a time, place, and manner restriction, because it allows only a select few to carry firearms for self-defense.[4]

Second, the law does not appear to be justified without regard to the right of self-defense. The whole point of the law, in New York's eyes, is to ensure that only properly qualified individuals may bear arms. Nevertheless, *Heller* held correctly that the Second Amendment guarantees "the individual right to

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[4] *Cf. Reed v. Town of Gilbert*, 576 U.S. 155 (2015) (rejecting the Ninth Circuit's argument that prohibiting church signs in a certain context was a content-neutral restriction and holding that it was a content-based restriction instead). In the same way, New York may characterize its concealed carry law as a time, place, or manner restriction, but in reality is it a restriction on the right to self-defense itself.

possess and carry weapons in case of confrontation." *Heller*, 554 U.S. at 592. To the extent that New York believes the risk of harm that unqualified individuals may pose is greater than the risk the individual bears of not being able to defend himself, the Supreme Law of the Land has resolved that question in favor of the individual. There may be, of course, instances in which an individual can forfeit his right to carry or be disqualified for good cause. But presuming that a citizen may bear arms until he proves that he may not bear them anymore is far different than presuming that citizens may not bear arms until they can prove that he may bear arms.

Third, the government undoubtedly has a substantial interest in protecting the public safety. But since the Constitution presumes that the ability of average citizens to carry weapons for their own protection is permissible, the validity of relying on this alone would be questionable. Even if it was valid, however, stripping most ordinary citizens of their ability to protect themselves is not a narrowly tailored means to achieve that interest. *See Ward*, 491 U.S. at 799 (holding that the narrowly tailored standard "does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interest").

Finally, the government's biggest problem in this case is that there are no ample alternative means of allowing citizens to defend themselves. New York law criminalizes both open and concealed carry without a license. *See* N.Y. Penal Code § 265.03(3). While the government might arguably be able to prohibit open

or concealed carry if it had a substantial reason for doing so, banning both cuts off the citizen's right to bear arms for self-defense.[5]

Consequently, if this Court applied the time, place, and manner test that it has articulated in its First Amendment jurisprudence, then the New York laws at issue would be unconstitutional, as would be the denial of the Petitioners' applications for concealed carry permits.

CONCLUSION

Even if the Constitution allows the states to regulate carrying concealed firearms, it may not prohibit the people from carrying concealed weapons if doing so would deprive them of the right to bear arms altogether. New York has done so here, and therefore it has run afoul of the Second Amendment. Consequently, the judgment of the Second Circuit is due to be reversed.

Respectfully submitted,

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[5] There are, of course, very special circumstances in which the government may be able to prohibit the bearing of arms altogether, such as entering a government-controlled building (where public officials need to control building security for their own protection) or boarding a flight (where one stray bullet from a gun may breach the plane and kill everyone on board). But even in those cases, a person's safety is usually guaranteed by other means, such as security personnel who are on the premises instead of far away at a police station.

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