No. 18-280

IN THE

Supreme Court of the United States

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

PETITIONERS,

V.

CITY OF NEW YORK, NEW YORK, ET AL.

RESPONDENTS.

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

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether New York City's ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the Commerce Clause, and the constitutional right to travel.

This brief focuses on the Second Amendment issue, because why else would the Court have taken this case?

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan think tank dedicated to individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of constitutionalism that are the foundation of liberty. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

This case interests Cato because it concerns the individual right to armed self-defense; its resolution could begin to flesh out the constitutional contours of this much-maligned fundamental right.

INTRODUCTION AND SUMMARY OF ARGUMENT

Years before this Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), New York City enacted a policy banning its residents from transporting a handgun anywhere outside of city limits, regardless of how the gun is stored in transport. This ironic prohibition on removing firearms from an eminently anti-gun locality makes mincemeat of New Yorkers' right to possess a useful firearm, especially those who might have a second residence outside of the city or wish to train or compete beyond the five boroughs.

Amicus's core concern is the slipshod way in which Second Amendment claims have been handled in the various courts of appeal throughout the country since *Heller*. The Second Circuit here purported to apply "intermediate scrutiny" after flirting with whether the

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[1] Rule 37 statement: Both parties issued blanket consents to the filing of *amicus* briefs. No party's counsel authored any of this brief; *amicus* alone funded its preparation and submission.

law was entitled to *any* level of heightened scrutiny at all. The court then worked backwards from the city's asserted public safety rationale to find that the ban "impose[s] at most trivial limitations on the ability of law-abiding citizens to possess and use firearms for self-defense." Pet.App.13.

The lack of a clear standard of review has enabled—if not encouraged—the development of an unintelligible and wildly divergent body of law. This Court should establish clear ground rules for evaluating Second Amendment claims and enable the lower courts to develop a coherent and consistent approach to the array of issues that will continue to arise under the Second Amendment. *Amicus* agrees with the Court's nostrum in *Heller* that "interest balancing" approaches to exercises of the fundamental right to keep and bear arms are inappropriate with respect to serious limitations like the one here. Instead, the Court should direct the lower courts to engage in an informed analysis based on constitutional text, history, and tradition. One of the greatest aspects of the American system of government is that the scope of our rights do not change over time (without constitutional amendment). They were quite deliberately fixed at the time of the Founding, and adjusted at the Second Founding after a bitter civil war. For that reason, references to 20th-century prohibitions are inappropriate to justify a narrowed scope of the right to armed self-defense.

Finally, the city's attempt to moot the case through a last-minute rulemaking ought not dissuade the Court from providing important guidance. A decade of silence has done serious damage to the state of the law. Americans should not be subjected to more silence in reward of the city's voluntary cessation.

ARGUMENT

I. LAWS INFRINGING ON THE RIGHT TO KEEP AND BEAR ARMS REQUIRE A MEANINGFUL STANDARD OF REVIEW THAT ESCHEWS BALANCING TESTS

The Second Amendment protects an individual right to keep and bear arms. *District of Columbia v. Heller*, 554 U.S. 570, 591–93 (2008). That right extends as against state infringement. *McDonald v. City of Chicago*, 561 U.S. 742, 804 (2010). In practical effect, however, all *Heller* and *McDonald* seem to have told circuit courts is that they may not bring about the complete and total denial of a constitutional right. *Heller*, 554 U.S. at 628 ("Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home 'the most preferred firearm in the nation to 'keep' and use for protection of one's home and family,' would fail constitutional muster."). When it has come to anything less than complete abridgement, though, the circuits have exhibited an uncanny level of complicity. *See, e.g. United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012) (determining that "marginal, incremental, or even appreciable restraint[s] on the right to keep and bear arms" necessitate nothing more than rational basis review); *Kachalsky v. City of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012) (allowing state officials to refuse handgun-carry permits solely because they oppose the idea of ordinary citizens' carrying arms for protection).

In a certain sense, the lower courts' reluctance is understandable. Unlike speech laws, the evolution of which have for centuries colored our nation's public conscience, current gun-control laws are largely a

product of the 20th century.[2] Modern gun-control laws emerged in a time when the majority of Americans supported a ban on all handguns. Jeffrey M. Jones, "Record-Low 26% in U.S. Favor Handgun Ban," Gallup (Oct. 26, 2011), https://tinyurl.com/yxvyegte (showing history of public support for handgun bans, with 60 percent so-favoring in 1959). Regardless of how public perception changes over time, a right's enumeration must stand for something, as it "takes out of the hands 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." *Heller*, 554 U.S. at 634.

The courts of appeal are searching for clarity in the Second Amendment context. Whether it be a newly articulated test or the old level-of-scrutiny analysis, this Court's guidance is dearly needed. *Silvester v. Becerra*, 138 S. Ct. 945, 947 (2018) (Thomas, J., dissental) ("This Court has not definitively resolved the standard for evaluating Second Amendment claims."). This lack of clarity reared its head quickly after *McDonald* and is not something new to this case. *See*, *e.g.*, *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) ("This case underscores the dilemma faced by lower courts in the post-*Heller* world . . . we think it prudent to await direction from the Court itself.").

It is equally clear that an interest-balancing approach is usually inappropriate when it comes to exercises of fundamental rights. As the Court said, "we know of no other enumerated constitutional right

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[2] The National Firearms Act (NFA), 73 Pub. L. No. 474 (1934), is essentially the genesis of the modern firearms regulation.

whose core protection has been subjected to a free-standing 'interest-balancing' approach." *Heller*, 554 U.S. at 634. Debating between "intermediate" or "strict" scrutiny when it comes to the Second Amendment is a ham-fisted attempt to treat our nuanced constitutional law as if it were a simple algebra equation. While these standards are familiar, "the search for the familiar may be leading courts…astray." Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. Rev. 375, 379 (2009) s*ee also*, *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 703 (6th Cir. 2016) (en banc) (Batchelder, J., concurring in part) (discussing how the court should "pass the time . . . while we wait for the Supreme Court to step in and do the historical analysis it has promised.").

Regardless of what is familiar or easy to apply, or what appeals to the most centrist of Americans when it comes to gun rights, the fact is that governments around the country have been left to act without any significant guidance in the Second Amendment context. Debates have raged on the myriad of individual issues that come up in this legal area: concealed carry permits, weapon-specific legislation, temporary restraining orders, and more. In such a landscape, approving the lower courts' application of a vague breed of intermediate scrutiny will guarantee nothing but continued chaos. What the law needs is a clear standard under which Americans have their rights respected, while recognizing that no right is absolute.

A. Text, History, and Tradition Must Inform Second Amendment Jurisprudence

As this court recognized in *Heller*, a "constitutional guarantee subject to future judges' assessments of its

usefulness is no constitutional guarantee at all." 554 U.S. at 634. The Framers held the right to keep and bear arms near and dear, because they had just lived, and fought, through military attempts to disarm them. 1 John Drayton, *Memoirs of the American Revolution* 166 (1821) (recounting late British law as "too clearly . . . a design of disarming the people of America, in order the more speedily to dragoon and enslave them.").

How, then, should Americans' Second Amendment rights be treated today? The way they were understood at the Founding, as a keystone of our constitutional system. "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 the scope too broad." *Heller*, 554 U.S. at 634–35. This is not to suggest that an approach based on text, history, and tradition is an easy one to frame or apply. *See McDonald*, 561 U.S. at 804 (Scalia, J., concurring) ("Historical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it."). But this Court is tasked with the unenviable duty to decide what is *right*, not what is easy.

Heller and *McDonald* "set[] forth a test based wholly on text, history and tradition." *Heller v. District of Columbia*, 670 F.3d 1244, 1276 (D.C. Cir. 2011) (*"Heller II"*) (Kavanaugh, J., dissenting). For this method to function, it must be framed in a way that "depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor." *McDonald* 561 U.S. at 803–04 (Scalia, J., concurring).

Even with the associated legwork, other judges have agreed that the text, history, and tradition approach is the best one yet conceived for Second Amendment cases. *See, e.g.*, *Tyler*, 837 F.3d at 702 (Batchelder, J., concurring in part) (observing that another method "fails to give adequate attention to the Second Amendment's original public meaning. . . . And it is that meaning—as *Heller* and *McDonald* make unmistakably clear—informed as it is by the history and tradition surrounding the right, that counts."); *Gowder v. City of Chicago*, 923 F. Supp. 2d 1110, 1123 (N.D. Ill. 2012) (Finding unequivocally that "the text, history, and tradition approach is the proper approach").

B. "Presumptively Lawful" Gun Laws Are Not Co-Extensive with an Accurate Understanding of the Second Amendment's Text, History, and Tradition

Many laws regulating firearms are of a more recent vintage than many people, and even many jurists, believe. While understanding the scope of the right to arms through the lens of the framers of the Second Amendment—along with the ratifiers of the Fourteenth Amendment—is what the law commands, any analysis rooted in text, history, and tradition should be accurate in understanding which gun regulations are, in fact, longstanding and would have been recognizable to the founding generation.

The main problems with the text, history, and tradition approach are the analytical shortcuts, originating as tiny cracks in *Heller*, which have already threatened to overrun the holding. Many laws were treated as "presumptively lawful":

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 554 U.S. at 626–27. But there are few founding-era analogues for the types of restrictions identified as "presumptively lawful." *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 196 (5th Cir. 2012) ("*Heller* considered firearm possession bans on felons and the mentally ill to be longstanding, yet the current versions of these bans are of mid–20th century vintage."); *United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) ("The first federal statute disqualifying felons from possessing firearms was not enacted until 1938"); David Kopel & Joseph Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, Charleston L. Rev. Vol. 13 (2018), https://tinyurl.com/y3ztcpg2 (finding little historical precedent for sensitive place restrictions). *But see* Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?,* 36 Okla. L. Rev. 65, 96 (1983) ("Colonial and English societies of the eighteenth century . . . excluded . . . felons [from possessing firearms]."); Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment,* 82 Mich. L. Rev. 203, 266 (1983) ("Founders [did not] consider felons within the common law right to arms.").

The lack of a coherent explanation for the examples chosen by the *Heller* court has puzzled the lower courts and invited rearward-facing judges to make similar jumps. "These provisions, and the various regulations they encompassed, were supported without any explanation of how they would fare in light of the Second Amendment's original meaning." *United States v. McCane*, 573 F.3d 1037, 1049 (10th Cir. 2009) "Given the uncertain pedigree of felon dispossession laws, though, the dictum sanctioning their application while simultaneously sidestepping the Second Amendment's original meaning is odd. One wonders, at least with regard to felon dispossession, whether the *Heller* dictum has swallowed the *Heller* rule." *Id.*

Nevertheless, by declaring that "there will be time enough to expound upon the *historical justifications* for the exceptions we have mentioned," *Heller*, 554 U.S. at 635 (emphasis added), *Heller* indicated that these regulations were expected to have founding-era origins. Whether they *actually* have founding-era origins or not, though, is of significant import under the decision's own logic. The loose "presumptively lawful" categorization, and its ill-explained examples, has invited far too much inventiveness for the current framework to be workable.

In the years following *Heller*, some of the laws lower courts have lumped into the category of "presumptively lawful" do not even exist. *Heller II*, 670 F.3d at 1270, 1272 (Kavanaugh, J., dissenting) (stating that "machine guns[] have traditionally been banned" despite no traditional ban on machine guns);[3]

[3] The National Firearms Act of 1934 first regulated the transfer of machineguns and other specific firearms, requiring registra-

Freidman v. City of Highland Park, 784 F.3d 406, 409 (7th Cir. 2015) ("Machine guns aren't commonly owned for lawful purposes today because they are illegal"). Any analysis based on "longstanding prohibitions" ought to invoke rules that are both longstanding in a constitutionally significant way and an actual prohibition. For example, it would be odd indeed if, in support of a ban on motorcycles, an allusion to a longstanding ban on cars was regarded as materially supportive of the motorcycle ban even though the purported car "ban" is actually a recently levied vehicle tax.

Laws regulating the transportation of arms, for example, were and still are common in many states. Yet those laws overwhelmingly focus on how the weapon should be stored, not on whether it can be transported at all. Pennsylvania, for example, forbids the carrying of a long gun in a vehicle if it is loaded. 18 Pa. Cons. Stat. Ann. § 6106.1. In Alabama, a loaded handgun cannot travel in the passenger compartment of a car without a permit, akthough any person eligible to own a handgun may possess it unloaded in a separate contained. Ala. Code § 13A-11-73. Bans on transporting weapons, however, are not "longstanding."

The patchwork of "presumptively lawful longstanding" regulations, as well as the concept of "dangerous and unusual" weapons originating in *Heller*, leaves Second Amendment claims open to too many diverse

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tion and the payment of a $200 tax. 73 Pub. L. No. 474. Any American could register such a firearm and pay the tax to own one. It wasn't until 1986 when the machine gun registry was closed, but any registered machine gun can still be owned and sold by ordinary Americans. This should not be called a "ban," and even if the 1986 amendment is treated as one, the span of a few decades is not "longstanding" in any constitutionally significant way.

avenues of analysis. The concepts are malleable enough for judges to insert whatever regulations they agree with, a problem Justice Breyer rightly pointed out at the outset. *McDonald*, 561 U.S. at 925 (Breyer, J., dissenting) ("[W]hy these rules and not others? Does the Court know that these regulations are justified by some special gun-related risk of death? In fact, the Court does not know. It has simply invented rules that sound sensible.").

The "common-use" test is similarly issue-laden. The question of whether an arm is popular seems unrelated to an inquiry into whether it is constitutionally protected. It also makes little sense that banning a class of arms would be permissible only if Congress acted before the product took hold. *See Heller*, 554 U.S. at 721 (Breyer, J., dissenting) ("On the majority's reasoning, if tomorrow someone invents a particularly useful . . . weapon, Congress and the States had better ban it immediately, for once it becomes popular Congress will no longer possess the constitutional authority to do so. In essence, the majority determines what regulations are permissible by looking to see what existing regulations permit."). To put it another way, it's not like popular or "common" speech enjoys greater First Amendment protection.

This is not to say that any arms regulations not in existence at the time of the Founding must necessarily be unconstitutional. But the current framework fails to dispatch the judicial judgment-substitution issues present in an interest-balancing approach. There is, however, another tool for evaluating laws that truly protect the public from particularly dangerous weapons: the concept of public nuisance. Intrinsically dangerous weapons, such as poison gas, high explosives,

and heavy ordnance, put the public at risk in the normal course of their operation. Certainly, the Founders would have accepted regulation of such dangerous instrumentalities under a theory of public nuisance. There is no need for malleable standards; a robust Second Amendment standard is unlikely to lead to wholesale deregulation of shoulder-fired rocket launchers.

II. NEW YORK CITY'S ATTEMPT TO MOOT THIS CASE IS IN BAD FAITH

After years of enforcing the transport ban without a blink, New York City requested that the Court halt this case in advance of a rule change. Mtn. of Respondents to Hold Briefing Schedule in Abeyance, *New York State Rifle & Pistol Ass'n v. City of New York* (No. 18-280) (denied Apr. 20, 2019). The New York City Police Department, mere weeks before the City's reply brief was due, proposed to amend their rules to allow New Yorkers to somewhat more readily transport their handguns outside the city. *Id*. This type of conduct is exactly what the voluntary cessation doctrine targets.

Where a defendant acts wrongfully, but ceases the wrongful conduct in response to litigation, the Court will not deem the correction to moot the case. The logic is that, especially where the law is undeveloped, a moving party could suspend its improper conduct for just long enough for the case to be dismissed. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Services, Inc.*, 528 U.S. 167 (2000) (industrial polluter who ceased harm-causing conduct could not claim case was moot so long as the polluter could potentially continue similar operations if not deterred by the penalties sought). New York has maintained and defended the policy at issue for more than a decade, yet openly seeks

to moot the case ahead of a final determination on the merits. Americans deserve clarity when it comes to abuses of their fundamental rights. This Court should not reward, in any way, Gotham's bad faith attempt to keep the law unclear at the expense of the people.

CONCLUSION

For the reasons stated above, the Court should reverse the Second Circuit.

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