No. _____

IN THE
Supreme Court of the United States

_____

MELQUAN TUCKER,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

_____

On Petition for a Petition for a Writ of Certiorari
to the New York Supreme Court,
Appellate Division, Fourth Judicial Department

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

Whether New York's Penal Law § 265.01-b(1) is unconstitutional as applied where it imposes criminal, felony penalties when citizens fail to ask for the State's permission before they exercise the core right to protect themselves in the home with a handgun in contravention of the Second Amendment and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

PARTIES TO THE PROCEEDING

The Petitioner is Melquan Tucker, who was defendant-appellant before the New York Supreme Court, Appellate Division, Fourth Judicial Department.

The Respondents are the State of New York, respondent before the Appellate Division, and the New York State Attorney General's Office, intervenor-respondent before the Appellate Division.

Petitioner was tried jointly with his codefendant. The codefendant did not participate in the appeal to the court below.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings in the Supreme Court of the State of New York, and the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department:

> *The People of the State of New York v Tucker*, No. 2016-1409 (N.Y. Sup. Ct., Erie County, Dec. 23, 2016).
>
> *The People of the State of New York v Tucker*, (N.Y. App. Div., 4th Dep't, Jan. 31, 2020).
>
> *The People of the State of New York v Tucker*, (N.Y. App. Div., 4th Dep't, June 29, 2020).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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In the wake of this Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), lower courts struggled to apply the decision in various Second Amendment contexts. Many repudiated *Heller* and defaulted to intermediate scrutiny for all Second Amendment issues.

Petitioner Melquan Tucker's case involves the exercise of the core of the Second Amendment: in-home possession for self-defense. Because petitioner failed to ask the State for permission before his private exercise of the core of this fundamental right, he was branded a felon. And when he tried to appeal this matter, the State determined, despite *Heller*, that this severe measure was only subject to intermediate scrutiny.

Although petitioner had no prior convictions, he is now barred from owning a handgun for self-defense because he exercised his right to have one in the home for self-defense. He respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Supreme Court of the State of New York, Appellate Division, Fourth Judicial Department.

OPINION AND ORDER BELOW

The opinion of the Supreme Court, Appellate Division, Fourth Judicial Department is reported at 111 N.Y.S.3d 401 (2020). The Order of the Appellate Division denying leave was unreported, but is reprinted at App.14.

JURISDICTION

The Appellate Division issued its judgement on January 31, 2020. App.1. It denied petitioner's motion for leave to appeal to the New York Court of Appeals on June 29, 2020. App.14. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Second Amendment to the United States Constitution reads:

> 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.

The Fourteenth Amendment to the United States Constitution reads:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process or law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Penal Law § 265.01-b(1), upon which petitioner was convicted reads:

> A person is guilty of criminal possession of a firearm when he or she: (1) possesses any firearm or; 2) lawfully possesses a firearm prior to the effective date of the chapter of the laws of two thousand thirteen which added this section subject to the registration requirements of subdivision sixteen-a of section 400.00 of this chapter and knowingly fails to register such firearm pursuant to such subdivision.
>
> Criminal possession of a firearm is a class E felony.

STATEMENT OF THE CASE

I. Petitioner was charged with a felony after a rusted handgun he kept for self-defense is located in his home.

Buffalo Police executed a search warrant at petitioner's home. During the search, police recovered a hard-shelled case in the back of a bedroom closet beneath a pile of clothing. An officer opened it to find a disassembled handgun. Two cylinders were in the case but were not attached to the revolver. The critical component that could connect the cylinders to the revolver was missing. Later examination of the revolver would show that a slight tap could cause the cylinder to fall out of the revolver. The revolver was in a state of disrepair, with ample rusting and corrosion. And, by the prosecutor's own account, was "kind of a beater."

Petitioner was arrested and jailed. In calls to his mother from the Erie County Holding Center, he expressed disbelief over the fact that he was being charged with a felony for having a handgun in his home for self-defense. "I got the right to bear arms," petitioner explained to his mother.

II. Constitutional challenges based on the Second Amendment are denied before the trial court.

When trial counsel was assigned, he immediately targeted the constitutionality of the statute petitioner was charged with violating. Defense counsel argued that the charge was a "violation of the defendant's Second Amendment rights under the United States Constitution to possess a pistol in his home for self-defense." Defense counsel noted the severe consequences that stemmed from a felony conviction for merely possessing a revolver in the home for self-defense: voter

disenfranchisement, loss of the ability to obtain certain licenses, and the prohibition on ever exercising his Second Amendment right for in-home handgun possession again.

Special counsel, who assisted in making a Second Amendment challenge, argued that petitioner's in-home possession of a handgun for self-defense was a fundamental right that could not be intruded upon or criminalized. He also argued that despite the "longstanding self-described policy against handguns, this is no longer tenable under federal Constitutional law."

The prosecutor's response was that *Heller* was inapplicable as petitioner "could have easily registered the firearm in this case and lawfully possessed it — both in and out of his home" and that "registering a weapon in an acceptable means of regulation." He added that the "law does not ban a citizen from possessing any pistol or revolver, it simply makes it illegal for a citizen to possess an unregistered pistol or revolver."

Trial counsel continued to reiterate in later pleadings that a "statute providing government officials with unfettered discretion over the exercise of fundamental and constitutional rights is void." A felony conviction for unlicensed possession in the home for self-defense was "fundamentally flawed" as "gun possession in the home is a right, not a privilege."

Before the Court issued its decision on the matter, the Erie County District Attorney moved to disqualify himself because of a conflict. The court then appointed the Niagara County District Attorney as the special prosecutor.

The Court issued a written Order on the issue and stated that "the motion to dismiss the firearm count of the Indictment is denied." App.16. Its oral decision on September 22, 2017, was limited to the following:

> And my decision is I'm denying that request after reviewing all of the arguments that had been submitted. I am not persuaded that your arguments raise an issue as to the — which would lead me to decide that that statute is unconstitutional as applied to this defendant in this case.

Following a jury trial, petitioner was obviously acquitted of the drug charges based on drugs recovered from his codefendant's person. But he was convicted of the firearms possession count.

III. The Appellate Division applies a "two-step test" to circumvent *Heller*.

On direct appeal to the Appellate Division, petitioner argued that in-home firearm possession could not be criminalized because it was "at the core of the fundamental right to defend hearth and home as embodied in the Second Amendment" and because of this Court's ruling in *Heller*. Of issue was that the statute should be viewed using strict scrutiny as plainly stated in *Heller*, no matter how "reprehensible" New York deemed handgun possession in the home to be.

Notice of the constitutional challenge was provided to the New York State Attorney General's Office when the appeal was filed. While the Attorney General initially declined to intervene in the matter as provided for in New York Executive Law § 71, they elected to intervene only after the prosecutor filed his brief. The Appellate Division granted the Attorney General permission to file a brief as an intervenor-respondent.

In briefing, the District Attorney argued that the statute did not operate as a ban and was not a severe restriction on the Second Amendment right to keep handguns in the home for self-defense. The District Attorney declined to state which level of scrutiny applied, and merely stated that "New York's law banning possession of an unlicensed handgun in the home does not violate the Second Amendment."

The Attorney General argued that the statute was constitutional because "New York has a long history of regulating firearms possession by its citizens." It urged the Appellate Division to adopt a "two-step" approach to determining whether strict or intermediate scrutiny should apply. Rather than addressing *Heller*'s protection of in-home defense as the "core" of the Second Amendment, the Attorney General instead chose to interpret *Heller* to mean that "longstanding prohibitions" were appropriate because they ensured that only "law-abiding responsible citizens" could have handguns.

Following argument on the matter, the Appellate Division held that "New York's criminal prohibition on the possession of a handgun in the home without a license, as applied to defendant, does not violate the Second Amendment of the Constitution of the United States." App.2. It recognized *Heller*'s holding that in-home possession for self-defense is at the core of the second Amendment right and that laws that implicate the core of a right necessitate strict scrutiny review. But it declined to use strict scrutiny. Instead, it determined that *Heller*'s "lack of detailed guidance" necessitated the use of a two-step approach to determining whether the Second Amendment has been implicated. App.7.

Using this novel two-step approach, the Appellate Division applied intermediate scrutiny to petitioner's challenge and held that the State's intrusion and criminal sanctions were permissible.

REASONS FOR GRANTING THE PETITION

A criminal conviction for exercising the core of an enumerated right is more than a mere burden. Any individual who has a handgun in their home for self-defense who has not yet asked the State for permission to exercise this inherent right is branded a felon. The irony of this penalty is that petitioner is now barred from exercising his Second Amendment right because he exercised it at all.

I. Lower courts repudiated *Heller* and invented a new, subjective standard for an enumerated right that is incongruous with the protections afforded to other rights.

While some portions of the *Heller* decision are concededly ambiguous, its key holding is not. Attacks on the exercise of the core of the Second Amendment do not survive any level of scrutiny, including strict scrutiny. *See District of Columbia v. Heller*, 554 U.S. 570, 628–629 (2008). The core of the Second Amendment is self-defense in the home. *Id.* at 630. And the preferred method for exercising this inherent right is the handgun. *Id.* at 628–629.

But lower courts — state and federal — have consistently repudiated *Heller*'s central holding. *See Rogers v. Grewal*, 140 S. Ct. 1865, 1867 (2020) (Thomas & Kavanaugh, JJ., dissenting) (noting that "lower courts systematically ignore the Court's actual holding in *Heller*"). Aside from merely ignoring *Heller*, many courts

misapply *Heller*. *See New York Pistol & Rifle Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1527 (2020) (Kavanaugh, J., concurring) (hereinafter *NYSRPA*).

The result of the lower courts' repudiation yields improper, inequitable, and startling applications of *Heller* in cases involving this core, enumerated right. *See Rogers*, 140 S. Ct. at 1867 (Thomas & Kavanaugh, JJ., dissenting); *see also NYSRPA*, 140 S. Ct. at 1528 (Kavanaugh, J., concurring). One court suggested that Second Amendment cases should be evaluated in the court of public opinion. *See Wilson v. Cook County*, 937 F.3d 1028, 1034 (7th Cir. 2019). Others imposed time, place, and manner restrictions. *See Drummond v. Township of Robinson*, 784 F. App'x 82, 84 (3d Cir. 2019).

But most troubling of all is the eagerness of the lower courts to apply an interest-balancing approach that this Court explicitly rejected in *Heller*. 554 U.S. at 634. Lower courts consistently adopt a subjective, two-part test in Second Amendment cases that morphs strict and intermediate scrutiny. *See Wilson*, 937 F.3d at 1028. This test uses a sliding scale and is one that is "entirely made up." *See Rogers*, 140 S. Ct. at 1867 (Thomas & Kavanaugh, JJ., dissenting).

Petitioner suffered from the application of this made-up standard. App.7–8. And he is not alone in having his Second Amendment rights analyzed under subjective standards. *See, e.g.*, *United States v. McGinnis*, 956 F.3d 747, 754 (5th Cir. 2020); *Mai v. United States*, 952 F.3d 1106, 1113 (9th Cir. 2020); *Drummond*, 784 F. App'x. at 83.

In New York, some courts have even gone so far as to say that there are no limitations to the government enacting any gun control measures. *See New York v. Morrill*, 475 N.Y.S.2d 648, 649 (N.Y. App. Div. 3d Dep't 1984) (citing caselaw *Heller* declined to extend). Other courts somehow interpreted *Heller* to mean that intermediate scrutiny is the de facto standard for the Second Amendment. *See Mai*, 952 F.3d at 1115; *see also United States v. Jimenez*, 895 F.3d 228, 234 (2d Cir. 2018) ("We have usually analyzed substantial burdens on non-core rights with intermediate scrutiny.").

In other words, the Second Amendment is now accorded less protection than other rights, both enumerated and non-enumerated. *See e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597–2598 (2015); *Lawrence v. Texas*, 539 U.S. 558, 562 (2003); *Griswold v. Connecticut*, 381 U.S. 479, 485–486 (1965). That is not to say that these other rights should not have strict scrutiny applied to them or that they are somehow inferior. But the beauty of the Bill of Rights is that each precious right, standing together or alone, is afforded great protection to protect the citizens rather than the government. None should be singled out for lesser protections than the others because of political agendas or other motives.

But lower courts have systematically targeted Second Amendment exercises for lesser protection than other rights. They choose to give some enumerated rights more protection than others based on the dangerous belief that political and moral beliefs govern which rights are more important than others. *See Harris v. McRae*, 448

U.S. 297, 331 (1980) (noting that the regulation at issue in *Harris* was "nothing less than an attempt by Congress to circumvent the dictates of the Constitution").

New York deems all handgun possession as "reprehensible." *New York v. Powell*, 430 N.E.2d 1285, 1286 (N.Y. 1981). To New York, in-home possession for self-defense is also reprehensible, but is just a little less reprehensible than public carry. *Id.* Cases analyzing the Second Amendment, such as in petitioner's case, mirror this belief in their use of subjective tests. Under these subjective tests, it is no surprise that the Second Amendment would be reduced to mere surplusage by a state that views its exercise as reprehensible in any circumstance.

Not shockingly, New York does not hesitate to apply strict scrutiny in legislation targeting cyberbullying, political donations, and adult bookstores. *See e.g.*, *New York v. Marquan M.*, 19 N.E.3d 480, 486–487 (N.Y. 2014); *Cahill v. Pub. Serv. Comm'n*, 556 N.E.2d 133, 137 (N.Y. 1990) *cert. denied* 498 U.S. 939 (1990); *Time Square Books, Inc. v. City of Rochester*, 645 N.Y.S.2d 951, 955–956 (N.Y. App. Div. 4th Dep't 1996), *lv. denied* 647 N.Y.S.2d 650 (N.Y. App. Div. 4th Dep't 1996). But when it comes time to address an enumerated right, the Second Amendment, New York turns a blind eye to a critical issue.

The ability to use guns in the home is critical given that citizens are not entitled to police protection. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 764–765 (2005); *see also McDonald v City of Chicago*, 561 U.S. 742, 855–856 (2010) (Thomas, J., concurring) (noting that that Fourteenth Amendment was created to protect citizens against private violence). But the means citizens possess to protect

themselves in their homes as provided by the Second Amendment are criminalized unless the State grants citizens the permission to exercise the right. And when these citizens look to lower courts for redress, their cases are analyzed using lesser standards than other enumerated rights.

Now is the time to resolve these varied interpretations of *Heller* and the Second Amendment. *See Silvester v. Becerra*, 138 S. Ct. 945, 947–948 (2018) (Thomas, J., dissenting). Lower courts have expressed concern over how they are to interpret *Heller*, even suggesting that they are "troubled" by the lack of guidance on how it should be applied. *See Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012), *cert. denied* 569 U.S. 918 (2013). The petition should be granted to address these concerns and settle the governing standards that should apply to Second Amendment cases.

II. Intrusions into the private exercise of this inherent right and any criminal penalties imposed for its exercise should be reviewed with strict scrutiny.

Despite the varied, subjective applications of *Heller*, its central holding remains clear:

> 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.

Heller, 554 U.S. at 628–629 (internal citations and quotation marks omitted). In other words: encroachments on the Second Amendment right to keep and bear arms in the

home do not survive strict scrutiny review. By virtue of their failure to withstand strict scrutiny, they also do not pass muster under intermediate scrutiny.

Rights contained in the Bill of Rights are typically afforded strict, rather than intermediate scrutiny. *Cf United States v. Carolene Prods.*, 304 U.S. 144, 154 n.4 (1938). Thus, if any criminal sanctions are to be imposed for this exercise, they must be narrowly tailored to achieve the State's goal or interest. And the restriction must be the least restrictive means possible. The challenged statute, as applied to petitioner, meets none of these standards.

The State's purported interest in enacting the statute petitioner was charged with was to protect against public harms and public, unlawful use by convicted criminals. *See* N.Y. Senate Introducer's Mem. in Support, Bill Jacket, L. 2013, ch. 1 at 9, 13, *available at* http://digitalcollections.archives.nysed.gov/index.php/Detail/objects/48186. However, none of these "interests" were at issue in petitioner's case.

For one, this was a private use within the confines of the home. For another, petitioner was in none of the categories that the government understandably has an interest in deterring handgun use with (i.e., mentally ill, felony convictions).

Lower court cases analyzing *Heller* tacitly recognize that the private exercise of the Second Amendment right in the home requires something more than intermediate scrutiny. *See Kachalsky*, 701 F.3d at 94 ("The state's ability to regulate firearms and, for that matter, conduct, is qualitatively different in public than in the home."). Heightened scrutiny is required for government intrusions into the home and into citizens' conduct in their homes. *See Georgia v. Randolph*, 547 U.S. 103, 114–

115 (2006); *see also Lawrence*, 539 U.S. at 562 ("In our tradition the State is not omnipresent in the home."); *Miller v. United States*, 357 U.S. 301, 306–307 (1958).

These standards are no different than the ones that should have been applied to petitioner's exercise of an inherently private act within his own home. There is no compelling interest in stripping citizens of their right to protect themselves in their home by sanctioning the private exercise with a felony conviction.

The State's excuses that they are concerned with public harm for an inherently private exercise of a right are simply inapplicable in petitioner's case. All the arguments they advanced were entirely speculative. And speculative arguments do not support the State's burden under strict scrutiny or intermediate scrutiny. *See also Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015).

Felony penalties for a citizen privately exercising this right in the home without first asking the State cannot be described as "narrowly tailored" or the "least restrictive means possible." Because petitioner did not obtain the State's permission first, he no longer has the right to vote. He cannot hold certain jobs. He cannot exercise his Second Amendment right to protect himself. *See Caetano v. Massachusetts*, 136 S. Ct. 1027, 1033 (2016) (Alito & Thomas, JJ., concurring) ("If the fundamental right of self-defense does not protect Caetano, then the safety of all Americans is left to the mercy of state authorities who may be more concerned about disarming the people than about keeping them safe.").

For some weapons possession offenses in the Penal Law, some allow for a home "exception" that allows for a reduction of the charge to a misdemeanor. *See* N.Y. Penal

Law § 265.03(3). But other offenses, such as the one petitioner was charged with do not allow for any reduction. *See New York v. Hughes*, 1 N.E.3d 298, 300–301 (N.Y. 2013). Such inconsistent applications cannot be described as narrowly tailored.

Furthermore, the means to secure permission to privately exercise this right utilize ambiguous standards such as "maturity" and morality. *See Peters v Randall*, 975 N.Y.S.2d 297, 298–299 (N.Y. App. Div. 4th Dep't 2013); *see also* N.Y. Penal Law § 400.00(1). These overly broad, vague, and subjective requirements cannot be described as narrow.

There are still other needless hurdles before a citizen can receive the State's permission to privately exercise this right in the home. Proceedings to obtain permission to exercise the right can be needlessly postponed. *See also FW/PBS, Inc., v. City of Dallas*, 493 U.S. 215, 227 (1990). When permission is denied, any further review of the denial of the private exercise of this fundamental, inherent right is subject to arbitrary and capricious review on already subjective standards. *See O'Brien v. Keegan*, 663 N.E.2d 316, 318 (N.Y. 1996).

The process for seeking permission from the State is superfluous — ergo, it is not narrowly tailored or utilizes the least restrictive means possible. The federal NICS database already checks for all the concerns the State advances: handgun possession by felons and those living with mental illness. *See* 18 U.S.C. § 922(g).

Simply stated, current federal regulations in place regarding the purchase of handguns for in-home use sufficiently protect any interest the State has in public

safety. New York's intrusion overburdens petitioner's exercise of this fundamental right and provides no additional level of safety.

Neither can the State justify an argument that the statute is not a ban. This type of argument was advanced before this Court once before and rejected. This is no different than *McDonald*, 561 U.S. at 750 (2010), which found that banning in-home possession until a license was granted operated as a ban.

New York interjected itself into the private exercise of a fundamental right and assessed criminal penalties upon petitioner after it did so. Such a violation from the State fails any level of scrutiny.

With no prior criminal history whatsoever, petitioner is now a felon. He is a felon because of New York's draconian decision to brand him one because he had the audacity to not ask its permission before exercising his right in his home for self-defense.

Regardless of the decision this Court may make, now is the time to address the issue so the harm petitioner suffered is not repeated elsewhere.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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July 31, 2020