No. 18-280

IN THE

Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, *et al.*,
Petitioners,
v.
THE CITY OF NEW YORK, *et al.*,
Respondents.

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

BRIEF OF *AMICI CURIAE* JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICI CURIAE* [1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan educational organization that seeks to promote transparency, accountability and integrity in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs to advance its public interest mission and has appeared as *amicus curiae* in this Court on several occasions.

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs to advance its purpose and has appeared as *amicus curiae* in this Court on several occasions.

Amici are concerned that the decision of the U.S Court of Appeals for the Second Circuit will allow state and local governments to undermine citizens' right to self-defense in a discriminatory fashion. *Amici* believe that the freedom to keep and bear arms is an inherent individual liberty right which the Constitution must secure for all citizens, and that states and cities may not infringe upon it regardless of the nobility of their motives. For these

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[1] Pursuant to Supreme Court Rules 37.3 and 37.6, *amici curiae* state that all parties have consented in writing to the filing of this brief, no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

and other reasons, *amici* urge the Court to reverse the Second Circuit's decision.

SUMMARY OF THE ARGUMENT

Gun control regulations which substantially burden the right to carry firearms are a discriminatory means to deny select citizens the full protections of the second amendment. The court should evaluate the constitutionality of New York City's gun control regulations based on how much they burden citizens' second amendment rights. In this case, the burden is great. States and cities concerned about reducing gun violence can and should instead implement other known effective measures – measures which do not require the state to exercise extra-constitutional powers to deprive the people of their fundamental rights.

ARGUMENT

1. New York City's Gun Control Laws Violate the Second Amendment in a Discriminatory Way

As the Gun Owners of America made clear in their certiorari stage *amicus* brief, under the existing New York City regulations very wealthy individuals can already enjoy as much second amendment protection as they desire wherever they travel

throughout the city.[2] The city's current gun control regulations burden the right to bear arms only for the average citizens, not the "elite" ones. Many people might be comfortable knowing the right to carry firearms is held only by the people they judge to be responsible individuals who can be trusted in a way they would not trust the average citizen. However, such arguments from elitism are not usually recognized today as legitimate grounds to carve out exceptions to people's constitutional rights. *See generally* U.S. Const., amend. XIV, sec. 1, cl. 4.

At their heart, gun control regulations have always been about a fundamental mistrust of one's fellow citizens to behave in a civilized way. In the United States, that mistrust has been aimed at different groups of people over the years.[3] Whether electorates mistrust their fellow citizens to bear firearms responsibly on the basis of race, income

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[2] Brief *Amicus Curiae* of Gun Owners of America, *et al*. at 2-3, Case No. 18-280 (filed October 9, 2018) ("'[B]earing' of arms within the City is limited to government agents, along with a select few 'politician[s], celebrit[ies] or [the] very, very wealthy…' For those without wealth, influence, or connections, the only 'bearing' arms they may do. . . is directly between their home or business and a few government authorized locations.").

[3] *See e.g.* Jane Coaston, *The (Really, Really) Racist History Of Gun Control In America,* MTV News, June 30, 2016, available at http://www.mtv.com/news/2900230/the-really-really-racist-history-of-gun-control-in-america/ ("the Black Lives Matter movement hasn't centered gun control as a priority — not only because of the racist history of gun control, but because gun control regulations, like drug laws, are more likely to be used against African-Americans than whites.").

level, social class or otherwise is irrelevant. Majorities may not infringe upon the basic rights of citizens, even when their reasons for doing so come across as sound and compelling.

2. The Court Should Avoid Balancing Tests and Instead Look to the Rights Protected by the Second Amendment and How Governments Are Burdening Those Rights

Rather than inquire as to the government's legitimate interests and the means the state used to achieve that interest, the better test for gun control regulation is how greatly the regulation burdens citizens' right to keep and bear firearms. U.S. Const., amend. II. The state will always have an interest in preventing avoidable deaths, and the Court is not better equipped than the legislature to evaluate the relationship between firearms rights and murder rates. *McDonald v. City of Chicago*, 561 U.S. 742, 790-791 (2010) ("Justice Breyer is incorrect that incorporation will require judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise. . . [W]hile his opinion… recommended an interest-balancing test, the Court specifically rejected that suggestion.") (Alito, J.); *see also Heller v. District of Columbia*, 670 F.3d 1244, 1278 (D.C. Cir. 2011) ("The Court's later decision in *McDonald*... again precluded the use of balancing tests; furthermore, it expressly rejected judicial assessment of 'the costs and benefits of firearms restrictions'") (Kavanaugh, J., dissenting).

Measuring how large of a burden has been placed on the exercise of a fundamental right is an approach used in both commerce clause cases and election law cases. *United States v. Lopez*, 514 U.S. 549, 579-580 (1995) ("One element of our dormant Commerce Clause jurisprudence has been the principle that states may not impose regulations that place an undue burden on interstate commerce…") (Rehnquist, C.J.); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) ("the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.") (White, J.). A similar test could be applied to second amendment jurisprudence as well.

The purpose of the bill of rights is to deprive the government of certain powers, and one of the powers of which the government has been deprived is the power to infringe upon the people's choice to keep and bear arms. "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." *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) (Scalia, J.). The second amendment should be interpreted consistently with the remainder of the bill of rights which "concerned restrictions upon federal power" imposed by means of "basic and fundamental rights which the Constitution guaranteed to the people." *Griswold v. Connecticut*, 381 U.S. 479, 490-493 (1965) (Goldberg, J., concurring). The only lawful process for changing this balance of power between the people and their

government is constitutional amendment. Accordingly, the only question is whether the city's regulations "unduly" burden the right or not. The Court should find that the regulations are an undue burden the people's second amendment rights, which have always included the right to travel with firearms.

The second amendment right to self-defense against unlawful aggression by any actor does not disappear when one travels outside the home. *District of Columbia v. Heller*, 554 U.S. 570, 583 (2008) ("At the time of the founding, as now, to 'bear' meant to 'carry.'") (Scalia, J.); *Parker v. District of Columbia*, 478 F.3d 370, 383 (DC Cir. 2007) (the second amendment protects "the right to defend oneself against attacks by lawless individuals, or, if absolutely necessary, to resist and throw off a tyrannical government.") (Silberman, J.).

Whether the Court decides to apply an undue burden test, or to merely find that the text and history of the second amendment unambiguously protects the right to travel with firearms outside the home, the New York City regulations should be held unconstitutional and the Second Circuit should be reversed.

3. Once Freed From the Crutch of Unconstitutional Gun Control Efforts, States and Cities Can Put Those Resources Into More Effective Programs for Reducing Violence

Restricting firearms rights may be politically popular in New York City, and perhaps less expensive in the short term than more impactful measures to reduce violence, but the constitutional impairment renders drastic gun control void. The city can prevent gun deaths in a variety of other ways without infringing on second amendment rights. Rather than trying to fight a war on guns, cities and states should consider doing more to better equip citizens to live peacefully in a world where firearms exist. New York City (and other cities) can increase funds for educational efforts towards teaching anger management and non-aggression for adolescents and adults.[4] Even more effectively, the city could increase funds for teaching interpersonal skills and emotional management for young children, which would eventually decrease violence and increase

[4] James McGuire, *A review of effective interventions for reducing aggression and violence*, Philosophical Transactions of the Royal Society of London B: Biological Sciences, 363(1503): 2577–2597 (Aug. 12, 2008), published online May 8, 2008, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2606715/ ("[T]here are large amounts of evidence showing that it is possible to reduce the rate of occurrence of these problems among individuals who have been identified as manifesting them.... Emotional self-management, interpersonal skills, social problem-solving and allied training approaches show mainly positive effects with a reasonably high degree of reliability.").

well-adaptedness throughout the adult population.[5] These measures would likely have positive effects for reducing gun violence without reaching beyond the states' constitutional authority.

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[5] Of the five types of interventions discussed, the evidence is strongest for those that target children early, through preschool enrichment and social development training – both in terms of reported outcomes and, critically, of the number and quality of studies measuring impacts on violence... Thus there is a well-developed evidence base for the effectiveness of preschool enrichment programmes and social development programmes in preventing aggression and improving social skills, particularly in deprived children. Furthermore, high-quality programmes have shown that these effects can be sustained well into adulthood.

Preventing violence by developing life skills in children and adolescents, World Health Organization (2009), at p. 14, available at https://www.who.int/violence_injury_prevention/violence/life_skills.pdf.

CONCLUSION

For all the foregoing reasons, *amici* respectfully request that the Court reverse the Second Circuit's decision.

Respectfully submitted,

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