No. 18-280

IN THE

# Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ROMOLO COLANTONE, EFRAIN ALVAREZ, AND JOSE ANTHONY IRIZARR,

*Petitioners,*

*v.*

THE CITY OF NEW YORK AND THE NEW YORK CITY POLICE DEPARTMENT – LICENSE DIVISION,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF OF BLACK GUNS MATTER AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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Dated: May 14, 2019

BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

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## STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Black Guns Matter is a Limited Liability Company established under the laws of the Commonwealth of Pennsylvania. Black Guns Matter educates people in urban communities on their Second Amendment rights and responsibilities through firearms training and education.

## SUMMARY OF ARGUMENT

Laws have been put in place, most often in the inner-city, that prohibit law-abiding residents from bringing a gun outside the home, where the likelihood of becoming a victim of violent crime doubles. While the right of the people to keep and bear arms is protected by the Second Amendment, many courts have held that only the right to keep a handgun in the home for self-defense is protected by the "core" of the Second Amendment. Bringing the handgun to the place where one is more likely to need it is not protected by the core. Law-abiding citizens should not be prohibited from being able to defend themselves from violent criminals in the places where those violent crimes are most likely to occur.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that he authored this brief in its entirety and that none of the parties or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of Record for all parties have filed letters reflecting their blanket consent to the filing of *amicus* briefs with the Clerk.

Black Guns Matter urges this Court to clearly define what is protected by the Second Amendment and how the analysis to determine that protection should be conducted.

## ARGUMENT

### I. THE INTEREST IN REDUCING GUN VIOLENCE

There is no arguing that gun violence is a problem. Every day the news contains more stories about school shootings, shootings in a house of worship, shootings in shopping malls, shooting on the streets and shootings in the home. The challenge is to reduce gun violence without infringing on the Second Amendment Rights of law-abiding citizens.

### II. PROXMIATE CAUSE OF GUN VIOLENCE VS CAUSE IN FACT

A shooting occurs when someone pulls the trigger of a loaded firearm while the muzzle is pointed at someone. There are many actions that precede the pulling of that trigger, but it is the pulling of the trigger that starts the bullet travelling down the barrel and towards the target.

A shooting does not occur because a law-abiding citizen purchased a firearm. A shooting does not occur because a law-abiding citizen placed a firearm in the trunk of a car. A shooting does not occur because a law-abiding citizen put a firearm in a holster. A shooting does not occur because a law-abiding citizen put a firearm in his pocket. A

shooting does not occur because a law-abiding citizen put a gun in his glove compartment. A shooting does not occur because a law-abiding citizen put a gun in his backpack. A shooting does not occur because a law-abiding citizen loaded a firearm. A shooting ONLY occurs when someone pulls the trigger of a loaded firearm while the muzzle is pointed at someone.

Residents of New York City may obtain a premises permit that allows them to defend themselves in the home, but nowhere else. A man going to the local grocery store can't use a gun to defend himself from an attacker for the simple reason that he is not permitted to bring his gun outside his home and to the store. The City will permit him to defend himself if the perpetrator follows him home and forces his way into the home. A woman cannot use a gun to defend herself from a dark alley rapist for the simple reason that she is not permitted to bring her gun on the streets of Manhattan. The City only gives her the ability to use a gun to protect herself from a rapist that breaks into her home.

District of Columbia v. Heller, 554 U.S. 570 (2008) tells us that the right to self-defense is a fundamental right, and struck down a law that prohibited possession of an operable handgun in the home because the need for self-defense is most acute in the home. Heller did not hold that the right of self-defense ends at the threshold.

Many states have tried prohibition as a method to reduce gun violence. Although the ideas may sound like "common sense" at first, a deeper analysis shows that they are not directed at the root

of the problem. The theory seems simple: prohibiting law abiding citizens from possessing guns will take them out of circulation, and the trickle-down effect will eventually leave the criminals with no source of guns to steal. This method ignores the facts that law-abiding citizens become the first disarmed while leaving criminals with the arms, and that semi-automatic guns do not require high technology manufacturing methods. The Colt 1911 is so named because it was adopted in 1911, over 100 years ago. The AK-47 is so named from it's year of adoption. If the supply of legally manufactured firearms is dried up, criminals will simply manufacture firearms, similarly to the way that criminals manufacture opioids.

The Second Amendment has been held to protect an individual right, yet courts have determined that the right of self-defense ends at the front door. Gould v. Morgan, 907 F.3d 659 (1st Cir. 2018) held that the right to bear arms outside the home for self-defense is not protected, unless the applicant "identify a specific need, that is, a need above and beyond a generalized desire to be safe." Id. at 663. If the licensing authority determines that the need is insufficient, a license may be issued restricting the "carrying" to employment, sporting, target, and hunting purposes. Only 34% to 40% of the licenses issued in Boston and Brookline permit carrying for self-defense.

The contrast between the government's "interest in public safety" and the requirement that the applicant provide specific reasons to be fearful is stark. In Massachusetts, an applicant for a License to Carry firearms must show that he is not federally prohibited, that he has never been convicted of a

crime of violence, has never been convicted of a controlled substance violation, has never been convicted of a jailable crime involving a firearm. Mass. Gen. Laws c. 140, § 131. This law abiding resident must articulate a credible fear that going out in public unarmed may cause him injury. This credible fear is then weighed against the government's public safety interest. The applicant can not state a general fear of injury, but the government can speculate that the applicant, a law abiding citizen with no criminal history, may spontaneously pull out his gun and start shooting people, and determine that this risk to public safety outweighs the individual's right to self-defense.

"Boston and Brookline require an applicant to articulate a reason to fear injury to himself or his property that distinguishes him from the general population" Id. at 664. The message here is loud and clear: The general population does not have a right to carry a gun outside the home for self-defense.

A gun that is carried does not create a risk to public safety. A gun that is locked in the trunk of a car is not a risk to public safety. A gun that is in the holster of a law-abiding citizen is not a risk to public safety. The risk to public safety only occurs when the trigger of a loaded firearm is pulled while the muzzle is pointed towards a member of the public.

There are laws in place prohibiting murder, homicide, assault and battery, and assault. These laws are narrowly-tailored to achieve the desired outcome of public safety. Laws prohibiting possessing firearms outside the home are not narrowly tailored to prevent the proximate cause of gun violence: the pulling of a trigger of a loaded

firearm while the muzzle is pointed at someone. That action is already prohibited. These laws, prohibiting possession of self-defense weapons, attempt to eliminate any cause in fact of gun violence. The laws attempt to falsely attribute *mens rea* to the simple possession of a tool, claiming that nobody possessing such a tool does so for a valid reason.

The petitioner's brief states, while describing the specific statute in question in this case "Petitioners are aware of no other jurisdiction in the entire country, now or ever, that prohibits its residents from transporting unloaded, locked-up firearms outside the jurisdiction." Unfortunately, New York City is not the only jurisdiction that restricts possession to the home.

Gould v. Morgan describes the various restrictions placed on a License to Carry firearms in Massachusetts, however the First Circuit has previously held that the License to Carry in Massachusetts is not protected by the Second Amendment, because it is the least restrictive license available that permits the applicant to possess a handgun in the home for self-defense. Morin v. Leahy, 862 F.3d 123 (1st Cir. 2017). Dr. Morin was denied a License to Carry due to a conviction in Washington, D.C. for attempted possession of a pistol. The court held that the Second Amendment was not applicable because Morin could have applied for an FID Card that, according to the court, would allow him to possess a handgun in the home for self-defense.

The Massachusetts Criminal Statutes surrounding handguns are found in Mass. Gen.

Laws c. 269, § 10. Paragraph (a) of this section prohibits possession of a handgun outside the home or place of business for anyone without a License to Carry. Paragraph (h) prohibits possession of a handgun in any place for anyone without an FID Card. The holder of an FID Card in Massachusetts is not permitted to bring his handgun outside the home. Doing so imposes the same penalty as a drug dealer caught with a gun outside the home in Massachusetts: a mandatory minimum 18 months in jail. Id. Although the licensing scheme permits the FID Holder to possess a handgun on a licensed gun range, Mass. Gen. Laws c. 140, § 129B(6), there is no exception for transporting the gun from the home to the single licensed gun range in Massachusetts.

## III. WHERE SELF-DEFENSE IS ACUTE

This Court struck down in District of Columbia v. Heller, 554 U.S. 570 (2008) the absolute prohibition on an entire class of "arms" in the home, the place where the importance of the lawful defense of self, family, and property is most acute.

The Bureau of Labor Statistics, in a study published at https://www.bjs.gov/index.cfm?ty=tp&tid=44 (last visited 5/10/19), found that more than two thirds of violent victimizations occur outside the home. Although the need for self-defense may be "most acute" in the home, the probability of becoming the victim of a violent crime more than doubles when one leaves the home. Although "Outside the home, society typically relies on police officers, security guards, and the watchful eyes of concerned citizens to mitigate threats." Gould v. Morgan, 907 F.3d at 671, it is apparent from the

doubling of crime rate outside the home, that something more than relying on the police is needed. The need to protect oneself outside the home, although arguably not *as* acute as the need inside the home, is nonetheless acute and, therefore, paramount to the security of a free state. The Framers did not preface the Second Amendment with a statement regarding home and hearth. The Framers prefaced the Right to Keep and Bear Arms with a statement regarding the Security of a Free State. The Security of a Free State is more closely related to the activities outside one's home than inside.

## IV. SIDE STEPPING THE SECOND AMENDMENT

Courts have repeatedly side-stepped any meaningful Second Amendment analysis by determining that, since alternatives exist, the item or action in question does not invoke the Second Amendment.

The First Circuit held, in Morin v. Leahy, *supra*, that the core of the Second Amendment is not invoked because there is an alternative to a License to Carry. More recently, the First Circuit decided in Draper v. Healey, 827 F.3d 1 (1st Cir. 2016) that the residents of Massachusetts have no right to purchase a Glock, because a Smith & Wesson is available to purchase. The Third Circuit held, in Association NJ Rifle v. Attorney Gen. New Jersey, 910 F.3d 106 (3rd Cir. 2018) that ten round magazines are not protected because an alternative five round magazine is available. The Fifth Circuit held, in Mance v. Sessions, 880 F.3d 183 (5th Cir. 2018) that,

because residents of Washington D.C. had available a single gun dealer from whom to purchase firearms, the ability to acquire arms outside D.C. is not protected.

## CONCLUSION

Because of the wide variance of Second Amendments between the circuits, and the murky waters left surrounding many Second Amendment issues after Heller, Black Guns Matter urges this court to clearly define the protection afforded by the words "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."

Respectfully submitted,

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