No. 19-487

In The
Supreme Court of the United States

KEVIN W. CULP, MARLOW DAVIS, FREDDIE REED-DAVIS, DOUGLAS W. ZYLSTRA, JOHN S. KOLLER, STEVE STEVENSON, PAUL HESLIN, MARLIN MANGELS, JEANELLE WESTROM, SECOND AMENDMENT FOUNDATION, INC., ILLINOIS CARRY AND ILLINOIS STATE RIFLE ASSOCIATION,

Petitioners,

v.

KWAME RAOUL, in his Official Capacity as Attorney General of the State of Illinois, BRENDAN F. KELLY, in his Official Capacity as Acting Director of the Illinois State Police, and JESSICA TRAME, as Bureau Chief of the Illinois State Police Firearms Services Bureau,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

I. The Non-Resident Concealed Carry Application Ban Is An Unwarranted and Excessive Infringement on Petitioners' Second Amendment Rights

Respondents' Brief in Opposition (BIO) fails to explain why they could not implement measures that would protect the Petitioners' Second Amendment rights while also benefitting public safety, when both the majority and dissent in the lower court acknowledged that such measures could be implemented. Pet. App. 18, 31. As the lower court majority noted that Petitioners "may be right" in asserting that the Second Amendment requires Illinois to allow non-residents to submit a concealed carry license application (Pet. App. 18), that failure stands out.

Respondents also ignore that their application of 430 ILCS 66/40 works as a total ban for the Petitioners and those from the 43 states (45 until two weeks ago) like them. They do not have criminal or mental health histories (BIO 4), they are law-abiding, they have concealed carry licenses in their home states and they would have to go through all the training and vetting requirements of an Illinois resident, not to mention paying double the fees. Respondents claim it is impossible to know if the non-resident carrying in Illinois, who has a concealed carry license in her home state, who is trusted to carry in her vehicle on Illinois roads, on Illinois private property, on Illinois firing ranges and hunting grounds, is nonetheless too dangerous or mentally ill to carry for self-defense and exercise her

Second Amendment right anywhere else in the State. BIO 15. Petitioners and their *amici* have demonstrated this is simply not true, and have controverted the conclusions of Respondent Trame's Affidavits. BIO 11, 1a.

Respondents argue as if the exceptions are the rule (BIO 24), but they instead show the folly of Respondents' argument. The Petitioners are trustworthy enough – even with Respondents' claimed "information deficit" – to bring and use firearms in the State safely and responsibly, but not to fill out an application for an actual concealed carry license, which requires training and vetting. If the State had shown that non-residents fraudulently obtain concealed carry licenses in their home states for the purpose of committing violence, at home or in Illinois, then that would be a separate discussion, but of course that evidence does not exist. Petitioners' *amici* constitute the governments of eighteen states, none of which have any interest in either granting concealed carry licenses to criminals or deranged individuals, nor in sending such persons into Illinois.

As Judge Manion noted in his lower court dissent (App. 31), there are many things Illinois could do to vet non-resident applicants, even on a continuing basis, that would arguably not offend Second Amendment rights. These steps would help ensure that the State is not issuing "licenses based on incomplete information at the outset and with no ability for ongoing monitoring of eligibility." BIO 20. And yet, the Respondents wash their hands of the idea, claiming it is too hard, or would cost more. These are not valid reasons to infringe constitutional rights. *See Watson v. City of*

Memphis, 373 U.S. 526, 537 (1963); *see also Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

And yet, these are the only reasons that have been offered, as Respondents have still never pointed to even one example where anyone was harmed as a result of someone completing a concealed carry application. The Respondents claim the harm is "obvious" (BIO 25), but that is incorrect. The claimed inability to verify is not the harm; being the victim of a violent attack and not having the means to defend oneself is the harm. Except that harm is to the Petitioners and other law-abiding persons, which does not seem to be the State's concern. After all, none of this is going to stop a criminal who decides he is going to come across state lines with a gun to commit an act of violence. It is not as if the State's non-resident concealed carry prohibitions are going to stop him.

Contrary to the Respondents' arguments, the Seventh Circuit held in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), that the right to the public carry of firearms by law-abiding persons is fundamental, as fundamental as the right to possess firearms inside one's home. Indeed, the *Moore* Court found that the need for self-defense may be even more pressing outside of the home. *Id.* at 937. This tracks with *Heller*'s instruction that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment." *District of Columbia v. Heller*, 554 U.S. 570, 591 (2008).

Earlier in the *Heller* Opinion, the Court explained this meaning in more detail:

> At the time of the founding, as now, to "bear" meant to "carry." . . . When used with "arms," however, the term has a meaning that refers to carrying for a particular purpose – confrontation. In *Muscarello v. United States*, 524 U.S. 125, 118 S. Ct. 1911, 141 L. Ed. 2d 111 (1998), in the course of analyzing the meaning of "carries a firearm" in a federal criminal statute, Justice Ginsburg wrote that "[s]urely a most familiar meaning is, as the Constitution's Second Amendment . . . indicate[s]: 'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.'" *Id.*, at 143, 118 S. Ct. 1911, 141 L. Ed. 2d 111 (dissenting opinion) (quoting Black's Law Dictionary 214 (6th ed. 1990)).

Heller, 554 U.S. at 584 (internal citations omitted).

Respondents argue that Petitioners have misstated the *Heller* disclaimer by failing to acknowledge the felon and mentally-ill prohibitions (BIO 17), but Petitioners clearly address the issue (Pet. 17), as it is a focal point of this analysis. And while Petitioners are not taking issue with *Heller*'s admonition, cited by the lower court, that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill," *Heller*, 554 U.S. at 636, the Petitioners do take issue with the State's assumption that everyone in 43

states is either a felon or mentally ill with no ability to prove otherwise. After all:

> 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 that scope too broad.

Heller, 554 U.S. at 634-35.

Petitioners have never argued for a "broad, unfettered right to carry a gun in public." BIO 21. Petitioners are not even arguing for a concealed carry reciprocity plan. Instead, Petitioners have argued for the right to file an application, prove themselves to the State that they meet the standards and requirements for a safe and responsible exercise of the Second Amendment right, and to be a part of the system.

The "enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Id.* at 636. The Respondents' non-resident concealed carry license application virtual ban should have been one of them.

II. Petitioners Have Met The Criteria For Certiorari

Respondents argue as if a circuit split is the only occurrence meriting this Court's review. But this is not the case, and this case merits certiorari due to its important and ongoing nature as to the deprivation of fundamental constitutional rights. Respondents ignore

Justice Thomas' words in *Jackson v. City & Cnty. of San Francisco*, 135 S. Ct. 2799, 2802 (2015) (Thomas, J., dissenting from denial of certiorari), where he noted the Court's

> repeated willingness to review splitless decisions involving alleged violations of other constitutional rights. *See*, *e.g.*, *Glossip v. Gross*, 574 U.S. ___, 135 S. Ct. 1173, 190 L. Ed. 2d 929 (2015) (cert. granted) (Eighth Amendment); *Ontario v. Quon*, 560 U.S. 746, 130 S. Ct. 2619, 177 L. Ed. 2d 216 (2010) (Fourth Amendment); *Hill v. Colorado*, 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000) (First Amendment). Indeed, the Court has been willing to review splitless decisions involving alleged violations of rights it has never previously enforced. *See*, *e.g.*, *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) (right to limit on punitive damages awards). And it has even gone so far as to review splitless decisions involving alleged violations of rights expressly foreclosed by precedent. *See*, *e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008) (right of aliens held outside U.S. territory to the privilege of habeas corpus); *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (right to engage in adult, consensual same-sex intimate behavior). I see no reason that challenges based on Second Amendment rights should be treated differently.

Therefore, Petitioners are not merely seeking an "error correction," as Respondents claim. BIO 15. This case is an egregious example of how the lower courts, in the absence of guidance and direction from this Court, feel free to disregard the Second Amendment right whenever the government finds it inconvenient or undesirable. Petitioners' *amici* identified two others – namely, the ability to overcome inclusion in a categorical ban eliminating one's Second Amendment rights (States' *amicus* Brief at 14), and "the proper historic scope of traditional exclusions" in the first place. *Id.* at 8. Multiple cases are cited as to these jurisprudential differences. *See Binderup v. Attorney General*, 836 F.3d 336 (3d Cir. 2016); *Medina v. Whitaker*, 913 F.3d 152 (D.C. Cir. 2019); *United States v. Rene E.*, 583 F.3d 8 (1st Cir. 2009). Respondents argue this discussion is irrelevant, but it underscores how the lower courts have only a minimal consensus when it comes to the Second Amendment, and why a person can be trustworthy enough to carry a firearm in multiple states, yet presumed "unvirtuous" in Illinois. Another example is the Respondents' citation to *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018), which held that "the core right protected by the Second Amendment is – as *Heller* described it – 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.' 554 U.S. at 635. Public carriage of firearms for self-defense falls outside the perimeter of this core right." *Gould*, 907 F.3d at 672. But the Seventh Circuit held the opposite, and should have analyzed this case on that basis. *See Moore*, 702 F.3d at 942 ("The Supreme Court has decided that the amendment confers

a right to bear arms for self-defense, which is as important outside the home as inside.").

Here, such leeway leads to the faulty reasoning that since felons and mentally-ill persons do not enjoy Second Amendment rights under *Heller*, it is perfectly logical to set up a system whereby everyone is presumed to be a felon or mentally ill, with no opportunity to counter that presumption. Such circular reasoning serves only to deny everyone's rights with no recourse. Defendants may have a "weighty interest" in preventing prohibited persons from obtaining firearms (App. 17), but the interest is not the issue. The issue is whether the chosen severe means implemented bear the required relationship to that interest. And given that the Respondents have never offered anything proving such a relationship, the answer is no.

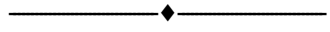
There is a large difference with taking measures to restrict access to felons and mentally ill, and banning everyone – even if they meet all the Illinois requirements, and have been vetted and licensed in their home states – because someone may someday fall into a prohibited category. The Respondents' system is simply avoidance of the responsibility of protecting constitutional rights. It is, as Judge Manion noted, "grossly overinclusive." App. 29. Coupled with the fact that the prohibitions are also "grossly underinclusive," *id.*, they completely fail to meet constitutional scrutiny.

While there are steps the State can take to protect both public safety and Second Amendment rights in this situation, its chosen method – avoidance – does

neither. Even two of the states that Illinois has approved – Arkansas and Virginia – rely on self-reporting of voluntary mental health disclosures, which is satisfactory to the Respondents, and apparently Texas and Nevada have similar situations (*see* https://www.ispfsb.com/Public/SubstantiallySimilarSurvey.pdf (last viewed January 23, 2020)). There is no reason why this could not work on an individual applicant basis, except that the Respondents do not want to do it that way. That is unacceptable under any level of heightened scrutiny.

The issue of transporting firearms outside of the home is raised in the pending *New York State Rifle & Pistol Ass'n v. City of New York*, No. 18-280 (Jan. 22, 2019) ("*NYSRPA*"). And while that case will not "clarify the entire field" any more than *Heller* did, 554 U.S. at 635, it is quite possible that *NYSRPA* will provide a further measure of clarity to the Second Amendment landscape, which currently allows the lower courts to narrow or disregard *Heller* as they see fit.

Here, the Seventh Circuit acknowledged the fundamental nature of the Second Amendment right in *Moore*, acknowledged that potentially millions of law-abiding persons were deprived of that right due to the State's concealed carry application ban, and still held that nonetheless complied with *Heller*. This Court should grant certiorari to reaffirm the fundamental nature of the Second Amendment right, that it applies to all law-abiding persons, and that arbitrarily denying the ability to exercise the right in the name of expediency and bureaucracy violates the Constitution.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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