

No. 20-843

IN THE
Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL
ASSOCIATION, INC., *et al.*,

Petitioners,

v.

KEVIN P. BRUEN, IN HIS OFFICIAL
CAPACITY AS SUPERINTENDENT OF
NEW YORK STATE POLICE, *et al.*,

Respondents.

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

**BRIEF OF *AMICI CURIAE* LAMBERT
HENRY, RUSSELL DAVENPORT, AND PETER
FUSCO IN SUPPORT OF PETITIONERS**

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INTEREST OF THE *AMICI CURIAE*¹

Lambert Henry, Russell Davenport, and Peter Fusco are three plaintiffs in federal civil rights lawsuits related to their Second Amendment rights.² Henry, Davenport and Fusco are each retired law enforcement officers who are citizens of the State of New York and reside in Nassau County, New York. The facts in each of their cases demonstrate clear examples of unconstitutional deprivations of New York citizens' Second Amendment Rights under the New York Penal Law §400.00(2)(f) “proper cause” statutory regime.

Henry, Davenport and Fusco each had a Nassau County issued N.Y. Penal Law § 400.00(2)(f) “proper cause” carry license issued by the Nassau County Police Department pistol license section. Henry, Davenport and Fusco had their pistol licenses revoked and, as a result of New York’s Secure Ammunition and Firearms Enforcement (SAFE) Act, have lost all of their constitutional rights to own or possess any rifle or shotgun in the County of Nassau.

Henry, Davenport, and Fusco support the arguments made by Petitioners in their brief that the Second

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

2. *Davenport v. County of Nassau, et al.*, 2:19-cv-05097 (FB) (SMG) (U.S. Dis. Ct., E.D.N.Y.), *Henry v. County of Nassau, et al.*, 2:17-cv-6545 (LDW) (AKT) (U.S. Dist. Ct., E.D.N.Y.), and *Fusco v. County of Nassau, et al.*, 2: 19-cv-04771 (DRH) (AKT) (U.S. Dist. Ct., E.D.N.Y.).

Amendment will only be meaningful if a “shall issue” rule is applied, as it is in many rural upstate New York State counties. The unbridled discretion given to non-elected police officials in Nassau County, New York has led to an increasing deprivation of Second Amendment rights. This brief exposes the consequences of this unfettered discretionary authority under the “proper cause” standard, particularly in Nassau County and New York City. Moreover, despite nearly a decade of court orders for reform by New York family court, state and federal courts, the Nassau County Police Department has been unwilling and unable to reform itself so that it complies with minimum constitutional requirements in the issuance of pistol licenses.³

SUMMARY OF THE ARGUMENT

The practical effect of New York’s “proper cause” standard for issuance of pistol licenses is that the ability of citizens to exercise their Second Amendment rights are subject to whims and prejudices of local licensing officials. New York’s “proper cause” statutory standard has resulted in increasing restrictions on New York citizens’ exercise of their Second Amendment rights, with no connection whatsoever to public safety. The experience

3. “As far as I’m concerned, there is... no court order directing or permitting anybody to take any weapons... As my personal opinion, somebody should bring a class action suit for failing to return property. I’ve said that for years and I think some attorneys should take it up.”

(Transcript dated September 28, 2007 from proceedings before Hon. John G. Marks in the matter of *Noreen Lomonaco v. Salvatore Lomonaco*, Docket No. O-08871-07 (Nassau County Family Court) p. 5, l. 18-p.6, l.6)

of Nassau County and New York City residents who have asserted their Second Amendment rights may be helpful to this Court in evaluating the constitutionality of the “proper cause” standard for licensing in New York. The *amici* who are currently arguing for a similar review in their lawsuits have retained this law firm.

ARGUMENT

I. The “Proper Cause” Standard and its Exposition in *Klenosky* and *Kachalsky*

N.Y. Penal Law § 400.00 differentiates handgun⁴ licenses into one of two major categories: home premise licenses and concealed carry licenses. N.Y. Penal Law § 400.00 also provides two standards for the issuance of these licenses. The home premise license is subject to the more navigable “shall issue” standard, which places the burden on the licensing official to show good cause before denying the application. The standard for the concealed carry license is subjective. It requires the applicant to show “proper cause” as to why a license should be issued.⁵ Purchase or possession of a handgun requires a citizen to possess any type of license.

4. N.Y. Penal Law § 265.00 reserves the term “firearm” only for what is known colloquially as a handgun, pistol, or revolver, excluding rifles and shotguns from the term.

5. N.Y. Penal Law § 400.00(2)(a) provides: “A license for a pistol or revolver ... shall be issued to (a) have and possess in his dwelling by a householder...” N .Y. Penal Law § 400.00(2) (f) states: “A license for a pistol or revolver ... shall be issued to (f) have and carry concealed, without regard to employment or place of possession, by any person when proper cause exists for the issuance thereof....”

The “proper cause” standard in New York is defined as “a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.” *Klenosky v. N.Y.C. Police Dep’t*, 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980).

Decades after *Klenosky*, the United States Court of Appeals for the Second Circuit addressed New York’s “proper cause” standard. The Second Circuit held that licensing officials are not limited to any particular set of factors when determining whether proper cause exists: “[l]icensing officers... are vested with considerable discretion in deciding whether to grant a license application, particularly in determining whether proper cause exists for the issuance of a carry license.” *Kachalsky v. County of Westchester*, 701 F.3d 81, 87 (2nd Cir. 2012); see also *Libertarian Party of Erie County v. Cuomo*, 300 F.Supp.3d 424 (W.D.N.Y. 2018). As a result, oversight of licensing officials is nearly impossible.

Licensing officials in the City of New York and Nassau and Suffolk Counties are unelected police commissioners under N.Y. Penal Law 265.00(10), whereas in most of the rest of the state the licensing official is a judge or justice of the court or record.

The vast “discretion” of licensing officers has not been limited to the issuance of concealed carry licenses. This vast discretion has been applied to nearly all Second Amendment rights, including the possession of unlicensed firearms, like rifles and shotguns, and the issuance of home premise licenses, as discussed below.

II. “Proper Cause” and Broad Discretion Manifests Differently in Practice than as Defined in Law

A. State and Federal courts in New York have ignored *Heller*, expanded the discretionary authority of licensing officials, which has eroded the Second Amendment rights of New York citizens.

Heller at the very least has protected the core right to use a firearm in the home for purposes of self-defense, as well as the “individual right to possess and carry weapons in case of confrontation,” (*District of Columbia v. Heller*, 554, 592 U.S. 570, 128 S.Ct. 2783 (2008)) New York courts have been hesitant to adopt the holding of *Heller*, a fact which this Court is aware of. See *NYSRP v. City of New York*, 140 S. Ct. 1525 (2020), (L. KAVANAUGH, concurring) (“And I share Justice Alito’s concern that some federal and state courts may not be properly applying *Heller* and *McDonald*. The Court should address that issue soon, perhaps in one of the several Second Amendment cases with petitions for certiorari now pending before the Court.”).

In New York the possession of a handgun is still relegated to a privilege: “Under New York Law, it is well settled that the possession of a handgun license is a privilege, not a right, which is subject to the broad discretion of the New York City Police Commissioner.” *Boss v. Kelly*, 306 Fed.Appx. 649, 650 (2nd Cir. 2009).

State courts have since expanded the discretionary authority of licensing officials. State courts have granted them broad discretion in cases of revocation of already-

issued licenses as well. This position that has been eventually adopted by the district courts. *See Weinstein v. Krumpster* 386 F.Supp.3d 220 (E.D.N.Y. 2019), *citing In the Matter of George Nash v. Nassau County*, 52 N.Y.S.3d (2d Dep’t 2017) (“The Acting Commissioner, as the licensing officer is vested with broad discretion in determining whether to issue or revoke a license to possess firearms.”); *see also Juzumas v. Nassau County*, 417 F.Supp.3d 178, 181 (E.D.N.Y. 2019).

B. The Expansion of Discretionary Authority by Local Licensing Officials Results in the Total Erosion of All Second Amendment Rights

Amicus Lambert Henry is a retired New York City Corrections Officer of African American descent. After a verbal argument with his daughter regarding her school grades, an *ex parte* temporary order of protection was issued by the Nassau County Family Court in favor of Henry’s daughter. The temporary order of protection did not permit the serving officers to seize Henry’s firearms, rifles, and shotguns. However, upon serving Henry with the temporary order of protection, the Nassau County deputy sheriffs seized all of Henry’s firearms. Additionally, Henry’s unrestricted carry license was suspended. After the temporary order of protection expired, Nassau County did not return Henry’s property or concealed carry license. Nassau County informed Henry by letter that he was barred from purchasing new firearms or possessing any rifles or shotguns (also referred to as “long-arms”) under N.Y. Penal Law 400.00.⁶

6. Nassau County issued a letter to Henry stating: “As directed by New York State Penal law § 400, and the New York State Secure Ammunitions and Firearms Enforcement Act, you are prohibited

After the temporary order of protection expired, Nassau County revoked Henry's pistol license. As a matter of Federal law the prohibition no longer applies. 18 U.S. Code sec. 922(d)(8) and sec. 922 (g)(8). Henry appealed administratively. Henry submitted affidavits from his wife and daughter (the original complainant in the proceeding that resulted in the temporary order of protection) in support of reinstatement of his pistol license. The appeal was denied by the NCPD on the ground that Nassau County "may revoke a pistol license for any good cause, including a finding that a licensee lacks the essential character or temperament, or that he or she does not possess the maturity, prudence, carefulness, good character, demeanor or judgment necessary to retain a pistol license." *Lambert Henry v. County of Nassau* 2:17-cv-6545 (LDW) (AKT) (U.S. Dist. Ct. E.D.N.Y.)

The federal civil rights complaint in *Henry* alleges (1) a violation of Henry's Second Amendment rights, and (2) a *Monell* claim, alleging Nassau County has a policy to deter the exercise of Second Amendment rights and reduce the overall number of pistol licenses in the county by, among other things, failing to issue home premises licenses to any county resident.

Henry's federal civil rights complaint was dismissed under Fed. Civ. Proc. R. 12(b)(6). Henry appealed. Oral argument was held and the parties are awaiting a decision. See *Lambert Henry v. County of Nassau* 20-1027-cv (2nd Cir. *pending*).

from possessing firearms, rifles, shotguns." Nassau County has offered on the record to restore Henry's constitutional right to own or possess a rifle or shotgun in Nassau County on the condition he agrees to withdraw his federal civil rights lawsuit.

Amicus Russell Davenport is former law enforcement officer, retired FBI-certified firearms instructor and currently serves as a Bishop in his church. Davenport is also an African American who formerly held an unrestricted carry license. At around 4:00 A.M. one morning, he discovered an individual peering into his daughter's bedroom window at his home. After confronting the "peeping Tom" and trespasser, a struggle ensued in which Davenport's handgun was discharged into the ground. It was later discovered that the trespasser, who was white, was an exterminator who had a contract dispute with Mr. Davenport and was taking photos of the Davenport residence. When the police arrived, they arrested Davenport and let the trespasser go. Davenport was charged with reckless endangerment in the first and second degrees. All charges against Davenport were dismissed. Less than a month after the charges were dismissed, Nassau County revoked Davenport's concealed carry license. Like Henry, Davenport was instructed that he was barred from all firearm possession and ownership under the SAFE Act. In a prior lawsuit, both New York State and Nassau County stated in Court that the Safe Act would never be used as a trigger the cause the loss of all long-arms rights by virtue of a loss of a locally issued pistol license.⁷

7. The Nassau County's policy of barring the ownership of rifles and shotguns upon the revocation of a concealed carry license directly contradicts the position the County of Nassau took previously in *Razzano v. County of Nassau*, where Susan Connolly, Assistant NYS AG stated;

"Revocation doesn't equal ineligible."

Razzano v. State of New York, et al. Case No. 2:14-cv-1864 (LDW) (AKT) (U.S. Dist. Ct., E.D.N.Y.) (as cited in *Henry v. County of Nassau*, Case No. 2:17-cv-06545 (DRH)(AKT), Dkt. 45-4, Ex. 4,

The class action complaint in *Davenport* alleges (1) a violation against the class' Second Amendment, Fourth Amendment, and Fourteenth Amendment rights, and (2) a *Monell* claim, alleging that Nassau County has a policy to deter the exercise of Second Amendment rights and reduce the overall number of pistol licenses in the county, including failing to issue home premises licenses to any county resident. *See Russell Davenport v. Nassau County* 2:19-cv-05097-FB-SMG (U.S. Dist. Ct. E.D.N.Y.).

The action is currently pending. Nassau County's moved to dismiss, but the motion was stayed pending the decision on the appeal of *Henry v. County of Nassau* to the U.S. Court of Appeals, Second Circuit.

Amicus Peter Fusco is a retired Nassau County police officer. Upon retirement, Fusco was issued a retired officer, unrestricted, concealed carry license under the "proper cause" standard. Years earlier during his

Transcript of *Razzano v. State of New York* April 14, 2014, p. 6, line 19-20).

In *Razzano*, Nassau County also had agreed N.Y. Penal Law § 400.00(11) did not give rise to a separate, independent grounds for revocation. David A. Tauster, Esq. of the Nassau County Attorney's office stated:

"I misspoke in the County papers.... [it] is not so much that Nassau County can revoke somebody's pistol license and forever prohibit [that individual] from possessing longarms."

Razzano v. State of New York, et al. Case No. 2:14-cv-1864 (LDW) (AKT) (U.S. Dist. Ct., E.D.N.Y.) (as cited in *Henry v. County of Nassau*, Case No. 2:17-cv-06545 (DRH)(AKT), Dkt. 45-4, Ex. 4, Transcript of *Razzano v. State of New York* April 14, 2014, p. 3, line 20- p. 4, line 4).

matrimonial proceeding, Fusco reported several domestic incidents for documentation purposes only for his civil divorce action. During the divorce process, Fusco's pistol license was suspended. Fusco requested his suspension be lifted so that he could seek a promotion. No response was ever received. Three years later, the Fusco divorce was finalized, and Peter Fusco received sole custody his son. Following this, Fusco again requested the return of his handguns the reinstatement of his pistol license. Nassau County interviewed his ex-wife. Fusco's ex-wife refused to consent to the return of Peter Fusco's pistol license. Thereafter, Peter Fusco's pistol license was fully revoked. Fusco administratively appealed the decision, and his appeal was denied.

The pending federal civil rights complaint in P.O. Fusco's case alleges (1) a violation against Fusco's Second Amendment and Fourteenth Amendment rights, and (2) a *Monell* claim, alleging Nassau County has a policy to deter the exercise of Second Amendment rights and reduce the overall number of pistol licenses in the county, including failing to issue home premises licenses to any county resident under the shall-issue standard. *See Peter Fusco v. County of Nassau* 2:19-cv-04771(DRH) (AKT) (U.S. Dist. Ct. E.D.N.Y.). The action is currently pending. Nassau County's motion to dismiss was stayed due to the appeal of *Henry v. County of Nassau* to the U.S. Court of Appeals, Second Circuit. *See Peter Fusco v. County of Nassau* 19-cv-04771 (DRH) (AKT) (U.S. Dist. Ct. E.D.N.Y.)

The *amici* each share a common problem: New York's "proper cause" standard and the broad discretionary authority of the local licensing officials. Under that standard, they are prevented from obtaining an

unrestricted concealed carry license. Furthermore, Nassau County has taken it upon itself to entirely prohibit a citizen's exercise of all Second Amendment rights, including restricting the possession or ownership of rifles and shotguns.⁸ This policy exists in spite of New York State and the N.Y. Penal Law lack of licensing authority over long arms and the *amici's* eligibility under federal law to purchase and possess rifles and shotguns. The Nassau County Police Pistol License Section takes its authority even further. Nassau County does not issue any "shall issue" home premises license whatsoever. It accomplishes this by eliminating the home premise "box" to check on the pistol license application. This forces all applicants to apply for a concealed carry license under N.Y. Penal Law § 400.00(2)(f), almost always with a restriction that only allows the licensee to travel with a concealed handgun to and from a shooting range or from hunting grounds. The "target/hunting" restriction elevates the standard from "shall issue" to "proper cause," while still effectively limiting the firearms' use to the home.

8. This is a long standing policy of Nassau County, despite successful federal civil rights actions against this policy in *Razzano v. County of Nassau et al.* 599 F.Supp.2d 345 (E.D.N.Y. 2009) and *Panzella v. County of Nassau*, 2015 WL 224967 (E.D.N.Y. Jan. 15, 2015). See also *Stanislaw Dudek v. County of Nassau, et al.*, Case No. 2:12-cv-01193(PKC/ARL) (U.S. Dist. Ct., E.D.N.Y.), *Dudek v. Nassau Cty. Sheriff's Dept*, 991 F. Supp. 2d 402 (E.D.N.Y. 2013), *Peter Schojan v. County of Nassau, et al.*, Case No. 2:16-cv-04790(SJF/AYS) (U.S. Dist. Ct., E.D.N.Y.), *Heriberto Heredia v. County of Nassau, et al.*, Case No. 2:16-cv-04792(ADS/ARL) (U.S. Dist. Ct., E.D.N.Y.), *David Hartenstein v. County of Nassau, et al.*, Case No. 2:16-cv-06139(SJF/AYS) (U.S. Dist. Ct., E.D.N.Y.), *George Stahura v. County of Nassau, et al.* Case No. 2:17-cv-04677(JMA/ARL) (U.S. Dist. Ct., E.D.N.Y.). The policy will not change without this Court's intervention.

Even more absurd is that a N.Y. Penal Law §400.00(2) (f) “proper cause” pistol license issued in an upstate county in New York without a “target/hunting” limitation is valid in Nassau County. For decades, those New York citizens wealthy enough to have a vacation home have applied for “proper cause” pistol licenses in that county. Such a license is valid in Nassau County. Therefore, if a Nassau County resident is financially capable of owning land upstate and applies for a “proper cause” license in certain upstate counties, he or she may carry a concealed weapon legally in Nassau County. The target/hunting local restrictions effectively ignore the main purpose of the Second Amendment, self-defense.

C. Broad Discretion, Coupled with the Unattainable Proper Cause Standard, Has Created a Spoils System in the City of New York

Because an unrestricted carry license is nearly unattainable in New York City, it has become a source of income for retired law enforcement officers and a trophy for the wealthy elite or politically connected. Licensing officials, (particularly in the counties of Westchester, Nassau, and Suffolk, and the City of New York, where the licensing official are unelected police officers, rather than elected judges and justices of a court of records) are enticed to issue licenses to the wealthy elite in exchange for favors, gifts, or cash, and at the same time deny licenses to their former colleagues who have fallen out of favor.

On January 31, 2019, former New York City Police Department lieutenant and licensing officer, Paul Dean, was sentenced by U.S. District Judge Edgardo Ramos

to eighteen months in prison for Dean's connection with bribery scheme, in which "expeditors" would provide lavish gifts, such as expensive watches, Broadway tickets, prostitutes, and private jet flights to Las Vegas, Nevada, in exchange for granting license applications. Some the applicants were felons and federally barred from possessing a firearm. Judge Edgardo Ramos said that the NYPD License Division had become "infested throughout with corruption." *United States v. Dean, et, al.*, 1:17-cr-00398-ER (S.D.N.Y.) and *United States v. Reichberg, et al.* ("Grant exerted his influence to secure the processing and approval of gun licenses, even when those applications were deficient or the applicants unqualified for the type of license sought" 19-1645 (2nd Cir. 2021)

A short list of individuals who received unrestricted carry licenses in the City of New York include celebrities such as Howard Stern and John Catsimatidis, former Sony CEO Thomas Mottola, former Morgan Stanley CEO John Mack, Ronald Lauder (of Estee Lauder), former Fox News CEO Roger Ailes, Sean Hannity, and comedian Tracy Morgan. The list of those who need self-protection but lack celebrity are innumerable.

At the same time the NYPD License Division used their "broad discretion" in denying license applications, to punish its former police officers that had "stepped out of line." Detective Joseph Oquendo made over 1,700 arrests during his 27-year long career, the majority of which he was assigned to the NYPD Narcotics Division. Detective Oquendo served nearly half of that time undercover, infiltrating the Jheri Curls, MS-13, Jamaican Posse gangs, and the Chinese-American "Ghost Shadows" street gang. After being falsely accused of driving while intoxicated by another officer and ultimately acquitted after surveillance

footage contradicted the accusing officer's testimony, the NYPD transferred Detective Joseph Oquendo from the Narcotics Division and filed administrative charges against him.

In New York State, law enforcement officers are exempt from the requirement to apply for a pistol license under N.Y. Penal law § 265.20(a)(1)(b). Instead, they carry "on the badge," while employed. New York law enforcement officers may legally carry and possess both their business and personal handguns. A letter from a supervisor is required to purchase a handgun. When an active police officer is involved in a situation which requires temporary or permanent suspension of their duty firearm, the personally owned firearms of the law enforcement officer are in limbo and must be surrendered, sold, or given to a family member with a pistol license.

In preparation for retirement from law enforcement, retirees such as the *amici* and Det. Oquendo, would obtain a "good guy letter" before being issued a "proper cause" license. The letter indicates that the officer retired in good standing with the department and that there was no outstanding disciplinary actions or investigations.

Oquendo initially brought suit to compel the issuance of a "good guy letter" in state court. On December 12, 2016, the court issued an order, which in part ordered the NYPD Pistol License Division to ignore the requirement of a "good guy letter" and consider Oquendo for a carry license under Penal Law § 400.00 without the letter. The court held:

While the Police License Inquiry Response Form might ease the [pistol license] application process, neither he [Oquendo] nor respondents have pointed to any bar, the unresolved disciplinary charges or otherwise, to a successful application. They [the “good-guy” letters] are not embodied in any regulation or statute and do not supersede the application process available to petitioner pursuant to Penal Law § 400.00. Moreover, respondents emphatically agree with petitioner that he is not ineligible to obtain a license due to his lack of a Pistol License Inquiry Response Form or due to the stamp on his retiree identification card, a position to which he may hold respondents if and when he applies.

Oquendo v. City of New York, Index No. 100529/2015 (Sup. Ct., N.Y. County 2016).

Oquendo then filed for an unrestricted concealed carry pistol license as a police retiree without the “good guy” letter. The licensing official denied Oquendo a “proper cause” license on the basis that he “failed to submit this required document [good guy letter] therefore your application to be granted an “Unrestricted Carry License has been disapproved.” *Oquendo* then sued the City of New York for violation of his rights. (*Oquendo v. City of New York*, 492 F.Supp.2d 345 (E.D.N.Y. 2020) (Complaint, ¶ 45). The NYCPD denial letter completely ignored the State court decision to abandon the “good guy” letter as a precondition of a proper cause license.

Ultimately, Det. Oquendo settled for a “special carry” license, a type of license issued to a business name, or

“issued for safety reasons unrelated to business” instead of a Law Enforcement Retiree License. (See NYCPD website <https://licensing.nypdonline.org/new-app-instruction/>).

CONCLUSION

The “proper cause” standard, as delineated in *Klenosky*, has left licensing officials with unreviewable discretion. Bail reform was unthinkable in New York until recently. Reform in the area of gun laws is equally overdue. For the foregoing reasons, this Court should reverse.

Respectfully submitted,

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