Written by **Bob Adelmann** on July 21, 2021

Gun-rights Groups Weigh in on Supreme Court Case on New York's Concealed-carry Restrictions

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Two gun-rights groups — the National Foundation for Gun Rights and the National Association for Gun Rights — have entered the fray over the Second Amendment. On Tuesday they filed an *amici curiae* (friends of the court) brief on the complaint filed by two gun owners against the State of New York.

When New York citizens Robert Nash and Brandon Koch each applied for permission to carry a firearm outside the home, permission was denied. The official used his discretion, claiming that neither Nash nor Koch had provided "proper cause" sufficient to justify his granting them such permission.

It didn't matter that both of them cited their needs for self-protection, nor that each had completed extensive firearms training. It didn't matter that they were upstanding law-abiding citizens concerned for their personal safety. New York has structured the law in such a way that almost no one can obtain such permission.

Each joined with the New York State Rifle & Pistol Association (NYSRPA) in filing suit in federal court in February 2018, claiming that the official violated their Second Amendment-protected rights. In December, a district court dismissed their complaint. They appealed. The Second Circuit Court of Appeals upheld the dismissal in August 2020.

They appealed to the Supreme Court, and on April 26, 2021, the high court agreed to hear the appeal, but with a catch: The NYSRPA wanted the high court to rule on "whether the Second Amendment allows the government to prohibit ordinary law-abiding citizens from carrying handguns outside the home for self-defense." This would cure and close the loophole left behind in the *Heller* decision.

The high court instead limited the question to: "Whether [New York's] denial of petitioners' application for concealed-carry licenses for self-defense violated the Second Amendment."

In other words, by limiting the question just to the application required to obtain a permit to carry concealed in New York, the high court is already, by inference, allowing other infringements to remain in place. The core right guaranteed by the Second Amendment will remain open to question even if the high court finds New York's restrictions on its application unconstitutional.

Nevertheless, the *amici curiae* makes the case for the fullest and broadest understanding of the Second Amendment even if the high court refuses to consider it in the present case.

The brief notes that "New York officials only grant a permit if an applicant can show 'proper cause' … [but] the term 'proper cause' is not defined within the statute." This then "makes it impossible for the typical law-abiding New Yorker to obtain such a permit."

Just the requiring of a permit to exercise a right is, in and of itself, an infringement:

> Requiring law-abiding citizens to obtain a special permit to keep and bear arms, whether for concealed or open carry, violates the Second Amendment.…
>
> This is clear from the text of the Second Amendment itself, which enumerated the right and declared that it "shall not be infringed."

The brief expands the argument that the Second Amendment doesn't stand alone but is part of the remarkable "experiment in liberty" represented by the Constitution of the United States and its Bill of Rights:

> The right to keep and bear arms is a fundamental right necessary to our system of ordered liberty.… It is an individual right that existed prior to the Founding.…

It is unique:

> The right to keep and bear arms is an advantage to that system of ordered liberty "which [quoting Federalist No. 46] the Americans posses over the people of almost every other nation."

The brief extended its quote from *Federalist*, No. 46:

> Besides the advantage of being armed, which the Americans possess over the people of almost every other nation … it forms a barrier against the enterprises of ambition.

New York's restrictions contradict the intention of the Founders:

> That original understanding binds government from creating policy and regulations which encroach on the original understanding of the pre-existing right that the Second Amendment protects.

The brief also dispatches any notion that somehow only "a well-regulated militia" may carry firearms, by quoting from the high court's ruling in *Heller*:

> At the time of the founding, as now, to "bear" meant to "carry".… The phrase implies that the carrying of the weapon is for the purpose of "offensive or defensive action," [and] it in no way connotes participation in a structured military organization.

The brief makes the case that the Second Amendment's position as an enumerated right removes it from discretionary restrictions by governments. It quoted Justice Clarence Thomas:

> The very enumeration of the right takes out of the hands of government — even the Third Branch of Government [the Judicial] — the power to decide on a case-by-case basis whether the right is really worth insisting upon.
>
> A constitutional guarantee subject to future judges' assessments of its usefulness is no

> constitutional guarantee at all.

The brief invites the high court to broaden its consideration of the matter:

> This Court should focus on the fact that the exercise of the right to keep and bear arms, concealed or not, was never understood, in the history and traditions of that right, at the Founding, to be limited to the home … a right so limited to one's home would be no "right" at all.

The brief reminds the high court of the sovereignty of the individual citizen:

> [In] our particular form of government … it is the individual citizen who stands as the ultimate source of governmental power and authority.
>
> It is the individual citizen who ultimately possesses inalienable and pre-existing rights such as the right to keep and bear arms for self-defense against tyranny and violence.

The brief decries attempts by the courts to keep the Second Amendment as a "second-class" right:

> Consider the value of the rights to speech, assembly, and religion [in the First Amendment] were they to be relegated only to being exercised within the home. Such limitation would neuter the right to the point of it being meaningless.

The brief concludes that "there is no historical or legal basis for the lower courts restricting the right to keep and bear arms, concealed or not, to being exercised solely within the home." Consequently,

> Governments and courts that fear or dislike arms should not be able to cavalierly treat the right of citizens to keep and bear arms, concealed or not, as a lesser right than the right to speech, assemble, or practice one's religion.

Whether the high court listens and agrees to expand its consideration of the complaint to encompass the full and robust guarantee of the Second Amendment remains to be seen. There are six so-called originalists now on the high court, but recent rulings have brought into question just how "originalist" they really are.

The high court will hear arguments in the fall and make its ruling next spring. In the meantime, the war against private ownership of firearms continues.

Related article:

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