NO. 20-843

In the

Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ROBERT NASH, BRANDON KOCH,

Petitioners,

v.

KEVIN P. BRUEN, in His Official Capacity as Superintendent of the New York State Police, RICHARD J. MCNALLY, JR., in His Official Capacity as Justice of the New York Supreme Court, Third Judicial District, and Licensing Officer for Rensselaer County,

Respondents.

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

BRIEF FOR PETITIONERS

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July 13, 2021

QUESTION PRESENTED

Whether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment.

PARTIES TO THE PROCEEDING

Petitioners are Robert Nash, Brandon Koch, and the New York State Rifle and Pistol Association, Inc. Petitioners were plaintiffs in the district court and plaintiffs-appellants in the court of appeals.

Respondents are Kevin P. Bruen, sued in his official capacity as Superintendent of the New York State Police, and Richard J. McNally, Jr., sued in his official capacity as Justice of the New York Supreme Court, Third Judicial District, and Licensing Officer for Rensselaer County. Respondents were defendants in the district court and defendants-appellees in the court of appeals.*

* Respondent Bruen became Superintendent of the New York State Police on June 7, 2021. His predecessors, George P. Beach II and Keith M. Corlett, were named in their official capacity in the district court and in earlier proceedings in this Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners state as follows:

Petitioner New York State Rifle and Pistol Association, Inc. has no parent corporation and no publicly held company owns 10 percent or more of its stock.

Petitioners Nash and Koch are individuals.

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INTRODUCTION

The Second Amendment guarantees to "the people" the rights "to keep and bear arms." While the right to "keep arms" may have its greatest application in the home, the right to carry arms obviously extends outside the home. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court not only definitively held that the Second Amendment secures individual rights, but recognized that those rights are intimately connected to the right to self-defense. Specifically, *Heller* held that "all Americans," not just "an unspecified subset," have the rights "to possess and carry weapons in case of confrontation." *Id.* at 580-81, 592. Two years later, the Court reaffirmed that "individual self-defense is 'the *central component*' of the Second Amendment right," that "citizens must be permitted 'to use handguns for the core lawful purpose of self-defense,'" and that this right "is fully applicable to the States." *McDonald v. City of Chicago*, 561 U.S. 742, 750, 767-68 (2010) (plurality op.) (quoting *Heller*, 554 U.S. at 599, 630) (brackets omitted).

In reaffirming the promise of the Second Amendment, *Heller* surveyed a wealth of historical materials that made clear beyond cavil that the vast majority of jurisdictions have honored the right to carry arms for self-defense. That remains true today in most of the Nation—but not in New York. New York continues to make it all but impossible for typical, law-abiding citizens to exercise their right to bear arms where the right matters most and confrontations are most likely to occur: outside the home. The only people who may carry a handgun beyond the curtilage are those who can show, to the

satisfaction of a local official vested with broad discretion, that they have a special need for a handgun that distinguishes them from the vast bulk of "the people" protected by the Second Amendment. As to everyone outside that small subset, there is no outlet to carry handguns for self-defense at all. That restrictive and discretionary regime is upside down. The Second Amendment makes the right to carry arms for self-defense the rule, not the exception, and fundamental rights cannot be left to the whim of local government officials.

New York's regime is irreconcilable with the text, history, and tradition of the Second Amendment. The textual inquiry is not a close question, as the text guarantees a right to "bear" arms as well as "keep" them, and a right to bear arms only within the confines of a home offends both common sense and original public meaning. The historical inquiry is no closer, and has already been answered in *Heller*. Founding-era cases, commentaries, and laws on both sides of the Atlantic, most of which were surveyed in *Heller*, confirm that the founding generation understood the Second Amendment and its English predecessor to guarantee a right to carry common arms for self-defense. The American tradition of protecting that right remained virtually unbroken in the century and a half following ratification; severe restrictions on the right to carry arms typically arose only in the context of efforts to disarm disfavored groups, like blacks in the South and immigrants in the Northeast. Those outlying and discriminatory efforts only underscore the framers' wisdom in enshrining the right of *all* "the people" to keep and bear arms in our founding document.

Because text, history, and tradition confirm that the Second Amendment protects the right to carry common arms like handguns for self-defense, the state cannot flatly prohibit law-abiding citizens like petitioners from exercising that right. That was the lesson of *Heller*. Indeed, *Heller* likened the District of Columbia's unconstitutional ban on possessing handguns inside the home to "severe restrictions" on carrying common arms outside the home. Like the District's regime in *Heller*, New York's regime effectively criminalizes the exercise of a fundamental constitutional right. Just as the District's extreme regime could not survive any meaningful form of scrutiny, neither can New York's effort to let only the few exercise a right that the Constitution secures to all.

OPINIONS BELOW

The Second Circuit's order affirming the district court's dismissal of this case is unpublished but is available at 818 F.App'x 99 and reproduced at Pet.App.1-2. The district court's opinion is reported at 354 F.Supp.3d 143 and reproduced at Pet.App.3-13.

JURISDICTION

The Second Circuit issued its judgment on August 26, 2020. The petition for certiorari was timely filed on December 17, 2020. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second and Fourteenth Amendments to the U.S. Constitution and relevant portions of the New York Penal Law are reproduced at Pet.App.14-15.

STATEMENT OF THE CASE

A. Legal and Historical Background

1. The Second Amendment declares: "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." U.S. Const. amend. II. As this Court emphasized in *Heller*, the Second Amendment did not create a new right but enshrined a pre-existing right. That pre-existing right had roots in the 1689 English Bill of Rights, the "predecessor to our Second Amendment," which declared "'[t]hat the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law.'" *Heller*, 554 U.S. at 593 (quoting 1 W. & M., ch. 2, §7, in 3 Eng. Stat. at Large 441). That pre-existing "birthright" was directly tethered to "the natural right of resistance and self-preservation," *i.e.*, "the right of having and using arms for self-preservation and defence." 1 William Blackstone, *Commentaries on the Laws of England* 139-40 (1765).

Given that self-defense purpose, the pre-existing right was not limited to keeping arms in the home; it encompassed the carrying of arms for self-defense outside the home. English law provided, for instance, that "the killing of a Wrong-doer … may be justified … where a Man kills one who assaults him in the Highway to rob or murder him." 1 William Hawkins, *A Treatise of the Pleas of the Crown* 71, §21 (1716). And "[i]f a thief assault a true man *either abroad or in his house* to rob or kill him, the true man … may kill the assailant, and it is not felony." 1 Matthew Hale, *Historia Placitorum Coronae* 481 (Sollom Emlyn ed. 1736) (emphasis added).

To be sure, the English right was not unfettered. For one thing, it was subjected to religious- and class-based distinctions—limitations that thankfully did not cross the Atlantic. *See Kanter v. Barr*, 919 F.3d 437, 453, 457 n.5 (7th Cir. 2019) (Barrett, J., dissenting) ("the right protected by the Second Amendment was decidedly broader than the one protected in the English Bill of Rights," as it belongs to all "the people"); *Heller*, 554 U.S. at 593, 606. The right to carry arms was also understood as compatible with the 1328 Statute of Northampton, which prohibited subjects from "bring[ing] ... force in affray of the peace" and enjoined them not "to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armour to the King, and their bodies to prison at the King's pleasure." 2 Edw. 3, c. 3 (Eng. 1328). Long before the founding, Northampton was widely understood as limited to the carrying of "dangerous and unusual Weapons, in such a Manner as will naturally cause a Terror to the People," 1 Hawkins, *supra*, 134-35, §§1, 4, and as fully consistent with the right to carry *ordinary* arms for self-defense.

For example, contemporaneously with the English Bill of Rights, after observing that the 300-year-old statute had by then "almost gone in desuetudinem," *Rex v. Sir John Knight*, 90 Eng. Rep. 330 (K.B. 1686), the Chief Justice of the King's Bench explained that Northampton did not prohibit the carrying of arms simpliciter, but rather prohibited only going armed "to terrify the King's subjects." *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1686). In a different report of the same proceeding, the King's

Bench elaborated that Northampton prohibited the carrying of arms only with intent to terrorize—*i.e.*, "where the crime shall appear to be malo animo." *Knight*, 90 Eng. Rep. 330. Applying that rule, the court found that "going to church with pistols" did not violate the statute because English law protected the right of gentlemen "to ride armed for their security." *Id.*; *see also Kanter*, 919 F.3d at 456 n.4 (Barrett, J., dissenting). As reflected in contemporaneous sources, "Sir John Knight's Case became blackletter law in England." *Rogers v. Grewal*, 140 S.Ct. 1865, 1870 (2020) (Thomas, J., dissenting from denial of certiorari). For example, in 1716, Serjeant Hawkins wrote that "no wearing of Arms is within the meaning of [Northampton], unless it be accompanied with such Circumstances as are apt to terrify the People," and English subjects were "in no Danger of Offending against this Statute by wearing common Weapons ... for their Ornament or Defence." 1 Hawkins, *supra* at 136, §9.

2. The importance of not just keeping firearms, but bearing them for self-defense, was substantially more obvious on this side of the Atlantic. "[T]he public carrying of firearms was widespread during the Colonial and Founding Eras." *Grace v. District of Columbia*, 187 F.Supp.3d 124, 136 (D.D.C. 2016); *see also* 5 St. George Tucker, *Blackstone's Commentaries* App'x 19 (William Young Birch & Abraham Small eds. 1803) ("Tucker's Blackstone"). Many of our Nation's most prominent founding fathers—including George Washington, Thomas Jefferson, and John Adams—carried firearms and supported the right to do so. *See Grace*, 187 F.Supp.3d at 137 (collecting authorities). Indeed, in many parts of early America, carrying arms

was not only permitted, but mandated. *See* Nicholas J. Johnson, et al., *Firearms Law and the Second Amendment* 106 (2012).

The ability to carry firearms for self-defense was seen as not just a practical necessity, but a matter of individual right in the early Republic. Most obviously, the framing generation enshrined the right "to keep and bear arms" in the Second Amendment to the Constitution, as part of the effort to formally protect the most fundamental rights of "the people" vis-à-vis the new federal government. Just a few years later, in lectures delivered between 1790 and 1792, James Wilson explained that the people have a right to carry arms for self-defense, and that only the wearing of "dangerous and unusual" arms could be prohibited. 2 *The Works of James Wilson* 399-400 (James DeWitt Andrews ed. 1896). St. George Tucker's 1803 edition of Blackstone's Commentaries—"the most important early American edition of Blackstone's Commentaries," *Heller*, 554 U.S. at 593—likewise explained that the English right entailed a "right of repelling force by force," and that only "[t]he offence of riding or going armed, *with dangerous or unusual weapons*, is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the statute of Northampton." 2 Tucker's Blackstone, *supra* at 145 n.42; 5 Tucker's Blackstone, *supra* at 149 (emphasis added). Charles Humphreys espoused the same view in 1822, explaining that "the Constitution guaranties to all persons the right to bear arms," so "it can only be a crime to exercise this right in such a manner, as to terrify the people unnecessarily." Charles

Humphreys, *Compendium of the Common Law in Force in Kentucky* 482 (1822).

Founding-era laws likewise reflected the understanding that the people had a robust right to carry arms, subject only to the kind of narrow limits that the King's Bench ascribed to the Statute of Northampton. For example, Georgia *required* men who qualified for militia duty "to carry fire arms" to "places of public worship." 19 *The Colonial Records of the State of Georgia* 137-139; *see also Heller*, 554 U.S. at 585 n.8 & 601. And early American courts likewise repeatedly recognized a right to carry arms for self-defense, subject only to narrow restrictions on abusing that right to terrorize the people. *See generally* Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. Rev. 1343, 1360 (2009). "American benchbooks for justices of the peace echoed" the interpretation of Serjeant Hawkins, providing that "[o]nly public carrying 'accompanied with such circumstances as are apt to terrify the people' was thus seen as prohibited; 'wearing common weapons' in 'the common fashion' was legal." Eugene Volokh, *The First and Second Amendments*, 109 Colum. L. Rev. Sidebar 97, 101-02 (2009) (collecting sources).

Courts specifically validated the right to carry for self-defense in a series of cases, surveyed in *Heller*, addressing state efforts to restrict the carrying of *concealed* weapons. In the earliest case on the subject, the Kentucky Supreme Court invalidated one such law even though the state still allowed people to carry arms openly, finding that the act imposed an impermissible "restraint on the right of the citizens to

bear arms." *Bliss v. Commonwealth*, 12 Ky. 90, 92 (1822). The Tennessee Supreme Court likewise vindicated the right to carry weapons in public in a non-terrifying manner. *See Simpson v. State*, 13 Tenn. 356, 359-60 (1833).

Even courts that approved concealed-carry laws reaffirmed the right to carry arms; they just found the ability to carry openly sufficient to protect it. *See, e.g.*, *State v. Reid*, 1 Ala. 612, 619 (1840) ("[T]he Legislature cannot inhibit the citizen from bearing arms openly, because [the constitution] authorizes him to bear them for the purposes of defending himself and the State, and it is only when carried openly, that they can be efficiently used for defence."); *Nunn v. State*, 1 Ga. 243, 251 (1846) (holding "prohibition against bearing arms *openly* … in conflict with the Constitution, and *void*"); *State v. Chandler*, 5 La. Ann. 489, 490 (1850) (holding restriction on concealed carry permissible only because Louisiana guaranteed every citizen's "right to carry arms ... 'in full open view'"). Indeed, the only cases that cast doubt on the right to carry arms were later cases that relied on the mistaken premise that the Second Amendment and state analogs did not protect the individual right to keep and bear arms for self-defense. *See, e.g.*, *English v. State*, 35 Tex. 473 (1871); *State v. Workman*, 14 S.E. 9 (W. Va. 1891).

3. In the years leading up to the Civil War, one point on which anti-slavery and pro-slavery forces concurred was that the Second Amendment secures a right to carry arms for self-defense. That right was invoked by anti-slavery Senator Charles Sumner in his famous 1856 "Bleeding Kansas" speech. *The*

Crime Against Kansas, May 19-20, 1856, in *American Speeches: Political Oratory From the Revolution to the Civil War* 553, 606-07 (T. Widmer ed. 2006); *see also McDonald*, 561 U.S. at 770. Just one year later, Chief Justice Taney invoked the prospect of newly liberated slaves exercising their right "to keep and carry arms wherever they went" in his infamous opinion in *Dred Scott v. Sandford*, 60 U.S. 393, 417 (1857).

The widespread agreement that the right protected a right to carry arms outside the home for self-defense continued into reconstruction "as people debated whether and how to secure constitutional rights for newly free slaves." *Heller*, 554 U.S. at 614. The newly liberated citizens faced waves of terror across the South, emboldened by ordinances prohibiting them from carrying arms for self-defense. For instance, an 1865 Mississippi ordinance "that would serve as a model for the black codes of other Southern States" declared that "'no freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind.'" Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876*, at 2 (1998) (quoting *An Act To Punish Certain Offences Therein Named, and for Other Purposes*, ch. 23, §1, 1865 Miss. Laws 165); *id.* at 5 (Louisiana ordinance); *McDonald*, 561 U.S. at 771.

News of these measures "generated demands that Congress take action to prevent the states from infringing on the freedmen's right to bear arms." Halbrook, *supra*, at 7. In a message to Congress, a

convention of South Carolina freedmen "'ask[ed] that, inasmuch as the Constitution of the United States explicitly declares that the right to keep and bear arms shall not be infringed[,] ... the late efforts of the Legislature of this State to pass an act to deprive us [of] arms be forbidden, as a plain violation of the Constitution.'" *Id.* at 9; *see McDonald*, 561 U.S. at 771-72. In a report submitted to Congress in March of 1866, General Fisk lamented how "[o]utlaws in different sections of the State ... make brutal attacks and raids upon the freedmen, who are defenceless, for the civil law-officers disarm the colored man and hand him over to armed marauders." H.R. Exec. Doc. No. 70, at 239 (1866); *see also id.* at 233-39 (cataloguing atrocities committed against the disarmed freedmen). He decried these black code laws, explaining that "the right of the people to keep and bear arms as provided in the Constitution is *infringed*." *Id.* at 236.

General Fisk's views were widely shared among federal officers in the South. General Swayne, stationed in Alabama, declared that "[t]here must be 'no distinction of color' in the right to carry arms, any more than in any other right." *Id.* at 297. General Tillson, in Georgia, insisted that "no military or civil officer has the right or authority to disarm any *class* of people, thereby placing them at the mercy of others. All men, without distinction of color, have the right to keep arms to defend their homes, families, or themselves." *Id.* at 65. And General Saxton, writing from South Carolina, denounced the "armed parties" who were "engaged in seizing all fire-arms found in the hands of the freedmen," explaining that "[s]uch conduct is in plain and direct violation of their personal rights as guaranteed by the Constitution of

the United States, which declares that 'the right of the people to keep and bear arms shall not be infringed.'" J. Comm. on Reconstruction, H.R. Rep. No. 30, pt. 2, at 229 (1866).

"The view expressed in these statements was widely reported and was apparently widely held." *Heller*, 554 U.S. at 615. The disturbing reports ultimately prompted Congress to act. On July 16, 1866, Congress enacted the Freedmen's Bureau Act, which declared that "the right ... to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms*, shall be secured to and enjoyed by all the citizens ... without respect to race or color, or previous condition of slavery." 14 Stat. 173, 176-77 (1866) (emphasis added); *see McDonald*, 561 U.S. at 773. Five years later, Congress enacted the Civil Rights Act of 1871 or Ku Klux Klan Act. Representative Butler, who drafted the Act, explained how "in many counties" the "men who oppress" black citizens "preceded their outrages ... by disarming [them], in violation of [their] right[s] as ... citizen[s] to 'keep and bear arms,' which the Constitution expressly says shall never be infringed." H.R. Rep. No. 37, 41st Cong., 3d Sess., 3 (1871). He envisioned the law as a means "to enforce the well-known constitutional provision guaranteeing the right in the citizen to 'keep and bear arms.'" *Id.* at 7. The act was not limited to safeguarding individuals in their homes, but targeted those who "conspire together, or go in disguise *upon the public highway or upon the premises of another* for the purpose, either directly or indirectly, of depriving any person or any

class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws." §§2, 8, 17 Stat. 13, 14 (1871) (emphasis added).

In sum, from long before the founding through well after, one constant thread among courts, commentators, and government officials is that the right enshrined in the Second Amendment includes the right not just to keep arms, but to carry them outside the home for self-defense.

B. Factual and Procedural Background

Today, the vast majority of states—at least 43—continue to respect the right of their citizens to carry arms for self-defense. New York is not among them. New York has instead permanently enshrined into its law a highly restrictive (and highly discretionary) licensing regime that was born of the kind of discrimination the Fourteenth Amendment was ratified to eradicate. *See* U.S. Const. amend. XIV.

1. Efforts to disarm disfavored groups were not limited to the postbellum South. Following a sharp rise in European immigration to cities in the Northeast, states and localities began crafting ways to keep arms out of the hands of immigrants. New York was at the forefront of this new wave of discrimination, and it used discretion, rather than more readily detected facial discrimination, to achieve its goal. In 1911, New York enacted a law known as the Sullivan Law, which made it unlawful to possess "any … firearm" anywhere without a license and gave local authorities broad discretion to decide who could obtain one. 1911 Laws of N.Y., ch. 195, § 1, at 443 (codifying N.Y. Penal Law §1897, ¶ 3); *see also* 1913

Laws of N.Y., ch. 608, at 1627-30 (adding "proper cause" requirement).

It was no secret that this discretionary regime was "designed to 'strike hardest at the foreign-born element.'" Stefan B. Tahmassebi, *Gun Control and Racism*, 2 Geo. Mason U. Civ. Rts. L.J. 67, 77 (1991) (quoting L. Kennett & J. L. Anderson, *The Gun In America* 50 (1975)). The act was passed on the heels of reports by the *New York Tribune* "that pistols were found "chiefly in the pockets of ignorant and quarrelsome immigrants of law-breaking propensities." David Kopel, *The Samurai, the Mountie, and the Cowboy: Should America Adopt the Gun Controls of Other Democracies?* 342-43 (1991) (quoting "The Use of Pistols," *N.Y. Tribune* (Nov. 19, 1903), p.8). According to the *New York Times*—which itself derided the purported "affinity of 'low-browed foreigners' for handguns"—"[i]n the first three years of the Sullivan Law," a remarkable "70 percent of those arrested had Italian surnames." "Bargains in Guns at the Pawnshops," *N.Y. Times* (Aug. 30, 1911), p.3. The judge lectured the first man convicted under the statute, an otherwise law-abiding Italian-American who carried a firearm to protect himself against organized crime, that "this is the custom with you and your kind, and that fact, combined with your irascible nature, furnishes much of the criminal business in this country." "First Conviction under Weapon Law; Judge Foster Gives Marino Rossi One Year for Arming Himself Against Black Handers," *N.Y. Times* (Sept. 28, 1911), p.5.

2. The Sullivan Law, with only minor modifications, remains on the books today. Under

New York law, it remains a crime to possess "any firearm" without a license, whether loaded or unloaded, and whether inside or outside the home. Underscoring the discretion that permeates the regime, a statutory violation is both a class E felony, punishable by up to four years in prison or a fine of up to $5,000, and a class A misdemeanor, punishable by up to one year in prison or a fine of up to $1,000. N.Y. Penal Law §§265.01-b, 70.00(2)(e) & (3)(b), 80.00(1)(a); *id.* §§265.01(1), 70.15(1), 80.05(1). Possessing a *loaded* firearm outside of a person's home or place of business without a license is a class C felony punishable by up to 15 years in prison. *Id.* §§265.03(3), 70.00(2)(c) & (3)(b), 80.00(1)(a). New York law defines "firearm" to include "any pistol or revolver," shotguns and rifles with barrels under specified lengths, and any "assault weapon." *Id.* §265.00(3). Those criminal prohibitions are subject to very narrow exemptions, primarily for police officers and members of the military. *Id.* §265.20(a).

For a member of the general public, the only way to lawfully possess a firearm in New York—whether inside or outside the home—is to obtain a license under N.Y. Penal Law §400.00. *See id.* §265.20(a)(3). Licenses are issued by "licensing officer[s]," typically judges or law enforcement officers, and "[n]o license shall be issued or renewed" unless the licensing officer determines that the applicant, among other things, is of good moral character and lacks a history of crime or mental illness, and that "no good cause exists for the denial of the license." *Id.* §400.00(1)(a)-(n).

To carry a firearm outside the home, New York provides members of the general public with a single

option: obtain a license to "have and carry" a "pistol or revolver ... concealed." *Id.* §400.00(2)(f). In addition to satisfying the conditions to possess a firearm in the home, an applicant for a license to carry a firearm outside the home must demonstrate, to a licensing officer's satisfaction, that "proper cause exists for the issuance thereof." *Id.* §400.00(2)(f).

Despite its importance as a condition precedent to the exercise of the right to carry a firearm, the phrase "proper cause" is not defined in the New York Penal Code. But New York courts have fashioned "a substantial body of law instructing licensing officials on the application of [the 'proper cause'] standard." *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 86 (2d Cir. 2012). As those cases illustrate, the standard is extraordinarily demanding. "A generalized desire to carry a concealed weapon to protect one's person and property does not constitute 'proper cause.'" *Id.* An applicant instead "must 'demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.'" *Id.* (quoting *Klenosky v. N.Y. City Police Dep't*, 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980)). Good, even impeccable, moral character plus a simple desire to exercise a fundamental right is not sufficient. Nor is living or being employed in a "high crime area." *Id.* at 86-87 (quoting *In re O'Connor*, 585 N.Y.S.2d 1000, 1003 (N.Y. Cty. Ct. 1992), and *Martinek v. Kerik*, 743 N.Y.S.2d 80, 81 (N.Y. App. Div. 2002)).

Indeed, courts have routinely affirmed denials of licenses even when applicants demonstrated that they have a *particularized* need to carry a handgun. For example, courts have repeatedly affirmed findings of

no "proper cause" for applicants whose jobs require them to "carry large amounts of cash in areas 'noted for criminal activity.'" *Bernstein v. Police Dep't of City of New York*, 85 A.D.2d 574, 574 (N.Y. App. Div. 1981); *see also, e.g.*, *Theurer v. Safir*, 254 A.D.2d 89, 90 (N.Y. App. Div. 1998) ("The mere fact that petitioner travels in high-crime areas to distribute petty cash to company employees and collect COD's does not establish proper cause."); *Milo v. Kelly*, 211 A.D.2d 488, 488-89 (N.Y. App. Div. 1995) (upholding denial of "proper cause" even "assuming that petitioner established that he made weekly cash deposits of approximately $4,000," "works in areas noted for criminal activity[,] and is occasionally called upon for night-time emergencies").

Courts have also upheld determinations that an applicant lacked "proper cause" based on nothing more than "the absence of documentation substantiating threats to petitioner personally." *Baldea v. City of N.Y. License Div. of NYPD*, 2021 WL 2148769, at *1 (N.Y. App. Div. May 27, 2021). Courts have cited, with approval, New York City Police Department regulations that "require a showing of '*extraordinary* personal danger, documented by proof of *recurrent* threats to life or safety,'" to show "proper cause." *Kaplan v. Bratton*, 249 A.D.2d 199, 201 (N.Y. App. Div. 1998) (emphasis added). And on top of all that, courts give the broadest of deference to the "proper cause" determinations of licensing officers, affirming them so long as they are "rational[]," and setting them aside only if they are "arbitrary and capricious." *Baldea*, 2021 WL 2148769, at *1.

As this substantial body of law confirms, New York law makes it effectively impossible for an ordinary, law-abiding citizen to obtain a license to carry a handgun for self-defense. Instead, only by demonstrating that she is *not* a typical law-abiding citizen—*i.e.*, by showing an *a*typical reason for wanting to carry a handgun for self-defense—can an applicant hope to satisfy New York's "proper cause" test. Moreover, it is common for individuals who have satisfied state officials that they are qualified to possess and carry firearms for other purposes, such as hunting and target shooting, to nonetheless be denied a license to carry a handgun for self-defense. Thus, both by design and in practice, New York's insistence on something atypical precludes typical New Yorkers from carrying handguns for self-defense.

3. Petitioners' experiences aptly demonstrate the stringency of New York's "proper cause" requirement. Robert Nash and Brandon Koch are law-abiding citizens of New York who wish to possess and carry firearms for self-defense. J.A.117, 122, 124. They have passed all required background checks and met every other qualification New York imposes to establish their eligibility for a license to carry and are licensed to carry for *other* purposes. Nonetheless, because, like the vast majority of law-abiding New Yorkers, they cannot establish a special *need* for self-protection that distinguishes them from the general public, they are precluded from obtaining a license to carry for the constitutionally protected purpose of self-defense. J.A.117, 122, 124.

Like many New Yorkers, Nash possesses a "restricted" license to carry a firearm, which permits

him to carry his handgun outside the home for hunting and target shooting, but not for self-defense. J.A.122. In 2016, Nash asked the appropriate licensing officer (respondent McNally) to lift those restrictions so that he could carry his handgun for self-defense. J.A.122-23. "In support of his request, Nash 'cited a string of recent robberies in his neighborhood and the fact that he had recently completed an advanced firearm safety training course.'" Pet.App.7. But the licensing officer denied his application on the ground that he "failed to show 'proper cause' to carry a firearm in public for the purpose of self-defense, because he did not demonstrate a special need for self-defense that distinguished him from the general public." Pet.App.7.

Like Nash, Koch possesses a "restricted" license, which permits him to carry his handgun outside the home for hunting and target shooting, but not for self-defense. J.A.124-25. In 2017, he asked the licensing officer to lift those restrictions and grant him a license that would "allow[] him to carry a firearm for self-defense." J.A.125. In support, "Koch cited 'his extensive experience in the safe handling and operation of firearms and the many safety training courses he had completed.'" Pet.App.8 (quoting J.A.125). But Koch too was turned away on the ground that he "failed to show 'proper cause' to carry a firearm in public for the purpose of self-defense, because he did not demonstrate a special need for self-defense that distinguished him from the general public." Pet.App.8.

As the district court summarized, "Nash and Koch do not satisfy the 'proper cause' requirement because

they do not 'face any special or unique danger to [their] life.'" Pet.App.6. For that reason—and that reason alone—New York prohibits them from carrying their handguns outside their homes for self-defense. Nash and Koch are not unique in that respect. Many members of the New York State Rifle and Pistol Association (NYSRPA) would like to exercise their right to carry handguns for self-defense but are prohibited from doing so solely because they cannot satisfy New York's demanding "proper cause" standard. Pet.App.6; *see* J.A.126.

4. Nash, Koch, and the NYSRPA joined together to try to remedy this unconstitutional state of affairs, challenging New York's ban on carrying handguns and its stringent "proper cause" requirement under the Second Amendment. Pet.App.3-4; J.A.117. As their complaint explains, they seek to "carry a handgun for self-defense when in public" and would do so "were it not for [respondents'] enforcement of New York's ban on the public carrying of firearms." J.A.122, 124. To remedy that constitutional violation, petitioners requested "an injunction compelling [respondents] ... to issue" them unrestricted carry licenses, "or to otherwise allow [them] to exercise their right to carry firearms outside the home." J.A.116; *see also* J.A.127.

Respondents moved to dismiss, the district court granted the motion, and the Second Circuit summarily affirmed, concluding that petitioners' claims were foreclosed by its decision in *Kachalsky*. Pet.App.13, Pet.App.1-2.

Kachalsky involved an earlier comparable Second Amendment challenge to New York's carry regime. In

rejecting that challenge, the Second Circuit began by positing that *Heller* "raises more questions than it answers." 701 F.3d at 88. According to the Second Circuit, "[w]hat we know from [*Heller*] is that Second Amendment guarantees are at their zenith within the home," but "[w]hat we do not know is the scope of that right beyond the home and the standards for determining when and how the right can be regulated by a government." *Id.* at 89. Attempting to fill that perceived vacuum, the court first invoked cases decided on the mistaken premise that the Second Amendment does not protect an individual right at all to declare history and tradition "highly ambiguous." *Id.* at 91. Drawing on *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Griswold v. Connecticut*, 381 U.S. 479 (1965), the court then concluded that "[t]he proper cause requirement falls outside the core Second Amendment protections identified in *Heller*" because it "affects the ability to carry handguns only in *public*, while the District of Columbia ban applied *in the home*." 701 F.3d at 94.

Having whittled the "core" of the right down to bare possession in the home, the court applied only intermediate scrutiny because New York's prohibition on carrying firearms is purportedly "[i]n some ways … similar" to laws "prohibit[ing] the use of firearms on certain occasions and in certain locations" or requiring firearms to be carried openly rather than concealed. *Id.* at 94-96. The court then declared that "[t]he proper cause requirement passes constitutional muster if it is substantially related to the achievement of an important governmental interest." *Id.* at 96-97. The court justified that relaxed form of scrutiny on the ground that "the label 'intermediate scrutiny' carries

different connotations depending on the area of law in which it is used." *Id.* at 97. Applying that relaxed scrutiny, along with "substantial deference to the predictive judgments of" the New York legislature, the court then accepted the state's claim "that limiting handgun possession to persons who have an articulable basis for believing they will need the weapon for self-defense is in the best interest of public safety." *Id.* at 100.

Believing that both the reasoning and the result of *Kachalsky* are incompatible with this Court's precedents (and better-reasoned circuit precedents), petitioners sought and obtained this Court's plenary review.

SUMMARY OF ARGUMENT

New York's denial of petitioners' applications for licenses to carry handguns for self-defense plainly violated their rights under the Second Amendment. That conclusion is compelled by the text, history, and tradition of the Second Amendment, all of which confirm that the right it secures encompasses a right to carry handguns outside the home for self-defense.

The text of the Second Amendment guarantees a right "to keep *and bear* arms." It is elementary that "to bear arms implies something more than the mere keeping." Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 271 (1880). Otherwise, those words would serve no purpose at all, which would violate the cardinal principle of constitutional interpretation. Their purpose and meaning is clear; the reference to *bearing* arms secures the pre-existing, fundamental right to "carry weapons in case of confrontation." *Heller*, 554

U.S. at 592. Of course, confrontations and the need for self-defense—at the time of the founding and today—are hardly limited to the home. To confine the Second Amendment to the home or keeping arms thus would defy both its text and common sense.

"History is consistent with common sense." *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting). Indeed, the historical record overwhelmingly confirms that the Second Amendment protects a right to carry firearms outside the home. In the centuries before the founding, the English right upon which the Second Amendment was based was uniformly understood to protect a right to carry ordinary arms for a range of lawful purposes, chief among them self-defense. That understanding was only amplified on this side of the Atlantic, where the dangers and potential need for self-defense both inside and outside the home were magnified. Carrying arms was commonplace in early America, and it was regarded as an exercise of the fundamental, inherent right of every individual to defend himself. The same leading commentators and court decisions on which this Court relied in *Heller* endorsed that view.

Following the Civil War, both the consensus that the Second Amendment is not a homebound right and the continued temptation of governments to selectively disarm the public were on full display. As freedmen in the South were subjected to waves of atrocities, typically preceded by attempts on the part of local authorities to disarm them, Congress and the federal officials entrusted with protecting them insisted that securing their Second Amendment rights was critical to ensuring that they could protect

themselves. That belief was premised on the understanding that the Second Amendment guaranteed the right to carry arms outside the home for self-defense. In short, from long before the founding to long after, the right protected by the Second Amendment was widely understood to encompass the right to carry arms abroad, not just to keep them at home.

Given that text, history, and tradition, New York's effort to deprive petitioners and other law-abiding New Yorkers of that right, unless they can satisfy a government official that they have an especially great need to exercise that right, is unconstitutional. Simply put, the state cannot reserve for a happy few a right that the Constitution protects for all "the people." Moreover, the substantial discretion afforded government officials exacerbates the constitutional difficulties and reflects the law's origins as a mechanism to selectively disarm the people.

The constitutional infirmities here are plain whether this Court keeps the focus on text, history, and tradition or applies heightened scrutiny. As with the District of Columbia's ban in *Heller*, New York's law effectively criminalizes the exercise of a fundamental right and is wholly antithetical to the Second Amendment. It cannot survive "[u]nder any of the standards of scrutiny that" this Court has "applied to enumerated constitutional rights." *Heller*, 554 U.S. at 628-29. The Second Circuit concluded otherwise only by subjecting the law to a form of "scrutiny" that is heightened in name only. Any faithful reading of text, history, tradition, and precedent forecloses New

York's attempt to prohibit petitioners from carrying handguns for self-defense just because the state is not convinced that they really *need* to exercise that fundamental right.

ARGUMENT

I. The Second Amendment Protects The Right To Carry Arms Outside The Home For Self-Defense.

The Second Amendment secures to the people the right to carry arms outside the home for self-defense. That conclusion is compelled by the constitutional text and confirmed by all the same historical sources this Court relied on in *Heller* to conclude that the Amendment secures an individual right. Those sources demonstrate beyond peradventure that the Second Amendment means what it says: "The people" have the right not just to "keep" arms, but to "bear" them for self-defense.

A. The Text of the Second Amendment Secures the Right to Carry Arms, Not Just to Keep Them.

The Second Amendment secures "the right of the people to keep and bear Arms." U.S. Const. amend. II. By its terms, that phrase secures two distinct rights. Collapsing those two distinct rights would violate cardinal principles of interpretation and the bedrock principle of *constitutional* interpretation that the framers did not waste words in our founding document generally or in securing the fundamental rights of the people in particular. *See, e.g.*, *Marbury v. Madison*, 5 U.S. 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is

inadmissible."); Cooley, *General Principles*, *supra* at 271 ("[T]o bear arms implies something more than the mere keeping.").

In interpreting each of those distinct rights, the Court is "guided by the principle that" the Second Amendment's "words and phrases were used in their normal and ordinary as distinguished from technical meaning." *Heller*, 554 U.S. at 576 (citation omitted). Following that guiding principle, *Heller* concluded that to "'[k]eep arms' was simply a common way of referring to possessing arms," typically (though certainly not exclusively) at home. *Id.* at 583. By contrast, "[a]t the time of the founding, as now, to 'bear' meant to 'carry,'" which typically (though certainly not exclusively) involves conduct outside the home. *Id.* at 584.

Samuel Johnson, for instance, defined "[b]ear" as "[t]o carry ... [s]o we say, to *bear* arms in a coat." 1 Samuel Johnson, *Dictionary of the English Language* 161 (4th ed. 1773) (reprinted 1978), *cited in Heller*, 554 U.S. at 584. Likewise, Noah Webster defined "[b]ear" as "[t]o wear ... as, to bear a sword, ... to bear arms in a coat." Noah Webster, *American Dictionary of the English Language* (1828), *cited in Heller*, 554 U.S. at 584. The immediate context reinforces that "bear" not only means carry, but means carrying for specific purposes. "When used with 'arms,'" the term "bear" "has a meaning that refers to carrying for a particular purpose—confrontation." *Heller*, 554 U.S. at 584. Thus, "the natural meaning of 'bear arms'" is to "'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.* (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). Such confrontations are most likely to occur outside the home (particularly if there is a constitutionally enshrined right to "keep" arms at home). *Accord, e.g.*, *Heller*, 554 U.S. at 679-80 (Stevens, J., dissenting) ("[T]he need to defend oneself may suddenly arise in a host of locations outside the home."). It is little surprise, then, that when Samuel Johnson and Noah Webster defined "bear" they chose to reference a "coat"—a garment typically worn outside.

The prospects for confrontations outside the home and the corresponding need to bear arms for self-defense were heightened in colonial America and the early Republic. "Exposed as our early colonists were to the attacks of savages, the possession of arms became an indispensable adjunct to the agricultural implements employed in the cultivation of the soil. Men went armed into the fields, and went armed to church. There was always public danger." John Ordronaux, *Constitutional Legislation in the United States: Its Origin, and Application to the Relative Powers of Congress, and of State Legislatures* 241-42 (1891), *cited in Heller*, 554 U.S. at 619. Writing shortly after ratification, St. George Tucker reported that, "[i]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side." 5 Tucker's Blackstone App'x 19. And Tucker tied that practice directly to the constitutional text, explaining that an American going armed was

exercising "the right to bear arms" that was "recognized and secured in the constitution itself." *Id.*

The surrounding text reinforces that conclusion. As *Heller* explained, the Second Amendment's prefatory clause—"[a] well regulated Militia, being necessary to the security of a free State"—performs a "clarifying function" with respect to the meaning of its operative clause. 554 U.S. at 577-78. Every Justice in *Heller* agreed that the right to bear arms was codified at least in part to ensure the viability of the militia. *See id.* at 599; *id.* at 637 (Stevens, J., dissenting). Militia service, of course, necessarily includes bearing arms outside the home. The Revolutionary War was not won with muskets left at home; nor were the Minutemen famed for their need to return home before springing into action. The Second Militia Act likewise envisioned the militia mustering with their weapons, not arriving at the proving ground unarmed. *See, e.g.*, Militia Act of 1792, ch. 33, §1, 1 Stat. 271 (1792) (requiring every citizen enrolled in the militia to, "within six months thereafter, provide himself with" a detailed list of weaponry and "appear" with it when "called out"); *Parker v. District of Columbia*, 478 F.3d 370, 386-89 (2007).

In short, there can be little doubt that, by protecting the right to "bear arms," the plain text of the Second Amendment secures the right to carry arms outside the home. After all, it is "extremely improbable that the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen." *Peruta v. California*, 137 S.Ct. 1995, 1998 (2017) (Thomas, J., dissenting from denial of certiorari); *see also, e.g.*,

Moore v. Madigan, 702 F.3d 933, 936 (7th Cir. 2012) ("To speak of 'bearing' arms within one's home would at all times have been an awkward usage."). "It would take serious linguistic gymnastics—and a repudiation of this Court's decision in *Heller*—to claim that the phrase 'bear Arms' does not extend the Second Amendment beyond the home." *Rogers*, 140 S.Ct. at 1869 (Thomas, J., dissenting from denial of certiorari).

B. History and Tradition Confirm that the Second Amendment Protects the Right to Carry Arms Outside the Home for Self-Defense.

History and tradition surrounding the ratification of the Second Amendment make abundantly clear that the founding generation understood the Amendment to enshrine a right to carry arms outside the home for self-defense. As *Heller* put it, "the right secured in 1689 ... was by the time of the founding understood to be an individual right protecting against both *public and private* violence." 554 U.S. at 594 (emphasis added). And it is "clear and undeniable" that, when the founding generation enshrined that right in the Constitution, it understood the right to entitle the people to "have arms for their own defence" and "use them for lawful purposes" wherever the need should "occur." *Legality of the London Military Foot-Association* (1780), *reprinted in* William Blizard, *Desultory Reflections on Police* 59-60, 63 (1785).

1. As *Heller* explained, "the predecessor to our Second Amendment" is the provision of the 1689 English Bill of Rights that provided that Protestant Englishmen "may have Arms for their Defence suitable to their Conditions, and as allowed by Law."

554 U.S. at 593 (quoting 1 W. & M., ch. 2, §7, in 3 Eng. Stat. at Large 441). That "right of having and using arms for self-preservation and defence," 1 Blackstone, *supra* at 140, was decidedly not confined to the home. It was widely understood to entail a "right of repelling force by force" whenever and wherever "the intervention of the society … may be too late to prevent an injury." 2 Tucker's Blackstone, *supra* at 145 n.42. The King's Bench recognized a general right of men "to ride armed for their security," *Knight*, 90 Eng. Rep. 330, and contemporary commentators recognized a right to justified self-defense when under assault "in the Highway." 1 Hawkins, *supra* at 71; *see also* 1 Hale, *supra* at 481 ("If a thief assault a true man *either abroad or in his house* to rob or kill him, the true man … may kill the assailant, and it is not felony." (emphasis added)).

To be sure, like the right to keep arms and virtually every other constitutional right, the right to carry arms was not unlimited or a right to "carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. But by the time of the founding, the right to bear typical arms suited for self-defense, and the ability of Parliament to restrict the display of unusual arms designed to terrorize, had already been reconciled. More than a century earlier, the King's Bench had confirmed that the Statute of Northampton proscribed only going armed "to terrify the King's subject" and did not interfere with the baseline right to carry arms for self-defense reaffirmed in the English Bill of Rights. *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1686); *see also Knight*, 90 Eng. Rep. at 330 (carrying must be "malo animo" to violate Northampton). Serjeant

Hawkins espoused the same view in 1716. As did James Wilson in the early 1790s, and St. George Tucker in 1803, and Charles Humphreys in 1822, and so on. *See supra* at 7-8; *accord* William Rawle, *A View of the Constitution of the United States of America* 123 (1825); 3 Joseph Story, *Commentaries on the Constitution of the United States* §1891, p. 747 (1833); *see also Heller*, 554 U.S. at 595, 606-08 (relying on these same founding-era commentaries).

The people repeatedly enshrined the same understanding into early laws. No colony or state in the early Republic affirmatively prohibited the people from carrying firearms, either openly or concealed, let alone attempted to foreclose all avenues for carrying arms in self-defense. To the contrary, some state and local laws affirmatively encouraged or required such carrying. *See, e.g.*, *Proceedings of the Virginia Assembly, 1619*, in *Narratives of Early Virginia*, 1606-25, at 273 (Lyon Gardiner Tyler ed., 1907).[1] And early restrictions targeted only conduct that terrorized the public, in accord with *Knight*'s reconciliation of Northampton and the English right to carry ordinary arms for self-defense. For example, a Massachusetts law authorized justices of the peace to arrest "all affrayers, rioters, disturbers, or breakers of the peace, and such as shall ride or go armed *offensively, to the fear or terror of the good citizens*." 1795 Mass. Laws

[1] *See also* 1 *The Public Records of the Colony of Connecticut* 95 (1850); 7 *The Statutes at Large of South Carolina* 418 (1840); 19 *The Colonial Records of the State of Georgia* (pt. 1) 137-38 (1911); 1 *Records of the Governor and Company of the Massachusetts Bay in New England* 85, 190 (1853).

436, ch. 2 (emphasis added).[2] And under the early "surety" laws, "everyone started out with robust carrying rights," *Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017), and a surety could be demanded only upon proof of "reasonable cause" to believe someone was going to abuse that right. *See, e.g.*, 1836 Mass. Laws 748, 750, ch. 134, §16. Even then, moreover, one against whom a surety complaint was sustained was free to continue carrying arms so long as he paid the surety. *Id.* The most common laws of the time thus expressly embodied an understanding that the people had the *right* to carry arms, and only its *abuse* was or could be prohibited.

2. The overwhelming weight of judicial authority in the Nation's early years espoused the same view. "American benchbooks for justices of the peace echoed" the English rule that "[o]nly public carrying 'accompanied with such circumstances as are apt to terrify the people'" was prohibited. Volokh, *supra*, 109 Colum. L. Rev. Sidebar at 101-02 (collecting sources). And case after case in the early years of our Nation—including many of the cases on which *Heller* relied—recognized a right to carry arms for self-defense subject only to the narrow conception of Northampton articulated by the King's Bench.

Then and now, the vast majority of states left the right of the people to carry arms for self-defense undisturbed. Thus, many of the early judicial decisions addressed the limited reach of

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[2] *See also*, *e.g.*, 1821 Me. Laws 285, ch. 73 §1 (punishing "affrayers, rioters, disturbers or breakers of the peace, and such as shall ride or go armed offensively, to the fear or terror of the good citizens of this State").

Northampton-like prohibitions or statutes that addressed the manner of carrying. For example, when opining on the scope of the common-law Northampton offense in an 1843 case that *Heller* invoked, *see* 554 U.S. at 585 & n.9, 602, the North Carolina Supreme Court reiterated that "the carrying of a gun *per se* constitutes no offence"; Northampton prohibited only carrying a "weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people." *State v. Huntly*, 25 N.C. 418, 422-23 (1843). When striking down a prohibition on concealed carry in 1822, the Kentucky Supreme Court concluded that there could be no "reasonable doubt but the provisions of the act import a restraint on the right of the citizens to bear arms" protected by the state's Second Amendment analog, *Bliss*, 12 Ky. at 92—a provision that *Heller* described as arising in "the most analogous linguistic context" close in time to the founding, 554 U.S. at 585-86 & n.9. When reaching the same conclusion in 1833, the Tennessee Supreme Court likewise confirmed—in another case on which *Heller* relied, *see id.*—that "the freemen of this state have a right to keep and to bear arms for their common defence," and that "it would be going much too far" to prohibit the carrying of weapons entirely. *Simpson v. State*, 13 Tenn. 356, 359-60 (1833).[3]

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[3] That court subsequently upheld a narrower statute banning the concealed carry of "any bowie-knife, or Arkansas toothpick, or other knife or weapon that shall in form, shape, or size resemble a bowie-knife or Arkansas toothpick." *Aymette v. State*, 21 Tenn. 154, 155 (1840). But even as to those weapons, the court reaffirmed the right "to bear arms openly." *Id.* at 160; *see Heller*, 554 U.S. at 613. And as *Heller* recounted, *see* 554 U.S. at 629, the court later struck down a statute that forbade openly carrying

Courts that sustained concealed-carry restrictions were of the same view. For example, in *Nunn*—an 1846 case that *Heller* praised for "perfectly captur[ing] the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause, in continuity with the English right," *Heller*, 554 U.S. at 612—the Georgia Supreme Court held that "so much of [the law] as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void*." 1 Ga. at 251. And the court held the concealed-carry restriction permissible only "inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms." *Id.* In *Reid*—an 1840 case that *Heller* invoked, *see* 554 U.S. at 585 n.9, 629—the Alabama Supreme Court likewise stressed that "the Legislature cannot inhibit the citizen from bearing arms openly, because [the constitution] authorizes him to bear them for the purposes of defending himself and the State." 1 Ala. at 619. And in *Chandler*—an 1850 case that again featured prominently in *Heller*, 554 U.S. at 585 n.9, 613, 626—the Louisiana Supreme Court held a concealed-carry restriction permissible only because the state guaranteed every citizen's "right to carry arms ... 'in full open view.'" 5 La. Ann. at 490.

To be sure, a few decisions, mostly in the second half of the nineteenth century, suggested (often in dicta) that the people may not have a constitutional right to carry handguns. But each relied on the erroneous premise that the Second Amendment

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a pistol "publicly or privately, without regard to time or place, or circumstances." *Andrews v. State*, 50 Tenn. 165, 187 (1871).

protects only military arms and protects no individual right to self-defense whatsoever. *See English*, 35 Tex. at 474, 476-77 (upholding carry restriction with self-defense exception on premise that right protects only "the proper or necessary arms of a 'well-regulated militia'"); *Workman*, 14 S.E. at 10-11 (sustaining conviction for carrying concealed pistol on premise that Second Amendment and state analog protect only "weapons of warfare to be used by the militia"); *Hill v. State*, 53 Ga. 472, 474-75 (1874) (upholding carry restriction and suggesting that Second Amendment "guarantees only" rights necessary to "encourage or secure the existence of a militia"); *State v. Buzzard*, 4 Ark. 18, 22 (1842) (opinion of Ringo, C.J.) (upholding concealed-carry restriction on premise that Second Amendment was "[c]ertainly not" intended "to enable each member of the community to protect and defend by individual force his private rights"). *But see id.* at 39 (Lacy, J., dissenting) ("[A] man's keeping and bearing private arms, whether concealed or exposed, is an act innocent of itself, and its freedom secured from all legislative interference.").[4]

These decisions have, of course, been "sapped of authority by *Heller*." *Wrenn*, 864 F.3d at 658. They are no more helpful to determining whether carry bans violate the Second Amendment than cases decided before *Reed v. Reed*, 404 U.S. 71 (1971), are to

[4] While *State v. Duke*, 42 Tex. 455 (1875), upheld a ban on carrying certain firearms, it did so under a provision of the Texas constitution that expressly conditioned the right to keep and bear arms on "such regulations as the Legislature may prescribe," *id.* at 458, after concluding that the Second Amendment did not apply to the states, *id.* at 457.

determining whether sex-based classifications violate the Fourteenth Amendment. What remains relevant is that *all* the courts that correctly understood the Second Amendment to protect the individual right to keep and bear arms *uniformly* understood that right to include the right to carry arms for self-defense outside the confines of one's home.

3. That consensus understanding remained evident on both sides of the Civil War. In the antebellum period, the prospect that emancipated individuals could keep and bear arms contributed to Chief Justice Taney's grave error. *See supra* at 10. And efforts to protect the constitutional rights of the newly emancipated in the South from the threat of selective disarmament underscored that this understanding persisted in "the aftermath of the Civil War." *Heller*, 554 U.S. at 614; *see also McDonald*, 561 U.S. at 771. As Congress and the public "debated whether and how to secure constitutional rights for newly free slaves," their discussions confirmed the widespread view that the Second Amendment secured a right to carry arms for self-defense. *Heller*, 554 at 614-15; H.R. Exec. Doc. No. 70, at 236. Indeed, the Second Amendment would have been of little value to the freedman if it did not enshrine a right to both keep *and carry* arms, as the violence perpetrated against them was by no means confined to their homes. *See, e.g.*, *id.* at 233-39.

Consistent with that understanding, when Congress passed the Freedmen's Bureau Act in 1866, it specifically identified "the constitutional right to *bear* arms," not just to keep them, as among the rights "secured to and enjoyed by all the citizens ... without

respect to race or color, or previous condition of slavery." 14 Stat. at 176-77 (emphasis added); *see also McDonald*, 561 U.S. at 773. And when Congress enacted the Ku Klux Klan Act five years later, it specifically targeted those who "conspire together, or go in disguise *upon the public highway or upon the premises of another* for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws." 17 Stat. at 13-14, §§2, 8 (emphasis added). As the generation that ratified the Fourteenth Amendment well understood, the freedmen's need for—and right to—armed self-defense was critical not just on their own premises, but on the public highways where armed and disguised marauders were likely to attack them.

Post-civil war commentators—again including many discussed in *Heller*—confirmed what the facts on the ground made evident. *See Heller*, 554 U.S. at 616-619. Most states, then and now, respected the right to carry and did not attempt to restrict it, let alone preclude it. Cooley was skeptical of "the power of the legislature to regulate this right" to carry at all, but remarked that "happily there has been very little occasion to discuss that subject by the courts." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 350 (1868). And Cooley cited approvingly the early *Bliss* case, which had invalidated Kentucky's ban on concealed carry even though the state did not restrict open carry. *Id.* at *350 n.1. James Kent's commentaries, edited by Justice Holmes, likewise observed that there had been much discussion in the state courts over whether it

was permissible to restrict "wearing or carrying concealed weapon." 2 James Kent, *Commentaries on American Law* *340 (12th ed. 1884). While Kent's treatise endorsed concealed-carry restrictions "on principles of public policy," it did not even hint that it would be permissible for a state to ban carrying firearms altogether. *Id.*

4. Given that wealth of historical authority, it is little surprise that *Heller* accepted the premise that the Second Amendment protects a right to carry arms outside the home. Indeed, several portions of *Heller* make sense only on that understanding. For instance, the Court went out of its way to note that "nothing in our opinion should be taken to cast doubt on ... laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Heller*, 554 U.S. at 626. That caveat would have been nonsensical if the Second Amendment does not protect the right to carry arms outside the home at all. The Court also likened the District's handgun ban to the "severe restriction[s]" on the carrying of firearms that were struck down in *Nunn*, 1 Ga. at 251, and *Andrews v. State*, 50 Tenn. 165, 187 (1871). *Heller*, 554 U.S. at 629. Describing such restrictions as severe and akin to the law invalidated in *Heller* would make little sense if the Second Amendment did not protect the right to carry arms outside the home.

This Court's opinion in *Caetano v. Massachusetts* likewise makes sense only on the understanding that the Second Amendment is not a homebound right. 577 U.S. 411 (2016) (per curiam). There, the Court vacated a decision of the Massachusetts Supreme Judicial Court affirming the conviction of a woman

found outside her home in possession of a stun gun that she obtained to defend herself from an abusive ex-boyfriend, concluding that the state court failed to follow this Court's precedent in determining whether a stun gun is a protected arm. *Id.* at 411-412; *id.* at 412-13 (Alito, J., concurring). That vacatur would have sent the Supreme Judicial Court on a fool's errand if the Second Amendment does not protect the right to possess arms outside the home in the first place.

More fundamentally, the notion that the Second Amendment's protections do not extend beyond the curtilage of one's home is incompatible with the entire thrust of *Heller* and *McDonald*. As *McDonald* explained, "in *Heller*, we held that individual self-defense is 'the *central component*' of the Second Amendment right," and that "citizens must be permitted 'to use handguns for the core lawful purpose of self-defense.'" 561 U.S. at 767-68 (quoting *Heller*, 554 U.S. at 599, 630); *see also, e.g.*, *Heller*, 554 U.S. at 628 ("the inherent right of self-defense has been central to the Second Amendment right"). As history confirms, both the founders who framed and the people who ratified the Second Amendment certainly understood that the need for self-defense is not and has not ever been confined to the home. That was true at the framing when the Republic was still relatively untamed, it was true in the wake of the Civil War when Congress acted to protect the rights of new citizens on the public highways, and it is true today. *See, e.g.*, *Moore*, 702 F.3d at 937 ("[A] Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower.").

* * *

In sum, from long before the founding through well after the ratification of the Fourteenth Amendment, the overwhelming weight of authority confirmed that the Second Amendment means exactly what it says: "The people" have the right not just to "keep" arms in their homes, but to "bear" them outside their homes for self-defense.

II. New York's Restrictive Carry Regime Violates The Second Amendment.

New York's law is no more compatible with the right to bear arms than the District of Columbia's invalidated ordinance was with the right to keep arms. *See Heller*, 554 U.S. at 629 (likening D.C.'s law to "severe" restrictions on the right to carry). For all the reasons just explained, New York's approach cannot be reconciled with the Second Amendment's "text, history, and tradition." *Heller v. District of Columbia*, 670 F.3d 1244, 1273 (D.C. Cir. 2011) (*Heller II*) (Kavanaugh, J., dissenting). By denying petitioners any outlet to exercise their constitutionally protected right to carry arms for self-defense and criminalizing the exercise of a fundamental right, New York's approach is fundamentally incompatible with the Second Amendment. And just like the District's ban on possessing handguns, New York's ban on carrying handguns for self-defense fails "any of the standards of scrutiny that" this Court has "applied to enumerated constitutional rights." *Heller*, 554 U.S. at 628-29.

1. The Second Amendment declares that the right "to keep and bear [a]rms" belongs to "*the people*." U.S. Const. amend. II (emphasis added). As *Heller*

explained, that term "unambiguously refers to all members of the political community, not an unspecified subset." *Heller*, 554 U.S. at 580. In other words, "the Second Amendment right is exercised individually and belongs to all Americans." *Id.* at 581.

New York's restrictive licensing scheme cannot be reconciled with that guarantee. Because "the [Second] Amendment is for law-abiding citizens *as a rule*, … it must secure gun access at least for each *typical* member of that class." *Wrenn*, 864 F.3d at 665. Yet, in contrast to the constitutionally compliant norm in the vast majority of the country, the default in New York is that law-abiding citizens may *not* carry handguns for self-defense; that exercise of a fundamental constitutional right is instead a crime. One can get out from New York's criminal prohibition only by satisfying a "proper cause" standard that, by design, restricts the right to a small subset of "the people" whose defining feature is that they are "'*distinguishable* from ... the general community.'" *Kachalsky*, 701 F.3d at 86 (quoting *Klenosky*, 428 N.Y.S.2d at 257) (emphasis added). Thus, for most of "the people," New York "totally bans" carrying handguns, just like the District of Columbia did with respect to keeping handguns. *Heller*, 554 U.S. at 628. This Court would not tarry long over a law that reserved First Amendment rights to those with an unusually compelling need to worship or criticize the government, or a law that reserved Fourth Amendment rights to those with an especial need for privacy. The result should be no different when it comes to the Second Amendment. Such efforts to reserve fundamental constitutional rights to a select

few are incompatible with the framers' decision to secure those rights for all "the people."

New York's regime is all the more troubling because the threshold "proper cause" determination is left to the broad discretion of a licensing officer. The Second Amendment, like the rest of the Bill of Rights, protects individuals against government actors. Requiring law-abiding individuals to secure the permission of a government official under a highly discretionary standard impermissibly converts a right into a privilege. When the government licenses constitutionally protected activity, clarity is at a premium, lest licensing authorities use their discretionary authority to reserve rights guaranteed for all to the politically powerful or well-connected. Simply put, when it comes to fundamental constitutional rights, discretion is a vice, not a virtue. *See Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 162 (2002); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 764 (1988) (collecting cases holding that government "may not condition … speech on obtaining a license or permit from a government official in that official's boundless discretion"). Yet New York leaves it to the practically unreviewable discretion of a licensing officer to decide who may exercise the fundamental right to carry a handgun for self-defense.

The prospect that the substantial discretion that New York's Sullivan Law gives to local officials could be used to selectively disarm individuals is far from hypothetical. It is arguably the law's *raison d'etre*. As noted, the law was passed with an avowed intent, supported by everybody from City Hall to the *New*

York Times, to disarm newly arrived immigrants, particularly those with Italian surnames. *See supra* at 14. Moreover, even today, the regime operates selectively, with the occasional celebrity or well-connected individual securing a carry license. But the vast majority of "the people" protected by the Second Amendment are told that they have failed to show a "proper cause" in the form of demonstrating to a public official a far greater need to exercise a constitutional right than their fellow law-abiding citizens.

To be clear, petitioners have not been denied licenses because they are insufficiently trained or trustworthy to carry a firearm. To the contrary, both Nash and Koch have been licensed to carry firearms for purposes less constitutionally and historically central than self-defense. New York allows them to carry firearms for purposes of hunting and target practice, but not self-defense. If *Heller* had traced the Second Amendment back to a pre-existing right to hunt or reaffirmed an individual right to shoot targets, the distinctions drawn by New York might be minimally defensible. But given *Heller*'s actual reasoning, New York's decision to license petitioners for other purposes, but not the constitutionally vital and historically rooted purpose of self-defense, is a non-starter.

Just as with the District's regime in *Heller*, "[f]ew laws in the history of our Nation have come close to the severe restriction of" New York's restrictions on carrying handguns—and "[s]ome of those few have been struck down." 554 U.S. at 629. Indeed, the laws *Heller* identified as "severe" outliers are even more relevant here because they involved restrictions on

carrying arms, not keeping them. *See id.* (citing *Nunn*, 1 Ga. at 251; *Andrews*, 50 Tenn. at 187). In singling out those laws as "severe restriction[s]" on the right, *Heller* invoked the Alabama Supreme Court's admonition that "'[a] statute which, under the pretence of regulating, … requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional.'" *Id.* (quoting *Reid*, 1 Ala. at 616-17).

As with the District's regime in *Heller*, "[i]t is no answer to say" that carrying "other firearms (*i.e.*, long guns) is allowed." *Id.* at 629. Because "the American people have considered the handgun to be the quintessential self-defense weapon" both inside and—if anything, with an even stronger preference given the need for portability—outside the home, "a complete prohibition" on the right to carry handguns for self-defense "is invalid." *Id.* Indeed, many of the nineteenth-century cases *Heller* invoked struck down restrictions on carrying handguns even though carrying long guns remained permissible. *See, e.g.*, *Nunn*, 1 Ga. at 246, 251; *Andrews*, 50 Tenn. at 171, 186; *Bliss*, 12 Ky. at 90, 92. As those decisions illustrate, while "[t]he Constitution leaves [states] a variety of tools for combating" handgun violence, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U.S. at 636. Denying law-abiding citizens the right to carry handguns for self-defense is one of those policy choices.

2. The Second Circuit concluded otherwise only by employing a form of scrutiny that is heightened in name only and is alien to "any of the standards that"

this Court has "applied to enumerated constitutional rights." *Id.* at 628-29. The court got off on the wrong foot from the start by positing that something "less than" strict scrutiny should apply to New York's regime because the right to carry arms is purportedly not at the "core" of the Second Amendment. *Kachalsky*, 701 F.3d at 93. The Second Amendment does not create a hierarchy of protected rights; by its terms, it puts the right to "keep" arms and the right to "bear" arms on equal footing. One is no more or less the "core" of the Second Amendment than freedom of speech, but not press or religion, is the "core" of the First Amendment. The text of the provisions of the Bill of Rights reflect what the founding generation thought to be at the core of the fundamental rights of the people secured against the government. It is not for the courts to decide that some fundamental rights are "core" rights that *really* merit protection, while others are too "peripheral" to be fully honored.

The Second Circuit's demotion of the right to carry arms has no more grounding in history than in constitutional text. That is plain from the strained analogies the court tried to draw. To say New York's prohibition on carrying handguns *at all* is "similar" to laws "prohibit[ing] the use of firearms on certain occasions and in certain locations," *id.* at 94-96, is "akin to saying that because the government traditionally could prohibit defamation, it can also prohibit speech criticizing government officials," *Heller II*, 670 F.3d at 1294 (Kavanaugh, J., dissenting). Such limited restrictions about sensitive places or special circumstances just reinforce that the right to carry for self-defense was the rule (and remains the rule in the vast majority of states). The

Second Circuit's analogy to nineteenth century concealed-carry laws was equally flawed, as the court simply ignored the fact that such laws were upheld only because, unlike New York, those states still permitted carrying arms *openly*. *See, e.g.*, *Nunn*, 1 Ga. at 251 (holding that a "prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void*" because government cannot "deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms"); *Andrews*, 50 Tenn. at 187 (striking down ban on carrying handguns openly).

That leaves only the Second Circuit's claim that *Heller* itself relegated everything save keeping arms in the home for self-defense to second-class status. *See Kachalsky*, 701 F.3d at 93. That is fanciful. *Heller* squarely held that the Second Amendment "guarantee[s] the individual right to possess *and carry* weapons in case of confrontation." 554 U.S. at 592 (emphasis added). To be sure, *Heller* observed that "the *need* for defense of self, family, and property is *most* acute" in the home. *Id.* at 628 (emphasis added). But nowhere did it suggest that the need "is *not* acute"—let alone nonexistent—"outside the home." *Moore*, 702 F.3d at 935 (emphasis added). Indeed, in its nearly-50-page analysis of the *scope* of the right (as opposed to its application of that analysis to the District's possession ban), the Court referred to the "home" or "homestead" a grand total of three times, in each instance quoting a historical source that recognized a right to keep and bear arms to defend both one's home and one's person and family. *See Heller*, 554 U.S. at 615-16, 625.

In all events, whether it can be characterized as core or peripheral, the right to carry arms is undoubtedly a fundamental and constitutionally enumerated right. This Court has already held as much. *McDonald*, 561 U.S. at 767-80. At a bare minimum, restrictions on such fundamental rights necessitate the same exacting scrutiny that this Court applies to burdens on other constitutional rights in contexts where it declined to apply strict scrutiny. Yet the Second Circuit did not even apply that. Instead, the court insisted that "[t]he proper cause requirement passes constitutional muster if it is substantially related to the achievement of an important governmental interest"—a test that the court viewed as entailing "substantial deference" to the legislature and virtually no tailoring to protect the rights of the people. *Kachalsky*, 701 F.3d at 96-97.

As this Court just explained in *Americans for Prosperity Foundation v. Bonta*, --- S.Ct. ---, 2021 WL 2690268 (U.S. July 1, 2021), that is decidedly not what intermediate scrutiny entails. Considering the same "substantially related to a sufficiently important interest" formulation, the Court explained that while such "exacting scrutiny does not require that [laws] be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to achieve the government's asserted interest." 2021 WL 2690268, at *7; *see also, e.g.*, *Packingham v. North Carolina*, 137 S.Ct. 1730, 1736 (2017) (intermediate scrutiny requires narrow tailoring); *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (same); *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 218 (2014) (same). New York has taken the extreme step of banning typical, law-abiding citizens from carrying

any type of handgun anywhere unless they can distinguish themselves from their fellow law-abiding citizens, even though they have an equally valid constitutional right to keep and bear arms. That is not a serious effort to avoid "burden[ing] substantially more [protected conduct] than is necessary to further the government's legitimate interests." *McCullen*, 573 U.S. at 486. Indeed, such bans are the antithesis of tailoring, narrow or otherwise. Thus, just like the District's ban on keeping handguns in the home, New York's ban on carrying handguns fails "any of the standards of scrutiny that" this Court has "applied to enumerated constitutional rights." *Heller*, 554 U.S. at 628-29.

In the end, the Second Circuit's analysis is nothing more than the kind of "interest-balancing" that *Heller* rejected. *Id.* at 634. Indeed, the Second Circuit was quite candid that, in its view, "assessing the risks and benefits of handgun possession and shaping a licensing scheme to maximize the competing public-policy objectives" is a job for the legislature. *Kachalsky*, 701 F.3d at 99. But as *Heller* admonished, the Second Amendment "is the very *product* of an interest balancing by the people" that neither the legislature nor the judiciary may "conduct for them anew." 554 U.S. at 635. And under any faithful reading of text, history, tradition, and this Court's precedent, the Second Amendment plainly forecloses New York's refusal to let petitioners carry handguns for self-defense just because the state is not convinced that they have demonstrated an unusual *need* to exercise fundamental rights guaranteed to all.

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted,

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