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 OF THE NATIONAL SHOOTING SPORTS FOUNDATION INC. AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

The Second Amendment provides that "the right of the people to keep and bear arms shall not be infringed." U.S. Const. amend. II; *see also McDonald v. Chicago*, 561 U.S. 742 (2010) (incorporating the Second Amendment against the States). The State of New York prohibits individuals from carrying pistols or revolvers outside the home unless they obtain a license, and it prevents these licenses from being granted unless the applicant demonstrates "proper cause for [its] issuance." N.Y. Penal Law § 400.00(2)(f). The statute does not define "proper cause," but the courts of New York interpret this phrase to require an applicant to "demonstrate 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 City Police Dep't*, 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980).

The question presented is:

> Does the Second Amendment allow the government to enforce a licensing scheme that establishes a presumption against the permissibility of carrying arms outside the home, while placing the burden on individual citizens to overcome that presumption by demonstrating "proper cause," defined as "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession"?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

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INTEREST OF AMICUS CURIAE[1]

The National Shooting Sports Foundation Inc. (NSSF) is the national trade association for the firearm,

1. All parties were timely notified and consented to the filing of this brief. No counsel for a party authored any part of this brief. And

ammunition, hunting, and shooting-sports industry that works to promote, protect and preserve hunting and the shooting sports. Formed in 1961, NSSF is a 501(c)(6) tax-exempt Connecticut non-profit trade association. Its members include federally licensed firearms manufacturers, distributors, retailers, endemic media, public and private shooting ranges, gun clubs and sportsmen's organizations throughout the United States. NSSF seeks to protect the constitutional right to keep and bear arms and the lawful commerce that makes the exercise of those rights possible. NSSF leads the way in advocating for the firearm industry and its businesses and jobs, keeping guns out of the wrong hands, encouraging enjoyment of recreational shooting and hunting, and helping people better understand the industry's lawful products.

SUMMARY OF ARGUMENT

New York's "proper cause" licensing regime was doomed when this Court declared that the Second Amendment protects an individual right to keep and bear arms and incorporated that right against the States. *See District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Once this Court recognized that the Second Amendment protects an *individual* right of self-defense that belongs to *each* of "the people," it pulled the rug from under any licensing regime that requires a citizen to demonstrate "a special need for self-protection distinguishable from that

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no one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief.

of the general community"[2] as a condition of carrying arms outside the home. *Heller* makes clear that the right to keep and bear arms belongs to *all* of the people,[3] yet New York is trying to limit that right to a small subset of the people who can demonstrate "proper cause"—which its courts define as "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012) (quoting *Klenosky v. N.Y City Police Dep't*, 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980)). The notion that one must demonstrate a "special need" before exercising a constitutional right—and to demonstrate that "special need" to the satisfaction of state licensing authorities—is absurd on its face and would never be tolerated for any other constitutional right. The Court should reverse the judgment below and repudiate the Second Circuit's reasoning in *Kachalsky*.

The Court should also reject the Second Circuit's attempt to apply "intermediate scrutiny" to a textually guaranteed constitutional right that was regarded as fundamental at the time of the Second Amendment's ratification and remains so today. Americans are now exercising their constitutionally protected right to keep and bear arms in record numbers. Today, the total number of

2. *Klenosky v. N.Y City Police Dep't*, 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980).

3. *See Heller*, 554 U.S. at 576–626.

firearms in possession exceeds 425 million.[4] In 2020, there were over 21 million firearms sold, which was an all-time high and up nearly 8 million from 2019.[5] Even more significant are the demographic trends showing that today's gun owner is more diverse than in the past and that more women and minorities are exercising this right than ever before. A 2020 survey performed by NSSF shows that there was a 58.2% increase in black gun buyers, a 49.4% increase in Hispanic-American gun buyers, and a 42.9% increase in Asian-American gun buyers compared to 2019.[6] The same survey showed that there were over 8.4 million new gun owners in 2020 and that 40% of the new gun owners were women.[7]

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4. *See* Small Arms Survey, available at https://bit.ly/3ey3OFM; Daniel Trotta, *U.S. Gun Sales Down 6.1 Percent in 2018, Extending "Trump Slump,"* Reuters (Jan. 29, 2019), https://reut.rs/3hPMLRB ("A previous boom that saw gun sales double over a decade through 2016 corresponded largely with Democratic President Barack Obama's time in office, when fears that gun control laws would be enacted drove gun aficionados to stock up."); Martin Savidge and Maria Cartaya, *Americans Bought Guns in Record Numbers in 2020 During a Year of Unrest—and the Surge Is Continuing*, CNN (Mar. 14, 2021), https://cnn.it/3kxXbXZ

5. *See* Joe Bartozzi, *Taking Stock Of Record-Setting 2020 Firearm Year* (Jan. 7, 2021), https://bit.ly/3wRHmxQ.

6. *See* Jim Curcuruto, NSSF Survey Reveals Broad Demographic Appeal for Firearm Purchases During Sales Surge Of 2020 (July 21, 2020), https://bit.ly/3kFXFeN.

7. *See Gun Sales Reach Record Highs In 2020 Especially Among African Americans and First-Time Gun Buyers* (Feb. 4, 2021), https://bit.ly/3rlLSDA; Jim Curcuruto, *Millions of First-Time Gun Buyers During COVID-19* (June 1, 2020), https://bit.ly/3BjM4ro.

The restriction that New York seeks to place on its residents flies in the face of the vast majority of its sister states and is counter to a national trend. Presently there are 21 states that allow for constitutional carry of firearms, up from just two states in 2010. 30 states and the District of Columbia presently require a firearm permit and the data show that Americans are choosing to acquire permits to legally arm themselves. As of 2020, there were 19.48 million concealed-carry permit holders, up from 2.7 million concealed-carry permit holders in 1999. *See* John Lott and Rujun Wang, *Concealed Carry Permit Holders Across the United States: 2020*, available at https://bit.ly/3wL2tSk. The right to carry arms in public is as fundamental today as it was when the Second Amendment was ratified, and it should not be relegated to second-class constitutional citizenship with an "intermediate scrutiny" standard of review.

ARGUMENT

Amicus offers three points that should inform the Court's consideration case this case. First, the Court's analysis should lead with the text of the Second Amendment, which is sufficient to resolve this case. The Second Amendment guarantees an individual's right to "keep and bear Arms," and there is nothing in the language of the Amendment that makes a distinction between bearing arms in public and bearing arms in the home. Indeed, it would be farcical to suggest that the Second Amendment fails to protect an individual's right to carry arms in public, because the Amendment's stated purpose is to preserve "a well regulated Militia," and a militia cannot function without a right to bear arms outside one's place of

residence. And while a state may still be able to restrict the public carrying of arms in the same way that it limits speech or religious exercise through the police power or in response to compelling governmental interests, it most assuredly cannot subject a constitutional right to a licensing regime that presumes this conduct impermissible, and compels the individual citizen to demonstrate a "special need" for self-protection. The burden of justification must always be imposed on the government entity that seeks to restrict the exercise of a constitutional right. The State cannot shift this burden by establishing a licensing system and requiring the individual to justify his supposed "need" to carry a gun in public.

Second, the Court should be careful in how it invokes history to analyze the constitutional issues in this case. The petitioners' brief relies heavily on historical evidence, as does the Second Circuit's opinion in *Kachalsky*. But some of these historical anecdotes—through interesting and important—have little or no probative value in determining what the Second Amendment means. The petitioners' brief, for example, observes that New York's Sullivan Act was enacted in response to anti-immigrant sentiment and a desire to "disarm disfavored groups." Pet. Br. at 13; *see also id.* at 13–14; *id.* at 42–43 ("[T]he [Sullivan] 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."). But that has nothing to do with the constitutionality of the law under the Second Amendment. New York's present-day licensing regime would be equally unconstitutional even if the Sullivan Act had been enacted

with the purest of motives, because the Second Amendment turns on whether the right to keep and bear arms has been "infringed"—not on the motivations of the legislators who enacted the restrictive laws.

Finally, the Court should repudiate the Second Circuit's decision to apply "intermediate scrutiny" to New York's licensing regime. *See Kachalsky*, 701 F.3d at 96–101. "Intermediate scrutiny" is a loose, indeterminate, and non-falsifiable balancing test, and it has no place in Second Amendment analysis. The Court should instead instruct lower courts to determine the scope of the "right" protected by the Second Amendment—an inquiry that turns on text and original understanding rather than debates over whether a purported governmental interest is sufficiently "important" (in the opinion of judges) to override what is supposed to be a constitutionally protected freedom.

I. THE TEXT OF THE SECOND AMENDMENT IS SUFFICIENT TO RESOLVE THIS CASE

As in *Heller*, the Court's analysis should begin with constitutional text. *See* Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 Harv. L. Rev. 145, 147–48 (2008). And the text of the Second Amendment is enough to dispose of this case.

The Second Amendment says:

> 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. This guarantees the "right of the people to keep and bear Arms"—a right that belongs to

each individual. *See Heller*, 554 U.S. at 576–626. And by including a right to "bear" arms (and not merely to "keep" them), the Second Amendment unambiguously protects the right to "carry" arms, both inside and outside the home. *See id.* at 584 ("At the time of the founding, as now, to 'bear' meant to 'carry.'"). A constitutional right to "bear" or "carry" arms only inside the confines of one's home would be nonsensical, as well as atextual. There is nothing in the text of the Second Amendment that supports a distinction between bearing arms inside the home and bearing arms in public, and the militia clause is incompatible with any interpretation that would limit the Second Amendment in this regard. A "well regulated Militia" does not require its members to leave their guns at home, or allow its members to fire their guns only when acting as snipers from their bedroom windows.

The Second Circuit, however, purported to find great constitutional significance in the fact that New York was licensing the carrying of arms "in public" rather than "in the home." *See Kachalsky*, 701 F.3d at 94 ("New York's licensing scheme affects the ability to carry handguns only ***in public,*** while the District of Columbia ban applied ***in the home***." (emphasis in original)). The Second Circuit did not cite anything in the text of the Second Amendment that could support this distinction. Indeed, the Second Circuit did not analyze the text *at all*, and never quoted the language of the Second Amendment at any point in its opinion. Instead, the Second Circuit claimed to find this distinction in the *Heller* opinion, which limited its holding to handgun possession inside the home and stopped short of announcing a constitutional right to carry arms in pub-

lic. *See Heller*, 554 U.S. at 635 ("[W]e hold that the District's ban on handgun possession *in the home* violates the Second Amendment" (emphasis added)); *see also id.* at 628 (observing that "the need for defense of self, family, and property is most acute" inside in the home). But the reason that *Heller* confined its holding in this regard is because the plaintiff limited his request for relief, and sought only to protect his right to keep and bear a handgun *at home*:

> Heller . . . filed a lawsuit . . . seeking, on Second Amendment grounds, to enjoin the city from enforcing the bar on the registration of handguns, the licensing requirement insofar as it prohibits the carrying of a firearm in the home without a license, and the trigger-lock requirement *insofar as it prohibits the use of functional firearms within the home*.

Heller, 554 U.S. at 575–76 (emphasis added) (internal quotation marks). *Heller* never holds or even suggests that its Second Amendment analysis would be any different for guns outside the home, and no such distinction can be squared with the text of the Second Amendment.

This is not to say that the Second Amendment gives the citizenry a right to carry arms into every imaginable location, or that it allows them to bring guns into federal courthouses or other places where firearms have long been prohibited. *See Heller*, 554 U.S. at 626 ("[N]othing 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"). The Second Amendment, like all constitutional rights, is subject to the

state's police powers, and it also incorporates limitations that are reflected in the amendment's original understanding. *See id.* at 627 (recognizing that the Second Amendment accommodates "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"). But it does defeat any suggestion that the state can impose restrictions or licensing requirements on the keeping and bearing of arms in public that would not be tolerated if applied to the keeping and bearing of arms in the home. The Second Amendment protects the right of the individual "to keep and bear Arms"—regardless of whether the individual keeps and bears those arms inside or outside the home.

Once it is recognized that the text of the Second Amendment protects the right to carry arms outside the home, New York's "proper cause" licensing scheme is left without a leg to stand on. A state that is seeking to restrict the exercise of a constitutional right must always bear the burden of justifying its limits on a constitutional freedom. But a licensing regime poses unique and uniquely pernicious threats to constitutional liberties, because it requires individuals get obtain advance permission from the state before they can exercise what is supposed to be a constitutional right. *See* Philip Hamburger, *Getting Permission*, 101 Nw. U. L. Rev. 405, 410 (2007) ("Licensing laws essentially require one to get permission, and this requirement of getting permission makes licensing a particularly serious threat to the authority of individuals in relation to government."). This Court has consistently viewed licensing regimes with skepticism—not only in the context of individual liberties but also in cases

concerning the relations between the state and federal governments. *See Shelby County v. Holder*, 570 U.S. 529, 544 (2013) (declaring unconstitutional a preclearance regime under which the "[s]tates must beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own"); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 590 (1976) ("[T]he First Amendment constitutes a direct repudiation of the British system of licensing.").

But the Court does not need to go so far as to hold that the Second Amendment forbids *any* system of licensing with respect to the carriage of firearms. It is enough to say that New York's licensing regime violates the Second Amendment by requiring an applicant to show "proper cause"[8] before he can carry a pistol or revolver in public—which the courts have defined as a requirement to "demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession."[9] This *eliminates* the right to bear arms in public for anyone who cannot prove that they have a "special need for self-protection" that goes beyond the need that a member of the "general community" might assert—even though the individual right to keep and bear arms protects *every* member of the "general community" and secures their right to carry arms in public on the same terms as everyone else. If the state wishes to restrict the right to carry arms in public, it must justify the restrictions that it seeks to impose; it

8. N.Y. Penal Law § 400.00(2)(f).

9. *Klenosky v. N.Y City Police Dep't*, 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980).

cannot eliminate this right and then establish a licensing regime that returns the right only to individuals who can distinguish themselves from the "general community."

II. THE COURT SHOULD BE CAREFUL IN RELYING ON HISTORICAL EVIDENCE

The petitioners' brief is rife with historical evidence and anecdotes—and so is the Second Circuit's opinion in *Kachalsky*. *See Kachalsky*, 701 F.3d at 89–91. But some of the historical evidence is of dubious relevance to the issues in this case, and the Court should be careful not to limit the scope of the Second Amendment by relying too heavily on the historical arguments that appear in the petitioners' brief.

This danger is particularly acute with regard to the petitioners' attack on the origins of New York's Sullivan Act. The petitioners correctly observe that governments have at times enacted gun-control measures for the purpose of facilitating persecution campaigns against disfavored groups—and this has been a problem not only in the United States but in other countries as well. *See, e.g.*, Stephen P. Halbrook, *Gun Control In The Third Reich: Disarming The Jews And "Enemies Of The State"* (2014); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration,* 80 Geo. L.J. 309 (1991). These episodes demonstrate why the Second Amendment is such an important bulwark of freedom, especially for those who cannot reliably depend on the protection of the state. *See Silveira v. Lockyer*, 328 F.3d 567, 569–70 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc) ("All too many of the other great tragedies of history—Stalin's atroci-

ties, the killing fields of Cambodia, the Holocaust, to name but a few—were perpetrated by armed troops against unarmed populations. Many could well have been avoided or mitigated, had the perpetrators known their intended victims were equipped with a rifle and twenty bullets apiece, as the Militia Act required here.").

But it is important that the Court not hinge its decision on the anti-immigrant sentiments that led to the enactment of the Sullivan Act—and it is important that the Court not suggest that these nefarious motivations from over a century ago should have anything to do with the outcome in this case. New York's "proper cause" licensing regime is unconstitutional no matter when or why it was enacted, and it will be equally unconstitutional if it is reenacted, or if it is enacted in a different state without any of the baggage associated with the Sullivan Act. The Second Amendment is concerned with whether New York's licensing regime "infringes" the constitutional right to "keep and bear arms"—and it will infringe that right regardless of the motivations of the legislators who enacted it.

III. THE COURT SHOULD REPUDIATE THE SECOND CIRCUIT'S USE OF INTERMEDIATE SCRUTINY

Finally, the Court should reject the Second Circuit's decision to apply "intermediate scrutiny" to New York's licensing regime. *See Kachalsky*, 701 F.3d at 96–101. The use of "intermediate scrutiny" in Second Amendment litigation is spreading rapidly among the federal courts, and if left unchecked it will return the Second Amendment to its pre-*Heller* status as a disfavored and underenforced

constitutional right.[10] It is imperative that the Court repudiate the use of "intermediate scrutiny" in this case, and insist that courts enforce the constitutional right to keep and bear arms without subjecting that right to an indeterminate and discretionary balancing test.

It has become all too common for the modern judiciary to downplay or narrowly construe constitutional provisions that are perceived to have outlived their usefulness. The contract clause has been rendered a nullity by the judiciary's lack of enforcement and a toothless standard of review. *See Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400, 411–13 (1983). The takings clause (until recently) was largely unenforceable in federal court because of a court-imposed exhaustion-of-state-remedies doctrine that no other constitutional claims were subject to. *See Knick v. Township of Scott*, 139 S. Ct. 2162 (2019). And the constitutional right to keep and bear arms suffered a similar disfavored status in the decades before *Heller* and *McDonald*. The "collective right" interpretation had rendered the Second Amendment effectively non-justiciable, and it was one of the few provisions in the Bill of Rights that had never been incorporated against the States.

The decisions of this Court in *Heller* and *McDonald* have taken large steps toward removing the second-class

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10. *See, e.g.*, *Association of New Jersey Rifle and Pistol Clubs, Inc. v. Attorney General New Jersey*, 910 F.3d 106, 126 (3d Cir. 2018) (Bibas, J., dissenting) ("The Second Amendment is an equal part of the Bill of Rights. We must treat the right to keep and bear arms like other enumerated rights, as the Supreme Court insisted in *Heller*. We may not water it down and balance it away based on our own sense of wise policy.").

status of the Second Amendment. But the lower courts' eager embrace of the "intermediate scrutiny" standard threatens to undo this. The "intermediate scrutiny" is full of amorphous and non-falsifiable jargon, requiring judges to determine whether a gun-control measure is "*substantially* related" (how substantial?) to achieving "*important* governmental objectives" (how important?), an inquiry that enables courts to enforce or disapprove gun-control regulations at will. The Court should instead instruct lower courts to determine the scope of the "right" protected by the Second Amendment by examining the text and original understanding—as this Court did in *Heller*—rather than fumbling around with court-invented jargon that was created for different constitutional provisions.

* * *

New York's "proper cause" licensing regime is a relic of the pre-*Heller* and pre-*McDonald* era in which the individual's right to keep and bear arms could be treated as a matter of legislative grace or could turn on the whim of a licensor. It cannot survive the rulings of this Court that endorse an individual's right to "keep and bear Arms," and that require the States to respect that individual right.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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