No. 20-843

In The
Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ET AL.,
Petitioners,
v.
KEVIN P. BRUEN, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF NEW YORK STATE POLICE, ET AL.,
Respondents.

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

BRIEF OF *AMICUS CURIAE* THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute (the "Institute") is an international civil liberties organization headquartered in Charlottesville, Virginia. Its President, John W. Whitehead, founded the Institute in 1982. The Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated, and in educating the public about constitutional and human rights issues.

At every opportunity, the Institute will resist the erosion of fundamental civil liberties, which many would ignore in a desire to increase the power and authority of law enforcement. The Institute believes that where such increased power is offered at the expense of civil liberties, it achieves only a false sense of security while creating the greater dangers to society inherent in totalitarian regimes.

SUMMARY OF ARGUMENT

For too long, the Second Amendment has—vis-à-vis other, co-equal guarantees of the Bill of Rights—been the constitutional equivalent of a second class citizen. This disparate treatment finds no support in either the text or the history of the Constitution. Any

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[1] The parties have consented to the filing of this brief, either by blanket consent filed with the Clerk or individual consent. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

state regulation that seeks to deprive citizens of their Second Amendment rights—like the New York statute at issue here—should be subject to heightened scrutiny. Like the other fundamental rights of "the people" guaranteed under the Constitution, the Second Amendment right "of the people to keep *and bear* arms" belongs to all of "the people"—not just those "special people" who can convince state bureaucrats that they are worthy of exercising the constitutional rights guaranteed to all citizens. If allowed to stand, New York's statute would effectively read the right to "bear" arms out of the Bill of Rights.

ARGUMENT

I. State Regulation of Second Amendment Rights Should Be Subject to a Heightened Standard of Review.

This Court's decision in *Heller* leaves no doubt that the Second Amendment guarantees the "individual right to . . . carry weapons in case of confrontation." *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). New York's proper cause licensing regime is clearly a burden on that right because it entirely forecloses the exercise of the right by the vast majority of New Yorkers. *Cf. id.* at 629 (describing two early prohibitions on carrying handguns as "severe restrictions" and noting they were struck down). To adequately protect the Second Amendment right, New York's licensing regime must *at the very least* be subjected to some heightened level of scrutiny under which the State must bear the burden of affirmatively proving that its licensing regime is narrowly tailored to serve an important governmental interest.

Where a fundamental right is at issue, the Court has traditionally analyzed a restriction under a form of heightened scrutiny—either intermediate scrutiny or strict scrutiny. In *Heller*, the Court left no doubt that something more searching than rational basis review was required: "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." *Id.* at 628 n.27.

Under the Court's strict scrutiny jurisprudence, a regulation that burdens a fundamental right is lawful only if the regulation is "the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). Intermediate scrutiny allows both a less substantial state interest and a looser fit between that interest and the regulation chosen to serve the interest, but it still requires narrow tailoring. "In order to survive intermediate scrutiny, a law must be narrowly tailored to serve a significant governmental interest." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736; 198 L. Ed. 2d 273 (2017) (internal quotation marks omitted). Under both forms of heightened scrutiny, however, the government bears the burden of proving the fit between the challenged infringement on a fundamental right and the governmental interest justifying the infringement. This is the central distinction between heightened scrutiny and rational basis review.[2]

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[2] Under rational basis review, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993).

The government bears a real burden to establish such a fit even on intermediate scrutiny. In *Craig v. Boren*, the Court applied intermediate scrutiny to an Oklahoma statute alleged to violate the Equal Protection Clause of the Fourteenth Amendment. 429 U.S. 190 (1976). The statute made it unlawful to sell a type of beer to males under 21 or to females under 18. *Id.* at 191-92. The state attempted to justify the differential treatment of the sexes based on its interest in preventing drunk driving. *Id.* at 199. The state introduced a variety of statistical surveys suggesting that males between 18 and 20 were more likely to drink and drive than females of the same age group. *Id.* at 200-01. The Court closely examined this statistical evidence and found that it did not show that "sex represents a legitimate, accurate proxy for the regulation of drinking and driving." *Id.* at 204.

In *Edenfield v. Fane*, 507 U.S. 761 (1993), the Court addressed a prohibition on certified public accountants soliciting potential clients in person. The Court analyzed the solicitation ban under the intermediate scrutiny framework articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980). *See Edenfield*, 507 U.S. at 767-69. The state Board of Accountancy sought to justify the ban on two grounds. First, it was needed to preserve the independence of accountants. An accountant who needed to solicit clients in person was obviously an accountant who needed business, and such an accountant might be willing to bend the rules to accommodate a client. *Id.* at 764-65. Second, the ban was necessary to prevent overreaching by accountants. *Id.* at 765. The Court examined the record and found the Board of Accountancy had not

carried its burden. *Id.* at 771. The Court noted that the record contained neither studies nor anecdotal evidence suggesting that personal solicitation created the harms that the Board of Accountancy sought to avoid. *Id.* In fact, the only record evidence supporting the ban was an affidavit that the Court rejected as "contain[ing] nothing more than a series of conclusory statements that add little if anything to the Board's original statement of its justifications." *Id.*

In *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), the Court again applied intermediate scrutiny to a restriction on commercial speech. The restriction at issue was a Florida Bar rule prohibiting lawyers from contacting potential clients within thirty days following an accident. *Id.* at 620. The Bar justified the rule as necessary to protect the reputation of the legal profession. *Id.* at 625. As required on intermediate scrutiny, the Court examined the record and found that it contained both statistical and anecdotal evidence "supporting the Bar's contentions that the Florida public views . . . solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession." *Id.* at 626. This record was unrefuted. *Id.* at 628. The Court found it sufficient to establish the required fit between the Bar's interest and its rule.

In subjecting a restriction to heightened scrutiny, the Court places a real burden on the proponent of the restriction. Yet in the years since this Court decided *Heller* and *McDonald*, the lower courts have not been holding governments to their burden. Justice Thomas, dissenting from the denial of certiorari in *Silvester v. Becerra*, observed:

> Purporting to apply intermediate scrutiny, the Court of Appeals upheld California's 10-day waiting period for firearms based solely on its own "common sense." It did so without requiring California to submit relevant evidence, without addressing petitioners' arguments to the contrary, and without acknowledging the District Court's factual findings. This deferential analysis was indistinguishable from rational-basis review. And it is symptomatic of the lower courts' general failure to afford the Second Amendment the respect due an enumerated constitutional right.

Silvester v. Becerra, 138 S. Ct. 945, 945; 200 L. Ed. 2d 293 (2018) (Thomas, J., dissenting from denial of certiorari).

In *Drake v. Filco*, 724 F.3d 426 (3d Cir. 2013), the Third Circuit upheld New Jersey's regime for issuing handgun carry permits only to those who can demonstrate a special "justifiable need." In an alternate holding, the court purported to analyze the regime under intermediate scrutiny, *id.* at 436, but in fact did not hold New Jersey to its burden. The court noted that New Jersey had not presented "much evidence" to justify its regime, but the court excused that failure on the ground that New Jersey's regime was enacted before the *Heller* decision and the state therefore could not have known at the time of the enactment that it might have been burdening a constitutional right. *Id.* at 437-38. Judge Hardiman in dissent correctly criticized the court for absolving New Jersey of its burden to establish a fit between its interest and

the handgun carry permit regime it enacted to serve that interest.[3] *Id.* at 454 (Hardiman, J., dissenting).

To prevent lower courts from analyzing infringements on the Second Amendment in a way that is substantively indistinguishable from rational-basis review, the Court should announce a standard of review that clearly imposes a burden on the proponent of the infringement to prove as an evidentiary matter that the infringement is in fact narrowly tailored to serve a substantial government interest. In conducting intermediate scrutiny review, the Court has held the proponent of a restriction to a meaningful evidentiary burden. In the process, the Court has conducted a meaningful examination of the evidentiary record to ensure that an infringement is upheld only where the record evidence truly supports the restriction. The Second Amendment right to keep and bear arms deserves the same protection. The potential for abuse when a fundamental right of "the people" is limited to certain "special people" is demonstrated by the history of gun control laws that have had both the purpose and the effect of targeting minorities.

II. New York Impermissibly Limits Second Amendment Rights of "the People" to Certain "Special People"

The plain language of the Second Amendment provides that "the right of the people to keep and bear arms, shall not be infringed." U.S. Const. amend. II.

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[3] Judge Hardiman suggested that New Jersey would not have been able to carry its burden in any case. Judge Hardiman cited materials from states with "shall-issue" carry permit regimes tending to show that permitholders in those states do not detract from public safety. Id. at 455 (Hardiman, J., dissenting).

In the context of the Second Amendment, First Amendment, and Fourth Amendment, the Court has stated that "the people . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008) (quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)). The term "the people," under the Court's prior jurisprudence, "unambiguously refers to *all members* of the political community, not an unspecified subset" within the context of the First, Second, and Fourth amendments. *Id.* (emphasis added). The Court's jurisprudence makes clear that "the people" does not mean "some people" or "certain people." Rather, the fundamental rights secured by the First, Second, and Fourth Amendments duly accrue to *all* of "the people."

To be sure, the "right secured by the Second Amendment is not unlimited."[4] *Heller*, 554 U.S. at 626. But New York's law operates to curtail New Yorkers' right to bear arms in its entirety. New York's law—and others like it—act to reduce "the people" to whom the Second Amendment right accrues to a privileged few "special people" whom unelected bureaucrats deem worthy of receiving the full guarantees of the Bill of Rights. For those persons falling outside of this special group, the Second

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4. "[L]ongstanding prohibitions on possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools or government buildings, or laws imposing conditions and qualifications for commercial sale of arms" are examples of limitations of the Second Amendment unquestioned by the Court in *Heller*. 554 U.S. at 626–27.

Amendment right to bear arms is a nullity. In New York, "the people" allowed to exercise their Second Amendment right to bear arms are limited to those members of the political community who can demonstrate "proper cause" to the satisfaction of state officials. N.Y. Penal Law § 400.00(2). Unfortunately, even for the most upstanding citizens of New York, persuading officials of a "proper cause" can be a futile endeavor. More importantly, it is not an endeavor that citizens ought to be required to undertake as a prerequisite for exercising their fundamental freedoms.

In New York, those seeking to obtain a license to carry a gun "for self-defense" cannot establish "proper cause" despite the fact that self-defense is "the core lawful purpose" of the right secured by the Second Amendment. *Heller*, 554 U.S. at 630. Thus, when subject to the whim of governmental officials, even those desiring to exercise their right for reasons at the core of that right are apparently undeserving. Who, then, is sufficiently "special" as to be deserving? Whoever comprises the ranks of this special group, one thing is sure: its membership is something less than the entire political community. By granting licenses only to the fortunate members of this ill-defined "special" group, New York's regime impermissibly withholds the right secured by the Second Amendment from "the people" to whom the right duly accrues.

In selectively awarding Second Amendment rights to a subset of people fortunate enough to appease government officials, laws like New York's improperly narrow a "right of the people" to a "right of the *special* people." Such an interpretation does not

comport with the plain language of the text of the Bill of Rights. *See Heller*, 554 U.S. at 580. It offends traditional notions of fundamental rights secured to "the people" by the Constitution. For example, the First Amendment secures "the right of the people peaceably to assemble." U.S. Const. amend. I. This is a First Amendment right[5] which this Court has

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[5]. The right to assemble is but one of the fundamental rights secured by the First Amendment. The Court in *De Jonge v. Oregon* stated that "the right of peaceable assembly is a right cognate to those of free speech and free press," 299 U.S. 353, 364 (1937), rights which have been similarly interpreted by the Court as an expansive rights that are broadly enjoyed. For example, the Supreme Court did not hold the jacket at issue *Cohen v. California* was permitted speech only after Cohen demonstrated a "special need" or "proper cause" to don the jacket; Cohen was permitted to speak despite any public official's opinion on Cohen's worthiness. 403 U.S. 15 (1971); *see also Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n.*, 475 U.S. 1, 8 (1986) ("The identity of the speaker is not decisive in determining whether speech is protected."); *see also First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual"). The same protections likewise extend to "the people" who seemingly have poor reasons for their speech, or if the speech is arguably of little societal value. *See, e.g., Mahanoy Area Sch. Dist. v. B. L.*, 594 U.S. ___, slip op. at 11 (2021) ("It may be tempting to dismiss [a speaker's] words as unworthy of the robust First Amendment protections . . . , [b]ut sometimes it is necessary to protect the superfluous in order to preserve the necessary"). In the same way, "the people" remain free to speak even if their speech is politically unfavorable. *See, e.g., First Nat'l Bank*, 435 U.S. at 785–86 (stating that governmental restriction of First Amendment rights is "unacceptable . . . [e]specially where . . . the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people . . . ."). First Amendment protections thus extend to all of "the people," from the most unsavory to the most noble.

stated is "beyond abridgment" by governmental restraint, a principle which is "applicable to all people under our Constitution irrespective of their race, color, politics, or religion." *Bates v. Little* Rock, 361 U.S. 516, 581 (1960) (Black, J., Douglas, J., concurring). Moreover, this right is enjoyed by all of "the people," regardless of intent behind the assembly. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (citing *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139–40 (1961)). However, if "the right of the people" meant "the right of the *special* people" in the context of the First Amendment, only a select subset of individuals would be able to assemble in protest, leaving others subject to tyranny, oppression, or discrimination without appropriate or effective recourse. One wonders what sorts of injustices would be permitted to persist if assemblers needed to first demonstrate "proper cause" for their assembly. In the context of the First Amendment, the phrase "the people" is thus properly understood to mean all members of the political community, and the phrase should be identically understood vis-à-vis the Second Amendment.

Like the First Amendment, the Fourth Amendment secures a fundamental "right of the people." Specifically, the Fourth Amendment secures "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. In the context of the Fourth Amendment, the term "the people" is understood to be "a class of persons who are part of a national community . . . ." *Verdugo-Urquidez*, 494 U.S. at 265. Furthermore, this Court has stated that "the reference to 'the people' in the

Fourth Amendment" cannot be understood as "restricting its protections." *Id.* at 276. Rather, the "explicit recognition of 'the right of the people' to Fourth Amendment protection may be interpreted to underscore the importance of the right, rather than to restrict the category of persons who may assert it." *Id.* It seems clear, therefore, that the phrase "the people"—at a minimum—refers to "the people of the United States" and not to "the certain people" or "the special people." If "the people" were understood to mean "the special people," Fourth Amendment protections would only extend to certain individuals, leaving others prone to even the most unreasonable or intrusive searches. A cruel and unjust society would manifest if governmental actors were permitted to act arbitrarily against a subset of the American people. In relation to the Fourth Amendment, the phrase "the people" is properly understood to mean all members of the political community, not merely a subset of the political community. The same phrase should bear the same meaning in relation to the Second Amendment.

The fundamental rights are of the First, Second, and Fourth amendments are each secured to "the people," and in each case, this Court has explained that "the people" refers broadly to all people of the political community, not to an unspecified subset. *See, e.g.*, *Heller*, 554 U.S. at 580. New York's law and others like it impermissibly award the right to bear arms only to a select few "special people." By effectively limiting the phrase "the people" to an unspecified subset of "special people," New York's law attempts to dole out the Second Amendment right to bear arms to those it deems worthy, while denying the same from everyone else. Because the Second

Amendment right to bear arms—like the First and Fourth Amendment rights—accrue to all of "the people" and not just to "the special people," New York's law violates the Second Amendment.

III. Historically, "the People" Denied Second Amendment Rights Have Disproportionately Been Minorities

"The first gun control laws were enacted in the antebellum South forbidding blacks, whether free or slave, to possess arms, in order to maintain blacks in their servile status." Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. CIV. RTS. L.J. 67 (1991). For example, "[i]n 1712, ... South Carolina passed 'An act for the better ordering and governing of Negroes and Slaves' which included two articles particularly relating to firearms ownership and blacks." Tahmassebi, at 70 (quoting 7 STATUTES AT LARGE OF SOUTH CAROLINA 353-54 (D.J. McCord ed. 1836-1873)). Similarly, Virginia had a history of statutes designed to disarm blacks, including an act entitled "An Act for Preventing Negroes Insurrections." *Id.* (quoting 2 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619 481 (W.W. Henning ed., 1823)).

Racially discriminatory gun control continued after the Revolutionary War and aimed at free blacks as well as slaves. J. Baxter Stegall, *The Curse of Ham: Disarmament through Discrimination-The Necessity of Applying Strict Scrutiny to Second Amendment Issues in order to Prevent Racial Discrimination by States and Localities through Gun*

Control Laws, 11 LIBERTY U. L. LAW REVIEW 271, 280 (2016). Multiple states enacted and enforced such laws by legislative and judicial power such as in 1844, when the North Carolina Supreme Court refused to strike down a law that prohibited free blacks from carrying guns and justified its decision on the basis that blacks were not citizens. Tahmassebi, at 70 (citing *State v. Newsom*, 27 N.C. 250 (1844)). Georgia's high court took the same approach with a Georgia law, holding that "free persons of color have never been recognized here as citizens; they are not entitled to bear arms, vote for members of the legislature, or to hold any civil office." *Id.* (citing *Cooper v. Mayor of Savannah*, 4 Ga. 68, 72 (1848)).

Whether alone or part of a broader effort to keep minorities trapped in inferior status to whites, states restricted minority gun rights even after the Civil War. Mississippi for one enacted a statute which stated, in part, "Be it enacted ... [t]hat no freedman, free negro or mulatto, not in the military ... and not licensed to do so by the board of police or his or her county, shall keep or carry firearms of any kind, or any ammunition, ... and all such arms or ammunition shall be forfeited to the informer ...." Tahmassebi, at 71 (citing 1866 Miss. LAWS ch. 23, § 1, 165 (1865)). North Carolina passed a similar statute entitled "[A]n [A]ct [C]oncerning Negroes, and [F]ree [P]ersons of [C]olor or [M]ixed [B]lood." James B. Browning, *The North Carolina Black Code*, 15 J. OF NEGRO HIST. 461, 463 (1930), http://www.jstor.org/stable/2714207. Florida's laws forbade Freedmen from carrying firearms of any kind. Joe M. Richardson, *Florida Black Codes*, 47 THE FLORIDA HISTORICAL QUARTERLY 365 (1969), http://www.jstor.org/stable/30140241. W. E.B.

DuBois described some of these odious state "Black Codes":

> Very generally Negroes were prohibited or limited in their ownership of firearms. In Florida, for instance, it was "unlawful for any Negro, mulatto, or person of color to own, use, or keep in possession or under control any bowie-knife, dirk, sword, firearms, or ammunition of any kind, unless by license of the county judge of probate, under a penalty of forfeiting them to the informer, and of standing in the pillory one hour, or be whipped not exceeding thirty-nine stripes, or both, at the discretion of the jury."
>
> Alabama had a similar law making it illegal to sell, give or rent firearms or ammunition of any description "to any freedman, free Negro or mulatto."
>
> Mississippi refused arms to Negroes. "No freedman, free Negro, or mulatto, not in the military service of the United States Government, and not licensed to do so by the board of police of his or her county, shall keep or carry firearms of any kind, or any ammunition, dirk, or bowie-knife; and on conviction thereof, in the county court, shall be punished by fine, not exceeding ten dollars, and pay the costs of such proceedings, and all arms or ammunition shall be forfeited to the informer."

> A South Carolina Negro could only keep firearms on permission in writing from the District Judge. "Persons of color constitute no part of the militia of the State, and no one of them shall, without permission in writing from the district judge or magistrate, be allowed to keep a firearm, sword, or other military weapon, except that one of them, who is the owner of a farm, may keep a shot-gun [sic] or rifle, such as is ordinarily used in hunting, but not a pistol, mustket, or other firearm or weapon appropriate for purposes of war ... and in case of conviction, shall be punished by fine equal to twice the value of the weapon so unlawfully kept, and if that be not immediately paid, by corporal punishment.

J. Baxter Stegall, at 286-87 (quoting W.E.B. Dubois, BLACK RECONSTRUCTION: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880 671-75, 172-173 (1935)).[6] Indeed, one commentator has noted that

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[6] Local governments also had discriminatory gun laws. For example, Opelousas, Louisiana law provided: "No freedman who is not in the military service shall be allowed to carry fire-arms [sic], or any kind of weapons, within the limits of the town of Opelousas without the special permission of his employer, in writing, and approved by the mayor or president of the board of police." J. Baxter Stegall, at 287 (citing Stephen P. Halbrook, SECURING CIVIL RIGHTS: FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS at 12-13 (2010)). Similarly, the city of Alexandria,

this behavior by states was sadly not rare. That commentator has catalogued testimony of federal "Freedman's Bureau" agents to Congress, which reported state efforts to confiscate arms from blacks whose authorities would sometimes then at the same time rob the then defenseless persons of other possessions. *See* J. Baxter Stegall, at 287-88 (citing Stephen P. Halbrook, SECURING CIVIL RIGHTS: FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS at 25-55 (2010)). Moreover, "[t]his oppressive conduct was not limited to southern states. Representative Anthony Thornton of Illinois, speaking on the House floor on March 3, 1866, claimed that '[i]n the North during the Civil War 'freedom of speech was denied; the freedom of the press was abridged; the right to bear arms was infringed.'" *See* J. Baxter Stegall, at 288 (citing Stephen P. Halbrook, at 29).

Even when gun-related laws or enforcement were not explicitly and solely focused on blacks in the post-Civil War but pre-Modern period, they were designed in a way that disproportionately infringed on the rights of minority group members. For instance, some states banned only certain types of weapons such as South Carolina, which in 1902 banned the sale of pistols "except to sheriffs and their special deputies." Tahmassebi, at 76 (citing Kates, *Toward A History of Handgun Prohibition in the United States*, RESTRICTING HANDGUNS: THE LIBERAL SKEPTICS SPEAK OUT 14, 15 (D. Kates ed. 1979)). Other states used targeted gun bans that

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Virginia, also enforced ordinances forbidding blacks to carry firearms, punishable by whipping. *See id.* (citing Stephen P. Halbrook, at 14).

prohibited sales of cheap guns and thereby priced impoverished blacks (and other poor people) out of the arms market. *See* J. Baxter Stegall, at 292. States also used other means such as taxes on gun sales or onerous registration processes. *See* J. Baxter Stegall, at 292-293 (citations omitted). An article in Virginia's official university law review actually called for:

> [A] prohibitive tax ... on the privilege of selling handguns as a way of disarming the son of Ham, whose cowardly practice of toting guns has been one of the most fruitful sources of crime .... Let a Negro board a railroad train with a quart of mean whiskey and a pistol in his grip and the chances are that there will be a murder, or at least a row, before he alights.

Tahmassebi, at 75 (quoting Comment, *Carrying Concealed Weapons*, 15 VA. L. REG. 391, 391-92 (1909)).[7] Thus, without expressly targeting race, state legislatures could successfully preclude or vastly limit black gun ownership.

Congress passed the National Gun Control Act of 1968 after the assassinations of President John F. Kennedy, Dr. Martin Luther King, Jr., and Senator Robert Kennedy. Gun Control Act of 1968, Pub. L.

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[7] Northern states similarly engaged in odious behavior designed to prohibit ethnic minorities from having the same gun rights as existing "native" populations. New York's "Sullivan Law" was one such example that enacted gun control laws targeting immigrants, beginning in 1911 with a permit requirement enforced by New York police that exercised the power by focusing on Italian immigrants. *See* Tahmassebi, at 77 (citations omitted).

No. 90-618, 82 Stat. 1213 (1968). Although this act did not explicitly target people of color, some of the background leading up to its passage suggests even this post-1964 Civil Rights Act law had racial overtones. In that regard, Chicago Mayor Richard Daley expressed his alarm at blacks obtaining firearms and demanded federal action:

> Outside the suburbs in the city, we have control, but what the hell, in the suburbs, there are--you go out to all around our suburbs and you've got people out there, especially the non-white, are buying guns right and left. Shotguns and rifles and pistols and everything else. There's no registration .... There's no, and you know, they've had trouble with this national gun law, but after the president's assassination, someone ought to do something.

J. Baxter Stegall, at 304 (citing Record of Telephone Call from President Lyndon B. Johnson to Chicago Mayor Richard J. Daley, Citation No. 10414, Lyndon B. Johnson Presidential Library, Univ. of Tex. (July 19, 1966), http://www.lbjlib.utexas.edu/johnson/archives.hom/Dictabelt.hom/lbj_recordings/6607/wh10414.pdf ; see also Audio Recording of Telephone Call from President Lyndon B. Johnson to Chicago Mayor Richard J. Daley, Citation No. 10414, Lyndon B. Johnson Presidential Library, Univ. of Tex., archived at The Miller Center, Univ. of Va. (July 19, 1966), http://millercenter.org/presidentialrecordings/lbj-wh6607.02-10414 (last visited Feb. 14, 2016) (transcribed from .mp3 audio file by author) (emphasis added).

Regardless of intentions, however, gun control laws and regulations employed in the modern era have had the effect—like explicitly anti-minority gun control measures of the past—of disparately impacting the ability of people of color to exercise the constitutional right to keep and bear arms. The 1968 act limited importation of cheap foreign handguns and this similarly priced members of minority groups out of many available options given their disproportionately suffering from poverty. *See* J. Baxter Stegall, at 308.

Other measures similarly affect minorities. For example, the District of Columbia's strict licensing of gun dealerships. Despite the district government's having touted multiple licensed gun dealers, they didn't all sell to individual citizens. *See* J. Baxter Stegall, at 315 – 316 (citations omitted). As one "Federal Firearms Dealer" ("FFL") in the district has reported, one cannot easily go out and buy a gun in the nation's capital and one cannot directly ship a gun purchased in another state to one's home or office; rather, practically, citizens of the district must transfer a weapon through an FFL. *See id*. (citations omitted); *see also* Jennifer Maas, *D.C. man quietly transfers legal handguns*, WASHINGTON TIMES (August 9, 2009) https://www.washingtontimes.com/news/2009/aug/09/dc-man-quietly-transfers-legal-handguns/.. Among other burdens the paucity of licensed gun dealers in the district cause, such transfers entail extra "middleman" costs that again disproportionately impact minorities. *See id*. (quoting at the time what was apparently the only FFL in the District referring to his "customers").

In reality, there are, as at least one commentator has noted, strong parallels between poll taxes, literacy tests, and certain gun control schemes that can have the effect of preventing blacks and other minorities from owning guns much as they were once prevented from voting. Things such as gun permitting that has been required in some jurisdictions demonstrate this effect. Modern handgun licensing processes for New York City for one have been extensive. They have included completion of an application, submission to fingerprinting, various documentation, a showing of necessity, and of course, fees. See J. Baxter Stegall, at 319 – 320 (citing *See Firearms Licenses--Handgun License Information, Types of Licenses*, NEW YORK POLICE DEP'T, http://www.nyc.gov/html/nypd/html/firearms_licensing/handgun_licensing_information.shtml (last visited Feb. 29, 2016)). Illinois has used a similar scheme, and even required a ten-dollar fee for each "Firearms Owners' Identification Card." See J. Baxter Stegall, at 320 (citing *Checklist Prior to Applying, Firearms Owners Identification* (FOID), ILLINOIS STATE POLICE (Oct. 9 2014), https://www.ispfsb.com/Public/FOID.aspx (click "Checklist prior to applying")).

Another such attempted modern imposition is the tax some states or localities have tried to impose on gun ownership. Not long ago the City of Seattle passed a unique sales tax aimed at retail sales of firearms. The law sought to "promote public safety, prevent gun violence, and address in part the cost of gun violence in the City [of Seattle]" and imposed a $25 tax on every firearm sold by retailers within the City of Seattle. *See* J. Baxter Stegall, at 322 (citing various Seattle municipal web pages and dates last

visited by the author). The law thereby deterred poor minorities from purchasing affordable arms for their defense much as bans on certain weapons in the past priced them out of gun ownership.

Many common gun control schemes incorporate safety training and testing prior to the issuance of firearms permits. *See* J. Baxter Stegall, at 327. Testing of course generally requires an applicant be able to read in order to successfully complete the test. One such test is employed in Lowell, Massachusetts, as a barrier to the exercise of Second Amendment rights. *See id*. (citing Grant Welker, *City Gun Policy in Place, Despite Protests*, LOWELL SUN (Jan. 19, 2016), http://www.lowellsun.com/breakingnews/ci_29406406/city-gun-policy-place-despite-protests). These financial and other impositions on what this Court has declared a fundamental right bear resemblance to poll taxes and literacy tests. By their nature they impinge on the rights of those who disproportionately suffer from poverty and illiteracy. Accordingly, common gun control measures raise disturbing issues of equal protection under the United States and many state Constitutions and governments should proceed warily before proceeding with particularly onerous schemes or restrictions.

IV. The Right to "Bear" Arms Will Be Rendered Superfluous If New York's "Proper Cause" Requirement Stands

New York's "proper cause" handgun licensing regime requires a reading of the Second Amendment that would render the Founders' protection of the right to "bear" arms "insignificant, if not wholly superfluous." *Duncan v. Walker*, 533 U.S. 167, 174

(2001). When interpreting a statute, the Court must look first to the language of the statute, attributing plain and ordinary meaning to all words and phrases. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (assuming "absent a clearly expressed legislative intention to the contrary," that "the legislative purpose is expressed by the ordinary meaning of the words used"). "We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *see also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[I]n interpreting a statute a court should always turn to one cardinal canon before all others. . . .[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.").

The Court must give meaning to each and every word of the Second Amendment, not just those that are convenient to the New York legislature, police, or state courts. It is the Court's "duty 'to give effect, if possible, to every clause and word of a statute.'" *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *United States v. Menasche*, 348 U.S. 528, 538–539 (1955)). This "surplusage canon"[8] is a "cardinal principle of statutory construction." *Williams v. Taylor*, 529 U.S. 362, 404 389 (2000).

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[8] This principle is also sometimes referred to as the "canon against superfluity." *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011).

Dictionaries define "keep" as "[t]o retain; not to lose," "[t]o have in custody," and "[t]o hold; to retain in one's power or possession." 1 Dictionary of the English Language 1095 (4th ed.) (reprinted 1978) (hereinafter Johnson); N. Webster, American Dictionary of the English Language (1828) (reprinted 1989) (hereinafter Webster). This Court has found that the "most natural reading" of "keep Arms" in the Second Amendment is to "have weapons." *Heller*, 554 U.S. at 582.

On the other hand, to "bear" means to "carry." *See* Johnson 161; Webster. When used with "arms," the term has a meaning that refers to carrying for a particular purpose—confrontation. This Court has concluded that the "natural meaning" of "bear arms" in the Second Amendment is therefore 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." *Heller*, 554 U.S. at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 139-40 (1998) (Ginsburg, J., dissenting)).

"The addition of a separate right to 'bear' arms, beyond keeping them, should therefore protect something more than mere carrying incidental to keeping arms." *Young v. Hawaii*, 896 F.3d 1044, 1052-53 (9th Cir. 2018) (citing Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America 271 (1880) ("[T]o bear arms implies something more than the mere keeping.")). As this Court explained in *Heller*, these two Second Amendment rights are distinct and the phrase "keep and bear arms" does not merely convey a "unitary meaning." *Heller*, 554 U.S. at 591. Likewise, the

right to "keep and bear Arms" is not a "term of art," unlike phrases like "hue and cry" or "cease and desist." *Heller*, 554 U.S. at 591. "Keep" and "bear" therefore carry two distinct meanings and their inclusion in the text of the Second Amendment provides two distinct protections.

This Court's general reluctance to treat any statutory terms as surplusage is clear, but the Court should be "especially unwilling" to treat a term as surplusage when it occupies a "pivotal" place in the statutory scheme. *Duncan v. Walker*, 533 U.S. 167, 174 (2001). In *Duncan*, the Court was considering competing interpretations of the federal habeas statute. Title 28 U.S.C. § 2244(d)(2) provides: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." The Court noted that "State" occupies a particularly pivotal place in the statute. The respondent's rendition of the statute, however, would have eliminated the distinction between "State" and "Federal" collateral review. Adhering to its duty to "give each word some operative effect" where possible, the Court reversed and remanded, holding that an application for federal habeas corpus review is not an "application for State post-conviction or other collateral review." *Duncan v. Walker*, 533 U.S. 167, 175 (2001).

The word "bear" occupies a pivotal position in the Second Amendment, similar to the position "State" played in *Duncan*. The Second Amendment consists of only 27 words, imputing significance to each. Ultimately, just two verbs identify the rights of

the people receiving protection: to "keep" and to "bear." While the canon against surplusage is not absolute, "the canon is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013). That is precisely the danger present in this case where New York's "proper cause" regime would squeeze the right to "bear" arms so tightly that it becomes functionally indistinguishable from the right to "keep" arms.

The Court has at times taken a narrower view of the canon of surplusage, stating that the canon "assists only where a competing interpretation gives effect to every clause and word of a statute." *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011). This approach does not diminish the applicability of the canon to interpreting the language of the Second Amendment in the present case. In *Microsoft*, the Court considered competing interpretations of Section 282 of the Patent Act of 1952 where neither interpretation of the statute avoided excess language regarding a party's burden in challenging patent invalidity under the statute. There the "canon against superfluity" did not provide any assistance to the Court because neither interpretation sought to give effect "to every clause and word of [the] statute." *Id*. (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). In the present case, Petitioners' interpretation of the Second Amendment ascribes distinct meaning to both "keeping" arms and "bearing" them. By contrast, New York's statutory regime would narrow the right to "bear" arms to within the home, rendering the founders' protection of a right to "bear Arms" mere surplusage to the right to "keep" arms.

CONCLUSION

The Circuit split addressed in Petitioner's merits brief shows that the Court's decision in *Heller* is being honored in the breach. If lower courts or state legislatures disagree with the Second Amendment, the Constitution provides for an orderly, lawful way of amending its provisions. On its face, New York's licensing regime is inconsistent with the Second Amendment as enacted. Only by striking it down can the Bill of Rights and the rule of law be protected.

Respectfully submitted

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