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.

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

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF CRIMINAL LEGAL SCHOLARS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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UNOPPOSED MOTION FOR LEAVE TO FILE

Movants, a group of criminal law professors with expertise in the law of self-defense, seek leave to file out of time the accompanying brief as amici curiae in support of Respondents. Amicus briefs in support of Respondents were due two days ago, on September 21, 2021 (seven days after Respondents filed their brief). The parties do not oppose the motion, and there is good cause to grant it.

First, Movants and their counsel have been working diligently to prepare their brief for timely filing for the last six weeks. Due to an internal administrative error, counsel mistakenly calendared September 23, 2021, as the due date for the brief. Movants and their counsel became aware of this error only on the morning of September 22, 2021, just after the deadline to file amicus briefs had passed. Movants and their counsel have the deepest respect for this Court and its processes, and regret not filing their brief on time two days ago. Movants and their counsel respectfully ask that their calendaring error not trump their diligence in preparing the accompanying brief to aid the Court.

Second, granting leave to file will not prejudice the parties or the Court. All parties filed notices of blanket consent to timely amicus briefs. As soon as Movants' counsel became aware of the calendaring error, counsel conferred with counsel for the parties. Respondents consent to this motion, and counsel for Petitioners do not oppose it, instead taking no position. Moreover, movants' two-day filing delay should not hinder this Court's consideration of the case. Oral argument will not take place until November 3, 2021, and the accompanying brief is intended only to aid the Court in its consideration of the question presented.

Third, Movants' proposed brief would significantly assist the Court in resolving this case. In *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008), the Court observed that self-defense is at the "core" of the rights granted by the Second Amendment. Yet the parties' briefing devotes relatively little attention to the law of self-defense. Movants' proposed amicus brief provides historical and contemporary background on the law of self-defense that will assist this Court in deciding the question presented.

CONCLUSION

The Court should grant leave to file the accompanying brief two days out of time.

Respectfully submitted.

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September 23, 2021

QUESTION PRESENTED

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

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INTEREST OF AMICI CURIAE

Amici curiae are legal scholars with expertise in substantive criminal law, particularly the law of self-defense. They have written extensively on the subject of self-defense, and their scholarship has been published by leading law journals and cited by federal and state courts across the country. Amici's interest in this case is in providing the Court important background on the law of self-defense, in both historical and present-day contexts. From the early days of the Republic through the present, self-defense has been a narrow concept in American criminal law, applied only on a case-by-case basis and under very specific circumstances. Amici's expertise renders them particularly well-suited to assist the court in considering the role of self-defense law as applied in this case.[*]

George P. Fletcher is the Cardozo Professor of Jurisprudence at Columbia Law School. He is recognized as one of the country's foremost scholars in the fields of comparative and international criminal law. He is the author of over 150 articles published in leading law journals across the United States, 20 books, and dozens of op-eds and articles in publications such as The New York Times, The New Republic, The New York Review of Books, and The Washington Post. His articles have been widely cited by district and appellate courts across the country, including by the United States Supreme Court. *See, e.g.*, *Patterson v. New York*, 432 U.S. 197, 202 n.7 (1977) (citing George P.

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[*] All parties have filed a notice of blanket consent with the Clerk. In accordance with Rule 37.6, no part of this brief was authored by any party's counsel, and no person or entity other than amici, or their counsel, funded its preparation or submission.

Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 Yale L.J. 880, 882-84 (1968)).

Guyora Binder is the S.U.N.Y. Distinguished Professor of Law and Hodgson Russ Scholar at the State University of New York at Buffalo. A leading authority on homicide law and the historical development of American criminal law, he is the author of *Criminal Law* (Oxford University Press 2016) and *Felony Murder* (Stanford University Press 2012) and co-author of *Criminal Law: Cases and Materials* (Little Brown 1996; Wolters Kluwer 2000, 2004, 2008, 2012, 2017, 2021). His criminal law scholarship is published or forthcoming in the Yale Law Journal, the Stanford Law Review, the Columbia Law Review, the Michigan Law Review, the Notre Dame Law Review, the Boston University Law Review, the Illinois Law Review, the Indiana Law Journal, the University of Toronto Law Journal, the Emory Law Journal, and the American Criminal Law Review. His scholarship has been cited by the Sixth, Seventh and Ninth Circuits and numerous federal district courts nationwide.

Brenner Fissell is an associate professor of law at Hofstra University. His scholarship on substantive criminal law has been published or is forthcoming in the Fordham Law Review, the Notre Dame Law Review, the U.C. Irvine Law Review, and other leading law journals. See, e.g., *Local Offenses*, 89 Fordham L. Rev. 837 (2020); *Capital Punishment of Unintentional Felony Murder*, 92 Notre Dame L. Rev. 1141 (2017), with Guyora Binder and Robert Weisberg; *When Agencies Make Criminal Law*, 10 U.C. Irvine L. Rev. 855 (2020). He regularly represents criminal defendants appealing from military court-martial convictions.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court observed that self-defense is at the "core" of the right conferred by the Second Amendment. Here, petitioners argue that New York's laws regulating firearms permits infringe their asserted "right to carry arms for self-defense." Pet. Br. 40. Although self-defense is at the "core" of the right they assert, petitioners do not mention the substantive law of self-defense, much less explain how it interacts with or qualifies their Second Amendment rights. Amici—a group of criminal law professors well-versed in American self-defense law—submit this brief to provide a historical and contemporary accounting of how self-defense has been understood in this country's legal system to ensure that such an account informs the Court's consideration of the constitutional debate in this case.

Amici take no position on the ultimate question before this Court—whether New York's firearms-permitting regime passes constitutional muster. Instead, they wish to present two important points for the Court's consideration.

First, the American legal system does not recognize, and indeed has never recognized, a broad personal right to use lethal force outside the home in self-defense. Instead, self-defense has always been construed narrowly as a regulated defense to criminal charges that may sometimes justify (or reduce the criminal penalties for) use of otherwise-unlawful force. It often does not necessarily apply even if a person subjectively believed that lethal force was necessary to defend herself. Moreover, self-defense

law varies significantly from state to state, making it impossible to identify a uniform, national concept of self-defense.

Second, if self-defense is at the Second Amendment's "core," as this Court has held, then the Second Amendment should be construed against the background of the pertinent state's self-defense law, which may differ in significant respects from state to state. Because self-defense is a narrow legal defense that does not apply the same way in every state, the Second Amendment must necessarily allow a state to tailor firearms access to the scope of self-defense that state authorizes. In New York, for example, subject to a handful of exceptions, a person may not use lethal force in self-defense outside of the home unless she: (i) reasonably believes an attacker is about to kill (or attempt to kill) her or someone else; and (ii) has exhausted reasonable options to retreat. N.Y. Penal Law § 35.15(2)(a). Because there are only a few rare scenarios in which New York would permit petitioners to lawfully use firearms in self-defense, it makes no sense to argue that New York cannot meaningfully restrict their right to carry a firearm for self-defense outside the home. By contrast, a state like Florida, which recognizes a fairly broad conception of self-defense, may rationally have less leeway to restrict a person's ability to carry a firearm outside the home because it gives its citizens greater leeway to use firearms in self-defense in the first place. In light of these differences, a state such as New York, which permits the use of deadly force only in narrow circumstances and, in some situations, only after retreat, may be able to justifiably place greater restrictions on its citizens' access to firearms for self-defense than a "stand-your-ground" state.

This brief proceeds in four parts. Part I provides a brief overview of judicial opinions discussing the role of self-defense operating at the "core" of the Second Amendment.

Part II provides a historical account of self-defense's limited nature both at English common law as well as in the early United States. In the American and English legal traditions, self-defense has long been understood as a closely regulated justification defense that one can raise in limited, often narrowly tailored circumstances to avoid a criminal penalty for an otherwise unlawful use of force. Self-defense law has never been understood to confer an affirmative right for individuals to carry firearms wherever or whenever they please in case they are attacked. Instead, self-defense has historically focused on the specific circumstances of an encounter, evaluating the imminence of a life-threatening attack, the necessity for using life-threatening force in response, whether a defendant's belief in imminent harm was objectively reasonable, and, if the attack occurred outside of one's home, whether the defendant could have retreated to avoid the danger.

Part III explains how the meaning and availability of self-defense vary broadly from state to state. Today, what constitutes self-defense in a "stand-your-ground" jurisdiction like Florida, which does not require one to retreat from a would-be attacker, differs greatly from what constitutes self-defense in New York, which still requires one to retreat, if possible, when outside the home.

Finally, in Part IV, amici argue that, because self-defense is at the Second Amendment's "core," but does not have a common, unitary national meaning,

individual states must necessarily retain some latitude to tailor firearms access to the scope of self-defense available in the relevant jurisdiction. An attempt to fashion a generalized, national Second Amendment "right" to self-defense would run counter to centuries of legal thought and understanding as to what self-defense actually means. Amici urge this Court to consider the long-held understanding that self-defense is a legal defense that differs from state to state, and to recognize in its decision that firearms regulations should be rationally tailored to the scope of self-defense available in the relevant jurisdiction.

ARGUMENT

I. Current jurisprudence has placed self-defense at the "core" of the Second Amendment.

The Second Amendment to the United States Constitution states that "[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. In its landmark decision in *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008), this Court held that the concept of self-defense is at the Second Amendment's "core." The Court was then addressing a D.C. statute that prohibited the possession of "usable handguns in the home." *Id.* at 573. The role of firearms in the home was also the focus of the Court's holding that D.C.'s "ban on handgun possession *in the home* violates the Second Amendment," and its direction that the District issue a license for firearm possession in the home. *Id.* at 635 (emphasis added).

Courts interpreting *Heller* have followed suit, focusing on self-defense as the "core" of the Second

Amendment. *See, e.g.*, *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. N.J.*, 910 F.3d 106, 117 (3d Cir. 2018) (calling self-defense the "core" of the Second Amendment); *Gould v. Morgan*, 907 F.3d 659, 671 (1st Cir. 2018) (same); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (same). For example, in *United States v. Masciandaro*, the Fourth Circuit rejected a constitutional challenge to a prohibition on firearm possession in a national park. 638 F.3d at 460. In a concurring opinion, Judge Wilkinson noted that an expansion of *Heller* beyond the home would "portend all sorts of litigation over schools, airports, parks, public thoroughfares, and various additional government facilities" as well as any supposed "right in a private facility where a public officer effects an arrest." *Id.* at 475 (Wilkinson, J. concurrence). Judge Wilkinson noted that such an expansion would amount to "a vast *terra incognita* that courts should enter only upon necessity and only then by small degree." *Id.*

As discussed in further detail below, self-defense has long operated subject to tight state regulation. Moreover, a person's ability to successfully raise a self-defense argument may turn on whether she was within her dwelling or outside it at the time in question. As such, *Heller*'s focus on the home is consistent with both historical and modern-day conceptions of self-defense, which have long distinguished between the dwelling and the outside world when determining what conduct is and is not justified.

II. Self-defense has historically operated as a narrow legal defense, with limited applicability outside of the home.

When this Court stated in *Heller* that self-defense is at the "core" of the Second Amendment, it specifically noted that it was referring to "lawful" self-defense. 554 U.S. at 630. In a subsequent opinion, the Court explained that the core purpose of self-defense has been "recognized by many legal systems." *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010). Consistent with that analysis, it is left to individual legal systems to determine when to recognize self-defense as a justification for the use of force. In the American legal tradition, self-defense has existed as a narrowly tailored legal defense, sanctioning the use of deadly force, such as a firearm, only in a limited set of circumstances and operating as "an exception" to the "general sanction" on acts of violence. Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 Cal. L. Rev. 63, 82 (2020).

A. At common law, the scope of lawful self-defense was extremely narrow.

A comprehensive survey of self-defense in the United States must begin with the English common law. The right of Englishmen to arm themselves in self-defense, recognized as early as the 1689 Declaration of Rights, had "serious limitations." Liz Mineo, *The Loaded History of Self Defense*, The Harv. Gazette, Mar. 7, 2017. English law allowed deadly force only to prevent equally deadly force, providing that "the killing of a Wrong-doer in the making of such Defence, may be justified in many Cases; as where a Man kills one who assaults him in the Highway to rob or murder him." William Hawkins, *A Treatise of the*

Pleas of the Crown 71, § 21 (1716). The Declaration of Rights went on to enumerate a limited set of circumstances in which killing in self-defense might be acceptable: where a woman killed an attempted rapist, where a home owner killed an attempted arsonist, and where a would-be victim killed an attempted murderer. *Id*. In other circumstances, however, lethal self-defense "could not [be] justified" and the proper course was to attempt to "apprehend" the wrongdoer rather than try to kill him. *Id*.

In addition, the Declaration imposed a duty to retreat before using deadly self-defense. Mineo, *supra*. One notable exception to the duty to retreat existed at common law. In 1604, the King's Bench in *Semayne v. Gresham*, 77 Eng. Rep. 194 (K.B. 1604) rejected a duty to retreat in one's own home. *Id*; Lacey N. Wallace, *Castle Doctrine Legislation: Unintended Effects for Gun Ownership?*, 11.2 Just. Policy J., (2014).

Commentators on English common law, including William Blackstone, also recognized limits to self-defense, noting that deadly self-defense is only permissible where the initial aggressor employs deadly force. According to Blackstone, "[w]here a crime, *in itself capital*, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting." 4 William Blackstone, *Commentaries On The Laws of England* 181 (1765-69); *see* Caroline Light, *Stand Your Ground: A History Of America's Love Affair With Lethal Self-Defense* 27 (2017) (emphasis added). John Locke similarly argued that self-defense involving bloodshed was appropriately used against those "whoso sheddeth man's blood." Light at 19; John Locke, *Second Treatise of Government* (1st ed. 1680; London, 1764).

B. This limited scope of self-defense continued into the founding of the United States.

Early American practice adopted and codified the English rule that self-defense has limited applicability. In both colonial America and the early days of the Republic, statutes and common law generally provided that the carrying of dangerous weapons for self-defense was justified only where one's fear of bodily harm was reasonable and that harm was imminent. Nineteenth-century Massachusetts, for example, allowed citizens to carry guns only if they had an "'imminent' or 'reasonable' fear of assault or injury to their person, family, or property." Patrick J. Charles, *The Second Amendment and the Basic Right To Transport Firearms For Lawful Purposes*, 13 Charleston L. Rev. 126, 145 (2019). In other states, such as West Virginia, Missouri, Tennessee, and Texas, citizens were allowed to carry weapons only if they reasonably feared unlawful attack or (as in the case of police officers) were otherwise entitled to do so by law. In these states, the burden of proving that an individual's conduct was lawful was borne by the individual carrying the dangerous weapon. *Id*. These states recognized, then, that self-defense was limited in nature and narrowly tailored to specific threats that could justify the use of otherwise unlawful force.[†]

[†] *See, e.g.*, *State v. Barnett*, 11 S.E. 735, 736 (W. Va. 1890) ("It is not enough for the defendant to state or show by other witnesses the general proposition that he had good cause to believe, and did believe, that he was in danger … . [I]t must be shown what were the facts constituting the basis or ground of the defendant's belief, so that it may be determined by the jury or court whether there existed cause to inspire fear, and whether the *(cont'd)*

The 1806 *Selfridge* trial provides an instructive example of early American notions of self-defense. The *Selfridge* case "became the legal authority for the plea of self-defense and was cited well into the late nineteenth century." Jack Tager, *Politics, Honor, and Self-Defense in Post-Revolutionary Boston: The 1806 Manslaughter Trial of Thomas Selfridge*, 37(2) Hist. J. of Mass. 85, (2009) (hereinafter Tager); *see also* Trial of Thomas O. Selfridge, attorney at law, before the Hon. Isaac Parker, Esquire, for killing Charles Austin, on the public exchange in Boston, August 4th, 1806 (Boston 1806) (hereinafter *Selfridge* Trial). On August 4, 1806, Thomas Selfridge, a Federalist lawyer, shot and killed Charles Austin. On trial for manslaughter, Selfridge asserted that Austin struck him forcefully with a cane on his head, and that he fired his pistol in self-defense. Tager, *supra*, at 88. From the beginning of the trial, the government argued that self-defense

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defendant, as a reasonable man, should have feared."); *State v. Livesay*, 30 Mo. App. 633, 637 (1888) ("'It devolves on him (the defendant) to show that, at the time he so carried said revolver, he had good reason to carry same as aforesaid',—that is, in the necessary defence of his person."); Charles, *supra*, at 151 ("Texas law prohibited the carrying of 'any pistol, dirk, dagger, slung-shot, sword-cane, spear, brass-knuckles, bowie knife, or any other kind of knife manufactured or sold for the purpose of offense or defense, unless be has reasonable grounds for fearing an unlawful attack on his person … .'"); *id.* at 155 ("Nashville, Tennessee … adopted an ordinance prohibiting the carrying of any 'pistol, bowie, knife, dirk-knife, slung-shot, brass knucks [sic] or other deadly weapon' unless the person was a police officer, 'entitled by law to carry such deadly weapons,' or was in the 'act of handling or moving such deadly weapons in any ordinary business way … .'"); *see also* Br. of Amicus Curiae Patrick J. Charles in Support of Neither Party, *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525 (2020).

was a narrow legal defense against criminal liability in limited circumstances. Quoting Blackstone, the prosecution explained that homicide in self-defense was justified only "'when committed in defence of chastity either of one's self or relations' and that a woman 'killing one who attempts to ravish her' may be justified, 'and so too the husband or father may justify killing a man, who attempts a rape upon his wife or daughter.'" Caroline Light, *Stand Your Ground: A History Of America's Love Affair With Lethal Self-Defense* 23 (2017).

The prosecution went on to bring in several witnesses, all of whom attested that Selfridge fired the pistol before Austin struck him with his cane, that there was no cane strike at all, or that Selfridge premeditated the murder when he packed a loaded pistol on his way to see Austin about a political dispute. Tager, *supra*, at 92-94.

The notion that self-defense is a limited defense from liability was so well-established at the time of the *Selfridge* trial that Selfridge's defense counsel refrained from arguing for any type of unlimited right to self-defense. Instead, the defense "argued it was evident that one had the right to kill *when protecting one's own life*." *Id.* at 94 (citing John D. Lawson, *American State Trials: A Collection of the Important and Interesting Criminal Trials which have taken place in the United States, from the beginning of our Government to 1920*, at 574-75 (Wilmington, Delaware, 1972)) (hereinafter Lawson) (emphasis added). All of the defense witnesses were called to testify that Selfridge was in immediate danger when he fired his pistol. Tager, *supra*, at 94-97.

The presiding judge's jury instructions further emphasized the well-accepted limitations on self-defense. At the end of the trial, Judge Parsons instructed the jury that "[a] man may repel force by force, in defense of his person, against anyone who manifestly intends … to kill him … and if he kills him in so doing, it is justifiable self-defense. But a bare fear … unaccompanied by an open act, indicative of such an intention, will not warrant him in killing … otherwise the killing of the assailant will not be justifiable homicide." *Selfridge* Trial, *supra*, at 8. Judge Parker further instructed the jury regarding the duty to retreat, stating that if Selfridge "could have escaped without killing Austin 'the defense set up has failed, and the defendant must be convicted.'" Tager, *supra*, at 94 (citing Lawson, *supra*, at 697). Selfridge was ultimately found not guilty of manslaughter by a jury of his peers on the grounds of self-defense. *Id* at 103.

The *Selfridge* trial makes it clear that, consistent with the English common law, founding-era Americans understood that lawful self-defense was limited to narrow circumstances. This conception of self-defense has continued into the modern American legal system.

III. Modern-day U.S. legal systems retain a limited notion of self-defense, but key differences exist across the states.

Consistent with the historical understanding of self-defense, modern-day self-defense permits otherwise unlawful force so long as the actor "reasonably believes its use necessary to protect against imminent and unlawful attack." Fritz Allhoff, *Self-Defense Without Imminence*, 56 Am. Crim. L. Rev. 1527, 1529 (2019). Modern U.S. legal systems have generally

used the English common law and early American thought as the basis for their conceptions of self-defense. But while commonalities persist, the particulars of self-defense doctrine have diverged sharply. Some states, such as New York, hew closely to traditional conceptions, narrowly applying self-defense under very specific circumstances and, in many instances, imposing a duty to retreat before the use of deadly force. In contrast, recent years have seen another group of states adopt "stand-your-ground" laws, which broaden the scope of permissible uses of deadly force. These crucial differences prevent any widespread, common definition of self-defense across the states.

A. Modern-day self-defense law has retained certain principles from English and early American legal practices.

As a general rule, modern self-defense law continues to maintain the goal of protecting life, as it considers deadly force unreasonable "to prevent a mere trespass or theft of personal property, regardless of whether the harm could not otherwise be prevented." T. Markus Funk, *Rethinking Self-Defense: The 'Ancient Right's' Rationale Disentangled* 174 (2021). The value that the American legal systems place on the preservation of life applies not only to the defender but also to any alleged attacker. For example, self-defense's necessity element precludes the use of deadly force "if non-deadly response would be sufficient to repel the attack." *Id.* at 181. Similarly, self-defense's imminence requirement commonly covers only an attack that is "about to occur," perhaps within minutes or seconds, rather than one that may potentially occur in the future. *Id.* at 178.

Finally, to avail oneself of a self-defense justification: (1) the proponent must "subjectively believe that the force is necessary to prevent an imminent attack, and (2) the facts must be such that a reasonable person would objectively agree with the defender's conclusion." *Id.* at 174. The law does not generally protect someone who seeks out or enters a conflict and then attempts to retroactively "cloak himself in the justification of self-defence." *Id.* at 184. In many states, these requirements mean that self-defense serves as a statutory defense to such crimes as murder and manslaughter. *See, e.g.*, Wis. Stat. § 939.48 (2014); Del. Code Ann. tit. 11, § 464; Or. Rev. Stat. Ann. § 161.209; Ala. Code § 13A-3-23. Meanwhile, in New York State, self-defense is a statutory defense based on justification. N.Y. Penal Law § 35.15.

Despite these general pronouncements about self-defense law, the rules are not uniform across the states. While the 1962 Model Penal Code attempted to create some form of consistency on this issue, the majority of states have not aligned their self-defense provisions with the Code. Funk, *supra*, at 167. And, as detailed in Section III.B, certain significant differences in self-defense law now exist between states, most notably regarding "stand-your-ground jurisdictions." *See, e.g.*, *id.* 182 (comparing the requirement in some jurisdictions for a defender outside the home to "take advantage of an available safe retreat option" with the option in other jurisdictions to "stand his ground and defend himself *even if* safe retreat is easily obtainable" (emphasis in original)). While there are certain broad similarities across state laws stemming from historical practices, it would be inaccurate to conclude that any national standard for or "right to" self-defense exists. For courts to construe the Second

Amendment as encompassing a uniform law of self-defense would thus ignore the sweep of history and the significant differences in criminal law across the country.

B. Under New York law, the availability of self-defense is extremely limited.

New York has long sharply circumscribed the circumstances under which individuals can defend themselves using deadly force because the state has long sought to protect against the unnecessary loss of life. New York has codified the defense of justification, providing that "[a] person may not use deadly physical force upon another person … unless [h]e reasonably believes that such other person is using or about to use deadly physical force." N.Y. Penal Law § 35.15(2)(a). "Deadly physical force is defined as force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury." *Matter of Y.K.*, 87 N.Y.2d 430, 433 (1996). Justification "does not operate to excuse a criminal act," but instead reflects the "common-law" privilege "of an individual to repel a threat to life" under limited circumstances. *People v. McManus*, 67 N.Y.2d 541, 546 (1986). New York imposes five significant limits on the defense of justification to ensure that individuals use deadly force in self-defense only as a last resort.

1. First, New York has "tended toward protection of life by imposing a generalized duty to retreat in the face of deadly force." *People v. Aiken*, 4 N.Y.3d 324, 327 (2005). Indeed, "throughout [its] statutory and decisional law," New York has required an individual to retreat before using deadly force. *People v. Jones*, 3 N.Y.3d 491, 494 (2004). This requirement

"reflects the idea that a killing is justified only as a last resort, an act impermissible as long as other reasonable avenues are open." *Id.*; *see also People v. Kennedy*, 159 N.Y. 346, 349 (1899) ("[T]he right of attack for the purpose of self-defense does not arise until he has done everything in his power to avoid its necessity."). The duty to retreat is so fundamental in New York that when a court once held that a defendant was justified "in standing his ground and … destroying the person making the felonious attack," *People v. Ligouri*, 284 N.Y. 309, 317 (1940), the legislature quickly responded by "[c]odifying what had been the common law of the state prior to *Ligouri*"—*i.e.*, withholding the justification defense "when the defender 'knows that he can avoid the necessity of using such force … by retreating," *Aiken*, 4 N.Y.3d at 328 (citation omitted).

Despite imposing a general duty to retreat, New York has adopted exceptions for the use of force within one's home through its castle doctrine, which is consistent with historical practice in both England and America. That doctrine does not require individuals to retreat when facing certain attacks in their homes because "retreat[ing] from one's home necessarily entail[s] increased peril and strife." *Aiken*, 4 N.Y.3d at 327 (citation omitted); *see also People v. Tomlins*, 213 N.Y. 240, 243 (1914) (Cardozo, J.) ("If assailed [at home] …. he is under no duty to take to the fields and the highways, a fugitive from his own home."). In addition to individuals' personal safety, New York accords "peculiar immunity" to the home because requiring individuals to retreat through "the back door" would also "expose[] their family to danger …. ." *Aiken*, 4 N.Y.3d at 327. Thus, because being confronted with physical force while at home poses unique risks to personal and family safety, New York's "Penal Law

and its common-law history" do not require individuals to retreat before using deadly force to repel attacks. *Id.* at 330.

The castle doctrine is a narrow exception to the duty to retreat, however. New York has carefully limited the doctrine to ensure that the use of deadly force is justified only when necessary. At the outset, the castle doctrine cannot be invoked by "the original aggressor." *People v. Watts*, 57 N.Y.2d 299, 302 (1982). Additionally, the castle doctrine is inapplicable unless the individual "exercises exclusive possession and control over the area in question." *People v. Hernandez*, 98 N.Y.2d 175, 183 (2002). For instance, in *Aiken*, the Court of Appeals held that the defendant could not use deadly force before attempting to retreat, even though he was standing in the doorway of his apartment when confronted with force. 4 N.Y.3d at 327. The court concluded that expanding the castle doctrine to apartment doorways was incompatible with New York's policy to avoid preventable deaths because the "defendant need only have closed the door, or pulled up the drawbridge, to be secure in his castle." *Id.* at 330.

2. As a second important limit to the defense of justification, New York requires that the individual using deadly force not only subjectively believe that the force was reasonably necessary, but also that this belief be objectively reasonable under the circumstances. Indeed, "[a]s early as 1849, the New York Court of Appeals stated that the … self-defense statute embodied an objective standard of reasonableness." David M. Posner, *The Proper Standard for Self-Defense in New York: Should People v. Goetz Be Viewed As Judicial Legislation or Judicial Restraint?*, 39 Syracuse L. Rev. 845, 855 (1988). When New York adopted Penal Law § 35.15 in 1965, the

legislature departed from the Model Penal Code "to incorporate the long-standing requirement of 'reasonable ground' for the use of deadly force and apply it to the use of ordinary force as well." *People v. Goetz*, 68 N.Y.2d 96, 112 (1986).

After some lower courts had initially construed § 35.15 to require only that the defendant subjectively believe that using deadly force was necessary, the Court of Appeals held in *Goetz* that the statute also requires that the use of force be objectively reasonable. *Id.* at 111. "To completely exonerate … an individual, no matter how … bizarre his thought patterns," the court reasoned, "would allow citizens to set their own standards for the permissible use of force." *Id.*; *see also People v. Sanchez*, 31 N.Y.3d 949, 950 (2018) ("[E]ven assuming that the jury could rationally find that defendant subjectively believed he had been threatened with the imminent use of deadly physical force, the jury could not rationally conclude that his reactions were those of a reasonable [person] acting in self-defense." (citation and internal quotation marks omitted)). In other words, New York's "objective standard … avoid[s] a regression to a code of the Old West" where individuals are justified in using deadly force far more often, even in circumstances where it is not objectively necessary, and even where the loss of life is avoidable. Posner, *supra*, at 855.

3. Third, further narrowing the circumstances in which an individual is justified in using deadly force in self-defense, "a defendant is never justified in using deadly physical force if that defendant is … the first person in an altercation who uses or threatens the imminent use of deadly physical force." *People v. Brown*, 33 N.Y.3d 316, 320 (2019). Thus, in *Brown*, the Court of Appeals held that the defendant could not claim

self-defense because, even though the victim "swiped at the [defendant's] gun," it was "only after [the defendant] wielded it." *Id.* at 321.

4. Fourth, New York requires that the force used be proportional to the force being defended against. Thus, a defendant is typically unjustified in using a weapon in self-defense when the victim is unarmed or where there is no reason to believe that the defendant knew that the victim was armed. *See, e.g., People v. Perry*, 210 A.D.2d 437, 438 (N.Y. App. Div. 1994) ("The defendant's contention that the trial court erred in failing to charge the defense of justification is … without merit [because] there is no reasonable view … that would indicate that the deceased was ever armed with a weapon."). In *People v. Torres*, 182 A.D.2d 788, 791 (N.Y. App. Div. 1992), for example, the court held that the defendant was not justified in shooting the victim in the foot—even though the victim drew his gun first—because the victim had discarded his gun before the defendant began shooting.

5. Fifth, New York generally prohibits the use of weapons in self-defense if the circumstances indicate that the defendant could have rebuffed the attack without one. For example, in *People v. Heatley*, 116 A.D.3d 23, 26 (N.Y. App. Div. 2014), the defendant testified that the victim had him in a headlock, and that the defendant was afraid that he would "pass out and then 'be demolished.'" The appellate court upheld the jury's rejection of the defendant's argument that he was justified in using a knife to stab the victim because "the victim was five inches shorter and only slightly heavier than defendant and that he was not armed." *Id.*

*   *   *

Accordingly, New York has carefully constructed several significant limits to an individual's lawful use of deadly force in self-defense, all of which are aimed at ensuring it is used only as a last resort.

C. Despite certain commonalities, self-defense law varies from state-to-state and no uniform national standard exists.

By asserting that they have a "right" to carry a concealed handgun for self-defense, petitioners imply that self-defense has a commonly understood, nationwide meaning that defines the Second Amendment's scope. Petitioners thus argue that New York's concealed weapons permitting regime violates the Second Amendment because it restricts their "right" to self-defense. *See* Pet. Br. at 40 ("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.").

Despite their purported focus on self-defense, petitioners do not articulate what scope of self-defense the Second Amendment embraces. This omission is critical because if this Court were to hold, as petitioners urge, that the Second Amendment guarantees the right to carry a concealed firearm for self-defense, courts and legislatures must know what self-defense means for Second Amendment purposes in order to determine whether any particular law impermissibly burdens that right. In fact, however, self-defense does not have a unitary nationwide meaning. To the contrary, there have long been significant differences in self-defense law from state to state, and these

differences are only growing larger and more important as time goes on.

1. To take one example, states differ sharply over whether, and under what circumstances, a person has a duty to retreat rather than use deadly force to defend themselves. Under English common law, in most threatening situations, a person had a duty to retreat to the greatest extent possible (*i.e.*, "to the wall") before he could use lethal force to prevent his own death or serious bodily injury. Richard Maxwell Brown, *No Duty to Retreat*: *Violence and Values in American History and Society* 3-4 (1991). For many years after the Founding, American courts generally followed that view. *See, e.g.*, *Allen v. United States*, 164 U.S. 492, 498 (1896) (recognizing the "general duty to retreat, instead of killing, when attacked"). But over time, many states (and this Court) rejected the common law duty to retreat. *See, e.g.*, *Brown v. United States*, 256 U.S. 335, 343 (1921) (Holmes, J.) (rejecting the view of Lord Coke and others that there is a general duty to retreat and instead holding that "the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went farther than he was justified in doing; not a categorical proof of guilt"); *Weiand v. State*, 732 So. 2d 1044, 1049 n.4 (Fla. 1999) (noting that as of 1999 "a majority of jurisdictions do not impose a duty to retreat before a defendant may resort to deadly force when threatened with death or great bodily harm"). Even today, a diverse group of 17 states ranging from New York to Wyoming still recognize a duty to retreat in at least some circumstances. *See, e.g.*, N.Y. Penal Law § 35.15(2)(a) ("the actor may not use deadly physical force if he or she knows that with complete personal safety, to oneself and others he or

she may avoid the necessity of so doing by retreating," subject to exceptions); *Baier v. State*, 891 P.2d 754, 760 (Wyo. 1995) ("prior to resorting to deadly force, a defendant has a duty to pursue reasonable alternatives under the circumstances, and that among those reasonable alternatives may be the duty to retreat").

Thus, in some states, including New York, a person cannot use deadly force, even when personally threatened with deadly force, if she could avoid the danger by retreating some place safe (usually her home). *See, e.g.*, N.Y. Penal Law § 35.15(2)(a). In other states, however, including the 24 states like Florida and Texas that have enacted so-called "stand-your-ground" laws, a person need not retreat before using otherwise-justified deadly force if she has a lawful right to be at the place where deadly force is committed. *See, e.g.*, Fla. Stat. Ann. § 776.012(2) ("A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in a place where he or she has a right to be."); Tex. Penal Code § 9.32(c) ("A person who has a right to be present at the location where the deadly force is used, who has not provoked the person against whom the deadly force is used, and who is not engaged in criminal activity at the time the deadly force is used is not required to retreat before using deadly force as described by this section.").

2. To take another example, states differ markedly in the degree to which a person may claim self-defense after playing some role in provoking the altercation necessitating the defense. *See* Paul H. Robinson, *Causing the Conditions of One's Own*

Defense: A Study in the Limits of Theory in Criminal Law Doctrine, 71 Va. L. Rev. 1, 2-27 (1985) (cataloguing the various approaches states have used over the years in taking into account a defendant's fault in evaluating her self-defense justification).

For example, some states, including South Carolina and Virginia, do not permit a self-defense justification unless the defendant was essentially without fault in provoking the altercation. *See, e.g.*, *State v. Slater*, 644 S.E.2d 50, 70 (S.C. 2007) (denying defendant self-defense charge where he returned fire while intervening in a robbery, killing the victim, because defendant was "not without fault in bringing on the difficulty"); *Scott v. Commonwealth*, 129 S.E. 360, 362 (Va. 1925) (affirming murder verdict against defendant who stabbed an assailant who was on top of him beating him with steel knuckles because defendant provoked the assault by insulting the victim's father).

Other states, like Texas and Arizona, have held that a defendant's role in causing an altercation does not defeat a self-defense justification unless the defendant acted in a way that would foreseeably escalate the conflict. *See, e.g.*, *State v. Jackson*, 382 P.2d 229, 232 (Ariz. 1963) (provocation must be "deliberately calculated to lead to further conflict" to defeat self-defense); *Smith v. State*, 965 S.W.2d 509, 514 (Tex. Crim. App. 1998) (en banc) (the defendant must "do or say something which actually provokes the attack before he will lose his right to self-defense").

A third group of states, including Delaware and Pennsylvania, have adopted an even narrower version of the provocation doctrine, holding that the defendant's ability to claim self-defense can only denied

where he tried to kill or seriously harm the victim earlier in the same encounter. *See, e.g.*, 11 Del. C. § 464(e)(1) (self-defense unavailable if the "defendant, with the purpose of causing death or serious physical injury, provoked the use of force against the defendant in the same encounter"); 18 Pa. C.S.A. § 505(b)(2)(i) (self-defense unavailable if "the actor, with the intent of causing death or serious bodily injury, provoked the use of force against himself in the same encounter").

IV. State-specific differences in self-defense law, coupled with historical precedent, militate against creating a national standard of or right to self-defense.

The state-specific differences discussed above in self-defense law are critically important to the issues before this Court. If the Second Amendment guarantees a right to carry concealed weapons for self-defense, as petitioners urge, surely that right must be tailored to the scope of the self-defense justification available in that person's home state. Otherwise, a person would be able to publicly carry a firearm even if their state recognized few or no situations in which that person could lawfully use that firearm in self-defense. And the Second Amendment surely does not serve as a method to constitutionalize state self-defense law, operating in such a way as to make "stand-your-ground" the national baseline standard.

Thus, even under petitioners' view of the Second Amendment, states must have some leeway in designing their firearms regulations to account for the scope of their particular self-defense doctrine. A state that permits the use of deadly force only if the defendant has retreated to the fullest extent possible and was without fault in causing the altercation may be able to

justifiably place greater restrictions on its citizens' access to firearms for self-defense than a state that permits a defendant to stand his ground and use lethal force as long as he did not start the encounter with an intent to kill or maim his adversary.

At bottom, while amici do not take an ultimate position on the case before this Court, they urge the Court to account for the state-by-state differences in self-defense law when analyzing New York State's permitting regime, so that the Second Amendment maintains a rational connection to lawful self-defense, however states may choose to define that evolving concept.

CONCLUSION

In conclusion, amici urge the Court to consider the history, scope, and nationwide diversity in the law of self-defense in addressing the constitutional questions presented here.

Respectfully submitted.

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September 23, 2021