No. 20-843

In the

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The courts of appeals are in open and acknowledged conflict over the exceptionally important question of whether the Second Amendment allows the government to prohibit ordinary law-abiding citizens from carrying handguns outside the home for self-defense. Respondents' stubborn efforts to deny that entrenched circuit split provide no reason to vindicate their plea to preserve it. The First, Second, Third, and Fourth Circuits have upheld permitting regimes under which law-abiding citizens cannot do so without making a special showing of "proper cause." The D.C. Circuit struck down a materially indistinguishable regime, joining the Seventh Circuit in concluding that the government may not prohibit ordinary law-abiding citizens from carrying handguns for self-defense. Panels of the Ninth Circuit have reached the same conclusion only to be countermanded by the en banc court. That leaves decisions from the regions where these restrictive laws are prevalent deeply divided. Respondents' effort to deny that conflict is worthy of an ostrich, but foreclosed by the decisions themselves. The D.C. Circuit expressly acknowledged that it was departing from the holdings of Second, Third, and Fourth Circuits, and the First Circuit, in turn, expressly acknowledged that it was departing from the D.C. Circuit. This conflict is acknowledged; it is not going away; and this case presents an ideal opportunity to resolve it.

The decision below is also manifestly wrong. In *District of Columbia v. Heller*, this Court made clear that the "core lawful purpose" of the Second

Amendment is "self-defense." 554 U.S. 570, 630 (2008); *see also McDonald v. City of Chicago*, 561 U.S. 742, 768 (2010). The need to defend oneself is hardly limited to the home; that is why the framers enshrined a right not only to "keep" arms, but also to "bear" them. The Second Circuit's view that carrying firearms outside the home is a privilege, to be granted at the state's discretion to those chosen few who can differentiate themselves from the vast majority of "the people" protected by the Second Amendment, cannot be squared with the text of the Amendment, the history and tradition of the right, or this Court's precedent interpreting it. And New York's boast that "numerous" New Yorkers are able to qualify for a right that our national charter guarantees to all underscores the problem and the stakes. Residents of the District, the Seventh Circuit, and the vast bulk of the country where these restrictive regimes have never taken root are excising a right to self-defense that is guaranteed by the Second Amendment yet denied to residents near the coasts. That is not a situation this Court should tolerate any longer.

I. This Court Should Resolve The Deep Disagreement Among The Lower Courts.

The lower courts remain deeply divided over whether laws that prohibit ordinary law-abiding citizens from carrying handguns outside the home can be reconciled with the individual and fundamental right to keep and bear arms. *See* Pet.9-15.

Respondents insist that there is no circuit split because all circuits "either held explicitly, or assumed without deciding, that the Second Amendment protects an individual right to carry firearms outside

the home." BIO.8. But holding that a constitutional right exists while then going on to eviscerate that right is indefensible, and being willing to *assume* that a constitutional right exists because that assumption makes no difference is arguably worse. When a fundamental constitutional right exists, and is not just assumed *arguendo*, it generally makes a difference. The fact that *Heller* and *McDonald* appear to have made no difference in at least four circuits is a powerful argument for this Court's review.

Respondents contend that the regimes invalidated in *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017), and *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), are distinguishable because they involved either "a flat ban on public carry" or "a particularly restrictive licensing scheme," BIO.15, in contrast to "New York's measured licensing scheme," BIO.11. But if New York has gotten away with suppressing constitutional rights because it has obscured the suppression with discretionary standards, rather than forthright rules, that too is a reason to grant review. When courts actually recognize and value constitutional rights, rather than just assume them *arguendo*, discretion is a vice, not a virtue. *See Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 162 (2002); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 764 (1988) (collecting cases holding that government "may not condition … speech on obtaining a license or permit from a government official in that official's boundless discretion.").

In all events, in material effect, New York's carry regime is indistinguishable from the D.C. regime in

Wrenn. Before issuing a carry permit, New York requires an applicant to demonstrate "proper cause." N.Y. Penal Law §400.00(2)(f). And New York courts have made clear that a general desire to carry a handgun for self-defense is not enough; rather, an applicant "must 'demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.'" *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 86 (2d Cir. 2012) (quoting *Klenosky v. N.Y. City Police Dep't*, 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980)). The D.C. regime in *Wrenn* was exactly the same: It required residents to demonstrate a "good reason to fear injury to [their] person or property" or "any other proper reason for carrying a pistol." *Wrenn*, 864 F.3d at 655 (quoting D.C. Code §22-4506(a)-(b)).

Respondents' efforts to distinguish *Moore* fall equally flat. Respondents emphasize that Illinois banned *everyone* from carrying handguns, whereas New York reserves carrying to those who can show a "special need" for self-defense. 702 F.3d at 940. But the constitutional defect of each regime is identical: Ordinary law-abiding citizens like petitioners are flatly prohibited from carrying handguns for self-defense. If the Second Amendment protects the right of "the people" to carry handguns for self-defense, then both regimes are equally unconstitutional, for each categorically deprives ordinary citizens of the ability to exercise that right.

That reality was not lost on either the majority or the dissent in *Moore*. The dissent expressly relied on *Kachalsky*, explaining that Illinois' "strict gun laws" were "in effect like those" in New York because,

although New York is "technically a 'may issue'" jurisdiction, "New York City rarely does so and so has been characterized as maintaining a virtual ban on handguns." *Id.* at 953 (Williams, J., dissenting). The majority responded by criticizing the Second Circuit for "suggest[ing] that the Second Amendment should have much greater scope inside the home than outside" and for relitigating "historical issues" that were "settled by *Heller*." *Id.* at 941. That back and forth makes respondents' suggestion that the *Moore* majority likely "would have upheld" New York's regime fanciful. BIO.12.

Finally, respondents do not and cannot distinguish New York's regime from those invalidated by panels in *Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018), *vacated, reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019), and *Peruta v. County of San Diego*, 742 F.3d 1144, 1167 (9th Cir. 2014), *vacated, rev'd on reh'g en banc*, 824 F.3d 919 (9th Cir. 2016). Instead, they simply note that those panel decisions were later vacated—a point that the petition fully acknowledged, and that only highlights the division among lower-court judges. *See* Pet.9-10. And even that understates the scope of the split in practical terms because most jurisdictions take the Second Amendment, *Heller*, and *McDonald* at face value and do not try to reserve a constitutional right guaranteed to all "the people" to a select few. The simple reality is that petitioners could carry handguns if they lived in D.C. or Illinois or any of the countless jurisdictions that do not reduce carry rights to the eye of a needle. Petitioners are denied that basic right because they live within the confines of the Second Circuit. That split of authority is not

something that can be successfully denied, and it should not be allowed to stand.

II. New York's "Proper Cause" Regime Plainly Violates The Second Amendment.

The Second Circuit is on the wrong side of this open and acknowledged split. Text, history, and tradition confirm as much.

1. *Heller* held that the Second Amendment protects "the individual right to possess and carry weapons in case of confrontation." 554 U.S. at 592. And it explained that the term "bear," as used in the text, means to "wear" or to "carry … upon the person or in the clothing or in a pocket, for the purpose … of being armed and ready for offensive or defensive action in a case of conflict with another person." *Id.* at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). Because "conflict with another person" often occurs outside one's home, the right to bear arms necessarily includes a right to carry a handgun outside the home. *See Wrenn*, 864 F.3d at 657; *Moore*, 702 F.3d at 941. Indeed, there would have been no need for the historical restrictions on carrying handguns in "sensitive places," *Heller*, 554 U.S. at 626, if the right were confined to the home.

Respondents claim that *Heller* actually "supports the Second Circuit's decision to uphold New York's licensing scheme for the public carrying of firearms." BIO.19. But, like the Second Circuit, they base that counterintuitive claim on the profoundly mistaken view that the "core" right articulated by *Heller* is limited to one's home. *Kachalsky*, 701 F.3d at 93. That is not a plausible reading of this Court's opinion.

While *Heller* held that a citizen has a right to keep a firearm in the home, because that was the particular right denied in that case, the Court identified "the core lawful purpose" of the right as "self-defense," period. *Heller*, 554 U.S. at 630; *see Wrenn*, 864 F.3d at 657. Respondents' contrary claim would detach the Second Amendment right from its very foundation.

2. Respondents are equally wrong in their claim that "New York's law fits comfortably within" the tradition of firearm regulation in this country and in England. BIO.20. In fact, the history of the Second Amendment—much of it surveyed and relied upon in *Heller*—confirms that the right to bear arms is not confined to the home. *See* Pet.17-21.

Respondents first try to derive support from the 1328 Statute of Northampton and its progeny. BIO.20-22. But their account of Northampton has been soundly rejected by this Court, and for good reason: Neither the text nor historical understanding of that law can bear respondents' interpretation. The Statute of Northampton prohibited all but the king's servants and ministers from bringing "force in affray of the peace." 2 Edw. 3, ch.3 (Eng. 1328). As early sources confirm, "affray" meant "a public offence *to the terror of the King's subjects*, and so called because it affrighteth and maketh men afraid." *State v. Huntly*, 25 N.C. (3 Ired.) 418, 421 (1843) (emphasis added) (quoting Sir Edward Coke, 3d Inst. 158 (1644)). The act of carrying alone thus did not constitute a crime.

Prominent contemporary commentators expressly disavowed respondents' contrary interpretation. As eighteenth-century legal scholar William Hawkins explained, "no wearing of arms is within the meaning

of this statute, unless it be accompanied with such circumstances as are apt to terrify the people." 1 William Hawkins, *A Treatise of the Pleas of the Crown* 135 (1716). Blackstone concurred, noting that Northampton banned only the carrying of "dangerous and unusual weapons." *See Heller*, 554 U.S. at 627 (citing 4 William Blackstone, *Commentaries* 148-149 (1769)). English courts reached the same conclusion. *See, e.g., Rex v. Knight*, 87 Eng. Rep. 75 & 90 Eng. Rep. 330 (K.B. 1686).

By the time of the Declaration of Rights in 1689, the forerunner to the Second Amendment, it was clear that the peaceable carrying of arms was not only lawful, but a natural right. *See* 1 Wm. & Mary, sess. 2, ch. 2. Blackstone, commenting on the Declaration, explained that such "public allowance" for Englishmen to carry arms emanated from "the natural right of resistance and self-preservation." 1 William Blackstone, *Commentaries* 139 (1765). That historical understanding did not change following the founding. James Wilson—a "virtual coauthor of the Constitution"—opined that Northampton laws banned only the carrying of "'dangerous and unusual weapons, in such a manner, as will naturally diffuse a terrour among the people.'" *Wrenn*, 864 F.3d 660 (quoting James Wilson, *The Works of the Honourable James Wilson* 79 (1804)).

Respondent cites some early state laws that they contend demonstrate otherwise. BIO.20. But these laws actually confirm that carry restrictions extended only to the carrying of weapons that caused terror. For example, Virginia's Northampton law prohibited citizens from "rid[ing] armed by night []or by day, in

fairs or markets, or in other places, *in terror of the County*," 1786 Va. Laws 33, ch. 21 (emphasis added), while Massachusetts punished not those who carried firearms for self-*defense*, but those who went "armed *offensively*, *to the fear or terror of the good citizens of this Commonwealth,*" 1795 Mass. Laws 436, ch. 2 (emphasis added).

Respondents next assert that "'good cause' laws" similar to New York's "became widespread in the early- and mid-19th century." BIO.22-23. But the statutes they cite bear no resemblance to New York's licensing scheme. Take, for instance, the 1836 Massachusetts statute that respondents selectively quote. That statute actually reads:

> If any person shall go armed ... *without reasonable cause to fear an assault or other injury*, or violence to his person, or to his family or property, *he may, on complaint of any person having reasonable cause to fear an injury, or breach of peace, be required to find sureties for keeping the peace*, for a term not exceeding six months, with the right of appealing as before provided.

1836 Mass Laws 748, 750, ch. 134, § 16 (emphasis added). By its plain terms, the law did not require any special justification for typical, law-abiding citizens to carry weapons. It instead created a regime under which individuals could *continue* to carry weapons by paying a bond *even if* another citizen had "reasonable cause to fear an assault or other injury." *Id.* These laws do not remotely represent "robust public carry restrictions." BIO.24.

Nor do cases addressing carry restrictions support the notion that "robust restrictions" were tolerated. In fact, in *Andrews v. State*, the court invalidated a statute that forbade openly carrying a pistol "publicly or privately, without regard to time or place, or circumstances." 50 Tenn. 165, 187 (1871). And respondents have no answer to the many early judicial authorities surveyed in *Heller* that confirm the Second Amendment was never confined to the home. Pet.20-23 (collecting cases).[1] Dismissing them as regional curiosities, BIO.24, when this Court relied on them in its path-marking *Heller* decision does not suffice.

Finally, respondents themselves underscore the fundamental problem with New York's approach when they boast that "numerous" individuals have run the gauntlet in New York and convinced a local judge or licensing official that they can enjoy a right that the Constitution guarantees to all. BIO.1. In the context of any other constitutional right, the notion that "numerous" individuals who sought to exercise their constitutional rights were granted the privilege of doing so by local officials would be a sure sign of unconstitutionality. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty," shall dictate whether we can exercise our fundamental constitutional rights. *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943).

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[1] The few contrary decisions were based on the flawed premise, expressly rejected by *Heller*, that the right to bear arms exists solely to serve the common defense. *See State v. Workman*, 14 S.E. 9, 11 (W. Va. 1891); *English v. State*, 35 Tex. 473, 477 (1871).

III. This Is An Excellent Vehicle To Resolve This Exceptionally Important Question.

This case is an excellent vehicle to finally resolve this immensely important question. Petitioners are ordinary law-abiding citizens who sought and were denied licenses to carry handguns outside the home, solely because they cannot demonstrate some special justification for wanting to exercise their constitutional right to self-defense. Pet.App.6-7. Respondents claim that a decision in this case would be "advisory" because the Second Circuit "assumed the existence" of a right "to carry firearms outside the home for self-defense." BIO.16. That is nonsensical. Resolving the question presented in petitioners' favor would have the obvious practical effect of enabling petitioners to actually *exercise* that right.

Respondents fault petitioners for "not proffer[ing] facts" to establish how "a significant portion of [New York] applicants ... are able to establish proper cause." BIO.17. Setting aside the problem that this case (like *Heller*) was resolved on *respondents'* motion to dismiss, that argument likewise makes no sense. It is undisputed that New York law requires proof of "a special need for self-protection distinguishable from that of the general community." *Kachalsky*, 701 F.3d at 86. And it is undisputed that petitioners were denied licenses because they could not demonstrate that special need. Whether most citizens, or only many, are similarly situated makes no constitutional difference.

Finally, respondents note that this Court has passed on prior efforts to resolve this split. But that is a reason for granting review, not further delaying it.

The circuits are deeply split, and no other circuit is likely to join the fray because the regional circuits that have not weighed in generally coincide with regions where state governments value and respect Second Amendment rights. Thus, the nation is split, with the Second Amendment alive and well in the vast middle of the nation, and those same rights disregarded near the coasts. Whatever else the framers intended in enshrining the Second Amendment in our charter of fundamental freedoms and guaranteeing rights to "keep *and bear* arms" to all "the people," it was not to tolerate a nation divided on an issue this significant. This Court should grant plenary review.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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