No. 20-843

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

BRIEF OF BLACK GUNS MATTER, A GIRL & A GUN WOMEN'S SHOOTING LEAGUE AND ARMED EQUALITY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the State of New York's denial of a petitioner's application for concealed-carry licenses for self-defense violated the Second Amendment.

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INTEREST OF *AMICI CURIAE*[1]

Black Guns Matter is a non-profit group founded in 2016. Black Guns Matter focuses on teaching African Americans about gun safety and armed self-defense.

A Girl & A Gun Women's Shooting League is a ladies-only organization established by women shooters for women pistol, rifle, and shotgun enthusiasts. The League provides instruction to novice shooters and helps cultivate marksmanship skills for new and experienced shooters alike.

Armed Equality is an LGBT friendly self-defense gun rights group that is dedicated to providing firearms training and advocacy for members of the LGBT community.

The subject matter of the case interests Black Guns Matter, Armed Equality and A Girl & A Gun because this case concerns the individual right to armed self-defense and the right to not just keep but also to bear arms. The resolution of this case could affect how the members of each group exercise their fundamental right to keep and bear arms.

INTRODUCTION AND SUMMARY OF ARGUMENT

New York law requires a license to carry a concealed handgun for the purposes of self-defense. The applicant must demonstrate "proper cause"

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

before a state bureaucrat *may* issue this license. N.Y. Penal Law § 400.00(2)(f). "[T]he applicant must 'demonstrate a special need for self-protection distinguishable from that of the general community' to satisfy the proper cause standard." *New York State Rifle & Pistol Ass'n, Inc. v. Beach*, 354 F. Supp. 3d 143, 146 (N.D.N.Y. 2018), *aff'd*, 818 F. App'x 99 (2d Cir. 2020). Appellants challenged the constitutionality of this requirement under New York Penal Law § 400.00(2)(f), after a licensing officer denied their respective applications.

The District Court upheld § 400.00(2)(f), relying upon the Second Circuit's decision in *Kachalsky v. County of Westches*ter, 701 F.3d 81 (2d Cir. 2012). The Second Circuit found the New York legislature had enacted § 400.00(2)(f) to address "substantial[and] compelling, governmental interests in public safety and crime prevention[,]" and specifically "the dangers inherent in the carrying of handguns in public." *Id*. at 97. Accordingly, the Second Circuit applied intermediate scrutiny and rejected an identical challenge to the constitutionality of § 400.00(2)(f). "[T]he proper cause requirement is substantially related to these interests[,]" the Court of Appeals concluded. *Id*.

Here, the District Court adhered to the analysis articulated in *Kachalsky*, and found, "[Appellants] do not satisfy the 'proper cause' requirement because they do not 'face any special or unique danger to [their] life[.]'" *Beach*, 354 F. Supp. 3d 143, 146. The same, however, cannot be said of an African American applicant or an applicant belonging to other historically marginalized groups. Yet the analytical framework that New York courts apply in evaluating

whether to issue a license under § 400.00(2)(f) does not account for the "special or unique danger[s]" that these groups regularly confront. Indeed, § 400.00(2)(f) derives from past laws enacted in the early twentieth century by state legislatures seeking "[to] ensur[e] that the 'wrong' sort of people did not obtain firearms, and could not carry them." *See* Snyder, Jeffrey R., *Fighting Back: Crime, Self-Defense, and the Right to Carry a Handgun* *4 (Cato Institute 1997).

The *Kachalsky* decision traces the policy reasons underlying § 400.00(2)(f) to New York's enactment of the Sullivan Law in 1911. 701 F.3d at 97. According to the Second Circuit, the New York legislature created the Sullivan Law to address concerns for public safety and crime prevention associated with "the dangers inherent in the carrying of handguns in public[.]" *Id*. at 97-98 (citing N.Y. Legislative Service, *Dangerous Weapons—"Sullivan Bill,"* 1911 Ch. 195 (1911)). Specifically, the Second Circuit found, the Sullivan Law – and its current iteration codified under § 400.00(2)(f) – "combat[s] these [inherent] dangers … [by] limit[ing] handgun possession in public to those showing proper cause for the issuance of a license." *Id*. at 97.

The Second Circuit's discussion of the Sullivan Law and its origins, however, omits one of the principal bases upon which the New York legislature enacted those restrictions in 1911. Genuine concern for public safety did not solely animate New York. Rather, New York used the Sullivan Law "to keep guns out of the hands of immigrants" in the same fashion that southern states used Black Codes to disarm African Americans. Funk, T. Marks, *Gun*

Control and Economic Discrimination, 85 J. Crim. L. & Criminology 764, 798-799 (1995). For example, "[i]n the first three years of the Sullivan Law, [roughly] 70 percent of those arrested had Italian surnames[.]" *Id.* (quoting David B. Kopel, *The Samurai, the Mountie and the Cowboy*, at *342-43 (1992)). Despite being "even-handed on the surface[,]" the Sullivan Law used discretion and vaguely defined criteria "to ensure that only the 'right' sort of people could carry arms, however conceived[.]" Snyder, *supra* at *5.

The Second Circuit ignored this aspect of the Sullivan Law's legacy in *Kachalsky*, and in doing so, the Court of Appeals overlooked the insidious opportunity for abuse and discriminatory application inherent within the structure of § 400.00(2)(f). African Americans, women, sexual minorities, religious minorities, immigrants, political dissidents and other historically marginalized groups are especially vulnerable to abuse under New York's discretionary scheme. Today, the "proper cause" requirement under § 400.00(2)(f) affords licensing officials the same unbridled discretion that led to the discriminatory treatment of New York's immigrant population under the original Sullivan Law. This requirement is "so broad, undefined, and devoid of any objective standards that [it] pose[s] no obstacle to granting or withholding licenses in a highly discriminatory, prejudicial, arbitrary, or political manner." *See* Snyder, *supra* at *5 (describing application of Sullivan Law's twin criterion of "good moral character" and "good cause").

ARGUMENT

I. SECTION 400.00(2)(F) SHARES ITS ORIGINS WITH LAWS THAT DISFAVOR CERTAIN GROUPS, KEEPING THEM MARGINALIZED ON THE PERIPHERY OF SOCIETY

"Indisputably, for much of American history, gun-control measures, like many other laws, were used to oppress African Americans." Adam Winkler, *The Secret History of Guns*, The Atlantic *15 (Sept. 2011), https://amp.theatlantic.com/amp/article/308608/. Examples range from the Black Codes passed in the wake of the Civil War to the Gun Control Act of 1968. *Id*. at *13-16. The Black Codes were the most overtly racist prohibitions on African American gun ownership, expressly "forbid[ding] [blacks] to own or bear firearms, and thus [ ] render[ing] [them] defenseless against assaults." Funk, *supra* at 798 (citation omitted). As gun control laws evolved, broad discretion in state licensing regimes came to replace patent discriminatory language; yet the functional application remained the same. *See Watson v. Stone*, 4 So.2d 700, 703 (1941) (Buford, J., concurring) (explaining a discretionary licensing regime "was never intended to be applied to the white population and in practice has never been so applied"). Local communities used discretion in granting licenses to exclude 'unsavory' groups from owning firearms.

This unspoken intent seeped into the federal regulation of firearms by 1968, following the assassinations of Robert Kennedy and Martin Luther King, Jr. *See* Winkler, *supra* at *13. Fueled by a wave of racial violence in the summer of 1967 and "the fear

inspired by black people with guns[,]" Congress enacted new legislation aimed at restricting the possession of firearms. *Id*. Aside from expanding the licensing and regulatory apparatus, the new federal laws continued "[to] reflect the old American prejudice that lower classes and minorities cannot be trusted with weapons." *See* Funk, *supra* at 799. "Gun control proponent and journalist Robert Sherrill frankly admitted that the Gun Control Act of 1968 was 'passed not to control guns but to control blacks[.]'" *Id*. at 799 (quoting Robert Sherrill, *The Saturday Night Special* 280 (1973)). The new federal laws targeted so-called "Saturday Night Specials," which were small affordable handguns popularized in African American and minority communities. *Id*. at 799-800. "It is difficult to escape the conclusion that the 'Saturday night special' is emphasized because it is cheap and is being sold to a particular class of people." Barry Bruce-Briggs, *The Great American Gun War*, 45 PUB. INTEREST. 37, 50 (1976).

Section 400.00(2)(f) – and the unrestrained discretion it affords licensing officers – is one more thread in this deeply discriminatory tapestry. *See* Funk, *supra* at 798-799. In addition to the requirements for possessing a firearm in the home, § 400.00(2)(f) places the burden on the applicant to demonstrate "*proper cause* exists for the issuance" of a license to carry a concealed handgun. N.Y. Penal Law § 400.00(2)(f) (emphasis added). As noted above, New York originally passed this regulation to disarm its immigrant population. *See* Funk, *supra* at 799. "[T]he *New York Tribune* grumbled about pistols found 'chiefly in the pockets of ignorant and quarrelsome immigrants of law-breaking

propensities,' and the *New York Times* pointed out the 'affinity of 'low-browed foreigners' for handguns.'" *Id.* (citations omitted).

In *Kachalsky*, the Second Circuit identified a similar law enacted in 1967 in California, the Mulford Act, which limits concealed carry licenses only to individuals who demonstrate "good cause[.]" 701 F.3d at 98. The Second Circuit explained approvingly that other states – like California – drew the same "connection between promoting public safety and regulating handgun possession in public[.]" *Id.* (citing, *e.g.*, *Peruta v. Cty. of San Diego*, 758 F. Supp. 2d 1106 (S.D. Cal. 2010), *rev'd and remanded*, 824 F.3d 919 (9th Cir. 2016) (*en banc*)). Yet, like the Sullivan Law, California first passed its gun control legislation largely as a reactionary measure designed with racially discriminatory intent to prevent a certain group of people from owning and carrying firearms. The Second Circuit's analysis fails to mention this historical context.

California's Mulford Act "made it a felony to publicly carry any firearm—either openly or concealed—in public places without a governmental license to do so." Patrick J. Charles, *The Black Panthers, NRA, Ronald Reagan, Armed Extremists, and the Second Amendment*, THE CTR. FOR FIREARMS LAW AT DUKE UNIV. (April 8, 2020), https://sites.law.duke.edu/secondthoughts/2020/04/08/the-black-panthers-nra-ronald-reagan-armed-extremists-and-the-second-amendment/. Like New York's Sullivan Law, the Mulford Act was not solely focused upon public safety and crime prevention.

Before the Mulford Act became law, members of the Black Panthers began openly displaying their firearms in Oakland while "policing the police[.]" Winkler, *supra* at *11. Armed Panthers would drive around following police and dispensing legal advice whenever law enforcement stopped a black person. *Id*. Conservative Republican, Don Mulford, sought "[t]o disarm the Panthers" by "propos[ing] a law that would prohibit the carrying of a loaded weapon in any California city." *Id*. Both the National Rifle Association (NRA) and then-Governor Ronald Reagan supported the Mulford Act. "[A] group of thirty Black Panthers appeared visibly armed at the California State Capitol building to protest an earlier version [of the Mulford Act]." Charles, *supra*. This demonstration helped to guarantee the proposed legislation became law. *Id*.

Neither California's Mulford Act, nor New York's § 400.00(2)(f), contains overtly discriminatory language that favors one group over another. That is precisely the insidious nature of these statutes. The lack of such overt language does not mean that the statutory provisions have no discriminatory intent or effect. Indeed, without such discriminatory language, the statutes nonetheless accomplish and perpetuate a form of veiled discrimination under the guise of discretion. On a case-by-case basis, an unelected New York licensing officer determines the precise meaning of § 400.00(2)(f)'s undefined term "proper cause[.]" Courts have not provided adequate guidance for exercising this discretion, only a rote precept "so broad, undefined, and devoid of any objective standards that [it] pose[s] no obstacle to granting or withholding licenses in a highly discriminatory,

prejudicial, arbitrary, or political manner." *See* Snyder, *supra* at *5.

In New York, only one avenue ostensibly exists to demonstrate "a special need for self-protection distinguishable from that of the general community[.]" *Klenosky v. New York City Police Dep't*, 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980). The applicant must provide evidence of "particular threats, attacks or other extraordinary danger to personal safety." *Martinek v. Kerik*, 743 N.Y.S.2d 80, 81 (N.Y. App. Div. 2002). This standard refuses to acknowledge the particularized dangers confronted every day by the members of minority communities – those on the periphery of society. *See e.g.*, *Martinek*, 743 N.Y.S.2d at 81 (regularly facing "high crime areas" not found to satisfy 'proper cause' standard).

This scheme would almost certainly deny a concealed carry license to someone like Mary Thomas, mother of basketball legend Isaiah Thomas, who raised her family in the housing projects of Chicago's west side. *See* Nicholas Johnson, *Negroes and the Gun*, at 333-334 (Prometheus Books 2014). Mary battled "the gang culture that has captured and destroyed so many black boys." *Id*. at 333. "[S]he refused to cede the problem or the solution to some local bureaucrat or some far-off federal program." *Id*. Instead, Mary *chose* to protect her family from the street violence that plagued her community by using the *threat* of violence.

> When the thugs came after her boys, thy were answered by the dangerous end of Mary's shotgun and her warning,

> "There's only one gang here and that's the Thomas gang."

Id. If she had lived in New York, § 400.00(2)(f) would not have afforded Mary this choice. Rather, because Mary would have relied on a *generalized* threat rather than a *particularized* threat to her family's safety, § 400.00(2)(f) would have left Mary's right to bear arms to defend her family in the hands of an unnamed bureaucrat with wide discretion to deny her that right.

If Mary were not living in a marginalized community, she might have experienced different treatment under § 400.00(2)(f). "The list of permit holders in New York City … strongly suggests that the Sullivan Law [and current § 400.00(2)(f)] has been applied on the basis of wealth, celebrity status, political influence, and favoritism." *See* Snyder, *supra*, at *7. Elites – such as Nelson Rockefeller, Donald Trump, Sammy Davis Jr., Bill Cosby, and Howard Stern – have been granted concealed carry licenses under § 400.00(2)(f) and its predecessors.

Laws like § 400.00(2)(f) strip individuals – particularly African Americans and other minorities – of their right to choose whether to exercise their right to bear arms in self-defense. *See* Johnson, *supra* at 355 ("As a matter of long practice and policy, the black tradition of arms respected, indeed, exalted, the self-defense interest of individual black people."). Section 400.00(2)(f) allows those in power to select *who* may exercise the individual right to self-defense, thus ensuring the marginalized remain on the periphery of society. In discussing California's near identical law, a dissenting opinion by Judge Callahan

of the Ninth Circuit observed, "a discretionary licensing scheme that grants concealed weapons permits to only privileged individuals would be troubling." *Peruta v. Cty. of San Diego*, 824 F.3d 919, 955 (9th Cir. 2016) (*en banc*) (Callahan, J., dissenting). He feared "[s]uch discretionary schemes might lead to licenses for a privileged class[.]" *Id.* (citations omitted).

II. BLACK GUNS MATTER, BOTH THEN AND NOW.

Armed self-defense has always been vitally important to the African American community. *See* Charles E. Cobb, Jr., *This Nonviolent Stuff'll Get You Killed*, at 23 (Basic Books 2014). "[A]lthough nonviolence was crucial to the gains made by the freedom struggle of the 1950s and '60s, those gains could not have been achieved without the complementary and still underappreciated practice of armed self-defense." *Id.* at 18. The use of firearms for protection allowed "both participants in nonviolent struggle and their sympathizers to protect themselves and others under terrorist attack for their civil rights activities." *Id.* Many in the Civil Rights and Freedom movements recognized that the "right to keep and bear arms" helped to protect African American activists from external threats, without which more would have lost their lives. *Id.* at 23.

The need for armed self-defense is most critical when the local, state and federal government fails to offer assistance. *Id.* In today's society, the concept of a "malevolent state" is considered an "anachronism." *See* Johnson, *supra* at 331. This inevitably leads some to conclude that armed self-defense has also become

anachronistic. This attitude "makes it easier for those ensconced in government bureaucracies to urge reliance on the state and to ignore the continuing failure of the government [in certain areas]." *Id*. This philosophy animates the policy behind § 400.00(2)(f). Section 400.00(2)(f) jeopardizes the choice for African American and other minorities, and relegates them to a system dependent on government elites. It advocates sole reliance upon the government, believing the need for personal armed self-defense has been alleviated – at least, in all but the rarest circumstances. The past eighteen (18) months of nationwide civil unrest have proven otherwise.

Over the past year, the pandemic and other factors have led to a dramatic increase in urban violence. *See* Jasmine Garsd, *Gun Violence Is Surging In New York, But Advocates Worry About More Policing*, (NPR June 22, 2021). "New York has seen a 73% rise [in gun violence] from June last year." *Id*. Other areas similarly affected include Chicago, Los Angeles, San Francisco and Washington, D.C. *Id*. The communities struck hardest by this increase in gun violence are the same communities that hold a high level of distrust for law enforcement.

They "have been calling out police brutality, asking for reform." *Id*. No straightforward answers are apparent. For example, last year, NYPD disbanded a team of plainclothes officers "amidst widespread protests over racial profiling." *Id*. Members of the African American community in New York acknowledge the increased threat of violence, especially in the summer months. *Id*. Yet the same community is "wary of a police force that … has often

handled [African American and minority] neighborhood[s] like [they are] a threat." *See id*.

In the wake of this civil unrest, many members of the African American community have become gun owners within the past year. In 2020, "there was a 58% jump in firearm purchases—the highest overall sales increase—among Black men and women, compared with the same period last year [in 2019]." Melissa Chan, *Racial Tensions in the U.S. Are Helping to Fuel a Rise in Black Gun Ownership*, Time (Nov. 17, 2020). This rise in gun ownership harkens back to the traditional practice of armed self-defense in the African American community. *See* Cobb, *supra* at 18. It signals a realization by African Americans that reliance upon the government is inadequate to address the challenges they face in their own communities and shows the current, modern importance of armed self-defense to the African American community.

"[T]he black tradition of arms has consistently exalted *individual choice* in preparations for dealing with imminent violent threats." *See* Johnson, *supra* at 334. In times of uncertainty and civil unrest, where the government is incapable of providing protection to the historically marginalized, the individual should be allowed to decide whether to bear arms in his own defense. Section 400.00(2)(f) stands as an illegal and unconstitutional obstacle to this choice. While "having, brandishing, or using a gun is no guarantee to a happy outcome[,]" the decision is one the Founders consigned to the sound judgment of individuals. *See id*. at 333.

CONCLUSION

For the foregoing reasons, this Court should reverse the Second Circuit.

Respectfully submitted,

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