No. _____

In the

Supreme Court of the United States

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

Petitioners,

v.

KEITH M. CORLETT, 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 Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

New York prohibits its ordinary law-abiding citizens from carrying a handgun outside the home without a license, and it denies licenses to every citizen who fails to convince the state that he or she has "proper cause" to carry a firearm. In *District of Columbia v. Heller*, this Court held that the Second Amendment protects "the individual right to possess and carry weapons in case of confrontation," 554 U.S. 570, 592 (2008), and in *McDonald v. City of Chicago*, the Court held that this right "is fully applicable to the States," 561 U.S. 742, 750 (2010). For more than a decade since then, numerous courts of appeals have squarely divided on this critical question: whether the Second Amendment allows the government to deprive ordinary law-abiding citizens of the right to possess and carry a handgun outside the home. This circuit split is open and acknowledged, and it is squarely presented by this petition, in which the Second Circuit affirmed the constitutionality of a New York regime that prohibits law-abiding individuals from carrying a handgun unless they first demonstrate some form of "proper cause" that distinguishes them from the body of "the people" protected by the Second Amendment. The time has come for this Court to resolve this critical constitutional impasse and reaffirm the citizens' fundamental right to carry a handgun for self-defense.

The question presented is:

Whether the Second Amendment allows the government to prohibit ordinary law-abiding citizens from carrying handguns outside the home for self-defense.

PARTIES TO THE PROCEEDING

Petitioners are Robert Nash, Brandon Koch, and New York State Rifle and Pistol Association, Inc. Petitioners were plaintiffs in the district court and plaintiffs-appellants in the court of appeals.

Respondents are Keith M. Corlett, sued in his official capacity as Superintendent of the New York State Police, and Richard J. McNally, Jr., sued in his official capacity as Justice of the New York Supreme Court, Third Judicial District, and Licensing Officer for Rensselaer County. Respondents were the defendants in the district court and defendants-appellees in the court of appeals.*

* Respondent Corlett became Superintendent of the New York State Police on June 4, 2019. His predecessor, George P. Beach II, was named as a defendant in his official capacity in the district court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners state as follows:

Petitioner New York State Rifle and Pistol Association, Inc. has no parent corporation and no publicly held company owns 10 percent or more of its stock. Petitioners Nash and Koch are individuals.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *N.Y. State Rifle & Pistol Ass'n, Inc. v. Beach*, No. 19-00156 (2d Cir.) (opinion affirming judgment of district court, issued August 26, 2020); and
- *N.Y. State Rifle & Pistol Ass'n, Inc. v. Beach*, No. 1:18-cv-00134-BKS-ATB (N.D.N.Y.) (order granting motion to dismiss, filed December 17, 2018).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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Perhaps the single most important unresolved Second Amendment question after this Court's landmark decisions in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), is whether the Second Amendment secures the individual right to bear arms for self-defense where confrontations often occur: outside the home. The text, history, and tradition of the Second Amendment and this Court's binding precedents compel the conclusion that the Second Amendment does indeed secure that right. As this Court held in *Heller*, the "right of the people to keep and bear Arms" protects at its core "the individual right to possess and carry weapons in case of confrontation." 554 U.S. at 592. A law that flatly prohibits ordinary law-abiding citizens from carrying a handgun for self-defense outside the home cannot be reconciled with the Court's affirmation of the individual right to possess and carry weapons in case of confrontation. The Second Amendment does not exist to protect only the rights of the happy few who distinguish themselves from the body of "the people" through some "proper cause." To the contrary, the Second Amendment exists to protect the rights of *all* the people.

Despite the wealth of authority confirming that the Second Amendment guarantees the people's right to keep and bear arms for self-defense outside the home, several courts of appeals continue to resist that conclusion, leaving the law in a state of chaos and the fundamental right to carry a firearm dependent on where one lives. The D.C. Circuit has seen these

restrictive regimes for what they are—"necessarily a total ban on most D.C. residents' right to carry a gun"—and joined the Seventh Circuit in concluding that the government may not prohibit ordinary law-abiding citizens from carrying handguns for self-defense. *See Wrenn v. District of Columbia*, 864 F.3d 650, 666 (D.C. Cir. 2017); *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012). But the Second Circuit upheld New York's materially identical regime, on the basis that the Second Amendment right of self-defense is subject to state control. In other words, in its view, the Second Amendment may protect a fundamental, individual right of the "people," but the state may fundamentally and individually dictate which people (if any) may exercise that right. *See Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012). This view is untenable.

Unfortunately, the Second Circuit is not alone in that view. The First, Third, and Fourth Circuits have likewise endorsed restrictions that cut off the right to keep and bear arms at a homeowner's door. Common sense dictates that the need for armed self-defense (i.e., cases of confrontation) is not confined to the interior of a home. And yet, these courts seem unconcerned with regimes in which the exercise of a right that the Constitution guarantees to all "the people" is instead deemed a crime unless one can preemptively convince a state official that she enjoys an especially good reason for wanting to exercise it. *See Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013). Such decisions stand in clear conflict with the D.C. Circuit's *Wrenn* decision and the Seventh Circuit's *Moore*

decision. The circuits are thus in open and acknowledged division over the constitutionality of laws denying ordinary law-abiding citizens their right to carry a handgun for self-defense. This Court should grant certiorari, resolve this untenable circuit split, and restore to all "the people" protected by the Second Amendment the right to keep *and* bear arms.

OPINIONS BELOW

The court of appeals' order affirming the district court's dismissal of the case is not reported in the Federal Reporter but is available at 818 F.App'x 99 and reproduced at App.1-2. The district court's opinion is reported at 354 F.Supp.3d 143 and reproduced at App.3-13.

JURISDICTION

The court of appeals issued its judgment on August 26, 2020. On March 19, 2020, this Court extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Second and Fourteenth Amendments to the United States Constitution and relevant portions of the New York Penal Law are reproduced at App.14-15.

STATEMENT OF THE CASE

A. Factual Background

New York has "a general prohibition on the possession of 'firearms' absent a license." *Kachalsky*, 701 F.3d at 85 (citing N.Y. Penal Law §§265.01-265.04, 265.20(a)(3)). Under New York's framework,

the only way to lawfully possess a firearm—regardless of whether one wishes to keep it inside the home or bear it outside the home—is by obtaining a license pursuant to N.Y. Penal Law §400.00. Licenses are issued by "licensing officer[s]"—typically judges or law enforcement officers—and "[n]o license shall be issued or renewed" unless the licensing officer determines that the applicant, among other things, is of good moral character and lacks a history of crime or mental illness, and that "no good cause exists for the denial of the license." N.Y. Penal Law §400.00(1)(a)-(n).

New York bans the open carry of handguns entirely. *Kachalsky*, 701 F.3d at 86. And while New York permits concealed carry of a handgun with a license, the state makes it virtually impossible for the ordinary law-abiding citizen to obtain a license. A New York licensing officer enjoys the discretion to grant a concealed carry license to members of select professions, such as state court judges, N.Y. Penal Law §400.00(2), but a license to carry a handgun "without regard to employment or place of possession" may only be granted "when proper cause exists for the issuance thereof," *id.* §400.00(2)(f). *See Kachalsky*, 701 F.3d at 86 ("Given that New York bans carrying handguns openly, applicants ... who desire to carry a handgun outside the home and who do not fit within one of the employment categories must demonstrate proper cause pursuant to section 400.00(2)(f).").

Despite the term's importance as a condition precedent, New York law does not define "proper cause." Instead, New York courts have fashioned "a substantial body of law instructing licensing officials on the application of [the 'proper cause'] standard." *Id.*

In particular, these courts have ruled that an applicant seeking a license to carry a handgun for self-defense "must 'demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.'" *Id.* (quoting *Klenosky v. N.Y. City Police Dep't*, 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980)). Thus, "'[a] generalized desire to carry a concealed weapon to protect one's person and property does not constitute "proper cause."'" *Id.* Good, even impeccable, moral character plus a simple desire to exercise a fundamental right is, according to these courts, not sufficient. Nor is living or being employed in a "high crime area." *Id.* at 86-87 (citations omitted) (quoting *In re O'Connor*, 585 N.Y.S.2d 1000, 1003 (N.Y. Cty. Ct. 1992), and *Martinek v. Kerik*, 743 N.Y.S.2d 80, 81 (N.Y. App. Div. 2002)). Instead, it is only by demonstrating that he or she is "special" (i.e., *not* a typical law-abiding citizen) and by showing an *a*typical reason for wanting to carry a handgun for self-defense that an individual applicant can hope to satisfy New York's "proper cause" test. As a practical matter, New York's insistence upon something atypical precludes typical New Yorkers from carrying their handguns for self-defense.

The experiences of the petitioners are illustrative. Petitioner Robert Nash requested a license to carry a handgun in public for self-defense. App.7. "In support of his request," the district court explained, "Nash 'cited a string of recent robberies in his neighborhood and the fact that he had recently completed an advanced firearm safety training course.'" App.7. The licensing officer, respondent McNally, denied the application on the ground that Nash "failed to show

'proper cause' to carry a firearm in public for the purpose of self-defense, because he did not demonstrate a special need for self-defense that distinguished him from the general public." App.7.

Petitioner Brendan Koch likewise applied for a license that would "'allow[] him to carry a firearm for self-defense.' Koch cited 'his extensive experience in the safe handling and operation of firearms and the many safety training courses he had completed' in support of his request." App.7 (citation omitted). McNally denied the request on the ground that Koch "failed to show 'proper cause' to carry a firearm in public for the purpose of self-defense, because he did not demonstrate a special need for self-defense that distinguished him from the general public." App.8. As the district court thus summarized, "Nash and Koch do not satisfy the 'proper cause' requirement because they do not 'face any special or unique danger to [their] life.'" App.6.

Petitioner New York State Rifle and Pistol Association is a group organized to defend the right of New York residents to keep and bear arms, including thousands of members who reside in New York. Many of its members would carry handguns if permitted, but are prohibited from doing so because they cannot satisfy New York's "proper cause" test. App.6.

B. Procedural History

Petitioners brought suit to challenge the constitutionality under the Second Amendment of New York's ban on carrying handguns outside the home without a special showing of a "proper cause." App.3-4. Both the district court and the Second Circuit held that petitioners' claims were foreclosed by

the Second Circuit's earlier decision in *Kachalsky*. App.2, 11-13.

Like this case, *Kachalsky* involved a Second Amendment challenge to New York's "proper cause" restriction. The plaintiffs sought licenses to carry handguns outside the home for self-defense, but their applications were denied for failure to establish "'proper cause'—a special need for self-protection." *Kachalsky*, 701 F.3d at 83-84. The district court granted summary judgment in favor of the state, and the Second Circuit affirmed. *Id.* at 84. In the Second Circuit's view, this Court's decision in *Heller* "raises more questions than it answers." *Id.* at 88. According to the Second Circuit, "[w]hat we know from [*Heller* and *McDonald*] is that Second Amendment guarantees are at their zenith within the home," but "[w]hat we do not know is the scope of that right beyond the home and the standards for determining when and how the right can be regulated by a government." *Id.* at 89. Writing on this purportedly blank slate, and invoking *Lawrence v. Texas*, 539 U.S. 558, 562 (2003), and *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965), the court reasoned that the Second Amendment must have vastly diminished force outside the home. 701 F.3d at 94. Hence, although the Second Circuit acknowledged (with considerable understatement) that "New York's proper cause requirement places substantial limits on the ability of law-abiding citizens to possess firearms for self-defense in public," *id.* at 93, it nonetheless ruled that the Second Amendment does not prohibit New York from "limiting handgun possession in public to those who show a special need for self-protection," *id.* at 101.

REASONS FOR GRANTING THE PETITION

As this Court made clear in both *Heller* and *McDonald*, the Second Amendment, at its core, guarantees a right to keep and bear arms for self-defense. Like the threats that might precipitate a need to act in self-defense, that individual and fundamental right necessarily extends beyond the four walls of one's home. That commonsense conclusion is compelled by the text and structure of the Second Amendment, by the history of the right it protects, and by any fair reading of both *Heller* and *McDonald*.

Consistent with that understanding, the vast majority of states protect the right of law-abiding citizens to carry handguns outside the home for self-defense. But a small minority persists in denying the right to typical law-abiding citizens, instead reserving self-defense rights to the small subset of individuals whom the state deems worthy. New York is illustrative: It curtails fundamental, individual self-defense rights by insisting upon a particularized "finding" of *need*; the current need to exercise a fundamental right reserved to "the people" must somehow preemptively pass governmental muster as *a*typical, special, and unique to the individual applicant. The governmental insistence upon a unique showing of *need* ignores that the Second Amendment broadly guarantees rights to all "the people."

The lower courts are in open and acknowledged disagreement over the constitutionality of prohibitions on the carrying of firearms outside the home. The same kinds of prohibitions blessed by the

First, Second, Third, and Fourth Circuits were rejected by the D.C. and Seventh Circuits. And the divide actually runs deeper; two Ninth Circuit panels that sided with the D.C. and Seventh Circuits had their opinions vacated by an en banc court, while other decisions provoked strong dissents. The result: Millions of law-abiding Americans are suffering a shifting patchwork of denials of a constitutional right that most states, jurists, and this Court recognize as fundamental. This Court should grant certiorari, resolve this untenable circuit split, and restore to *all* "the people" protected by the Second Amendment the right to keep *and* bear arms for their own self-defense.

I. This Court Should Resolve The Open And Acknowledged Circuit Split On Whether The Second Amendment Protects A Right To Carry A Handgun Outside The Home.

The text, the well-documented history of the right to bear arms in England and America, and this Court's decisions in *Heller* and *McDonald* make clear that the Second Amendment protects not only the individual right to keep arms for protection inside the home, but also the individual right to bear arms for protection outside the home. *See* Part II, *infra*. The Second Amendment affords no protection to the state official who wishes to restrict the individual right of self-defense to a chosen few, or to confine such rights to the interior walls of a home at the expense of every danger beyond its doors.

Nevertheless, lower courts are fractured over this basic issue: whether laws prohibiting ordinary law-abiding citizens from carrying handguns beyond the home are incompatible with the individual and

fundamental right to keep and bear arms for self-defense. The circuit split is open and acknowledged, and it necessitates this Court's intervention.

1. In the more than ten years since this Court's decision in *Heller*, two courts of appeals—the Seventh Circuit and the D.C. Circuit—have correctly concluded that the Second Amendment protects the right of citizens to carry firearms outside the home. *See Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012); *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017). Two panels of the Ninth Circuit have reached the same conclusion, only to have each decision vacated by an en banc panel. *See Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1167 (9th Cir. 2014), *vacated, rev'd on reh'g en banc*, 824 F.3d 919, 942 (9th Cir. 2016); *Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018), *vacated, reh'g en banc granted*, 915 F.3d 681 (9th Cir. 2019). In each of these cases, as here, the challenged regulation severely restricted law-abiding citizens from bearing arms outside their homes.

The laws at issue in *Wrenn*, *Young*, and *Peruta* in particular were materially indistinguishable from New York's "proper cause" regime. In *Wrenn*, the D.C. Circuit considered the District of Columbia's law prohibiting law-abiding citizens from carrying a handgun outside the home unless they showed "a special need for self-defense." 864 F.3d at 67. In *Young*, the Ninth Circuit considered Hawaii's restriction of handgun carry permits to those who can show "reason to fear injury to the applicant's person or property." 896 F.3d at 1048. And in *Peruta*, the Ninth Circuit considered California's requirement that a law-abiding citizen show "good cause" to obtain a carry

permit. 742 F.3d at 1148. Each of these laws, like New York's, had been applied to condition a carry permit on a special showing of cause that differentiates the applicant from the body of "the people" protected by the Second Amendment.

These decisions, along with *Moore*, share two important features. *First*, they rightfully followed the holdings of *Heller* and *McDonald* that the Second Amendment's guarantee is, at its core, a right to self-defense. *See Heller*, 554 U.S. at 630; *McDonald*, 561 U.S. at 749-50. Any proper application of *Heller* and *McDonald* must honor that central holding. Consequently, these courts concluded that the Second Amendment applies outside the home because the *need* for self-defense—the purported touchstone for even New York's scheme—inevitably arises outside the home. *See Moore*, 702 F.3d at 937 ("[A] Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower."); *Young*, 896 F.3d at 1074 ("[T]he Second Amendment does protect a right to carry a firearm in public for self-defense."); *Wrenn*, 864 F.3d at 667 ("At the Second Amendment's core lies the right of responsible citizens to carry firearms for personal self-defense beyond the home.").

Second, the correct decisions in the Seventh Circuit and the D.C. Circuit gave substantial weight to the history of the right to bear arms—precisely as *Heller* instructed. *See* 554 U.S. at 605. *Wrenn*, for example, dedicated considerable discussion to the origin of the right and provided thorough analyses of the relevant legal treatises and nineteenth century case law. *See Wrenn*, 864 F.3d at 658-61; *see also*

Young, 896 F.3d at 1053-68. Similarly, *Moore* rejected Illinois's request "to repudiate [the Supreme] Court's historical analysis," which, the court explained, implied "that the constitutional right of armed self-defense is broader than the right to have a gun in one's home." 702 F.3d at 935; *see also id.* at 936-37 (evaluating the historical right to bear arms in medieval and early-modern England).

2. In stark contrast to these decisions, the First, Second, Third, and Fourth Circuits have all either refused to recognize the Second Amendment's applicability outside the home or refused to give it any meaningful force. *See Gould*, 907 F.3d 659; *Kachalsky*, 701 F.3d 81; *Drake*, 724 F.3d 426; *Woollard*, 712 F.3d 865.

In *Gould*, the First Circuit considered a Massachusetts law that requires a law-abiding citizen to "demonstrate a 'proper purpose' for carrying a firearm" to receive a license to carry. 907 F.3d at 663. In *Kachalsky*, the Second Circuit considered a similar New York law—the same law at issue here—which requires a showing of "proper cause" to obtain a license to carry a handgun. 701 F.3d at 86. In *Drake*, the Third Circuit considered a New Jersey law requiring a handgun permit applicant to show "a justifiable need to carry a handgun." 724 F.3d at 428. And in *Woollard,* the Fourth Circuit confronted a Maryland law conditioning eligibility for a handgun permit on showing a "good and substantial reason" to carry. 712 F.3d at 868. While *Moore*, *Wrenn*, and *Young* embraced *Heller*, these decisions defied it, relying on an exceedingly begrudging reading of this Court's opinion to uphold anachronistic regimes that pre-

dated *Heller*'s reaffirmation of an individual right. The result: denial of fundamental, individual Second Amendment rights to typical law-abiding citizens.

First, each of the flawed decisions misconstrued the foundation of the Second Amendment. The First Circuit in *Gould*, for example, claimed that "the core right protected by the Second Amendment is—as *Heller* described it—'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" *Gould*, 907 F.3d at 672 (quoting *Heller*, 554 U.S. at 635). While *Heller* did, of course, hold that a citizen had the right to keep a firearm in the home, the Court made clear that "the core lawful purpose" of the right is self-defense—regardless of where this core need arises. *Heller*, 554 U.S. at 630. The Second, Third, and Fourth Circuits committed the same mistake. *See Kachalsky*, 701 F.3d at 94 ("*Heller* explains that the 'core' protection of the Second Amendment is the 'right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" (quoting *Heller*, 554 U.S. at 634-35)); *Drake*, 724 F.3d at 431 ("[W]e decline to definitively declare that the individual right to bear arms for the purpose of self-defense extends beyond the home, the 'core' of the right as identified by *Heller*."); *Woollard*, 712 F.3d at 874 ("*Heller*, however, was principally concerned with the 'core protection' of the Second Amendment: 'the right of law-abiding, responsible citizens to use arms in defense of hearth and home.'" (quoting *Heller*, 554 U.S. at 634-35)).

Second, the First, Second, Third, and Fourth Circuits declined to undertake any meaningful analysis of the history surrounding the right to bear

arms. Indeed, the Third Circuit in *Drake* openly declared that it was "not inclined to … engag[e] in a round of full-blown historical analysis," and instead just summarily declared that "[h]istory and tradition do not speak with one voice." 724 F.3d at 431 (quoting *Kachalsky*, 701 F.3d at 91). The Second Circuit likewise would not deign to engage in the historical analysis *Heller* requires, instead declaring (contrary to *Heller* itself) that the "history and tradition" of "the meaning of the Amendment" is "highly ambiguous." *Kachalsky*, 701 F.3d at 91. And the Fourth Circuit in *Woollard* did not even acknowledge historical inquiry as a component of *Heller*'s analysis; instead, the court held that Maryland's carry regime withstood scrutiny without so much as considering the scope of the right. *See* 712 F.3d at 874-76. While the First Circuit was generous enough to admit that history might matter, it summarily dismissed the very same nineteenth century cases on which *Heller* itself relied, *see infra* Part II.C, as reflecting merely "practices in one region of the country." *Gould*, 907 F.3d at 670.

3. As these decisions reflect, lower courts are deeply and intractably divided on the question of whether the fundamental, individual right to keep and bear arms for self-defense that the Second Amendment protects is somehow confined to the home. Multiple courts have correctly concluded that fundamental, individual right to keep and bear arms for self-defense does not vanish at one's doorstep. And yet, several circuits have persisted in the view that the government may hamstring both the Second Amendment and "the people" it protects with obstacles and conditions that serve one purpose: reserving a right guaranteed to all "the people" to a smaller class

of people that the state deems worthy based on an atypical or "special" need.

The circuit split on this issue is clear, it is acknowledged, and it is not going away; if anything, the divide is only deepening. Only this Court can resolve this critical constitutional question.

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

This Court's review is critical because most of the lower courts that have considered the question presented, including the court below, got it wrong. As a result, millions of Americans are being denied a textually guaranteed, fundamental right that was enshrined to secure their personal safety. Text, history, and tradition readily confirm that the Second Amendment protects a right to carry a firearm outside the home for self-defense. It is a right that belongs to all "the people" protected by the Second Amendment, not just to some subset of "the people" who successfully distinguish themselves from their fellow Americans. Regimes like New York's "proper cause" criteria ration constitutional rights instead of protecting them. Government may not reserve to a select few what the Constitution guarantees to all.

A. The Text, Structure, and Purpose of the Second Amendment Confirm That the Right to Bear Arms Extends Beyond the Home.

The Second Amendment provides 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. Critically, this Court already held that the text

protects two separate rights: the right to "keep" arms and the right to "bear" arms. *See Heller*, 554 U.S. at 591 ("keep and bear arms" is not a "term of art" with a "unitary meaning"). As *Heller* explains, to "keep arms" means to "have weapons." *Id*. at 582. To "bear arms" means to "carry" weapons for "confrontation"—i.e., to "wear, bear, or carry" firearms "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)).

The term "bear" is most naturally read to encompass the carrying of a weapon beyond the walls of one's residence, as "[t]he prospect of confrontation is … not limited to one's dwelling." *Young*, 896 F.3d at 1052; *accord Moore*, 702 F.3d at 937. To say otherwise—to confine the right to the home—cannot be reconciled with the Second Amendment's "central component": individual self-defense. 896 F.3d at 1069; *see also, e.g.*, *Wrenn*, 864 F.3d at 657 ("After all, the Amendment's 'core lawful purpose' is self-defense, and the need for that might arise beyond as well as within the home." (citation omitted)); *Moore*, 702 F.3d at 941 ("[T]he interest in self-protection is as great outside as inside the home."); *accord Heller*, 554 U.S. at 679 (Stevens, J., dissenting) ("[T]he need to defend oneself may suddenly arise in a host of locations outside the home."). Indeed, "[t]o speak of 'bearing' arms within one's home would at all times have been an awkward usage." *Moore*, 702 F.3d at 936; *see Grace v. District of Columbia*, 187 F.Supp.3d 124, 135 (D.D.C. 2016) ("[R]eading the Second Amendment right to 'bear' arms as applying only in the home is forced or

awkward at best, and more likely is counter-textual."), *vacated on other grounds*, *Wrenn*, 864 F.3d at 663-64. It is far "more natural to view the Amendment's core as including a law-abiding citizen's right to carry common firearms for self-defense beyond the home." *Wrenn*, 864 F.3d at 657.

Confining the right to "bear arms" to the home would be nonsensical, and would unjustifiably render the right duplicative of the separately protected right to "keep" arms. Such redundancy would contradict the basic principle that no "clause in the constitution is intended to be without effect." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803). "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*, 896 F.3d at 1052-53 (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."")). And "[u]nderstanding 'bear' to protect at least some level of carrying in anticipation of conflict outside of the home provides the necessary gap between 'keep' and 'bear' to avoid rendering the latter guarantee as mere surplusage." *Young*, 896 F.3d at 1053. In short, the most natural reading of the right to bear arms encompasses the right to carry the firearm outside the home.

The amendment's structure reinforces the conclusion that the Second Amendment protects a right to carry a firearm outside the home. As this Court explained, the Second Amendment's prefatory clause—"[a] well regulated Militia, being necessary to

the security of a free State"—performs a "clarifying function" with respect to the meaning of the operative clause. *Heller*, 554 U.S. at 577-78. Here, the prefatory clause's reference to "the Militia" clarifies that the operative clause's protection of the right to "bear Arms" encompasses a right that extends beyond the home. Militia service, of course, necessarily includes bearing arms outside the home. The Revolutionary War was not won with muskets left at home; nor were the Minutemen saddled with the need to return home before achieving readiness for action. To the contrary, the Second Militia Act envisioned the militia mustering with their weapons, not arriving at the proving ground unarmed. *See* Militia Act of 1792, ch. 33, 1 Stat. 271. It is little surprise, then, that every Justice in *Heller* agreed that the right to bear arms was codified at least in part to ensure the viability of the militia. *See Heller*, 554 U.S. at 599; *id.* at 637 (Stevens, J., dissenting). The Court in *Heller* thus unanimously agreed that a critical aspect of the right to bear arms extends beyond the home.

B. The History of the Second Amendment Confirms That the Right to Bear Arms Extends Beyond the Home.

The "historical background" of the Second Amendment "strongly confirm[s]" that the right to bear arms extends beyond the home. *Heller*, 554 U.S. at 592. The Second Amendment traces its roots back to England, where Blackstone described "the right of having and using arms for self-preservation and defence," 1 William Blackstone, *Commentaries* 136, 140 (1765), as "one of the fundamental rights of Englishmen," *Heller*, 554 U.S. at 594. The

"fundamental" right to use arms for "self-preservation and defence" necessarily included the right to carry firearms outside the home because, as discussed, the need for self-defense necessarily arose outside the home. Indeed, English authorities made clear that "the killing of a Wrong-doer … may be justified … where a Man kills one who assaults him *in the Highway* to rob or murder him." 1 William Hawkins, *A Treatise of the Pleas of the Crown* 71 (1762) (emphasis added); *see also* 1 Matthew Hale, *Historia Placitorum Coronae* 481 (Sollom Emlyn ed. 1736) ("If a thief assaults a true man *either abroad or in his house* to rob or kill him, the true man … may kill the assailant, and it is not felony." (emphasis added)).

The need to carry firearms for self-defense beyond the home was even greater in early America, which was largely frontier country with myriad dangers. *Moore*, 702 F.3d at 936. As St. George Tucker explained in his American version of Blackstone's Commentaries, "[i]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than a European fine gentleman without his sword by his side." 5 St. George Tucker, *Blackstone's Commentaries*, app, n.B (1803).

Tucker's observation regarding the ubiquity of arms borne outside the home is confirmed by accounts from prominent figures of the time. Many of the Founding Fathers, including George Washington, Thomas Jefferson, and John Adams, carried firearms in public and spoke in favor of the right to do so—a clear indication that the right to bear arms was not limited to the home. *See Grace*, 187 F.Supp.3d at 137.

And in many parts of early America, the public carrying of arms was not only permitted, but mandated. *See* Nicholas J. Johnson, et. al., *Firearms Law and the Second Amendment* 106 (2012) ("[A]bout half the colonies had laws requiring arms-carrying in certain circumstances."). "[I]t is unquestionable that the public carrying of firearms was widespread during the Colonial and Founding Eras." *Grace*, 187 F.Supp.3d at 136. The right to armed self-defense was considered by men of the era to be the "true palladium of liberty," 1 Tucker, *Blackstone's Commentaries*, app, n.D, and "was by the time of the founding understood to be an individual right protecting against both *public* and private violence," *Heller*, 554 U.S. at 594 (emphasis added).

America's early judicial authorities confirm that the Second Amendment was understood to include the right to bear arms outside the home in some manner. The decision of the Kentucky Court of Appeals in *Bliss v. Commonwealth*, 12 Ky. 90 (1822), is particularly instructive given its proximity to the founding. *See Heller*, 554 U.S. at 585 n.9 (discussing *Bliss*); *see also* Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. Rev. 1343, 1360 (2009). The court in that case struck down a statute banning generally the concealed carrying of weapons, holding that the act violated Kentucky's analog to the Second Amendment. *See Bliss*, 12 Ky. at 93. In so doing, the *Bliss* court assumed that Kentucky's constitution codified a preexisting right that "had then no limits short of the moral power of the citizens to exercise it, and it in fact consisted in nothing else but in *the liberty of the citizens to bear arms*." *Id.* at 92 (emphasis added).

Eleven years later, in *Simpson v. State*, 13 Tenn. 356, 361 (1833), Tennessee's highest court held that the State's constitution prevented a citizen from being indicted simply for being armed in public; instead, the State had to prove that a defendant had committed acts of physical violence to sustain a charge against him. *See id.* at 361-62. As the court explained, Tennessee's constitution guaranteed "an express power ... secured to all the free citizens of the state to keep and bear arms for their defence, without any qualification whatever as to their kind or nature." *Id.* at 360.

The Supreme Court of Alabama in *State v. Reid*, 1 Ala. 612 (1840), upheld the conviction of a man prosecuted under a statute forbidding the concealed carrying of firearms. In contrast to the approach taken in *Bliss*, the court determined that the Alabama constitution permitted the legislature "to enact laws in regard to the manner in which arms shall be borne ... as may be dictated by the safety of the people and the advancement of public morals." *Id.* at 616. Even so, however, the court made clear that the legislature's power to regulate the manner in which firearms may be carried did not include the power to ban carrying a firearm entirely: "A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional." *Id.* at 616-17.

The Georgia Supreme Court expressed the same sentiment in *Nunn v. State*, 1 Ga. 243 (1846), when it reversed the conviction of a man under a statute

making it a misdemeanor to carry a pistol openly or concealed. The court explained that the statute, as applied to the concealed carrying of firearms, was "valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void*." *Id.* at 251. This Court considered *Nunn* particularly helpful in *Heller*, noting that it "perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause." 554 U.S. at 612.

Finally, in *State v. Chandler*, 5 La. Ann. 489 (1850), the Louisiana Supreme Court echoed the reasoning of the Georgia and Alabama high courts. The court refused to invalidate a concealed carry prohibition because it "interfered with no man's right to carry arms ... 'in full open view,' which places men upon an equality. This is the right guaranteed by the Constitution of the United States." *Id.* at 490.

As these cases make clear, nineteenth century jurists decided case after case on the premise that the right to bear arms, as codified in the Second Amendment and numerous state analogs, guaranteed a right to carry a weapon outside the home for self-defense. *See* Michael P. O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 Am. U. L. Rev. 585, 590 (2012). Every one of those cases could have been dispatched quickly, and many of them would have been decided the other way, if the Second Amendment right did not extend beyond

the home. *Heller* relied on these cases as persuasive in surveying the contours of the Second Amendment to determine whether the Constitution guarantees a right to possess firearms in the home. *See Heller*, 554 U.S. at 585 n.9, 610-14, 629, 688. These authorities provide even more compelling evidence that the right to carry—the specific topic with which they dealt—was not confined to the home.

To be sure, there are decisions from the nineteenth century that rejected an individual right to carry arms outside the home. *See, e.g.*, *State v. Buzzard*, 4 Ark. 18 (1842). The few cases that reached such a conclusion, however, either have been "sapped of authority by *Heller*" because they "assumed that the [Second] Amendment was only about militias and not personal self-defense," *Wrenn*, 864 F.3d at 658, or, in one instance, concerned the interpretation of a state Second Amendment analog that expressly allowed for the broad regulation of the carrying of firearms, *see State v. Duke*, 42 Tex. 455, 458 (1874). The overwhelming weight of historical authority thus compels the conclusion that the fundamental right to bear arms was understood to guarantee a right to carry firearms outside the home. In short, under *Heller*, "history matters, and here it favors the plaintiffs." *Wrenn*, 864 F.3d at 658.

C. *Heller*'s Reasoning Strongly Supports the Conclusion That the Second Amendment Protects a Right to Carry Outside the Home.

In upholding New York's oppressive carry regime, the Second Circuit distorted the holding of *Heller*. While the specific issue before this Court in *Heller*

concerned the possession of a firearm in the home, the reasoning of *Heller* was no more limited to the home than *Cohen v. California*, 403 U.S. 15 (1971), was limited to jackets. The central issue in *Heller* persists here: the individual and fundamental right of self-defense. As this Court explained, "the inherent right of self-defense has been central to the Second Amendment right." *Heller*, 554 U.S. at 628; *see also id.* at 599 ("[S]elf-defense ... was the *central component* of the right."); *McDonald*, 561 U.S. at 749-50 ("the Second Amendment protects the right to keep and bear arms for the purpose of self-defense"). *Heller* thus began with the proposition that the Second Amendment protects a right to self-defense; the Court then applied that understanding of the right to the specific regulation at issue—a general prohibition on possessing handguns in the home. *See Heller*, 554 U.S. at 575.

That law proved unconstitutional, the Court explained, because it made "it impossible for citizens to use them for the core lawful purpose of self-defense." *Id.* at 630. But while the Court observed that "the need for defense of self, family, and property is *most* acute" in the home, *id.* at 628 (emphasis added), that hardly compels the conclusion that "it is not acute outside the home," *Moore*, 702 F.3d at 935. Indeed, nothing in *Heller* suggests that its logic terminates at the curtilage. To the contrary, if *Heller* is to be taken at its word that the Second Amendment protects a right to self-defense, then the right to bear arms is necessarily implicated by regulations that restrict one's ability to carry a weapon outside the home (or beyond one's property line), as the need for self-defense frequently arises outside the home.

Moreover, several portions of *Heller* make sense only upon the understanding that the right to keep and bear arms is not home-bound. For instance, the Court noted that "nothing in our opinion should be taken to cast doubt on ... laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Heller*, 554 U.S. at 626. That caveat about places beyond the home makes sense only if the Second Amendment applies beyond the home. The Court also likened D.C.'s handgun ban to the "severe restriction[s]" on the carrying of firearms that had been struck down in *Nunn* and *Andrews v. State*, 50 Tenn. 165, 187 (1871). *See Heller*, 554 U.S. at 629. Describing prohibitions against the carrying of arms as among the most extreme restrictions on Second Amendment rights would make no sense if the amendment did not confer carry rights outside the home.

This Court's decision in *Caetano v. Massachusetts*, 136 S.Ct. 1027 (2016), likewise makes sense only on the assumption that there is a right to bear arms outside the home. In a *per curiam* opinion, the Court reversed a decision of the Massachusetts Supreme Judicial Court upholding the conviction of a woman found in possession outside the home of a stun gun she was carrying to defend herself from an abusive boyfriend. *Id.* at 1027-28; *id.* at 1028 (Alito, J., concurring). The Supreme Judicial Court failed to faithfully follow *Heller*, this Court explained, when it insisted that the Second Amendment protected only weapons that were in common usage at the time of its ratification and were in use by the military. *See id.* at 1027-28. But if the Second Amendment had no application outside the home, the defense asserted in

Caetano—that the Second Amendment protects the carrying of stun guns—would have been frivolous.

In sum, this Court's opinions interpreting the meaning of the right to keep and bear arms are unequivocal: The Second Amendment, at its core, guaranties a fundamental, individual right to self-defense. *See, e.g.*, *McDonald*, 561 U.S. at 749-50. "[I]nterpreting the Second Amendment to extend outside the home is merely a commonsense application of the legal principle established in *Heller* and reiterated in *McDonald* ...." *Drake*, 724 F.3d at 446 (Hardiman, J., dissenting). Any construction of the Second Amendment that denies a right to carry a firearm outside the home is inconsistent with common sense and this Court's jurisprudence.

* * *

Because the Second Amendment protects a fundamental, individual right to bear arms outside the home for self-defense, regimes like New York's "proper cause" regime—which only serve to curtail such rights—are categorically unconstitutional. Such laws flatly deny to ordinary law-abiding citizens like petitioners Nash and Koch the rights that the Second Amendment protects. By requiring a permit applicant to submit evidence differentiating him or herself from the body of "the people" guaranteed rights under the Second Amendment, the New York regime is not merely an infringement; the regime is antithetical to the constitutional freedom itself. Just as with D.C.'s handgun ban in *Heller*, these regimes fail under any mode of constitutional scrutiny. Because no government authority may ration to some what the

Constitution guarantees to all, this Court must intervene and right this wrong.

III. The Question Presented Is Exceptionally Important.

There is no Second Amendment issue more pressing than whether the fundamental, individual right to self-defense is confined to the home. While the vast majority of states have correctly affirmed the individual's right to decide for him or herself whether to carry a handgun for self-defense, a minority of jurisdictions seem determined to control the very people and rights that the Second Amendment promises "shall not be infringed." That minority includes some of the nation's most populous cities and states, located in circuits that have stubbornly resisted the controlling decisions of this Court in *Heller* and *McDonald*. As a result of decisions that failed to abide by this Court's precedents, tens of millions of citizens are being deprived of individual, fundamental rights guaranteed by the Constitution. That is untenable. The exercise of a fundamental right expressly guaranteed by the Constitution to all "the people" cannot be made to turn on where someone lives, any more than it can be made to turn on how "proper" or "special" the state considers the individual's "cause" for wanting to exercise that right.

Making matters worse, the refusal of some lower courts to meaningfully engage in the textual and historical analysis that *Heller* requires is not confined to cases involving the right to bear arms outside the home. Time and again, courts have effectively replaced *Heller*'s textually and historically grounded analysis with a loose form of "interest-balancing" in

which the state always wins. *See, e.g.*, *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. New Jersey*, 910 F.3d 106 (3d Cir. 2018); *Pena v. Lindley*, 898 F.3d 969 (9th Cir. 2018); *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185 (5th Cir. 2012); *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011).

Repetition of an error does not cure the error; it just heightens the need for this Court's review. Indeed, several members of this Court have expressed "concern that some federal and state courts may not be properly applying *Heller* and *McDonald*." *See N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S.Ct. 1525, 1527 (2020) (Kavanaugh, J., concurring); *id.* (Alito, J., dissenting, joined by Gorsuch, J., in full and Thomas, J., in part). Only this Court has the power to restore proper rigor to Second Amendment analysis, and the need is even greater now than it was a decade ago in *Heller*. The Court should grant certiorari to resolve this persistent circuit split and restore to all of "the people" protected by the Second Amendment the fundamental and individual right that it guarantees.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari.

Respectfully submitted,

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