No. ____

In the Supreme Court of the United States

TIA LYN NICOLE SULU-KERR,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition for a Writ of Certiorari to the
Court of Appeals of the State of Arizona, Division One

PETITION FOR A WRIT OF CERTIORARI

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MARCH 3, 2025

QUESTION PRESENTED

Question Presented For Review

Whether a state legislature may completely eliminate the enumerated right to self-defense, which is the second amendment's "central component", by limiting that justification to crimes that it chooses to define within the same criminal code title, and not permit it to be applied to any crime that it defines outside of that criminal code title, regardless of the reasonableness of the accused's actions.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

United States Supreme Court Cases

United States Court of Appeals and District Court Cases

State Supreme Court Cases

United States Court of Appeals and District Court Cases

State Supreme Court Cases

United States Constitution

Federal Statutes

State Statutes

INTRODUCTION

The Second Amendment prevents federal and state governments from impermissibly infringing on an individual's right to bear arms; a right that predates the United States Constitution. In recent doctrine, this Court has begun to define the parameters of permissible state legislative actions that limit a citizen's rights in this area.[1] The general right of self-defense is the Second Amendment's "central component."[2] This Court has examined how any proposed restrictions of "arms" have traditionally been applied both at the founding of the Constitution and at the time of the ratification of its Fourteenth Amendment.[3]

This Petition presents a different twist on what has been the typical factual scenario that this court has used to define the limits on the right to "keep and bear arms." This court has used legislation involving guns and any historical restrictions on those lethal instruments to craft its Second Amendment analysis. This Petition differs in that it presents an opportunity to define the "constitutional bounds" of any state legislative Second Amendment restrictions by using a different instrument than a traditional "arm" because the means the Petitioner used to defend herself was a motor vehicle. This "arm" is of general

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[1] *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022)
[2] *Heller*, at 599.
[3] *United States v. Rahimi*, 602 U.S. ___ (2024).

common lawful use and is something with which everyone in the debate over the scope of this amendment has an inherent understanding and experience.

Through this petition, this Court can further define the Second Amendment legislative parameters in two ways. Because the general right to self-defense includes more than just traditional firearms, pronouncements in this case will apply to situations that do not involve commonly understood "arms." Nevertheless, the general principles from this petition can be used to define specific parameters for future cases involving any restriction on those traditional "arms" that compose the Second Amendment. Further, this Court's opinion will be without the added emotionally charged scenarios that traditional "arms" cases often produce.[4]

PARTIES TO THE PROCEEDING

The Petitioner is Tia Lyn Nicole Sulu-Kerr. Respondent is the State of Arizona. No party is a corporation.

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[4] See, e.g., *National Rifle Association of America v. Vullo,* 602 U.S. ___ (2024) ("Following the (Stoneman Douglas High School) shooting, the NRA and other gun-advocacy groups experienced "intense backlash" across the country."); *Garland v. Cargill,* 602 U.S. ___ (2024) ("This tragedy (the mass shooting in Las Vegas, Nevada) created tremendous political pressure to outlaw bump stocks nationwide.").

RELATED PROCEEDINGS

THIS CASE ARISES FROM THE FOLLOWING PROCEEDINGS IN ARIZONA STATE COURTS:

This case was tried in the Superior Court of Arizona, Yuma County, docket number, S1400CR202100038.

It was appealed to the Arizona Court of Appeals, Division One docket number 1 CA-CR 22-0565.

The Arizona Supreme Court denied both the State's Petition for Review and the Petitioner's Cross-petition for review in CR-24-0049-PR on December 3, 2024. (App.2).

JURISDICTION

The Arizona Supreme Court denied the State's Petition for Review and Petitioner's Cross-Petition for Review on December 3, 2024. (App. 2).

The jurisdiction of this Court is invoked under 28 U.S.C.§ 1257(a).

CONSTITUTIONAL PROVISIONS

1. United States Constitution, Second Amendment.

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.

2. United States Constitution, Fourteenth Amendment, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. United States Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

4. United States Constitution, Art. VI, Cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

STATEMENT

On June 16th, 2022, the Petitioner was convicted for felony crimes of leaving the scene of a fatal accident, theft of a means of transportation, aggravated assault and negligent homicide (App. 1, ¶1). These charges arose from a traffic fatality in an early-morning encounter between the Petitioner and two brothers at a convenience store in Yuma, Arizona.

The Petitioner had borrowed a stolen vehicle from a friend who informed her that the car was stolen. This was the basis for her conviction for theft of a motor vehicle in this case (App. 1, ¶7). The Petitioner is not contesting that verdict. Her driving that stolen vehicle led to the random incident a few hours after she took it.

After using the car for most of the evening the Petitioner and her male passenger stopped to refuel it at a convenience store. By happenstance, the true owner's boyfriend and his brother were burglarizing the coin-machines of the self-serve car wash that was located next door. Recognizing the vehicle, the owner's boyfriend wanted its immediate return. He and his brother, the victim, sprinted to the vehicle from the shadows between the businesses before the occupants got out of it. They aggressively banged on the car windows and jumped on its hood while screaming for the Petitioner and her passenger to get out of the car. One of the brothers had something in his hand that the passenger thought was a weapon. The Petitioner, scared for their safety because she thought that they were being "carjacked", drove briefly in reverse, then forward, and left the parking lot of the store. Later, she reported to the police that she knew that she hit something while

leaving the lot. Her vehicle did, in fact, fatally strike the victim who was the brother to the car owner's boyfriend. (App. 1, ¶¶2-7).

In her pretrial notice, the Petitioner claimed self-defense to all of the charges under the specific justification of "defense of residential structure or occupied vehicle," which did not contain any requirement that the defendant have a legal right to be in the car. (A.R.S. §13-418) (App. 12). Instead, the court gave the more general self-defense instruction of "use of a deadly weapon" which requires the Petitioner to be in a "place where (she) may legally be" in order to justify her actions (A.R.S. § 13-405(B)) (App. 1).

The prosecutor asked the trial court that a special instruction be given to the jury directing that the justification of self-defense applied to the manslaughter and aggravated assault charges, but that it *did not apply* to the charges for leaving the scene of a fatal accident or the theft of vehicle. (App. 4). The Petitioner objected to this specific non-standard jury instruction as far as it pertained to the leaving the scene of a fatal accident. (App.1, ¶¶11 and 17; App. 4, p. 31-33, lns. 12-14). The Court gave the instruction that the State requested to the jury. (App. 5., p. 28, lns. 10-12)).

Four guilty jury verdicts on the criminal charges were rendered against the Petitioner, including count one for her leaving the scene of a fatal accident. The jury also found her guilty for negligent homicide, a lesser-included offense of manslaughter. The trial court sentenced the Petitioner to concurrent and consecutive prison terms totaling 12.5 years. (App. 1, ¶9)

On May 3, 2023, the Petitioner appealed three of the verdicts to the Arizona Court of Appeals, Division One. She specifically challenged, among others issues, the trial court's instruction to the jury that told it that she could not assert the privilege of self-defense to the leaving the scene of a fatal accident charge. (App. 6, p. 22-28). In her brief to that court she argued that the Second Amendment contains the inherent right to defend oneself against threatened physical harm, and that it applied to all of the challenged convictions. On October 11, 2023, the Arizona Court of Appeals ordered supplemental briefing on whether the trial court committed fundamental error by not instructing jurors on the self-defense justification set forth in A.R.S. § 13-418. (App. 7).

The Arizona Court of Appeals issued its opinion on January 25, 2024. (App. 1). It affirmed the leaving the scene of a fatal accident conviction, but reversed the two others. In its opinion, that Court did not meaningfully address the Petitioner's argument that the jury instruction that self-defense did not apply to her leaving the scene of a fatal accident charge violated her Second and Fourteenth Amendment rights. The Court of Appeals merely concluded that she ". . . fail(ed) to explain how legislation criminalizing the use of force encroaches on the constitutional right to bear arms." (App. 1, ¶14). There was no analysis of her argument other than citing to one federal circuit case of *Calderone v. City of Chicago*, 979 F.3d 1156 (7th Cir. 2020)., The Court of Appeals' only pertinent comment was that *Calderone* found that ". . . (this Court's) precedent has not established a constitutional right to shoot someone in self-defense" (Id., ¶14).

On February 14, 2024, the Petitioner filed a motion to reconsider her Second Amendment argument with that court. (App. 11). Her motion was denied on February, 22, 2024. (App. 8).

Both parties then filed petitions for review with the Arizona Supreme Court on April 3, 2024. The State was declared to be the appellant while the Petitioner was the cross-appellant. Upon denial of both petitions on December 3, 2024, (where it then ordered the Court of Appeals' opinion to be de-published. (App. 2)) the case was remanded to the Court of Appeals. On December, 9, 2024, the Petitioner requested that the Court of Appeals stay its issuing a mandate in the case so that she could pursue her Petition to this Court for a writ of certiorari. Her motion to stay was granted the following day. (App. 9).

This petition follows.

REASONS FOR GRANTING THIS PETITION

A. The Arizona decision in this Petition permits its legislature to define its crimes and defenses which, if extended, would allow it to completely eliminate the justification of self-defense to a criminal prosecution, despite any Second Amendment protections. Therefore, it poses a significant threat to established law from this Court and would relegate the Second Amendment to a second-class right.

1. This Court has never addressed whether a legislature may completely eliminate its criminal code's justification of self-defense, the central component of the Second Amendment, from applying to a crime that is enumerated in a statute that is not part of that formal criminal code.

The enumerated Second Amendment right to bear arms is a personal right that does not hold any secondary status in the panoply of fundamental rights that protect United States citizens. (*District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022)). The Second Amendment ". . . vindicates the 'basic right' of individual self-defense." *Caetano v. Massachusetts*, 577 U.S. 411 (2016) (*per curiam*) (Alito concurring). However, if permitted to stand, this decision by the Arizona courts would relegate the Second Amendment to a "second class right"; a right "subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause." *McDonald v. City of Chicago*, 561 U.S. at 780. This constant threat to the Second Amendment's status has been recognized in other petitions to this Court which were denied.[5]

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[5] *Silvester v. Becerra*, 583 U.S. 1139 (Thomas dissent from denial of certiorari); *Friedman v. City of Highland Park, Ill*, 577 U.S. 1039 (2015) (Thomas dissent from denial of certiorari); *Peruta v. California*, 582 U.S. 943 (2017) (Thomas dissent from denial of certiorari); *Rogers v. Grewal*, 590 U.S. ___ 1865 (2020) (Thomas dissenting from denial of certiorari; joined by Kavanaugh, J); *Harrel v. Raoul*, 144 U.S. 2491 (2024) (Thomas Statement).

If permitted to stand then in Arizona its state legislature may define a crime outside of its criminal code and completely deny the criminal code's self-defense justification to apply to that outside crime. In so doing, it elevated the state legislature's power to designate crimes and defenses to be superior to enumerated established federal constitutional protections. The right to defend oneself from violent threats applies to all crimes, not just ones that the legislature deem worthy. If the legislature can deny the inherent right of self-defense to any particular crime, there is nothing to constrain it from eliminating that justification defense altogether.

Further, the Arizona decision directly eliminated a whole class of "weapons" from any use to defend oneself when charged with traffic crimes. Criminal charges for leaving the scene accidents only apply to the driver of a "vehicle." (A.R.S. §§28-661 through 28-665). The trial court clearly told the jury that the justification of self-defense is not available for <u>any</u> leaving the scene of a traffic accident charge, regardless of how reasonable the Petitioner's action may have been. (App. 10, lns. 15-25).

While legislatures possess the ability to define the parameters for crimes and defenses, they cannot do so in violation of federal constitutional rights. In *Dixon v. United States*, this Court gave Congress latitude to determine the elements of crimes that the prosecution must prove. 548 U.S.1, 7 (2006). It then permitted Congress to change the burden of proof to the government to disprove duress beyond a reasonable doubt instead of the common-law rule that gives the burden of proof of a defense to its proponent. *Id.*, p. 17.

But *Dixon* did not address whether legislatures could completely eliminate the common-law defense of duress; it only held that they could allocate the burden of its proof to either side. A close reading of all of the opinions in that case suggest that there was a majority of that Court who agreed that some form of the duress defense must be available to defendants, although its contours were malleable. If this Petition is granted, this Court can clarify *Dixon* to the extent that ". . . *subject to constitutional constraints*, Congress has the authority to determine the *content* of a duress defense with respect to federal crimes and to *direct whether the burden of proof rests with the defense* or the prosecution." *Id.*, at 17 (Kennedy concurring) (*emphasis added*).

Arizona's opinion conflicts with decisions by this Court that found the Second Amendment to be a fundamental constitutional right, equal in status to other rights.[6] Examples are both the First Amendment's unpopular speech (*303 Creative LLC. V. Elenis*, 600 U.S. 570 (2023)) and its free exercise of religion clause (*Kennedy v. Bremerton School Dist.*, 597 U.S. 507 (2022)), and the Sixth Amendment's confrontation clause. (*N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022)).

2. The Second Amendment applies to non-traditional "arms," such as motor vehicles, when used as a means to defend oneself.

A major component of the Second Amendment that has not been clearly decided is whether motor vehicles fall within the class of "weapons" to which the

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[6] *Rahimi*, supra; *McDonald*, supra, at 778.

Second Amendment applies. This may at first appear to be obvious, yet the language that has been used in other cases from both this Court and lower appellate courts suggest that clarification is still needed. ("Beyond handguns, the Court is without binding authority as to what other weapons the Second Amendment protects as "arms." *Banta v. Ferguson*, 2:23-CV-00112-MKD (E.D. Wash. Sep. 26, 2024), 2024 WL 4314788, 2024 U.S. Dist. LEXIS 174958), p. 12).

In *Harrel v. Raoul*, ___ U.S. ___ (2024), in declining the petition for review, Justice Thomas commented that the Seventh Circuit's decision illustrated the need for this Court must provide more guidance on which weapons the Second Amendment covers. A year earlier the Seventh Circuit denied an injunction against Illinois by finding that the regulation of "assault weapons" and "high capacity magazines" did not have "a strong likelihood of success" in the pending litigation on restricting the carry and use of the weapons. *Bevis. v. City of Naperville, Illinois,* 85 F.4th 1175 (7th 2023). While discussing those bans by various cities in Illinois, the Seventh Circuit's decision analyzed what weapons are included by the term "bearable arms?" *Id.*

Further, the Fourth Circuit noted that ". . . the Supreme Court, in the handful of Second Amendment cases that it has decided, has not yet had the opportunity to clarify *the full array of weaponry* that falls outside the ambit of the Second Amendment." *Bianchi v. Brown*, 111 F.4th 438, 451 (4th Cir. 2024) (*emphasis added*). *Bianchi* recognized that the Second Amendment ". . . jealously safeguards the right

to possess weapons that are *most appropriate and typically used for self-defense. . .* ." *Id.*, at 451 (emphasis added).

The scope of what weapons are covered by the Second Amendment needs further clarification by this Court. By granting this petition, this Court can build upon the floor that it constructed in *Caetano, supra,* regarding whether there are limits to the types of weapons that can be used to defend oneself when threatened with physical violence. *Caetano* extended the Second Amendment to stun guns, finding that it includes weapons that were not available at the time that the Constitution was adopted in 1789.

This Petition presents this issue outside the direct context of traditional firearms, but will give this Court the opportunity to frame this central component of the Second Amendment by using an instrument that is commonly used for lawful purposes, but not generally thought of as a typical "arm" for the "militia."

3. State courts and legislatures must respect this Court's opinions regarding fundamental federal constitutional rights.

The Arizona opinion refused to engage any analysis of the Petitioner's Second Amendment claim. It never discussed this Court's precedent regarding Second Amendment cases to her right of self-defense even though she specifically raised and argued those points to the Arizona appellate courts. This Petition questions whether Arizona violated federalism concepts embodied in the United States Constitution, as well as the Supremacy Clause of Art. VI, Cl 2, and the incorporation of the Second Amendment to the states via the Fourteenth Amendment.

May a state court, legislature or regulatory body simply ignore opinions of this Court that set a minimum standard for individual rights guaranteed by the federal constitution? That is the danger embodied by this Arizona decision.

The Fourteenth Amendment specifically incorporated the Second Amendment to the states. *McDonald*, supra, at 3050. Yet, the decision by the Arizona courts inescapably concludes that its courts may permissibly ignore the federal minimum constitutional protections by simply declaring that legislatures may exempt defenses, including the right to self-defense, from crimes defined in statutes outside of its formal criminal code. Even though it gave lip-service to the "constitutional bounds" of the justification defenses (*citing State v. Holle*, 240 Ariz. 301, 303, ¶9 (2016)), both the Arizona Court of Appeals and the Arizona Supreme Court, by extension, were completely indifferent and dismissive of the Second and Fourteenth Amendment claims by this Petitioner.

Specifically this opinion recognized that the Petitioner ". . . relies on federal and state constitutional provisions enshrining the right to bear arms as a basis for extending self-defense to charges falling under (the traffic code). . . (but) she fails to explain how *legislation criminalizing the use of force* encroaches on the constitutional right to bear arms. . . ." (App. 1, ¶14).

In conclusory fashion, the Arizona courts merely recast the Petitioner's argument regarding the Second Amendment constraints on legislative power into the legislature's traditional authority to "criminaliz(e) the use of force." The Petitioner asserted the Second Amendment boundary against that inherent

legislative power in both her original brief to the Court of Appeals and in her motion to it to reconsider its opinion. She petitioned the Arizona Supreme Court for review on this one issue. She was denied at all turns.

This same substantive issue was presented to this Court in *Wilson v. Hawaii,* 604 U.S. ___ (2024). In *Wilson*, the Supreme Court of Hawaii, despite recognizing the overlay between the federal and state constitutions regarding the right to bear arms, simply declared that any Second Amendment protections regarding public carry of firearms were subordinated to those contained in its state constitution. That court simply declared that this Court's Second Amendment jurisprudence is inaccurate. *State v. Wilson*, 154 Haw. 8 (2023).

Justice Thomas described *Wilson* with one succinct sentence; "Remarkably, the Hawaii Supreme Court's recognition of the 'federally-mandated' right to public carry disappeared when it turned to Wilson's Second Amendment defense." 604 U.S. ___, ___ (J. Thomas, Statement respecting denial of certiorari; Alito, concurring).

Is a state court permitted to ignore United States Supreme Court precedent in deciding whether to apply the federal Second Amendment as a floor against any state court constitutional encroachment? This Petition squarely presents this question. Unlike *Wilson*, this Petitioner clearly has standing before this Court.

Like Hawaii, the Petitioner's "federally mandated right" to self-defense disappeared. Both the Arizona and Hawaiian Supreme Courts never analyzed whether the Second Amendment would override any contrary interpretation of its own state's statutes or constitution.

Both courts appear to have cocked-a-snook at both the federal constitution's Supremacy Clause and its Second and Fourteenth Amendments. Hawaii was dismissive to this Court in particular. It curtly stated, "As the world turns, it makes no sense for contemporary society to pledge allegiance to the founding era's culture, realities, laws, and understanding of the Constitution." *State v. Wilson,* 543 P.3d, 440, 454 (Haw. 2024). It refused to analyze whether any federal constitutional precedence overrode its own state's constitutional protections.

The Arizona courts only gave lip-service to the constitutional bounds of *Dixon.* So far, the Arizona Supreme Court has not demonstrated that it treats the Second Amendment as providing actual limits to its legislature. In *Holle, supra,* at 3, ¶9, the Arizona Supreme Court expressed a limit on legislative power to define *statutory criminal defenses* to those "within constitutional bounds." Apparently, based on this decision those "constitutional bounds" do not include self-defense. The Arizona Supreme Court simply denied her Petition without comment, thus leaving to its legislature the ability to regulate the Second Amendment completely from existence in Arizona if it so desires.

If Arizona's opinion is not corrected then the Fourteenth Amendment did not fully incorporate the Second Amendment. This threat, alone, presents a compelling reason to accept jurisdiction of this petition. States that are hostile to this enshrined right would have free rein to similarly ignore the limits of federalism and the supremacy clause whenever they deem it to be prudent. This Court needs to establish firm guiding principles for the lower federal and state courts respecting the

boundaries of the Second Amendment and self-defense. This will prevent the Second-Amendment's relegation to a second-class right.

B. This Arizona decision conflicts with decisions of the Supreme Courts of other states which recognize an independent basis for the right to use self-defense for crimes charged under its traffic code.

1. Other states have held that the right to defend oneself with a motor vehicle exists even if not expressly authorized by the traffic or criminal codes.

In contrast to Arizona, other state courts have approached the inherent right to self-defense differently regarding traffic crimes.

a. The Wisconsin and Nevada Supreme Courts have applied the criminal-code justification of self-defense to traffic crimes, directly disagreeing with this decision by the Arizona Courts.

In *State v. Hanson*, the Wisconsin Supreme Court never questioned that self-defense applies to a traffic crimes. In that case, the appellant fled from a traffic stop motivated by "fear that the traffic officer would 'beat' or 'kill' him." 338 Wisc.2d 243, 249, ¶1 (2012). The Wisconsin Supreme Court specifically found that the defendant could assert self-defense, even though the jury ultimately disagreed with him that it applied. *Hanson* held that there is not a good-faith exception to fleeing the police if

drivers felt threatened and that ". . . (the defendant's) opportunity to demonstrate any justification for his behavior was through his self-defense claim. . . . " *Id.*, at 249, ¶2.

Likewise, the Nevada Supreme Court came to a different conclusion than Arizona for this exact crime for leaving the scene of a fatal accident. In *Guidry v. State*, 510 P.3d 782 (2022), a driver was confronted by the screaming "victim's" aggressive attack, jumping on the hood of her stopped motor vehicle and punching its windshield. When it looked like the 'victim" was then going to punch her side window the driver accelerated forward, striking him that caused his death. She was convicted of second degree murder, robbery, grand larceny and for a traffic violation for leaving the scene of an injury accident. There, as in this petition, the murder charge was overturned but the traffic charge (and other non-murder criminal charges) were left intact because the jury considered and rejected her self-defense argument. Had the evidence shown otherwise, she would have been exonerated. In Guidry, it was the failure of proof that led the court to uphold her leaving the scene of an accident offense; not that self-defense could not be asserted as a valid justification (". . . the evidence did not suggest that Guidry was under any real or reasonably perceived threat when she drove off. . . . ." *Id.*, at 792).

These two cases directly conflict with the decision in this petition by recognizing the self-defense justification can apply in a traffic case. By contrast, Arizona denies any justification defense for all traffic crimes, even if the driver acted reasonably to a physical threat. Notably, the *Guidry* case presents an almost

identical factual scenario at issue in this Petition yet, unlike Nevada, Arizona denied the Petitioner any opportunity to assert self-defense.

b. The Minnesota Supreme Court found that justification defenses applied to crimes, but not to other non-criminal matters.

In contrast to Arizona, but similar to Wisconsin and Nevada, the Minnesota Supreme Court recognized that self-defense can apply to *traffic crimes*. However, like Arizona, it did not extend those criminal justification defenses to *non-criminal sanctions*. In *State v. Hage*, 595 N.W.2d 200 (1999), the trial court recast the defendant's original claim of "self-defense/retreat'" into a "necessity" defense. It then assumed without comment that the criminal code's necessity defense did apply to the *crime* of driving under the influence even though it was placed by the legislature in the traffic code.

Later, in *Axelberg v. Commisssioner of Public Safety*, 848 NW.2d 206 (Minn. 2014), that same court found that the justification defenses for crimes would not apply *to the administrative suspension* of a driver's license as a result of a DUI arrest. It decided that the specific *administrative non-criminal* statute did not include any other affirmative defense that was not *expressly* contained within that legislative act. Specifically, like Arizona, *Axelberg* recognized that it could not ". . . ignore the plain language of (Minnesota statutes), which 'limit[s]' '[t]he scope of" implied consent hearings.'" *Id.*, at 212. *Axelberg's* dissenting opinion criticized the outcome. It wrote that "(t)oday . . . (the petitioner) must lose her right to drive, even if she

drove impaired to *save her life or escape serious injury*. The majority asserts that this outcome is required because the Legislature has tied the judiciary's hands." *Id.*, at 213. (*emphasis added*).

This petition presents this same issue simply and directly: the extent to which a state legislature or regulatory body may "tie the hands" of its judiciary in applying criminal justification defenses; specifically, self-defense.

2. The Arizona decision conflicts with the Missouri Supreme Court which recognizes a distinction between the defense of necessity and self-defense, a position argued by the Petitioner in her opening brief but ignored in the Arizona opinion.

The Petitioner argued in her opening brief that any Arizona decision regarding the defense of "necessity" did not apply to the justification of "self-defense" because the latter has greater "constitutional implications". (App. 6, p. 22-29). Former Justices of this Court have acknowledged that *courts* have long-recognized common-law defenses of duress (*Dixon v. United States*, 548 U.S. 1, 20, (2006)) and necessity (*United States v. Bailey*, 444 U.S. 394 (1980)). This case presents the opportunity for this Court to define if the defense of necessity is part of the D.N.A. of the Second Amendment. In *Bailey*, Justice Rehnquist wrote that "(m)odern cases have tended to blur the distinction between duress and necessity. *Id.*, at 410. In

this case, Arizona blurred the distinction between self-defense and the other justification defenses.

Some courts have found necessity to be the "touchstone of any claim of self-defense" (*People v. Riddle*, 467 Mich. 116, 127 (2002)); others take the position that they are separate defenses with separate interests. Recently, the Missouri Supreme Court separated the justification of self-defense from the defense of necessity. It noted that "(t)here are fundamental differences in the nature of these respective defenses and . . . (t)his distinction reflects the importance of self-defense in our criminal jurisprudence . . ." *State v. Hurst*, 663 S.W.3d 470, 478 (Mo. 2023). Here, the Arizona decision conflated the two defenses by applying its case law regarding the necessity defense to this case that challenged the legislative power under self-defense. Like Missouri's interpretation, the Petitioner argued that the "constitutional implication" for self-defense is greater than it is for the defense of "necessity" and asked that the court acknowledge the difference. Her argument was ignored.

In a different context, this Court has asked but not answered if the necessity defense, alone, may be on equal status to self-defense. In *City of Grants Pass, Oregon, v. Johnson*, the dissent characterized that "camping" by homeless individuals is a "biological necessity" and is not a crime. 603 U.S.520, 564 (2024) (Sotomayor, dissent). Moreover, other Justices have challenged the idea that this Court ". . . would declare, for example, that a State may do away with the defenses of duress or self-defense on the ground that, in its idiosyncratic judgment, they are

not required." *Kahler v. Kansas*, 589 U. S. 271, 315 (2020) (Breyer, dissent). That sentiment applies to Arizona's decision to eliminate all justification from application to crimes defined outside its formal criminal code.

A State's ability to define crimes was at issue before this Court in *Montana v. Egelhoff*, 518 U.S. 37 (1996). Justice Ginsberg, in concurrence, explained that fundamental principles denied to a criminal defendant may violate due process of the Fourteenth Amendment. She remarked that "((a) due process challenge to state's power to define criminal conduct) must offend some '. . . principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental.'" *Id.*, at 58 (quoting *Patterson v. New York*, 432 U.S. 197 (1977)). This Court in this Petition can reaffirm its opinions in *Heller* and *McDonald* finding that the Second Amendment is a "tradition" that that is "so rooted" that it establishes "an outer limit" upon which legislation may not trod.

C. Because the state court decision limited self-defense only to criminal charges contained in one specific title of the state statutes, a decision in this Petition can guide decisions regarding self-defense and Second Amendment jurisprudence to other situations outside of the formal criminal code.

1. Rights of petitioners in habeas corpus proceeding must rely on "clear precedent" from this Court in order to obtain relief.

This Court's precedent is vital for both the proof and the material used by lower federal courts in habeas corpus petitions. In *Brown v. Davenport*, 596 US 118 (2022),

this Court found that for habeas proceedings, one of the two tests that petitioners must overcome in order to prevail in habeas proceedings is from the AEDPA[7], which requires a violation of clear precedent from this Court.. *Id.*, at 1514.

Under that AEDPA test, *Brown* identified that the standard that must be met by habeas petitioners is that "'. . . no fair minded juris[t] could reach the state court's conclusion under *this court's precedence.*'" *Id.*, at 1525 (emphasis added). Second, Brown reestablished that the only material that federal courts may rely upon it is clear, specific opinions from this Court. "It is not enough that the state-court decision offends lower federal court precedents." *Id.*, at 1525

A clear decision by this Court from this petition may be the difference between habeas petitioners receiving an equitable hearing on the merits or its denial by the habeas court, even if the petitioner is proven right by later decisions given by this Court.

2. Non-criminal disciplinary proceedings have either not permitted a justification of self-defense or, when allowed, have applied non-criminal standards to control its application.

The extent that the right to use self-defense applies to escape non-criminal discipline sanctions is presented by this petition. Two examples are policies banning "fighting" in both schools and prisons. This Court may give courts direction on the

[7] Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d).

limits, if any, that strict "no-fighting" policies may legally proscribe on the combatants and the extent to which they may differ from the criminal code.

a. Are self-defense due process protections identical to the corresponding criminal justifications when applied by schools in a disciplinary proceeding?

Students are afforded due process protections under the Fourteenth Amendment when they face temporary suspensions if their liberty interests are affected. *Goss v. Lopez*, 419 U.S. 565 (1975). School policies banning fighting can present self-defense issues. These can arise from direct issues of the validity of any suspension, or can relate to other legal issues such as whether the student violated a probationary term from a juvenile court.

In Georgia, its Supreme Court ruled that the school district improperly considered self-defense in an expulsion case for a fight that occurred on school grounds. *Henry County Board of Education v. S. G.* While that court overturned the school disciplinary panel's decision that self-defense was not an available defense to the student, it applied the civil rule to the disciplinary hearing that placed the burden of proof on the student, instead of the criminal rule that placed the burden on the school which was seeking the punishment.

In a related issue, the Maryland Court of Appeals (later renamed the Maryland Supreme Court) upheld a juvenile's the validity of a probationary term that he ". . . attend school regularly without suspension." However, it noted that the juvenile may be able to present a defense at the violation hearing that the suspension resulted from factors beyond his control, such as another student starting the fight.

In re SF, 477 Md. 296 (2022). It allocated the burden of proof to the juvenile instead of to the state who was seeking to punish him.

This Court by granting this Petition can provide guidance to school systems regarding the extent that any "no fighting" policies must account for the constitutional protections of self-defense and other justifications, and whether legislatures or courts are free to apply the civil burden of proof instead of placing it on the institution who is seeking to punish a juvenile.

b. Courts have divided over the issue regarding whether inmates may assert self-defense to justify their violent behavior in disciplinary proceedings in correctional institutions.

For correctional institutions, there is an apparent split regarding whether self-defense may be a valid justification in disciplinary proceeding of inmates for fighting. In *Rowe v. DeBruyn*, 17 F.3d 1047 (7th Cir. 1994) the Court of Appeals noted that the Appellant had not asserted an individual right to self-defense (which was later found to be an individual right by this Court in *Heller, supra*) but rather asserted a substantive due process claim. ("Rowe is actually arguing against the state's ability to deprive him of his right to claim self-defense at all." *Id.*, at 1051). *Rowe* specifically held that ". . . in view of our deference to the administrative discretion of prison authorities, prisoners do not have a fundamental right to self-defense in disciplinary proceedings." *Id.*, at 1053.

This holding was later affirmed in that circuit in *Scruggs v. Jordan*, 485 F.3d 934 (2007). Further, in *Jones v. Cross*, 637 F.3d 841 (7th Cir. 2011) these precedents

were used to deny prisoners access to allegedly "exculpatory" video and medical reports because inmates ". . . do not have a constitutional right to raise self-defense as a defense in the context of prison disciplinary proceedings." *Id.*, at 848.

However, *Jones* conflicts with *Howard v. United States Bureau of Prisons*, 487 F.3d 808 (10th Cir. 2007). In the same situation, the Tenth Circuit found that the Bureau of Prisons improperly withheld video evidence from the inmate in a disciplinary proceeding that was premised on ". . . Mr. Howard's specific allegations of self-defense and exculpatory videotape evidence (being) in the government's exclusive possession. . . ." *Id.*, at 815.

Likewise, the Supreme Court of Kansas recognized that the common-law right of self-defense was not eliminated for prison inmates, and that the burden to disprove that justification was on the prison officials seeking the discipline. It overturned its Court of Appeals decision that had placed the burden on the prisoner. *May v. Cline*, 372 P.3d 1242 (2016). This state court decision conflicts with *Henry*.

3. States have applied the self-defense justification differently between its criminal versus civil proceedings.

Because Arizona apparently would permit its legislature to completely eliminate reasonable uses of self-defense for certain crimes the question remains whether legislatures can completely eliminate self-defense for torts and other civil law situations.

Arizona, itself, provides an example of this potential dilemma for different treatment between crimes and torts. As discussed, Arizona restricts self-defense crimes defined in its criminal code, A.R.S. Title 13. *Holle*, supra, ¶9. That case recognized Arizona's abolition of common-law criminal defenses. A.R.S. §13-103(A). However, two years later, that same court recognized that *for civil law purposes*, the common-law burden of proof for justification defenses remained intact, including self-defense. It validated the difference between applying the common-law's traditional burden of proof placed on the asserting party in *civil law* from the *criminal law's* placing the burden on the prosecution. *Ryan v. Napier*, 245 Ariz. 54, 64-65, ¶43 (2018). This shows the anomaly that, at least in Arizona, if the Petitioner had been sued in civil court for her actions she could have asserted a claim for self-defense when only money was at stake, but not when her freedom was at risk. This Court can clarify if there are limits that constrain states in applying inconsistent applications of this fundamental right.

Further, this case can help to clarify how self-defense can be limited by courts and legislatures when applied to other civil contexts, such as questions regarding qualified immunity claims in 42 U.S.C. §1983 (see, i.e., *Knibbs v. Momphard*, 30 F.4th 200 (4th Cir. 2022); *Luke v. Gulley*, 50 F.4th 90 (11th Cir. 2022), *Karamanoglu v. Town of Yarmouth*, 15 F.4th 82 (1st Cir. 2021)) or insurance policy exclusions. (*Ryan*, supra regarding tort liability; *Transamerica Ins. Group v. Meere*, 143 Ariz. 351 (1984) regarding policy exclusion). It may give voice to whether self-defense is a public

policy exception to the at-will employment doctrine. *Potts v. City of Devils Lake*, 953 N.W.2d 648 (N.D. 2021).

By granting this Petition this Court may provide guidance regarding the extent that discipline systems and other areas of civil law must recognize self-defense justifications as well as the extent that self-defense may differ in civil versus criminal cases.

D. This case presents the perfect vehicle for this Court to provide guidance regarding self-defense, in general, and specifically to the Second Amendment's right to bear arms.

First, previously noted, there are no issues of the Petitioner's standing to assert her Second Amendment claim to this Court; the expressed reason for this Court's denial of the Petition that was present in *Wilson,* supra. This Petition argues the same primary issue; Arizona's utter failure to examine this Court's precedence on the Second Amendment. This is an opportunity to address whether any state or territory may ignore the Second Amendment, either explicitly (*Wilson*) or by implication.

Second, the means of protection, a motor vehicle, gives this Court a robust palette to craft Second Amendment jurisprudence since the scenario presented involves a non-firearm. This Court can focus on the common principle of self-defense that underlies the Second Amendment without bringing extra passions into the debate that seems to accompany traditional firearms cases.

Third, the Court may identify how the general concept of self-defense applies to non-criminal proceedings in its various forms. Guidance from this Petition can help lower courts determine the extent that self-defense applies outside of criminal charges and the extent that there may be differences in treatment between its application to criminal and civil law. Further, it gives the Court an opportunity to decide if there are any constitutional distinctions among the justifications of necessity, duress and self-defense, in either the criminal or civil contexts.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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