No. 20-843

In the
Supreme Court of the United States

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

v.

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

On Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

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

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
JURISDICTION 1
CONSTITUTIONAL PROVISIONS INVOLVED 1
FACTS OF THE CASE 1
SUMMARY OF ARGUMENT 2
ARGUMENT 3
I. Text, History, and Tradition Support Carrying Arms Outside the Home 3
A. The Text of the Second Amendment Enshrines a Fundamental Right to Keep and Carry Arms 3
B. History and Tradition Affirm That the Carrying of Arms Outside the Home for Self-Defense Is Protected by the Constitution 5
II. New York's Public Carry Regime Violates the Second Amendment 11
A. New York's Licensing System Gives Government Officials Absolute Discretion Over a Core Second Amendment Right 11
B. Petitioners' Right to Carry Is Severely Restricted by New York 13
III. The Second Circuit Erred in Upholding New York's Law 13
A. The Right to Carry Is Not a Second-Class Right 13
B. The Second Circuit Engaged in Interest-

Balancing And Failed to Apply Heightened Scrutiny 15
CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Americans for Prosperity Foundation v. Bonta
--- S.Ct. ---, 2021 WL 2690268 (U.S. July 1, 2021) 16

Baldea v. City of N.Y. License Div. of NYPD,
2021 WL 2148769 (N.Y. App. Div. May 27, 2021) 12

Bliss v. Commonwealth,
12 Ky. 90, 92 (1822) 8

City of Lakewood v. Plain Dealer Publ'g Co.,
486 U.S. 750 (1988) 11

District of Columbia v. Heller,
554 U.S. 570 (2008) .... passim

Dred Scott v. Sandford,
60 U.S. 393 (1857) 9

English v. State,
35 Tex. 473 (1871) 9

Grace v. District of Columbia,
187 F.Supp.3d 124, 136 (D.D.C. 2016) 5

Kachalsky v. *Cty. of Westchester*,
701 F.3d 81, 86 (2d Cir. 2012) .... passim

Kaplan v. Bratton,
249 A.D.2d 199, 201 (N.Y. App. Div. 1998) 12

Marbury v. Madison,
5 U.S. 137, 174 (1803) 3

Martinek v. Kerik,
743 N.Y.S.2d 80 (N.Y. App. Div. 2002) 12

McCullen v. Coakley,

573 U.S. 464, 486 (2014) 16

McDonald v. City of Chicago,
561 U.S. 742 (2010) 15

Milo v. Kelly,
211 A.D.2d 488 (N.Y. App. Div. 1995) 12

Moore v. Madigan,
702 F.3d 933, 936 (7th Cir. 2012) 10

Muscarello v. United States,
524 U.S. 125, 143 (1998) 3

Nunn v. State,
1 Ga. 243 (1846) 9, 15

Rex v. Dewhurst,
1 State Trials, N.S. 529, 601-02 (1820) 9

Rex v. Sir John Knight
90 Eng. Rep. 330 (K.B. 1686) 6

State v. Chandler,
5 La. Ann. 489, 490 (1850) 8

State v. Huntly,
25 N.C. 418, 422-23 (1843) 9

State v. Reid,
1 Ala. 612, 619 (1840) 8

State v. Workman,
14 S.E. 9 (W. Va. 1891) 9

Stockdale v. State,
32 Ga. 225, 227 (1861) 9

Theurer v. Safir,
254 A.D.2d 89 (N.Y. App. Div. 1998) 12

United States v. Sprague,
282 U. S. 716, 731 (1931) 3

Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton,
536 U.S. 150 (2002) 11

Wrenn v. District of Columbia,
864 F.3d 650 (D.C. Cir. 2017) 10

Constitutional Provisions

DEL. CONST. art. I, § 20 8

Freedmen's Bureau Act, 14 Stat. 173 (1866) 9

GA. CONST. art. I, § 1, cl. VIII 8

IDAHO CONST. art. I, § 11 8

KY. CONST. of 1792, art. XII, § 23 7

ME. CONST. of 1819, art. I, § 16 8

N.C. CONST. of 1868, art. I, § 24 8

PA. CONST. of 1776, Declaration of Rights,

cl. XIII 7

U.S. Const. amend. II 3, 14

VT. CONST. ch. I, art. 16 7

Statutes

1 W. & M., c. 2, 7, in 3 Eng. Stat. at Large
441 (1689) 5

1328 Statute of Northampton, 2 Edw. 3
(Eng. 1328) 6

1911 Laws of N.Y., ch. 195 11

Other Authorities

"Bargains in Guns at the Pawnshops," *N.Y. Times*
(Aug. 30, 1911) 11

"Concealed Carry Permits: A Guide to Firearm

Information by State." *USA Carry*, 22 Oct. 2021, www.usacarry.com/concealed_carry_permit_information.html. 12

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John Adams, *First Day's Speech in Defense of the British Soldiers Accused of Murdering Attucks, Gray, and Others, in the Boston Riot of 1770, in 6 Masterpieces of Eloquence* 2569, 2578 (Hazeltine et al. eds. 1905) 6

Joint Comm. on Reconstruction, H. R. Rep. No. 30, 39th Cong., 1st Sess., 229 (1866) (Proposed Circular of Brigadier Gen. R. Saxton) 10

Kopel, Daniel B. "What State Constitutions Teach About the Second Amendment." *Northern Kentucky Law Review* 29, no. 4 (2002). 8

Nicholas J. Johnson et al., *Firearms Law and the Second Amendment* 106 (2012) 5

"Open Carry." *USCCA*, 1 Sept. 2021, www.usconcealedcarry.com/resources/terminology/carry-types/open-carry/.. 12

Samuel Johnson, *Dictionary of the English Language* 161 (4th ed. 1773) (reprinted 1978) 4

St. George Tucker, *Blackstone's Commentaries* (William Young Birch & Abraham Small eds. 1803) 6, 7

William Hawkins, *A Treatise of the Pleas of the Crown* 71, §21 (1716) 6

JURISDICTION

The Second Circuit entered judgment on August 26, 2020. The petition for certiorari was timely filed on December 17, 2020. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second and Fourteenth Amendments to the U.S. Constitution and relevant portions of the New York Penal Law reproduced at Pet.App.14-15.

STATEMENT OF THE CASE

In September 2014, New York residents Robert Nash and Brandon Koch each applied for concealed carry licenses to carry a firearm outside the home for self-defense. Nash cited recent robberies in his neighborhood and completed advanced firearm training courses, while Koch referenced completed safety training courses and extensive experience handling firearms. Both had no criminal history.

Though Nash and Koch met the requirements to qualify for a license, New York officials denied both licenses for lack of a special need, or "proper cause". The two men and the New York State Rifle and Pistol Association, a gun-rights advocacy group, sued Kevin P. Bruen, the Superintendent of New York State Police, and Justice Richard McNally, a judge in New York's Third Judicial District.

The district court dismissed the case, and the Second Circuit affirmed. Pet.App.13, Pet.App.1-2.

SUMMARY OF ARGUMENT

New York's public carry regime restricts a fundamental, enumerated right to carry arms for self-defense to only those who demonstrate an atypical *need* to express that right. This Court need only look to the "text, history, and tradition" of the Second Amendment to determine that the founders clearly enshrined two distinct, pre-existing rights in the Bill of Rights: the right to keep arms and the right to bear them.

Before America's founding, the right to carry was guaranteed in the colonies under the 1689 English Bill of Rights. Thus, the Second Amendment expanded a pre-existing right to bear arms, one also supported by the state constitutions. Court precedent following the founding and during the Civil War era reaffirmed an expansive view of the Second Amendment.

New York's "proper cause" requirement is unprecedented in its scope, granting officials near-absolute discretion over who can receive a concealed carry license in a city where open carry is already prohibited. Under the "proper cause" standard, the vast majority of citizens can not exercise their Second Amendment rights.

The Second Circuit erred when it applied intermediate scrutiny to New York's law, thereby relegating the right to bear arms to second-class status. Ruling for the Petitioner will rectify the Second Circuit's erroneous ruling and ensure that a constitutional right cannot be restricted to a select few.

ARGUMENT

1. Text, history, and tradition support carrying arms outside the home.

A. The text of the Second Amendment enshrines a fundamental right to keep and carry arms

The text of the Second Amendment declares the right "of the people to keep and bear arms." U.S. Const. amend. II. Following the assumption that no clause, phrase, or word in the Constitution was written "without effect," this Amendment protects two distinct rights, each carrying individual weight. *Marbury v. Madison*, 5 U.S. 137, 174 (1803). It is imperative to remember that the "Constitution was written to be understood by the voters," and thus the interpretation of each distinct right begins and ends with how "its words and phrases were used in their normal and ordinary as distinguished from technical meaning." *United States v. Sprague*, 282 U. S. 716, 731 (1931).

This Court concluded in *Heller* that the right to keep arms refers simply and naturally to "possessing arms, for militiamen *and everyone else*." *District of Columbia v. Heller*, 554 U.S. 570 (2008). The right to carry was understood in *Heller* to indicate the carrying of arms "upon the person" to be "armed and ready for offensive or defensive action." *Id.*, at 10 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). Naturally, this applies outside the home. The vernacular of the founding era would concur: "bear" was commonly used as "[t]o carry" in the sense of "bear[ing] arms in a coat." Samuel Johnson, *Dictionary of the English Language*

161 (4th ed. 1773) (reprinted 1978). The carrying of arms in a coat is, not coincidentally, an action likely to occur outside the home. Also established in *Heller* is that "bear" "when used with 'arms,'" assumes that said arms will be used for the explicit purpose of self-defense or "confrontation." *District of Columbia v. Heller*, 554 U.S. 570 (2008).

Moreover, the Second Amendment extends this right to "the people." There is no reason to assume that "the people" refers to a vague subset of the population; instead, the First, Fourth, and Ninth Amendments and "all six other provisions of the Constitution" that refer to "the people" do so to address "all members of the political community." *Id.*, at 6.

The prefatory clause does not limit who the Second Amendment applies to or what it refers to. Instead, it serves a clarifying function. When the Bill of Rights was ratified, the Anti-Federalists were concerned with the federal government's ability to dissolve the militia simply by disarming the people. *See Id.,* at 25 ("[w]hen a select militia is formed; the people in general may be disarmed.") (quoting *Documentary History of the Ratification of the Constitution* 508–509 (M. Jensen ed. 1976)). In fact, for many citizens, the right to bear arms for hunting or self-defense may have been preeminent to participation in a militia. However, under the umbrella right to "keep and bear arms," the Second Amendment "codified in a written constitution" that the government lacked the power to "destroy the citizens' militia by taking away their arms." *District of Columbia v. Heller* 554 U.S. (2009). The ability to participate in a militia hinges on—and lies within—the broader right to bear arms. It is impossible to form a militia if its members can only

possess arms within the home; the minutemen could not be "minutemen" if they had to return home before taking up arms. The prefatory clause, therefore, clarifies one of the wide range of rights protected by the individual "right to keep and bear arms." Us Const. amend. II. The people remain the inheritors of that right, and not as a specific subset of people, but as a whole.

B. History and tradition affirm that the right to carry arms outside the home for self-defense is protected by the Constitution

1. The Second Amendment "codified a pre-existing right." *District of Columbia v. Heller* 554 U.S. (2009). Its most clear antecedent lies in the 1689 Bill of Rights, which established that "[T]he subjects which are Protestants may have arms for their defense suitable to their conditions and as allowed by law." 1 W. & M., c. 2, 7, in 3 Eng. Stat. at Large 441 (1689). This explicitly guaranteed an individual right to have arms for the direct purpose of self-defense. Blackstone's Commentaries on the Laws of England further stated that "the right of having and using arms for self-preservation and defence" were fundamental "rights of Englishmen." William Blackstone, *Commentaries on the Laws of England* (1765).

While the right was limited by the governing laws of the time and the "conditions" of the individual possessing arms, those laws often allowed for—or even required—carry outside the home. See *Grace v. District of Columbia*, 187 F.Supp.3d 124, 136 (D.D.C. 2016), citing 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.") The 1689 Bill of Rights was

also viewed as compatible with the 1328 Statute of Northampton, which prohibited the people from "rid[ing] armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armour to the King, and their bodies to prison at the King's pleasure." 2 Edw. 3, c. 3 (Eng. 1328). The seminal case on the matter, *Rex v. Sir John Knight*, confirmed that Northampton was limited in scope to dangerous weapons, and those used in a way that would "terrify the King's subjects." Rex v. Sir John Knight, 90 Eng. Rep. 330 (K.B. 1686). William Hawkins' *A Treatise on the Pleas of the Crown* said as much, writing that Northampton was restricted to "dangerous and unusual Weapons, in such a Manner as will naturally cause a Terror to the People." William Hawkins, *A Treatise of the Pleas of the Crown* 71, §21 (1716).

In the colonies, the need to bear arms for self-defense was especially pressing—and existential. As St. George Tucker noted in 1803, "[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 an European fine gentleman without his sword by his side." St. George Tucker, *Blackstone's Commentaries* (William Young Birch & Abraham Small eds. 1803). Many of the founding fathers (Thomas Jefferson, Patrick Henry, and George Washington, notably) not only endorsed a right to bear arms but carried weapons themselves. In a speech on the Boston Massacre, John Adams argued that "the inhabitants had a right to arm themselves at that time for their defense." (John Adams, *First Day's Speech in Defense of the British Soldiers Accused of Murdering*

Attucks, Gray, and Others, in the Boston Riot of 1770, in 6 Masterpieces of Eloquence 2569, 2578 (Hazeltine et al. eds. 1905)). Of course, the actions of the founders do not always parallel their intentions when writing the Bill of Rights. However, they do "provide an essential context for what the people who ratified the Second Amendment understood bearing arms to entail." *Grace v. District of Columbia*, 187 F.Supp.3d 124, 136 (D.D.C. 2016). And thus far, it is clear that those who ratified the Second Amendment understood that an individual right to bear arms was assumed within the colonies as "the first law of nature." St. George Tucker, *Blackstone's Commentaries* App'x 19 (William Young Birch & Abraham Small eds. 1803) ("Tucker's Blackstone"). The Second Amendment simply extended a right once limited only to Protestants to all "the people" of the United States.

This was evident in the state constitutions established around the same time, with at least nine explicitly protecting the right to carry arms for self-defense. Pennsylvania's first constitution, adopted in 1776, stated that "the people have a right to bear arms" to defend themselves and the state. PA. CONST. of 1776, Declaration of Rights, cl. XIII. The state constitutions of Vermont and Kentucky, which came into effect in 1776 and 1792 respectively, used nearly the same language. VT. CONST. ch. I, art. 16.; KY. CONST. of 1792, art. XII, § 23. And whereas North Carolina's 1776 Constitution declares that the people "have a right to bear arms, for the defence of the State," the phrase has always been interpreted to guarantee the right to carry for personal protection. N.C. CONST. of 1868, art. I, § 24. As states entered the Union, their constitutions—from Maine and Delaware

to Idaho and Georgia—consistently protected the right of the people to bear arms, several using the exact language laid down in the Bill of Rights. ME. CONST. of 1819, art. I, § 16.; DEL. CONST. art. I, § 20.; IDAHO CONST. art. I, § 11.; GA. CONST. art. I, § 1, cl. VIII. Forty-two states in all established the right to keep and bear arms, "consistently interpreted as protecting an individual right."[1]

2. Jurisprudence following the founding upheld a right to bear arms outside the home. In 1822, the Kentucky Supreme Court held that the state's prohibition on concealed carry was unconstitutional, even though open carry was allowed in the state. *Bliss v. Commonwealth*, 12 Ky. 90, 92 (1822). *Bliss* ruled that any infringement of the Second Amendment right, including restraint imposed by concealed carry, was "forbidden by the Constitution." *Ibid.*

When other courts upheld prohibitions of concealed carry, they did so only on the presumption that open carry was readily available. Courts reasoned concealed carry bans could be upheld if open carry laws were "openly sufficient" in protecting an individual's Second Amendment rights. *State v. Chandler,* 5 La. Ann. 489, 490 (1850). However, any laws that required arms "to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional." *State v. Reid*, 1 Ala. 612, 619 (1840). The Georgia Supreme Court illustrated this principle when it upheld the state's ban on concealed carry, while

[1] Kopel, Daniel B. "WHAT STATE CONSTITUTIONS TEACH ABOUT THE SECOND AMENDMENT." *Northern Kentucky Law Review* 29, no. 4 (2002).

simultaneously striking down its restriction on open carry. *Nunn v. State* 1 Ga. 243 (1846). In line with *Nunn, Stockdale* reflected that prohibiting both concealed and open carry would be "to prohibit the bearing of those arms altogether." *Stockdale v. State*, 32 Ga. 225, 227 (1861). So long as weapons were not carried in a manner "calculated to produce terror and alarm," citizens were at "perfect liberty to carry [their] gun[s]." (first quoting *Rex v. Dewhurst*, 1 State Trials, N.S. 529, 601-02 (1820); then *State v. Huntly*, 25 N.C. 418, 422-23 (1843).

Cases to the contrary misinterpreted the Second Amendment as a collective right. *State v. Workman* and *English v. State* both upheld the regulation or prohibition of the carrying of arms on the premise that the right to keep and bear for self-defense was not an individual right. *State v. Workman*, 14 S.E. 9 (W. Va. 1891); *English v. State*, 35 Tex. 473 (1871). This interpretation is indefensible under *Heller*.

Further, laws that prohibited the carrying of arms often had discriminatory roots. Chief Justice Taney infamously warned that allowing African Americans to "to keep and carry arms wherever they went" would endanger "the peace and safety of the State" in his majority opinion in *Dred Scott v. Sandford*, 60 U.S. 393 (1857). In the same vein, southern black codes selectively restricted the rights of freedmen to keep and bear arms following the Civil War, a clear violation of the Second Amendment. In response, Congress enacted the 1866 Freedmen's Bureau Act, declaring that "the constitutional right to keep and bear arms" belonged to all citizens "without respect to race or color." 14 Stat. 173, 176-77 (1866). Likewise, an 1866 circular in a congressional report on the issue

noted that the banning of arms deprived freed slaves from "kill[ing] game for subsistence" and "protect[ing] their crops from destruction by birds and animals." Joint Comm. on Reconstruction, H. R. Rep. No. 30, 39th Cong., 1st Sess., 229 (1866) (Proposed Circular of Brigadier Gen. R. Saxton). The mention of public activities makes evident that Congress at the time understood arms were meant to be used outside the home, and that public carry in such circumstances was protected under the Constitution.

3. In recent years, several states have attempted to restrict Second Amendment rights by requiring individuals to establish "proper cause" or "good reason" to carry arms for self-defense, thereby giving the state absolute discretion to limit the right to carry. Among these, New York's requirement is one of the most restrictive. Although the District of Columbia previously enforced a similar law, it was struck down in 2017. *Wrenn v. District of Columbia* dissolved the district's requirement that applicants provide evidence of "specific threats" posing "special danger to the applicant's life" to receive a license, reaffirming the right to carry arms for self-defense outside the home as a core Second Amendment right. 864 F.3d 650 (D.C. Cir. 2017). Similarly, the Seventh Circuit ruled that an Illinois statute prohibiting the public carry of guns for all but a select few was unconstitutional. "To speak of 'bearing' arms within one's home," the court noted, "would at all times have been an awkward usage." *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012). *Moore* rejected the state's argument that the restriction should be upheld because it benefited the public, remarking that "so substantial a

curtailment...require[d] a greater showing of justification" *Ibid.*

Courts have also struck down similar efforts to tether government discretion to other constitutional rights, notably First Amendment rights. In *City of Lakewood v. Plain Dealer Publ'g Co.,* the Court held that the right to free speech could not depend on receiving a permit from a government official with unlimited discretion. 486 U.S. 750 (1988). A later First Amendment case, *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, ruled that the government could not condition speech by requiring permits for door-to-door canvassing. 536 U.S. 150 (2002).

II. New York's public carry regime violates the Second Amendment

A. New York's licensing system gives absolute discretion to government officials over a core Second Amendment right

New York's challenged law draws its roots from the 1911 Sullivan Law, which required gun owners to possess a license issued at an official's discretion. 1911 Laws of N.Y., ch. 195, § 1, at 443 (codifying N.Y. Penal Law §1897, ¶ 3). The Sullivan Law targeted foreigners, and it was reported that in the first three years after the law was passed, "70 percent of those arrested had Italian surnames." "Bargains in Guns at the Pawnshops," *N.Y. Times* (Aug. 30, 1911), p.3. Since enacted, the Sullivan Law has received only slight modification.

Whereas forty-two states grant licenses on an objective basis to those who meet an established

criteria[2], New York requires that individuals also prove a "special need for self-protection distinguishable from that of the general community" *Kachalsky* v. *Cty. of Westchester*, 701 F.3d 81, 86 (Sd Cir. 2012). Unfortunately, the "proper cause" requirement operates as an ambiguous standard which grants officials near absolute discretion. As applied to a few instances, New York's law has denied licenses for travel through high-crime areas to distribute petty cash *Theurer v. Safir,* 254 A.D.2d 89 (N.Y. App. Div. 1998); for "night-time emergencies" and working in "areas noted for criminal activity" *Milo v. Kelly,* 211 A.D.2d 488 (N.Y. App. Div. 1995); for claims of fear while traveling through high crime areas *Martinek v. Kerik,* 743 N.Y.S.2d 80 (N.Y. App. Div. 2002); and denied license renewals for lack of documentation of personal threats. *Baldea v. City of N.Y. License Div. of NYPD,* 2021 WL 2148769 (N.Y. App. Div. May 27, 2021). And whereas individuals must demonstrate "extraordinary personal danger documented by proof of recurrent threats to life or safety" to meet "proper cause," a license may be denied only based only on an official's "rational" decision to do so. (first quoting *Kaplan v. Bratton*, 249 A.D.2d 199, 201 (N.Y. App. Div. 1998); then quoting *Baldea*, 2021 WL 2148769). Meanwhile, open carry is prohibited under state law.[3]

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[2] *Concealed Carry Permits: A Guide to Firearm Information By State*, USA Carry,
https://www.usacarry.com/concealed_carry_permit_information.html.

[3] *Open carry*. USCCA. (2021, September 1). Retrieved from https://www.usconcealedcarry.com/resources/terminology/carry-types/open-carry/.

B. Petitioners' right to carry is severely restricted by New York

In the petitioners' case, Robert Nash and Brandon Koch completed all requirements to qualify for a firearm license, but were denied for failing to establish "proper cause." Both have "restricted" licenses, which allow them to carry firearms outside the home for hunting and target practicing, but not for self-defense. Nash applied for a self-defense license, citing "recent robberies in his neighborhood" and his recent completion of an "advanced firearm safety training course"; Koch cited completed safety training courses and "extensive experience in the safe handling and operation of firearms" (first quoting Pet.App.7; then quoting Pet.App.8 (quoting J.A.125)). Nash and Koch, the district court ruled, could not carry a firearm outside the home for self-defense because they did not face "special or unique danger[s] to [their] live[s]." Pet.App.6.

III. The Second Circuit erred in upholding New York's law

A. The right to carry is not a second-class right

In upholding New York's concealed carry provision, the Second Circuit relegated the right to carry to second-class status, determining that New York's "proper cause requirement falls outside the core Second Amendment protections identified in *Heller*." *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012). This does not in any way reflect this Court's reasoning in *Heller,* nor does it comport with the "text,

history, and tradition" behind the Second Amendment. *Heller v. District of Columbia*, 670 F.3d 1244, 1273 (D.C. Cir. 2011) (Heller II) (Kavanaugh, J., dissenting). Each enumerated right is inherently fundamental, and inherently at the "core" of our republic's stated values. Freedom of speech is no more the "core" of the First Amendment than freedom of expression, religion, or the press; the right to counsel no less a "core" of the Sixth Amendment than an impartial jury. So too here. The drafters of the Bill of Rights intentionally did not give the people "the preeminent right to keep arms, and the secondary right to bear them." Instead, they made a conscious decision to enshrine in tandem "the right to keep *and* bear arms." U.S. Const. amend. II (emphasis added).

While the Court wrote in *Heller* that "the need for defense of self, family, and property is most acute" in the home, it certainly did not say that the right to carry was unnecessary to protect "self, family, and property" outside the home. *District of Columbia v. Heller*, 554 U.S. 570 (2008). It said the opposite. *Heller* repeatedly affirmed that the right to defend one's home is a right that occurs in conjunction with the right to defend one's family and one's self, and primarily protects the right "to possess and carry weapons in case of confrontation"—whether inside or outside the home. *Id.,* at 10.

Furthermore, the Second Circuit's cited historical and textual backing for their hierarchy of Second Amendment rights is flimsy at best. The Second Circuit's insistence that the proper cause requirement is comparable to laws that "ban firearm possession in sensitive places" like those that "prohibit the possession of firearms on school grounds" is a stretch.

Kachalsky v. Cnty. of Westchester, 701 F.3d 81 (2d Cir. 2012). Those laws that limit possession in sensitive places stem from an assumption that the individual right to bear arms for self-defense is fundamental—with minor limitations; New York's prohibition on concealed carry without "proper cause" abandons this basis.

After analyzing the historical and legal commentary on concealed carry restrictions, the Second Circuit decided that the "highly ambiguous history and tradition" was unhelpful. *Id.,* at 91. However, the Second Circuit overlooks that many of the cases they relied on upheld prohibitions on concealed carry only when open carry was permitted in the state (e.g. *Nunn v. State,* in which the Supreme Court of Georgia kept a concealed carry restriction in place on the grounds that open carry be legalized). This is incomparable to the New York provision, which practically prohibits concealed carry in a state where open carry is also banned. This Court made it clear in *McDonald* that the right to keep *and* bear arms cannot be "single[d] out for special—and specially unfavorable—treatment." *McDonald v. City of Chicago*, Ill., 561 US 742. The right is "among those fundamental rights necessary to our system of ordered liberty." *Id.,* at 31. No evidence within the text of the Constitution or historical precedent can reduce that right to second-class status.

B. The Second Circuit engaged in interest-balancing and failed to apply heightened scrutiny

The Second Circuit applied intermediate scrutiny to New York's concealed carry provision, upholding the law on the ground that the proper cause requirement

was "substantially related to the achievement of an important governmental interest." *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012). Under this relaxed standard of scrutiny, the Second Circuit concluded that "substantial deference to the predictive judgments of [the legislature]" is warranted. *Ibid.* Thus, the Second Circuit openly endorsed the "freestanding 'interest balancing' approach" that *Heller* warned against. *District of Columbia v. Heller*, 554 U.S. 570 (2008). Applauding the legislature for " assessing the risks and benefits of handgun possession and shaping a licensing scheme to maximize the competing public-policy objectives" the Second Circuit forgets that it is not the job of the legislature or the judiciary to weigh "anew" the countervailing interests and concerns behind securing an enumerated constitutional right. (first quoting *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2d Cir. 2012); then quoting *District of Columbia v. Heller*, 554 U.S. 570 (2008)). The founders conducted their own 'interest-balancing' when establishing the First and Second Amendment; the result of that is the fundamental right to "keep and bear arms." *Id*., at 64.

Because, as established above, the right to carry is a fundamental, enumerated right, no less than exacting scrutiny can be applied. This standard demands that the means are "narrowly tailored to achieve the desired objective." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). Just recently, the Court extrapolated on the matter in *Americans for Prosperity Foundation v. Bonta*, clarifying that "exacting scrutiny requires "a law to be "narrowly tailored to the government's asserted interest, even if it is not the least restrictive means of achieving that end."

Americans for Prosperity Foundation v. Bonta --- S.Ct. ---, 2021 WL 2690268 (U.S. July 1, 2021). Despite the objections of the Second Circuit, this Court's precedents foreclose any form of relaxed scrutiny for laws that infringe on constitutional rights.

CONCLUSION

The proper cause requirement is, by nature, far from narrowly tailored. It prohibits the average citizen from expressing their constitutional right to carry arms outside the home and instead demands that they demonstrate an atypical need to do so. It may be true that New York has a legitimate interest in "public safety and crime prevention." But this interest does not give unilateral authority to the state—and wide discretion to government officials—to prohibit the possession of handguns outside the home by law-abiding, safe citizens. A constitutional right is by nature immovable, and the text, history, and tradition of the Second Amendment and its interpretation by this Court leave little room for debate: the right to carry arms for self-defense outside the home is enshrined in the Constitution. This Court said 12 years ago that no branch of government— whether the legislature or the judiciary—has the authority to "decide on a case-by-case basis whether the right is really worth insisting upon." The Court should not allow New York to do so here.

For these reasons, this Court should reverse.

Respectfully submitted,

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