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 United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS KEVIN P. BRUEN ET AL.

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QUESTION PRESENTED

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

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JURISDICTION

This case comes to the Court on writ of certiorari from the Second Circuit. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FACTS OF THE CASE

I. The Precursor of *Heller*

The Second Amendment states 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. In *Dist. of Columbia v. Heller*, 554 U.S. 570, 577 (2008), this Court held that the protections of the Second Amendment extended to the bearing of handguns for the purpose of self-defense within the home, and that the handgun statute enacted in the District of Columbia violated the Second Amendment. The Court declared in *Heller* that the Second Amendment undoubtedly protects the "right of law-abiding, responsible citizens to use arms in defense of hearth and home," *id.,* at 635, and that "the need for defense of self, family, and property is most acute" in the home. *Id.,* at 628. The right to bear arms as enumerated in the Second Amendment was held to apply to the States in *McDonald v. Chicago,* 561 U.S. 742 (2010), and *Caetano v. Massachusetts,* 577 U.S. 411 (2016) (*per curiam*).

Although this Court's decision in *Heller* resolved the issue of whether the Second Amendment protected the right to bear arms for self-defense within the home, it left open the issue of whether states could enact regulations of concealed-carry firearms outside the home. See *Kachalsky v. County of Westchester,* 701 F.3d 81, 89 (2d Cir. 2012)

(describing "the scope of th[e] [Second Amendment] right beyond the home" as a "vast 'terra incognita'") (quoting *United States v. Masciandaro,* 638 F.3d 458, 475 (4th Cir.) (Wilkinson, J., for the court), *cert. denied,* 565 U.S. 1058 (2011)). The majority in *Heller* acknowledged that the Second Amendment's protections were not absolute, and that regulations could be enacted for firearms carried outside the home, even for self-defense. 554 U.S., at 626-627. The Court also acknowledged that throughout the 19th century, states enacted various regulations on concealed-carry firearms, some of which were upheld by state courts. *Id.,* at 626. However, the Court declined to specifically address whether statutes that prohibited the concealed-carry of firearms for the purpose of self-defense would pass constitutional muster, or the standard of review to be used. The Court also left the issue unaddressed in *McDonald v. Chicago, supra,* causing much confusion within lower courts. See *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015) (noting that "[n]either *Heller* or *McDonald*… delineated the precise scope of the Second Amendment or the standards by which lower courts should assess the constitutionality of firearms restrictions").

One of the states that enacted 19th-century concealed-carry firearm regulations was New York. In 1891, the legislature prohibited anyone who were not "members of the police force, regularly elected constables, the sheriff of Eric county [sic], and his duly appointed deputies" from "carry[ing] concealed upon or about his person, any pistol or revolver or other dangerous weapon or weapons without first

obtaining a permit as hereinbefore provided." 1891 Laws of N.Y., ch. 105, § 209, at 177. The 1911 Sullivan Bill prohibited the carrying of "any pistol, revolver or other firearm of a size which may be concealed upon the person, without a written license therefor, issued to him by a police magistrate of such city or village, or by a justice of the peace of such town…" 1911 Laws of N.Y., ch. 195, § 1, at 443. The proper cause requirement was enacted two years later. From the start, the Sullivan Bill survived numerous legal challenges, and two years later, a requirement that an applicant for a license demonstrate "good moral character" and that "proper cause exists for the issuance [of the license]" was implemented. *Kachalsky,* 701 F.3d, at 85 (citing 1913 Laws of N.Y., ch. 608, § 1, at 1629) (brackets in original)).

Several sections of New York's Penal Law represent the current licensing scheme enacted in New York. N.Y. Penal Law § 265.01-B criminalizes the "possess[ion of] any firearm." N.Y. Penal Law § 265.02(5)(i) criminalizes the "possess[ion] [of] three or more firearms." N.Y. Penal Law § 265.03(2) criminalizes the "possess[ion] [of] five or more firearms" as criminal possession of a weapon in the second degree, while N.Y. Penal Law § 265.04(2) criminalizes the "possess[ion of] ten or more firearms" as criminal possession of a weapon in the first degree.

New York does provide several exceptions to the codified penalties above. For example, the sections above do not apply in the event of "[p]ossession of a pistol or revolver by a person to whom a license therefor has been issued as provided under section

400.00 or 400.01 of this chapter…" N.Y. Penal Law § 265.20(3). N.Y. Penal Law § 400.00(2) lists out the types of licenses that would exempt an individual from criminal penalties based on employment or purposes of the license, and one of the types of licenses issued is an unrestricted concealed-carry license that allows the licensee to carry a firearm concealed. N.Y. Penal Law § 400.00(2)(f). The license is issued at the discretion of a designated licensing officer, and an officer can restrict the purpose of a license issued under N.Y. Penal Law § 400.00(2)(f). *O'Connor v. Scarpino,* 83 N.Y.2d 919, 920-921 (1994). Anyone who applies for such a license must show that "proper cause exists for the issuance thereof." *Id.* Although proper cause is not explicitly defined in N.Y. Penal Law § 400.00(2)(f), New York courts have granted licenses for purposes such as "target practice, hunting, or self-defense." *Kachalsky,* 701 F.3d, at 86. However, when dealing with unrestricted licenses, New York has recognized that "[a] generalized desire to carry a concealed weapon to protect one's person and property does not constitute `proper cause'" for an unrestricted concealed-carry license. *Id.* (quoting *Application of O'Connor*, 154 Misc.2d 694, 697 (Co. Ct. 1992)).

In *Kachalsky*, appellants had challenged the licensing scheme under § 400.00(2)(f) largely on the same grounds as petitioner in this case do now. The Second Circuit first outlined how history could not provide a clear picture on whether concealed-carry was within the core protections of the Second Amendment, as some state courts prohibited the concealed-carry of firearms, while others held such

prohibitions constitutional. *Kachalsky*, 701 F.3d at 89-92. The division created by the rulings and the fact that the question presented in *Kachalsky* - whether the Second Amendment's protections extended to the concealed carry of firearms outside the house - was unanswered by those rulings meant that history and tradition did not necessarily view concealed-carry as a core fundamental right under the Second Amendment. *Id.,* at 90-91. Ultimately, however, the Second Circuit held that the handgun ban did not act as a complete ban on handguns as the District of Columbia handgun statute had in *Heller*, see *id.,* at 91, and that petitioner's arguments that the licensing scheme under § 400.00 was a prior restraint did not hold water. *Id.,* at 92. Finally, the Second Circuit held 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.'" *Id.,* at 93 (quoting *Heller*, 554 U.S., at 634-635). In the Second Circuit's view, "applying less than strict scrutiny when the regulation does not burden the "core" protection of self-defense in the home [made] eminent sense in this context and [was] in line with the approach taken by [its] sister circuits." *Id.,* at 93.

Several states also have enacted similar restrictions for concealed-carry firearms. For example, California prohibits the act of "[c]arr[ying] concealed upon the person any pistol, revolver, or other firearm capable of being concealed upon the person." Cal. Penal Code § 25400. Like New York, California also includes an exception for those who possess an unrestricted concealed-carry firearm

license, Cal. Penal Code § 25655, so long as an applicant for such a license meets several requirements, including a requirement to demonstrate that good cause "exists for issuance of the license." Cal. Penal Code § 26150. And like New York's licensing scheme, California's licensing scheme for unrestricted concealed-carry firearms licenses has withstood constitutional challenges. See *Peruta v. Cty. of San Diego,* 824 F.3d 919 (9th Cir. 2016), *cert. denied*, 137 S.Ct. 1995 (2017).

II. Procedural History

In 2008, petitioner Brandon Koch was granted a firearms license in the State of New York. However, this license only allowed Koch to possess a handgun in public for "hunting and target" purposes only. JA 125. The hunting and target restrictions on Koch's license prevents him from carrying a firearm in public for self-defense. JA 125. In 2017, Koch asked respondent Justice Richard McNally to remove the hunting and target restrictions on his license, making it an unrestricted concealed-carry handgun license under N.Y. Penal Law § 400.00(2)(f). Koch cited the concealed-carry licenses he possessed in several other states, as well as numerous gun safety classes he had taken in other states, as evidence that he had proper cause for the issuance of an unrestricted concealed-carry license under § 400.00(2)(f).

Likewise, in September of 2014, petitioner Robert Nash was granted a handgun license, but only for the purposes of "hunting, target only." JA 34-35. Like Koch, such a restriction prevents Nash from carrying a firearm for self-defense outside his home. JA 35. In

August 2016, however, Nash noticed an increase in robberies in the area where he resided. JA 40. Therefore, he asked Justice McNally to remove the hunting restrictions from his license, noting that he would use his handgun for "personal protection" and that he had taken several gun training classes to practice gun safety. JA 40. The removal of the restrictions would have converted his license to an unrestricted concealed-carry handgun license under N.Y. Penal Law § 400.00(2)(f).

Both Koch and Nash conceded that they did not have proper cause that justified the removal of the hunting restrictions on their licenses, but merely wished to carry their handguns in public for self-defense. JA 122, 124. Koch and Nash also acknowledged that they are not employed in a department that would exempt them from the normal restrictions that § 400.00(2)(f) entails, nor fall under any other exception under N.Y. Penal Law §§ 265.01-265.04.

Justice McNally denied the applications for both Koch and Nash in separate letters. See JA 41, 114. Although he did not elaborate on the exact reasoning as to why the restrictions would not be removed from the licenses, McNally noted in his letter to Nash that the restrictions were intended to "prohibit [one] from carrying concealed in ANY LOCATION typically open to and frequented by the general public." JA 41 (emphasis in original).

Following Justice McNally's denial of their requests to remove the hunting restrictions, Nash and Koch filed a lawsuit in the U.S. District Court for

the Northern District of New York with the New York State Rifle and Pistol Association against then-Superintendent of the New York State Police George Beach and Justice McNally. Koch and Nash argued that the licensing scheme under N.Y. Penal Law § 400.00(2)(f) violated the Second Amendment, claiming that the proper-cause requirement as described in *Kachalsky,* 701 F.3d at 86, operated as a "flat ban on the carrying of firearms by typical law-abiding citizens, who by definition cannot demonstrate this kind of atypical need to bear arms." JA 127. The District Court for the Northern District of New York dismissed petitioners' case after holding that *Kachalsky* foreclosed their claims. Pet. App. 9a-12a. Nash and Koch appealed the dismissal to the Second Circuit, who summarily affirmed the decision, agreeing with the District Court that *Kachalsky*'*s* holding was determinative in the case. Pet. App. 2a. Petitioners then filed a petition for a writ of certiorari to this Court. This Court granted certiorari on the following question: Whether the restrictions placed on petitioners' concealed-carry licenses violate the Second Amendment.

SUMMARY OF ARGUMENT

I. New York's licensing scheme under N.Y. Penal Law § 400.00(2)(f) implicates the individual's ability to possess concealed-carry handguns for self-defense. However, several circuits have already declared that the core component of the Second Amendment is self-defense within the home only. History and tradition support such a conclusion, as the British, Founding Fathers, and several 19th-century state courts noted that the right to keep and bear arms for self-defense

was utilized to defend one's property and home, as well as the state in times of conflict. Because § 400.00(2)(f) only relates to concealed-carry licenses, it does not implicate the core components of the Second Amendment.

II. New York has an important, even compelling government interest in crime prevention and ensuring the safety of the public. From 2000 to 2009, the rate of violent crimes involving firearms outside of New York city, for example, steadily increased, while that same rate decreased from 2011-2019. This volatile rate means that New York's restriction on concealed-carry firearms in public without a license issued under proper cause is substantially related to preventing potential misuse of unrestricted concealed-carry firearms licenses.

III. Petitioner's arguments that the licensing scheme violates the Second Amendment are insufficient. The argument that the licensing scheme should be reviewed under strict scrutiny does not overcome the argument that self-defense outside the home is not a core component of the Second Amendment as held in *Heller*. Even if this Court utilizes strict scrutiny, the licensing scheme is constitutional.

ARGUMENT

I. This Court should utilize intermediate scrutiny.

A. When determining whether a statute violates an established constitutional right, this Court utilizes

three tests: the rational basis test, intermediate scrutiny, and strict scrutiny. Rational basis review has already been rejected for use in Second Amendment analysis. See *Heller*, 554 U.S. at 628, n. 27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect").

In general, strict scrutiny has been utilized to review regulations that implicate fundamental rights under the Constitution. See Michael C. Dorf, *Incidental Burdens on Fundamental Rights,* 109 Harv. L. Rev. 1175, 1177-1178 (1996), *id.,* at 1178, n. 9. These rights are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *McDonald,* 561 U.S., at 760. Thus, statutes requiring strict scrutiny analysis are presumed to be unconstitutional, and the government bears the responsibility of demonstrating that the statute does not violate the Constitution. See *Ashcroft v. American Civ. Liberties Union,* 542 U.S. 656, 660 (2004) (first citing *R.A.V. v. St. Paul,* 505 U.S. 377, 382 (1992), then citing *United States v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 816 (2000)).

Several circuits have accordingly held that only when the "core lawful purpose" of the Second Amendment has been implicated should the reviewing court utilize strict scrutiny, comparing it with analysis of statutes that implicate First Amendment rights. Cf. *Kachalsky,* 701 F.3d, at 94. These circuits have also held, however, that the "core

lawful purpose" of the Second Amendment has always been restricted to self-defense within the home. Thus, these circuits have held that the possession of concealed-carry firearms is not within the "core lawful purpose" of the Second Amendment as outlined in *Heller*. See, e.g., *Gould v. Morgan*, 907 F.3d 659, 671 (1st Cir. 2018), *cert. denied,* 141 S.Ct. 108 (2020), *Kachalsky*, 701 F.3d at 93; *Woollard v. Gallagher,* 712 F.3d 865, 876 (4th Cir.), *cert. denied,* 571 U.S. 952 (2013); *Peruta*, 824 F.3d, at 927 (stating that the Second Amendment "simply does not extend to the carrying of concealed firearms in public by members of the general public"); *United States v. Focia*, 869 F.3d 1269, 1285 (11th Cir. 2017), *cert. denied,* 139 S.Ct. 846 (2019).[1]

The text in *Heller* undoubtedly supports such a conclusion. In that case, this Court stated that the Second Amendment undoubtedly protects the "right

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[1] One Court of Appeals panel has held that *Heller's* holding applies to regulations affecting concealed-carry licenses for firearms outside the home. *Wrenn v. Dist. of Columbia,* 864 F.3d 650 (D.C. Cir. 2017). The panel also held that no level of scrutiny was required if a statute violated the core component of the Second Amendment or acted as a "total ban" on the exercise of the Second Amendment. *Id.*, at 667. This view has not been adopted by any other circuit.

Another panel on the Seventh Circuit has also held that self-defense outside the home is a core component of the Second Amendment right to bear arms. *Moore v. Madigan,* 702 F.3d 933 (2012). However, the Court also compared the Illinois regulation challenged in *Moore* with New York's licensing scheme, and found that New York's licensing scheme was "less restrictive" than the regulation invalidated in *Moore. Id.,* at 941.

of law-abiding, responsible citizens to use arms in defense of hearth and home," *id.,* at 635, and that "the need for defense of self, family, and property is most acute" in the home. *Id.,* at 628. But traditionally, such a right to bear arms has more limited "as [one] move[s] outside the home," because "public safety interests often outweigh individual interests in self-defense." *Masciandaro,* 638 F.3d at 470 (Niemeyer, J., for the court). And as seen below, that reading is consistent with historical precedent and text.

A. The Second Amendment's core purpose is limited to the possession of firearms for self-defense within the home

The readings of the circuit courts of appeals are consistent with the historical meaning around the Second Amendment. As the Ninth Circuit in *Peruta* found, the history of regulating the concealed-carry of firearms predates to when Henry VIII issued an order prohibiting *anyone* from carrying weapons that were concealable on the body. 824 F.3d, at 930-931. Henry's successors would continue his prohibition on the concealed-carry of firearms, until the 1700s. *Id.,* at 930-933. This demonstrates that prohibiting concealed-carry was longstanding in English history.

But before Henry VIII ascended to the English throne, past monarchs had already restricted the carrying of arms to their discretion. For example, Kings Edward I and Edward II enacted some policy that required those who carried arms in public to obtain a license or special permission from the King. *Peruta,* 824 F.3d, at 929. Discretion marked this

period, when the King could easily grant or deny special licenses to carry arms. Furthermore, Edward III expanded upon his predecessors' policies to maintain that enforcement of the regulations would lie with "the King's justices in their presence, sheriffs, and other ministers in their bailiwicks, lords of franchises, and their bailiffs in the same, and mayors and bailiffs of cities and boroughs, within the same cities and boroughs, and borough-holders, constables, and wardens of the peace within their wards." 2 Edw. 3, c. 3 (1328). New York's usage of local officials to grant or deny licenses based on their discretion is act certainly based off of history and tradition.

Other sources also assist in concluding that the core lawful purpose of the Second Amendment's right to keep and bear arms was for self-defense within the home. To start, Blackstone's Commentaries, the "preeminent authority on English law for the founding generation," see *Heller,* 554 U.S. at 593-594; *Alden v. Maine,* 527 U.S. 706, 715 (1999), described "having arms for [self] defence" as one of the "auxiliary right[s] of the [English] subject." 1 William Blackstone, *Commentaries* 139. However, Blackstone made clear that such a right to bear arms was also conditioned as "such as are allowed by law" and under "due restrictions." *Id.* Thus, historical sources have indicated that the right to bear arms was never absolute, and that restrictions could be placed on its exercise.

Granville Sharp expanded on the phrase "as are allowed by the law," writing that the phrase "respects

the limitations in the above-mentioned act of 33 Hen. VIII. c. 6, which restrain the use of some particular sort of arms, meaning only such arms as *were liable to be concealed*… as "cross-bows, little short hand-guns, and little hagbuts." *Tracts, Concerning the Ancient and Only True Legal Means of National Defence, by a Free Militia* 17-18 (3d ed. 1782) (emphasis added). Blackstone's description of the right to bear arms for self-defense would not have encompassed concealed-carry for self-defense, as evidenced by the fact that English law forbade even the carrying of concealable weapons at the time.

This history continued well into the founding-era and the 19th century. As *Heller* first noted, "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." 554 U.S., at 626. Many of these courts held that so long as the right to bear arms *openly* was not infringed, a restriction against concealed-carry firearms did not violate the Constitution. See, *e.g., Nunn v. State,* 1 Ga. 243, 251 (1846); *State v. Chandler,* 5 La.Ann. 489, 490 (1850) (holding that a restriction against concealed-carry firearms did not violate the Second Amendment because "[i]t interfered with no man's right to carry arms… 'in full open view'"). Others held that, regardless of whether the regulation covered the open carry of firearms, statutes restricting the concealed-carry of firearms were constitutional. See *Fife v. State,* 31 Ark. 455 (1876); *Aymette v. State,* 21 Tenn. 154 (1840); *English v. State,* 35 Tex. 473 (1871). This Court previously even held that the Second

Amendment did not preclude restrictions on concealed-carry firearms. *Robertson v. Baldwin*, 165 U.S. 275, 281-282 (1897). For much of American history, therefore, it could be said that self-defense outside the home was not a core fundamental right of the Second Amendment that outweighed public safety concerns.

On the other hand, the keeping and bearing of arms for self-defense *within* the home, as described in *Heller,* is backed by history. The idea that "a man's house is his castle" is deeply rooted not only in American history, but also in English history. Cf. *Payton v. New York,* 445 U.S. 573, 596-597 (1980) (stating that "'the freedom of one's house' was one of the most vital elements of English liberty"). The general doctrine was that "the house of every one is to him as his castle and fortress… for his defence against injury and violence," and that "if thieves [came] to a man's house to rob him, or murder, and the owner of his servants kill[ed] any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing." *Id.,* at 596, n. 44 (quoting *Semayne's Case,* 77 Eng.Rep. 194, 195 (K.B.1603)). In the colonial age, when the right to keep and bear arms "[became] fundamental for English subjects," *Heller,* 554 U.S., at 593, King George III began to disarm the colonists with several restrictions, "provok[ing] polemical reactions by Americans invoking their rights as Englishmen to keep arms." *Id.,* at 594, *McDonald,* 561 U.S., at 768. In addition, following the notorious Boston Tea Party, the English Parliament passed several acts in 1774, one of which allowed the King to "cause any Officers or Soldiers in

his Majesty's service to be quartered and billetted in such manner as is now directed by law where no Barracks are provided by the Colonies." 14 Geo. 3 c. 54. Noting that the Quartering Act was a setback from the castle doctrine set in Great Britain, the Founding Fathers intended for the Second, Third, and Fourth Amendments to provide protections allowing for Americans to defend their property from unconstitutional encroachment from the government. Cf. *Engblom v. Carey*, 677 F. 2d 957, 967 (2d Cir. 1982) (Kaufman, J., concurring in part and dissenting in part). Furthermore, the Founding Fathers feared that the national government would "disarm the universal militia," which was "the perceived threat that had prompted the inclusion of the Second Amendment in the Bill of Rights." *McDonald,* 561 U.S., at 770. As James Madison wrote,

> Besides the advantage of being armed, which the Americans possess over the people of almost every other nation, the existence of subordinate governments to which the people are attached, and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.

The Federalist No. 46 (J. Madison) at 321-322 (J. Cooke ed. 1961). And throughout the 19th century, many officials, including those in the militias, argued that the bearing of arms for self-defense was most effective in the home. As one official wrote,

> It is true, that it is better that the arms should be kept by the men themselves, at their own dwellings, than in the public arsenals. They thus learn to take care of them, at least; and as opportunities for hunting and practical shooting offer, they improve as marksmen. But few boys would learn their catechisms, if the books which contained them, were to be found in the public libraries only; and but few men would be familiar with the use of arms, which were not kept in their own possession.

Letter from William H. Sumner to John Adams (May 3, 1823), in An Inquiry into the Importance of the Militia to a Free Commonwealth 39 (1823). Thus, the right to bear arms under the Second Amendment for self-defense was always meant to be effective within the home, and not outside the home.

B. The requirements for an unrestricted concealed-carry license under N.Y. Penal Law § 400.00(2)(f) does not implicate the Second Amendment's core purpose of self-defense within the home

Having dealt with the issue of whether self-defense outside the home was a "core lawful purpose" to keep and bear arms under the Second Amendment, the requirements for an unrestricted concealed-carry handgun license under N.Y. Penal Law § 400.00(2)(f) does not implicate the Second Amendment's core purpose of self-defense within the home. To start, § 400.00 separates licenses by type, and firearms licenses for carry within the home are defined separately from licenses for unrestricted concealed-

carry *outside* the home. Compare N.Y. Penal Law § 400.00(2)(a) with § 400.00(2)(f). Licenses issued under § 400.00(2)(a) (*i.e.*, licenses to possess firearms within the home) do not require the applicant to demonstrate proper-cause, which makes it substantially easier to obtain a license to possess handguns within the home. *Id.*

Such a distinction should not be taken lightly. For one, the New York legislature did not distinguish the two types of licenses without reason. To do so otherwise would render the legislature's distinction of licenses for handgun possession within the home and concealed-carry outside the home contrary to the intent of the legislature. By specifically enacting § 400.00(2)(a), the New York Legislature intended for the scope of licenses issued under § 400.00(2)(f) to encompass concealed-carry *outside the home* only, and for the proper-cause requirement to apply *only* to applicants who sought an unrestricted license for concealed-carry outside the home. The matter is therefore straightforward – because the license petitioners seek – an unrestricted, concealed-carry handgun license for self-defense *outside the home* under § 400.00(2)(f) – differs in function from a license to "possess in [one's] dwelling by a householder," § 400.00(2)(a), § 400.00(2)(f) does not implicate the Second Amendment's core lawful purpose – self-defense within the home.

II. N.Y. Penal Law § 400.00(2)(f) does not violate the Second Amendment.

When determining if a statute satisfies intermediate scrutiny, this Court looks toward

whether the statute serves "important governmental objectives" and is "substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976); see also *Mills v. Habluetzel*, 456 U.S. 91, 99 (1982). New York's licensing scheme is substantially related to its interests in guaranteeing the public safety and preventing crime, and is narrowly tailored to serve those interests.

A. New York has a significant government interest in public safety and crime prevention.

This Court has previously recognized a significant, even compelling, interest in preventing crime and ensuring the safety of the public. See, e.g. *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 677 (1989) (describing the government's interest in public safety as "compelling"); *United States v. Salerno*, 481 U.S. 739, 749-750 (1987) (crime prevention); *Schall v. Martin*, 467 U.S. 253, 264 (1984) (state has a "'legitimate and compelling interest' in protecting the community from crime" (quoting *De Veau v. Braisted*, 363 U.S. 144, 155 (1960)). As other states would note, public safety and crime prevention have been significant and longstanding justifications for the enactment of concealed-carry regulations. Cf. Andrew Kim, *A "Justified Need" For the Constitutionality of "Good Cause" Concealed Carry Provisions,* 88 Fordham L. Rev. 761, 778 (2019) (describing how states have banned or restricted concealed weapons "for the sake of public safety"); Saul Cornell & Nathan DeDino, *A Well Regulated Right*: *The Early American Origins of Gun Control,* 73 Fordham L. Rev. 487, 501-502 (2004)

(stating that historically, state legislature could define the limits of such a right and could enact laws about firearms "consistent with the goals of protecting public safety"). Indeed, as scholars have noted, "[t]he primary target of such local regulation is gun-related crime." Joseph Blocher, *Firearm Localism,* 123 Yale L.J. 82, 100 (2013).

New York's licensing scheme was especially designed to combat crime and guarantee public safety. As the Second Circuit noted, the New York licensing scheme was enacted in the wake of rising gun violence and the need for stringent measures. *Kachalsky,* 701 F.3d, at 84-85 (citing various articles detailing the rising rates of gun violence). It was under this same rising violence that the Sullivan Bill was passed in 1911. *Id.* And the licensing scheme under § 400.00 continues to serve "regulatory and public safety aims" today. See *O'Brien v. Keegan,* 87 N.Y.2d 436, 440 (1996).

Thus, New York's licensing scheme is designed to serve the substantial (and compelling) state interests in crime and public safety.

B. New York's licensing scheme is substantially related to its interests in public safety and crime prevention.

As stated above, a statute must be substantially related to the important government interest that has been identified. In essence, the statute must not only "promote[] a substantial government interest that would be achieved less effectively absent the regulation," but also promote it in a manner where it

would not unnecessarily limit more protected activity "than is necessary to further the government's legitimate interests." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (internal quotation marks omitted).

New York's licensing scheme is substantially related to its interests in public safety and crime prevention. History has pointed to many instances of states prohibiting the carrying of dangerous weapons such as firearms out of public safety concerns, and New York's statute was enacted in the wake of rising gun violence within the state. See *Kachalsky,* 701 F.3d, at 84-85. From 2000 to 2009, violent crimes involving firearms had increased by about 18% outside of New York City.[2] But from 2011-2019, the rate of violent crimes involving firearms had decreased outside of New York City.[3] Simply put, the volatile nature of gun violence in New York means that there is little to no space for error when it comes to issuing unrestricted concealed-carry firearms licenses for self-defense outside the home, and the licensing scheme enacted is substantially related to

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[2] See *2009 Crimestat Report,* New York Division of Criminal Justice Services (June 2010), https://web.archive.org/web/20120921063514/http://www.criminaljustice.ny.gov/pio/annualreport/2009-crimestat-report.pdf, at 4.

[3] See *Violent Crime Involving a Firearm and Shooting Report*, New York Division of Criminal Justice Services (May 2021), https://www.criminaljustice.ny.gov/crimnet/ojsa/GIVE%20VCBF%20and%20Shooting%20Activity%20Report.pdf, at 3.

reducing the rate of gun violence outside the home. Furthermore, by restricting the proper-cause requirement to applicants who wish to receive an unrestricted concealed-carry firearms license for self-defense outside the home (and not within the home), the law does not burden the core lawful purpose of the Second Amendment's right to keep and bear arms – self-defense within the home.

The problem of the proper-cause requirement that petitioners identify is that the requirement seems to lock out the majority of individuals who wish to receive an unrestricted concealed-carry firearms license for self-defense outside the home. But consider this: when most people purchase a gun for self-defense, "they generally do not know whether they will ever have to use it for [self-defense]." Joseph Blocher, *Good Cause Requirements for Carrying Guns in Public,* 127 Harv. L. Rev. Forum 218, 220 (2014). In most cases, the purchaser does not have to figure that out the hard way. *Ibid.* Thus, it could be said that people often have "no way" of knowing "with precision" the chances of their facing a "real" threat. *Ibid.* As one scholar accurately put it,

> It is also true that mere preparations for self-defense might never involve physical harm to anyone, so the state's interest in public safety is presumably lower than when it comes to actual confrontations. Nonetheless, when such preparations include the public carrying of guns, the risk of misuse is undeniable. It is that risk which good cause limitations seek to minimize.

Blocher, 127 Harv. L. Rev. Forum, at 221. The proper-cause requirement therefore represents New York's attempt to prevent crime through the misuse of unrestricted concealed-carry firearms on the well-sounded basis that "public safety interests often outweigh individual interests in self-defense [outside the home]." *Masciandaro,* 638 F.3d, at 470.

Thus, the licensing scheme is substantially related to New York's substantial government interests in crime and public safety.

III. Petitioner's arguments do not support the assertion that New York's licensing scheme violates the Second Amendment.

Petitioners offer several arguments as to how New York's licensing scheme under § 400.00(2)(f) violates the Constitution. First, petitioners argue that strict scrutiny analysis should be used because the licensing scheme implicates the core component of the Second Amendment – individual self-defense. Petitioners then argue that the licensing scheme is not narrowly tailored to serve New York's interests in public safety and crime prevention. None of these arguments suffice.

A. *Heller* does not lend support to a fundamental right to carry firearms for self-defense outside the home.

Petitioners first argue that the licensing scheme is subject to strict scrutiny analysis because it implicates a core component of the Second Amendment's right to bear arms. But as stated

above, the Supreme Court has already recognized that the zenith of the Second Amendment right to bear arms for self-defense is strongest within the home. *Heller,* 554 U.S. at 577. And historically, although the Second Amendment's right to bear arms is especially applicable to self-defense within the home, there has been little to no support to a right to concealed-carry outside the home as stated above. Even if the term "bear arms" does refer to carrying arms within a coat, that does not outweigh nearly five-hundred years of precedent regarding the regulation of concealed-carry firearms.

B. Even if this Court uses strict scrutiny, New York's licensing scheme passes constitutional muster because § 400.00(2)(f) is narrowly tailored to compelling state interests.

Even if petitioner is correct in asserting that strict scrutiny should be applied to New York's licensing scheme, § 400.00(2)(f)'s proper cause requirement still satisfies strict scrutiny. Under the standard of strict scrutiny, a statute that implicates a core fundamental right of the Constitution must be narrowly tailored to serve a compelling state interest. See, e.g., *McCullen v. Coakley*, 573 U.S. 464, 486 (2014); *Playboy Entertainment,* 529 U.S. at 813; *Adarand Constructors, Inc. v. Pena*, 515 U.S. 220, 227, 236 (1995). As established through § 400.00(2)(f)'s satisfaction of intermediate scrutiny above, the state of New York has compelling state interests in public safety and crime prevention. The only difference between intermediate and strict

scrutiny analysis in this case is whether § 400.00(2)(f)'s proper-cause requirement is narrowly tailored to serve a compelling (rather than substantial) state interest, and whether it is "the least restrictive means of achieving [those] compelling state interest[s]." *McCullen,* 573 U.S., at 478.

Petitioner advances several arguments to argue that the licensing scheme is not narrowly tailored to serve New York's interest in crime prevention. The first is that the proper-cause requirement restricts many New Yorkers from obtaining an unrestricted concealed-carry license, likening it to a flat-ban on handguns such as that invalidated in *Heller*. But New York's licensing scheme is easily distinguished from the District of Columbia statute invalidated in *Heller*. First, as *Heller* noted, the District of Columbia prohibited the possession of an unregistered firearm, but it also prohibited the registration of handguns. 554 U.S., at 574. Such a restriction could not be sustained, given that handguns were "the most preferred firearm[s] in the nation to keep and use for protection of one's home and family." *Id.,* at 628-629 (internal quotation marks omitted). Not only did the statutory scheme "totally ban[] handgun possession in the home," it also required "any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable." *Id.,* at 628. In contrast, New York has not only allowed handgun possession within the home so long as one obtains a license (without needing to demonstrate proper-cause), it has also allowed the concealed carry of firearms, so long as a license is issued when proper

cause is established. And though proper cause does not equate to a simple need for self-defense, see *O'Connor,* 154 Misc.2d, at 697, the existence of the exception allows for a less restrictive regulation than that seen in *Heller*. Cf. *Kachalsky,* 701 F.3d, at 94 (noting that New York's regulations only "affects the ability to carry handguns in public," while the statute in District of Columbia challenged in *Heller* applied "in the home" as well) (citing *Heller,* 554 U.S., at 628).

Next, petitioners argue that the discretion afforded to local licensing officers opens the gate to abuse and yet another method of restricting concealed-carry to the general public, because the discretion is virtually unreviewable. But there is indeed a standard for New York courts to review the grant or denial of unrestricted concealed-carry licenses – a licensing officer's determination will be reversed if it is an abuse of discretion or if the determination is arbitrary or capricious. See *O'Brien,* 87 N.Y.2d, at 440. And although the licensing officer's factual findings and credibility determinations are "entitled to great deference," see *Sibley v. Watches,* 194 A.D.3d 1385, 1389, (4th Dep't 2021), that standard is not necessarily a heavy one. The discretion would tip in the applicant's favor so long as the applicant demonstrates proper cause for an unrestricted concealed-carry license. Petitioners' arguments simply do not carry the burden of demonstrating that New York's licensing scheme violates the Second Amendment, either by restricting the right to bear arms for self-defense within the home or through the arbitrary exercise of discretion.

CONCLUSION

New York recognizes the Second Amendment's right to keep and bear arms for self-defense. However, public safety interests will certainly outweigh that right, especially when lives are at stake because of the potential for misuse of mechanisms intended to allow both the exercise of that right while also ensuring the safety of the public.

For the foregoing reasons, this Court should hold that New York's licensing scheme allowing for restrictions for unrestricted- concealed-carry firearm licenses under N.Y. Penal Law § 400.00(2)(f) is constitutional under the Second Amendment, and affirm the decision of the Second Circuit.

Respectfully submitted,

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