No. 20-843

IN THE

Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC.,
ET AL., *Petitioners*,

v.

KEVIN P. BRUEN, IN HIS OFFICIAL CAPACITY AS
SUPERINTENDENT OF NEW YORK STATE POLICE,
ET AL., *Respondents*.

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

Brief *Amicus Curiae* of
Gun Owners of America, Inc.,
Gun Owners Foundation, and
Heller Foundation
in Support of Petitioners

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INTEREST OF THE *AMICI CURIAE*[1]

Gun Owners of America, Inc. is a nonprofit social welfare organization, exempt from federal income tax under Internal Revenue Code ("IRC") section 501(c)(4). Gun Owners Foundation and Heller Foundation are nonprofit educational and legal organizations, exempt from federal income tax under IRC section 501(c)(3).

Amici organizations were established, *inter alia*, for the purpose of participating in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

STATEMENT OF THE CASE

Petitioners New York State Rifle & Pistol Association, Inc. and certain individuals brought an action under 42 U.S.C. § 1983, alleging a violation of Second Amendment rights by certain New York State officials who denied their applications for a license to carry a firearm outside the home for self-defense. *See New York State Rifle & Pistol Ass'n v. Beach*, 354 F. Supp. 3d 143, 145 (N.D.N.Y. 2018) ("*NYSRPA*").

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[1] It is hereby certified that counsel for Petitioners filed a blanket consent with the Clerk, and counsel for Respondents has consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Petitioners' license applications were denied under one of the most restrictive firearms laws in the United States — the Sullivan Law — enacted in 1911. Carrying a concealed handgun outside the home or office for the purpose of self-defense requires a license issued by a licensing officer. Such licenses are not issued unless the applicant makes certain showing to the satisfaction of the licensing officer. Of particular importance here as to carrying a concealed handgun, the scheme requires that the applicant demonstrate that "'proper cause exists for the issuance thereof.'" *Id*. Under case law, that "proper cause" requires the applicant "'demonstrate a special need for self-protection distinguishable from that of the general community.'" *Id*. at 146. Since plaintiffs "did not 'show any facts demonstrating a need for self-protection distinguishable from that of the general public,'" the license was found to have been properly denied. *Id*. at 148.

The district court viewed plaintiffs' claims foreclosed by the Second Circuit's decision in *Kachalsky v. County of Westchester,* 701 F.3d 81 (2d Cir. 2012), which had ruled that the New York State licensing scheme did not violate the Second Amendment. *NYSRPA* at 147.

Appeal was taken to the Second Circuit, which resolved the appeal with a summary order of three paragraphs, likewise relying on its decision in *Kachalsky*. *See New York State Rifle & Pistol Ass'n v. Beach*, 818 Fed. Appx. 99 (2d Cir. 2020). Since the court's summary order was not supported by an opinion, the Petition for Certiorari correctly based its

claims of error on the Second Circuit's *Kachalsky* decision, even though it was written years before in 2012.

The Second Circuit's opinion in *Kachalsky* explained that, although New York State generally prohibits the possession of "firearms" absent a license, firearms are defined to include only pistols and revolvers, rifles and shotguns of shorter lengths, and what the law pejoratively terms "assault weapons." Thus, because some long guns are not classified as "assault weapons," they are not subject to the licensing provision of the statute. *Kachalsky* at 85. Applicants for licenses to possess firearms must be (i) over 21 years of age; (ii) of good moral character; (iii) without a history of crime or mental illness; and (iv) "'concerning whom no good cause exists for the denial of the license.'" *Id*. at 86.

New York also issues various types of "license[s] to carry a concealed pistol or revolver...." *Id.* at 85. Some are "restricted" to certain activities including "target practice or hunting." *Id.* at 86 n.5. Meanwhile, various exceptions to the licensing scheme authorize certain state and city judges to carry concealed. *Id*. Other concealed carry permits, like the ones at issue in this case, are for those "who desire to carry a handgun outside the home and who do not fit within one of the employment categories," who "must demonstrate proper cause...." *Id.* at 86. The issue in *Kachalsky* and the current challenge is one of these types of licenses — to carry concealed without regard to employment, outside one's home or place of business.

A petition for certiorari was filed on December 17, 2020. When granted on April 26, 2021, review was limited by the Court to one question: "Whether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment." This Court narrowed the broader question posed by Petitioners: "Whether the Second Amendment allows the government to prohibit ordinary law-abiding citizens from carrying handguns outside the home for self-defense."

SUMMARY OF ARGUMENT

Insofar as this Court has issued no substantive Second Amendment firearms decisions in the decade since *Heller* and *McDonald*, this case takes on great significance. The decision of the Second Circuit cannot be allowed to stand. The analysis of the Second Amendment in the *Kachalsky* decision completely missed the mark, illustrating the anti-gun instincts of most lower federal judges. At one point, the court in *Kachalsky* recognized that "[i]n *Heller*, the Supreme Court concluded that the Second Amendment codifies a pre-existing 'individual right to possess **and carry** weapons in case of confrontation'" (*Kachalsky* at 88), but then its decision ultimately disregarded that right. It was deemed sufficient that New York occasionally grants a license to the rich and well connected to keep it from being considered a complete ban on carrying. Indeed, New York's licensing system creates what could be viewed as a "select militia" while disarming the People's militia protected by the Second Amendment. Since this case involved bearing firearms outside the home, it was said to involve a non-core

right which could be easily overtaken by government assertions of public safety, even though the effective ban makes New Yorkers less safe on the streets. The fact that the licensing scheme has existed for over a century does nothing to demonstrate its constitutionality — just that New Yorkers have been longsuffering.

The *Kachalsky* decision employs interest balancing which *Heller* and *McDonald* rejected. As Justice Scalia explained, the Second Amendment interest balancing has already been done — by the People in ratifying the Constitution. Rather, this Court should employ here the test defined by then Judge Kavanaugh — "text, history, and tradition." The rights that *Kachalsky* authorized New York to infringe were pre-existing rights given the People, as the Declaration of Independence asserts, by our Creator. Rights not given by the government cannot be taken by the government.

Since the Second Circuit in *Kachalsky* did its best to evade the faithful application of the principles set out in those two cases, these *amici* trust that this Court will use this case to restore order to Second Amendment jurisprudence. Should this Court rule for Petitioners, these *amici* urge that great care be given to the language of the decision so as to guard against lower federal courts working hard to circumvent and narrow application of this decision to future challenges, as those courts have done with *Heller* and *McDonald*.

ARGUMENT

I. THE SECOND CIRCUIT'S *KACHALSKY* DECISION WAS BASED ON A FLAWED UNDERSTANDING OF BOTH THE SECOND AMENDMENT AND THIS COURT'S *HELLER* AND *McDONALD* DECISIONS.

The Second Circuit's opinion in *Kachalsky* is simply wrong on virtually every key point involving purpose and scope of the Second Amendment, effectively refusing to give effect to this Court's *Heller* and *McDonald* decisions.

A. Confusion about *Heller*.

First, *Kachalsky* was internally contradictory as to its understanding of *District of Columbia v. Heller*, 554 U.S. 570 (2008).

In its decision, the Second Circuit began by asserting that "the Supreme Court's pronouncement in *Heller* **limits** the right to **bear** arms for self-defense **to the home**." *Kachalsky* at 88 (emphasis added). No citation is provided for this assertion, nor could there be. Although the facts of *Heller* related a challenge to a ban on **possessing** a handgun in the home, there is no language in the *Heller* decision which **limits bearing** of arms to inside one's home. Moreover, the Amendment's right to "keep" arms involves possessing firearms, while the right to "bear" arms applies outside the home. Indeed, as Justice Thomas has noted, the Second Amendment does not merely "protect ... carrying a gun from the bedroom to the kitchen."

Peruta v. California, 137 S. Ct. 1995, 1998 (2017) (Thomas, J., dissenting from denial of certiorari).

From the deeply flawed starting point that *Heller* only applies within the home, the court in *Kachalsky* made every effort to cabin in the Second Amendment and diminish the significance and scope of this Court's decision. The court below asserts that *Heller* provides "no categorical answer" (*Kachalsky* at 88) as to whether a licensing scheme which effectively bans concealed carry by ordinary persons violates the Second Amendment. That may be true to the extent that bearing outside the home was not the issue addressed in *Heller*, but it is hardly as if the principles enunciated in *Heller* have no bearing on Petitioners' challenge here.

Interestingly enough, just after claiming that *Heller* does not implicate the bearing of arms, the Second Circuit then turned around and asserted the opposite — that "[i]n *Heller*, the Supreme Court concluded that the Second Amendment codifies a pre-existing 'individual right to possess **and carry** weapons in case of confrontation.'" *Id.* at 88 (emphasis added) (citations omitted). Here, the court below made an accurate statement. However, if the Second Circuit truly understood ***Heller*** to codify a **pre-existing right to carry in case of confrontation**, then one naturally would expect that the "carry[ing]" and the "confrontation" spoken of would occur outside the home. Yet the court below found otherwise.

B. Disagreement with *Heller*.

The court below seemed determined not only to narrow, but also to demean, the *Heller* decision by claiming that "it raises more questions than it answers." *Kachalsky* at 88. In reality, the Second Circuit did not like the answers *Heller* provides, and so it refused to recognize them by pretending they are not there. Reading the circuit court's opinion, it quickly becomes clear that it believes that the only reason that Mr. Heller prevailed in his challenge was because the D.C. law constituted a "complete ban on handguns in the home." *Id.* The court apparently believes that, since a few New York carry licenses are issued to the well-connected and politically powerful (*see* Brief for Petitioners at 42), the law here "does not operate as a complete ban" (*Kachalsky* at 91) and thus must be upheld.

Kachalsky likewise disregards *Heller*'s refusal to engage in interest balancing, alleging that was due only to the fact that the Court was addressing a "complete ban." *Kachalsky* at 88. Thus, the court launched into an evaluation of "how closely to scrutinize New York's statute" — discussing "heightened scrutiny," "strict scrutiny," "core rights," "fundamental rights," and other wholly arbitrary language indicative of judicial interest balancing that was eschewed by the *Heller* opinion. *Id.* at 93. In the end, the court landed on "intermediate scrutiny," application of which enabled it to reach the desired result — upholding the challenged statute. Entirely unsurprisingly, New York's "compelling, governmental interests in public safety and crime prevention"

(*Kachalsky* at 97) were said to be so strong that they overrode the need of New Yorkers to have a meaningful way to protect themselves from crime on the streets.

Ironically, *Kachalsky* viewed plaintiffs' argument that constitutional rights may not be subject to a "prior restraint" to be nothing more than a First Amendment type of analysis, with no application to the Second Amendment, even though the court had used a First Amendment interest balancing test to uphold the state's licensing scheme. *See Kachalsky* at 91 n.16.

C. Reliance on *Lawrence v. Texas* and *Griswold v. Connecticut*.

The court below should be given extra credit for its creativity in inventing the argument it relied on to conclude that concealed carry of firearms outside the home in New York is entirely "outside the core Second Amendment protections identified in *Heller*...." *Kachalsky* at 94. To establish this dubious proposition, the court invoked *Lawrence v. Texas,* 539 U.S. 558 (2003) to allege that constitutional rights apply in one's home more robustly than outside the home. *Id.* Thus, according to the Second Circuit, while bearing firearms inside the home (the "core" right) cannot be entirely banned by government, bearing firearms anywhere else (an alleged non-"core" right) can be banned and criminalized.

Exploring the court's curious analogy and its high view of the home, the "core" of Fourteenth Amendment "liberty" interest created in *Lawrence* is performing

homosexual sodomy in the home. By the court's own logic, if a statute criminalized homosexual acts that occurred in a motel, or in the woods, that would be permissible, since it would not be part of the "core right" recognized in *Lawrence*. The same would be true for the court's reliance on *Griswold v. Connecticut*, 381 U.S. 479 (1965) (*id*. at 94), where the "core" of the right of married couples using contraception would be limited to the home only.

If a comparison is to be made between the enumerated Second Amendment right "to keep and bear arms" and the unenumerated right to engage in homosexual acts grounded loosely in the word "liberty" in the Fourteenth Amendment, one would think that the enumerated right would receive greater protection. Not so, either with the court below or most lower federal courts, where the Second Amendment simply is not enforced as stated. To diminish Second Amendment protections, the fiction of "core" and "non-core" rights allows unelected judges to grant or withhold rights based on personal preference rather than constitutional text. Of course, when protecting Fourteenth Amendment unenumerated rights favored by the courts, judges feel free to demonstrate the full range of their creative legal reasoning to expand — not restrict — the "spheres of our lives and existence." *Lawrence* at 562. To the court below, the Second Amendment not only is, but should be, a "constitutional orphan." *See Silvester v. Becerra*, 138 S. Ct. 945, 952 (2018) (Thomas, J., dissenting from denial of certiorari).

D. The Lower Court Erroneously Relied on the "Longstanding" Status of the Sullivan Law to Establish Its Constitutionality.

The Second Circuit claimed that *McDonald v. City of Chicago*, 561 U.S. 742 (2010), "reaffirmed *Heller*'s assurances that Second Amendment rights are far from absolute and that many longstanding handgun regulations are 'presumptively lawful.'" *Kachalsky* at 89. While, in a footnote, the court stated it did not view the "longstanding" standard "as a talismanic formula for determining whether a law regulating firearms is consistent with the Second Amendment," the court nevertheless found this statement "informative," and to "make[] clear that the Second Amendment right is not unlimited." *Id.* at 90, n.11.

However, even if not a talisman, there is no question that the fact that the Sullivan law was enacted in 1911 weighed heavily in the court's decision. The court below believed that "there is a longstanding tradition of states regulating firearm possession and use in public because of the dangers posed to public safety." *Id.* at 94-95. Thus, the impression given by the court's opinion is that longstanding laws have some special validity, simply because of their age. But this was not at all Justice Scalia's point in *Heller*, when he stated that:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on [i] **longstanding** prohibitions on the possession of firearms by

> felons and the mentally ill, or [ii] laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or [iii] laws imposing conditions and qualifications on the commercial sale of arms. [*Heller* at 626-27 (emphasis added).]

It is far from clear that Justice Scalia meant the word "longstanding" to be operative, as the court below assumed, rather than merely descriptive.

Heller's footnote 26 then termed these types of restrictions as examples of "**presumptively lawful** regulatory measures." *Heller* at 627 n.26 (emphasis added). Since the Court was not deciding every possible issue related to the right to keep and bear arms, it did not want to give the impression that it was. Of the three illustrations given by the Court, "longstanding" arguably described only the first — possession by felons and the mentally ill. And neither that nor the other two illustrations has any bearing on the issue before the Court here. Indeed, a virtually complete ban on bearing arms is an entirely different kettle of fish from a "regulatory measure."

But even if "longstanding" was to be applied as some sort of test, a "presumptively lawful" regulatory measure is one that still may be challenged — *Heller* most certainly does not state "conclusively lawful" or foreclose such challenges. On the contrary, Justice Scalia stated "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us." *Id.* at 635. This is such a time, and the fact

that New York's infringement has existed for 110 years does not make it constitutional. Indeed, the Supreme Court of New York recently stated that "[t]he mere fact that a practice has long existed without court challenge does not by itself demonstrate its constitutionality ... '[u]nconstitutional acts do not become constitutional by virtue of repetition, custom or passage of time'...." *Soares v. State of New York*, 68 Misc. 3d 249, 275 (2020).

II. NEW YORK STATE'S LICENSING SCHEME UNDERMINES RATHER THAN PROTECTS OUR FREE STATE.

Under New York's licensing scheme, an applicant must "'demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.'" *Kachalsky* at 86. Moreover, "[a] generalized desire to carry a concealed weapon to protect one's person and property does not constitute 'proper cause.'" *Id.* (internal quotations omitted). Meanwhile, licensing officers are "'vested with considerable discretion'" in deciding whether to grant a license application, particularly in determining whether proper cause exists for the issuance of a carry license." *Id.* at 87.

The view of the court below — that the government's "licencing officers" can be entrusted with the discretionary power to determine which members of "the People" may bear arms and which may not — is to disregard the purpose of the Second Amendment, which is not merely self-defense against thugs on the

street. To find that purpose, one need look no further than the Second Amendment's text:

> **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. [Emphasis added.]

The court below devoted little attention to the Second Amendment's "keep and bear" language, but even less to the prefatory clause. Yet the amendment asserts that "a well regulated Militia" — meaning the people's militia, not the government's militia — is not only desirable, but also "necessary to the security of a free State."

First, a "well regulated militia" requires an armed populace because, over time, the natural tendency of government is to grow its powers, which otherwise could not be checked. No unarmed populace could be considered sovereign, and its rights could never be effectively protected against government abuses. Indeed, the Battles of Lexington and Concord were precipitated not by "taxation without representation," but instead by British efforts to confiscate colonial guns and powder in order thereby to render the American People powerless to resist the crown's dictates.[2] History is replete with instances of governments which disarm their own people to make

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[2] For a discussion of the role of British gun control in precipitating the American revolution, *see* Gun Owners of America, Inc., *et al.* Amicus Brief filed in *Heller* at 22-27 (Feb. 11, 2008).

them less able to resist the will of the rulers, including the rule of the Philistines over ancient Israel,[3] Hitler's reign over Germany,[4] and Hugo Chavez's installed dictatorship over Venezuela.[5]

Second, the Second Amendment expressly identifies its purpose. The Founders wrote a Constitution to be the law which governed the government, and those who supported ratification asked the People to trust that it would be honored. Anti-Federalists such as George Mason and Patrick Henry, who opposed ratification, may have had a better understanding of the heart of man, rejecting the notion that the new national government would not eventually attempt to seize from the People the rights with which they were endowed by their Creator. It thus was necessary to preserve a free state, in which the rulers of the nation were ever aware that the People were armed, so that there would be a point beyond which they could not go in abusing their powers.

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[3] *See* 1 Samuel 13:19 ("Now there was no smith found throughout all the land of Israel: for the Philistines said, Lest the Hebrews make them swords or spears:").

[4] *See, e.g.,* Stephen P. Halbrook, "Nazi Firearms Law and the Disarming of the German Jews," 17 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW, No. 3, 483-535 (2000).

[5] *See*, *e.g.*, "Venezuela bans private gun ownership," BBC (June 1, 2012); B. Adams, "MSNBC gives quick, minute-and-a-half lesson on the need for our Second Amendment," *Washington Examiner* (Apr. 30, 2019).

In total opposition to the protections afforded by the Second Amendment, New York State determines which of the People it trusts to be armed. For example, the state trusts those who currently or previously worked for it — police officers and correctional officers. New York Penal Law Sections 265.20, 400.01. The state also trusts those who are providing private protection who likely are under some form of government supervision.

In his recently published opus on the right to bear arms, Second Amendment scholar Stephen P. Halbrook explained the concerns expressed by another anti-federalist to ratification of the Constitution without a Second Amendment. He explained that Federal Farmer had:

> argued that "the constitution ought to secure a genuine [militia] and guard against a **select militia**, by providing that the militia shall ... include ... all men capable of bearing arms.'" Instead of a **select militia**, "to preserve liberty, it is essential that the whole body of the people always possess arms.... [S. Halbrook, The Right to Bear Arms: A Constitutional Right of the People or a Privilege of the Ruling Class? (Bombardier Books: 2021) at 181 (emphasis added).]

Through application of its discretionary standard of "good cause," New York State has assumed it may arm its allies and protectors as a "select militia," while disarming the "well regulated Militia" — "the people." Indeed, for an entire century, New York State has

denied New Yorkers the right to defend themselves against criminals, and against a government that in the future could turn against its people. It creates criminals out of citizens seeking to assert their constitutional rights.[6] Indeed, many officials of the State of New York act as if they have no respect for its citizenry, or even employees.[7]

Even in its basic public safety role, New York's largest city — New York City — has failed. An analysis of New York Police Department's communications demonstrated slow responses to mass looting of businesses.[8] The NYPD has been slow in responding to rioting, and has failed to stop crimes, even when committed in front of officers.[9] In 2020, New York City shootings almost doubled, and murders

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[6] *See, e.g.*, J. Marzulli, "Weapons ban defied: S.I. man, arsenal seized," *Daily News* (Sept. 5, 1992) ("Police raided the home of a Staten Island man who refused to comply with the city's tough ban on assault weapons, and seized an arsenal of firearms…. Spot checks are planned....")

[7] *See, e.g.,* D. Tcholakian, "Is New York the Most Corrupt State in the Nation?" *Longreads* (May 11, 2018) ("Sexual harassment and abuse is omnipresent in Albany. Lawmakers' efforts to address the problem have ranged from well-intentioned to outright absurd.")

[8] *See, e.g.,* J. Bolger, "Exclusive: NYPD took hours to respond to mass looting, despite quickly cracking down on protests," *The Intercept* (June 1, 2021).

[9] *See, e.g.,* A. Feuer and E. Sandoval, "'It Was a Disgrace': De Blasio and Police Chief Faulted Over Looting," *New York Times* (June 17, 2020).

almost increased by half.[10] More recently, crime rose by 30.4 percent in April 2021 compared to April 2020, termed by the City a crime "surge."[11]

Having failed to respect the rights of its residents, and having failed to ensure their safety, New York has absolutely no business prohibiting the bearing of arms by the People.

III. THE SECOND CIRCUIT'S USE OF INTEREST BALANCING VIOLATES BOTH *HELLER* AND *MCDONALD*.

The *Kachalsky* court first "assum[ed]" that the Second Amendment applied to New York licensing scheme, thereafter believing its job was to determine "how closely to scrutinize New York's statute to determine its constitutional mettle." *Kachalsky* at 93. The court believed that *Heller* ruled out only rational basis review, but claimed that this Court had "expressly avoided deciding the standard of review" because the D.C. law was unconstitutional under any of the standards of scrutiny. *Id.* On that assumption, the lower court then dismissed use of "heightened scrutiny" on the theory that, although New York law did place "substantial limits" on citizens' exercise of

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[10] *See, e.g.*, R. Parascandola and T. Tracy, "Violence adds to NYC's 2020 death toll, with 97% jump in shootings and 45% increase in murders — criminal carnage not seen in 14 years," *Daily News* (Jan. 1, 2021).

[11] *See, e.g.,* S. Lepore, "NYPD: Shootings up 166%, fueling NYC crime surge," *News 10* (May 19, 2021).

their rights, its licensing scheme was not a "complete prohibition" as a few licenses to favored persons are approved occasionally. Plus, since the court alleged that the "core" protection of *Heller* only applies in the home, it believed that "applying less than strict scrutiny ... makes eminent sense...." *Id.* at 93. In the end, the court landed on "intermediate scrutiny" on its way to sanctioning the deprivation of an enumerated constitutional right that "shall not be infringed." *Id.* at 81.

A. *Heller* Did Address Use of Standards of Review.

First, and most importantly, the *Heller* decision did not "expressly avoid" deciding the standard of review to apply — it expressly eschewed use of any so-called "standard of review." In fact, this Court signaled hostility to using conventional judge-created standards of review to analyze Second Amendment cases even before it issued its opinion in *Heller*. During oral argument, Chief Justice Roberts criticized the various tests being proposed for evaluating the constitutionality of firearms laws under the Second Amendment:

> Well, these various phrases under the different standards that are proposed, "compelling interest," "significant interest," "narrowly tailored," none of them appear in the Constitution; and I wonder why in this case we have to articulate an all-encompassing standard. Isn't it enough to determine the scope of the existing right that the amendment refers to....

> [T]hese standards that apply in the First Amendment just kind of developed over the years as sort of **baggage that the First Amendment picked up.** But I don't know why when we are starting afresh, we would try to articulate a whole standard.... [*District of Columbia v. Heller* Oral Argument (Mar. 18, 2008), p. 44, ll. 5-23 (emphasis added).]

Likewise, Justice Scalia criticized Justice Breyer's dissent for advocating **a "judge-empowering 'interest-balancing** inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the state's salutary effects upon other important government interests.'" *Heller* at 634 (emphasis added). Justice Scalia responded:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding **'interest-balancing'** approach. The very enumeration of the right takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.... [*Heller* at 634 (emphasis added).]

To make certain the Court's point was understood, Justice Scalia added:

> We would **not** apply an **"interest-balancing"** approach to the prohibition of a peaceful neo-Nazi march through Skokie ... [t]he Second Amendment is no different. Like the First, it is the very *product* of an **interest balancing by the people** – which Justice Breyer would now conduct for them anew. [*Heller* at 634-45 (bold added).]

It is simply a charade to pretend that this Court was not discussing tests such as strict and intermediate scrutiny when it rejected interest balancing.

B. Judges May Not Balance a Right that "Is the Very Product of an Interest Balancing by the People."

Having settled on intermediate scrutiny, the Second Circuit then stated what it believed was on each side of the balancing test — the government's lofty and compelling interest in public safety[12] and crime control — to prevent "'mayhem in public places'" (*id.* at 96) — versus the individual's narrow interest in self-defense

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[12] The court embraced the view of the Fourth Circuit that, "'outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.'" *Kachalsky* at 94 (*citing U.S. v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011)). *See also Id.* at 475 (Wilkinson, J., dissenting) ("This is serious business. We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights."). On the contrary, Second Amendment rights may not be infringed on the basis of the dangerousness of the right as perceived by modern federal judges.

on rare occasions that may never occur. Viewed through this lens, the outcome of the case was determined before the court's analysis even began. Balancing of competing interests gives judges great power to decide a case based on what they believe to be the best outcome — not from a legal perspective but from a policy perspective — what Justice Scalia described as "judge-empowering 'interest-balancing.'" *Heller* at 634.

To be sure, the Second Circuit is not alone in its misreading of *Heller*, because the temptation of judges to empower themselves to re-write the Constitution is strong. In spite of that, some lower courts have adhered to *Heller*. Perhaps the first lower federal court opinion to faithfully and correctly read *Heller* on this point was then-Judge Kavanaugh's dissent in *Heller v. District of Columbia,* 670 F.3d 1244, 1247 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). That approach, elevating "text, history, and tradition," not interest balancing, should be applied here, and by all federal courts reviewing Second Amendment challenges.

Indeed, New York's licensing scheme for bearing arms infringes on the constitutionally enumerated right of the People of New York to "bear arms," even if judges on the Second Circuit do not agree with the Second Amendment. Contrary to the lower court's use of interest balancing to uphold one of the most onerous gun control regimes in the nation, the Second Amendment "is the very *product* of an interest balancing by the people." *Heller* at 635. The "enshrinement of constitutional rights necessarily

takes certain policy choices off the table." *Id.* at 636. Having adopted the rules by which they would be governed when the People ratified the Constitution, judges have no right to "conduct [interest balancing] for them anew." *Id.* at 635.

Early in this nation's history, Justice Marshall explained "the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature." *Marbury v. Madison*, 5 U.S. 137, 179-80 (1803). If federal judges are allowed to set aside portions of the Constitution with which they disagree, then the contract with the people is broken. This Court must restore order to the lower federal courts.

IV. PRE-EXISTING RIGHTS ARE GOD-GIVEN RIGHTS.

For almost a century and a half, this Court has made absolutely clear that it understood that the Second Amendment does not grant a right to the People, but rather recognizes and protects a right that the People enjoyed before the Constitution was ratified. In *United States v. Cruikshank*, 92 U.S. 542 (1876), the Court asserted:

> **This is not a right granted by the Constitution**. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed.... [*Id.* at 553 (emphasis added).]

The *Heller* Court was even more expressive:

> [I]t has always been widely understood that the Second Amendment ... codified a ***pre-existing*** right. The very text of the Second Amendment implicitly recognizes the **pre-existence** of the right and declares only that it "shall not be infringed." [*Heller* at 592 (bold added).]

Although the Second Circuit quotes this language from *Heller* (*Kachalsky* at 88), the consequence of a right being pre-existing appears to have been lost on that court. Stated simply: if the government granted a right to the People, it would have the power to alter or rescind that right, based on a decision that the rights of the people are less important than the purported interests of the government. But if the right pre-existed the existence of the government, then government has no power to alter or rescind it, as the lower court has permitted to occur here.

Our nation's charter, the Declaration of Independence, asserts that:

> We hold these Truths to be **self-evident**, that all Men ... are endowed by their **Creator** with certain **unalienable** Rights, that among these are Life, Liberty, and the Pursuit of Happiness — That to **secure** these Rights, Governments are instituted among Men.... [Declaration of Independence (emphasis added).]

Indeed, the Creator has much to say about this unalienable right, as the right of self-defense can be found throughout Scripture. In the Old Testament, Exodus 22:2 (NASB) teaches: "If the thief is caught

while breaking in and is struck so that he dies, there will be no guilt for bloodshed on his account." In the New Testament, Luke 11:21 (NLT) states: "When a strong man, fully armed, guards his own house, his possessions are secure." As to bearing arms in self-defense, when Jesus sent out his followers to spread the Good News, he instructed: "he who has a money bag, let him take it ... and he who has no sword, let him sell his garmet and buy one." Luke 22:35-37 (KJV). Also, the right of self-defense is closely connected to the right to defend others being attacked: "Rescue weak and needy people. Help them escape the power of wicked people." Psalm 82:4 (GW).

As to the responsibility of government to "secure" the right to self-defense, the lower court has done a perfectly terrible job. It has sanctioned New York State's eradication of the pre-existing right of the People to bear arms outside the home. The tendency of government to grow government power is no surprise, as the Declaration of Independence recognizes that governments sometimes become abusive of the rights of the People. While "Governments long established should not be changed for light and transient Causes" and "Mankind [is] more disposed to suffer, while Evils are sufferable," there comes a time that "Government becomes destructive of these Ends." At such a time "it is the Right of the People to alter or abolish [their government] and to institute new Government...." No one wants that day to arrive — but the People of New York have long suffered under a "longstanding" abusive law. Thus, it now falls upon this Court to reject and repudiate the

decision of the Second Circuit, and to protect pre-existing and unalienable rights of the People.

V. A DECISION STRIKING DOWN NEW YORK'S "PROPER CAUSE" STANDARD ALMOST CERTAINLY WILL BE MANIPULATED BY THE LOWER COURTS TO LIMIT GUN RIGHTS IN SUBSEQUENT LITIGATION.

After *Heller* and *McDonald*, the lower federal courts — largely populated by highly educated, establishment lawyers from big cities, with little affinity for firearms, and who often worked in big law or as prosecutors — have often resisted faithful implementation of those decisions. Whether by the two-step test, or the approach taken in *Kachalsky*, the lower courts have sought to construe the holding in *Heller* in the narrowest possible terms — as a prohibition on nothing more than government implementing a total ban on having an operable handgun in the home for self-defense. Based on this experience, these *amici* urge this Court to consider how even a pro-gun decision in this case could be evaded or narrowed by those same lower federal courts. For example, if the Court determines that New York may not enforce its "proper cause" standard to authorize licensure of the concealed carry of handguns, that ruling could be interpreted as having *sub silentio* determined that open carry can be banned, and any carry of rifles and shotguns could be banned as well.

This problem was not created by Petitioners. Petitioners originally sought this Court's review on the question "[w]hether the Second Amendment allows the

government to prohibit ordinary law-abiding citizens from carrying handguns outside the home for self-defense." Petition for Certiorari at i. This Court, however, granted review as to a much narrower question: "[w]hether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment." Responding to the issue under review, Petitioners addressed primarily the "proper cause" aspect of the New York permitting system, seeking only that they be issued "unrestricted" licenses to carry concealed handguns. J.A.127-28.

In order to be responsive to the revised question posed by this Court, Petitioners' merits brief no longer challenges the legitimacy of a state law requiring a law-abiding person to obtain government preclearance, in the form of a license to carry a firearm, before he may exercise an enumerated constitutional right.[13] As Petitioners note, "Nash possesses a 'restricted' license to carry a firearm, which permits him to carry his handgun outside the home for hunting and target

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[13] Such a licensing scheme would never be permitted in any other area of constitutional law. This Court should not permit the lower courts to treat the Second Amendment as a "second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees...." *McDonald v. City of Chicago* at 780. *See also Mai v. United States*, 974 F.3d 1082, 1097 (9th Cir. 2020) (VanDyke, J., dissenting) (noting that the Second Amendment is treated differently from other constitutional rights based merely on the subject matter involved — "a simple four-letter word: guns," something about which judges often permit "outcome[s]" that would not be "countenance[d] in ... any other area of the law.").

shooting, but not for self-defense." Brief for Petitioners ("Pet. Br.") at 18-19. Likewise, "Koch possesses a 'restricted' license." *Id.* at 19. Below, Petitioners challenged only the "proper cause" aspect of the New York permitting system, and sought that they be issued "unrestricted" licenses to carry handguns. J.A.127-28.

Second, Petitioners reference various cases in which state courts have discussed either open carry with respect to whether concealed carry is permitted, or vice versa, and reference Thomas "Cooley [who] was skeptical of 'the power of the legislature to regulate this right' to carry at all." Brief for Petitioner at 33-38. However, since open carry is not the issue in this case, Petitioners understandably do not further discuss open carry.[14]

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[14] In recent years, some lawyers have advocated the position that a state might ban open carry, or alternatively, it might ban concealed carry, so long as it does not ban *both*, thus leaving its residents some avenue to "bear" arms. *See, e.g., Palmer v. District of Columbia*, 1:09-cv-01482 (D.D.C.), Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment, ECF #5-2 at 12-13 ("Plaintiffs make no claim for a right to carry *concealed* handguns, any more than they claim a right to carry handguns openly. ... Legislatures might well prefer one form of carrying over another. ... *Heller*[] ... does not compel government officials to allow the carrying of handguns in a manner ... so long as a more socially-conducive option exists to allow people to exercise the right to bear arms....").

This position conflicts with the text, which broadly protects the right to "bear arms" without qualification. This reasoning is also in conflict with *Heller*, which explained that, "[a]t the time of the founding, as now, to 'bear' meant to 'carry,'" including "'upon the person or in the clothing or in a pocket....'"

Third, throughout Petitioners' brief, they argue in favor of the carrying of "arms" broadly. Petitioners correctly argue that "text, history, and tradition confirm that the Second Amendment protects the right to *carry common arms* like handguns for self-defense," and Petitioners note that, "'[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.'" Pet. Br. at 3, 27 (emphasis added). *See also* at 6 (noting "[t]he importance of not just keeping firearms, but bearing them for self-defense"). That said, in this case, Petitioners seek only the right to "carry *handguns* for self-defense." Pet. Br. at 48 (emphasis added).[15]

Certainly, there is much to be said for judicial restraint, with the Court deciding only the specific case

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Id. at 584. Since the Court discussed carrying both "upon" one's body (meaning "[r]esting or being on the top or surface" (N. Webster, An American Dictionary of the English Language, 1828, p. 862)) and "in" one's clothing, it thus foreclosed the argument that "bear arms" can be limited to open or concealed carry. Finally, *Heller* rejected outright the notion that the government need only leave *some* option for exercising a right, calling it "no answer to say ... that it is permissible to ban the [one thing] so long as [another thing] is allowed," thus explicitly leaving it up to "the American people," rather than their government, to choose how they exercise their rights. *Id.* at 629.

[15] Of course, *Heller* foreclosed any notion that the right to bear arms applies only to handguns, stating that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." *Id.* at 582.

or controversy before it. However, if the jurisprudence since *Heller* and *McDonald* teaches anything, it is that the lower courts will go to great lengths to avoid this Court's Second Amendment holdings by any means necessary. Indeed, as noted *supra*, in the past 13 years, the lower federal courts have largely sought to contain *Heller* to its specific facts. First, the courts mostly have rejected the notion that this Court's reasoning has *any application at all* outside of the so-called "core" act of keeping an operable handgun in the home for self-defense. Second, even though *Heller* rejected the use of "judge-empowering 'interest-balancing inquir[ies],'" the lower courts almost uniformly continue to use some type of scrutiny on the theory that the Court did not explicitly reject those particular balancing tests by name.

Unless this Court is crystal clear in its language, it is a virtual certainty that the lower federal courts likewise would engage in guerilla warfare against a pro-gun decision in this case. Should this Court conclude that Petitioners should be granted a New York state carry license, the lower courts no doubt will take that as conclusive proof that all licensure in the Second Amendment context is permissible. Should this Court conclude that Petitioners have a right to carry a concealed firearm in public, the lower courts no doubt will claim this means that there is no Second Amendment right to carry a firearm openly. And should this Court conclude that the Amendment protects the right to carry a handgun in public, the lower courts no doubt will treat that as a definitive statement that no one may "bear" long guns. *See Kachalsky* at 88 (claiming that "the Supreme Court's

pronouncement in *Heller* limits the right to bear arms for self-defense to the home.").

Viewed through this lens, this Court should attempt to preempt and thwart future attempts by the lower courts to undermine the right to keep and bear arms, who will rely on questions this Court *does not answer* as irrefutable proof that other persons, other arms, and other activities *are not protected* by the Second Amendment.

CONCLUSION

For the foregoing reasons, the decision of the U.S Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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