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 THE NEW YORK STATE POLICE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and education institution—a "think tank"—to formulate and promote free-market public policy in the States. The staff at The Buckeye Institute accomplish the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating sound free-market policies, and promoting those solutions for implementation in Ohio and replication across the country. Through its Legal Center, The Buckeye Institute engages in litigation in support of the rights and principles enshrined in the United States Constitution.

The Buckeye Institute supports the principles of limited government and individual liberty, and particularly the rights guaranteed to the people in the Bill of Rights. To protect these rights and ensure the guarantee of individual liberty, The Buckeye Institute advocates that the Constitution be interpreted according to its original meaning. The Buckeye Institute therefore has a strong interest in protecting the natural right of self-defense by

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[1] Petitioners in this case gave blanket consent to the filing of briefs *amici curiae* in support of Petitioners, Respondents, or neither party. Respondents gave written consent to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

promoting adherence to the Second Amendment's protection of the right to keep and bear arms.

SUMMARY OF ARGUMENT

The Second Amendment protects the fundamental right to self-defense by ensuring that "the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. In stark contrast to this broad constitutional protection, New York law and the State's "proper cause" licensing regime effectively prevent ordinary citizens from carrying firearms outside of their homes for the purposes of self-defense. The Second Amendment's text, as well as the history and tradition of the right to bear arms, require that the law be found unconstitutional and that the decision below be reversed. *See New York State Rifle & Pistol Association, Inc. v. Beach*, 818 Fed. Appx. 99 (2020).

Amicus curiae writes to highlight three discreet issues. First, the historical record demonstrates that to "bear arms" includes carrying common arms in public for self-defense. In the Northwest Territory, for example, carrying arms in public was not merely permissible, it was expected. In some cases it was even required. Historically, one's Second Amendment right was not limited to her home. Nor is there a constitutionally-sound basis for imposing such a limit today. Yet that is the consequence of New York's law—to prevent most ordinary citizens from enjoying their constitutional right to bear arms for self-defense.

Next, the discretionary nature of New York's licensing scheme treats similarly-situated individuals differently, and turns a right that is guaranteed to the people into a privilege that is only enjoyed by a select few. This Court has often been skeptical of allowing broad discretion by government officials in regulating enumerated constitutional rights. It should not be left to a State official to determine who may carry to defend herself, and who may not.

Finally, alleged infringements on the right to bear arms should be subject to heightened scrutiny. The right to self-defense is fundamental and deeply rooted in our Nation's history. Any attempts to impede that right should face a commensurate burden.

ARGUMENT

I. The Historical Record Demonstrates That In Ohio, The Northwest Territory, And The Rest Of The Nation, To "Bear Arms" Meant To Be Armed In Public.

The Second Amendment protects the fundamental right to self-defense by ensuring that "the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. In contrast, the New York law at issue here, and its related licensing regime, effectively prevent ordinary citizens from carrying arms outside of their homes.[2] New York's law cannot be reconciled with the rights guaranteed in the

[2] The relevant statutes are set forth in the Brief for Petitioners. *See* Pet. Br. at 14-16.

Second Amendment—therefore New York's law cannot stand.

The text of the Second Amendment protects "the individual right to possess *and carry* weapons in case of confrontation." *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (emphasis added). The history and tradition of that right confirm that it has been understood, since our Nation's founding, to include the carrying of common arms in public for self-defense. Indeed, "public carrying of firearms was widespread during the Colonial and Founding Eras." *Grace v. District of Columbia*, 187 F.Supp.3d 124, 136 (D.D.C. 2016). Many of our Nation's founders themselves openly carried firearms. *See id.* at 137; *see also* Br. of *Amici Curiae* Professors of Second Amendment Law, at 27-30.

In the Northwest Territory and throughout the Nation, carrying firearms was not merely permitted—it was *expected* and in some cases it was even *required*. A law in the Northwest Territory designated all male inhabitants between the ages of fifteen and sixty as subject to performing military duty, and emphasized that "assembling without arms in a newly settled country, may be attended with danger." Law of July 25, 1788, ch. I, §§ 1, 4, *reprinted in* 1 THE STATUTES OF OHIO AND OF THE NORTHWESTERN TERRITORY 92 (Salmon P. Chase ed. 1833) ["Chase, STATUTES OF OHIO"]. Those men who failed to furnish themselves with arms and ammunition were subject to fines. Law of Nov. 23, 1788, ch. VIII, § 2, *reprinted in* Chase, STATUTES OF

OHIO 102. Another statute required certain persons to carry arms "at any place for public worship." Act of July 2, 1791, ch. XXIII, § 2, *reprinted in* Chase, STATUTES OF OHIO 114.

A 1790 law regulating the discharge of firearms made clear that it did not extend "to any person lawfully using fire-arms as offensive or defensive weapons" or defending "his or her person or property, or the person or property of any other." Act of Aug. 4, 1790, ch. XIII, § 4, *reprinted in* Chase, STATUTES OF OHIO 106. This included defending against "highwaymen, robbers, thieves, or others unlawfully assailing him or her." *Id.* Thus, even when they were regulating firearms, officials in the Northwest Territory did so respectful of the expectation that men and women would carry arms outside their homes. They assumed that citizens would carry arms for a very specific purpose—what this Court has called the "core lawful purpose of self-defense." *McDonald v. City of Chicago*, 561 U.S. 742, 768 (2010) (quoting *Heller*, 554 U.S. at 630)).

This understanding and tradition of the Second Amendment tracks with the rest of early America. At least ten States (including Ohio) had contemporaneous constitutional provisions that used the phrase "bear arms" in a manner that included carrying arms for private purposes such as self-defense. *See United States v. Emerson*, 270 F.3d 203, 230 n.29 (5th Cir. 2001) (collecting provisions); *see, e.g.*, PA. CONST. art. I, § 21 (1790) ("The right of the citizens to bear arms in defense of themselves and the

State shall not be questioned."); KY. CONST. art. 10, ¶ 23 (1792) ("the right of the citizens to bear arms in defense of themselves and the State, shall not be questioned"); OHIO CONST. art. VIII, § 20 (1803) ("the people have a right to bear arms for the defense of themselves and the State"); IND. CONST. art.1, § 20 (1816) ("the people have a right to bear arms for the defence of themselves and the State").

Altogether, "about half the colonies had laws requiring arms-carrying in certain circumstances." Nicholas J. Johnson, et al., FIREARMS LAW AND THE SECOND AMENDMENT 106 (2012). This included carrying to church, courts, public assemblies, and while traveling. *See also* Br. of *Amici Curiae* Professors of Second Amendment Law, at 25-26 (collecting examples). Likewise, the great weight of nineteenth century case law "assume[s] the importance *of carrying* as well as possessing." *Wrenn v. District of Columbia*, 864 F.3d 650, 658 (2017) (emphasis added); *see* Pet. Br. at 32-36 (collecting cases and noting that courts overwhelmingly understood the Second Amendment to protect a "right to carry arms for self-defense outside the confines of one's home").

"[O]ne doesn't have to be a historian to realize that a right to keep and bear arms for personal self-defense in the eighteenth century could not have rationally been limited to the home." *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012). And the historical record is clear that Second Amendment rights *were not* limited in this way. Bearing arms outside one's

home was commonplace and, in many circumstances, it was expected.

Nor is there a constitutionally-sound basis for imposing such a limit today, as New York has effectively done. Respectfully, this Court has already decided the fundamental questions at issue here. Individual self-defense is "'the *central component*' of the Second Amendment right." *McDonald*, 561 U.S. at 767 (quoting *Heller*, 554 U.S. at 599). To be sure, both *Heller* and *McDonald* indicate that "the need for defense of self, family and property is most acute" in the home. *McDonald*, 561 U.S. at 767 (quoting *Heller*, 554 U.S. at 628). However, neither decision even hints that one's right to self-defense ends at her doorstop, because it does not.

Heller makes clear that to "bear arms" means "being armed and ready for defensive or offensive action in a case of conflict with another person." *Heller*, 554 U.S. at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). Yet confrontations "are not limited to the home." *Moore*, 702 F.3d at 936; *see also Wrenn*, 864 F.3d at 657 (emphasizing that the Second Amendment's "core lawful purpose is self-defense … and the need for that might arise beyond as well as within the home") (quotations omitted). That is precisely why lawmakers in the Northwest Territory and elsewhere expected people to bear arms. It is also why they recognized the need for defense against highwaymen, robbers, thieves, and other assailants.

See Act of Aug. 4, 1790, ch. XIII, § 4, *reprinted in* Chase, STATUTES OF OHIO 106.

Laws and licensing regimes like those at issue here infringe on the precise conduct (carrying arms) for the precise reason (self-defense) that the Second Amendment was intended to protect. *Grace*, 187 F.Supp.3d at 142; *see id.* at 129 (granting a preliminary injunction prohibiting the District of Columbia from enforcing a "good reason" requirement similar to New York's "proper cause" requirement). *Amicus curiae* respectfully asks this Court to make clear that the fundamental right to bear arms extends beyond one's home and cannot be curtailed as it has been by New York's unconstitutional licensing scheme.

II. The Discretionary Nature Of New York's "Proper Cause" Requirement Is Constitutionally Suspect.

Petitioners note that New York's regime is particularly concerning because the "proper cause" determination is left to the broad discretion of a licensing officer. *See* Pet. Br. at 42. *Amicus curiae* writes separately to underscore just how problematic this process is. The discretionary nature of New York's regime amplifies the State's constitutional violations. It treats similarly-situated individuals differently and it turns a *right* guaranteed to "the people" into a privilege enjoyed only by a select few.

As Petitioners point out, New York's law is discretionary *by design*, for purposes that were themselves constitutionally suspect and which would not pass muster today. *See* Pet. Br. at 42-43 ("the law was passed with an avowed intent … to disarm newly arrived immigrants, particularly those with Italian surnames"). And even today, "the regime operates selectively, with the occasional celebrity or well-connected individual securing a carry license." Pet. Br. at 43.

The Second Amendment protects "the right of the people to keep and bear Arms." U.S. CONST. amend. II. By its clear terms, it applies to "the people"—by which the Framers meant "the whole people." *See* 3 Jonathan Elliot, DEBATES IN THE SEVERAL STATE CONVENTIONS 425 (3d ed. 1937) (statement of George Mason, June 14, 1788); *see also* THE FEDERALIST NO. 46 (Madison) (discussing "near half a million citizens with arms in their hands"); THE FEDERALIST NO. 29 (Hamilton) (discussing "the great body of the yeomanry, and of the other classes of the citizens," indeed "the whole nation"). This Court was clear in *Heller* that when the Constitution protects the rights of "the people," it "unambiguously refers to all members of the political community, not an unspecified subset." *Heller*, 554 U.S. at 580; *see also United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990). The Second Amendment is not limited to the wealthy or well-connected, or those who demonstrate a specialized need to bear arms, or to any other category that the State deems fit.

This Court should reject any regime which, like New York's, purports to "license" constitutionally-protected activity but relies on discretionary authority to determine who may engage in that activity. It is difficult to imagine any other provision in the Bill of Rights being treated so poorly. Surely New York could not license free speech, giving officials broad discretion to deny that right to most citizens and allowing only a select few to speak freely. Nor could a State license individuals to travel outside of their homes without being subjected to warrantless searches, giving officials broad discretion to deny that right to most citizens and allowing only a select few to be free of warrantless searches. Yet that is precisely what has happened to the right to self-defense: "New York leaves it to the practically unreviewable discretion of a licensing officer to decide who may exercise the fundamental right to carry a handgun for self-defense." Pet. Br. at 42.

This Court has rightly been skeptical of allowing broad discretion to governmental officials to regulate individual constitutional rights. For example, in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), this Court held unconstitutional a city ordinance giving a government official broad authority to grant or deny applications for permits for publishers to place their newsracks on public property. The Court emphasized that a law or policy protecting the rights "for some but not for others" raises the specter of unconstitutional censorship and viewpoint discrimination. *Id.* at 763. Indeed, the Court found that the danger of unconstitutionality "*is*

at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official." *Id.* (emphasis added).

Plain Dealer Publishing Co. is hardly an outlier. Over many decades this Court has repeatedly found broad governmental discretion to be constitutionally-suspect. *See, e.g.*, *Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 162-164 (2002); *Cox v. State of Louisiana*, 379 U.S. 536, 558 (1965) ("allowing unfettered discretion in local officials" is an abridgement of First Amendment rights); *Saia v. New York*, 334 U.S. 558, 562 (1948) (holding an ordinance unconstitutional where it gave broad licensing discretion to a government official, and concluding such a regime "sanctions a device for suppression" of people's rights); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (ordinance requiring persons to obtain a license before soliciting door-to-door was invalid because the "executive and judicial branches [had] too wide a discretion in its application").

Nor are these principles cabined to selected rights or specific Amendments. The case law makes clear that broad discretion by government officials is constitutionally-suspect when applied to the full range of rights protected by the Bill of Rights. This Court has emphasized that the "central concern underlying the Fourth Amendment" is that law enforcement officers would otherwise have "unbridled discretion" to perform searches. *Arizona v. Gant*, 556

U.S. 332, 345 (2009); *see also Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978) (Fourth Amendment) (holding a portion of the Occupational Safety and Health Act unconstitutional, where the statute gave "almost unbridled discretion [to] executive and administrative officers" to perform warrantless searches).

This Court has expressed its concerns even when the judiciary itself is vested with overly-broad discretion. For example, the Court has found that sentencing judges "may not be given unbridled discretion" because the Constitution prevents capital punishment "from being administered in an arbitrary and unpredictable fashion." *California v. Brown*, 479 U.S. 538, 541 (1987); *see also Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (Eighth Amendment) ("discretion must be suitably directed and limited" to minimize the risk of arbitrary and capricious action). This Court has also declined to infer statutory discretion where doing so would potentially impinge on constitutionally-protected rights. *See Kent v. Dulles*, 357 U.S. 116, 129 (1958) (Fifth Amendment) ("Since we start with an exercise by an American citizen of an activity included in constitutional protection [the liberty to travel], we will not readily infer that Congress gave the Secretary of State unbridled discretion to grant or withhold it.").

The concern the Court expresses in these decisions is particularly well-founded here. New York's discrimination against individuals in the enjoyment of their Second Amendment right to carry is a

feature—not a glitch—of the challenged law. New York's law was designed to treat certain persons differently, depriving them of rights guaranteed to "the whole people." And that is, of course, exactly what the law has done over time. Although the State's regime no longer targets immigrants expressly, they are included in the unprivileged class of individuals who are denied their rights, and the law's continued application infringes on an even larger body of persons. The fact that the law now infringes on the rights of a vastly larger group of individuals (rather than singling out one subset) should not be a saving grace.

The Bill of Rights exists specifically to protect individuals' rights against government interference. It cannot be left to the discretion of a government official to determine who may enjoy those rights—who may defend herself and who may not. *Compare Plain Dealer Publishing Co.*, 486 U.S. at 763. The Constitution does not abide such selective application of fundamental rights.

III. Infringements On The Right To Self-Defense Should Be Reviewed Under Truly Heightened Scrutiny.

Finally, *amicus curiae* recognizes that determining the standard of review for alleged violations of the Second Amendment may not be necessary to decide the question before this Court. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31 (1993) (indicating that

this Court does not consider issues not "'fairly included' in the question presented"). The Court granted certiorari to address a narrowly-circumscribed question: Whether the State's denial of Petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment. The Buckeye Institute respectfully submits that New York's "proper cause" restriction should be held unconstitutional under *any* level of heightened scrutiny. *See Wrenn*, 864 F.3d at 666 (invalidating a similar law and emphasizing that prohibitions "on the ability of most citizens to exercise an enumerated right would have to flunk any judicial test that was appropriately written and applied").

That being said, if this Court finds it necessary to address the level of scrutiny applicable to Petitioners' claim, The Buckeye Institute asks this Court to clarify that alleged infringements on the right to self-defense are subject to truly heightened scrutiny.[3] At the very

[3] *Amicus curiae* recognizes that two members of this Court, when they were Judges of the Courts of Appeals, considered the scope of the Second Amendment by reference to text, history, and tradition rather than the traditional levels of scrutiny. *See Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting) (analyzing felon dispossession statute based on history, rather than applying traditional levels of scrutiny); *Heller v. District of Columbia*, 670 F.3d 1244, 1275-76 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("The majority opinion here applies intermediate scrutiny …. I disagree with that approach. I read *Heller* and *McDonald* as setting forth a test based wholly on text, history, and tradition."). The historical record is clear, as discussed *infra*. If this Court applies the "text, history, and tradition" methodology, New York's licensing scheme should be held unconstitutional.

least, this Court should correct the error of the Second Circuit in this case and its predecessor *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012). The circuit court purports to apply "intermediate scrutiny," but uses a watered-down standard that does not protect people's rights and is incompatible with this Court's precedents.

The right to self-defense is deeply rooted in our Nation's history. *See Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (strict scrutiny applies to "fundamental" rights that are "'deeply rooted in this Nation's history and tradition'") (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)). It has long been viewed as a fundamental right. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 43 (1998) (the Framers "thought the right of self-defense to be absolutely fundamental"). Indeed, *Federalist No. 28* recognizes an "original right of self-defense which is paramount to all positive forms of government." THE FEDERALIST NO. 28 (Hamilton).

Alexander Hamilton's words captured the longstanding view of legal scholars and philosophers alike. For example, John Locke maintained that the right to armed self-defense was "so necessary to, and closely tied with, a man's preservation, that he cannot part with it but by what he forfeits his preservation and life together." John Locke, SECOND TREATISE ON GOVERNMENT 23 (1690) (reprinted Hackett ed. 1980). William Blackstone recognized that the right to bear arms in the English Bill of Rights acknowledged "the

natural right of resistance and self-preservation." 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 139-40 (1765). Indeed, Blackstone described the right of self-defense as "the primary law of nature" that cannot be "taken away by the law of society." 3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 4 (1768). The Founding generation understood these principles well. For example, Judge St. George Tucker described the Second Amendment as equivalent to Blackstone's "right of self-defence [which] is the first law of nature." 1 St. George Tucker, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES 300 (1803).

Later generations likewise understood that the Second Amendment is the guarantor of other fundamental constitutional rights. The emphasis on the fundamental nature of the right to keep and bear arms continued through the Reconstruction Era and was reinforced by the Framers of the Fourteenth Amendment. They maintained that the Fourteenth Amendment was designed to protect the "rights guarantied and secured by the first eight amendments to the Constitution, such as . . . the right to keep and bear arms" and made clear that the Fourteenth Amendment would "restrain the power of the States and compel them at all times to respect these great fundamental guarantees." CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866) (Senator Howard). *See also id.* at 1182 (Senator Pomeroy) (every citizen "should have the right to bear arms for

the defense of himself and family and his homestead"); Michael Kent Curtis, NO STATE SHALL ABRIDGE 104 (1986) ("[a]mong the rights that Republicans in the Thirty-ninth Congress relied on as absolute rights of the citizens of the United States were the right[s] to freedom of speech . . . due process . . . and the right to bear arms").

Despite all this, the Second Circuit has held that New York's "proper cause" requirement is constitutional "if it is substantially related to the achievement of an important governmental interest." *Kachalsky*, 701 F.3d at 96. The court has specifically declined to address whether the State's chosen means is "narrowly tailored" to serve the stated governmental interest. *See id.* at 97 ("we are not required to ensure that the legislature's chosen means is 'narrowly tailored'").

The test applied by the Second Circuit is not even true *intermediate* scrutiny—let alone the heightened scrutiny that typically applies to fundamental rights. "In order to survive intermediate scrutiny, a law must be 'narrowly tailored to serve a significant governmental interest.'" *Packingham v. North Carolina*, 137 S.Ct. 1730, 1736 (2017) (quoting *McCullen v. Coakley*, 573 U.S. 464, 486 (2014)). "Exacting scrutiny" likewise requires that laws "be narrowly tailored to the government's asserted interest." *Americans for Prosperity Foundation v. Bonta*, 141 S.Ct. 2373, 2383 (2021); *see also McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 218 (2014). The Second Circuit's watered-down

standard does not require New York's law to be narrowly tailored, despite this Court's clear instruction for decades. *See In re R.M.J.*, 455 U.S. 191, 203 (1982) (restrictions interfering with rights "must be narrowly drawn").

The standard applied by the Second Circuit is little more than a "rational basis" test in disguise. That test disregards the constitutional text and history, ignores this Court's precedents cited above, and fails to properly protect an enumerated fundamental right. If this Court chooses to correct the Second Circuit's error, the Court should make clear that alleged infringements on the right to self-defense—the "original right" "which is paramount to all positive forms of government"—must be subject to *true* heightened scrutiny. *See* THE FEDERALIST NO. 28.

CONCLUSION

The Second Amendment protects the fundamental "right of the people" to self-defense, which necessarily includes the right to "bear arms" outside of one's home. This is confirmed by the Second Amendment's text, as well as the history and tradition of the right itself.

The decision below should be reversed.

Respectfully submitted,

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