No. 20-843

In the Supreme Court of the United States

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

Petitioners,

v.

KEITH M. CORLETT, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF NEW YORK STATE POLICE, ET AL.,

Respondents.

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

BRIEF OF THE STATES OF ARIZONA, MISSOURI, AND 21 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

This brief is filed on behalf of the states of Arizona, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and West Virginia.[1] The undersigned are their respective states' chief legal officers and have authority to file briefs on behalf of the states they represent.

Through their Attorneys General, the *Amici* States have a special responsibility to safeguard their citizens' fundamental rights, including their right to bear arms in self-defense outside the home. The Second Circuit's misinterpretation of the Second Amendment threatens the liberty of citizens in every State, not just New York. Moreover, the States have a unique perspective that should aid the Court in weighing the value and importance of the questions presented by the petition. The *Amici* States are charged with advancing their substantial interests in public safety, preventing crime, and reducing the harmful effects of firearm violence while ensuring that their citizens can exercise their enumerated constitutional right to bear arms. The *Amici* States offer this brief to highlight empirical research and their experiences with permit systems for applicants that meet objective criteria, and to call the Court to restore the original public meaning of the right to bear arms.

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[1] This brief is filed under Supreme Court Rule 37.4, and all counsel of record received timely notice of the intent to file this amicus brief under Rule 37.2.

SUMMARY OF ARGUMENT

The petition merits review to unify the Courts of Appeals on the question whether the Second Amendment supplies all the "proper cause" that law-abiding citizens need to bear arms outside the home. Subjective-issue handgun permit regimes, such as N.Y. Penal Law §400.00, are unconstitutional because they impose state-created, subjective conditions upon the exercise of a fundamental constitutional right.

The *Amici* States emphasize two reasons that this case warrants the Court's review. *First*, empirical data and the States' experience with objective-issue regimes demonstrate that these subjective-issue regimes undermine the very public-safety purposes that they purport to advance. Citizens that receive permits are significantly more law-abiding than the public at large, and studies link objective-issue regimes with decreased murder rates and no rise in other violent crimes. Public safety is also increased at the individual level when citizens carry for self-defense and respond to a criminal attack with a firearm; these defensive gun uses leave the intended victim unharmed more frequently than any other option and almost never require firing a shot.

Second, the Court should grant review to restore the original public meaning of the Second Amendment. In 2008, this Court recognized that the original meaning of the Second Amendment includes the right of law-abiding citizens to keep and bear weapons in self-defense. Yet thirteen years later, many lower courts have largely ignored the Amendment's original meaning, instead adopting interest-balancing tests that allow legislatures to

encroach on this fundamental right. These courts employ interest balancing to favor a sense of security over liberty. This is backwards: liberty ensures security. The Founding generation knew this all too well, and they enshrined the right to bear arms in their constitutions to keep it safe, not just from kings, but from legislatures as well. The widespread adoption of judge-made, interest-balancing tests has introduced incoherency into the jurisprudence of the Second Amendment and undermined the liberty that the Amendment guarantees. The Court should grant certiorari to reaffirm the original public meaning of the Second Amendment.

ARGUMENT

I. The States' Collective Experience Supports Petitioners' Arguments.

Forty-two states employ objective permit regimes that allow a permit to any individual who meets a certain set of objective criteria, which can include fingerprinting, a background check, a mental health records check, and training in firearms handling and/or laws regarding the use of force; such regimes are also known as "shall-issue," as the laws typically mandate the relevant authority's issuance of a permit to those who meet the established criteria.[2] These regimes began with New Hampshire in 1923, and by 1995 half of all states had adopted one.[3] And

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[2] *Concealed Carry Permit Information By State*, USA Carry, https://www.usacarry.com/concealed_carry_permit_information.html.

[3] *See* NRA-ILA, *Concealed Carry | Right to Carry*, n.9 (2018) *available at* https://www.nraila.org/get-the-facts/right-to-carry-and-concealed-carry/.

every state that has adopted objective-issue has maintained it, establishing a national standard for public safety.[4]

Within these states, even initial detractors, including elected officials who vehemently opposed objective carry laws before they were enacted, are admitting that reality has changed their minds.[5] And these opinions have a firm basis in fact: The extant empirical data and the experience of states with objective-issue regimes demonstrate why subjective, or "may-issue," carry laws cannot be upheld even under sliding-scale scrutiny, since these laws undermine public safety, making such regimes antithetical to their own justification.

The simple truth is that, as shown below, permit holders are less likely than members of the general public to commit violent crimes, and neither

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[4] Larry Arnold, *The History of Concealed Carry, 1976-2011*, Texas Handgun Association, https://txhga.org/texas-ltc-information/a-history-of-concealed-carry/.

[5] For instance, John B. Holmes, then-District Attorney of Harris County (containing Houston) and Glenn White, former President of the Dallas Police Association, were strong opponents of licensed carry in Texas. Both changed their minds after observing the results and seeing that their fears were incorrect. "I . . . [felt] that such legislation . . . present[ed] a clear and present danger to law-abiding citizens by placing more handguns on our streets. Boy was I wrong. Our experience in Harris County, and indeed statewide, has proven my initial fears absolutely groundless." "All the horror stories I thought would come to pass didn't happen. . . . I think it's worked out well, and that says good things about the citizens who have permits. I'm a convert." H. Sterling Burnett, *Texas Concealed Handgun Carriers: Law-abiding Public Benefactors*, Nat'l Center for Pol'y Analysis (June 2, 2000).

Washington, D.C., nor any state that has a permissive permit regime has experienced widespread trouble from those who go through the licensing process. Indeed, over three years after the decision concluding that "the individual right to carry common firearms beyond the home . . . falls within the core of the Second Amendment" in *Wrenn* v. *District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017), even the Violence Policy Center has failed to identify a single permit holder responsible for an unlawful lethal incident in Washington, D.C., despite concealed carry permits now being available without a "good reason" requirement.[6]

A. Right-To-Carry And "Shall-Issue" Permit Regimes Decrease Crime And Increase Safety

The empirical data on licensed carry is extensive, and the weight of the evidence confirms that objective, non-discriminatory licensed-carry laws have two results: (1) statistically significant reductions in some types of violent crime, or (2) no statistically significant effect on violent crime. This has held true despite the overwhelming increase in the number of concealed handgun permits issued in the past decade. "Since 2007, the number of concealed handgun permits has soared from 4.6 million to over 12.8 million, and murder rates have fallen from 5.6 killings per 100,000 people to just 4.2,

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[6] Violence Policy Center: Concealed Carry Killers, http://concealedcarrykillers.org/ (last updated Dec. 16, 2020) (identifying zero killings since the 2017 ruling in *Wrenn*, but listing the 2013 D.C. Navy Yard Shooter, a former Navy sailor who had a concealed carry permit in Texas as well as a federal security clearance).

about a 25 percent drop." Kellan Howell, *Murder rates drop as concealed carry permits soar: report*, WASH. TIMES, July 14, 2015. "The most significant, certain conclusion to be drawn is that neither large nor small states evidence obvious long-term increases in murder rates after passage of these laws. The experience of the carry reform states plainly shows that homicide rates will not *increase* as a result of crimes committed by persons with carry permits." Clayton E. Cramer and David B. Kopel, *"Shall Issue": The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 709 (1995).

One outlier to this evidence is the work of John Donohue, but scholars have called the validity of his results into question, and "[Aneja, Donohue, and Zhang] have admitted that they estimated the wrong model" in *The Impact of Right to Carry Laws and the NRC Report* (2014). Carlisle E. Moody, et al., *The Impact of Right-to-Carry Laws on Crime: An Exercise in Replication*, 4 Rev. of Econ. & Finance 33, 35 (2014). These flaws were underscored by Moody et al.'s research, which determined that "[t]he most robust result," confirmed even by Donohue's "county and state data sets is that the net effect of [right-to-carry] laws is to decrease murder." *Id.* at 42. Further, analysis of Donohue's own data showed that objective-issue permit regimes, referred to by Moody as "right-to-carry" laws, statistically "decrease rape" and "reduce the victim costs of crime." *Id.*

And these population-level statistical findings make sense: Those who obtain firearms-carry permits are, and remain, overwhelmingly more law abiding than the general population. An expansive 2009 study demonstrates just how law-abiding permit holders are: Michigan reported 161 charges

involving handguns out of approximately 190,000 licensees in 2007-08 (from an estimated 25 to 35 criminal incidents), while the general population produced 953 violent crimes per 190,000 people.[7] Ohio reported 639 license revocations, including licensees who moved from Ohio, out of 142,732 permanent licenses issued from 2004 to 2009. And Florida reported 27 firearm crimes per 100,000 licenses. David B. Kopel, *Pretend "Gun-Free" School Zones: A Deadly Legal Fiction*, 42 Conn. L. Rev. 515, 564-69 (2009) (providing state-level data). Indeed, the data cited by proponents of subjective regimes is not to the contrary when properly analyzed for the effects of having lawful permit holders carrying *outside the home* (*e.g.*, by looking past data on suicide or killings within a licensee's home or business where no license is required).

For instance, the Violence Policy Center's "Concealed Carry Killers" database inflates its numbers by counting deaths, over half of which are suicides, that are wholly irrelevant to an individual's right to carry a firearm outside the home.[8] Similarly, the Brady Campaign, citing CDC data, often includes suicides in its shooting death

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[7] General population data calculated based on the FBI's reported rate for Michigan in 2008. Federal Bureau of Investigation, *2008 Crime in the U.S.*, *available at* https://ucr.fbi.gov/crime-in-the-u.s/2008.

[8] Violence Policy Center: Concealed Carry Killers, http://concealedcarrykillers.org/ (last updated Dec. 16, 2020) ("Concealed Carry Killers documents 1,522 incidents in 40 states and the District of Columbia resulting in 1,760 deaths" 886 of which represent "the concealed carry killer committ[ing] suicide").

numbers, which has the impact of nearly tripling the total since suicides make up roughly two-thirds of the cases they report.[9] It is no wonder that a CDC study concluded that there was "insufficient evidence to determine the effectiveness of any of the firearms laws or combinations of laws … on violent outcomes." Robert A. Hahn, Ph.D., et al., *First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws* (2003).

As Professor John Lott says about studies that manufacture rises in violent crime rates to support an anti-right-to-carry agenda:

> [T]he bottom line is pretty clear: Since permit holders commit virtually no crimes, right-to-carry laws can't increase violent crime rates. . . . To get their results, state police agencies would have to be missing around 99.4% to 99.83% of violent crimes committed by permit holders.

John R. Lott, Jr., *Concealed Carry Permit Holders Across the United States: 2017,* at 23, (July 2017). And "[i]f large numbers of violent crimes really were committed by carry permit holders, it would be fairly easy to document this, since carry permit holders who are convicted of violent crimes have their permits revoked, and states maintain records of

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[9] *E.g.*, Brady United, *Key Statistics*, *available at* https://www.bradyunited.org/key-statistics (last accessed Jan. 15, 2021). Suicide, though tragic, is not the focus of carry-permit laws; suicide does not require (or typically entail) bringing a firearm into a public space, and is a self-inflicted act that does not generally imperil the public at large.

permit revocations." Gary Kleck, *A Critique of Donohue et al. (2018) Analysis of RTC Laws*, supra, at 6.

Justice Department statistics reveal that the victims of crime who resist with a gun are less likely to suffer serious injury than victims who either resist in other ways or offer no resistance at all. *See* John R. Lott, Jr., *More Guns Less Crime: Understanding Crime and Gun Control Laws* 4–5 (3d ed. 2010). The safety advantage of carrying a firearm is even more pronounced for women: Women are 2.5 times more likely to suffer a serious injury if they offer no resistance to a criminal attacker (as compared to women who resist with a gun), and 4 times more likely to suffer injury if they resist without a gun. *Id.*

Numerous studies have found that robbery and rape victims who resist with firearms are significantly less likely to have their property taken, the rape attempt completed, or suffer additional injuries. Gary Kleck, *Targeting Guns: Firearms and their Control* 170, 174–75 (1997). Indeed, a national survey indicates that in roughly 95% of cases it is necessary only to display a firearm, rather than pull the trigger, to prevent completion of an attack. Lott, *More Guns Less Crime*, at 3. Fewer than one in a thousand defensive gun uses results in the death of a criminal. *See* Kleck, *Targeting Guns*, at 178. And empirical data also refute the misperception that citizens licensed to carry firearms are likely to have the weapon used against them in a violent encounter. U.S. Bureau of Justice Statistics figures indicate that, in confrontations with criminals, 99% of victims who are licensed to carry maintain control of their firearms. *See* Kleck, *Targeting Guns*, at 168-

69. Thus, New York lacks a factual basis for any attempt at justifying its subjective-issue permitting regime as a benefit to public safety.

B. New York's Restrictive Licensing Regime Is Not An Allowable Fit For The Interests Of Public Safety In Light Of Empirical Research And The Experience Of Other States

New York's subjective-issue regime for handgun carry permits infringes upon and restricts an individual's ability to lawfully carry a firearm outside the home. In addition to requiring the above-mentioned objective criteria (*e.g.* background check, mental health records check, etc.), New York requires that an applicant "'demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.'" *Kachalsky* v. *Cty. of Westchester*, 701 F.3d 81, 86 (2d Cir. 2012).

The Court has regularly looked to the several states for guidance and to "provide testimony to the unreasonableness of a single state's law "and to the ease with which the State can adopt less burdensome means" to accomplish its objectives. *Hodgson* v. *Minnesota*, 497 U.S. 417, 455 (1990); *see also Tennessee* v. *Garner*, 471 U.S. 1 (1985); *Harper* v. *Virginia State Bd. of Elections*, 383 U.S. 663 (1966); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). Here, *Amici* States write not merely to suggest "less burdensome means," but to demonstrate that subjective-issue regimes such as New York's plainly do not accomplish—and even detract from—the objective of increased public safety.

The question is, if not *per se* unconstitutional, whether the infringement is properly justified under the appropriate level of scrutiny; but, as demonstrated by the empirical studies discussed above, as well as the experience of the forty-two states with an objective-issue regime, New York's licensing scheme is not tailored to the cited public safety interest—it actually undermines it.

New York's regime, which fails to decrease crime while also putting law-abiding citizens at a personal disadvantage when faced with a criminal attack, is not just a poor fit for, but completely antithetical to, New York's stated justification of promoting public safety. In the data from 42 states' objective-issue systems demonstrates more success on every front including personal liberty, public safety, and individual security. In other words, if subjective- or may-issue were a medical standard of care, it would be obsolete and any legislature employing it guilty of malpractice.

II. The Original Public Meaning Of The Second Amendment Protects The Right To Bear Arms In Self-Defense Outside The Home.

In addition, the Court should grant certiorari to restore the original public meaning of the Second Amendment's right to bear arms. In *District of Columbia* v. *Heller*, this Court adopted and applied the original public meaning of the Second Amendment. 554 U.S. 570 (2008). But in *Heller*'s aftermath, many lower courts—including the Second Circuit—have disregarded the Amendment's original meaning, relying instead on policy-laden balancing tests. This approach results in a fundamental

inconsistency, even incoherency, in Second Amendment jurisprudence, and it permits legislatures to invade the core right to self-defense that the Amendment protects. The Court should grant certiorari in this case to reaffirm that the original public meaning of the Amendment defines the scope of Americans' liberty, and that this meaning encompasses the right to bear arms in self-defense outside the home.

In *Heller*, following the text and history of the Second Amendment, this Court held that the federal constitution "guarantee[s] the individual right to possess and *carry* weapons in case of confrontation." 554 U.S. at 592 (emphasis added). Since the Second Amendment has been applied to the States, many courts have misinterpreted *Heller* by limiting the Second Amendment to the right to *keep* arms, leaving the right to *bear* arms largely illusory. Courts that have upheld licensing regimes requiring citizens to have "a reason to possess the weapon for a lawful purpose," *Kachalsky* v. *Cty. of Westchester*, 701 F.3d 81, 98 (2d Cir. 2012), misunderstand *Heller's* import. The Second Amendment protects the "core lawful purpose of self-defense." *Heller*, 554 U.S. at 630. Permitting government actors to determine, on a case-by-case basis, who has "good cause" to exercise a fundamental right contradicts the Second Amendment's original public meaning.

The right to bear arms pre-dates our written Constitution, and the Second Amendment's text indicates it "is not a right granted by the Constitution." *United States* v. *Cruikshank*, 92 U.S. 542, 553 (1876). It descends from our English heritage, after the abuses of the Stuart Kings who used "select militias loyal to them to suppress

political dissidents, in part by disarming their opponents." *Heller*, 554 U.S. at 592. The Glorious Revolution gave rise to the English Bill of Rights, which granted that "the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law." 1 W. & M., ch. 2, § 7, in 3 ENG. STAT. AT LARGE 441. At the Founding, the colonists understood this right to bear arms as a "natural right of resistance and self-preservation" held by all Englishmen. 1 WILLIAM BLACKSTONE, COMMENTARIES 136, 139 (1765). Thus, when King George III attempted to disarm the colonists in the most rebellious areas, it prompted outcries that he was violating their English right to keep and bear arms. *Heller*, 554 U.S. at 594–95; VA. GAZETTE (Williamsburg), Aug. 5, 1775, at 2, col. 1 (noting the "many attempts in the northern colonies to disarm the people, and thereby deprive them of the only means of defending their lives and property").

With this historical understanding, the Founding generation enshrined the right to bear arms in their constitutions and laws. "Americans understood the 'right of self-preservation' as permitting a citizen to 'repel force by force' when 'the intervention of society in his behalf, may be too late to prevent an injury.'" *Heller*, 554 U.S. at 595 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 145–146, n. 42 (1803)). "The inherent right of self-defense" is "central to the Second Amendment right." *Id.* at 628. This Court's survey of those provisions shows that, by 1820, nine States expressly guaranteed the right to bear arms in defense of themselves, or of himself and the State. *Id.* at 602–03. Justice James Wilson observed that Pennsylvania's "right of citizens to bear arms, in

defence of themselves and the State," PA. CONST., art. IX, § 21 (1790), recognized the natural right of defense "of one's person or house." *Id.* at 585 (citing 2 COLLECTED WORKS OF JAMES WILSON 1142, and n. x (K. Hall & M. Hall eds. 2007)). This widespread adoption of a "citizen's right to self-defense is strong evidence that that is how the founding generation conceived of the right." *Id.* at 603. Of course, "'[s]elf-defense has to take place wherever the person happens to be,' and in some circumstances a person may be more vulnerable in a public place than in his own house." *Peruta* v. *California*, 137 S. Ct. 1995, 1998–99 (2017) (Thomas, J., dissenting from denial of certiorari) (quoting Volokh, *Implementing the Right To Keep and Bear Arms for Self–Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1515 (2009)); *see supra*, Part I.

Early court decisions interpreting these provisions recognized the individual right to bear arms in self-defense, whether in public or private. In Missouri, a jury instruction that "the people's right to bear arms in defense of themselves cannot be questioned" "could not possibly aid the jury" because it was "known to every jury man" that the "right is to bear arms in defense of ourselves." *State* v. *Shoultz*, 25 Mo. 128, 155 (1857). A Louisiana court commented that the Second Amendment "is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country." *State* v. *Chandler*, 5 La. Ann. 489, 490 (1850). A Georgia court struck down a statute prohibiting open carry as depriving the "citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms." *Nunn* v. *State*, 1 Ga. 243, 251 (1846). *Nunn* emphasized that state legislatures lacked authority

to infringe on the right to bear arms in self-defense, holding that "[t]his right is too dear to be confided to a republican legislature." *Id.* at 250. "Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this *right*, originally belonging to our forefathers, trampled under foot by Charles I and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own *Magna Charta!*" *Id.* at 251 (italics in original).

Indeed, state legislatures have often fallen short of the mark in defending this right to bear arms in self-defense. In the antebellum South, "statutes restricting black access to firearms were aimed primarily at free blacks, as opposed to slaves." Robert J. Cottrol, Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309, 336 (1991). In the wake of the Nat Turner slave revolt, Maryland, Virginia, and Georgia passed laws prohibiting free blacks from carrying firearms. *Id.* at 337–38. Delaware initiated a licensing scheme that required free blacks to obtain a license from a justice of the peace to keep and bear a firearm. *Id.*; Act of Feb. 10, 1832, sec. 1, DEL. LAWS 180 (1832) (requiring free blacks to obtain a permit certifying "that the circumstances of [the holder's] case justify his keeping and using a gun"). Nor was racial disarmament confined to the slave states. In 1841, Cincinnati disarmed all blacks and placed all adult black males into protective custody following a riot. Cottrol & Diamond, 80 Geo. L.J. at 342. The next night "white rioters again assaulted the black residential district, resulting in more personal injury

and property damage." *Id.* Even after the Civil War, Mississippi, Louisiana, Kentucky, and Alabama (among others) continued systematic efforts to disarm blacks. *McDonald* v. *City of Chicago, Ill.*, 561 U.S. 742, 771 (2010).

Based on its original meaning, the right to keep and bear arms backstops "the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally . . . enable the people to resist and triumph over them." 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1897, pp. 620–621 (4th ed. 1873). The People's right to self-defense was so well regarded that Alexander Hamilton dismissed the threat of Congress raising a large army "while there is a large body of citizens . . . who stand ready to defend their own rights and those of their fellow citizens." THE FEDERALIST NO. 29, p. 185 (C. Rossiter 1961). "Antislavery advocates routinely invoked the right to bear arms for self-defense." *Heller*, 554 U.S. at 609. One such advocate "wrote that 'the right to keep and bear arms, also implies the right to use them if necessary in self defence; without this right to use the guaranty would have hardly been worth the paper it consumed.'" *Id.* (quoting A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 117–118 (1849)).

Reviewing this history of the original public meaning of the Second Amendment, *Heller* made clear that the central component of the Second Amendment is the right to self-defense when confrontation arises. 554 U.S. at 584. The two circuits to employ this historical analysis have both concluded that "carrying beyond the home, even in populated areas, even without special need, falls

within the Amendment's coverage, indeed within its core." *Wrenn*, 864 F.3d at 664; *see also Moore* v. *Madigan*, 702 F.3d 933 (7th Cir. 2012). Justice Story observed that "[o]ne of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia." J. STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 450 (reprinted 1986). Just as *Heller* rejected the argument that the Second Amendment only applies to organized militias because it "guarantees a select militia of the sort the Stuart kings found useful," 554 U.S. at 600, this Court should reject the contention that the right to bear arms in self-defense is confined to the home, and restore the right to bear arms to its original public meaning.

CONCLUSION

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

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