Case No.: 20-843

In The Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

BRIEF OF THE BLACK ATTORNEYS OF LEGAL AID, THE BRONX DEFENDERS, BROOKLYN DEFENDER SERVICES, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amicus The Black Attorneys of Legal Aid caucus ("BALA"), founded in 2017, is an amalgamation of over 100 Black Legal Aid lawyers. Most of the lawyers are criminal defense attorneys. Aside from providing quality legal representation to thousands of indigent persons throughout New York City, BALA advocates for racial justice within the legal sphere.

Amicus The Bronx Defenders ("BxD") is a non-profit provider of innovative, holistic, client-centered criminal defense, family defense, civil legal services, and social work support to indigent people in the Bronx. Each year, BxD defends over 20,000 low-income Bronx residents in criminal, civil, family, and immigration cases and reaches hundreds more through outreach programs and community legal education.

Amicus Brooklyn Defender Services ("BDS") is a public defender organization that provides multi-disciplinary and client-centered criminal defense, family defense, immigration, and civil legal services for

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[1] Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of our *amici curiae* brief in accord with Supreme Court Rule 37.3.

over 30,000 people in Brooklyn every year. In addition to zealous legal defense, BDS provides a wide range of additional services to meet people's unique needs, including social work support, help with housing, benefits, education and employment, and advocacy targeting systems and laws that implicate their rights. BDS has represented hundreds of New Yorkers who have been traumatized or criminalized by New York's firearm licensing scheme and currently represents thousands of people facing criminal prosecution in the criminal courts in Brooklyn.

Amicus The Franklin County Public Defender represents hundreds of individuals each year in local criminal courts, County Court, Supreme Court, and Family Court.

Amicus Monroe County Public Defender's Office provides representation to approximately 20,000 clients each year in the criminal courts, family court, and appellate courts of Monroe County, New York.

Amicus St. Lawrence Public Defender's Office ("SLPD") defends hundreds of indigent people every year with violations of law that could result in incarceration upon conviction and provides representation to indigent parties in Family Court matters as well. In addition to trying cases and negotiating favorable plea dispositions, SLPD attorneys and advocates help clients address the underlying cause that brought them to the point of

arrest by recommending drug and alcohol treatment programs, mental health programs, and alternatives to incarceration.

Amicus Oneida County Public Defender ("OCPD") is a non-profit provider of innovative, holistic, client-centered criminal defense services. OCPD has in-house forensic specialists, a specialized investigative staff, and provides high level criminal defense to all its clients. It handles several thousand cases annually for those charged in Oneida County, and it maintains both in-house and community legal education programs.

Amicus The Ontario County Public Defender's Office is the primary provider of criminal defense services in the criminal and appellate courts in Ontario County, New York. The Office also has a Family Court program, represents individuals alleged to have violated the terms of their parole, provides interdisciplinary support to clients participating in the County's Drug, Mental Health, and Veterans Treatment Courts, and hosts the eastern half of the Western New York Regional Immigration Assistance Center.

Amicus the Ontario County Office of the Conflict Defender ("OCOCD") represents indigent people who are accused of a crime in Ontario County, located in upstate New York. OCOCD handles hundreds of cases each year ranging from misdemeanor level offenses to violent felony offenses, including gun possession

charges. As trial level attorneys, the office's members are on the front line of protecting their clients' constitutional rights.

Amicus Wayne County Public Defender ("WCPD") in western New York represents people charged with crimes who are unable to obtain counsel. In the rural county of Wayne, of roughly 93,000 people, WCPD handles nearly 2,000 cases a year. It actively attempts to guide criminal justice legislation in Albany and works closely with its community to achieve the goals of reform and reinvention of the criminal justice system at the local level.

Amici submit this brief because we have first-hand experience representing hundreds of indigent people each year who are arrested, jailed, and prosecuted for exercising their constitutional rights to keep and bear arms.

SUMMARY OF ARGUMENT

The incorporated Second Amendment affords the people "the right to keep and bear arms." U.S. Const. amends. II, XIV; *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008). Despite the clear text and this Court's precedent, New York's licensing regime does the opposite. It deprives everyone of that right, only returning it to those select few who manage to first secure a firearm license from the police. For everyone else, possession of a firearm is effectively a "violent

felony," punishable by 3.5 to 15 years in prison. N.Y. Penal Law §§ 265.03; 70.02(1)(b). New York's licensing requirements criminalize the exercise of the fundamental Second Amendment right, with rare exception.

As a result, each year, we represent hundreds of indigent people whom New York criminally charges for exercising their right to keep and bear arms. For our clients, New York's licensing regime renders the Second Amendment a legal fiction. Worse, virtually all our clients whom New York prosecutes for exercising their Second Amendment right are Black or Hispanic. And that is no accident. New York enacted its firearm licensing requirements to criminalize gun ownership by racial and ethnic minorities. That remains the effect of its enforcement by police and prosecutors today.

The consequences for our clients are brutal. New York police have stopped, questioned, and frisked our clients on the streets. They have invaded our clients' homes with guns drawn, terrifying them, their families, and their children. They have forcibly removed our clients from their homes and communities and abandoned them in dirty and violent jails and prisons for days, weeks, months, and years. They have deprived our clients of their jobs, children, livelihoods, and ability to live in this country. And they have branded our clients as "criminals" and "violent felons" for life. They have done all of this only because our clients exercised a constitutional right.

Therefore, we ask this Court to answer the question presented in a way that will protect the Second Amendment for all the people: by holding that Petitioners' license denials violated the Second Amendment because New York's licensing regime is unconstitutional.

ARGUMENT

Drawing on our experience in New York criminal courts, we urge the Court to issue a clear rule, consistent with its precedent and the Constitution, that New York's licensing regime violates the right to keep and bear arms.

I. New York's licensing regime criminalizes the exercise of the Second Amendment right to keep and bear arms.

New York violates our clients' rights to keep and bear arms by arresting, jailing, and prosecuting them for possessing a firearm—anywhere—unless they have applied to and survived the state's expensive and onerous discretionary licensing process. New York's appellate courts believe that structure to be constitutional, *Heller* and *McDonald* notwithstanding. *See, e.g.*, *People v. Tucker*, 117 N.Y.S.3d 401 (N.Y. App. Div. 2020).

When someone in New York City is prosecuted for exercising their right to keep and bear arms—either at home or outside—they are almost always charged with

second-degree criminal possession of a weapon, a "violent felony" punishable by 3.5 to 15 years in prison. N.Y. Penal Law §§ 265.03; 70.02(1)(b). That statute criminalizes possessing a loaded firearm outside of the home or possessing a loaded firearm anywhere with the intent to use it unlawfully. N.Y. Penal Law §§ 265.03(3), 265.03(1)(b). It is a more severe charge than possession of an unloaded firearm, which is a lower level, "non-violent" felony. N.Y. Penal Law § 265.01-B(1).

Second-degree criminal possession of a weapon applies to virtually all firearm possession cases—both at home and outside—because of broad provisions within the Penal Law. First, the Penal Law considers a firearm "loaded" if a person possesses it "at the same time" they possess ammunition, regardless of whether the firearm is, in fact, loaded. N.Y. Penal Law § 265.00(15); *People v. Gordian*, 952 N.Y.S.2d 46, 47 (N.Y. App. Div. 2012) (finding it "legally irrelevant" whether cartridges were in a firearm at the time of the arrest). As a result, New York prosecutors rarely charge firearm-possession cases as a lower-level offense alleging an "unloaded" firearm. Second, the Penal Law dictates that unlicensed "possession" of a firearm is, on its own, "presumptive evidence of intent to use the same unlawfully against another." N.Y. Penal Law § 265.15(4). As a result, unlicensed possession, on its own, is legally sufficient evidence to establish the heightened violent felony of second-

degree criminal possession of a weapon. *People v. Galindo*, 17 N.E.3d 1121, 1124 (N.Y. 2014). Together, these two provisions allow New York prosecutors to charge almost every firearm possession case as the violent felony of second-degree criminal possession of a weapon.[2]

It is a defense to a pure possession charge if one has a firearm license, but securing such a license is no easy feat—especially for those who are indigent. For example, the New York City Police Department ("NYPD") maintains control of firearm licensing in New York City. It requires that applicants submit over $400 in fees,[3] pricing out indigent people, like those living in the most impoverished Congressional district in the country, which is in the Bronx.[4] It administratively adjudicates, on its own, the "moral

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[2] In addition, because unlicensed possession alone is legally sufficient to establish an unlawful intent, the "home" exception contained within the text of § 265.03(3) is rendered academic. Every possession case at least qualifies for second-degree criminal possession of a weapon under § 265.03(1)—even in the home.

[3] New York City's fees greatly exceed those of other jurisdictions. Pennsylvania, for instance, charges only $20 for a license to carry a firearm. *See* 18 Pa. Cons. Stat. § 6109(h).

[4] Office of the New York State Comptroller, *An Economic Snapshot of the Bronx* (July 2018), https://www.osc.state.ny.us/files/reports/osdc/pdf/report-4-2019.pdf.

character" of applicants. And it retains ultimate and broad discretion in determining whom to grant or deny licenses.

New York's firearm licensing requirement originated with the 1911 Sullivan Law. That law made it unlawful to possess any firearm, anywhere, without a license, and gave local police broad discretion to decide who could obtain one. 1911 Laws of N.Y., ch. 195, § 1, at 443. The bill was one of the "early Northern controls" that was passed in response to post-Reconstruction "concerns about organized labor, the huge number of immigrants, and race riots in which some blacks defended themselves with firearms." David B. Kopel, *The Great Gun Control War of the Twentieth Century—And its Lessons for Gun Laws Today*, 39 Fordham Urb. L.J. 1527, 1529 (2012). It also responded to years of hysteria over violence that the media and the establishment attributed to racial and ethnic minorities—particularly Black people and Italian immigrants. In a 1909 *New York Times* interview, Police Chief Douglas I. McKay, who was overseeing the working-class men brought up from New York City to build the Catskill Aqueduct, summarized the views of law enforcement at the time:

> Another thing that we consider essential to the safety of the [upstate] residents is to prevent the workmen from carrying concealed weapons. This

> is a strong habit with both negroes and Italians.

Along the Line with the Aqueduct Police, N.Y. Times (Apr. 4, 1909). A few years later, Chief McKay became Deputy Police Commissioner, and then Police Commissioner, of the NYPD, the authority in charge of the Sullivan Law's discretionary licensing in New York City. *See Kline Ousts Waldo*, N.Y. Times (Jan. 1, 1914). Meanwhile, the *Times* implored the police to begin "frisking" hundreds of people in the city—a practice that, at the time, it believed was "less common, perhaps, than it ought to be." *The Rossi Pistol Case*, N.Y. Times (Sept. 29, 1911).

Throughout the twentieth century, racial fear continued to drive New York's firearm regulation scheme, which consciously excluded people of color in continued violation of the Fourteenth Amendment. This was particularly glaring in the wake of movements calling for racial equality and Black liberation in the 1960s, when New York concurrently implemented increasingly restrictive firearm policies. *See, e.g.*, Thomas Buckley, *12,000 Rifle Cartridges Seized from Harlem Gun Club Officers*, N.Y. Times (May 13, 1964); Martin Tolchin, *Police Say Thousands in Bedford-Stuyvesant Possess Guns*, N.Y. Times (July 28, 1964); Emanuel Perlmutter, *Wider State Control Over Pistols Sought*, N.Y. Times (Nov. 23, 1964). During the summer of 1967, major firearm retailers such as Sears suspended the sale of firearms "in

racially troubled neighborhoods," a policy that then-New York City Mayor John Lindsay attempted to codify into law. Homer Bigart, *Sears Suspends Gun Sales Here*, N.Y. Times (Aug. 8, 1967); Will Lissner, *Mayor Asks Curb on Sale of Rifles Under a City Law*, N.Y. Times (Aug. 21, 1967); Charles G. Bennett, *Mayor Asks Curb of Guns in Riots*, N.Y. Times (Apr. 23, 1968).

In the 1970s, New York's officials focused on the proliferation of "Saturday Night Specials," cheap handguns that were associated with Black communities. Robert Sherrill, *The Saturday Night Special and Other Hardware*, N.Y. Times (Oct. 10, 1971). The term itself has racist origins; it evolved from the racist phrase "[n****r]-town Saturday night." B. Bruce-Briggs, *The Great American Gun War*, 45 Pub. Interest 37, 50 (1976). Meanwhile, police officers were secretly accepting bribes from prominent businesspeople to help them secure firearm permits. Marcia Chambers, *Nadjari Studying Pistol Licensing*, N.Y. Times (Jan. 28, 1975).

Today, the NYPD's licensing process favors former NYPD officers. It explicitly waives their license application fee. *See* N.Y. Penal Law § 400.00(14). And upon leaving the force, the NYPD also issues its officers a special certification so they can more easily obtain a firearm license—what the NYPD's licensing division calls a "Good Guy letter." *See* Murray Weiss, *NYPD 'Good Guy' Note Let Suspect Pack Heat*, N.Y. Post (May 18, 2006) ("The letter—which is given

virtually automatically to all retiring full-duty cops—is . . . basically all a former cop needs to get a permit as a civilian.").

The result of this system is that the NYPD unilaterally decides whose firearm possession is an unlicensed crime and whose is a licensed right. It thus "leaves the right to keep and bear arms up to the discretion" of local police. *See Voisine v. United States*, 136 S. Ct. 2272, 2291 (2016) (Thomas, J., dissenting) (criticizing a statute for leaving the right up to the discretion of federal, state, and local prosecutors). And because the licensing requirement empowers the NYPD to make these decisions, there are disparities in the results. In 1969, for instance, working-class Black and Hispanic families marched through their Bronx neighborhoods, calling for the NYPD to grant them firearm licenses so they could protect their families. In response, the NYPD scoffed, telling them that "[i]t's the policy of this department not to give out permits for people who want to protect themselves." *40 in Bronx Seek Gun Permits*, N.Y. Times (Sept. 26, 1969). Yet the NYPD routinely grants licenses to well-guarded and well-resourced celebrities, like Howard Stern and Robert De Niro. Brad Hamilton, *NYC's '1 Percent' Totally 'Gun'-Ho*, N.Y. Post (Apr. 22, 2012).

New York City also aggressively sends its police onto the streets with a strict directive: take firearms away from minority men and deter them from

carrying. As former Mayor Michael Bloomberg explained when justifying the practice:

> 95% of your murders, murderers and murder victims, fit one M.O. You can just take the description and Xerox it and pass it out to all the cops. They are male minorities 15 to 25 . . . . [T]he way you should get the guns out of the kids' hands is throw them against the wall and frisk them.

Bobby Allyn, *'Throw Them Against the Wall and Frisk Them'*, NPR (Feb. 11, 2020). Stop-and-frisk continued after Mayor Bloomberg's term ended. Between 2014 and 2017—despite allegedly ending the practice after a federal court found it to be unconstitutional—New York City conducted 92,383 stops and 60,583 frisks of people on the street. Christopher Dunn et al., *Stop-and-Frisk in the de Blasio Era*, NYCLU, 1, 14 (Mar. 14, 2019). During that time, 81% of stops were of Black or Latino people, as were 84% of frisks. *Id.* at 9, 17. Black and Latino men between the ages of 14 and 24 accounted for 38% of the stops, even though they only made up 5% of the city's population. *Id.* at 2. Still, Black and Latino people were "less likely to be found with a weapon" than others. *Id.*

Stop-and-frisk, motivated by New York's furor to criminalize its people's firearm possession, is a driving reason why, in New York City, "[f]or generations, black

and brown parents have given their children 'the talk'—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them." *See Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J. dissenting).

Further downstream, the penal consequences of New York's licensing requirements are reflected in today's data from the criminal legal system.[5] In 2020, while Black people made up 18% of New York's population, they accounted for 78% of the state's felony gun possession cases. Non-Latino white people, who

[5] We made the following conclusions in this paragraph, up to the next footnote, by analyzing the Pretrial Release Data Extract compiled by the New York State Unified Court System. This includes data from January 1, 2020, to December 31, 2020. Our analysis considers the following statutes: N.Y. Penal Law §§ 265.01-A, 265.01-B, 265.02(3), 265.02(5), 265.02(6), 265.02(7), 265.03(2), 265.03(3), 265.04(2), and 265.55. The comma-separated values extract for this data is available at http://ww2.nycourts.gov/pretrial-release-data-33136 (last visited July 19, 2021). We include 265.02(5)(ii)—which alleges possession and a prior conviction of a "felony or class A misdemeanor"—in recognition that "Founding-era legislatures did not strip felons of the right to bear arms simply because of their status of felons." *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting); *see also Voisine v. United States*, 136 S. Ct. 2272, 2291 (2016) (Thomas, J., dissenting) (arguing that a federal statute unconstitutionally "impose[d] a lifetime ban on possessing a gun for *all* nonfelony domestic offenses").

made up 70% of New York's population, accounted for only 7% of such prosecutions. Black people were also more likely to have monetary bail set, as opposed to release on their own recognizance or under supervision, even when comparing individuals with no criminal record. When looking at only N.Y. Penal Law § 265.03(3)—which alleges only possession of a loaded firearm—80% of people in New York who are arraigned are Black while 5% are non-Hispanic white. Furthermore, according to NYPD arrest data, in 2020, 96% of arrests made for gun possession under N.Y. Penal Law § 265.03(3) in New York City were of Black or Latino people.[6] This percentage has been above 90% for 13 consecutive years.[7]

II. Our clients are prosecuted for exercising their Second Amendment rights.[8]

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[6] This conclusion, as well as the following sentence, is based on statistics determined from analyzing the NYC Open Data, NYPD Arrests (Historic) dataset. The NYPD published this data, and it runs from 2006 through the end of 2020. Our analysis here only looks at N.Y. Penal Law § 265.03(3). The data was most recently updated on May 3, 2021. The complete dataset is available at https://data.cityofnewyork.us/Public-Safety/NYPD-Arrests-Data-Historic-/8h9b-rp9u (last visited July 19, 2021).

[7] *See id.*

[8] Names have been changed to protect our clients' privacy.

Below, we illustrate representative cases of what we see every day to show this Court the real-life consequences of New York's firearm licensing requirements on ordinary people. In New York City alone, prosecutors charge thousands of people with unlicensed firearm possession every year.[9] The Bronx District Attorney's Office—in lockstep with other New York district attorneys—explicitly defines "the least restrictive disposition for carrying a loaded gun in the Bronx as two years in prison and two years of post-release supervision."[10] Our clients' conduct would not be a crime in states that already properly recognize the Second Amendment.

The stories we include here are but a small sample of the devastation we witness. *First*, we include cases where New York's licensing requirement undermined a person's right to keep and bear arms outside of the home. *Second*, we also include cases where New York's licensing requirement undermined a person's right to keep and bear firearms within the home. Notably, our cases where clients are charged with home possession

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[9] NYC Open Data, NYPD Arrest Data (Historic), https://data.cityofnewyork.us/Public-Safety/NYPD-Arrests-Data-Historic-/8h9b-rp9u (last visited July 14, 2021).

[10] *A Safer Bronx Through Fair Justice*, Office of the Bronx District Attorney (2020), https://www.bronxda.nyc.gov/downloads/pdf/safer-bronx-through%20fair-justice.pdf [https://perma.cc/3WTG-V7BU].

illustrate that New York uses its license requirement to "resist[] this Court's decisions in *Heller* and *McDonald*"—decisions that clearly intended to protect the right to keep and bear a firearm in the home. *See, e.g.*, *Silvester v. Becerra*, 138 S. Ct. 945, 950-51 (2018) (Thomas, J., dissenting from denial of certiorari); *see also Rogers v. Grewal*, 140 S. Ct. 1865, 1866 (2020) (Thomas, J., dissenting from denial of certiorari).

a. Our clients are prosecuted for exercising their Second Amendment rights outside of the home.

We routinely see people charged with a violent felony for simply possessing a firearm outside of the home, a crime only because they had not gotten a license beforehand.

i. Ms. Jasmine Phillips, a Texan who lawfully owned a gun there, was prosecuted for unlicensed possession while visiting family in New York.

Ms. Jasmine Phillips is a combat-decorated military veteran who served in Iraq. She had never been convicted of a crime. She legally possessed a pistol in Texas for self-defense. After she and her husband separated, her husband moved to New York. To have their children spend some time with their father, Ms. Phillips and her children drove to New York.

While Ms. Phillips was parked in her car in New York, police officers surrounded the vehicle. One officer knocked on the passenger side window. Another opened the driver side car door, put her in a chokehold, dragged her out of the car, threw her on the pavement, flipped her over, and handcuffed her. She heard officers search the car and find her pistol. The prosecution later justified these acts because of a "tip."

"The arrest was traumatizing," she recounts. "Being separated from my two baby boys, who were three and four years old, broke my heart." After the arrest, she was held at the precinct, and then the courthouse, without food, water, a phone call, or even access to a bathroom. After hours and hours of pre-arraignment detention and processing, she finally saw a judge. Like virtually everyone else accused of possessing a firearm, she was charged with violating N.Y. Penal Law § 265.03(3), a violent felony.

The judge set high monetary bail. "I felt completely hopeless," she says. "I thought about my kids, wracked with guilt and worry about what they were going through—were they scared? Confused? I was taken away from them so suddenly. I was crushed. I also thought about my job and the home I was renting, realizing that I was going to lose both. I felt broken."

Ms. Phillips was jailed on Rikers Island for weeks before she made bail. Because of her arrest, the Administration for Children Services ("ACS")

intervened and filed a child-neglect proceeding against her. "I lost everything: my job, my car, my home, and my kids." She couldn't see her children again for a full year, missing her son's fifth birthday. She recalls:

> Through my attorneys, I petitioned the family court to allow ACS to let me see my child, but ACS was too slow to respond. I spent my son's fifth birthday in an Airbnb, alone, surrounded by the gifts that I had bought for him. When I was finally allowed to see my children while I was in New York, ACS required that I meet with them during supervised visits in an ACS facility. It was so humiliating to have someone stand there while I tried to have some semblance of a normal, loving interaction with my kids. During one visit, my older son told me that he loved going to school. I was absolutely devastated. No one had told me that he had started pre-K. I missed his first day of school. I missed the chance to ask how his first day of school went. I can never undo that.

After extensive advocacy, Ms. Phillips' case was diverted and eventually dismissed. Still, the case had lasting effects: a Texas judge ruled against her in a child-custody case because of her "felony arrest." For Ms. Phillips, that was "the lowest moment of [her] life and the most hopeless [she] ever felt." "There are no

words to fully reach the depth of that emotion I was feeling," she explains.

But the effects of the case did not stop there, either. ACS failed to properly close Ms. Phillips' case and, four years after the arrest, they called the local sheriff in Texas to do a "welfare check." She was not at home when the police came by, but her landlord was. The police repeated inaccurate information about the dismissed case, provided by ACS, and the landlord then terminated the lease. In addition, to this day, Ms. Phillips reports that her younger son continues to suffer severe separation anxiety.

> If I leave the house to get something from the car without telling him, he'll run out and say, "Momma, why didn't you tell me you were leaving?" It hurts me so much every time he asks.

In sum, Ms. Phillips' arrest for gun possession outside of the home continues to affect her, her family, and their lives today.

ii. Mr. Benjamin Prosser was prosecuted for carrying a gun for self-defense after he was the victim of multiple violent stranger assaults and street robberies.

Mr. Benjamin Prosser is a young man who graduated from high school with honors. He was

distinguished by a national foundation. And because of New York's carry licensing requirement, he is now a "violent felon," solely because he carried a firearm for self-defense without a license.

At the police precinct after his arrest, Mr. Prosser confessed to possessing the gun for self-defense. He had repeatedly been the victim of violent stranger assaults and robberies on the street. When he started a job that required that he travel two hours for work every day, he decided to carry a firearm. He did not possess it with any intent to engage in violence, but his experiences taught him that he needed a weapon to be safe.

In response, the prosecution charged him, like so many others, with N.Y. Penal Law § 265.03(3), a violent felony. After lengthy plea negotiations, the prosecution offered him a "deal" to a probation sentence on a plea to a lesser charge—also a violent felony—because he had previously been a victim of violence. Afraid of the 3.5-to-15-year mandatory sentencing range on the top count, Mr. Prosser accepted the offer. *See generally* Richard A. Oppel Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. Times (Sept. 25, 2011).

Because of New York's carry licensing requirement, Mr. Prosser's once-bright future will forever be marked with the scarlet letter of "violent felon." He is barred from serving on a jury. N.Y. Jud.

Law § 510(3). He is prohibited by federal law from possessing a firearm, 18 U.S.C. § 922(g), and is forever ineligible for a firearm license under New York's law, N.Y. Penal Law § 400.00(1)(c). And he will face the worst kind of "'civil death' of discrimination by employers, landlords, and whoever else conducts a background check." *See Strieff*, 136 S. Ct. at 2070 (Sotomayor, J., dissenting).

Mr. Prosser is grateful not to be incarcerated. However, he is also deeply disheartened, struggling with the idea of being another nameless casualty in a licensing system that was designed to preclude him from exercising his rights.

iii. Mr. Sam Little, who had survived a face slashing and lost multiple friends to gun violence, was prosecuted after carrying a gun to defend himself and his young son.

Mr. Sam Little is a loving father in his 30s who was balancing school, a job, and parenting. He was enrolled in college, and he planned to get his associate's degree in child psychology. He dreamed of eventually working with children with disabilities or in group homes. That dream stemmed from his own experience as a single father, raising a son with neurological and physical disabilities.

Like many young people in New York City, Mr. Little had repeatedly witnessed and been victimized by

violence. He had friends who had been shot and murdered, and he himself had been shot—both when he was a teenager and then several years later. Once, Mr. Little was slashed across the face with a knife. He still bears the scar.

One night, Mr. Little left his home to go a friend's birthday party, which was in the same neighborhood where he had previously been slashed. To ensure his safety, Mr. Little brought a firearm. As a father, he felt that he owed it to his son to maintain his safety: who would take care of his son if something happened to him?

While walking down the sidewalk, police jumped out of a car, stopping and immediately frisking him. Police found the gun and arrested him. Prosecutors charged him with N.Y. Penal Law § 265.03, a violent felony.

Overcome with the stress of an open felony case, Mr. Little dropped out of his classes and did not obtain his associate's degree. Although he had recently been offered a new job with the Department of Education, the open case made him ineligible to take the position.

Mr. Little was eventually convicted of attempted second-degree criminal possession of a weapon. He served eight months in jail. Mr. Little served his sentence at the Vernon C. Bain Center—colloquially called "the Boat"—a floating jail in the East River. *See* Jon Schuppe, *Prisoners in New York City Jails Sound*

Alarm As Coronavirus Spreads: "I Fear for My Life," NBC News (Mar. 30, 2020) (describing the Boat as "like a slave ship," where men are laid "back-to-back" with others and then later bunked only three feet apart). In addition to the trauma of incarceration, he describes his experience there as "absolutely devastating" to his relationship with his son. While he was incarcerated, he did not want his son to undergo invasive searches or witness him in a jail, so during that period, he did not see his son at all. "These were eight months that I will never be able to get back. Eight months where I could have raised my son and taught him things. Eight months of missed holidays like Thanksgiving and his grandmother's birthday."

After he was released, the conviction derailed his dreams for an education and employment. Due to this conviction, he will never be able to work for the Department of Education. He has only been able to gain employment through post-conviction programs.

Despite these challenges, Mr. Little continues to provide for his family and contribute to his community by volunteering for extracurriculars with children. He is grateful for what he does have: family who support him and a stable place to continue living. However, he reminds us that many people who have been incarcerated have few support systems and are not as fortunate. He hopes that New Yorkers in the future will never have to experience the trauma and hardship

he endured simply for exercising their right to keep and bear arms in self-defense.

b. Our clients are prosecuted for exercising their Second Amendment rights at home, despite *Heller* and *McDonald*.

We also regularly witness New York undermining the core of *Heller* and *McDonald* by prosecuting people for gun possession in the home. New York's licensing requirement is the mechanism that allows the state to do so. The following stories illustrate this problem, and the need for this Court to answer the question presented in a way that will clearly protect the Second Amendment for all the people.

i. Ms. Sophia Johnson, a survivor of domestic violence and sexual assault, was prosecuted for possessing a firearm in her home.

When Ms. Sophia Johnson lived in the Midwest, she legally purchased a firearm for her and her daughter's safety. As a single parent and a survivor of domestic violence and sexual assault, she found that possessing a gun in her home, even unloaded and in a lockbox, gave her peace of mind.

She eventually moved to New York, and she brought her gun with her. Unaware of New York's stringent laws, Ms. Johnson thought it was enough

that her gun was legally purchased and registered in the state of purchase.

A few years later, she found herself in an abusive relationship. When she tried to leave, her abuser stole some of her belongings, including the gun. Ms. Johnson had never interacted with the police before, and she trusted them, so she did what she thought was right: she immediately reported the gun missing to the police. She cooperated with the police and even signed a search warrant.

Police found the gun—and then arrested her. The prosecution charged her with a felony for owning the gun. They prosecuted her using her own statement to the police, where she affirmed that the gun was hers and that she had bought it out-of-state for her own protection.

Ms. Johnson spent a night incarcerated in the criminal courthouse. The felony case hung over her head for a year and a half. *See Barker v. Wingo*, 407 U.S. 514, 537 (1972) (White, J., concurring) (noting that open cases "disrupt [one's] employment, drain [their] financial resources, curtail [their] associations, subject [them] to public obloquy, and create anxiety in [them], [their] family and [their] friends").

The open case depleted her. It stalled her education and her plans for a master's degree. It caused her constant stress and anxiety about the possibility of becoming a convicted criminal and losing

her job. *See id.* She recalls that she could not sleep, always thinking about who would support her daughter if she went to prison.

ii. Mr. Gary Smith was prosecuted for possessing a "loaded gun" in his home because he had a gun and ammunition under his bed.

Mr. Gary Smith is an elderly man who worked his whole life as a city employee. He retired after he was diagnosed with cancer. After several rounds of chemotherapy, his cancer was finally in remission.

A few weeks after his last treatment, while his friend was staying at his house, police barged through Mr. Smith's front gate. They demanded that the friend "consent" to a search of Mr. Smith's apartment or they would "bust the door down." His friend—more terrified than she had ever been in her life—acquiesced. When Mr. Smith returned to the apartment, the officers arrested him. They had found a small handgun inside a closed pouch under his bed. They alleged they found ammunition in a separate pouch, also under the bed.

The police processed Mr. Smith for court. He awaited arraignment for over twenty-four hours. He remembers sitting in the arraignment cell, worried about his health, anxious that it would not be able to withstand the obviously filthy conditions. *See* Molly Crane-Newman, *NYC Courthouses Are in Decrepit and 'Historically Unsanitary' Condition, Photos Show*, N.Y.

Daily News (July 11, 2021) ("Multiple courthouse workers said the sections that prisoners are moved through are notoriously disgusting.").

At his arraignment, Mr. Smith was charged with violating both N.Y. Penal Law § 265.03(1)(b) and N.Y. Penal Law § 265.03(3)—each a violent felony. As a result, he faced a mandatory sentence of 3.5 to 15 years in prison. The prosecutors accused him of possessing a loaded firearm with intent to use it unlawfully because New York presumes that intent from unlicensed possession alone. N.Y. Penal Law § 265.15(4). New York's law considered the firearm "loaded" because the ammunition was in the same area as the firearm. N.Y. Penal Law § 265.00(15). And the "home" exception in N.Y. Penal Law § 265.03(3)—which is virtually always rendered academic because the law presumes that any unlicensed possession is already legally sufficient to establish a violation of § 265.03(1)(b)—did not apply to him because he had previously been convicted of a class A misdemeanor for jumping a subway turnstile.

After extensive negotiation and the defense's investigation of the unlawful police entry into the home, the prosecution agreed it could not sustain its burden at the suppression hearing and dismissed the case. Still, the psychological effects of the case have lasted. Regarding his friend, Mr. Smith says, "She's just not the same anymore."

iii. Mr. Andre Thomas was charged with possessing his roommate's gun after police found it in their shared kitchen.

New York's Penal Law provisions are so broad that they even affect people who are merely proximate to those who exercise their Second Amendment rights. Mr. Andre Thomas is one such example.

Mr. Thomas had recently moved to a new home to be closer to his mother, for whom he was caring after she had a stroke. At the break of dawn, Mr. Thomas awoke to the sound of his door being violently smashed in. At first, he thought he was being attacked. Then he realized his attackers were the police. The police charged into his kitchen, tearing his home apart along the way. They found a safe in the kitchen, broke it open, and discovered a firearm inside. This was not Mr. Thomas' gun, but his roommate's—an old friend he was trying to help by renting him a room at an affordable price.

Police arrested Mr. Thomas for the gun and prosecutors charged him with N.Y. Penal Law § 265.03, a violent felony. At arraignment, the judge set monetary bail. In New York, monetary bail is usually synonymous with extended pretrial detention: like thousands of people in New York City, neither Mr. Thomas nor his ill mother could afford the amount set. *See, e.g.*, Bernadette Rabuy & Daniel Kopf, *Detaining*

the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time, Prison Policy Initiative (May 10, 2016). He was sent to Rikers Island.

Mr. Thomas had grown up in the foster care system, but he had never experienced the trauma that he did at Rikers. He did not have a criminal record, and the criminal legal system was alien to him. His mother was heartbroken when she saw him in a jumpsuit. Helplessly incarcerated, he soon became depressed. He had a felony firearm charge hanging over his head. He worried he would lose his home, and if released, would have to live on the streets. And he worried his mother might succumb to her illness before he would ever be released.

Eventually, a friend bailed Mr. Thomas out, but escaping the trauma of Rikers was only the beginning. Because of the gun possession charge, Mr. Thomas lost his security guard license and his job of over four years as a security guard supervisor.

Even after his release, his mental health continued to decline: he became increasingly paranoid and fearful of another breach into his home. Every time the elevator doors opened on his floor—just like they did right before the raid—he felt waves of crushing anxiety wash over him. He could not sleep or eat. He turned inward and stopped talking much to other people. When he did sleep, he dreamt of the police breaking into his home and of being at Rikers again. He rapidly

lost weight. Eventually, an insightful judge pressured the prosecutors to dismiss the case. But the damage was already done.

Today, Mr. Thomas is still trying to recover. He has a new job, he has gained his weight back, and he is trying to follow his mother's advice and maintain his trusting and good heart. But he cannot shake feeling resentful towards the legal system and jaded about the police. When reflecting on what happened, Mr. Thomas repeats: "It wasn't fair. It just wasn't fair."

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The Second Amendment is a right held by all the people. *McDonald*, 561 U.S. at 773. However, we regularly see New York charging those who exercise their Second Amendment rights with a "violent felony" offense. Our experience illustrates that New York effectively deprives its people of the Second Amendment right by requiring that they successfully obtain a license from the police before exercising it. As a result, we urge this Court to enforce the Second Amendment by issuing a clear and durable rule. The Court should hold that Petitioners' denials violated the Second Amendment because New York cannot condition Second Amendment rights on a person first obtaining a license.

In asking that the Court resolve the question presented in this way, we are mindful that the right to keep and bear arms has "controversial public safety

implications." *McDonald*, 561 U.S. at 783. "As surely as water is wet, as where there is smoke there is fire," there are those who will "take[] for granted" that criminalizing gun possession "is the antidote to killing." *See Leaders of a Beautiful Struggle v. Baltimore Police Dep't*, No. 20-1495, 2021 WL 2584408, at *14 (4th Cir. June 24, 2021) (Gregory, C.J., concurring) (criticizing the logic of policing and prosecution as the only tool for preventing violence). It is tempting, "if the only tool you have is a hammer, to treat everything as if it were a nail." *Id.* (internal quotation marks and citations omitted).

But what these stories and our experience illustrate is that New York's licensing requirements—which cause criminal penalties for unlicensed possession—themselves have controversial public safety implications. It is not safe to be approached by police on suspicion that you possess a gun without a license. *See, e.g.*, Michael Cooper, *Officers in the Bronx Fire 41 Shots, And An Unarmed Man Is Killed*, N.Y. Times (Feb. 5, 1999) (reporting the murder of Amadou Diallo). It is not safe to have a search warrant executed on your home. *See, e.g.*, Richard A. Oppel et al., *What to Know About Breonna Taylor's Death*, N.Y. Times (Apr. 26, 2021). It is not safe to be caged pretrial at Rikers Island. *See, e.g.*, Michael Schwirtz et al., *Rikers Deemed Too Dangerous for Transferred Inmates*, N.Y. Times (May 5, 2017). It is not safe to lose your job. Margaret W. Linn et al., *Effects of Unemployment on*

Mental and Physical Health, 75 Am. J. Pub. Health 502 (1985). It is not safe to lose your children. Bruce Golding, *Lawsuit Says NYC Has One of the Worst Foster Care Systems in US*, N.Y. Post (July 8, 2015). It is not safe to be sentenced to prison. Jean Casella et al., *New York's State Prisons Are Brutal and Deadly. That's Something We Can Change*, Gothamist (Feb. 21, 2019). And it is not safe to forever be branded as a "criminal," or worse, as a "violent felon." *See Strieff*, 136 S. Ct. at 2069-70 (Sotomayor, J., dissenting) (describing the "civil death" that accompanies criminal convictions). In sum, New York's licensing requirements are not safe.

And these licensing requirements also violate the Constitution. They allow New York to deny Second Amendment rights to thousands of people, and to instead police and criminalize them for exercising those rights. Such a policy is the type that "the enshrinement of constitutional rights necessarily takes . . . off the table." *Heller*, 554 U.S. at 636.

The Court must not "stand by idly" while New York denies its people the right to keep and bear arms, "particularly when their very lives may depend on it." *Peruta v. California*, 137 S. Ct. 1995, 2000 (2017) (Thomas, J., dissenting from the denial of certiorari). It must create a rule that will in fact protect the Second Amendment rights of "all" the people. *See McDonald*, 561 U.S. at 773. Achieving that goal requires that the Court answer the question presented by holding for the

Petitioners and reasoning that New York's licensing regime violates the right to keep and bear arms.

CONCLUSION

For the reasons stated above and in the petitioners' brief, the judgment of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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