No. 20-843

In the Supreme Court of the United States

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

v.

KEVIN P. BRUEN, ET AL.,
Respondents.

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

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BRIEF OF AMICI CURIAE NATIONAL FOUNDATION FOR GUN RIGHTS AND NATIONAL ASSOCIATION FOR GUN RIGHTS IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

Amicus Curiae the National Foundation for Gun Rights, Inc. ("NFGR") is a nonprofit educational, research, and legal aid organization, exempt from income tax operating under the Internal Revenue Code ("IRC") § 501(c)(3). The NFGR was established, *inter alia*, to conduct research and inform and educate the public on the right to keep and bear arms as protected by the Second Amendment to the United States Constitution. NFGR accomplishes its mission through public communications and litigation. Through its litigation program, the NFGR has filed amicus briefs, in this Court and others, and has assisted gun owners in both criminal and civil matters where their rights have been violated.

Amicus Curiae the National Association for Gun Rights, Inc. ("NAGR") is a non-profit social welfare organization exempt from income tax operating under IRC § 501(c)(4). The NAGR was established to inform the public on matters related to the Second Amendment, including publicizing the related voting records and public positions of elected officials. The NAGR encourages and assists Americans in public participation and communications with elected officials and policy makers to promote and protect the right to keep and

[1] All parties have consented to the filing of this brief. Pursuant to Rule 37.6 no counsel for a party authored this brief in whole or in part; and no person other than these amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

bear arms through the legislative and public policy process.

SUMMARY OF THE ARGUMENT

New York law prohibits citizens from carrying a handgun outside of the home without a permit. N.Y. Penal Law §400.00. New York officials only grant a permit if an applicant can show "proper cause." *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 86 (2d Cir. 2012). The term "proper cause" is not defined within the statute. *Id.* And, as the Petitioners have pointed out, New York courts have fashioned a body of law that essentially makes it impossible for the typical law-abiding New Yorker to obtain such a permit. Pet. at 16-18. This Court granted Certiorari on the question of "whether the [New York] state's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment."

Requiring law-abiding citizens to obtain a special permit to keep and bear arms, whether for concealed or open-carry, violates the Second Amendment. This is clear from the history and traditions of this right as understood by Americans who voted for the adoption of the Second Amendment. This is also clear from the text of the Second Amendment itself, which enumerated the right and declared that it "shall not be infringed."

The jurisprudence of this Court commands that New York's restriction on its citizens' right to keep and bear arms is unconstitutional and must fail. In this case, to hold otherwise would treat the right to keep

and bear arms as a second-class right, worthy of less protection than the other enumerated rights in the Constitution and Bill of Rights. Such a result would be repugnant to the history and traditions of our nation, and inconsistent with the text of the Second Amendment. Further, it would mark a dramatic departure from this Court's jurisprudence.

ARGUMENT

I. The Right to Keep and Bear Arms is Not a Second-Class Right

The right to keep and bear arms protected by the Second Amendment is not a "second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 780 (2010) (plurality opinion). Yet that is precisely how many lower courts have treated and continue to treat the right to keep and bear arms.

The right to keep and bear arms is a "fundamental righ[t] necessary to our system of ordered liberty." *Id. at* 742. Further, it is an individual right that existed prior to the Founding. *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) (stating the Second Amendment "codified a right 'inherited from our English ancestors.'"). The right to keep and bear arms is an advantage to that system of ordered liberty, "which the Americans possess over the people of almost every other nation." Federalist 46. This pre-existing right is protected by the Second Amendment which states, "the right of the people to

keep and bear Arms, shall not be infringed." New York's attempt to limit the right to keep and bear handguns to the home, simply because those handguns may be concealed, finds no support in the understanding of the right at the time of the founding.

The scope of the right to keep and bear arms extends as far as it was understood to extend by the people who adopted the Second Amendment. *Heller*, at 634 ("Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad."). That original understanding binds government from creating policy and regulations which encroach on the original understanding of the pre-existing right that the Second Amendment protects. The history, tradition, and textual analysis conducted by this Court in *Heller* gives no support to the notion that the right to keep and bear arms is limited to the home.

Indeed, *Heller's* analysis forecloses that argument.[2] 554 U.S. at 591. Just as the phrase "bear arms'" common usage in the military context did not negate the presence of other non-military historical examples, so here the historical emphasis of the rights' protection in the home cannot supplant the myriad examples of the right's historical application outside of the home. *Id.* ("At the time of the founding, as now,

[2] To the extent *Heller's* decision has been read to invite federal, state, and municipal restrictions on the right to keep and bear arms because the Court declined to decide situations not before it, this Court should take the opportunity to clarify such a reading is in error.

to 'bear' meant to 'carry'…the phrase implies that the carrying of the weapon is for the purpose of 'offensive or defensive action,' [and] it in no way connotes participation in a structured military organization.")

Yet, for far too long, governmental entities including the federal government—New York is not alone—have attempted to restrict the right of Americans to keep and bear arms. Even after *Heller* and *McDonald*—which applied the Second Amendment to the states through the Fourteenth Amendment—governmental entities at all levels have both sought to maintain existing laws that infringe upon the right to keep and bear arms and even enact new restrictions contrary to this Court's holdings. Unfortunately, many lower courts have upheld those restrictions. In doing so, those courts often ignore *Heller's* guidance that any law that restricts the right to keep and bear arms must be analyzed against the historical context of the right as understood at the Founding, and any decision must be made in light of that understanding. *Heller*, 554 U.S. at 635. Lower courts often treat *Heller's* reasoning and discussion as creating constraining limits on the rights' application, rather than taking to heart this Court's guidance that *Heller* left "many applications of the right to keep and bear arms in doubt," which should be worked out by analyzing potential Second Amendment violations in light of the right's "historical justifications." *Id.*

In essence, many courts eschew the roadmap for examining Second Amendment rights provided by *Heller*, *de facto* adopting Justice Breyer's "weighing needs and burdens" balancing test approach proffered

in his *Heller* dissent. *Heller*, 554 U.S. at 710. Balancing tests and sliding scales find no support in either the text of the Second Amendment or the history and traditions of the right to keep and bear arms as understood by Americans at the Founding. *Rogers v. Grewal*, 140 S. Ct. 1865, 1867 (2020) (Thomas, J. dissenting from denial of certiorari). *Heller* could not have been clearer on this point:

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

554 U.S. at 634. Yet these infringements persist in the lower courts.

This persistence demonstrates that the lower courts often treat the right to keep and bear arms as a second-class right. Such treatment has no basis in the history or traditions of the right. This inferior treatment does not find any refuge in the text of the Second Amendment, nor should it find any in the jurisprudence of this Court or any lower court either.

II. History, Tradition, and Contemporary Sources Support that the Right to Keep and Bear Arms Extends to Outside the Home

It is not necessary to rehash the exhaustive histories of the right to keep and bear arms discussed in *Heller* and *McDonald*. Instead, this Court should focus on the fact that the exercise of the right to keep and bear arms, concealed or not, was never understood, in the history and traditions of that right, at the Founding, to be limited to the home. The writings of Sir William Blackstone and, more importantly, James Madison are instructive on this point. So too are state constitutions and laws in effect at the time of the Founding. These sources contemporary with the Founding demonstrate the understanding of those who adopted the Second Amendment that the right to keep and bear arms was not limited to being exercised in one's home. To the contrary, these sources enforce the understanding that a right so limited to one's home would be no "right" at all.

The text of the Second Amendment broadly prohibits anyone from infringing the people's right to "bear Arms." Analyzing these sources, *Heller* held that the combination of the words "bear" and "Arms" refers to carrying arms "for a particular purpose—confrontation." 554 U.S. 584. And *Heller* further held that the individual right secured by the Second Amendment guaranteed Americans the right to defend themselves against "both public and private

violence." *Id.* at 594. This understanding is consistent with the writings of Blackstone.

A. Blackstone's Writings

Blackstone's account of the right to bear arms provides strong evidence that this right was not cabined to citizens' homes. Blackstone rooted the right to bear arms in "the natural right of resistance and self preservation," and described how the right was enshrined in English law for situations "when the sanctions of society and laws are found insufficient to restrain the violence of oppression." 1 William Blackstone, Commentaries 143 (1765).

Blackstone provided no reason to infer that the right to resist physical violence or to defend oneself, which Blackstone believed formed the foundation for the right to bear arms, ends at one's door. And when society's laws fail in restraining violence or oppression, nothing in Blackstone's writings indicates that citizens would be limited to opposing such violence or oppression to areas behind the threshold of their homes. Restricting the absolute right to bear arms to one's home, then, makes little sense based on Blackstone's reasoning.

In fact, Blackstone never limited the right to bear arms to any specific location. Instead, he frequently described the expansive nature of the right to bear arms, and wrote that "to vindicate [their] rights, when actually violated or attacked, the subjects of England are entitled ... to the right of having and using arms for self-preservation and

defense." *Id.* at 143-44. Given that there is no limitation on where one may be violated or attacked, and indeed, one is more likely to be the subject of violence or oppression outside of one's dwelling, it logically follows that the right to keep and bear arms is an expansive right where individuals have the right to possess and use arms to preserve and defend themselves from attack both inside and outside the home.

Further support for understanding that the right to keep and bear arms existed outside the home can be found in Blackstone's discussion of historical examples of the public bearing of arms:

> The custom of the ancient Germans was to give their young men a shield and a lance in the great council: this was equivalent to the toga virilis of the Romans: before this they were not permitted to bear arms, but were accounted as part of the father's household; after it, as part of the community.

Id. at 403. While Blackstone's writings, as a leading authority on the law at the time of the Founding, are important to the understanding of the right to keep and bear arms at that time, state constitutions and laws of the time also edify that understanding.

B. Contemporary State Constitutions and Laws

During America's Founding, the right to keep and bear arms was enshrined in many state constitutions and laws that support Petitioners' argument that the right was not simply limited to the home. Pennsylvania's Declaration of Rights, adopted in 1790, provided that "[t]he right of the citizens to bear arms in defense of themselves and the State shall not be questioned." Pa. Dec. of Rights, art. XXI (1790). Nothing cabined this right to a citizen's home, and this provision made crystal clear that citizens held a broad right to bear arms for purposes of self-defense and defense of the state, both inside and outside the home.

Likewise, in North Carolina, delegates met at the state constitutional convention in 1776 and adopted a Declaration of Rights that stated: "the People have a Right to bear Arms for the Defense of the State." N.C. Dec. of Rights, art. XVII (1776). The Supreme Court of North Carolina later interpreted this provision to mean that a citizen may carry a gun outside his home for any lawful purpose but cannot use arms to terrify regular citizens. *State v. Huntley*, 25 N.C. 418, 422-23 (1843). The North Carolina court emphasized that "it is to be remembered that the carrying of a gun per se constitutes no offence." *Id.* Nothing in North Carolina's Declaration of Rights limited the right to bear arms to the home. As ably stated by the North Carolina court, the right to bear arms included the right to carry arms outside of one's home for a lawful purpose:

> For any lawful purpose-either of business or amusement-the citizen is at perfect liberty to carry his gun. It is the wicked purpose-and the mischievous result-which essentially constitute the crime. He shall not carry about this or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people.

Id. at 423. It was well understood that it was the "wicked purpose-and the mischievous result-which" would constitute a crime, not merely the possession or carrying of a gun. *State v. Speller*, 86 N.C. 697, 700 (1882) (holding the "right to keep and bear arms" protected the open wearing of the arms in public). This understanding that the mere possession or bearing of arms was not to be restricted was common to the understanding of those citizens of the several states who later formed the United States by adoption of the Constitution.

The Massachusetts Declaration of Rights from 1780 also included a broad guarantee regarding the right to keep and bear arms, providing that "[t]he people have a right to keep and bear arms for the common defense." Mass Dec. of Rights, art. XVII (1780). The declaration also stated that citizens had certain inalienable rights including "defending their lives and liberties . . . and protecting property." Mass Dec. of Rights, art. I (1780).

Both of these provisions substantiate that the people had the right to "keep" their firearms in the

home, or "bear" them outside the home, for "the common defense" and for "defending their lives and liberties . . . and protecting property." Mass Dec. of Rights, arts. I and XVII (1780). A Massachusetts law passed in 1795 permitted justices of the peace to arrest only those who "ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth," confirming the right to bear arms outside the home for legitimate purposes. Act of Jan. 29, 1795, in 1 The Perpetual Laws of the Commonwealth of Massachusetts, From the Establishment of Its Constitution in The Year 1780, To The End of the Year 1800, 259 (1801). Again, the citizens of Massachusetts at the time of the Founding understood, like those citizens of North Carolina, that it was the "wicked purpose" and "mischievous result" that was the crime, not mere possession or carrying of arms.

In light of these contemporary historical examples, it is not surprising that James Madison considered the right to keep and bear arms an advantage that Americans possessed superior to those rights possessed by the citizens of any other nation. Federalist 46.

C. James Madison and Federalist 46

James Madison's Federalist 46 provides a uniquely American understanding of the right to keep and bear arms as understood at the time. Madison's arguments in Federalist 46 bolster the position that the Second Amendment right to bear arms was not constrained to the home. For Madison, the right of

American citizens to bear arms outside the home was foundational to American exceptionalism and self-government. This right acted as a bulwark against potential oppression by a far-off federal government and differentiated the United States from tyrannical nations in Europe who refused their citizens similar access to firearms. Madison understood that American citizens had the right to bear arms outside of their homes to defend against enemies both foreign and domestic, and that this right was crucial to preserve the American system of government and individual liberty.

Our particular form of government, which was largely developed by Madison and others, was based on the idea of federalism, where state and federal governments have separate spheres, rights, and responsibilities limited by the Constitution. In this system, it is the individual citizen who stands as the ultimate source of governmental power and authority. It is the individual citizen who ultimately possesses inalienable and pre-existing rights such as the right to keep and bear arms for self-defense against tyranny and violence.

With the backdrop of the American Revolution, where the colonists revolted against an overbearing government, the concern over an all-powerful federal government's ability to transgress against those inalienable and pre-existing rights was foremost in the citizens' mind. The state governments were seen as the first line of defense against such transgressions.

Responding to those who believed that the federal government would maintain a standing army that would enable "the downfall of the State governments," Madison first pointed out the unlikely sequence of events that would need to happen for that downfall to occur. James Madison, Federalist 46, The Federalist Papers 290 (Charles R. Kesler and Clinton Rossiter, eds., 2003). Madison argued that it was highly unlikely that "the people and the States should, for a sufficient period of time, elect an uninterrupted succession of men ready to betray both," and "that the traitors should, throughout this period, uniformly and systematically pursue some fixed plan for the extension of the military establishment." *Id.* Further, it was unlikely "that the governments and the people of the States should silently and patiently behold the gathering storm, and continue to supply the materials, until it should be prepared to burst on their own heads." *Id.*

If the federal government did form a regular army "fully equal to the resources of the country" and "entirely at the devotion of the federal government," Madison reasoned that "the State governments, with the people on their side, would be able to repel the danger." *Id.* According to Madison, the states would be able to unite a militia "amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence" against a much smaller federal force. *Id.*

This does not mean that Madison understood the right to keep and bear arms to be solely for the purpose of confronting an overreaching federal or foreign power through service in a militia. He understood it to be a pre-existing individual right. Citizens too had the right to bear arms outside the home to fight for their common and individual liberties and could be called upon to unite for the common defense precisely because they were rightfully armed as individual citizens. Nothing in Madison's writings limited the right to keep and bear arms to the home.

This understanding was absolutely crucial in Madison's mind to ensure the preservation of federalism in the American system of government which was designed to protect the individual liberty of its citizens where the ultimate authority rested with the individual citizen. Madison cited the American colonies' "last successful resistance . . . against the British arms" as evidence that a state militia composed of citizens with the right to bear arms outside the home could not be conquered by a federal force. *Id.* Remember that the American Revolution was fought to secure the individual rights the colonists possessed that the Crown and Parliament violated.

To Madison, Americans' broad right to keep and bear arms was a key advantage and was a right unique to the American citizen that the people of almost every other nation lacked:

> Besides the advantage of being armed, which the Americans possess over the

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

Id. This was a uniquely American right.

As Madison pointed out, "[n]otwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms." *Id.* European governments refused to trust their people with arms. In stark contrast, the right of Americans to keep and bear arms was protected by the adoption of the Second Amendment.

In arguing for the adoption of the Bill of Rights, Madison reflected the understanding of the times of the Americans who were voting to adopt the Bill of Rights. If possession and bearing of arms were limited to being exercised solely within the home, it is likely the American Revolution would never have occurred, much less succeeded, and neither the Constitution nor the Bill of Rights would have been adopted.

III. There is No Distinction Between Exercising Rights Protected Under the Bill of Rights in the Home Versus Outside the Home

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943). The right to keep and bear arms is supposed to be one of those protected subjects. Nonetheless, officials, such as the New York state officials here, and lower courts have hollowed out this right to the point that its meaning shifts with every change in political winds, despite it being settled that the Second Amendment protects an individual right to keep and bear arms that applies against both the federal government and the states. *Heller*, 554 U.S. 570; *McDonald*, 561 U.S. 742.

Though *Heller* acknowledged that the right is not unlimited, 554 U.S. at 595, the onerous restrictions lower courts have placed on the right to keep and bear arms protected by the Second Amendment have no parallel among the Constitution's other enumerated rights. *See Silvester v. Becerra*, 138 S. Ct. 945 (2018) (Thomas, J. dissenting from denial of certiorari) ("If a lower court treated another right so cavalierly, I have little doubt that this Court would intervene. But as evidenced by our continued inaction in this area, the Second Amendment is a disfavored right in this Court.").

There is no historical or legal basis for states' and courts' treatment of the Second Amendment as a second-class right.

In this case and others, courts of appeal have upheld state laws which essentially treat the Second Amendment as a right of domicile rather than an individual right. *See, e.g., Rogers v. Grewal*, 140 S. Ct. 1865, 1867 (Thomas, J., dissenting from denial of certiorari). But for the Third Amendment[3] which, by its terms, applies solely to the home, the Second Amendment alone among the enumerated rights seems to bears this burden in the lower courts.

Consider the value of the rights to speech, assembly, and religion were they to be relegated only to being exercised within the home. Such limitation would neuter the right to the point of it being meaningless.

Of course, those fundamental rights are not treated as being limited to the home. Yet, for some lower courts, the right to keep and bear arms is somehow different. Contrast the right to free speech which may be freely exercised at the schoolhouse, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."), the courthouse, *Cox v. State of La.*, 379 U.S. 536, 546 (1965) (holding civil rights protesters could

[3] "No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. Const. amend. III.

not be prosecuted for breach of the peace for their peaceful protest which ended at a courthouse), and the people's house, *see e.g., California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 512 (1972) ("Certainly the right to petition extends to all departments of the Government").

An individual may exercise his or her right to free speech outside of the home even when much of society would deem that speech offensive, *United States v. Stevens*, 559 U.S. 460, 471–72 (2010) (striking down a law restricting depictions of animal cruelty), exploitive, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567 (1991) (limiting restrictions on nude dancing as violative of free speech), or dangerous, *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 793 (2011) (striking down speech restrictions on violent video games). The individual right to free speech attaches to the individual, not the domicile. And such rights are meaningful because they may be exercised where they are needed and may be most effective.

Likewise, the right to freely exercise one's religion is not limited to an individual's home. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993) (holding members of the Santeria church at the Church of Lukumi Babalu Aye, Inc. could exercise their religion—outside of their homes—free from government interference). Similarly, the right to be free from self-incrimination applies both inside and outside the home, *see Orozco v. Texas*, 394 U.S. 324, 326 (1969) (holding persons questioned in their bed retain a Fifth Amendment right against self-incrimination); *Miranda v. Arizona*, 384 U.S. 436, 492

(1966) (holding persons being interrogated must be informed of their Fifth Amendment right against self-incrimination).

In *Heller*, the Supreme Court emphasized the importance of the Second Amendment's application in the home. *Heller*, 554 U.S. at 628. Yet, lower courts, inexplicably, interpret this emphasis as a limiting principle rather than merely a point of explanation and the Court simply deciding the case before it based on the facts of the case. As discussed above, there is no historical or legal basis for the lower courts restricting the right to keep and bear arms, concealed or not, to being exercised solely within the home.

The Fourth Amendment generally prevents the government from compelling a suspect to consent to a search of his home. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 248–249 (1973). This Court has stated the "very core" of the individual right to be free from unreasonable search and seizure in the Fourth Amendment is "'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Florida v. Jardines*, 569 U.S. 1, 6 (2013). Yet, this acknowledgment of the right's gravity as applied within the home has not stopped this or lower courts from applying it without. Fourth Amendment protections extend to cars, *Brendlin v. California*, 551 U.S. 249, 255 (2007), airports, *United States v. Place*, 462 U.S. 696 (1983), motels, *City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 412 (2015), and beyond. Only the right to keep and bear arms protected by the Second Amendment, for some lower courts, ends at the front door.

As Justices Thomas and Kavanaugh recently noted, "[t]he Second Amendment provides no hierarchy of 'core' and peripheral rights." *Rogers v. Grewal*, 140 S. Ct. 1865, 1867 (2020) (dissenting from the denial of certiorari). The general framework for analyzing Second Amendment cases requires a review of the "text, history, and tradition" to determine whether a challenged law violates the right to keep and bear arms. *Id.* (citing *Heller*, 554 U.S. at 635). Governments and courts that fear or dislike arms should not be able to cavalierly treat the right of citizens to keep and bear arms, concealed or not, as a lesser right than the right to speech, assemble, or practice one's religion.

CONCLUSION

History, tradition, and text demonstrate that the right to keep and bear arms is not a second-class right limited to being exercised within the home if the arm is carried concealed. This Court's jurisprudence treats no other enumerated right in such a manner. This Court should put to rest states' and lower courts' treating the right to keep and bear arms, as protected by the Second Amendment, as a second-class right.

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