No. 20-843

In the
Supreme Court of the United States

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

Petitioners,

v.

KEVIN P. BRUEN, in His Official Capacity as Superintendent of the New York State Police, 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 Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS/RESPONDENTS

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QUESTIONS PRESENTED

Whether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment.

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SUMMARY OF ARGUMENT

New York's requirement for proper cause when applying for a concealed-carry license is consistent with the Second Amendment.

While petitioners are correct that the Second Amendment protects the right of people to carry arms outside of the home, this right is not absolute. "Longstanding prohibitions" are within the bounds of restrictions the Second Amendment allows. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008). New York's law is longstanding. First, the proper cause requirement's origin can be directly traced back to the 1328 Statute of Northampton. Second, bans on carry of concealable weapons date back to 1613 and were upheld by 19th century state courts many times. *Heller* used more recent history than is present here to give the stamp of approval to provisions such as bans on felons possessing guns. *Id.* at 626. If New York's law does not pass the historical burden, this court's insistence on text, history, and tradition would become hollow and arbitrary.

At worst, the historical record is unclear. In such a case, the court should use intermediate scrutiny. Strict scrutiny would be an extreme standard rendering most gun laws unconstitutional, contradicting the history. Intermediate scrutiny clearly upholds New York's law. Statistics bear out the significant public safety concerns New York has for handguns. A "shall issue" regime that only considers major red flags like criminal records is not

sufficient to fulfill this interest. The court should defer to New York's judgement on the factors it considers to meet its governmental duty of public safety.

ARGUMENT

I. Text, history, and tradition support New York's restrictions on concealed carry permits

A. New York's proper cause requirement is a longstanding prohibition

Any analysis of the constitutionality of gun control measures must start with *Heller's* "laundry list of Second Amendment exceptions," which included laws prohibiting possession by felons, carrying in sensitive places like schools, and commercial sales that didn't meet preset conditions. Winkler, *Heller's Catch22*, 56 U.C.L.A. L. Rev. 1551, 1561 (2009); see *Heller,* 554 U.S. at 626-27. None of these so-called "longstanding prohibitions," *id*. at 626, were around at the founding. Winkler, *Heller's Catch22*, 56 U.C.L.A. L. Rev. at 1563. Bans for felons only started in the 1920s. *Id.* at 1563; see also *Kanter v. Barr*, 919 F.3d 437, 458 (7th Cir. 2019) (Barrett, J., dissenting). By this standard, New York's law is clearly constitutional as it was passed in 1913. 1913 Laws of N.Y., ch. 608, at 1627–30.

Further, New York's proper cause requirement mirrors the laws in many other states starting from before the Civil War. First, in 1836, Massachusetts criminalized carrying a "dirk, dagger, sword, pistol, or other offensive and dangerous weapon" for any person "without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property." 1836 Mass. Acts 748, 750, ch.

134, §16. Virginia passed an almost identical law in 1847. 1847 Va. Laws 127, 129, §16. The surety bond clauses of these laws are not relevant to whether they violated the Second Amendment. Further proving that the surety bond clauses don't weaken our historical analysis, Massachusetts passed a similar law in 1906 that transitioned its proper cause requirement to a permitting regime and removed the surety bond system. 1906 Mass. Acts 150, ch. 172, §1. This law was then adopted by Hawaii and New York. 1913 Haw. Laws 25, act 22, §1; 1913 Laws of N.Y., ch. 608, at 1627–30. If states that broadly allowed open carry are included, Pennsylvania, North Dakota, South Dakota, Washington, Alabama, and California could all be counted as states where proper cause requirements followed within the next 25 years. 1931 Pa. Laws 497, 498-499, Act No. 158, §7; 1923 N.D. Acts 379, 381-382, ch. 266, §8; 1935 S.D. Sess. Laws 355, 356, ch. 208, §7; 1935 Wash. Sess. Laws 599, 600-601, ch. 172, §7; 1936 Ala. Laws 51, 52 §7; 1923 Cal. Acts 695, 698-699, ch. 339 §8.

Moreover, these proper cause requirements follow the tradition of the Statute of Northampton from before the founding. Although, this is a contested area, it is incontrovertible that the text of the 1328 statute holds "no man" will "go nor ride armed by day or by night" in "no part elsewhere." 2 Edw. 3, 258, ch. 3 (1328). The plain meaning of this statute was clearly enforced in one English court in 1615 as the court wrote, "The sheriff hath power to commit . . . if contrary to the Statute of Northampton, he sees any one to carry weapons in the high-way, in terrorem populi Regis; he ought to take him, and arrest him, notwithstanding he doth not break the peace in his

presence." *Chune v. Piott*, 80 Eng. Rep. 1161, 1162 (K.B. 1615). More importantly was how equivalents were enforced in the colonies. 1699 New Hampshire law criminalized "any other who shall go armed offensively." 1699 N.H. Laws 1. Post-revolution Massachusetts passed a similar law, only adding a fear or terror clause, "ride or go armed offensively, *to the fear or terror of the good citizens of this Commonwealt*h." 1795 Mass. Acts 436, ch. 2 (emphasis added).

Altogether, there is a clear tradition of statutes from many different states that lead to the proper cause requirement New York uses. That there is an evolution of these laws is a point in their favor because it shows continuous consideration by legislatures. The history around the edges might be murky, but the historical line drawn from the Statute of Northampton to New York's law is one that has been confirmed by multiple judges. *Young v. Hawaii*, 992 F.3d 765, 787-812 (9th Cir. 2021); *Kachalsky v. County of Westchester*, 701 F.3d 81, 95-96 (2d Cir. 2012). Even a significantly weaker historical showing would be sufficient to put the permitting regime in question here "within the class of traditional, 'longstanding' gun regulations in the United States." *Heller v. District of Columbia*, 670 F.3d 1244, 1270 (D.C. Cir. 2011) (Heller II) (Kavanaugh, J., dissenting).

B. A ban on all carry of concealable weapons has a longstanding tradition

New York's law would be constitutional even if it didn't grant a permit to anyone. The limiting

principle being states can only impose complete carrying bans on concealable weapons. This again is derived from the history. The law challenged here only applies to concealed carry of handguns. The fact that New York's law is different from these and derived from a separate tradition of proper cause requirements is irrelevant to a historical analysis because if the Second Amendment doesn't protect the right to carry concealable weapons, it could hardly invalidate a law that allows only some to carry concealable weapons.

The tradition starts in England in 1613 with a proclamation stating, "We doe straitly charge***that they neither make, nor bring into this Realme, any Dagges, Pistols, or other like short Gunnes*** And that no person or persons shall beare or carry, about him or them, any such." King James I, A Proclamation Against the Use of Pocket Dags 1 (1613). Here the inherent danger of hidden weapons was recognized and addressed through a ban on all carry of concealable weapons, not just concealed carry. In the aftermath of the War of 1812, many states in the South banned concealed carry. Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights* 55, 64 & nn. 50-54 Law & Contemp. Tennessee's law banned both the open and concealed carry of concealable weapons. Tennessee: Act of Oct. 19, 1821, ch. XIII, 1821 Tenn. Pub. Acts 15. As of 1981, "Nineteen states barred concealed gun carrying entirely, and twenty-eight states had 'may issue' laws." Spitzer, *Gun Law History* at 62.

These laws were upheld in state courts at the time. The most reliable case comes from the Tennessee Supreme Court, which while construing

the state's Second Amendment as an individual right, wrote that a law "so far as it prohibits the citizen 'either publicly or privately to carry a dirk, sword cane, Spanish stiletto, belt or pocket pistol,' is constitutional." *Andrews v. State*, 50 Tenn. 165, 187 (1871). *Heller* correctly interprets that the rest of the paragraph finds such a law with no exceptions would be unconstitutional but omits the court's finding that this is only true insofar as it makes it practically impossible to keep the gun at home. *Heller,* 554 U.S. at 629. Petitioners rely heavily on *Nunn v State*, but there a couple of flaws. *Nunn v. State*, 1 Ga. 243 (1846). First, the court couldn't properly reach the constitutional question of open carry because "the law failed to list handguns among those weapons not to be openly carried." Spitzer, *Gun Law History* at 62. Second, the court's opinion seems to suggest that to be valid, a restriction on bearing arms "is valid, inasmuch as it does not deprive the citizen of his natural right of self-defence." *Nunn* 1 Ga. at 251. Indeed, the opinion goes out of its way to clarify that concealed carry was constitutional because there are other avenues to self-defense. It seems that being able to openly carry long guns and rifles, as New York state law allows, provides access to this right. *Id.* at 251. Proving this point, in a later case where the court properly reached the question, the court agreed with *Andrews* and found that a law stating, "No person *** shall be permitted or allowed to carry about his or her person any *** pistol or revolver, or any kind of deadly weapon, to *** any other public-gathering in this state, except militia muster grounds," was constitutional. *Hill v. State*, 53 Ga. 472, 474 (1874). The only case that supports

petitioners' case is an anomaly from Kentucky, which should not have any bearing on interpreting the U.S. constitution because it "instead was based on Kentucky's more expansive right-to-beararms-type [sic] provision." Spitzer, *Gun Law History* at nn. 50. Overall, the historical record of state cases overwhelmingly supports total bans on carrying of concealable weapons.

Although the historical record for banning carry of handguns completely is weaker than the case for proper cause requirements, it is still sufficient. First, many such laws have existed and none struck down based on the U.S. constitution. Second, you can draw "appropriate analogue" from banning only concealed carry to banning carry of concealable weapons as in practice, they have a similar purpose and effect. *Heller II*, 670 F.3d at 1268 (Kavanaugh, J., dissenting). Banning only concealed carry is almost certainly constitutional as demonstrated by the weight of the evidence in this section. Even Heller seemed to suggest ""prohibitions on carrying concealed weapons" are consistent with the Second Amendment. *Heller,* 554 U.S. at 626-27. Finally, even if none of these arguments hold, this topic is at the very least unclear and thus, means-end scrutiny should be used.

C. The right to have guns outside the home is less expansive than within the home

While the Second Amendment protects the right to keep arms and the right to bear arms, it is "the home, where the need for defense of self, family, and

property is most acute." *Heller,* 554 U.S. at 628. The right to bear arms is more limited than the right to keep arms. This concept is confirmed by the purpose of the Second Amendment and history. Petitioners try to conflate the two rights. Indeed, they would prefer to characterize New York's law as practically identical to a ban on handguns outside the home, so they can make direct comparisons to *Heller*. Even withstanding the proper cause requirement that differentiates New York's regime from a total ban, this argument is not sufficient. An entirely new analysis needs to be done for carrying outside the home.

The Second Amendment has always been a more fundamental right within the home. *Heller* recognizes that despite the prefatory clause discussing the importance of a militia, when the founders were discussing the operative clause, most "undoubtedly thought it even more important for self-defense." *Heller,* 554 U.S. at 599. This distinction between self-defense in the home and outside the home is best captured in the castle doctrine, a doctrine dating back to English common law which relieved individuals from the duty to retreat when using deadly force at home. Outside the home, protection was to be primarily the role of the state, so individuals were required to use force only as a last resort and "apply to the law for redress" in other instances. Francis Wharton, *The Law of Homicide* 268 (1907). Even militia interests are mostly served with only the right to keep arms. This explains why many state analogues to the Second Amendment such as Massachusetts provided, "The people have a right to keep and to bear arms *for the common defence*." Pt.

First, Art. XVII, in 3 Thorpe 1888, 1892 (emphasis added). These analogues still had the same prefatory clause but seemed to limit the carrying of arms to when it was necessary for the common defense. Different scopes of the rights to keep and bear arms would be consistent with the purposes of the Second Amendment.

The history of gun restrictions, starting with the Statute of Northampton, proves carrying a gun outside the home was an action subject to more regulation than merely owning a gun. Even petitioners focus on the "to the fear or terror of the people" clauses contained in laws derived from the Statute of Northampton support this conclusion as carrying a gun outside the home will always engender more fear. It is also clear that for sensitive places like "in fairs, markets," total bans on carrying were commonplace. 2 Edw. 3, 258, ch. 3 (1328). Heller explicitly provides for firearm bans at "sensitive places such as schools and government buildings" as being "longstanding prohibitions." *Heller*, 554 U.S. at 626. The discussion of sensitive places has special importance in the context of New York. New York City sees so much congestion that some parts would certainly constitute places where the risks of arms being used or arms simply fostering fear becomes unacceptably exacerbated.

Considerations of history and the purpose of the Second Amendment overpower a straightforward textual analysis that equates keep and bear. The Fourth Amendment has a well-established "automobile exception" because "a vehicle can be quickly moved" to avoid search in the time it takes to acquire a warrant despite the text not providing for

this differentiation between home and car. *Collins v. Virginia*, 138 S. Ct. 1663, 1669- 1672 (2018); citing *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543. Indeed, many rights become "virtually unfettered inside the home but become subject to reasonable regulation outside the home." *Gould v. Morgan*, 907 F.3d 659, 672 (1st Cir 2018); *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (consensual sexual intimacy). There is no reason this principle shouldn't apply to the Second Amendment. Handguns being allowed at home doesn't give people the presumptive right to carry them. The right to bear arms outside the home being severely limited would be consistent with constitutional jurisprudence; treating it as expansive would be an anomaly.

II. Means-End Scrutiny also Upholds

A. Intermediate scrutiny is appropriate if the history is unclear

Sometimes, history will not be enough for courts to render a decision on the constitutionality of a law. Indeed, some regulations simply won't have an historical analogue. To best assess the constitutionality of such legislation, intermediate scrutiny should be used. Gun regulations have successfully coexisted with the Second Amendment since the founding. In contrast, "if courts applied strict scrutiny, then presumably very few gun regulations would be upheld." *Heller II*, 670 F.3d at 1274 (Kavanaugh, J., dissenting). The founders did

not write the Second Amendment believing "their whole scheme of law and order, and government and protection, would be a failure, and that the people, instead of depending upon the laws and the public authorities for protection, were each man to take care of himself." *Hill*, 53 Ga. at 47. That failure is exactly what strict scrutiny creates.

There are instances where some doctrinal test will need to be used. If lack of history were enough to render a statute unconstitutional, laws prohibiting felons from owning guns would presumably have been invalid when they were first passed. States will always need to adapt to new innovations in guns or new uses. In these cases, means-end scrutiny plays an "essential" role to evaluate "new restrictions." *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting). Moreover, sometimes the history is simply somewhat vague. Slight modifications to previous laws should not be grounds for rendering them unconstitutional. Means-end scrutiny can be a great tool for courts to balance state interests and additional impositions on the right to keep and bear arms in these cases.

Intermediate scrutiny is the test that best coheres with historical gun regulations. This is the primary way to evaluate the fit of a doctrinal test, which should be "crafted so as to reflect" the "traditions that embody the people's understanding" of the law at issue. *Ibid.* at 568. With the Second Amendment, where text, history, and tradition has been identified as the primary test, this is even more necessary. The best example to prove that strict scrutiny doesn't fit is bans on concealed carry; there is little doubt that such laws would be well beyond strict scrutiny. The

somewhat narrow safety interest in prohibiting concealed carry as opposed to open carry is one that courts would not find "compelling" or "narrowly tailored." See, e.g., *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444-456 (2015). However, such bans are clearly historically allowed. See *supra.* at 6-8. Similarly, it would be hard to think that broad regulations for past felons and the mentally ill would be the least restrictive means to meet state interests of preventing dangerous people from owning guns yet Heller notes these as "longstanding traditions." *Heller,* 554 U.S. at 626.

The Second Amendment being a core right is not sufficient to justify strict scrutiny. Freedom of speech is one of the most fundamental rights to a functioning democratic society. Despite this, the Supreme Court regularly applies intermediate scrutiny towards various aspects of speech. Time, place, and manner restrictions and forms of speech that have potential harm are often reviewed with intermediate scrutiny. See *Watts v. United States*, 394 U.S. 705, 707-708 (1969) (per curiam) (true threats); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573-574 (1942) (fighting words); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (incitement). Moreover, this case reviews the right to bear guns outside the home. Unlike within the privacy of one's home where rights are often quite broad, the same rights often face various forms of reasonable restrictions in public. See *Gould*, 907 F.3d at 672; *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (possessing obscene materials). Intermediate scrutiny is best in evaluating laws that do not clash with the core values of a constitutional provision. For the Second Amendment, the core is the

right to keep arms within the home. See *supra*. at 8-11.

B. Intermediate scrutiny upholds

Courts have articulated a wide variety of standards to define intermediate scrutiny. Despite this, there is a set of central requirements that are "the government's stated objective *** be significant, substantial, or important" and that there must be a "reasonable fit between the challenged regulation and the asserted objective." *Jackson v. City & County of San Francisco*, 746 F.3d 953, 964 (9th Cir. 2014) (Ikuta, J.) (citing *Ward*, 491 U.S. at 798 and *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). Public safety is one of the most substantial interests that exists. Governments have a duty to keep their citizenry safe. New York's proper-cause requirement for concealed carry permits is a reasonable way to fulfill this interest.

New York's public safety interest is well-supported by the data. In 2019, firearm-based homicides caused 14,414 deaths in the United States. See the Centers for Disease Control and Prevention (CDC), U.S. Dep't of Health & Human Servs., Web-Based Injury Statistics Query and Reporting System, Fatal Injury and Violence Data (2020). Firearm based assaults accounted for an estimated 59,077 injuries in 2012. See CDC, Web-Based 25 Injury Statistics Query and Reporting System, Nonfatal Injury Data (2020). Today, as when New York adopted the proper-cause requirement, the "particular kind of arm" targeted by the requirement is "the handy, the usual, and the favorite weapon of the turbulent criminal

class." *People ex rel. Darling v. Warden of City Prison*, 139 N.Y.S. 277, 285 (N.Y. App. Div. 1913). Merely denying firearms to those with criminal records is insufficient. New York presented evidence showing "a majority of criminal homicides and other serious crimes are committed by individuals who have not been convicted of a felony." D. Ct. Doc. 52 at 14, *Kachalsky v. County of Westchester*, No. 10-cv-5413 (S.D.N.Y. Feb. 23, 2011). These statistics meet the burden of a substantial interest as they "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner I*, 512 U.S. at 664.

New York's law has a reasonable fit. Intermediate scrutiny only requires "a fit that is not necessarily perfect, but reasonable" or "'in proportion to the interest served.'" *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989). Rather than meeting a least-restrictive means test, we need only show that New York's law "does not burden substantially more than is necessary to further that interest." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 213-214 (1997) (Turner II). Unlike in *Heller*, where the law in question did completely prohibit possession of the "quintessential self-defense weapon," *Heller,* 554 U.S. at 629, at home, the burden imposed by New York is modest. The Second Amendment does not protect the overarching, general right to possess weapons for any subjective reason; rather, it protects a right to possess firearms for the explicit purpose of self-defense. *Id.*, 554 U.S. at 577. Bans on concealed-carry permits do not hamper an individual's ability to hunt or defend one's livelihood. "Defense of the public

square" does not fall upon the private citizen; it falls on the states. *Young*, 992 F.3d at 814. For those who do have an exaggerated need to self-defense outside the home, permits are granted. New York's law does an overall good job of balancing self-defense and public safety.

Petitioners try to emphasize the application of New York's law. Maybe there are better ways to regulate gun safety. However, that is not for the court to decide, and if the legislature can show even modest empirical support for its policy, the court should not question that under intermediate scrutiny. Petitioners are probably right that some permit applications are denied improperly. Again, this is not for the court to question. Mistakes are going to be made because New York evaluates thousands of permit applications every year. Preliminary data from records of state police shows that for 2018 and 2019, 93% or 54198 of applicants were given either an unrestricted or restricted license. There is a reason many states throughout the 20th century and eight states today use may issue regimes. This court should not overrule the judgement of many legislatures.

CONCLUSION

This court should affirm the judgement of the Court of Appeals.

Respectfully submitted,

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