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

BRIEF OF THE NATIONAL LEAGUE OF CITIES, THE UNITED STATES CONFERENCE OF MAYORS, THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, THE MAJOR CITIES CHIEFS ASSOCIATION, THE NATIONAL POLICE FOUNDATION AND THE NATIONAL ORGANIZATION OF BLACK LAW ENFORCEMENT EXECUTIVES AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Amici will address the following question:

Whether, in light of the potential for dangerous confrontations when firearms are brought into public places, individuals can be required to demonstrate some form of particularized need to before they may lawfully carry concealable firearms in public.

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INTEREST OF THE AMICI CURIAE

Amici are not-for-profit organizations whose mission is to advance the interests of local governments and those they serve.[1]

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. The NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The United States Conference of Mayors is the official nonpartisan organization of the more than 1,400 United States cities with a population of more than 30,000. Each city is represented in the Conference by its chief elected official, the mayor.

The International City/County Management Association is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities.

The Major Cities Chiefs Association is the professional organization of chiefs and sheriffs of the largest cities in the United States, serving more than 68 million people.

The National Police Foundation is a private, nonprofit organization established by the Ford Foundation in 1970 with a mandate to improve the quality of American policing. It has trained police executives

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than amici, their members, or their counsel made a monetary contribution to its preparation or submission.

and managers throughout the United States and has conducted and published research studies involving virtually every aspect of police policy and operations.

The National Organization of Black Law Enforcement Executives (NOBLE) has over 3,000 members worldwide and represents chief executive officers and command-level law enforcement officials from federal, state, county, and municipal law enforcement agencies, and criminal justice practitioners.

STATEMENT OF THE CASE

Under New York law, an individual can obtain an unrestricted "carry" license that authorizes the holder to carry a concealable firearm, as well as a restricted carry license that permits carrying concealable firearms for specific purposes such as hunting or target shooting. Pet. App. 5-6. A carry license "shall be issued . . . when proper cause exists for the issuance thereof." N.Y. Penal L. § 400.00(2)(f).

New York's courts have interpreted "proper cause," within the meaning of the statute, "to include carrying a handgun for target practice, hunting, or self-defense," but "[t]o establish proper cause to obtain a license without any restrictions—the full-carry license that [petitioners] seek in this case—an applicant must 'demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.'" *Kachalsky v. County of Westchester*, 701 F.3d 81, 86 (2d Cir. 2012) (quoting *Klenosky v. New York City Police Department*, 428 N.Y.S. 2d 256, 257 (App. Div. 1980), *aff'd on opinion below*, 421 N.E.2d 503 (N.Y.1981)).

SUMMARY OF THE ARGUMENT

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court held that the Second Amendment secures a right to possess and use firearms within the home "for the core lawful purpose of self-defense," *id.* at 630, while cautioning that the Second Amendment is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626.

In this case, the Court confronts the scope of the right to carry firearms in public. This context offers complexities not present in *Heller*. After all, a law-enforcement officer on patrol will often be unable to readily determine whether an individual he encounters on the streetscape is armed for lawful purposes or some other reason.

Although many individuals carry firearms for proper purposes, in areas riven by gang- and drug-related crime, all too often firearms on the streetscape lead to violent confrontations and endanger officers on patrol. In these areas, effective policing often requires efforts to reduce firearms on the streetscape.

Acknowledging the difficulty of determining whether an individual is carrying a firearm for a proper purpose, the law has long permitted prophylactic regulation that reduces the likelihood that individuals will carry firearms in public for an improper reason. There is textual support in the Second Amendment for such regulatory authority; as the Court acknowledged in *Heller*, the phrase "bear arms" in the Second Amendment is ambiguous, and therefore is properly interpreted with reference to the Second Amendment's preamble, which contemplates a "well regulated Militia." *Heller* added that

the term "Militia" includes all those who exercise the right to keep and bear arms, regardless whether they serve in a formal military organization.

Accordingly, the Second Amendment's text contemplates regulatory authority with respect to those who "bear arms." There is, indeed, a long history of regulation directed at reducing the likelihood that those who "bear arms" in public will pose a danger to others. Only laws imposing an undue burden on the core, constitutionally-protected interest in lawful armed defense should be invalidated.

In areas where it is common for individuals to carry firearms for unlawful purposes, but whose intent will often be difficult for officers on patrol to discern, prophylactic regulation may well be appropriate. Absent a requirement that licensees show particularized need to carry concealable firearms, licensing laws could do little to stop a proliferation of concealed weapons on the streetscape. This could produce undue threats to police and public safety and compromise the ability of police to prevent violent confrontations involving armed individuals. Accordingly, a requirement that those who seek to carry handguns in public demonstrate particularized need imposes no undue burden on Second Amendment rights.

ARGUMENT

In *Heller*, as it invalidated the District of Columbia's prohibition on the possession and use of handguns within the home, this Court cautioned that the Second Amendment is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 554 U.S. at 626. This case, unlike *Heller*, involves carrying firearms outside of

the home. Vastly different considerations therefore come into play.

I. CRITICAL LAW ENFORCEMENT INTERESTS ARE IMPLICATED WHEN FIREARMS ARE CARRIED IN HIGH CRIME AREAS

Although many individuals carry firearms for proper purposes, in areas riven by gang- and drug-related crime, all too often concealable firearms on the streetscape lead to violent confrontations and endanger law-enforcement officers on patrol.

For example, there is considerable evidence that members of criminal street gangs carry firearms at elevated rates.[2] The same is true of those involved in drug trafficking.[3] Indeed, those engaged in unlawful but intensively competitive illegal markets will often turn to violence. For example, there is ample evidence that homicide spiked in large cities following the

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[2] *See, e.g.*, James C. Howell, Gangs in American Communities 218 (2012); Beth M. Huebner et al, *Dangerous Places: Gang Members and Neighborhood Levels of Gun Assault*, 33 Justice Q. 836, 855-56 (2016); Henry B. Tigri et al., *Investigating the Relationship Between Gang Membership and Carrying a Firearm: Results from a National Sample*, 41 Am. J. Crim. Just. 168, 180 (2016).

[3] See, e.g., Beidi Dong & Douglas J. Wiebe, Violence and Beyond: Life-Course Features of Handgun Carrying in the Urban United States and Associated Long-Term Life Consequences, 54 J. Crim. Just. 1, 9 (2018); Meghan Docherty et al., Distinguishing Between-Individual From Within-Individual Predictors of Gun Carrying Among Black and White Males Across Adolescence, 43 Law & Hum. Behav. 144, 152 (2019).

introduction of crack cocaine in the 1980s, which created new competitive opportunities and pressures.[4]

The prevalence of violent competition involving street gangs and drug traffickers is likely to increase the rate at which offenders carry firearms. A wealth of research concludes that offenders carry firearms as a consequence of the perceived threat of firearms violence in their communities.[5] Firearms violence, moreover, is often escalatory; a study of homicide in New York City, for example, found evidence of a contagion effect, in which firearms violence stimulated additional, often retaliatory firearms-related violence in nearby areas. *See* Jeffrey Fagan, Deanna L. Wilkinson & Garth Davies, *Social Contagion of Violence*, *in* Cambridge Handbook of Violent Behavior and Aggression 688, 701-10 (Daniel J. Flannery et al. eds., 2007).

Ironically, those who carry firearms in high-crime neighborhoods are rarely safer; to the contrary, even though gang members carry firearms at elevated

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[4] *See, e.g.*, James Alan Fox, Jack Levin & Kenna Quinet, The Will to Kill: Making Sense of Senseless Murder 87-88 (rev. 2008); Benjamin Pearson-Nelson, Understanding Homicide Trends: The Social Context of a Homicide Epidemic 37-41 (2008); Alfred Blumstein & Joel Wallman, *The Crime Drop and Beyond*, 2006 Ann. Rev. Soc. Sci. 125, 131 (2006).

[5] *See* Mark R. Pogrebin, Paul B. Stretsky & N. D Unninthan, Guns, Violence & Criminal Behavior: The Offender's Perspective 69-71 (2009); Jeffrey Fagan & Deanna Wilkinson, *Guns, Youth Violence, and Social Identity*, *in* Youth Violence 105, 174 (Michael Tonry & Mark H. Moore eds., 1998); Paul B. Stretsky & Mark R. Pogrebin, *Gun-Related Gang Violence: Socialization, Identity, and Self*, 36 J. Contemp. Ethnography 85, 105-08 (2007).

rates, they experience vastly higher homicide victimization rates.[6]

The prevalence of the drive-by shooting, for example, is a product of the high rate at which gang members and drug dealers carry firearms. Drive-by shootings are a common tactic of criminal street gangs and pose significant risks to innocent bystanders. *See*, *e.g.*, H. Range Hutson et al., *Drive-by Shootings by Violent Street Gangs in Los Angeles: A Five-Year Review from 1989 to 1993*, 3 Acad. Emergency Med. 300 (1996); H. Range Hutson et al., *Adolescents and Children Injured or Killed in Drive-by Shootings in Los Angeles*, 330 New Eng. J. Med. 324 (1994). When offenders believe that an intended target may be armed, a drive-by shooting enables them to approach with the benefit of tactical surprise and leave quickly. *See* William B. Sanders, Gangbangs and Drive-bys: Grounded Culture and Juvenile Gang Violence 65–74 (1994); James C. Howell, *Youth Gangs: An Overview*, *in* Gangs at the Millennium 16, 36–37 (Finn-Aage Esbensen, Stephen F. Tibbets & Larry Gaines eds., 2004).

It follows that in gang-ridden communities experiencing elevated rates of firearms violence, police tactics that make it riskier for those engaged in gang- and drug-related activity to carry guns in public reduce the risk of violent confrontation and

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[6] *See*, *e.g.*, Scott H. Decker & Barrick Van Winkle, Life in the Gang: Family, Friends, and Violence 173 (1996); Armando Morales, *A Clinical Model for the Prevention of Gang Violence and Homicide*, *in* Substance Abuse and Gang Violence 105, 111-12 (Richard C. Cervantes ed., 1992); Sudhir Venkatesh, *The Financial Activity of a Modern American Street Gang*, *in* Gangs at the Millennium 16, 36–37 (Finn-Aage Esbensen, Stephen F. Tibbets & Larry Gaines eds., 2004).

increase the difficulties facing criminal enterprises. Indeed, there is something approaching consensus among criminologists that one of the few interventions that demonstrably reduces rates of violent crime involves proactive patrol targeting statistical concentrations (or "hot spots") of crime, and focusing on recovering guns unlawfully brought into public places.[7] As one scholarly assessment explained, proactive patrol "operates more through deterrence—*i.e.*, keeping criminals from carrying guns on the street due to fear of being stopped and frisked . . . . " Paul G. Cassell & Richard Fowles, *What Caused the 2016 Chicago Homicide Spike? An Empirical Examination of the "ACLU Effect" and the Role of Stop and Frisks in Preventing Gun Violence*, 2018 U. Ill. L. Rev. 1581, 1662.

If the Second Amendment conferred an unfettered right to carry firearms in public, the ability of police in high-crime, gang-ridden neighborhoods to execute a strategy aimed at driving unlawful guns off the

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[7] *See, e.g.,* Anthony A. Braga, Andrew V. Papachristos & David M. Hureau, *The Effects of Hot Spots Policing on Crime: An Updated Systematic Review and Meta-Analysis*, 41 Just. Q. 633, 643-60 (2014); Daniel S. Nagin, Robert M. Solow & Cynthia Lum, *Deterrence, Criminal Opportunities, and Police*, 53 Criminology 74, 78-79 (2015); Richard Rosenfeld, Michael J. Deckard & Emily Blackburn, *The Effects of Directed Patrol and Self-Initiated Enforcement on Firearm Violence: A Randomized Controlled Study of Hot Spot Policing*, 52 Criminology 428, 428-30, 445-47 (2014); Cody W. Telep & David Weisburd, *What Is Known About the Effectiveness of Police Practices in Reducing Crime and Disorder?*, 15 Police Q. 331, 340-41 (2012); David Weisburd, *Does Hot Spots Policing Inevitably Lead to Unfair and Abusive Police Practices, Or Can We Maximize Both Fairness and Effectiveness in the New Proactive Policing?*, 2016 U. Chi. Leg. F. 661, 666-71.

streetscape to inhibit violent competition and armed confrontations would be sharply circumscribed.

Moreover, firearms licensing laws could prove difficult to enforce if there were a Second Amendment right to obtain a carry license without a showing of particularized need, since, once a presumptive right to a carry license is recognized, the Fourth Amendment's prohibition on unreasonable search and seizure may well prevent police from stopping individuals they reasonably believe to be armed to determine if they are properly licensed. *See Northrup v. City of Toledo Police Department*, 785 F.3d 1128, 1132-33 (6th Cir. 2015) (possibility that suspect was not licensed in a state permitting open carry did not justify stop). *Cf. Delaware v. Prouse*, 440 U.S. 648, 655-63 (1979) (stops of vehicles to check license and registration violate the Fourth Amendment in the absence of reasonable suspicion that the driver does not have proper license and registration or has committed some other offense). *See generally* Shawn E. Fields, *Stop and Frisk in a Concealed Carry World*, 93 Wash. L. Rev. 1675 (2018) (discussing the constitutional obstacles to license checks if a presumptive right to carry firearms in public is recognized).

Beyond that, when firearms become prevalent on the streetscape in high-crime communities, the risks when police attempt to execute a strategy of proactive patrol escalate. The available data indicate that most individuals shot or killed by police are armed.[8] As the

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[8] *See, e.g.*, Wash. Post, *Fatal Force*, https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ (retrieved Aug. 12, 2021) (in 64% of fatal police shootings of civilians in 2020 (652/1021) the victim possessed a firearm); Wesley G. Jennings, Meghan E. Hollis & Allison J. Fernandez, *Deadly Force and Deadly Outcome: Examining the Officer,*

eminent criminologist Franklin Zimring observed: "[T]he dominant threat that police are responding to when they use lethal force is that of guns in the hands of their adversaries." Franklin E. Zimring, When Police Kill 56 (2017). If the Second Amendment prevented police from using proactive patrol strategies to reduce the prevalence of concealed firearms on the streetscape in high-crime areas, proactive patrol would become far riskier for police and public alike.

Accordingly, an effectively unqualified right to carry concealable firearms could critically inhibit the ability of the authorities to combat violent crime, and heighten the risks faced by both police and residents of areas riven by gang and drug crime.

Indeed, there is compelling evidence that a number of recent spikes in violent firearms-related crime are attributable to reductions in rates of stop-and-frisk targeting those who unlawfully carry firearms.[9] There is also substantial evidence that laws that entitle individuals to carry firearms in public, or that mandate issuance of carry licenses, produce higher rates of violent crime than laws affording officials discre-

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Suspect, and Situational Characteristics of Officer-Involved Shootings, 41 Deviant Behav. 969, 972 & tbl.1 (2019) (suspect was armed in 81.8% of police shootings); Charles E. Mennifield, Geiguen Shin & Logan Strother, *Do White Law Enforcement Officers Target Minority Suspects?* 79 Pub. Admin. Rev. 56, 60-61 & fig. 2 (2019) (65.3% of suspects killed by police were armed with a handgun); Franklin E. Zimring, When Police Kill 56-57 (2017) (56% of individuals killed by police were armed with firearms) .

[9] *See* Paul G. Cassell, *Explaining the Recent Homicide Spikes in U.S. Cities: The "Minneapolis Effect" and the Decline in Proactive Policing*, 33 Fed. Sent'g Rep. 83, 97-110 (2020); Cassell & Fowles, supra at 1604-18.

tion to decide whether issuance of a carry license is warranted, although the pertinent studies consider only state-level data and therefore likely understate the magnitude of the resulting crime increases in specific high-crime areas.[10]

Prophylactic regulation of those who carry firearms in public may well be unwarranted in many communities, but in high-crime areas plagued by gang and drug crime, the case for prophylactic regulation is powerful. If police were helpless to intervene on the streetscape until after offenders use a firearm to commit a violent crime, proactive patrol would be rendered largely ineffective. Recognizing a right to carry firearms could therefore fatally undermine the type of hot-spot policing that reduces the likelihood of violent, armed confrontations. Fortunately, the Constitution does not require this outcome.

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[10] *See*, *e.g.*, John Donohue, Abhay Aneja & Kyle D. Webe, *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis*, 16 J. Empirical Legal Stud. 198, 200 (2019) (right-to-carry laws increase violent crime 13-15%); Mark Gius, *Using the Synthetic Control Method to Determine the Effects of Concealed Carry Laws on State-Level Murder Rates*, 57 Int'l Rev. L. & Econ. 1, 5-6 (2019) (states adopting nondiscretionary carry-permit laws experienced 12.3% higher firearms-homicide rates); Michael Siegel et al., *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, 107 Am. J. Pub. Health 1923, 1927 (2017) (right to carry laws associated with 10.6% increase in handgun-homicide rates) (right-to-carry laws associated with a 4% increase in firearm homicide); Michael Siegel et al., *The Impact of State Firearm Laws on Homicide and Suicide Deaths in the USA, 1991–2016*: A Panel Study, 34 J. Gen. Intern. Med. 2021, 2024 (2019) (shall-issue permit laws associated with 9.0% higher homicide rates).

II. THE SECOND AMENDMENT PROVIDES THAT THOSE WHO CARRY FIREARMS MAY BE "WELL REGULATED."

Regulations that reduce the likelihood that individuals will carry firearms in public for an improper purpose are consistent with the Second Amendment; its text provides that those who seek to carry firearms in public may be "well regulated."

A. The Second Amendment's Text Contemplates Regulatory Authority Over Those Who Carry Firearms.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

In *Heller*, this Court undertook "the examination of a variety of legal and other sources to determine the *public understanding* of a legal text in the period after its enactment or ratification," 554 U.S. at 605. After surveying the evidence, the Court concluded that the "right of the People" refers to individual rights, *id.* at 579-81, the right to "keep" arms means "possessing arms," *id.* at 583, and the right to "bear" arms means "carrying for a particular purpose—confrontation." *Id.* at 584. The Court invalidated the District of Columbia ordinance at issue because it "totally ban[ned] handgun possession in the home" and "require[d] that any lawful firearm in the home be disassembled or bound by a trigger lock at all times, rendering it inoperable." *Id.* at 628.

Petitioners claim that "the plain text of the Second Amendment secures the right to carry arms outside the home." Pet. Br. 28. Yet, when it comes to the right

to carry or "bear" arms at issue in this case, *Heller* identified a critical textual ambiguity.

In *Heller*, when considering whether the original meaning of the right to "bear arms" referred only to those who carried arms in connection with military service, the Court concluded that this phrase "*unequivocally* bore that idiomatic meaning only when followed by the preposition 'against,' which was in turn followed by the target of the hostilities." 554 U.S. at 586 (emphasis in original). Thus, the Court found equivocality in the phrase "bear arms"; indeed, the Court acknowledged that "the phrase was often used in a military context . . . ." *Id.* at 587. This conclusion was sound; for example, one survey identified ample evidence that the phrase "bear arms" often had a military meaning in the framing era, even when not followed by "against." *See* Nathan Kozuskanich, *Originalism in a Digital Age: An Inquiry into the Right to Bear Arms*, 29 J. Early Repub. 585, 589-605 (2009).

Thus, *Heller* found that the constitutional text on which petitioners rely—the right to "bear arms"—is ambiguous. The phrase can refer to carrying arms in relation to military service, or an individual right to carry arms unrelated to military service.

This ambiguity warrants consideration of the Second Amendment's preamble since, as the Court explained in *Heller*, "[l]ogic demands that there be a link between the stated purpose and the command," and, accordingly, "[t]hat requirement of logical connection may cause a prefatory clause to resolve an ambiguity in an operative clause." 554 U.S. at 577.

As for the preamble's reference to a "well regulated Militia," *Heller* concluded that the term "Militia" refers not to "the organized militia," but rather "all

able bodied men," while "the federally organized militia may consist of a subset of them." 554 U.S. 596. Thus, "the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service." *Id.* at 627. Accordingly, *Heller* effectively treated the militia and those entitled to exercise the right to keep and bear arms as equivalent.

Heller added that the phrase "well regulated" means "the imposition of proper discipline and training." *Id.* at 597. These terms, of course, are expansive; they contemplate not merely training, but also discipline for the breach of rules and regulations.

Thus, the Second Amendment contemplates regulatory authority over all who exercise the right to bear arms. This textual commitment to regulation is found in no other of the Constitution's enumerated rights. Moreover, "it would do serious violence to this original understanding to disaggregate the right from the existence of regulatory authority . . . . [T]he framing-era understanding was that the right would be exercised by individuals subject to regulation." Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 Wash. U. L. Rev. 1187, 1231 (2015) (footnote omitted).

B. Historical Practice Confirms the Propriety of Prophylactic Regulation of Those Who Carry Firearms

In *Heller*, to ascertain the meaning of the Second Amendment, this Court examined commentary and practice from "after its ratification through the end of the nineteenth century," adding, "[t]hat sort of inquiry is a critical tool of constitutional interpretation." 554 U.S. at 605.

Petitioners contend that "the historical record makes clear that individuals were permitted . . . to carry loaded firearms upon their persons as they went about their daily lives." Pet. Br. 22-23. Many of their amici advance similarly unqualified views of the historical record. *E.g.*, Professors of Second Amendment Law Br. 4-36. The historical evidence, however, is quite mixed.

Regulation of those who carry arms in public can be traced to the Statute of Northampton, which provided that persons could "bring no force in affray of the peace, nor to go nor ride armed by night nor by day." 2 Edw. 3, c. 3, § 3 (1328) (Eng.).

Despite its broad text, petitioners characterize this statute as "consistent with the right to carry ordinary arms for self-defense." Pet. Br. 5. Yet, Blackstone characterized the statute as a prohibition on carrying dangerous weapons in public because of their tendency to alarm others: "[R]iding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land." 4 William Blackstone, Commentaries on the Laws of England 1489 (1765).

To be sure, Hawkins offered a somewhat narrower rule: "[N]o Wearing of Arms is within the Meaning of this Statute, unless it be accompanied with such Circumstances as are apt to terrify the People." 1 William Hawkins, A Treatise on the Pleas of the Crown 136 (3d ed. 1739) (modern spelling added). Coke, in contrast, described the prohibition in broad terms, providing that all but royal officials, those assisting them, and those responding to "a Cry made for armies to keep the peace," are forbidden "to go nor ride armed by night nor by day." Edward Coke, The Third Part of the Institutes of the Laws of

England 160 (1644) (modern spelling added). Thus, the historical evidence is mixed.

Petitioners argue that "[t]he ability to carry firearms for self-defense was seen as not just a practical necessity, but a matter of individual right in the early Republic." Pet. Br. 7. In the early Republic, however, the utility of firearms for self-defense was not so clear; and firearms posed threats far different than those faced by contemporary urban America and detailed in Part I above.

The most advanced type of bearable firearm in the framing era was the flintlock smoothbore musket, which was difficult to load, could produce at most three shots per minute, and was inaccurate except at close range. *See* Michael S. Obermeier, Comment, *Scoping Out the Limits of "Arms" Under the Second Amendment*, 60 U. Kan. L. Rev. 681, 684–87 (2012). As one leading historian explained:

> [B]ecause eighteenth-century firearms were not nearly as threatening or lethal as those available today, we . . . cannot expect the discussants of the late 1780s to have cast their comments about keeping and bearing arms in the same terms that we would. Theirs was a rhetoric of public liberty, not public health; of the danger from standing armies, not that of casual strangers, embittered family members, violent youth gangs, freeway snipers, and careless weapons keepers. Guns were so difficult to fire in the eighteenth century that the very idea of being accidentally killed by one was itself hard to conceive. Indeed, anyone wanting either to murder his family or protect his home in the eighteenth century would have been better

> advised (and much more likely) to grab an axe or knife than to load, prime, and discharge a firearm.

Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 Chi.-Kent L. Rev. 103, 110 (2000).

Moreover, in the early Republic, new challenges to public safety brought forth new regulation. For example, in the 1820s and 1830s, laws prohibiting the carrying of concealed weapons emerged in the wake of a surge in violent crime. *See*, *e.g.*, Saul Cornell, A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America 138-44 (2006); Clayton E. Cramer, Concealed Weapon Laws of the Early Republic: Dueling, Southern Violence, and Moral Reform 2-3, 139-41 (1999); Adam Winkler, Gunfight: The Battle Over the Right to Bear Arms in America 166-69 (2011); Robert Leider, *Our Non-Originalist Right To Bear Arms*, 89 Ind. L.J. 1587, 1599-601 (2014).

Some states adopted even broader bans on carrying firearms even if not concealed: "Many states followed Massachusetts and restricted such a right [to carry firearms in public] to situations in which individuals had a reasonable fear of imminent threat." Saul Cornell, *The Right To Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, Law & Contemp. Probs., vol. 80, no. 2, at 11, 43 (2017). Under Massachusetts law, anyone who

> shall go armed . . . without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may on complaint of any person having reasonable cause to fear an injury, or breach

> of the peace, be required to find sureties for keeping the peace.

1835 Mass. Acts 750. This approach hardly reflects an unqualified right to carry firearms in public. Indeed, there is a vast array nineteenth-century laws requiring permits to carry firearms that long predate the New York statute at issue here. *See* Charles Br. 7-13.[11]

As this Court observed in *Heller*, "the majority of 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." 554 U.S. at 626. Moreover, a line of cases upheld even broader prohibitions on carrying firearms in public, whether openly or concealed. *See* Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1, 31-41 (2012).[12]

Significantly, virtually all the nineteenth-century statutes and judicial decisions embracing a right to carry firearms in public, at least openly, were in the antebellum South, where the need to carry arms openly may have been a product of the prevalence of slavery and the fear of slave revolts, while in the North broader prohibitions on carrying arms in public were common. *See* Saul Cornell, *The Right to Carry*

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[11] For a more elaborate discussion of the historical evidence, see Saul Cornell, *History, Text, Tradition, and the Future of Second Amendment Jurisprudence: Limits on Armed Travel under Anglo-American Law, 1688-1868*, Law & Contemp. Probs., vol. 83, no. 3, at 73 (2020).

[12] For examples of judicial opinions endorsing the constitutionality of bans on open carry, see *Fife v. State*, 31 Ark. 455, 461–62 (1876); *Hill v. State*, 53 Ga. 473, 473–75 (1874); *Andrews v. State*, 50 Tenn. 165, 178–82 (1871); and *English v. State*, 35 Tex. 473, 478–79 (1871).

Firearms Outside of the Home: Separating Historical Myths from Historical Realities, 39 Fordham Urb. L.J. 1695, 1716–25 (2012). Thus, the embrace in the antebellum south of open-carry may well have been tainted by slavery.

In any event, there is reason to doubt petitioners' claim that the courts that upheld bans on carrying concealed weapons "reaffirmed the right to carry arms; they just found the ability to carry openly sufficient to protect it." Pet. Br. 9. Petitioners overlook the stated rationale for the nineteenth-century distinction between concealed and open-carry.

The nineteenth-century cases upholding concealed-carry prohibitions articulated the view that those who carried concealed firearms were unduly likely to be suspicious or threatening. *See, e.g.*, *State v. Reid*, 1 Ala. 612, 617 (1840) ("[A] law which is intended . . . to put down lawless aggression and violence, and to that end inhibits the wearing of certain weapons, in such a manner as is calculated to exert an unhappy influence upon the moral feelings of the wearer . . . does not come in collision with the constitution."); *Nunn v. State*, 1 Ga. 243, 249 (1846) (setting out the same passage from *Reid*); *State v. Smith*, 11 La. Ann. 633, 633 (1856) ("Th[e Second Amendment] was never intended to prevent the individual States from adopting such measures of police as might be necessary, in order to protect the orderly and well disposed citizens from the treacherous use of weapons . . . ."); *State v. Chandler*, 5 La. Ann. 489, 490 (1850) ("This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country, without any tendency to secret advantages and unmanly

assassinations."); *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 160 (1840) ("[A]s the manner in which they are worn and circumstances under which they are carried indicate to every man the purpose of the wearer, the Legislature may prohibit such manner of wearing as would never be resorted to by persons engaged in the common defence.").

Thus, the courts that upheld prohibitions on concealed-carry regarded it as a proxy for dangerousness, as many scholars have observed. *See, e.g.*, Leider, *supra* at 1604-05; Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1522-23 (2009); Jonathan Meltzer, Note, *Open Carry for All:* Heller *and Our Nineteenth-Century Second Amendment*, 123 Yale L.J. 1486, 1518-20 (2014). This rationale is rooted in the Statute of Northampton's concern about firearms carried under circumstances that provoke alarm. Notably, this rationale is not premised upon viewers' reactions to concealed firearms—bystanders could hardly be alarmed by a concealed weapon they cannot see—but is instead based in concern that those who carried concealed weapons posed an undue danger.

Concealed-carry prohibitions are not the only example of prophylactic regulation directed at reducing the likelihood that firearms will be misused. As the Court cautioned in *Heller*:

> [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing

> conditions and qualifications on the commercial sale of arms.

554 U.S. at 626-27. These are additional examples of longstanding prophylactic regulations.

To be sure, the nineteenth-century rationale for the distinction between concealed and open-carry has little resonance today. As a leading academic advocate of firearms rights (and one of petitioners' amici) acknowledged: "Concealed carrying is no longer probative of criminal intent. If anything, concealed carrying is probably more respectful to one's neighbors, many of whom are (sensibly or not) made uncomfortable by the visible presence of a deadly weapon." Volokh, *supra* at 1523. The laws banning concealed-carry, nevertheless, offer ample historical precedent for prophylactic regulation directed at reducing the risk that firearms will be carried by the criminally-minded.

Petitioners attempt to bolster their submission by reference to the Reconstruction-era enactment of the Freedmen's Bureau Act and the Ku Klux Klan Act. *See* Pet. Br. 36-37. Neither statute, however, secured a right to carry arms in public.

The Freedmen Bureau's Act provided that "full and equal benefit of all laws and proceedings concerning personal liberty, personal security . . . including the constitutional right to bear arms, shall be secured and enjoyed by all citizens of such State or district without respect to race or color, or previous condition of slavery." Act of July 10, 1866, § 14, 14 Stat. 173, 176 (1866). The statute thusly granted no right to carry firearms; rather, it banned racial discrimination when it came to firearms regulations. Any other reading renders its final clause surplusage.

Similarly, the Ku Klux Klan Act prohibited "depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws." An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of United States, and for Other Purposes, 17 Stat. 13, 13 §2 (1871). Again, this statute prohibited discrimination rather than conferring a substantive right to carry arms in public.

Conversely, shortly after it approved what became the Fourteenth Amendment, the Thirty-Ninth Congress abolished the militia in most southern states and prohibited any effort to arm those militias. *See* Act of March 2, 1867, ch. 170, § 6, 14 Stat. 485, 487 (1866). The measure's sponsors dismissed Second Amendment objections, arguing that the prohibition was justified by armed groups "dangerous to the public peace and to the security of Union citizens in those states." Cong. Globe, 39th Cong., 1st Sess. 1849 (1866) (Sen. Lane). *Accord, e.g.*, *id.* at 1848-49 (Sen. Wilson).[13]

Thus, history confirms the propriety of prophylactic regulation directed at reducing the risks posed by those who carry firearms in public.

While many persons carry firearms for lawful purposes, others do not. Although limiting the ability to carry firearms may be unwarranted in most jurisdictions, as we explain in Part I above, cities afflicted by gang and drug crime have reason to endeavor to

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[13] This legislation was one of a series of measures undertaken at this time to disarm those who threatened violence in the then-turbulent south. *See* Carole Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 Stan. L. & Pol'y Rev. 615, 620-23 (2006).

reduce the risks presented by firearms on the streetscape. Indeed, history reflects a tradition of more stringent regulation of firearms in larger cities as a consequence of the greater law-enforcement challenges they face. *See* Joseph Blocher, *Firearm Localism*, 123 Yale L.J. 82, 108-20 (2013).

C. Laws Imposing No Undue Burden on Those Who Carry Firearms For Lawful Purposes Are Consistent With the Second Amendment.

As we explain above, the Second Amendment contemplates a "well regulated Militia," and therefore affords state and local governments authority to enact prophylactic regulations with respect to those who carry firearms in public.

Petitioners nevertheless criticize the court of appeals for stating that "something 'less than' strict scrutiny should apply to New York's regime . . . ." Pet. Br. 45. If not strict scrutiny, petitioners seek "the same exacting scrutiny that this Court applies to burdens on other constitutional rights in contexts where it declined to apply strict scrutiny." Pet. Br. 47. Yet, as we have seen, the Second Amendment contains a textual commitment to regulation found in no other enumerated right. Moreover, an invariable requirement "strict" or "exacting" judicial scrutiny of the efficacy and tailoring of a challenged regulation would be deeply problematic.

The myriad methodological difficulties in demonstrating the effect of a challenged regulation on crime rates would make it difficult to mount a convincing empirical demonstration that virtually any regulation—even the longstanding regulations discussed in *Heller* such the prohibition on the possession of firearms by

convicted felons—is narrowly tailored to achieve a compelling governmental interest. *See, e.g.*, Volokh, *supra*, at 1464–69.[14]

Moreover, the narrow tailoring required by strict scrutiny forbids regulations that are significantly over- or underinclusive. *See, e.g.*, *Brown v. Entertainment Merchants' Ass'n*, 564 U.S. 786, 799-802 (2011); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543–46 (1993). Similarly, the "exacting scrutiny" petitioners alternatively seek requires that a challenged enactment be "narrowly tailored to the government's asserted interest." *Americans For Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2383 (2021). Yet, prophylactic regulations of the type embraced historically—and in *Heller*—are necessarily over- or underinclusive; for example, not all those who carry concealed weapons commit crimes, and not all convicted felons recidivate. Under petitioners' approach, the nineteenth-century statutes prohibiting concealed carry, or the longstanding prohibition on the possession of firearms by convicted felons, would presumably fall for lack of "tailoring."

Rather than endorsing tiers of scrutiny, *Heller* focused on the character of the burden that the District's ordinance imposed. The Court wrote that "the inherent right of self-defense has been central to the Second Amendment right," and that the District's "handgun ban "extends . . . to the home, where the need for defense of self, family, and property is most acute." 554 U.S. at 628.

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[14] For a helpful discussion of the difficulties in assembling empirical evidence of the efficacy of gun-control laws, see Mark V. Tushnet, Out of Range: Why the Constitution Can't End the Battle over Guns 77–85 (2007).

Heller thusly teaches that the Second Amendment invalidates laws to the extent that they unduly burden "the core lawful purpose of self-defense." 554 U.S. at 630. This approach accommodates both the right found in the operative clause in the Second Amendment and the regulatory authority acknowledged in the preamble and confirmed by history. Beyond that, the Second Amendment contemplates that those who seek to carry firearms are "well regulated." Regulations are therefore not presumptively unconstitutional, although those that impose undue burdens do not produce a "well regulated" militia.

The task of reconciling a core right and legitimate regulatory interests is not a new one in constitutional law. It has frequently been addressed through a methodology that assesses the extent of the burden placed on the core right by a challenged regulation.

For example, the First Amendment protects the right to vote, but in light of legitimate regulatory interests, the Court utilizes strict scrutiny on regulations imposing what are regarded as severe burdens on voting, while regulations imposing more modest burdens are upheld if reasonable. *See, e.g.*, *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 189–91 (2008) (opinion of Stevens, J.); *id.* at 204–05 (Scalia, J., concurring in the judgment).

Similarly, while the Constitution secures both a right to travel and a right of access to the courts, this Court upheld a durational residency requirement to obtain a divorce because it advanced legitimate governmental interests in assuring that an individual has an adequate attachment to the forum state before adjudicating an action for divorce. *See Sosna v. Iowa*, 419 U.S. 393, 405–09 (1975). This holding was no innovation, this Court "long ago recognized that the

nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel," yet this right to travel is infringed only "by statutes, rules, or regulations which *unreasonably* burden or restrict this movement." *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (emphasis supplied).

In the same vein, when it comes to the right to abortion, the Court has concluded, in light of the states' legitimate regulatory interests, "[w]here it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power . . . in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life." *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007).

An approach that keys judicial scrutiny to the extent to which a challenged regulation burdens the core right not only is consistent with *Heller*'s focus on the extent to which a challenged regulation burdens "the core lawful purpose of self-defense," 554 U.S. at 630, but also has the virtue of minimizing the extent to which the judiciary must engage in difficult predictive or empirical judgments about the efficacy of the challenged regulation. *Cf. McDonald v. City of Chicago*, 561 U.S. 742, 790–91 (2010) (plurality opinion) (warning against "requir[ing] judges to assess the costs and benefits of firearms restrictions and thus to make difficult empirical judgments in an area in which they lack expertise").

Inquiry into whether a challenged regulation imposes an undue burden avoids difficult predictive and empirical judgments about the effects of a challenged regulation. Since very severe burdens are virtually per se invalid, little inquiry into their

justification will be required, but for less severe burdens, a degree of deference to legislative judgment is appropriate. This methodology is consistent with both the Second Amendment's textual commitment to regulation, and the historical acceptance of prophylactic regulation of those who carry firearms in public.

III. NEW YORK LAW IMPOSES NO IMPERMISSIBLE BURDEN ON THOSE WHO SEEK TO CARRY FIREARMS IN PUBLIC.

As we explain above, this case, unlike *Heller*, involves the right to carry or "bear" firearms in public, and this ambiguous term warrants reference to the Second Amendment's preamble, which contemplates that those who "bear arms" may be "well regulated." Moreover, *Heller* notes that the interest in lawful armed defense is particularly compelling in "the home, where the need for defense of self, family, and property is most acute." 554 U.S. at 628. Thus, this case involves a less onerous burden than *Heller*. Moreover, in urban areas where police are nearby, the need for individuals to undertake their own armed defense is reduced. In rural areas where law enforcement personnel are not readily available, particularized need may well be more easily established.

Beyond that, New York law addresses only those who carry concealable firearms, not long guns, and authorizes licensing officials to deny carry permits for purposes of armed defense only when an applicant can identify no particularized need. A law that denied carry licenses to those who identify a specific threat to their safety would impose a serious burden on "the core lawful purpose of self-defense," *Heller*, 554 U.S. at 630. Here, however, the individual petitioners affirmatively alleged that each "does not face any special or unique danger to his life." J.A. 104, 106.

Petitioners complain that New York has improperly "bann[ed] typical, law-abiding citizens from carrying any type of handgun anywhere unless they can distinguish themselves from their fellow law-abiding citizens . . . ." Pet. Br. 47-48. Yet, accepting petitioners' submission would mean that most everyone in New York would be entitled to carry concealable firearms. This outcome misses the point of prophylactic regulation.

While the criminal history of an applicant for a carry permit can be readily ascertained (to the extent that petitioners' submission tolerates licensing), whether an applicant is a "typical, law abiding citizen[]," as well as whether an applicant's actual "purpose" for carrying a firearm is "the core lawful purpose of self-defense," *Heller*, 554 U.S. at 630, are not so easy to know. This is accordingly the context in which the case for prophylactic regulation is strongest.

Requiring a showing of particularized need secures the ability to carry handguns in cases in which the core constitutional interest in lawful self-defense is most plainly implicated, while denying applications that could lead to an unwarranted proliferation of firearms on the streetscape in high-crime areas, endangering police and public alike.

As we have seen, there is a long history of laws directed toward producing a "well regulated Militia" that will not pose undue threats to public safety. A requirement of particularized need is likely more reliable than the nineteenth-century criterion of requiring open carry to identify those likely to carry firearms for lawful purposes—though the antebellum endorsement of open-carry was itself likely tainted by slavery—and a good deal better suited to the contemporary urban landscape.

Moreover, as we explain above, a constitutional mandate that licenses be granted absent particularized need could well produce serious constitutional limitations on the ability of police to stop armed individuals and determine whether they are properly licensed, undermining proactive policing and increasing the risks facing police on patrol.

Indeed, in high-crime areas, it may be effectively impossible to have a "well regulated Militia" if everyone expressing a generalized interest in carrying firearms for self-defense, and not disqualified by a prior conviction or serious mental illness, can carry concealable firearms "in case of confrontation." *Heller*, 554 U.S. at 592.[15] As we explain above, in high-crime jurisdictions riven by gang and drug crime, carrying firearms in public may be accompanied by unacceptable risks, and for that reason, may warrant prophylaxis. When the law enables police to prevent a proliferation of guns at high-crime urban hot spots, the likelihood of violent armed confrontation is reduced.

Given the difficulty in assessing the purpose of someone carrying firearms in public, a requirement that an individual be licensed and demonstrate

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[15] One leading study found that only about 43% of adult homicide offenders in Illinois had a prior felony conviction. *See* Philip J. Cook, Jens Ludwig & Anthony A. Braga, *Criminal Records of Homicide Offenders*, 294 JAMA 598 (2005). Another found that about 41% of adults arrested for felony homicide and just 30% of adults arrested for all felonies in Westchester County, New York, had a prior felony conviction, and just 33% of all adults arrested for felonies in New York State had a prior felony conviction. *See* Philip J. Cook, *Q&A on Firearms Availability, Carrying, and Misuse*, 14 N.Y. St. Bar Ass'n Gov't L. & Pol'y J. 77, 80 (2012).

particularized need serves a far more important public purpose than the now largely outdated judgment that law-abiding persons are more likely to engage in open and not concealed carry. Such an approach has the added benefit of preserving the ability of urban police to stop and investigate individuals they reasonably suspect to be unlawfully armed. This is the kind of "proper training and discipline," *Heller*, 554 U.S. at 597, which may sometimes be necessary to produce a "well-regulated Militia."

At a minimum, there is good reason to permit state and local governments to retain the option to utilize, when deemed warranted, licensing laws requiring a showing of particularized need, enforced by proactive patrol. These tactics may sometimes prove necessary to combat urban lawlessness. As Justice Brandeis famously wrote:

> To stay experimentation in things social and economic is a grave responsibility . . . . It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

CONCLUSION

For the preceding reasons, the judgment of the court of appeals should be affirmed.

Respectfully Submitted,

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