No. 18-280

IN THE

Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., *et al.*,

Petitioners,

v.

CITY OF NEW YORK, NEW YORK, *et al.*,

Respondents.

On Petition from the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE EVERYTOWN FOR GUN SAFETY SUPPORT FUND IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other authorities

INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT[1]

Amicus curiae Everytown for Gun Safety Support Fund is the education, research, and litigation arm of Everytown for Gun Safety, the nation's largest gun-violence-prevention organization, with millions of supporters in all 50 states. Everytown for Gun Safety was founded in 2014 as the combined effort of Mayors Against Illegal Guns, a national bipartisan coalition of mayors combating illegal guns and gun trafficking, and Moms Demand Action for Gun Sense in America, an organization formed after the murder of twenty children and six adults in an elementary school in Newtown, Connecticut. Everytown's mission includes defending gun laws through the filing of amicus briefs that provide historical context and doctrinal analysis that might otherwise be overlooked.

Everytown files this brief to respond to the sweeping historical assertions made by the petitioners and their amici about the right to bear arms. Although these assertions go far beyond what is necessary to resolve the dispute in this case—a dispute that, in any event, is now moot—Everytown believes it is important to make the Court aware that the challengers' historical account is mistaken, misleading, and (at a minimum) contested. Resolving the historical debate and the effect it should have on the constitutional inquiry would require extensive additional briefing and research. For that reason—and because the petitioners here do not assert *any* right to carry loaded guns in public—the Court need not opine on the scope of the right to bear arms outside the home.

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[1] No counsel for a party authored this brief in whole or in part and no person other than amicus and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of amicus briefs are on file with the Clerk.

ARGUMENT

I. The scope of the right to bear arms for self-defense—and the ability of state and local governments to regulate the public carrying of loaded firearms—is not at issue here.

The petitioners wish only to transport locked and unloaded firearms to shooting ranges and second homes outside New York City. *See* Pet. for Writ of Cert. i (presenting the question "[w]hether the City's ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment"); Resp. Br. 35 ("[The] petitioners have consistently limited their challenge to 'the right to keep arms in the home and the right to hone their safe and effective use.'"). They claim that this activity is protected by the constitutional "right to keep and bear arms," repeatedly emphasizing the phrase "bear arms" in their merits brief. *See* Pet. Br. 1, 14, 15, 17, 19, 33.

But the petitioners are not asserting a right to "bear arms" under this Court's interpretation of that phrase. As the Court stated in *Heller*, the phrase primarily "refers to carrying [firearms] for a particular purpose—confrontation." *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008); *see id.* ("[T]he phrase implies that the carrying of the weapon is for the purpose of 'offensive or defensive action.'"). The petitioners do not assert such a right. They do not seek to carry loaded firearms "upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." Pet. Br. 19–20 (quoting *Heller*, 554 U.S. at 584); *see also* U.S. Br. 22 ("Petitioners do not seek a right to transport loaded handguns for self-defense in public."). They do not seek to carry loaded firearms for *any* purpose.

So "this case is not about bearing arms on the person," as one of the petitioners' own amici has recognized. *See* Nat'l Afr.-Am. Gun Ass'n Br. 9. It thus does not present the question whether and to what extent individuals may carry loaded firearms outside the home for self-defense purposes—or, conversely stated, the extent to which state and local governments may regulate the public carrying of loaded handguns to protect their communities from gun violence on city streets. As the Solicitor General correctly observes, that is "not at issue in this case." U.S. Br. 22.

II. The historical claims of the petitioners and their amici about the public carrying of loaded firearms are inaccurate.

Although the petitioners do not assert any right to carry loaded firearms for self-defense outside the home, they nevertheless go out of their way to claim (at 22–23) that "the historical record makes clear that individuals were permitted" to "carry loaded firearms upon their persons as they went about their daily lives." Some of the petitioners' amici elaborate on this claim. The NRA, for example, cites and describes a handful of historical sources in an attempt to convey the impression that individuals have always and invariably been able to tote loaded guns in the public square. *See* NRA Br. 22–25.

But that claim is incorrect. None of the sources cited by the petitioners or the NRA supports such a claim. And countless other authorities unmentioned in either brief—including dozens of laws from throughout the relevant historical period, as well as an array of cases, treatises, justice-of-the-peace manuals, contemporaneous historical commentary, and English authorities—roundly refute it. Everytown has catalogued this extensive history—much of which has come to light only recently as part of ongoing scholarly research—in briefs in cases involving public-

carry regulations. *See, e.g.*, Br. of Everytown for Gun Safety, *Malpasso v. Pallozzi.*, No. 18-2377 (4th Cir.), *available at* https://bit.ly/2ZlI8D5. Among other things, those briefs show that, from the Founding to the early 20th century, more than 20 states and countless cities enacted laws that either broadly prohibited public carry in populated areas or else required a "good reason" to publicly carry a firearm. *See, e.g.*, *id.*

This brief is much more limited in its scope. It aims only to respond to the challengers' breezy and one-sided portrayal of the history—to explain why their historical assertions are at best misleading and at worst incorrect.

A. American history and traditions

The petitioners and the NRA make several claims about the history and traditions of public carry in the United States. None of the evidence they cite, however, shows that individuals across the country have long been permitted to "carry loaded firearms upon their persons as they went about their daily lives." Pet. Br. 22–23.

1. Broadly speaking, the petitioners and the NRA cite two types of evidence in support of this claim. The first are statements designed to show that, in some parts of the country, the "public carrying of firearms was widespread during the Colonial and Founding Eras." Pet. Br. 23. The petitioners point out, for example, that St. George Tucker (in a passage criticizing a federal prosecution of whiskey-tax protestors for treason) observed that, "[i]n many parts of the United States," it was not uncommon for men to carry a "rifle or musket" outside their homes. *Id.* The petitioners further assert that a few of the Founding Fathers may have been among those who did. *Id.*

To begin, these observations are of limited significance to the constitutional question. There is no question that *some* state and local governments, at *some* points in our

history, have chosen to broadly allow public carry. Many have chosen to do so today. But it is equally true that (1) these policy choices tell us little about whether the United States Constitution requires that result, and (2) many other states and cities have gone the other way. Our federalist system permits—indeed, celebrates—a diversity of local solutions to local problems, particularly when it comes to public safety. The Bill of Rights sets a floor, not a ceiling. And, by the same token, "the simple fact that the Framers engaged in certain conduct does not necessarily prove they forbade its prohibition by government." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 360 (1995) (Thomas, J., concurring).

That said, the petitioners' reliance on the Framers' personal conduct is misplaced. The petitioners assert that "[m]any of the Founding Fathers, including Washington, Jefferson, and Adams, . . . carried firearms and defended the right to do so." Pet. Br. 23. To the extent that the petitioners are suggesting that the Framers routinely carried loaded firearms in populated public places and advocated a broad constitutional right to do so, there is no evidence of that, and the petitioners do not point to any. *See* Meltzer, *Open Carry for All*, 123 Yale L.J. 1486, 1523 (2014) ("[T]here are no examples from the Founding era of anyone espousing the concept of a general right to carry"). Instead, they cite a district court case from 2016, which in turn clips a few quotations out of context. Pet. Br. 23 (citing *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 137 (D.D.C. 2016)). When read in context, however, none of those quotations provides support for the notion that the Framers advocated a broad right to public carry.

For instance, the quotation from Thomas Jefferson comes from a letter in which he advised his nephew to bring a gun as a "constant companion" on walks. *Grace*,

187 F. Supp. 3d at 137. But the full quotation makes clear that Jefferson was advising carrying a gun for the specific purpose of hunting and recreation—not for general self-defense. It reads:

> As to the species of exercise, I advise the gun. While this gives a moderate exercise to the body, it gives boldness, enterprise, and independence to the mind. Games played with the ball, and others of that nature, are too violent for the body, and stamp no character on the mind. Let your gun therefore be the constant companion of your walks. Never think of taking a book with you. The object of walking is to relax the mind.

1 The Writings of Thomas Jefferson 398 (1853).[2]

The petitioners also try to make something of the fact that some jurisdictions mandated the carrying of firearms as part of militia service or public defense. *See* Pet. Br. 23. This is entirely beside the point. Carrying arms when compelled by government (or acting under governmental authority) is not the same conduct as carrying arms for personal reasons. *See, e.g.*, *Powers v. Ohio*, 499 U.S. 400, 409 (1991) ("An individual juror does not have a right to sit on any particular petit jury," even though jury service is required.). This Court recognized as much in the militia context almost 150 years ago. *See Presser v. Illinois*, 116

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[2] The other examples cited in *Grace* are no more illuminating. The George Washington anecdote is from a highly dubious source—a chapter of a book privately published more than 70 years after his death, in which the author compiled a series of jokes, tall tales, and farfetched stories. *See* Tayloe, *In Memoriam* 95 (1872). And the John Adams quotation was about using firearms to suppress a riot, not a broad right to carry. *See* Frassetto, *Meritless Historical Arguments in Second Amendment Litigation*, 46 Hastings Const. L.Q. 531, 538–45 (2019).

U.S. 252, 267 (1886) (holding that participation in a non-government-organized militia "cannot be claimed as a right independent of law"). And it did the same in *Heller*, explaining that "weapons of war," not typically possessed by law-abiding citizens for lawful purposes, fall outside of the Second Amendment's scope—even though federal and state governments may mandate their use in the military or militia. 554 U.S. 570, 625 (2008). In short, the duty to carry arms when compelled does not create a reciprocal civilian right to carry arms in public.

2. The second type of evidence on which the petitioners and the NRA rely is a handful of state-court decisions from the slaveholding South. *See* Pet. Br. 23–24; NRA Br. 25. The challengers claim that these cases (all of which predate the Fourteenth Amendment's ratification) show that "the Second Amendment was understood both before and after the Civil War to protect a right to carry a loaded firearm upon one's person should the need for self-defense arise." Pet. Br. 23. That is a vast overstatement.

For starters, these cases come from one part of the country and reflect a regional tradition that differs from other regions—a tradition that owes itself to the South's peculiar history and the prominent institution of slavery. *See generally* Ruben & Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 Yale L.J. Forum 121 (Sept. 25, 2015), https://goo.gl/3pUZHB. Even within the South, moreover, courts and legislatures took varying stances toward public carry. *See, e.g.*, *State v. Buzzard*, 4 Ark. 18, 27 (1842) (upholding concealed-carry prohibition as constitutional); *Walburn v. Territory*, 9 Okla. 23, 59 P. 972, 973 (1899) (same). The Texas Supreme Court, for instance, twice upheld a state law broadly restricting public carry (with several narrow exceptions), while observing that nearly

"every one of the states of this Union ha[d] a similar law upon their statute books." *English v. State*, 35 Tex. 473, 479 (1871); *see State v. Duke*, 42 Tex. 455, 458 (1874). The West Virginia Supreme Court likewise upheld a similar law. *See State v. Workman*, 35 W. Va. 367, 367 (1891).

Even the handful of cases cited by the challengers do not stand for the proposition that a broad right to public carry is constitutionally mandated. One of those cases, *Bliss v. Commonwealth*, cited by the NRA (at 25), came under swift criticism after it was decided and "was overruled over a decade before the Civil War." *Peruta v. Cnty. of San Diego*, 824 F.3d 919, 935–36 (9th Cir. 2016) (en banc). Another case relied on by the NRA, *Aymette v. State*, involved a state constitutional provision that the "free white men of this State have a right to keep and bear arms for their common defence." 21 Tenn. 154, 156 (1840). Taking a collective-rights approach, the court upheld the state's prohibition on carrying a concealed bowie knife. Neither of these cases supports the assertions made by the petitioners and their amici.

To be sure, a couple of the other cases cited by the petitioners and the NRA, in the course of upholding prohibitions on carrying concealed weapons in public, expressed the view that the right to bear arms protects the right, under some circumstances, to openly carry a weapon in public. *See, e.g.*, *State v. Chandler*, 5 La. Ann. 489, 490 (1850) (rejecting proposed instruction in murder case that would have told the jury "that to carry weapons, either concealed or openly, is not a crime in the State of Louisiana" and is protected by the Constitution, and remarking that the state's concealed-carry restriction does not affect the right to carry arms openly); *Nunn v. State*, 1 Ga. 243 (1846) (striking down the open-carry portion of a statewide prohibition on carrying weapons

based on the erroneous view that the Second Amendment applied to the states before 1868). But open carry was exceedingly rare. The Louisiana Supreme Court, for example, referred to "the extremely unusual case of the carrying of such weapon in full open view." *State v. Smith*, 11 La. Ann. 633, 634 (1856). The dicta in these decisions, therefore, should not be read to endorse the proposition that public carry is broadly required as a constitutional matter.

At any rate, these isolated snippets are just one tiny part of the historical inquiry. For them to be probative of the Second Amendment's meaning, they would have to be considered in light of all the other evidence from all the other states throughout our history—not only the cases, but also the many statutes, ordinances, and contemporary historical accounts reflecting the people's understanding of the scope of the right. That evidence, which Everytown has summarized in briefs in other cases—where it was actually at issue—shows that throughout American history many other states, as well as many cities, have not understood the right to bear arms to confer a broad right on individuals to "carry loaded firearms upon their persons" in the public square. Pet. Br. 22–23; *see, e.g.*, Br. of Everytown for Gun Safety, *Malpasso v. Pallozzi.*, No. 18-2377 (4th Cir.), *available at* https://bit.ly/2ZlI8D5.

B. English history

English history is also relevant to the inquiry. That is because, as this Court put it in *Heller*, the Second Amendment "codified a *pre-existing* right" "inherited from our English ancestors." 554 U.S. at 592 599. The petitioners do not discuss any English history in making their sweeping historical assertions, but the NRA does (at 22 & 24). Every claim that it makes about this history is wrong (or, at best, misleading).

We start with the Statute of Northampton, which was first enacted in 1328 and provided that "no Man great nor small" shall "go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere." 2 Edw. 3, 258, ch. 3 (1328). This prohibition was repeatedly reenacted and enforced centuries after its original codification, up to and beyond the English Bill of Rights in 1689. Without quoting or mentioning the text of this statute, the NRA asserts (at 24) that one must "squint" to see in the statute "a general prohibition on carrying firearms in public." But the statute's plain text refutes that assertion. And it is not how the statute was understood to operate at the time.

In 1579, for example, Queen Elizabeth I called for enforcement of the statute against those found carrying "offensive weapons"—including "Handguns"—"in and near Cities, Towns corporate, [and] the Suburbs thereof where [the] great multitude of people do live, reside, and trav[el]," because that was "to the terrour of all people professing to travel and live peaceably." Charles, *The Faces of the Second Amendment Outside the Home*, 60 Clev. St. L. Rev. 1, 21–22 (2012) (quoting royal proclamation, spelling modernized). And Lord Coke—"widely recognized by the American colonists 'as the greatest authority of his time on the laws of England,'" *Payton v. New York*, 445 U.S. 573, 593–94 (1980)—described the Statute of Northampton as making it unlawful "to goe nor ride armed by night nor by day . . . in any place whatsoever." Coke, *The Third Part of the Institutes of the Laws of England* 160 (1817 reprint).

Citing a sentence from Blackstone and an English case from the 1600s, the NRA disputes this understanding of the Statute of Northampton. It contends (at 24) that "the statute was no more than a rule against 'riding or going

armed, with dangerous or unusual weapons' and thereby 'terrifying the good people of the land.'" *See* 4 Blackstone, *Commentaries on the Laws of England* 148–49 (1769) ("The offence of riding or going armed with dangerous or unusual weapons is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the statute of Northampton."). But what Blackstone meant by that description is no different than what Queen Elizabeth I had said two centuries earlier: that carrying a dangerous weapon (such as a firearm) in populated public places naturally terrified the people, so it was a crime against the peace—even if unaccompanied by a threat, violence, or any additional breach of the peace. *See Chune v. Piott*, 80 Eng. Rep. 1161, 1162 (K.B. 1615) ("Without all question, the sheriffe 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 . . . ."). It is hard to imagine what "dangerous" or offensive weapon Blackstone might have had in mind if *not* a firearm.

As for the 17th-century case, the NRA claims that it stands for the proposition that the statute contained an unstated "evil intent" requirement. NRA Br. 24 (citing *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1686)). But that is not what that case holds, and it is not how English courts understood the statute to work. *See Chune*, 80 Eng. Rep. at 1162 (explaining that the law had no evil-intent requirement); Coke, *Institutes* 161 (noting that a court sentenced a man to prison because he "went armed under his garments" to "safeguard . . . his life" because someone had "menaced him").[3]

[3] The statute's narrow exceptions, moreover, confirm its breadth. The law did not apply inside the home, consistent with principles of

Finally, the NRA contends (at 22) that the historical "right to *armed* self-defense" was "understood to extend beyond the home." But English self-defense law imposed a broad duty to retreat while in public, in contrast to the strong self-defense right conferred at home. Blackstone, 4 *Commentaries* 185. As Lord Coke explained, using force at home "is by construction excepted out of this act[,] . . . for a man's house is his castle." *Institutes* 162. "But [a man] cannot assemble force," Coke continued—including by carrying loaded firearms—even "though he [may] be extremely threatened, to go with him to Church, or market, or any other place, but that is prohibited by this act." *Id.*; *see also Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1603) ("[E]very one may assemble his friends and neighbors to defend his house against violence: but he cannot assemble them to go with him to the market, or elsewhere for his safeguard against violence."). William Hawkins (cited by the NRA, at 22 & 24) likewise explained that "a man cannot excuse the wearing [of] such armour in public, by alleging that such a one threatened him, and he wears it for [his] safety," but he may assemble force "in his own House, against those who threaten to do him any Violence therein, because a Man's House is as his Castle." 1 Hawkins, *A Treatise of the Pleas of the Crown* 489, 516.

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self-defense law. Nor did it apply to the King's officers. And it was understood to permit high-ranking nobles to wear fashionable swords and walk in public with armed servants. *See* 1 Hawkins, *Treatise of the Pleas of the Crown* 489, 798 (1721) (1824 reprint). These exceptions would not have been necessary if the statute prohibited the public carrying of loaded firearms only if accompanied by "evil intent."

III. Given the limited nature of the petitioners' challenge and the lack of support for their historical claims, this Court should refrain from opining on the scope of the right to bear arms.

At the very least, this short discussion should make it apparent that the historical claims advanced by the petitioners and their amici rest on a shaky foundation. Contrary to the petitioners' assertion, the "historical record," to the extent it provides any support for their view, is far from "clear" on that score. *Id.* Resolving the disagreement about the history, and deciding the proper scope of the right to bear arms, would require extensive additional briefing and argument—if for no other reason than to allow the robust eight-century Anglo-American tradition of public-carry regulation to be fully presented. Given the limited nature of the petitioners' challenge, this case does not provide such an occasion.

That is particularly true given that there is no longer a case or controversy of *any kind* for this Court to resolve between the parties, as the City persuasively explained in its suggestion of mootness. When a dispute ceases to be "a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). That same principle should apply with special force here. It would be neither proper nor wise for this Court to expound on the law of the Second Amendment—a provision that the Court only recently began to interpret to protect an individual right—in a way that would go beyond the scope of even the original (but now mooted) controversy. *See PDK Labs. Inc. v. U.S. D.E.A.*, 362 F.3d 786, 799 (D.C. Cir. 2004) ("[I]f it is not necessary to decide more, it is necessary not to decide more.") (Roberts, J., concurring). In addition, since this Court decided *Heller*,

underscoring the importance of history to the constitutional inquiry, a trove of historical sources have been discovered (and continue to be discovered) that shed considerable light on what the right to bear arms has long been understood to mean. For example, the first comprehensive database of historical gun laws came online early last year. *See* Repository of Historical Gun Laws, Duke University School of Law, https://law.duke.edu/gunlaws/.

When and if the Court eventually decides to take a case that calls on it to decide the scope of the right to bear arms outside the home, it should do so only after appropriate percolation and on the basis of a complete historical record—not on the misleading snippets presented by the petitioners and their amici. Everytown therefore respectfully submits that this Court would be best served by refraining from opining in this case on the right to carry loaded firearms outside the home for self-defense.

CONCLUSION

Because the controversy has been rendered moot by recent legislation, the Court should vacate and remand with instructions to dismiss. Should the Court conclude that the controversy is not moot, however, it should decide the question presented without opining on the scope of the right to bear arms for self-defense outside the home.

Respectfully submitted,

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