No. 18-280

IN THE
SUPREME COURT OF THE UNITED STATES

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

v.

CITY OF NEW YORK, ET AL.,
Respondents.

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

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Amici will address the following question:

Whether the Second Amendment permits jurisdictions to require those who wish to carry firearms in public to obtain permits and demonstrate some form of particularized need to carry 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 the public dependent on their services.[1]

The National League of Cities (NLC) is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 State municipal leagues, 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 (USCM), founded in 1932, is the official nonpartisan organization of the more than 1,400 United States cities with a population of more than 30,000 people. Each city is represented in the USCM by its chief elected official, the mayor.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

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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, its members, or its counsel made a monetary contribution to its preparation or submission. Pet. App. 6.

STATEMENT OF THE CASE

Under New York law, an individual can obtain a "carry" license that authorizes the holder to carry a concealed handgun, or a "premises" license that authorizes the holder to possess a handgun in his dwelling or place of business. Pet. App. 3-5.

A "carry" license "shall be issued" to "a messenger employed by a banking institution or express company," or, for other applicants regardless of profession, "when proper cause exists for the issuance thereof." N.Y. Penal L. § 400.00(2)(c) & (f). New York's courts have interpreted "proper cause," within the meaning of this provision, "to include carrying a handgun for target practice, hunting, or self-defense." *Kachalsky v. County of Westchester*, 701 F.3d 81, 86 (2d Cir. 2012). But, "[u]nlike a license for target shooting or hunting, '[a] generalized desire to carry a concealed weapon to protect one's person and property does not constitute 'proper cause.'" *Id.* (quoting *In re O'Connor*, 595 N.Y.S.2d 1000, 1003 (Westchester Cnty. Ct. 1992)).

This lawsuit was brought by three individuals holding premises licenses who sought to transport their handguns to ranges and competitions outside of New York City, along with the New York State Rifle & Pistol Association. Pet. App. 7. In addition, petitioner Colantone wished to transport his handgun between his licensed residence in New York City and his second house in Hancock, New York. *Id.*

At the time this case was brought, the holder of a premises license could remove his handgun from his dwelling only for a purpose specified the applicable rules, which included transporting

handguns "directly to and from an authorized small arms range/shooting club, unloaded, and in a locked container, the ammunition to be carried separately." Pet. App. 5. These rules further provided that "an authorized small arms range/shooting club" must be located within New York City. Pet. App. 6.[2] Authorized small arms ranges and shooting clubs are required to maintain a roster listing the names and addresses of all persons who have used the range and the date and hour that they used it and to make those records available for inspection by New York City Police Department during their hours of operation. JA120.

The district court granted summary judgment against petitioners, concluding that the challenged regulations "are substantially related to the City's substantial in public safety and crime prevention." Pet. App. 62. The court of appeals affirmed, concluding: "The burdens imposed . . . do not substantially affect the exercise of core Second Amendment rights . . . ." Pet. App. 29.

After this Court granted certiorari, New York amended its rules, and the State amended applicable law, to entitle premises licensees to transport their handguns to other residences, their places of business, shooting ranges, clubs, and competitions where the licensee is authorized to

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[2] Holders of premises licenses may also "transport his/her handgun(s) directly to and from an authorized designated by the New York Fish and Wildlife Law and in compliance with all pertinent hunting regulations, unloaded, in a locked container, the ammunition to be carried separately, after the licensee has requested and received a 'Police Department – City of New York Hunting Authorization' Amendment attached to his/her license." Pet. App. 6.

possess a handgun, even if outside of New York City. Sugg. of Mootness 5-8.

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 firearms within the home for purposes of lawful armed defense, 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 outside of the home. This context offers complexities not present in *Heller*.

A police officer will often be unable to readily determine whether an individual he encounters on the streetscape is armed for lawful purposes, or some other reason. Acknowledging this difficulty, the law has long permitted prophylactic regulations that reduce the likelihood that individuals will bring a firearm into a public place for an improper reason. There is textual support in the Second Amendment for such regulatory authority, and a long tradition of prophylactic regulation. Only laws that impose undue burdens on the right to keep and bear arms for lawful purposes run afoul of the Second Amendment.

As amended, New York premises licensees may transport their handguns to a second residence, shooting club, or shooting competition. The limited burden on those who wish to bring their handguns into public places imposed by New York law—which requires those holding premises licenses to take their handguns outside only for specified purposes,

and requires those wishing to carry concealed handguns for other reasons to obtain a carry license by demonstrating particularized need—is constitutional.

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 transporting firearms outside of the home. Vastly different considerations therefore come into play, since law enforcement personnel who encounter armed individuals in public will often be uncertain whether the firearms are being carried for a constitutionally protected purpose.

In Part I below, we explain that the Second Amendment recognizes—indeed, it expressly contemplates—regulatory authority with respect to those who possess and carry firearms. Only laws imposing an undue burden on the core, constitutionally-protected interest in lawful armed defense or other lawful activities should be invalidated. In Part II, we explain that New York's law providing that those who carry handguns in public should be licensed and demonstrate particularized need imposes no undue burden on Second Amendment rights.

I. THE SECOND AMENDMENT PERMITS REGULATIONS THAT POSE NO UNDUE BURDEN ON LAWFUL USES OF FIREARMS.

There are powerful reasons to enable police, when confronted with an armed individual, to readily and reliably determine whether he is properly exercising the constitutional right to keep and bear arms for proper purposes, such as "the core lawful purpose of lawful self-defense." *Heller*, 554 U.S. at 630. The Second Amendment's text and history confirms this conclusion.

A. Critical Law Enforcement Interests Are Implicated When Individuals Carry Firearms In Public.

While some persons carry firearms for lawful purposes, others carry firearms with different ends in mind.

For example, there is considerable evidence that members of criminal street gangs carry firearms at elevated rates.[3] The same is true of those involved

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[3] *See, e.g.*, Scott H. Decker & Barrick Van Winkle, Life in the Gang: Family, Friends, and Violence 175-76 (1996); James C. Howell, Gangs in American Communities 218 (2012); Joseph F. Sheley & James D. Wright, In the Line of Fire: Youths, Guns, and Violence in Urban America 95-103 (1995); Terence P. Thornberry et al., Gangs and Delinquency in Developmental Perspective 123-25, 131 (2003); Scott H. Decker, *Youth Gangs and Violent Behavior*, *in* The Cambridge Handbook of Violent Behavior and Aggression 388, 391-92 (Daniel J. Flannery et al. eds., 2007); Beth Bjerregaard & Alan J. Lizotte, *Gun Ownership and Gang Membership*, 86 J. Crim. L. & Criminology 37, 46-53 (1995); Beth M. Huebner et al, *Dangerous Places: Gang Members and Neighborhood Levels of Gun Assault*, 33 Justice Q. 836, 855-56 (2016); C. Ronald Huff, *Comparing the Criminal Behavior of Youth Gangs and At-Risk*

in drug trafficking.[4] This should not be surprising; those engaged in unlawful but intensively competitive markets will often turn to violence. For example, there is ample evidence that homicide spiked in large cities following the introduction of crack cocaine, which created new competitive opportunities and pressures.[5]

Youth, *in* American Youth Gangs at the Millennium 78, 83 (Finn-Aage Esbensen, Stephen F. Tibbets & Larry Gaines eds., 2004) [hereinafter Gangs at the Millennium]; Alan J. Lizotte et al., *Factors Influence Gun Carrying Among Urban Males Over the Adolescent-Young Adult Life Course*, 38 Criminology 811, 812-13 (2000); 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).

[4] *See, e.g.*, Sheley & Wright, *supra* note 3, at 75-76, 83-93; Alfred Blumstein, *Youth Violence, Guns, and the Illicit-Drug Industry*, 86 J. Crim. L. & Criminology 10, 29-31 (1995); 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); Lizotte et al, *supra* note 3, at 814-16, 826-28; 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).

[5] *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 & Richard Rosenfeld, *Explaining Recent Trends in U.S. Homicide Rates*, 88 J. Crim. L. & Criminology 1175, 1209-10 (1998); Alfred Blumstein & Joel Wallman, *The Crime Drop and Beyond*, 2006 Ann. Rev. Soc. Sci. 125, 131 (2006); Philip J. Cook & John H. Laub, *After the Epidemic: Recent Trends in Youth Violence in the United States*, *in* Crime & Justice: A Review of Research 1, 21-31 (Michael Tonry ed., 2002).

The prevalence of violent competition and street gangs and drug traffickers, in turn, is likely to increase the rate at which offenders carry firearms. Researchers have found that the perception of danger in high-crime neighborhoods becomes a stimulus for the carrying of firearms as a means of self-protection.[6]

For example, Jeffrey Fagan and Deanna Wilkinson's ethnographic study of at-risk youth in New York demonstrates that when inner-city youth live under the increasing threat of violence in an environment in which firearms are prevalent, not only are they more likely to arm themselves, but they become increasingly likely to respond to real or perceived threats and provocations with lethal violence, creating what they characterize as a contagion effect. *See* Jeffrey Fagan & Deanna Wilkinson, *Guns, Youth Violence, and Social Identity*, *in* Youth Violence 105, 174 (Michael Tonry & Mark H. Moore eds., 1998).

Indeed, a study of homicide in New York found evidence of what it characterized as a contagion effect, in which firearms violence stimulated additional firearms-related violence in nearby areas. *See* Jeffrey Fagan, Deanna L. Wilkinson & Garth

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[6] *See* Mark R. Pogrebin, Paul B. Stretsky & N. Prahba Unninthan, Guns, Violence & Criminal Behavior: The Offender's Perspective 69-71 (2009); Sheley & Wright, *supra* note 3, at 102-03, 110-13; Jeffrey Fagan & Deanna Wilkinson, *Guns, Youth Violence, and Social Identity*, *in* Youth Violence 105, 174 (Michael Tonry & Mark H. Moore eds., 1998); David Hemenway, et al., *Gun Carrying Among Adolescents*, Law & Contemp. Probs., Winter 1996, at 39, 44-47; Lizotte et al, *supra* note 3, at 813-14; Paul B. Stretsky & Mark R. Pogrebin, *Gun-Related Gang Violence: Socialization, Identity, and Self*, 36 J. Contemp. Ethnography 85, 105-08 (2007).

Davies, *Social Contagion of Violence*, *in* Cambridge Handbook of Violent Behavior and Aggression 688, 701-10 (Daniel J. Flannery et al. eds., 2007).[7] Fagan and Wilkinson have labeled this phenomenon an "ecology of danger" in which the need to carry firearms and be prepared to use them came to be seen as essential. *See* Fagan & Wilkinson, *supra*, at 174.

Ironically, those who carry firearms in high-crime neighborhoods are not safer; to the contrary, even though gang members carry firearms at elevated rates, they also experience vastly higher homicide victimization rates than the public at large.[8] Beyond that, the available data indicates that most individuals shot or killed by police are armed.[9] Accordingly, when police encounter individuals who are armed, the likelihood escalates that a fatal confrontation will ensue.

It follows that in gang-ridden communities experiencing elevated rates of firearms violence,

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[7] For a similar finding about Chicago, see Elizabeth Griffiths & Jorge M. Chavez, *Communities, Street Guns and Homicide Trajectories in Chicago, 1980-1995: Merging Methods for Examining Homicide Trends Across Space and Time*, 42 Criminology 941, 965-69 (2004).

[8] *See*, *e.g.*, Decker & Van Winkle, *supra* note 3, at 173; 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, *supra* note 3, at 239, 242.

[9] *See, e.g.*, 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) (national dataset indicating that regardless of race, most suspects killed by police were armed and 65.3% were armed with a handgun at the time of death).

police tactics that make it more difficult and riskier for those engaged in gang- and drug-related activity to carry guns in public reduce the risk of violent confrontation and increase the difficulties facing criminal enterprises engaged in violent competition. Indeed, there is something approaching consensus among criminologists that one of the few interventions that demonstrably reduces rates of violent crime involves aggressive patrol, targeting statistical concentrations of crime, and focusing on recovering guns that have been unlawfully brought into public places.[10]

If the Second Amendment conferred unfettered authority to carry firearms in public, the ability of police in high-crime, gang-ridden neighborhoods to execute strategy aimed at driving guns off the streetscape by enforcing firearms-licensing laws

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[10] *See, e.g.,* Nat'l Res. Council, Firearms and Violence: A Critical Review 230-35 (Charles F. Wellford et al. eds., 2005); 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); Jacqueline Cohen & Jens Ludwig, *Policing Crime Guns*, *in* Evaluating Gun Policy: Effects on Crime and Violence 217, 238-39 (Jens Ludwig & Philip J. Cook eds., 2003); 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.

would be sharply circumscribed, if not altogether eliminated. Licensing laws could prove difficult to enforce if there were a general right to obtain a carry permit since the Fourth Amendment may well prevent police from stopping armed individuals to determine if they are properly licensed. *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 this issue).

Accordingly, an effectively unqualified right to carry firearms in public could critically inhibit the ability of the authorities to combat violent crime. Police could not use laws directed at those who carry firearms in public to make it risky for criminals to carry guns in public and thereby to disrupt Fagan and Wilkinson's "ecology of danger" in high-crime neighborhoods. Indeed, there is compelling evidence that when rates of stop-and-frisk targeting concealed firearms decline, violent crime surges. *See* 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, 1649-60.

The case for prophylactic regulation of those who carry firearms in public in high-crime areas should therefore be obvious. If police were helpless to intervene on the streetscape until offenders use a firearm to commit a violent crime, they would be rendered largely ineffective. After all, few offenders

will commit an overt crime in front of uniformed officers. Recognizing a right to bring firearms into hot spots of gang and drug violence could therefore fatally undermine they type of hot-spot policing that reduces the likelihood of violent confrontation. Fortunately, the Second Amendment does not require such an outcome.

B. The Second Amendment Contemplates Regulatory Authority Over Those Who Carry Firearms In Public.

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*, the 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 pertinent evidence, the Court concluded that the "right of the People" refers to an individual right, 554 U.S. at 579-81, the right to "keep" arms means the right to possess them, *id.* at 582, and the right to "bear" arms means the right to "carry[] for a particular purpose – confrontation." *Id.* at 584. The Court invalidated the regulations at issue because they "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.

Heller involved the right to "keep" arms in one's home, not the right to "bear" them in public. Indeed, when it comes to the right to "bear" arms, *Heller* identified a critical ambiguity in the Second

Amendment.

In *Heller*, in response to the argument that the phrase "bear arms" meant carrying arms in military service, the Court concluded that the original meaning of 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 ambiguity in the phrase "bear arms"; the Court acknowledged that "the phrase was often used in a military context . . . ." *Id.* at 587. Indeed, one post-*Heller* 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).[11] Accordingly, the meaning of right to "bear arms" is ambiguous; it can refer to carrying arms in relation to military service, or an individual right.

This ambiguity warrants consideration of the Second Amendment's preamble and its reference to a "well regulated Militia," 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

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[11] To similar effect, see, for example, *Aymette v. State*, 2 Tenn. 154, 1840 WL 1554, * 3 (1840) ("The words 'bear arms,' too, have reference to their military use, and were not employed to mean wearing them about the person as part of the dress.").

an ambiguity in an operative clause." 554 U.S. at 577.

As for the preamble, *Heller* concluded that the term "Militia" refers not to "the organized militia," but rather "all able bodied men," or, "the body of all citizens capable of military service, who would be expected to bring the sorts of lawful weapons that they possessed at home to militia duty." *Id.* at 596, 627. Thus, *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 training and discipline." *Id.* at 597. The first edition of Webster's dictionary similarly defined "regulated" as "[a]djusted by rule, method or forms; put in good order; subjected to rules or restrictions." 2 Noah Webster, An American Dictionary of the English Language 54 (1828).[12] These terms, of course, are expansive; they contemplate not merely training, but also rules and discipline.

Thus, the Second Amendment contemplates regulatory authority over all who exercise the right to bear arms. Indeed, the Second Amendment's textual commitment to regulation is found in no other of the Constitution's enumerated rights.

C. Historical Practice Confirms the Propriety of Prophylactic Regulation of Those Who Carry Firearms in Public

In *Heller*, to ascertain the meaning of the Second Amendment, this Court examined commentary and

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[12] To similar effect, see 2 Samuel Johnson, A Dictionary of the English Language in which Words Are Deduced from their Originals cdlxxvi (6th ed. 1785) (defining "regulate" as "[t]o adjust by rule or method" or "[t]o direct").

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. Thus, inquiry into historical practice is critical to ascertaining the scope of Second Amendment rights.

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. The historical record, however, is considerably more complex.

Regulation of those who carry firearms 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.). Blackstone characterized the rule that evolved from the statute thusly: "[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). Hawkins focused more directly on whether the firearm alarmed others: "[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 statute 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).

In this country, in the 1820s and 1830s, laws prohibiting the carrying of concealed firearms 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 more comprehensive regulation: "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) [hereinafter Cornell, *The Right To Keep and Carry*]. *See also* Charles Br. 5-15 (surveying historical evidence). Similarly, in response to rampant violence in frontier towns, some towns limited or even banned the carrying of firearms, an approach taken by many cities as well. *See*, *e.g.*, Joseph Blocher, *Firearm Localism*, 123 Yale L.J. 82, 114-18 (2013).

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. Nevertheless, a line of cases upheld broad 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).[13]

Significantly, virtually all the nineteenth-century laws and judicial decisions embracing a right to carry firearms in public were in the South, where the need to carry arms may have been regarded as greater given 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 Firearms Outside of the Home: Separating Historical Myths from Historical Realities*, 39 Fordham Urb. L.J. 1695, 1716–25 (2012).

In any event, the cases distinguishing between open and concealed carry rested on the view that law-abiding persons carried weapons openly, while concealed firearms were thought suspicious or threatening. *See, e.g.*, Robert Leider, *Our Non-Originalist Right To Bear Arms*, 89 Ind. L.J. 1587, 1604-05 (2014); 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

[13] 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).

L.J. 1486, 1518-20 (2014). There is ample expression in nineteenth-century decisions to this effect.[14] On this view, concealed carry was used as a proxy for dangerousness, and accordingly is rooted in the Statute of Northampton's concern for carrying firearms under circumstances that might alarm others.

To be sure, the nineteenth-century rationale supporting the distinction between concealed and

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[14] *See, e.g.*, *State v. Reid*, 1 Ala. 612, 617 (1840) ("[A] law which is intended merely to promote personal security, and 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, by making him less regardful of the personal security of others, does not come in collision with the constitution."); *Nunn v. State*, 1 Ga. 243, 249 (1846) (quoting *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 not even designed for any purpose of public defence, and used most frequently by evil-disposed men who seek an advantage over their antagonists, in the disturbances and breaches of the peace which they are prone to provoke."); *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) ("[T]he right to bear arms is not of that unqualified character. . . . [T]hey may be borne by an individual, merely to terrify the people or for purposes of private assassination. And, as 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.").

open has little resonance today. As Professor Volokh observed: "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. Even if the historical justification for preferring open to concealed carry may now be inapposite, however, this history demonstrates the propriety of prophylactic regulation that endeavors to minimize the dangers posed by those who bring firearms into public.

While many persons transport firearms for lawful purposes, others do not. The drive-by shooting, for example, is a common tactic of criminal street gangs. *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, 302 (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, 324 (1994).

Indeed, the prevalence of this tactic may be a product of the high rate at which gang members and drug dealers carry firearms in public. When offenders believe that an intended target may be armed, they are more likely to employ this tactic because it enables them to both approach and leave the target quickly and enjoy the benefits of tactical surprise. *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).

Thus, while limiting the ability to carry firearms in public may be unwarranted in most jurisdictions, cities afflicted by gang and drug crime have ample reason to endeavor to reduce the risks presented by those who transport firearms in vehicles. Indeed, history reflects a tradition of more stringent regulation of the possession and use of firearms in larger cities as a consequence of the greater law-enforcement challenges they face. *See* Blocher, *supra*, at 108-20.

There is considerable peril in relying on framing-era practice when evaluating contemporary regulation. Consider, for example, the framing-era firearm. 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).

Thus, what was regarded as sufficient regulation in the framing era might accordingly be regarded as insufficient today, considering the greater dangers posed by contemporary firearms. As one eminent 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).[15]

D. Laws Imposing Undue Burdens On The Right To Carry Firearms For Lawful Purposes Violate the Second Amendment

As we explain above, the text of the Second Amendment, as well as the history of firearms regulation, powerfully suggests ample power to enact prophylactic regulations with respect to those who carry firearms in public. Petitioners nevertheless argue that regulation of those who carry firearms in public should be subject to strict scrutiny in which challenged regulation must be narrowly tailored to advance a compelling interest. Pet. Br. 30-32. In addition to the Second Amendment's textual and historical commitment to regulation, however, an invariable requirement of

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[15] For a more elaborate discussion of the difficulties in employing historical analogies when assessing firearms regulation, see Lawrence Rosenthal, *The Limits of Second Amendment Originalism and the Constitutional Case for Gun Control*, 92 Wash. U. L. Rev. 1187, 1214-22 (2015).

strict scrutiny would be anomalous.

First, the myriad methodological difficulties in demonstrating the effect of any one regulation in isolation on crime rates would make it difficult to mount a convincing empirical demonstration that virtually any regulation—including longstanding regulations 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.[16]

Second, 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). In the First Amendment context, for example, the Court has held that a statutory prohibition on corporate-funded electioneering could not be justified as a means to prevent corruption because the prohibition swept beyond the type of corrupt quid pro quo that the government has a compelling interest in preventing. *See, e.g.*, *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 479 (2007). Yet, prophylactic regulations are necessarily over- or underinclusive; for example, not all those who carry concealed weapons do so to commit crimes, and not all convicted felons remain dangerous. Both the textual basis for and longstanding acceptance of prophylactic regulation, in short, strongly argue

[16] 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).

against an invariable requirement of strict scrutiny under the Second Amendment.

Rather than endorsing rigid 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. *Heller* accordingly teaches that the Second Amendment invalidates laws to the extent that they burden "the core lawful purpose of self-defense." *Id.* 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.

Indeed, 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 imposes strict scrutiny on regulations imposing what are regarded as severe burdens on First Amendment rights, 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, in light of the modest burden on First Amendment rights imposed by laws compel

disclosure of the identities of those who may political expenditures, the Court has upheld such laws after assessing the magnitude of the burden imposed on First Amendment rights. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 366–67 (2010).

This mode of inquiry is not unique to free-speech jurisprudence. For example, while the Constitution secures both a right to travel and a right of access to the courts, the Court upheld a durational residency requirement to obtain a divorce because it imposed no absolute bar to travel or access to the courts and advanced legitimate governmental interests in assuring that an individual has an adequate attachment to the forum state before it endeavors to adjudicate an action for divorce. *See Sosna v. Iowa*, 419 U.S. 393, 405–09 (1975). This holding was no innovation, while 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," 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).[17]

Similarly, when it comes to abortion, the Court has concluded, in light of the legitimate regulatory interests implicated by abortion, that "[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

[17] In addition to their Second Amendment claim, petitioners also advance a right-to-travel claim in this case. Pet. Br. 54-57. As we explain above, a right-to-travel claim should be assessed by reference to whether the challenged ordinance imposes an undue burden.

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"). 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 prophylaxis.

II. NEW YORK LAW IMPOSES NO UNDUE BURDEN ON THE RIGHT TO BEAR ARMS IN PUBLIC PLACES.

The laws at issue in this case should be sustained because of the modest burden they impose on those who wish to "bear" arms in public places.

To be sure, a "well regulated Militia" must be able to obtain training and practice in the use of firearms. Petitioners are quite right that "the 'right

to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use.'" Pet. Br. 22 (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011)). A law that prohibited premises-permit holders such as petitioners from transporting their firearms to target ranges or competitions for purposes of lawful training, practice, or competition, or which makes it unduly difficult or expensive to do so, would be invalid because of the burden it would impose on "the core lawful purpose of self-defense," *Heller*, 554 U.S. at 630.

New York, however, never prohibited petitioners from transporting their firearms for purposes of practice and training, but only regulated the time, place, and manner by which firearms may be transported to a range by requiring that they be taken to a regulated facility within the City the records of which were available for inspection. *Cf. Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) ("If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place, and manner . . . .").

In any event, New York now permits petitioners to transport their handguns to ranges, competitions, and their residences outside the City. Petitioners have not challenged New York's prohibition on holders of a premises license carrying firearms in public for purposes other than target practice, hunting, or transportation to a second home. New York, moreover, no longer prohibits the holders of premises licenses from transporting firearms to ranges or residences outside of the New York City.

Although petitioners have a variety of new complaints about New York's revised regulations, Mootness Resp. 13-20, surely those are best addressed in the first instance by the lower courts, either in fresh litigation, or on remand.

Petitioners claim that "there is no historical analog to the City's regime." Pet. Br. 27. Even if this observation remains accurate after New York's licensing revisions, as we explain above, as the lethality of firearms has evolved, regulatory authority has appropriately evolved. In any event, if a historical analog is required, the fact that petitioners assert a right to transport firearms within their vehicles brings this case within the tradition of prohibiting the concealed carrying of firearms.

Petitioners assert that "law-abiding, responsible citizens . . . have a right to transport their arms to other places where they may be lawfully used . . . ." Pet. Br. 21. Officers on patrol confronted with an armed individual, however, often cannot readily determine whether they are dealing with "law-abiding, responsible citizens." Nor is it easy to tell whether an armed individual on the streetscape is carrying a firearms for "the core lawful purpose of lawful self-defense." *Heller*, 554 U.S. at 630.

There is, moreover, a risk that some individuals who are not "law-abiding, responsible citizens" will obtain carry permits if they must be issued to anyone not disqualified by a prior conviction or some other disqualifying adjudication, and who proclaims a generalized desire to carry firearms for self-

defense.[18] This is precisely why the case for prophylactic regulation is strong, given the inevitable error rate that inheres in any effort to make predictive judgments about persons who wish to carry firearms in public, especially when applicants proclaim only a generalized and conclusory interest in carrying firearms for lawful purposes. And, as we explain above, both the Second Amendment's preamble and the history of firearms regulation suggest that the right to bear arms permits prophylactic regulations and argues for a measure of deference to legislative assessments of the efficacy of and justification for such regulation.

Petitioners have not sought carry licenses or attempted to make the requisite showing of particularized need to obtain such licenses. Requiring a showing of particularized need for a carry license protects Second Amendment rights in cases in which the core constitutional interest in lawful self-defense or other lawful uses of firearms is most plainly implicated, and supplies an administrable basis to decide whether applicants are likely to be "responsible, law-abiding citizens."

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[18] 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).

The criterion of particularized need is at least as reliable as the nineteenth-century criterion of requiring open carry to determine the likely purpose for which firearms are carried, and a good deal better suited to the contemporary urban landscape. Moreover, a constitutional requirement that licenses must be liberally granted could well produce potent Fourth Amendment limitations on the ability of the authorities to stop armed individuals and determine whether they are properly licensed, critically undermining prophylactic policing.

Equally important, when the law enables police to keep guns off the streets in high-crime urban hot spots, the likelihood of violent confrontations that prove fatal is reduced. In these 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 who is not disqualified by a prior conviction or otherwise, can carry firearms.

Especially in high-crime jurisdictions riven by gang and drug crime, carrying firearms in public may be accompanied by unacceptable risks, and for that reason, warrant prophylactic restriction. As we explain above, there is a long tradition of more restrictive firearms regulation in urban areas. If the Second Amendment permitted the development of concealed-carry prohibitions directed at those who carried firearms under circumstances that were thought to pose unacceptable risks, surely the Second Amendment also permits regulations directed at what are properly regarded, under contemporary conditions, as circumstances posing unacceptable risk.

Given the difficulty in assessing the purpose of someone carrying firearms in public, a requirement that an individual be licensed and demonstrate some special need to carry the firearm 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. This is the kind of rule appropriate to any "well regulated" militia.

CONCLUSION

For the preceding reasons, the judgment of the court of appeals should be vacated in light of the changes to New York's premises-permit laws or, in the alterative, affirmed.

Respectfully Submitted,

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