No. 20-843

IN THE

Supreme Court of the United States

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

v.

KEITH M. CORLETT, in His Official Capacity as Superintendent of New York State Police, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Second Amendment prohibits New York from requiring residents who wish to carry a concealed firearm in public to have an actual and articulable need to do so.

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INTRODUCTION

Petitioners challenge the New York law governing licenses to carry concealed firearms in public. The law has existed in the same essential form since 1913 and descends from a long Anglo-American tradition of regulating the carrying of firearms in public. Under New York's law, applicants who seek an unrestricted license to carry a concealed handgun in public must establish "proper cause." This flexible standard, which numerous New York residents have successfully satisfied, generally requires a showing that the applicant has a non-speculative need for self-defense. Absent such a need, applicants may receive a "premises" license that allows them to keep a firearm in their home or place of business, or a "restricted" license that allows them to carry in public for any other purposes for which they have shown a non-speculative need—such as hunting, target shooting, or employment. The individual petitioners here received restricted licenses.

The petition does not present a question warranting this Court's review. *First*, petitioners and several of their amici are mistaken in claiming a split in authority on whether the Second Amendment applies outside the home. Like all of the other courts of appeals that have considered restrictions on the public carrying of firearms, the Second Circuit proceeded from an understanding that the Second Amendment protects an individual right to carry firearms outside the home for self-defense. And like those other courts, the Second Circuit was guided by this Court's recognition in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment right is not unlimited and can be subject to state regulation consistent with the histor-

ical scope of the right. Contrary to petitioners' contention, neither the court below nor any other court of appeals has sustained a blanket prohibition on ordinary, law-abiding persons carrying firearms outside the home. Instead, several courts of appeals have sustained state law regimes for licensing the public carrying of firearms, and one court that invalidated a blanket prohibition has recognized that New York's laws do not amount to such a prohibition.

Second, this case is a poor vehicle for deciding whether the Second Amendment applies outside the home: a question that petitioners imply is presented by this case. Because the court below proceeded on the understanding that the Second Amendment does so apply, a ruling in petitioners' favor would change neither the result nor the reasoning below. In any event, petitioners failed to allege facts establishing that New York's licensing regime bans the public carrying of firearms for all but "a small subset of individuals" (Pet. 8).

Finally, the decision upholding New York's longstanding and measured licensing law was correct. The law is consistent with the historical scope of the Second Amendment and directly advances New York's compelling interests in public safety and crime prevention. The petition should therefore be denied.

STATEMENT

1. Since the founding era, New York has exercised localized control to regulate the carrying of concealable firearms in public spaces, in light of the inherent dangers that firearms pose. *See* John A. Dunlap, *The New-York Justice* 8 (1815) (discussing New York common law restriction on carrying "dangerous and

unusual weapons" in public). In 1884, New York instituted a statewide licensing requirement for minors carrying weapons in public. Ch. 46, § 8, 1884 N.Y. Laws 44, 47. In 1905, it expanded its statewide licensing requirement to cover all persons carrying "any pistol, revolver or other firearm." Ch. 92, § 2, 1905 N.Y. Laws 129, 129-30.

After a 1911 New York Coroner's Office Report detailed a marked increase in homicides and suicides committed with concealable firearms, the New York legislature sought to craft a licensing scheme that would stem the rise in deaths associated with such weapons. *See People ex rel. Darling v. Warden of City Prison*, 154 A.D. 413, 423 (1st Dep't 1913); *Revolver Killings Fast Increasing*, N.Y. Times, Jan. 30, 1911, at 4 (citing New York Coroner's Office Report). The result was the enactment in 1911 of the Sullivan Law, which required a license to possess "any pistol, revolver or other firearm of a size which may be concealed upon the person." Ch. 195, § 1, 1911 N.Y. Laws 442, 443 (codifying former N.Y. Penal Law § 1897 ¶ 3).

In 1913, the New York legislature amended the Sullivan Law to establish statewide standards for issuing licenses to possess and carry concealable firearms. Ch. 608, § 1, 1913 N.Y. Laws 1627, 1627-30. As amended, the statute allowed any magistrate in the State to issue a license for home possession if the magistrate was "satisfied of the good moral character of the applicant," and "no other good cause exist[ed]" to deny the license. *Id.* at 1629. The statute likewise allowed a magistrate to issue an unrestricted license for concealed carrying in public upon proof "of good moral character, and that *proper cause* exists for the issuance [of the license]." *Id.* (emphasis added). These requirements responded to the finding in the New York

State Coroner's Report that a law prohibiting "a person having a revolver in his possession, either concealed or displayed, unless for some legitimate purpose" "would be the means of saving hundreds of lives." *Revolver Killings Fast Increasing*, *supra* (quoting New York Coroner's Office Report).

Over the course of the 20th century, New York maintained this licensing regime, including the requirement of "proper cause" for carrying a concealed firearm in public. Statutory amendments and recodifications through the years reiterated the importance of New York's licensing requirements to public safety—but never evinced a "general animus towards guns." *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 97 n.22 (2d Cir. 2012). As a 1965 legislative report observed: "Statutes governing firearms and weapons are not desirable as ends in themselves. Such legislation is valuable only as a means to the worthwhile end of preventing crimes of violence before they occur." State of N.Y., *Report of the N.Y. State Joint Legislative Comm. on Firearms & Ammunition* 12 (1965).

2. New York's current licensing scheme is substantially the same as that enacted in 1913. It requires individuals to obtain a license to possess or carry a concealable "firearm." N.Y. Penal Law § 265.00(3). The statutory term "firearm" is defined to include handguns (e.g., pistols and revolvers) but excludes most rifles and shotguns, which are not subject to New York's licensing requirements. *Id.* New York residents can obtain either a "premises" license, which allows them to possess a handgun in their home or place of business, N.Y. Penal Law § 400.00(2)(a)–(b), or a "carry" license, which allows them to carry a concealed handgun in public, N.Y. Penal Law § 400.00(2)(c)–(f). Carry licenses "shall be issued" to applicants engaged in certain kinds of

employment (including certain state and local judges, correctional facility employees, and bank messengers), N.Y. Penal Law § 400.00(2)(c)–(e), as well as to all other qualified applicants who can show "proper cause," N.Y. Penal Law § 400.00(2)(f).[1] It is the latter requirement that petitioners challenge here.

New York courts have defined "proper cause" to include "carrying a handgun for target practice, hunting, or self-defense." *Kachalsky*, 701 F.3d at 86. Where an applicant demonstrates proper cause to obtain a license for target practice or hunting, the licensing officer may limit the carry license to those activities. *O'Connor v. Scarpino*, 83 N.Y.2d 919, 921 (1994). Applicants seeking a license to carry a concealed handgun in public without restriction must show "an actual and articulable—rather than merely speculative or specious—need for self-defense." *Kachalsky*, 701 F.3d at 98 (citing *Klenosky v. N.Y. City Police Dep't*, 75 A.D.2d 793, 793 (1st Dep't 1980), *aff'd on op. below*, 53 N.Y.2d 685 (1981)). Contrary to petitioners' contention, applicants need not show that their need to carry a firearm is "atypical" or "unique" (Pet. 5, 8, 15).

Applications for handgun licenses are adjudicated by firearms licensing officers, who in most counties are state court judges, and in New York City and certain other counties are local police commissioners. N.Y. Penal Law § 265.00(10). To determine whether "proper cause" exists for the issuance of an unrestricted license, licensing officials consider an open universe of person- and locality-specific factors bearing on the applicant's

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[1] Applicants for a handgun license in New York must also meet certain general requirements that petitioners do not challenge, such as being at least 21 years of age and having no convictions for a felony or serious offense. N.Y. Penal Law § 400.00(1).

need for self-defense, *see, e.g.*, *Application of O'Connor*, 585 N.Y.S.2d 1000, 1003 (Co. Ct. 1992). If a licensing officer denies a handgun license application in whole or in part, the applicant may obtain judicial review in state court. *E.g.*, *Kozhar v. Kelly*, 62 A.D.3d 540 (1st Dep't 2009).

3. Petitioners Robert Nash and Brandon Koch are residents of Rensselaer County who wish to obtain an unrestricted license to carry a concealed handgun in public. They allege that respondent Richard N. McNally, Jr., a state court judge who serves as a licensing officer for Rensselaer County, denied their applications for failure to establish proper cause and instead issued them with carry licenses restricted to hunting and target shooting. Nash and Koch assert that they "do not face any special or unique danger" to their lives, but they nonetheless wish to carry a handgun in public without restriction for the purpose of self-defense. CA2 J.A. (Dkt. 39) 13-15. For its part, petitioner New York State Rifle and Pistol Association alleges that it has at least one unnamed member who also wishes to carry a handgun in public for self-defense but was denied a license to do so for failure to establish proper cause. CA2 J.A. 16. Petitioners do not allege that they sought judicial review in state court to ascertain whether the licensing officer correctly applied state law in denying them an unrestricted license, and respondents have been unable to locate any such state court case.

This lawsuit, which petitioners filed in federal court, alleges that New York's firearms licensing statute violates the Second Amendment as applied to the States through the Fourteenth Amendment. As relief, petitioners ask for invalidation of the licensing statute on its face and as applied to them. The complaint

names as defendants both licensing officer McNally and the Superintendent of the New York State Police.[2]

Although petitioners allege that New York State law bans the "vast majority" of state residents from publicly carrying firearms for self-defense (CA2 J.A. 8, 12), the complaint offers no supporting allegations about the number or percentage of unrestricted concealed carry permits granted under the law. Petitioners instead acknowledge that they seek a result that is "directly contrary to the Second Circuit's holding in *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012)" (CA2 J.A. 12), a prior decision upholding New York's public carry statute.

The district court granted respondents' motion to dismiss, agreeing that *Kachalsky* foreclosed petitioners' claims. App. 11-12. The Second Circuit affirmed, reasoning that it had already decided—both in *Kachalsky* and subsequently in *Libertarian Party of Erie Cty. v. Cuomo*, 970 F.3d 106, 113 (2d Cir. 2020)—that "New York's proper cause requirement does not violate the Second Amendment." App. 2.

REASONS FOR DENYING THE PETITION

For over a hundred years, New York has allowed individuals to publicly carry firearms throughout the State where they have an actual and articulable need to do so. In recent years, this Court has denied a petition for certiorari involving an identical challenge to New York's law. *See Kachalsky v. Cacace*, No. 12-845

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[2] George P. Beach II was the Superintendent at the time the complaint was filed. Beach was succeeded by respondent Keith M. Corlett before the instant petition was filed. Corlett has since been succeeded by Acting Superintendent Kevin P. Bruen.

(cert. denied Apr. 15, 2013). The Court has also denied petitions for certiorari challenging closely analogous public carry laws. *See Rogers v. Grewal*, No. 18-824 (cert. denied June 15, 2020); *Gould v. Lipson*, No. 18-1272 (cert. denied June 15, 2020); *Peruta v. California*, No. 16-894 (cert. denied June 26, 2017); *Woollard v. Gallagher*, No. 13-42 (cert. denied Oct. 15, 2013). There is no reason for this Court to take a different approach here: the claimed split is illusory, the case is a poor vehicle for considering petitioners' sweeping constitutional claims, and the decision below is correct.

I. The Claimed Split in Authority Is Illusory.

Petitioners are incorrect in claiming that lower courts are "in open and acknowledged division over the constitutionality of laws denying ordinary law-abiding citizens their right to carry a handgun for self-defense." Pet. 3. They erroneously assert that the First, Second, Third, and Fourth Circuits have "endorsed restrictions that cut off the right to keep and bear arms at a homeowner's door" while the D.C. and Seventh Circuits have held that the right extends beyond the home. Pet. 1-2. In fact, all of these courts have either held explicitly, or assumed without deciding, that the Second Amendment protects an individual right to carry firearms outside the home. All of these courts have likewise acknowledged, in line with this Court's decisions in *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), that the right to carry firearms in public is not unlimited and can be subject to regulatory measures consistent with longstanding limitations on that right.

Thus, rather than the disagreement that petitioners claim, there is in reality a broad consensus. And while the courts in question did not all reach the same ultimate conclusions about whether the public carry

laws they reviewed were constitutional, that difference in outcome is not based on the courts' conflicting views of the Second Amendment's scope, but rather on critical distinctions among the particular laws being challenged. Petitioners' amici are therefore mistaken in asserting that the circuits are split over the extent to which the Second Amendment right applies outside the home. *See* Brief of Amici Curiae Firearms Policy Coalition et al., 4-9.

1. The First, Second, Third, and Fourth Circuits have all upheld licensing schemes, like New York's, that limit the public carrying of firearms to those who can demonstrate good or proper cause. *Gould v. Morgan*, 907 F.3d 659, 670 (1st Cir. 2018) (upholding Massachusetts' "proper purpose" requirement); *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013) (upholding New Jersey's "justifiable need" requirement); *Woollard v. Gallagher*, 712 F.3d 865, 882 (4th Cir. 2013) (upholding Maryland's "good and substantial reason" requirement); *Kachalsky*, 701 F.3d at 100-01 (upholding New York's "proper cause" requirement).

All of these courts proceeded on the understanding that the Second Amendment right applies outside the home. The First Circuit explained that while this Court's decisions in *Heller* and *McDonald* invalidated laws that prohibited the possession of firearms in the home, the Court's reasoning "impl[ied] that the right to carry a firearm for self-defense guaranteed by the Second Amendment is not limited to the home." *Gould*, 907 F.3d at 670. The First Circuit therefore "proceeded on the assumption" that Massachusetts's licensing scheme "burden[ed] the Second Amendment right to carry a firearm for self-defense." *Id.* Similarly, the Second Circuit has read this Court's precedent concerning firearm possession in the home as suggesting that

the Second Amendment "must have *some* application in the very different context of the public possession of firearms," and thus proceeded on the "assumption that the Second Amendment applies to this context." *Kachalsky*, 701 F.3d at 89, 93 (emphasis in original); *see also* App. 2 (court below relying on *Kachalsky* in affirming dismissal of petitioners' claims). The Third and Fourth Circuits employed the same assumption. *Drake*, 724 F.3d at 431 ("[a]ssuming that the Second Amendment individual right to bear arms does apply beyond the home"); *Woollard*, 712 F.3d at 876 ("assum[ing] that the *Heller* right exists outside the home").

All four courts of appeals thus based their decisions on a very different premise from the one on which petitioners claim a split. After assuming an individual right to carry arms outside the home, the courts followed *Heller*'s admonition that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited" and that regulatory measures that are part of a "longstanding" tradition are "presumptively lawful." *Heller*, 554 U.S. at 595, 626-27 & n.26. The courts then looked to the centuries-long history of state and local regulation regarding the public carrying of firearms to conclude that good cause licensing schemes are consistent with the historical scope of the Second Amendment; and they further concluded that such schemes are sufficiently related to the government's important interests in public safety and crime prevention to pass constitutional muster. *See Gould*, 907 F.3d

at 666-77; *Drake*, 724 F.3d at 435-40; *Woollard*, 712 F.3d at 874-83; *Kachalsky*, 701 F.3d at 89-101.[3]

2. Because petitioners are wrong that the decisions of the First, Second, Third, and Fourth Circuits rested on the premise that the Second Amendment's protections "vanish at one's doorstep" (Pet. 14), they are likewise wrong that these decisions conflict with decisions of the Seventh and D.C. Circuits rejecting that premise.

a. The Seventh Circuit's decision in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), shows the illusory nature of the claimed conflict. In *Moore*, the Seventh Circuit invalidated an Illinois law that imposed "a flat ban on carrying ready-to-use guns outside the home." *Id.* at 940. Unlike New York's measured licensing scheme, this ban did not permit individuals to establish that they had proper cause to carry a firearm in public; rather, it was a "blanket prohibition on carrying [a] gun in public." *Id.* As a result, the ban could pass constitutional muster only if the Second Amendment were construed to have *no* application outside the home. The Seventh Circuit declined to adopt this categorical view. Instead, like the courts discussed above, the Seventh Circuit read *Heller* to imply "a broader Second Amendment right than the right to have a gun in one's home." *Id.* at 935-36. And the court found Illinois's law unconstitutional because it completely negated any such right, thereby "prevent[ing] a person from defending himself anywhere except inside his home." *Id.* at 940.

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[3] Neither the Second Circuit nor any other court of appeals has raised a question about the validity of this Court's analysis in *Heller*, nor have petitioners claimed a split on that question.

Far from creating a split, the Seventh Circuit took pains to distinguish the Illinois law at issue in *Moore* from the New York law upheld by the Second Circuit in *Kachalsky*. The Seventh Circuit explained that, unlike Illinois's total ban, the New York licensing scheme reflects a "recogni[tion] that the interest in self-defense *extends outside the home*." *Id.* (emphasis added). In other words, the Seventh Circuit expressly agreed with the Second Circuit that New York's law does not unduly "cut off the right to keep and bear arms at a home-owner's door." Pet. 2. Nor did the agreement end there. The Seventh Circuit cited with approval the Second Circuit's conclusion that New York acted constitutionally when the State "decided not to ban handgun possession, but to limit it to those individuals who have an actual reason ('proper cause') to carry the weapon." *Id.* at 941 (quoting *Kachalsky*, 701 F.3d at 98). And the Seventh Circuit strongly suggested that it would have upheld this more measured form of regulation, describing similar regulations as striking a "proper balance between the interest in self-defense and the dangers created by carrying guns in public." *Id.* at 940.[4] The Seventh Circuit even took the unusual step of staying its mandate "to allow the Illinois legislature to craft a new gun law that will impose reasonable limitations" on the carrying of guns in public—that is, to make Illinois's law more like New York's. *Id.* at 942. *Moore* thus reflects agreement with the decision below,

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[4] While the Seventh Circuit expressed disagreement with "some aspects of the historical analysis" in *Kachalsky*, it did not suggest that this disagreement was dispositive in any way; on the contrary, it implied that the disagreement was too inconsequential even to set out in its opinion, describing it as "unnecessary to bore the reader with." *Moore*, 702 F.3d at 941.

not an "open and acknowledged" conflict (Pet. 1, 3, 8, 9, 10).

b. The other case on which petitioners rely, *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017), does not present a conflict either. There, a divided panel of the D.C. Circuit invalidated a District of Columbia public carry law and, in so doing, held that the Second Amendment protects "the right of responsible citizens to carry firearms for personal self-defense beyond the home, subject to longstanding restrictions." *Id.* at 667. The D.C. Circuit thus held explicitly what the First, Second, Third, and Fourth Circuits assumed. In other words, all of those courts proceeded from an understanding that the Second Amendment applies outside the home.

Nor does *Wrenn* otherwise present a conflict that warrants this Court's intervention. *Wrenn* involved a regulatory scheme that was far more restrictive than New York's, and that restrictiveness explains the different outcome in *Wrenn*. The District of Columbia law at issue in *Wrenn*, which permitted individuals to obtain a concealed carry license if they could show "a special need for self-defense," *id.* at 655, provided that applicants could meet this standard only by alleging "serious threats of death or serious bodily harm, any attacks on [their] person, or any theft of property from [their] person," *id.* at 655-56. The D.C. Circuit construed this requirement as imposing "a total ban on most D.C. residents' right to carry a gun" for self-defense outside the home. *Id.* at 665-66. The court then concluded that this "total ban" was per se unconstitutional because it "destroy[ed] the ordinarily situated citizen's right to bear arms" outside the home. *Id.* at 666.

The Second Circuit, in contrast, was never confronted with this question because it correctly recognized that New York's law does not operate as a ban. Unlike the District of Columbia law invalidated in *Wrenn*, New York's law does not limit the types of circumstances that applicants may present in seeking to establish a need for self-defense; it requires only that the applicant's need be "actual and articulable—rather than merely speculative or specious," *Kachalsky*, 701 F.3d at 98. New York's law is therefore "oriented to the Second Amendment's protections," *id.*, while recognizing that those protections do not encompass "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose," *Heller*, 554 U.S. at 626. Contrary to petitioners' unsubstantiated contention (Pet. 4), this licensing standard does not make it "virtually impossible" for ordinary citizens to obtain a public carry license.[5] For all these reasons, *Wrenn* is readily distinguishable from the decision below and does not present a conflict warranting this Court's review.

3. Finally, petitioners mistakenly rely on the Ninth Circuit's panel decisions in *Peruta* and *Young* to buttress their claim of a split. Pet. 10-11. As petitioners acknowledge, those decisions were both vacated by the

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[5] New York's proper cause standard does not require applicants to demonstrate that their need satisfies an "interest-balancing" analysis (Brief of Amici Curiae Firearms Policy Coalition et al., 14-16). Nor is the application of the proper cause standard inherently "subjective" (Brief of Amici Curiae States of Arizona et al., 2, 4, 7, 10-11): In assessing whether an applicant has a non-speculative need for self-defense, licensing officers must consider wholly objective factors such as "population density, composition, and geographical location," among others. *Application of O'Connor*, 585 N.Y.S.2d at 1003-04.

en banc Ninth Circuit and thus no longer reflect the current state of that court's law. In *Peruta*, the en banc Ninth Circuit added its voice to the broad consensus among lower courts on the constitutionality of public carry licensing schemes, upholding a California law requiring good cause to carry a concealed firearm in public. *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc). In doing so, the court expressly declined to "reach the question whether the Second Amendment protects some ability to carry firearms in public, such as open carry," *id.* at 927, further undermining petitioners' claim of a split on that issue.

Other pending decisions in the Ninth Circuit counsel in favor of allowing the issue to percolate further. The en banc court has not yet issued its decision in *Young*, which challenges a Hawai'i law requiring good cause to carry a firearm openly in public. *Young v. Hawaii*, 915 F.3d 681 (9th Cir. 2019) (granting en banc review). Moreover, pending that decision, a panel has stayed the proceedings in another case challenging a similar California law. *See Flanagan v. Becerra*, No. 18-55717. These unresolved cases provide yet another reason to deny review here.

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Four courts of appeals (the First, Second, Third, and Fourth Circuits) have held that good cause licensing schemes like New York's are constitutional; one court of appeals (the Seventh Circuit) struck down a flat ban on public carry but strongly suggested that it would have upheld a good cause licensing scheme like New York's; one court of appeals (the D.C. Circuit) struck down a particularly restrictive licensing scheme that is distinguishable from New York's scheme, and that the court construed as a flat ban; and one court of

appeals (the Ninth Circuit) upheld a good cause licensing scheme for concealed carry but has yet to rule on two similar schemes for open carry. These decisions are mutually consistent—and expressly agree on the sole question petitioners present for review. There is no "chaos" (Pet. 1) for this Court to resolve.

II. This Case Is a Poor Vehicle for Considering Petitioners' Sweeping Constitutional Claims.

Not only is there no split of authority on the constitutional question on which petitioners seek review; this case is also a particularly weak vehicle for considering that question. A ruling on the question would be purely advisory here because (1) the court below did not resolve that question against petitioners, and (2) petitioners failed to present factual allegations that would permit the Court to evaluate, at the motion to dismiss stage, how their question for review applies to New York's licensing scheme.

1. In upholding New York's public carry law, the Second Circuit recognized that there was no need to decide whether the Second Amendment protects an individual right to carry firearms outside the home for self-defense. The court assumed the existence of such a right, *Kachalsky*, 701 F.3d at 89, 93, and then decided the case on the separate ground that New York's measured regulation of that right is consistent with the Second Amendment, *id.* at 93-101. The constitutional ruling that petitioners seek would thus be no more than advisory opinion; it would not change the result or even the reasoning below.

2. In addition, petitioners have not presented the facts needed to review how their question for review applies to New York's licensing scheme: another reason

why the constitutional ruling they request would be no more than advisory. Although New York law allows individuals with a non-speculative need for self-defense to obtain a public carry license, petitioners claim that the law imposes a de facto ban on public carry for the "ordinary law-abiding citizen" (Pet. 9). According to petitioners, New York's law "makes it virtually impossible for the ordinary law-abiding citizen to obtain a license" (Pet. 4) and restricts the individual right of self-defense to "a small subset of individuals" (Pet. 8) or "a chosen few" (Pet. 9). *See also* Pet. 1, 15.

However, petitioners have not proffered facts—alleged or established—that are adequate to permit this Court to assess their claims about New York's licensing statute. Petitioners simply assume that myriad New York residents would like to carry firearms publicly for self-defense purposes but cannot establish proper cause to do so. Petitioners allege no facts to support that proposition.[6] If a significant portion of applicants who seek an unrestricted license statewide or in Rensselaer County are able to establish proper cause for such a license, petitioners' claim that New York limits such licenses to a "chosen few" (Pet. 9)—and thus cuts off "ordinary" citizens' Second Amendment rights at the curtilage (*id.*)—is untenable.

Petitioners' complaint made no effort to flesh out this issue: for example, by alleging that no licenses are

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[6] Petitioners' amici likewise proffer no such facts. While amici offer an estimated percentage of the adults in the general population who hold unrestricted concealed carry licenses (*see* Brief of Amici Curiae Law Enforcement Groups et al., 6), that percentage is not instructive because amici fail to identify how many individuals actually seek such a license, or what percentage of license applications are denied statewide or in the geographic area relevant to this case.

in fact granted to individuals outside of particular occupational categories, if that is what petitioners indeed believe. Had petitioners made such allegations, there would have been discovery on this issue and the State could have proved petitioners' allegations untrue. Petitioners cannot claim that relevant information was unavailable to them when they filed their complaint: New York's Public Officers Law provides an avenue for obtaining information about the number of firearm licenses granted in specific areas of the State, and members of the public have availed themselves of that avenue to obtain such information.

Instead of trying to build up a concrete case for judicial review, petitioners simply conceded that their claims were foreclosed by the Second Circuit's prior decision in *Kachalsky* and then sought to have that decision overturned on appeal. In rushing to obtain appellate review, however, petitioners failed to provide this Court with the facts that it would need to determine how their question for review applies to New York's licensing scheme.

III. The Decision Below Is Correct.

This Court should deny review for the additional reason that the decision below is correct. In line with several other courts of appeals, the Second Circuit correctly concluded that good cause licensing schemes like New York's are supported by a centuries-old tradition of state and local measures regulating the carrying of firearms in public. The court also correctly concluded that New York's law directly advances the State's compelling interests in protecting the public from gun violence.

A. History and tradition show that state public carry laws like New York's are consistent with the Second Amendment.

In *Heller*, this Court stressed that the Second Amendment right to keep and bear arms is "not unlimited" and does not allow a person to "keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626; *see also McDonald*, 561 U.S. at 786. Rather, the Court explained, the Second Amendment "codified a *pre-existing* right" and thus incorporated the "limitations upon the individual right" that were "inherited from our English ancestors." *Heller*, 554 U.S. at 592, 595, 599 (emphasis in original). The Court also made clear that its decision should not "be taken to cast doubt on longstanding prohibitions," such as the prohibitions "on the possession of firearms by felons and the mentally ill" or the "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Id.* at 626-27 & n.26; *see also McDonald*, 561 U.S. at 786. The Court added that this list of longstanding laws was not "exhaustive" and that such measures are "presumptively lawful." *Heller*, 554 U.S. at 626-627 & n.26.

This analysis supports the Second Circuit's decision to uphold New York's licensing scheme for the public carrying of firearms. Similar or even stricter public carry regulations have continuously been in place in large parts of the country throughout the history that *Heller* identified as significant to understanding the "pre-existing right" codified in the Second Amendment: from precolonial England through the period when the Second Amendment was drafted and on through the period when the Second Amendment was incorporated by the Fourteenth Amendment. *See*

Heller, 554 U.S. at 592-595, 605-19; *see also McDonald*, 561 U.S. at 753-91 (explaining that the Fourteenth Amendment incorporated the Second Amendment and thus made it applicable to the States). To be sure, "[h]istory and tradition do not speak with one voice" on our nation's public carry norms, as the Second Circuit rightly acknowledged. *Kachalsky*, 701 F.3d at 91; *see also* Add. 2 (decision below relying on *Kachalsky*). What they establish beyond dispute, however, is that state and local authorities have long possessed significant discretion to regulate the public carrying of firearms based on the particular conditions in their jurisdictions. New York's law fits comfortably within this tradition.

1. Public carry laws predate the founding, tracing back to 14th-century England and 17th-century colonial America. *See Peruta*, 824 F.3d at 929-33 (discussing in depth the history of public carry laws). Such laws include the Statute of Northampton in 1328, the English Bill of Rights in 1689, and multiple colonial laws in America. *See id.* In 1686, New Jersey became the first colony to codify a Northampton-style law providing that no person "shall presume privately to wear any pocket pistol . . . or other unusual or unlawful weapons," and that "no planter shall ride or go armed with sword, pistol, or dagger." Ch. 9, 1686 N.J. Laws 289, 290; *see Oxford English Dictionary* (3d ed. 2006) (defining "planter" as "an early settler" or "a colonist"). Other colonies enacted similar laws, *e.g.*, No. 6, 1692 Mass. Laws 10; 1699 N.H. Laws 1, as did many early States, *e.g.*, Ch. 21, 1786 Va. Acts 33; Ch. 3, 1792 N.C. Law 60; Ch. 2, 1795 Mass. Law 436; Ch. 22, § 6, 1801 Tenn. Laws 259, 260-61.

Under these founding-era laws, as under the English laws from which they derived, "constables, magistrates, or justices of the peace had the authority

to arrest anyone who traveled armed." Eric M. Ruben & Saul Cornell, *Firearm Regionalism & Public Carry: Placing S. Antebellum Case Law in Context*, 125 Yale L.J. Forum 121, 129 (2015). The mere act of carrying a dangerous weapon like a firearm was grounds for arrest, even if the arrestee did not "threaten[] any person" or engage in "any particular act of violence." James Ewing, *A Treatise on the Office & Duty of a Justice of the Peace* 546 (1805); *accord Chune v. Piott*, 80 Eng. Rep. 1161, 1162 (K.B. 1615) (affirming sheriff's authority to apprehend an armed person "notwithstanding he doth not break the peace"). Nor could a person evade arrest simply "by alleging that such a one threatened him, and he wears it for the safety." William Hawkins, *A Treatise of the Pleas of the Crown* 136 (1762). In the words of Lord Coke—who is "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) (quotation marks omitted)—individuals were not permitted to carry firearms merely "for doubt of danger." Edward Coke, *The Third Part of the Institutes of the Laws of England* 161 (1797).

The enforcement of public carry restrictions during this period did, however, vary widely based on geographic region. Even under English law, the general prohibition on travelling armed was most strictly enforced in "fairs, markets, and other populated areas." Ruben & Cornell, *supra*, at 128. This focus on populated areas was still more pronounced in colonial America. Many early Americans lived and worked in rural areas, far from towns and cities and from public officials who might protect them. They needed firearms to hunt and fend off dangerous strangers, animals, or "foreign enemies," Leonard W. Levy, *Origins of the Bill*

of Rights 139 (1999), and they commonly carried firearms "when traveling on unprotected highways or through the unsettled frontier," Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Two*, 64 Clev. St. L. Rev. 373, 401 (2016). But this does not mean, as petitioners contend, that early Americans had an unfettered right to carry firearms in virtually any public place. On the contrary, once they reached more populated areas—"any great Concourse of the People"—local authorities retained the authority to restrict or even ban the carrying of firearms. James Davis, *The Office and Authority of a Justice of the Peace* 13 (1774); *see also* Charles, *supra*, at 378-401; Ruben & Cornell, *supra*, at 128-34.

2. The tradition of closely regulating firearms in the public sphere continued uninterrupted in many States throughout the 19th century. During this time, "most [S]tates enacted laws banning the carrying of concealed weapons," and some States went even further, banning concealable weapons altogether, "whether carried openly or concealed." *Kachalsky*, 701 F.3d at 95-96.

The more moderate "good cause" laws from which New York's current law descends also became widespread in the early- and mid-19th century. Massachusetts first enacted such a law in 1836, barring the public carrying of firearms except by those who had a "reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property." Ch. 134, § 16, 1836 Mass. Laws 748, 750. In the next three decades—the period directly preceding and following the adoption of the Fourteenth Amendment—at least nine other States followed suit, in regions as geographically diverse as the Northeast (Maine, Pennsylvania), Southeast (Virginia, West Virginia), Southwest (Texas), Midwest (Michigan, Minnesota,

and Wisconsin), and Northwest (Oregon).[7] These good cause laws were upheld in every State to consider their constitutionality. *E.g.*, *Andrews v. State*, 50 Tenn. 165, 190-91 (1871) (holding States could limit the public carrying of handguns to circumstances when the weapon is "worn *bona fide* to ward off or meet imminent and threatened danger"); *English v. State*, 35 Tex. 473, 477 (1871) (holding States could regulate "the place, the time and the manner in which certain deadly weapons may be carried as means of self-defense").

New York's current public carry law is a slightly modernized version of these 19th-century good cause laws. In 1906, Massachusetts transformed its good cause law into a licensing scheme that would become the model for New York and other States. This scheme allowed applicants to obtain an unrestricted public carry license if they could show a "good reason to fear an injury to [their] person or property." Ch. 172, § 1, 1906 Mass. Acts 150. New York adopted its closely analogous "proper cause" law seven years later, Ch. 608, § 1, 1913 N.Y. Laws at 1627-30; *see Kachalsky*, 701 F.3d at 85, and many other States followed suit in the next two decades.[8]

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[7] *See* 1838 Wisc. Laws 381, § 16; Ch. 169, § 16, 1841 Me. Laws 707, 709; Ch. 162, § 16, 1846 Mich. Laws 690, 692; Ch. 14, § 16, 1847 Va. Laws 127; Ch. 112, § 18, 1851 Minn. Laws 526, 528; Ch. 16, § 17, 1853 Or. Laws 218, 220; 1861 Pa. Laws 248, 250, § 6; Ch. 153, § 8, 1870 W. Va. Laws 702; Ch. 34, § 1, 1871 Tex. Gen. Laws (1st Sess.) 25, 25.

[8] *E.g.*, Ch. 226, § 8, 1923 N.D. Acts 379, 381-382; Ch. 260, § 8, 1925 Or. Laws 468, 471; No. 313, §§ 5-6, 1925 Mich. Pub. Acts 473, 473-474; Ch. 64, § 2, 1925 N.J. Laws 185, 186; Ch. 207, § 7, 1925 Ind. Laws 495, 496-97; Act No. 158, § 7, 1931 Pa. Laws 497, 498-499; Ch. 208, § 7, 1935 S.D. Sess. Laws 355, 356; Ch. 172, § 1, 1935 Wash. Sess. Laws 599, 600-01; 1936 Ala. Laws 51, 52, § 7.

Here too, there was regional variation. Around the time that good cause laws were being enacted in many parts of the country, a few States in the slaveholding South adopted an approach that allowed white citizens to carry firearms openly, while at the same time banning all concealed carry. *See, e.g.*, Ch. 89, § 1, 1813 Ky. Acts 100; 1813 La. Acts 172, § 1. That choice reflected local customs and concerns. In those States, guns were sometimes carried "partly as a protection against the slaves" and partly for "quarrels between freemen." Richard Hildreth, *Despotism in America* 89-90 (1854). And open carry was viewed as the more "noble" and "manly" method of serving those purposes. *State v. Chandler*, 5 La. Ann. 489, 490 (1850).

Petitioners place great weight (Pet. 20-22) on state court decisions from this antebellum Southern period. Some of those decisions do reflect a local preference for permissive open carry laws. *See, e.g.*, *Nunn v. State*, 1 Ga. 243 (1846). But they do not establish a national consensus on the meaning of the Second Amendment in this period. On the contrary, they were decided by judges "immersed in a social and legal atmosphere unique to the South," whose "embrace of slavery and honor[] contributed to an aggressive gun culture." Ruben & Cornell, *supra*, at 128; *see also McDonald*, 561 U.S. at 844 (Thomas, J., concurring) ("[I]t is difficult to overstate the extent to which fear of a slave uprising gripped slaveholders and dictated the acts of Southern legislatures."). Meanwhile, in the rest of the country, state legislatures were enacting—and courts were upholding—robust public carry restrictions. See *supra* at 22-23.

3. The existence of this regional variation supports rather than undermines the constitutionality of New York's public carry law. Reasonable minds can disagree

about the exact places and circumstances in which individuals were permitted to carry firearms in 14th-century England, 17th-century colonial America, or pre- and post-Civil War United States. But one cannot reasonably dispute that, in each of these periods, state and local authorities enjoyed wide latitude to implement measures restricting the public carrying of firearms in accordance with local circumstances.

Indeed, this diversity of laws—which allows States and localities to serve as "laboratories for experimentation"—is at the heart of our federal system. *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2214 (2016) (quotation marks omitted); *see also Graham v. Florida*, 560 U.S. 48, 87 (2010) (Roberts, C.J., concurring) (noting "the state-by-state diversity protected by our federal system"). While there is of course only one United States Constitution, its "federal structure allows local policies more sensitive to the diverse needs of a heterogeneous society, permits innovation and experimentation, enables greater citizen involvement in democratic processes, and makes government more responsive by putting the States in competition for a mobile citizenry." *Bond v. United States*, 564 U.S. 211, 221 (2011) (quotation marks omitted).

Petitioners ignore this diversity. They argue that the Constitution commands every State and locality to give individuals unfettered freedom to carry concealable firearms in virtually any public place. Petitioners' extreme position runs headlong into this Court's admonition that longstanding restrictions on firearms remain presumptively valid;[9] it also relies on a grossly

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[9] Even putting aside the wealth of history dating to the 14th century, it is indisputable that the good cause laws from which

reductive view of history that takes a few limited—and distinctly minoritarian—regional trends and extrapolates them to the entire country.

The Second Circuit correctly rejected this reductive view. A more nuanced understanding of the historical record establishes that New York's licensing scheme fits comfortably within a 700-year-old Anglo-American tradition of regulating the carrying of dangerous weapons in the public sphere.

B. New York's law advances the State's compelling interests in public safety and crime prevention.

In addition to examining history to conclude that the ability of state and local authorities to regulate the public carrying of firearms is "enshrined with[in] the scope of the Second Amendment," *Kachalsky*, 701 F.3d at 96 (quoting *Heller*, 554. U.S. at 634), the Second Circuit also correctly concluded that New York's licensing scheme was sufficiently related to New York's "substantial, indeed compelling, governmental interests

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New York's law descends date back to at least 1836. See *supra* at 22-23. That makes such laws considerably more longstanding than the regulatory measures that this Court described as "longstanding"—and therefore "presumptively valid"—in *Heller*, 554 U.S. at 626-627 n.26. Laws dispossessing felons "were unknown before World War I," C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 Harv. J.L. & Pub. Pol'y 695, 708 (2009), and laws barring possession by the mentally ill originated in the 1930s, Carlton F.W. Lawson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 Hastings L.J. 1371, 1376-77 (2009).

in public safety and crime prevention" to pass constitutional muster, *id.* at 97.[10]

Petitioners make no effort to refute this aspect of the Second Circuit's decision in *Kachalsky*, which the court below relied upon. Add. at 2. Specifically, petitioners contest neither that New York has an "undeniably compelling interest in protecting the public from gun violence," *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting), nor that the fit between that compelling interest and New York's licensing scheme is sufficiently close to withstand constitutional review. Nor do petitioners take issue with the decision of the Second Circuit and many other courts of appeals to apply intermediate scrutiny to laws that carry forward the centuries-long tradition of regulating the carrying of firearms in public. *See, e.g.*, *Kachalsky*, 701 F.3d at 94-101. Instead, petitioners assert in conclusory manner, without citing any supporting facts or evidence, that public carry laws like New York's "fail under any mode of constitutional scrutiny." Pet. 26. Here again, petitioners are mistaken.

1. Empirical evidence strongly supports the efficacy of New York's public carry licensing regime in serving the State's public safety and crime prevention interests. As the Second Circuit explained, New York first enacted this scheme in response to a 1911 New York Coroner's Office Report that connected a marked increase in firearm-related homicides and suicides to the increased prevalence of concealable firearms in public. *Kachalsky*,

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[10] As *Heller* recognized, and as the D.C. Circuit has subsequently observed, heightened scrutiny is not the same as an "interest-balancing inquiry." *Heller v. District of Columbia*, 670 F.3d 1244, 1265 (D.C. Cir. 2011) ("*Heller II*") (quoting *Heller*, 554 U.S. at 634).

701 F.3d at 85-86 (citing *Revolver Killings Fast Increasing*, *supra*). Adopting the recommendations of this report, New York enacted a licensing scheme that limited the public carrying of handguns to those who could show proper cause. Ch. 608, § 1, 1913 N.Y. Laws at 1627-30. And in the intervening century, empirical studies and data have confirmed the New York legislature's judgment. *See Kachalsky*, 701 F.3d at 99.

To take just a few examples, studies have shown that jurisdictions that impose some controls on public carrying experience significantly lower rates of gun-related homicides and other violent crimes, including shootings of law enforcement officers;[11] that gun owners are more likely to be the victims of gun violence when they carry their weapons in public;[12] and that increased gun carrying among potential victims may cause criminals to carry guns more often themselves, with the end result that street crime becomes more lethal.[13]

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[11] *See* John J. Donahue et al., *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Controls Analysis*, 16 J. Empirical Legal Stud. 198 (2019); *see also Peruta*, 824 F.3d at 943 (Graber, J., concurring) (noting how "heightened restrictions on concealed-carry permits in many jurisdictions" have caused "statistically reduced violence by permit holders," including violence against law enforcement officers).

[12] *See* Charles C. Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 Am. J. Pub. Health 2034 (2009).

[13] *See* Philip Cook et al., *Gun Control After* Heller*: Threats and Sideshows from a Social Welfare Perspective*, 56 U.C.L.A. L. Rev. 1041, 1081 (2009).

Courts evaluating cognate laws have recognized the broad empirical support for the laws' salutary effects on public safety and crime prevention. The Fourth Circuit concluded based on the empirical evidence that controlling access to the public carrying of handguns protects citizens and inhibits crime by (1) lessening the likelihood that basic confrontations between individuals would turn deadly; (2) decreasing the availability of handguns to criminals via theft; and (3) curtailing the presence of handguns during routine police-citizen encounters. *Woollard*, 712 F.3d at 879-80. Other courts have relied on similar evidence. *E.g.*, *Peruta*, 824 F.3d at 944 (Graber, J., concurring) ("Several studies suggest that 'the clear majority of states' that enact laws broadly allowing concealed carrying of firearms in public 'experience increases in violent crime, murder, and robbery when [those] laws are adopted.'" (citations omitted)).

Granted, there are "studies and data challenging the relationship between handgun ownership by lawful citizens and violent crime," as the Second Circuit candidly recognized. *Kachalsky*, 701 F.3d at 99. But when reviewing the constitutionality of a statute under intermediate scrutiny, this Court has long accorded "substantial deference to the predictive judgments" of the legislature on public policy questions that fall outside the courts' competence. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) ("*Turner II*"). This is because "the legislature is 'far better equipped than the judiciary' to make sensitive public policy judgments (within constitutional limits)" on complex empirical questions like "the dangers in carrying firearms and the manner to combat those risks." *Kachalsky*, 701 F.3d at 97 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) ("*Turner I*")). The role of the courts is

thus simply "to assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence." *Turner II*, 520 U.S. at 181 (quoting *Turner I*, 512 U.S. at 666). That standard is easily met here: the New York legislature's predictive judgment concerning the efficacy of its public carry law in reducing gun violence is rationally supported by a substantial body of empirical data, notwithstanding the existence of some data supporting a contrary view.

2. The Second Circuit also correctly concluded that New York's law is sufficiently limited in scope. "[I]nstead of forbidding anyone from carrying a handgun in public," the court explained, "New York took a more moderate approach to fulfilling its important objective and reasonably concluded that only individuals having a bona fide reason to possess handguns should be allowed to introduce them into the public sphere." *Kachalsky*, 701 F.3d at 98-99. The law thus restricts no more conduct than is necessary to advance its public safety objectives: it allows individuals who have "an articulable basis for believing they will need the weapon for self-defense" to carry a handgun in public without restriction, *id.* at 100, while at the same time imposing greater restrictions on those who lack such a basis. Even for those individuals, the law does not completely deny the right to carry firearms in public; instead, as occurred with the individual petitioners here, it allows them to carry for specific purposes such as hunting, target practice, and employment. In all these respects, New York's licensing scheme is sufficiently "oriented to the Second Amendment's protections" to withstand constitutional review. *Id.* at 98.

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In sum, the Second Circuit correctly recognized that New York's longstanding public carry licensing regime is constitutional. The licensing regime has existed in the same form for over a century and comports with a long tradition of state and local regulations restricting the carrying of firearms in public. It takes a "measured approach" that "neither bans public handgun carrying nor allows public carrying by all firearm owners." *Drake*, 724 F.3d at 440. And it manifestly serves the State's compelling interests in protecting the public.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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