No. 20-843

In the Supreme Court of the United States

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

v.

KEVIN P. BRUEN, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF NEW YORK STATE POLICE, ET AL.,
Respondents.

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

BRIEF OF GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Giffords Law Center to Prevent Gun Violence is a nonprofit policy organization dedicated to researching, writing, enacting, and defending laws and programs proven to reduce gun violence and save lives. Founded in 1993 after a gun massacre at a San Francisco law firm, the organization was renamed Giffords Law Center in October 2017 after joining forces with the gun-safety organization led by former Congresswoman Gabrielle Giffords.

Today, Giffords Law Center provides free assistance and expertise to lawmakers, advocates, legal professionals, law-enforcement officials, gun-violence survivors, and others seeking to make their communities safer from gun violence. Its attorneys track and analyze firearm legislation, evaluate policy proposals regarding gun-violence prevention, and participate in Second Amendment litigation nationwide. The organization has provided courts with *amicus* assistance in many important cases involving guns and gun violence.

[1] Pursuant to Supreme Court Rule 37.6, Giffords Law Center states that no counsel for a party authored this brief in any part, and that no person or entity, other than Giffords Law Center and its counsel, made a monetary contribution to fund its preparation and submission. All parties consented to the filing of this brief.

INTRODUCTION & SUMMARY OF ARGUMENT

I. Second Amendment rights are "intimately connected to the right to self-defense." Pet'rs' Br. 1. But that broad principle does not resolve the specific question at hand. Instead, it directs attention to history, which illuminates the scope of the self-defense right. As Respondents show, New York's proper-cause requirement for an unrestricted public concealed-carry license is supported by centuries of state and local practice. We identify a distinct tradition further supporting New York's law: longstanding Anglo-American principles of self-defense. This case thus falls at the intersection of two historical traditions—regulating the public *carrying* of firearms and regulating their *use* for self-defense—which overlap and complement each other in confirming the constitutionality of New York's licensing scheme.

Principles of self-defense are central to the constitutional inquiry. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), this Court recognized an individual right centered on self-defense. Both opinions keyed their analysis to past practice. And neither opinion suggested that the Second Amendment protects conduct that exceeds settled principles of self-defense in criminal and tort law; in other words, neither opinion constitutionalized or rewrote the common law of self-defense. So the right recognized in *Heller* and *McDonald* is a right to keep and bear arms for historically lawful self-defense purposes—and an understanding of those purposes clarifies the nature (and limits) of Second Amendment rights.

More specifically, the history of self-defense principles offers three lessons, each supporting the constitutionality of New York's modest regulation.

First, under the castle doctrine, the right to self-defense with lethal weapons was at its zenith in the home—and substantially diminished in public. This rule followed from the principle that the modern state maintains a presumptive monopoly on the legitimate use of lethal force. Within the public sphere of this "king's peace" (as it was originally known), individuals had a duty to retreat if reasonable before resorting to lethal force in self-defense. Only in the home did the common law disavow that duty and authorize immediate, lethal self-defense. In this respect, the individual right to use lethal force in self-defense has always received far greater protection within a person's home than in public—where the police power, rather than an individual right to self-defense, principally guaranteed personal safety.

Second, under the necessity doctrine, the right to lethal self-defense has long been subject to a showing of specific, immediate, and personal need. As one court put the point, self-defense "is the natural and inalienable right of every human being; . . . But still, it is a law of necessity; . . . The necessity and the right are from their nature co-extensive and concurrent." *Lander v. State*, 12 Tex. 462, 476 (1854). The common law thus required a person to show a good reason to act in lethal self-defense—much as New York requires a person to show a good reason before affording an unrestricted license to carry a concealed gun for lethal self-defense.

Finally, under the excuse doctrine, a person who used force in self-defense would not be acquitted at common law; instead, such self-defense would serve solely as a basis to seek a royal pardon and release from imprisonment upon forfeiture of property. In this respect, the self-defense right was neither automatic nor unlimited. Instead, it required express invocation of (and appeal to) sovereign authority and permission. Requiring a person to show proper cause before conferring a license to carry a lethal weapon for self-defense is fully consistent with this historical understanding of the excuse of self-defense.

II. Petitioners' view of the Second Amendment right conflicts not only with history but also with our broader constitutional structure—and it is tinged with threats of vigilantism.

As was true in the age of the king's peace, the Constitution aims to establish a system of justice and secure a peaceful society. It does so by creating structures of government and protecting individual rights. Within that framework—which strives to minimize the circumstances where private violence is necessary (or legally permissible)—it would be highly incongruous to allow people to carry deadly weapons in abstract contemplation of the potential need for private violence. That is not our tradition.

At bottom, Petitioners' arguments hinge on a startling claim: that the Constitution mandates a substantial role for private violence and the threat of such violence in sustaining public safety. That argument is unmoored from history and tradition. It is at odds with

constitutional structure. And it exalts vigilantism at the expense of First Amendment values. Experience confirms that declaring unbounded rights to carry firearms in public will chill rights of speech, assembly, and prayer (especially for groups including women and racial minorities). In this tense, polarized moment, that would be deeply unwise. Now more than ever, we need democratic discourse—not vigilante violence—to uphold civil order and pursue our constitutional ideals.

ARGUMENT

I. Traditional Principles of Self-Defense Support the Constitutionality of New York's Law

Heller held that the Second Amendment protects an individual right to keep and bear arms for self-defense. *See* 554 U.S. at 626-627. But that right is "not unlimited" and does not allow a person to "keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. Because the Second Amendment "codified a pre-existing right" based in English and colonial tradition, its protections are governed by past practice and do not cast doubt on "longstanding prohibitions." *Id.* at 603, 626; *see also McDonald*, 561 U.S. at 768.

As Respondents explain—and as many Courts of Appeals have concluded—public-carry licensing schemes (like the New York law challenged here) rest firmly on centuries of tradition. *See* Resp'ts' Br. 3-6, 21-36; *see also Young v. Hawaii*, 992 F.3d 765, 813 (9th Cir. 2021) (en banc) ("Our review of more than 700

years of English and American legal history reveals a strong theme: government has the power to regulate arms in the public square."); *Gould v. Morgan*, 907 F.3d 659, 670 (1st Cir. 2018); *Peruta v. County of San Diego*, 824 F.3d 919, 932 (9th Cir. 2016) (en banc); *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 882 (4th Cir. 2013); *Kachalsky v. County of Westchester*, 701 F.3d 81, 100-01 (2d Cir. 2012).

That understanding is supported by a related Anglo-American tradition: the common law of self-defense. As *Heller* observed, self-defense is "the central component" and "core lawful purpose" of the Second Amendment right. 554 U.S. at 599, 630. Yet self-defense is a distinct legal principle with its own history, tradition, and doctrine. If the Second Amendment exists to protect an individual right to carry deadly arms for self-defense, then the scope of the Second Amendment cannot be understood without reference to the circumstances in which our legal traditions have authorized the use of lethal force in self-defense.

This history confirms the constitutionality of New York's proper-cause requirement in three respects: first, it reinforces the importance of the home/public distinction; second, it shows that the government has long imposed preconditions on lethal self-defense; and finally, it refutes any assertion that the self-defense right is absolutely or solely the prerogative of individuals without state involvement. *See* Eric Ruben, *An Unstable Core: Self-Defense and the Second Amendment*, 108 Cal. L. Rev. 63, 66-67 (2020) ("[T]he limitations of lawful self-defense can inform Second

Amendment doctrine by lending principled requirements and procedures for the right to keep and bear arms."). New York's law thus rests at the intersection of two legal traditions—one focused on *carrying* weapons in public for self-defense, the other focused on *using* weapons in public for self-defense.

A. Origins of Self-Defense Doctrine

The story of self-defense in Anglo-American law begins with the rise of the "king's peace." In medieval England, given the absence of effective law enforcement and the Crown's limited role in criminal justice, violent self-help was frequently necessary and leniently punished. *See* 2 Sir Frederick Pollock & Frederic W. Maitland, *History of English Law Before the Time of Edward I* 447-49 (1895) (describing this period as "a time when law was weak, and its weakness was displayed by a ready recourse to outlawry"). As England developed into a modern state, the Crown expanded its jurisdiction over law enforcement. *See* Assize of Clarendon (1166). A centralized sovereign system of criminal justice—and with it the domain of the king's peace—eventually supplanted private justice and the ready resort to violent self-help characteristic of the medieval era. *See* Frederic W. Maitland, *The Forms of Action at Common Law* 10-11 (1936).

Accompanying this new regime was the institution of a state "monopoly on coercion resting on deadly force." K.J. Kesselring, *Making Murder Public: Homicide in Early Modern England, 1480-1680* 18 (2019). Law enforcement and criminal prosecution were now the prerogatives of the government,

not the individual. *See id.* By default, wronged individuals were required to seek justice from the state—not to rely on private violence or self-help. As William Blackstone explained, in a "well-regulated community . . . instead of attacking one another for injuries past or impending, men need only have recourse to the proper tribunals of justice." 4 William Blackstone, *Commentaries on the Laws of England* *182, *185 (William Carey Jones ed., 1916).

In time, the use of private violence came to be heavily disfavored—indeed, even punishable by the state. By the seventeenth century, the use of deadly force (even in self-defense) had evolved from a *de facto* private right to a *de jure* "public wrong." 4 Blackstone, *supra*, at *176-78; *accord* Edward Coke, *The Third Part of the Institutes of the Laws of England* 47 (1797). The newly evolved criminal law regulated the private use of force in self-defense "to caution men how they venture to kill another upon their own private judgment." 4 Blackstone, *supra*, at *187.

Thus, even as the common law came to authorize lethal self-defense in the centuries preceding ratification of the United States Constitution, it did so cautiously and subject to substantial regulation. *See* Darrell A. H. Miller, *Self-Defense, Defense of Others, and the State*, 80 Law & Contemp. Probs. 85, 86 (2017) ("[S]elf-defense . . . has been far from inalienable, individual, or innate. Instead it has been heavily conditioned and constructed by the state."). The legal doctrines that came to structure the right of self-defense offer lessons for any understanding of that right—and

those lessons firmly support the challenged New York law.

B. The Castle Doctrine

A defining feature of the self-defense right at common law was the "duty to retreat." Under this principle, which remains with us today, an individual was required to retreat to safety where reasonable; he could resort to deadly force only when he had been driven "to the wall." 1 Matthew Hale, *Historia Placitorum Coronae* 479-80 (1736); *see* Frederic S. Baum & Joan Baum, *Law of Self-Defense* 16 & n.5 (1970) (citing *Erwin v. State*, 29 Ohio St. 186 (1876)); Seymour D. Thompson, *Homicide in Self-Defence*, 14 Am. L. Rev. 545, 547 (1880). However, the castle doctrine provided an important exception to this rule for the use of lethal self-defense at home—making clear that the individual self-defense right was subject to greater regulation in public than in the home.

The retreat rule itself was an expression of the modern state's drive to monopolize the deployment of lethal force. Because such conduct was the sovereign's prerogative, individuals were required to "apply to the law for redress" rather than take matters into their own hands. Francis Wharton, *The Law of Homicide* 268 (Frank H. Bowlby ed., 1907); *see* Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 839 (1882) ("The law may, and, in natural reason, should, in various circumstances, forbid the individual to protect even his undoubted rights in so extreme a way, when the courts are ready to give him redress."). In other words, before killing even "upon a principle of

self-preservation," one had a duty to retreat, "[b]ecause the king and his courts are the *vindices injuriarum* [avengers of injuries], and will give to the party wronged all the satisfaction he deserves." 4 Blackstone, *supra*, at *183, *185; *accord* 1 Hale, *supra*, at 481.

Early American law tracked these understandings of the self-defense right, consistent with the broader colonial adoption of English common-law principles. *See Com. v. York*, 50 Mass. 93, 109-10 (1845) (explaining that the 1692 Massachusetts provincial charter replicated "all the local laws made under the colonial government . . . [and] the laws of England, with some modifications, continued in force till the revolution"). Thus, early American courts held that retreat was required where reasonable, and a person who employed lethal self-defense in violation of that rule could be held guilty of resorting to violence instead of "[t]he machinery of the law." *Evans v. State*, 44 Miss. 762, 777-78 (1870). As one American court noted, even where a person "entertain[s] fears of bodily harm at the hands of his enemy," rather than resorting to lethal self-help, he should in most circumstances "have him placed under bonds to keep the peace." *Cummins v. Crawford*, 88 Ill. 312, 318 (1878).

The castle doctrine constituted the principal exception to the duty to retreat: an individual assailed in his home was *not* required to retreat before using deadly force to save himself from death or great bodily harm (or to save his property from felonious destruction). *See* Thompson, *supra*, at 554-55. This rule had foundations in the thirteenth century, when

individuals who killed a "housebreaker" in self-defense were acquitted because they were entitled to lethal self-help. *See* Thomas A. Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 Mich. L. Rev. 413, 440 (1976). As Sir Edward Coke wrote, "[I]f thieves come to a man's house to rob him, or murder, and the owner or his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing . . . ." *Semayne's Case* (1604) 77 Eng. Rep. 194, 195 (K.B.).

In this period, the castle doctrine was justified on the theory that the state—notwithstanding its public monopoly on the use of force—was unavailable to secure and vindicate personal rights within private dwellings. The doctrine "originated in those turbulent medieval times when every great land-owner lived in a fortification, and when the formula of the old law was literally true, that 'a man's house is his castle.'" Thompson, *supra*, at 554-55. Especially before the king's peace, "the King's protection [was] a matter not of common right but of privilege." Frederick Pollock, *The Expansion of the Common Law* 99 (1904). "Every man [was] entitled to maintain the peace of his own house," and thereby effectively stood in for the sovereign within his home. *See id.* Even as the modern nation-state asserted greater control over private violence in the public sphere, the castle doctrine persisted due partly to the unique status of the home as a place shielded from state intrusion. *See* 4 Blackstone, *supra*, at *223 ("[T]he law of England has so particular and tender a regard to the immunity of a man's house, that it styles it his castle, and will never suffer it to be

violated with impunity . . . ."); *accord* John G. Hawley & Malcolm McGregor, *Criminal Law* 132 (1896).

The colonies and early American states followed the common-law castle doctrine—and the Constitution more broadly adhered to traditions of greater protection for certain individual rights within the home. *See* U.S. Const. amends. III, IV; *see Caniglia v. Strom,* 141 S. Ct. 1596 (2021); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Stanley v. Georgia*, 394 U.S. 557 (1969).[2]

This history teaches a lesson applicable here: the right to self-defense has traditionally been understood very differently inside versus outside the home. Whereas individuals had a right to immediately use lethal force within their homes, they were elsewhere subject to a duty to retreat that reflected the state's primary role in affording protection and righting injustices. Accordingly, the self-defense right has never been absolute or unbounded: especially outside the home, the right was subject to preconditions arising from the state's presumptive monopoly over lethal force, the state's interest in redressing unlawful

[2] In a departure from centuries-old self-defense traditions, some states—not including New York—have recently enacted "Stand Your Ground" laws that eliminate the duty to retreat. *See Stand Your Ground*, Giffords L. Ctr. to Prevent Gun Violence, https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/stand-your-ground-laws (last visited Sept. 19, 2021). That trend began in 2005 and therefore does not affect the historical understanding of self-defense traditions for purposes of interpreting the Second Amendment. In any event, the recent wave of Stand Your Ground laws has undermined—not enhanced—public and personal safety, especially for women and people of color. *See id.*

action, and the dangers of opening the door to private violence and self-help. Following this tradition, New York's licensing regime governs carrying concealed guns in public, *not* on one's private property. And it is consistent with past practice for New York to require a showing of proper cause to carry lethal arms in public for self-defense.

C. The Necessity Requirement

The conditional, regulated nature of the self-defense right at common law was also reflected in the necessity doctrine: an individual who killed in self-defense could evade accountability only if his use of force was necessary under the circumstances. *See* 1 Hale, *supra*, at 478 (explaining that "homicide in defense of a man's own life, which is usually styled *se defendendo*," arose only from "necessity, which obligeth a man to his own defense and safeguard"); 1 William Hawkins, *A Treatise of the Pleas of the Crown* 69 (1716) ("It must be owing to some unavoidable Necessity, to which the Person who kills another must be reduced without any manner of Fault in himself.").

This understanding had deep foundations in Anglo-American political thought. Like the duty to retreat, the necessity requirement reflected the principle that the sovereign presumptively monopolizes the use of deadly force. This presumption ensures that the use of deadly force to maintain order is reserved not to individual vigilantism, but to institutions of government, which (in the modern state) afford due-process protections and other mechanisms of transparency and accountability. *See* Kesselring, *supra*, at 18. Only

where the state could not intervene given the immediacy of the circumstances, and the clarity of personal need, was lethal self-defense permitted. *See* Michael Foster, *Crown Cases* 274 (1792) (noting that self-defense properly arose "in cases of necessity, [where] individuals incorporated into society cannot resort for protection to the law of the society").

Early American courts followed English teachings on the rule of necessity. In 1790—in what appears to be the first reported case on self-defense in the United States—the New Jersey Supreme Court upheld a manslaughter conviction because the defendant had violated the necessity requirement in using a deadly weapon to oppose a battery. *See State v. Wells*, 1 N.J.L. 424, 430 (1790). Over the subsequent decades, many American courts echoed this idea. *See Lander*, 12 Tex. at 476 ("The right of self-defense rests upon the law of necessity."); *Cummins*, 88 Ill. at 318 (affirming judgment against defendant who had attempted to kill plaintiff although there was "no pretense that defendant was in any immediate danger of his life or of any bodily harm at the hands of plaintiff"). Courts showed no hesitation in applying such logic to self-defense committed with firearms. *See Head v. State*, 44 Miss. 731, 754 (1870) (holding that unless defendant accused of shooting could show "present, immediate and imminent" need for lethal self-defense, "the use of a deadly weapon [was] *prima facie* evidence of malice"); *State v. Thompson*, 9 Iowa 188, 191 (1859) (affirming trial instruction that assailed party may "resort[] to a concealed deadly weapon, and us[e] it in a deadly manner," only upon actual or apparent danger of death).

Establishing necessity required more than a generalized claim about potential risk. Courts looked to *immediate* necessity: in Blackstone's terms, the exercise of lethal self-defense required a showing of a "manifest danger [to] life, or enormous bodily harm." 4 Blackstone, *supra*, at *186. Killing in self-defense was thus limited to "sudden and violent cases; when certain and immediate suffering would be the consequence of waiting for the assistance of the law." *Id.* at *184; *see* Elliott Anthony, *A Treatise on the Law of Self Defense, Trial by Jury in Criminal Cases, and New Trials in Criminal Cases* 4 (1887) ("On that necessity the right to kill rests, and when the necessity ceases, the right no longer exists."). A vague fear that one might need to use lethal force to protect oneself from an unknown danger would not suffice to invoke the excuse of self-defense. *See* Bishop, *supra*, at § 872.

In this respect, the necessity requirement offers a helpful parallel to New York's licensing scheme (which mirrors many other licensing schemes in many other jurisdictions over the past several centuries). To lawfully exercise the right to self-defense, a person traditionally needed to show a concrete, particularized, and context-specific necessity. To lawfully obtain an unrestricted license to secretly carry a firearm to exercise the right to self-defense, a person in New York must similarly show proper cause. The history of self-defense thus supports this requirement: if a person must show a good reason to exercise the right to lethal self-defense, that person may also be required to show a good reason before carrying a deadly weapon for the anticipated purpose of exercising that very same right. *See* Ruben, *supra*, at 94, 97 ("[T]o the

extent modern good-cause statutes already bake necessity into the statutory scheme, that should insulate them, not undermine them, in the constitutional analysis.").

D. The Doctrine of Excuse

At common law, an individual who killed in self-defense would not be acquitted. Instead, because such homicide was deemed *excusable* rather than *justifiable*, he would raise his self-defense arguments in seeking a pardon through a direct appeal to the sovereign. If that appeal succeeded, he would receive a pardon, but would still be required to forfeit his property before obtaining release from imprisonment. In this respect, those who used lethal force in self-defense were subject to a burden on their rights far beyond any burden resulting from New York's licensing scheme. Not only was the self-defense right subject to preconditions like retreat and necessity, but it was also subject to an after-the-fact governmental determination of propriety and forfeiture of property. Although that paradigm has since evolved, the historical record confirms that our legal traditions tolerate far more substantial, *ex post* burdens on the right to self-defense than the modest *ex ante* licensing rule at issue in this case.

The division of homicide into the categories of felonious, justifiable, and excusable occurred in England amid the emergence of a public criminal justice system. *See* Green, *supra*, at 419-420, 483-84; 4 Blackstone, *supra*, at *178. Most homicides were *felonious*, leading to execution and forfeiture of lands to the Crown. *See* Green, *supra*, at 419, 483-84. *Justifiable*

homicide involved killing that was faultless, resulting in acquittal and the defendant's immediate release from jail. *See* Green, *supra*, at 419-20; 4 Blackstone, *supra*, at *178. A finding of *excusable* homicide, in contrast, did not lead to acquittal but served only as grounds for a sovereign pardon. *See* Green, *supra*, at 425; Joseph H. Beale, *Retreat from a Murderous Assault*, 16 Harv. L. Rev. 567, 569 (1903).

Homicide was *justifiable* only on the "command or express permission of the law," not as a pure "private right." 4 Blackstone, *supra*, at *186, *see id.* at *179. In other words, homicide was justifiable where it advanced state objectives such as "public justice," Bishop, *supra*, at § 619; "law enforcement and crime prevention," Rollin M. Perkins, *Perkins on Criminal Law* 1018 (2d Ed. 1969); or "prevention of a felony or an atrocious crime," Wharton, *supra*, at 348. For example, an individual committed a justifiable killing where he performed an execution "pursuant to an official order." Green, *supra*, at 437-38.

By contrast, killing in self-defense—including to prevent murder or rape—was deemed a form of *excusable* homicide. Consequently, an individual who had killed an attacker in self-defense would not have been acquitted. *See* 4 Blackstone, *supra*, at *183, *187 (homicide "*se defendendo*, upon a principle of self-preservation," was "in no case . . . absolutely free from guilt"). Instead, such an individual "deserv[ed] but need[ed] a pardon." 2 Pollock & Maitland, *supra*, at 477. He would have been convicted and imprisoned, and he would then use self-defense as a basis to seek a sovereign pardon and release from imprisonment.

See Green, *supra*, at 419-20, 425. In addition, he would be required to "forfeit all his goods and chattels" to the Crown to be released. Coke, *supra*, at 55; *accord* Green, *supra*, at 425. While certain of these medieval requirements relaxed over time, others lingered well past the Framing of the United States Constitution. *See* 2 Pollock & Maitland, *supra*, at 477-79 (forfeiture of goods might have been required even in the nineteenth century).

The persistence of this understanding of the consequences of killing in self-defense confirms that the state has always closely regulated lethal self-defense. Licensing schemes of the sort that New York has established for those who seek to carry a firearm in public for self-defense are consistent with—and in fact much less burdensome than—the traditional treatment of those claiming they were justified in using lethal force in self-defense.

*   *   *

Under *Heller* and *McDonald*, the Second Amendment centrally guarantees an individual right to keep and bear arms for the purpose of lawful self-defense. Understanding the traditional scope of the right to lawful self-defense in public settings thus illuminates the scope of the Second Amendment. And for the reasons given above, that history unequivocally supports the constitutionality of New York's proper-cause requirement for the issuance of unrestricted licenses to carry concealed firearms.

II. Departing from Traditional Self-Defense Principles Would Conflict with Constitutional Structure

The common-law understanding of self-defense set forth above is more than a historical curiosity. It is an essential part of any self-defense right grounded in tradition. And it rests on premises that remain vital to a peaceful, ordered society: the state's presumptive monopoly on the use of deadly force outside the home, the state's assumption of a primary role in redressing wrongs that may spark violence, and the dangers of incentivizing resort to private self-help. Although we have long passed the age of the king's peace, the Constitution of the United States takes up the same challenges of "establish[ing] Justice," "insur[ing] domestic Tranquility," and "promot[ing] the general Welfare."

In seeking to achieve those goals, the Constitution does not place principal reliance on vigilantism. For that reason, the carrying of concealed firearms outside the home—which is itself only one aspect of the right to keep and bear arms—has historically played a minor role in the Constitution's endeavor to ensure public order. *See* Eric Ruben, *Law of the Gun: Unrepresentative Cases and Distorted Doctrine*, 107 Iowa L. Rev. (forthcoming 2021). Indeed, for most people in most circumstances for most of American history, it has not been the right to carry guns in public that provided security as they went about their daily lives. If anything, the historical record reveals powerful legal traditions reflecting the belief that widespread public carrying of guns would *threaten* public safety and expose people to danger. Rather than

relying on an armed citizenry to sustain a version of the king's peace, the Constitution instead deploys many other rights and structures. And consistent with longstanding regulatory practices and self-defense principles, it has long allowed the citizenry latitude to determine when authorizing public carry for self-defense will facilitate or undermine their own security.

A. The Constitution and Public Safety

Common-law limitations on self-defense rights reflected an understanding that it was the sovereign's responsibility to maintain the peace and punish wrongdoing. Within that framework, the self-defense right was treated not as an inviolable individual prerogative, but rather as a carefully bounded excuse defined by reference to deeper public-policy considerations.

So too in the United States. It is commonplace to discuss the many ways in which the Constitution protects "We the People" from a tyrannical federal government. But the Constitution also seeks to create a safe and secure society in which "We the People" coexist peacefully as we go about our lives. To that end, the Constitution does not contemplate a lawless state of nature. Through the structures of government that it establishes—and the individual rights that it protects—the Constitution strives toward public order. In so doing, it relies on the government and our democratic system, rather than citizens publicly carrying deadly weapons for violent self-help, to assure individual safety. Consistent with that framework, the right of self-defense (and the corresponding right to carry

weapons in public for that purpose) is limited in scope—since it may in some cases hinder rather than advance the Constitution's public-safety purposes.

Many aspects of the Constitution's design operate to promote public safety and personal security. For starters, it empowers both the states and the federal government to enact and enforce a criminal code. *See* U.S. Const. amend. X (states); *id.* art. I, § 8, cl. 3 (federal government); *id.* art. I, § 8, cl. 18 (federal government). At the same time, it disciplines and regulates the exercise of criminal justice authority. *See id.* amends. IV, V, VI, VIII. And it more broadly authorizes the states and the federal government to enact policies that enhance the general welfare, sustain order, and mitigate the socioeconomic conditions that may precipitate private strife. *See id.* art. I, § 8; *id.* amend. X.

The Constitution also establishes the federal courts as a forum to peacefully resolve private grievances, so that they do not spiral into violent self-help. *See id.* art. III; *id.* amend. VII. It creates an accountable Legislature and an energetic Executive so that the federal government can respond as necessary to new or evolving threats, including private violence. *See id.* arts. I, II; *see also, e.g.*, 42 U.S.C. § 1985(3). It imposes checks and balances to protect minority rights and avoid domestic discord. *See* U.S. Const. arts. I, II. It provides for a system of federalism to encourage responsive governance, so that communities can more effectively address local evils and adjudicate local controversies. *See Printz v. United States*, 521 U.S. 898, 918-22 (1997); *New York v. United States*, 505 U.S.

144, 155-59, 168-69 (1992). And it establishes rights and governmental structures that together protect the rule of law, promoting nonviolent methods for resolving disputes throughout American culture. *See* U.S. Const. art. III; *id.* amend. I, V, XIV.

Additionally, the Constitution's protection of individual rights can reduce social friction and function as a safety valve. The freedom of speech affords "a method of achieving a . . . more stable community" because it allows for discourse and dissent in forms "consistent with law and order." Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 884-85 (1963); *see also Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[T]he path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies . . . ."). Prohibitions against religious establishment and discrimination "embody an understanding, reached in the 17th century after decades of religious war, that liberty and social stability demand a religious tolerance." *Zelman v. Simmons-Harris*, 536 U.S. 639, 718 (2002) (Breyer, J., dissenting). Similarly, the Constitution's requirement of the equal protection of the laws, its rule that private property cannot be taken without just compensation, and its insistence upon procedural and substantive due process in official action all mitigate private violence in our society.

Our system of government is not perfect. No system is. There is much to criticize and debate in every aspect of the constitutional plan just described. Still, it is a system bristling with mechanisms to promote the rule of law—and to minimize private

violence, vigilantism, and self-help. And it pursues that goal far more devotedly (and ably) than any English monarch could.

Indeed, democratic institutions like those in the United States succeed in promoting a less violent society. *See* Susanne Karstedt, *Democracy, Values, and Violence: Paradoxes, Tensions, and Comparative Advantages of Liberal Inclusion*, 605 Annals Am. Acad. Pol. & Soc. Sci. 50, 73 (2006). Homicide rates are lower in democratic societies due partly to the government's monopoly on violent force. *See* Ted Piccone, Brookings Inst., *Democracy and Violent Crime* 2-3 (Sept. 2017). And countries with effective criminal justice systems "report lower propensity of resorting to violence to redress personal grievances." OECD, *Effectiveness and Fairness of Judicial Systems*, *in Government at a Glance 2015* 188, 188 (2015).

In light of the Constitution's framework for protecting public safety—which echoes the age of the king's peace in prioritizing state action over private violence—it is unsurprising that Americans have long followed English common law in narrowly defining the right to self-defense (and in limiting the scope of the right to carry lethal weapons in public for self-defense purposes).

While the Second Amendment, too, is part of the constitutional plan, the right it protects has always been subject to important limitations. The logic of those limits is straightforward. There are indeed circumstances where violent self-defense is allowed within our legal system. In at least some cases, having

a firearm may facilitate the exercise of that self-defense right. But private violence can also be dangerous and destabilizing, and individual self-help (unchecked by law) poses threats to our society. Even presuming that self-help occasionally has some beneficial value, that value must be balanced against the strong likelihood that firearms will be misused, resulting in lethal harm.

Simply put, carrying a gun in public makes it more likely it will be fired—rightly or wrongly. Holding that individuals have a right to carry a firearm in public at all times (since they may someday need it for self-defense) therefore risks causing a significant increase in wrongful private violence. And that would undermine the Constitution's goal of creating a peaceful society governed by the rule of law. *See* Ruben, *An Unstable Core*, *supra*, at 100 (it would be "wildly over-inclusive" to protect "gun carrying during times when the need for self-defense with a gun is remote or non-existent, which in turn could present a threat to public safety").[3]

Our tradition resolves these tensions by recognizing the right to keep and bear arms for self-defense, and by recognizing limits on the scope of that right that reflect the history of self-defense principles in

[3] Importantly, empirical evidence confirms that increasing access to guns can fuel aggression, *see* Craig A. Anderson *et al.*, *Does the Gun Pull the Trigger? Automatic Priming Effects of Weapon Pictures and Weapon Names*, 9 Psych. Sci. 308 (1998), and that threat identifications are often inaccurate or racially biased, *see* John Paul Wilson *et al.*, *Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat*, 113 J. Personality Soc. Psy. 59, 74 (2017).

Anglo-American law. One such limit is that cities and states enjoy substantial discretion in imposing licensing schemes for the public carrying of firearms. *See* Resp'ts' Br. 3-6, 21-36. This allows local variation responsive to shifting democratic decisions and public safety considerations. And it furthers important constitutional values, including our commitment to peaceful coexistence in a safe, secure, ordered society.

B. The Constitution and Vigilantism

For the reasons just given, Petitioners' position conflicts with our history and tradition of self-defense rights—and does so in a manner that risks discord within the constitutional plan. One dimension of that conflict is especially significant: the choice it frames between democratic order and vigilante justice, between the First Amendment and Petitioners' vision of the Second.

In our constitutional system, First Amendment rights are the lifeblood of democracy. They nurture political discourse, debate, resistance, and evolution. But if Second Amendment rights are expanded beyond their historical limitations, they risk colliding directly with core First Amendment protections: if more people are allowed to carry guns in more public places without establishing proper cause for doing so, it will become much more dangerous to speak, assemble, pray, or express controversial ideas in public settings. *See* Gregory P. Magarian, *Conflicting Reports: When Gun Rights Threaten Free Speech*, 83 Law & Contemp. Probs. 169, 169 (2020) ("In the real world . . . guns far more commonly impede and chill free speech than

protect or promote it."). Those who have historically been silenced—including racial minorities—may experience an especially intense chilling effect. *See Armed Assembly: Guns, Demonstrations, and Political Violence in America*, Everytown Rsch. & Pol'y (Aug. 23, 2021). In practice, the abstract promise of First Amendment rights affords little assurance against hostile listeners bearing concealed handguns or tactical rifles for "self-defense." Recent experience proves the point. *See* David Welch, *Michigan Cancels Legislative Session to Avoid Armed Protesters*, Bloomberg News (May 14, 2020); Dahlia Lithwick & Mark Joseph Stern, *The Guns Won*, Slate (Aug. 14, 2017) ("When the police are literally too afraid of armed protesters to stop a melee, First Amendment values are diminished; discussion is supplanted by disorder and even death . . . .").

It cannot be denied that these are tense times in American society. *See* Grace Kay, *A Majority of Americans Surveyed Believe the US Is in the Midst of a 'Cold' Civil War*, Bus. Insider (Jan. 13, 2021); Ezra Klein, *Why We're Polarized* (2020). Massive protests have occurred throughout the Nation in recent years—and far too many have been shadowed by armed individuals, including some who deliberately wield their weapons to chill and terrify. *See* Michele L. Norris, *We Cannot Allow the Normalization of Firearms at Protests to Continue*, Wash. Post (May 6, 2020) ("Accepting and even expecting to see firearms at protest rallies means that we somehow embrace the threat of chaos and violence. While those who carry say they have no intention of using their weapons, the firepower alone creates a wordless threat, and something

far more calamitous if even just one person discharges a round."). We have also seen more instances where firearms are publicly carried in willful efforts to menace lawmakers and public servants. *See* Robyn Thomas, *Armed Protesters Inspire Fear, Chill Free Speech*, Giffords L. Ctr. to Prevent Gun Violence (Aug. 12, 2021) (collecting cases).

In these fraught circumstances, a single spark could lead to carnage and tragedy. Now more than ever—as weapons possessed for self-defense are repurposed as tools to censor and intimidate—cities and states must retain their traditional right to regulate the public carrying of lethal firearms. Only then can we safely enjoy our historic First Amendment rights, and collectively pursue the Constitution's promise of democracy.

To be sure, there are those who reach the exact opposite conclusion, insisting that the rise in social discord makes it more urgent to hold that everyone can carry a firearm in public. But that gets things backwards—and marks a path toward violent vigilantism squarely inconsistent with the constitutional plan.

Substantial experience teaches that firearms are unlikely to provide an antidote to the strife and polarization of our age. When carried in public, they too often raise blood pressures and magnify the risk of violence where calm and understanding are desperately needed. In cases where guns do succeed in cooling tempers, it usually comes at the price of terrifying

others into retreat or suppressing the exercise of First Amendment rights.

More disturbingly, the notion that we should carry guns as a response to social discord arises from an overtly vigilante mindset: the belief that private self-help is a credible first resort, that lethal violence is always an immediate possibility, that the threat of violence must be omnipresent, that it is up to each of us to impose order and redress wrongs. This vigilante mindset runs contrary to the basic constitutional plan. *See supra*. It is the path to anarchy and private violence—and a continuing betrayal of First Amendment principles, which cannot flourish at gunpoint.

Some likewise claim that expanding public carry rights could help mitigate racial injustice. But this argument suffers from similar flaws. As a historical matter, calls for self-help and private policing are deeply entangled with efforts to oppress racial minorities. *See Ku Klux Klan*, S. Poverty L. Ctr., https://www.splcenter.org/fighting-hate/extremist-files/ideology/ku-klux-klan (last visited Sept. 16, 2021); Michelle L. Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 70 (2d ed. 2020). Moreover, empirical evidence demonstrates that exercises of the right to self-defense are often invoked (and adjudicated) in ways that reinforce racial and gender prejudice. *See, e.g.*, Justin Murphy, *Are "Stand Your Ground" Laws Racist and Sexist? A Statistical Analysis of Racism and Sexism in 'Stand Your Ground' Cases in Florida, 2005-2013*, 99 Soc. Sci. Q. 439 (2018); Daniel Lathrop & Anna Flagg, *Killings of Black Men by Whites are Far More Likely to be Ruled*

"Justifiable," Marshall Project (Aug. 14, 2017); L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 Iowa L. Rev. 293 (2012). And in all circumstances, racial prejudice in American life will not be mitigated by authorizing the widespread carrying of guns and relying on the threat or actuality of private violence to maintain order.

Make no mistake: Petitioners' position rests ultimately on a startling account of the role that private violence (and the threat of such violence) should play in American life. That account conflicts with our history and offends the Constitution. It encourages unlawful vigilantism. And it would inevitably undermine fundamental First Amendment protections throughout the Nation.

This Court has previously rejected interpretations of the Second Amendment that would clash with the deeper structure of our democratic order. Most notably, *Heller* rejected claims that the Second Amendment's purpose is essentially insurrectionist: arming citizens to wage war against a tyrannical government. *See* 554 U.S. at 597-98. Sadly, however, dangerous impulses toward violence, vigilantism, and insurrectionism remain with us—and fester in some corners of American life. *See* Dmitry Khavin *et al.*, *Day of Rage: An In-Depth Look at How A Mob Stormed the Capitol*, N.Y. Times (June 30, 2021). Interpreting the Second Amendment's self-defense right as requiring unbounded public carry—in derogation of centuries of tradition—risks inflaming such vigilantism. And it would chill the exercise of rights protected by the First Amendment, the backbone of peaceful democratic

change and legitimate political resistance. *See* Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 Tex. L. Rev. 49, 53 (2012) ("We cannot have both First Amendment dynamism and Second Amendment insurrectionism—and we have made our choice.").

The First and Second Amendments can coexist harmoniously. But Petitioners' position needlessly calls them into conflict. The Constitution does not demand that we endure mortal terror when exercising First Amendment rights in public. It does not leave the American people powerless to address gun violence and the misuse of lethal force for self-defense in public. And it does not exalt private violence and vigilante justice over our shared commitment to democracy and the rule of law.

* * * * *

If the Second Amendment is truly grounded in the right to self-defense—as this Court held in *Heller* and *McDonald*—then self-defense principles must shape its scope. The right to self-defense has always been a narrowly defined, expressly regulated exception to the presumptive rule against private violence (*i.e.*, the king's peace). Given that history, an individual right to keep and bear arms for potential future self-defense offers no warrant to turn public squares into dueling grounds. Instead, consistent with our legal traditions, it allows cities and states to require a showing of proper cause before providing a public-carry license.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Second Circuit.

Respectfully submitted,

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