

No. 18-280

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**In the  
Supreme Court of the United States**

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New York State Rifle & Pistol Association, *et al.*,

*Petitioners,*

v.

The City of New York, *et al.*,

*Respondents.*

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

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**BRIEF OF AMICI CURIAE  
NATIONAL SHERIFFS' ASSOCIATION *ET AL.*  
IN SUPPORT OF PETITIONERS  
(*AMICI* LISTED ON INSIDE COVER)**

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The following eighteen law enforcement groups and state and local firearms rights groups are *amici curiae* in this case:

National Sheriffs' Association  
Western States Sheriffs' Association  
California State Sheriffs' Association  
Indiana Sheriffs' Association  
New Mexico Sheriffs' Association  
International Law Enforcement Educators and Trainers Association  
Law Enforcement Legal Defense Fund  
International Association of Law Enforcement Firearms Instructors, Inc.  
Association of New Jersey Rifle & Pistol Clubs, Inc.  
Bridgeville Rifle and Pistol Club, Ltd.  
Buckeye Firearms Association  
Connecticut Citizens Defense League  
Delaware State Sportsmen's Association  
Gun Owners' Action League Massachusetts  
Maryland State Rifle & Pistol Association  
Vermont Federation of Sportsmen's Clubs  
Vermont State Rifle & Pistol Association  
Virginia Shooting Sports Association

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**INTEREST OF *AMICI CURIAE*<sup>1</sup>****National Sheriffs' Association**

The National Sheriffs' Association ("NSA") is a 26 U.S.C. § 501(c)(4) non-profit organization formed in 1940. It works to promote the fair and efficient administration of criminal justice throughout the United States, and to promote, protect, and preserve the many Offices or Departments of our country's Sheriffs. The NSA has over 21,000 members and is a strong advocate for over 3,000 individual Sheriffs located throughout the Nation. Over 99% of the NSA's member Sheriffs are directly elected by the citizens living in the respective local counties, cities, and parishes. The NSA promotes the public-interest goals and policies of law enforcement in our Nation, and it participates in judicial processes (such as this case) where the vital interests of law enforcement and its members are at stake.

**Western States Sheriffs' Association**

The Western States Sheriffs' Association ("WSSA") was established in 1993, and consists of more than three hundred members from sixteen member states (Arizona, California, Colorado, Idaho, Montana, North Dakota, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, South Dakota, Texas,

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<sup>1</sup>No party's counsel authored this brief in whole or in part. No party or party's counsel, and no person other than *amici*, their members, or their counsel contributed money that was intended to fund preparation or submission of this brief, except for partial funding expected to be provided by Gun Owners of California. All parties have consented to the filing of this brief by blanket consents.

Utah, Washington, and Wyoming). Most of these states have “shall issue” concealed carry permit systems and/or permitless carry, and WSSA members have observed first hand that individuals who voluntarily obtain a license or permit tend to be strongly law-abiding and do not endanger public safety when transporting their firearms.

#### **California State Sheriffs’ Association**

The California State Sheriffs’ Association is a nonprofit professional organization that represents each of the fifty-eight California sheriffs. It was formed to allow the sharing of information and resources between sheriffs and departmental personnel, in order to improve law enforcement throughout the state.

#### **Indiana Sheriffs’ Association**

The Indiana Sheriffs’ Association was established in 1930 to promote better communication and information sharing between sheriffs and law enforcement personnel, and was incorporated in 1977 as a non-profit organization. It represents the sheriff’s departments of all 92 counties in Indiana, and provides training and educational opportunities for those departments. It also works on legislative efforts to improve public safety consistent with constitutional guarantees of the Bill of Rights.

#### **New Mexico Sheriffs’ Association**

The New Mexico Sheriffs’ Association is a professional and educational organization dedicated to keeping the peace and to protecting the lives and property of the citizens of New Mexico. The elected New Mexico Sheriffs have the responsibility for

upholding the laws of the state of New Mexico and of the United States of America, including the United States Constitution and the Second Amendment. The Association serves the people and communities of New Mexico through professional assistance, education, and unity.

#### **International Law Enforcement Educators and Trainers Association**

The International Law Enforcement Educators and Trainers Association (“ILEETA”) is an association of 4,000 professional law enforcement instructors committed to the reduction of law enforcement risk, and to saving lives of police officers and the general citizenry through the provision of training enhancements for criminal justice practitioners. ILEETA’s *amicus* briefs were cited in *District of Columbia v. Heller* and in *McDonald v. Chicago*.

#### **Law Enforcement Legal Defense Fund**

Law Enforcement Legal Defense Fund (“LELDF”) is a 501(c)(3) non-profit organization, headquartered in Alexandria, Virginia, that provides legal assistance to law enforcement officers. LELDF has aided nearly one hundred officers, many of whom have been acquitted, mostly in cases where officers have faced legal action for otherwise authorized and legal activity in the line of duty. While LELDF supports measures that will further legitimate public safety interests, it does not support provisions that are ill-conceived and violate the constitutional rights of citizens.



**International Association of Law Enforcement  
Firearms Instructors, Inc.**

The International Association of Law Enforcement Firearms Instructors, Inc., is a non-profit association formed in 1981 whose 2,000-plus members come from local, state, and federal law enforcement agencies nationwide. It conducts approximately 20 police firearms training events annually, and publishes authoritative training standards and guidelines.

The following are state and local groups that promote the shooting sports, provide firearms safety training, enhance marksmanship, educate the public about firearms, and defend Second Amendment rights, including the right of ordinary citizens to lawfully carry and transport firearms for legitimate purposes such as self-defense: Association of New Jersey Rifle & Pistol Clubs, Inc., Bridgeville Rifle & Pistol Club, Ltd., Buckeye Firearms Association, Connecticut Citizens Defense League, Delaware State Sportsmen's Association, Gun Owners' Action League Massachusetts, Maryland State Rifle & Pistol Association, Vermont Federation of Sportsmen's Clubs, Vermont State Rifle & Pistol Association, and Virginia Shooting Sports Association. These organizations have numerous members who are current or former law enforcement officers.

Thus, *amici* are all organizations with members who are law enforcement officers or that support law enforcement officers and agencies. *Amici* believe that the perspective of front line law enforcement personnel and organizations should be of assistance in determining whether any interest in public safety

is served by New York City's rule prohibiting premises license holders from transporting their handguns in a locked, unloaded condition outside the city for lawful purposes. The gun clubs and firearms rights organizations can also provide valuable perspective on issues relating to firearms ranges and competitions.

### SUMMARY OF ARGUMENT

To reach the primary issue in this case—whether the ban on out-of-city transport imposed by 38 R.C.N.Y. § 5-23(a) (the “Rule”) violates the Second Amendment—requires the prior resolution of two major issues. First, does the Second Amendment apply outside the home? Second, if so, what is the proper constitutional standard of review: text, history, and tradition; strict scrutiny; intermediate scrutiny; or some other test? The Courts of Appeals are divided on the issue of whether the Second Amendment applies outside the home. Yet a large, well-designed study of defensive gun uses shows that nearly two-thirds of instances of defense with a firearm take place outside the home. The Second Circuit in this case purported to apply intermediate scrutiny, even though interest balancing tests were rejected in *Heller*. This brief addresses matters relating both to means-end scrutiny, and to the text, history, and tradition approach.

New York City already severely restricts the rights of citizens to possess, carry, and transport handguns outside the home. Individuals who possess a premises license constitute less than one-half of one percent of the city's adult population. The Second Amendment rights of premises licensees are

drastically curtailed even further by restricting transport to in-city ranges and limited hunting destinations in New York State. The Rule prevents licensees from transporting their handguns out of the city for practice, training, hunting, shooting competitions, repairs and modifications, appraisal, display at gun collector events, informal recreational shooting, and, most importantly, defense of self and loved ones when traveling outside the city.

The Rule's prohibition on the right to practice, train, and compete out of the city impairs the proficiency necessary for defense with a handgun. Experts recommend frequent training, using realistic scenarios, to acquire and maintain proficiency. Such practice and training, both by law enforcement and civilians, should be performed with the same handgun that will be used for defense. The assumption by the Court of Appeals that proficiency can be maintained by practice and competition outside the city with rented handguns is incorrect and unsupported by any evidence.

The public safety interest alleged to support the Rule is non-existent and unproven. There is no proof that premises licensees have ever posed a threat to public safety when transporting their handguns. The NYPD has a system that requires immediate, centralized reporting of any incidents involving a licensee. Yet, even though the License Division has the data regarding incidents, if any, of violence committed by premises licensees while transporting their handguns, the City has not identified a single instance of that occurring.

It is also highly implausible that premises

licensees would engage in violence when transporting their handguns out of the city. Licensees undergo exceedingly searching inquiries during the application process, and licenses can be refused for even trivial reasons. Accordingly, licensees as a group are likely to be highly law-abiding. Data from other jurisdictions show that concealed carry permit holders in “shall issue” states are extraordinarily law-abiding, much more so than the general public. Data from several large urban areas demonstrate that most murders and non-fatal shootings are committed by individuals who already have a criminal record, and thus are ineligible to receive a license.

The Rule must be held unconstitutional under a text, history, and tradition test as well. In the Founding period and early republic there was no tradition of banning peaceful carry or transport outside the home. Many of the Founding Fathers, including Patrick Henry, George Washington, John Adams, Thomas Jefferson, and James Madison carried or transported their firearms and used them outdoors.

From the time of independence until 1813, no state restricted peaceful carry of any kind. From 1813 until the beginning of the Mexican-American War in 1846, only eight out of twenty-eight states enacted any kind of limit on concealed carry. Court decisions from that era were unanimous that some kind of carry outside the home—open, concealed, or both—must be allowed in order to give effect to the constitutional right to keep and bear arms.

**ARGUMENT****INTRODUCTION**

The narrow issue in this case is whether forbidding transport by premises licensees of their locked and unloaded handguns to any place other than the two places specified in 38 R.C.N.Y. § 5-23(a) (“the Rule”) is unconstitutional under the Second Amendment. But to reach that issue, it must first be clarified whether the Second Amendment applies outside the home.

Some courts have held that, without further guidance from this Court, they will not “extend” the principles in *District of Columbia v. Heller*, 554 U.S. 570 (2008), outside the home. The Court of Appeals of Maryland characterized as “dicta” the statement in *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010), that “the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home.” It refused to recognize any Second Amendment right outside the home, stating “If the Supreme Court, in this dicta, meant its holding to extend beyond home possession, it will need to say so more plainly.” *Williams v. State*, 10 A.3d 1167, 1177 (Md. 2011). *See also United States v. Masciandaro*, 638 F.3d 458, 467 (4th Cir. 2011) (after *Heller* and *McDonald*, “there now exists a clearly-defined fundamental right to possess firearms for self-defense within the home,” but “a considerable degree of uncertainty remains as to the scope of that right beyond the home....”).

*Heller* concluded that the Second Amendment codifies a pre-existing “individual right to possess and

carry weapons in case of confrontation.” 554 U.S. at 592. The home may indeed be the place where “the need for defense of self, family, and property is most acute.” 554 U.S. 628. But many confrontations take place at locations outside the home. The best study of defensive gun uses by citizens against human aggressors shows that 62.1% of defensive uses take place outside the home itself. Gary Kleck and Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. OF CRIM. LAW AND CRIMINOLOGY 150, 185 (Fall 1995).

Some courts have assumed without deciding that the Second Amendment applies outside the home, usually as a preface to upholding the law in question against a Second Amendment challenge. *See, e.g., Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) (though Second Amendment rights are at their zenith within the home, the Second Amendment “must have some application in the very different context of the public possession of firearms,” and “[o]ur analysis proceeds on this assumption.”).

Others have squarely held that the right to keep and bear arms extends outside the home. Relying on the language of *Heller* itself, the D.C. Circuit explained:

to “bear” means to “wear, bear, or carry ... upon the person or in the clothing or in a pocket, for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another person.” [*Heller*] at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). That definition shows that the

Amendment's core must span, in the Court's own words, the "right to possess *and carry* weapons in case of confrontation." *Id.* at 592 (emphasis added).

*Wrenn v. District of Columbia*, 864 F.3d 650, 657-58 (D.C. Cir. 2017). *See also Moore v. Madigan*, 702 F.3d 933, 935-37 (7th Cir. 2012) (striking down Illinois' ban, with limited exceptions, on carrying a loaded handgun outside the home).

Some courts have upheld licensing schemes that effectively prevent carry of firearms outside the home against Second Amendment challenges. The Ninth Circuit has held that "the Second Amendment does not preserve or protect a right of a member of the general public to carry concealed firearms in public." *Peruta v. County of San Diego*, 824 F.3d 919, 924 (9th Cir. 2016) (en banc). Because California already prohibits most open carry, *Peruta* essentially banned any carry outside the home for self-defense in local jurisdictions where concealed carry permits are difficult or impossible for an ordinary citizen to obtain. The Third Circuit has also upheld New Jersey's *de facto* ban on carrying outside the home. *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); *Rogers v. Grewal*, No. 18-824, *cert. pending*.

If the right to keep and bear arms exists outside the home, it then becomes necessary to decide what the proper constitutional test is in such cases: text, history, and tradition;<sup>2</sup> strict scrutiny; intermediate

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<sup>2</sup> *See, e.g., Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014), *rev'd en banc* 824 F.3d 919 (9th Cir. 2016); *see also Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

scrutiny; or some other test. In this case, the Second Circuit purported to apply intermediate scrutiny, even though *Heller* rejected interest balancing tests. This brief addresses from a law enforcement perspective the burdens imposed by the Rule on the Second Amendment rights of premises licensees, and the state interests alleged to justify it. It also includes some historic perspective from the Founding period and early republic.<sup>3</sup>

**I. THE RULE SHARPLY RESTRICTS THE ALREADY SEVERELY BURDENED RIGHTS OF RESIDENTS TO CARRY, POSSESS, AND TRANSPORT HANDGUNS.**

**A. New York City severely burdens the rights of residents to possess handguns for lawful purposes such as self-protection.**

To put this case in context, it is necessary to understand that the City of New York has come close to eliminating the right of most of its residents to keep and bear arms. The restrictions at issue in this

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<sup>3</sup> This brief addresses only the Second Amendment issues, but *amici* agree with petitioners that the Rule is also unconstitutional under the Commerce Clause and the constitutional right to travel. The Association of New Jersey Rifle & Pistol Clubs, Inc., an *amicus* on this brief, operates the Cherry Ridge Range in New Jersey, and the Rule directly interferes with its ability to accommodate premises licensees from the city. ANJRPC also represents over 100 ranges and gun clubs in New Jersey, many of which are similarly affected. See ANJRPC, *Places to Shoot*, [https://www.anjrpc.org/page/places\\_to\\_shoot](https://www.anjrpc.org/page/places_to_shoot). In compliance with certain conditions, New Jersey law allows transport of firearms, by residents and non-residents, directly to ranges in New Jersey. N.J. Rev. Stat. § 2C:39-6.



case further encroach on that enumerated, fundamental, constitutional right.

One cannot even possess a handgun in New York City without going through an extraordinarily long, costly, intrusive, and discretionary licensing process. *See* Part II.B., below. There are several types of carry licenses in addition to the premises license at issue here. According to public records obtained by the New York Times, there are about 37,000 licensed individuals and nearly 4,000 of those have carry licenses. Jo Craven McGinty, *The Rich, the Famous, the Armed*, NEW YORK TIMES (Feb. 18, 2011).<sup>4</sup> These licensees do not include the 14,602 retired police officers who are licensed to have a handgun. *Id.* Thus, if things have not changed drastically over the past few years, there are something like 33,000 civilian premises license-holders in the city.<sup>5</sup>

The Census Bureau estimates New York City's population to be 8,398,748 as of July 1, 2018.<sup>6</sup> In the most recent census, 79% of the city's residents were 18 years old or older. Applying that percentage to the

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<sup>4</sup> <https://www.nytimes.com/2011/02/20/nyregion/20guns.html>.

<sup>5</sup> The Declaration of Andrew Lunetta, Commander of the NYPD License Division ("Lunetta Declaration"), states that there were currently (in 2014) approximately 40,000 active handgun licenses. JA 82. Because the declaration does not state whether the 40,000 figure includes licenses for retired police officers, it cannot be determined from that declaration how many civilian license holders there were at the time it was executed.

<sup>6</sup> New York City Department of City Planning, *Current Estimates of New York City's Population for July 2018*, <https://www1.nyc.gov/site/planning/data-maps/nyc-population/current-future-populations.page>.

2018 data, there are currently about 6,635,010 adults in the city. Thus, based on the number of premises licenses referenced above, less than one-half of one percent of adults in New York City can legally possess a handgun at home under a premises license. Even members of this tiny minority are forbidden by the Rule to transport their handguns outside the home except to a range in the city or while hunting in designated areas of New York State.<sup>7</sup> The only individuals who can carry or transport their handguns outside the home without those limitations are those 4,000 individuals with carry permits, who constitute only .0006 of the adult population of the city. Of the six types of carry licenses, most are limited as to time, place, and/or occupation (*e.g.*, security guards). R.C.N.Y. §§ 5-01, 5-23(b)-5-23(e).

By contrast, forty-two states plus the District of Columbia now have “shall-issue” concealed carry permit laws and/or allow permitless concealed carry.<sup>8</sup>

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<sup>7</sup> A licensee cannot even transport an unloaded, locked handgun to a gunsmith for repair without obtaining in advance written permission from the Division Head, License Division. 38 R.C.N.Y. § 5-22(a)(16).

<sup>8</sup> HANDGUNLAW.US, *United States of America*, <https://www.handgunlaw.us/states/usa.pdf>. The seventeen states with permitless concealed carry laws include Alaska, Arizona, Arkansas, Idaho, Kansas, Kentucky, Maine, Mississippi, Missouri, Montana, New Hampshire, North Dakota, Oklahoma, South Dakota, Vermont, West Virginia, and Wyoming. Idaho, Montana, North Dakota, and Wyoming limit the right to carry concealed without a permit to residents and/or have some geographical limits. The permitless carry laws of Kentucky, Oklahoma, and South Dakota go into effect later this year. HANDGUNLAW.US, *Permitless Carry States*, [http://www.handgunlaw.us/documents/Permitless\\_Carry\\_States.pdf](http://www.handgunlaw.us/documents/Permitless_Carry_States.pdf).

According to the Crime Prevention Research Center, over 17.25 million people in the United States have concealed carry permits, with most of these residing in “shall issue” states.<sup>9</sup> Overall, 7.14% of American adults have permits allowing concealed carry and in some states the percentages run into double digits. *Id.* Thirty states allow open carry without a license or permit, and fifteen more allow open carry with a permit.<sup>10</sup> In other words, both open and concealed carry is widely available to law-abiding citizens throughout most of the country, including many large urban areas. Only New York City and a handful of states have laws that amount to a ban on carrying by most law-abiding citizens.

**B. R.C.N.Y. § 5-23(a) imposes further serious restrictions on Second Amendment rights outside the home.**

R.C.N.Y. § 5-23(a) forbids all transport of handguns by premises license holders except for a very limited exception for hunting within New York State, and transportation to one of the seven “authorized” shooting ranges within the city. It thus bans transport of handguns to *all* places outside the city except for limited in-state hunting.

The Rule completely bans transport of a handgun to another state or country for *all* lawful purposes, including:

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<sup>9</sup> Crime Prevention Research Center, *Concealed Carry Permit Holders Across the United States: 2018* 3, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3233904](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3233904).

<sup>10</sup> OPENCARRY.ORG, *Media Summary*, <https://opencarry.org/maps/map-open-carry-of-a-properly-holstered-loaded-handgun/>.

- practice
- training
- hunting
- shooting competitions
- repair, refurbishing, modifications, and maintenance
- appraisal
- display at gun collectors events
- informal recreational shooting

But most importantly, it deprives the premises licensee of the right to defend himself or herself, and loved ones, while traveling outside the city. If the Second Amendment applies outside the home, the right to self-defense is certainly at the heart of that right. In the vast majority of states, anyone can bring a firearm into the state for legitimate purposes without any permission needed, and can travel with that firearm in accordance with the laws of the state.

In short, the Rule imposes a *complete national and international ban* on premises licensees taking their handguns outside the four walls of the licensed premises.

**C. The Second Circuit’s rationale for denying the right to practice and to receive training outside the city is flawed.**

Although the Second Circuit opinion pays lip service to the need to acquire and maintain proficiency with a handgun for self-defense, it contends that only regulations that “sharply restrict” that ability could lead to a substantial burden on

Second Amendment rights. Pet.App.16-17. It characterizes the restrictions imposed by the Rule as “insignificant and indirect” and “trivial.” Pet.App.13, 29.

Training and practice are essential to safe firearm handling, to speed and accuracy in shooting in defense situations, and to develop and maintain skills needed to identify threats correctly and to respond to them properly under stress. The restrictions imposed by the Rule on premises license holders are neither insignificant nor trivial.

Training is not a “one-time” endeavor, but must be engaged in continually. That is why law enforcement agencies require periodic training and qualification by officers with their duty weapons. Qualification is the firing of a course for score, to establish a minimum competency threshold. Training can take a number of forms, including practice on a wide variety of targets, participation in tactical drills, and the like in order to maintain and further develop competency.

The International Association of Law Enforcement Firearms Instructors (“IALEFI”), one of this brief’s *amici*, recommends qualification with a handgun not less than twice per year, dim light qualification not less than once per year, and training not less than quarterly. E. KAPELSOHN, PRINCIPAL AUTHOR, IALEFI, FIREARMS TRAINING STANDARDS FOR LAW ENFORCEMENT PERSONNEL, §§ 14.9, 14.10 (2004).

For non-law enforcement personnel such as premises licensees, training is also essential. A respected manual for civilians on defensive shooting has a chapter appropriately entitled “Practice: Your Life Depends on It.” CHRIS BIRD, THE CONCEALED

HANDGUN MANUAL 423 (6<sup>th</sup> ed. 2011). In that book, former U.S. Customs special agent, competition shooter, and firearms instructor Robert Butler is quoted as saying, “I really can’t stress enough on training.” *Id.* at 428. “Butler recommends a civilian gun carrier should practice at least once a month for the first year and a minimum of once a quarter after that.” *Id.* at 429.

The Second Circuit opinion contends that practice and training are not significantly curtailed because “nothing in the Rule precludes the Plaintiffs from utilizing gun ranges or attending competitions outside New York City, since guns can be rented or borrowed at most such venues for practice purposes.” Pet.App.28. But the principle that the exercise of a constitutional right may not be “abridged on the plea that it may be exercised in some other place,” applies in the Second Amendment context. *Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011) (quoting *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76–77 (1981)). Furthermore, there is nothing in the record to substantiate the claim that guns can be rented or borrowed at most such out-of-city venues, and indeed that claim is very likely incorrect.

The Court’s statement that petitioners are “free to participate in [out-of-city] shooting competitions with a rented firearm” is unrealistic. Pet.App.28. Even if some type of rental gun was available, the assumption that anyone would shoot in a competition with a rented firearm is as implausible as assuming that an individual would engage in skiing competitions with rented skis, or participate in off-road motorcycle competitions with a rental

motorcycle. Shooting competitions also have rules regarding the types and features of handguns that can be used, and to suppose that ranges keep those specific firearms available for rental is at the very least unsubstantiated. Additionally, most competitions are held at gun clubs, and clubs rarely rent guns.

In claiming that the seven shooting ranges in New York City are sufficient to satisfy all license holders' needs for practice and training, the Second Circuit seems to consider range facilities as essentially fungible. But they are not. Some ranges are set up only for paper target shooting from designated stations. Others can be set up as a course, usually timed, where the competitor or trainee moves from position to position, with varying targets, cover, barriers, lighting conditions, and the like, to more realistically simulate defensive firing under stress. See BIRD, CONCEALED CARRY MANUAL 423-27. Experts generally agree that competition builds and maintains skills that are useful and perhaps critical in defense situations.<sup>11</sup>

The Court's opinion asserts that petitioners "still need to demonstrate that practicing with one's own handgun provides better training than practicing with a rented gun *of like model....*" Pet.App.28-29

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<sup>11</sup> John Scott, *10 Experts: Can Competitive Shooting Help Real-World Defensive Shooting?*, BALLISTIC MAGAZINE (Apr. 8, 2016), <https://www.ballisticmag.com/2016/04/08/10-experts-can-competitive-shooting-help-real-world-defensive-shooting/>; OFFICER.COM, *IDPA: Training or Just a Game?* (Jul. 14, 2008), <https://www.officer.com/home/article/10248759/idpa-training-or-just-a-game>.

(emphasis added). There are literally thousands of different models of handguns, and to suppose that a range would keep such a selection on hand for rental is a further flight of imagination.

More importantly, “practicing with one’s own handgun” is overwhelmingly recognized as vitally important among police and civilian instructors. Every handgun is different, even among similar models. There are nearly infinite combinations of barrel lengths, sights, grips, weight of trigger pulls, finishes, calibers, and other features. Even with identical models, the point of impact on the target may vary among individual handguns. The shooter must regularly confirm that the gun, and its magazines if a semi-automatic, are functioning properly with the exact same ammunition the shooter intends to use for self-defense. A shooter cannot do this if he or she has to use a rented gun at a range outside the city. In addition, many ranges that do rent guns require that these be used only with the range’s own ammunition, not ammunition the shooter brings. Even within a single caliber, ammunition varies by type of powder, amount of powder, and bullet weight and type, among other factors. Different kinds of ammunition will often shoot to a different point of impact on the target. Some kinds of ammunition may not function well in particular semi-automatics, causing jams.

Reasons like these are why virtually every police department in the country requires its officers to qualify with their own issued handguns, not just another handgun of the same model.

The same principle holds for civilians who own



handguns for self-defense. “[Y]ou should definitely practice self-defense shooting with the gun you normally carry....” BIRD, *THE CONCEALED HANDGUN MANUAL* at 428. According to expert Robert Butler, quoted above, “I would stay with one gun, because in a stress situation you’ll know how to use it.” *Id.* at 429.

In short, the very real burdens imposed by the Rule on the ability of premises licensees to maintain proficiency with their handguns have been disregarded by the Court of Appeals based on suppositions that are unsupported by evidence and contradicted by the experts.

## **II. THE “PUBLIC SAFETY” INTEREST ALLEGED TO SUPPORT THE RULE IS ILLUSORY.**

### **A. The purported public safety interest is supported by no facts, data, or demonstrated harm, but relies only on speculation.**

The centerpiece of respondents’ argument is a declaration from a police official which states that “license holders in a public setting are just as susceptible as anyone else to stressful situations” including “driving situations that sometimes lead to or have the potential to lead to road rage incidents, the stress and injury of traffic accidents, crowd situations, demonstrations, family disputes, all other types of disputes between individuals, being a victim of a crime or harassment, and any other stress-inducing circumstance outside of the home.” Lunetta Declaration, JA 77. The implication is that a licensee who is transporting his locked, unloaded handgun to a range outside the city is likely to snap and start shooting at the least provocation. The Second Circuit

expressly relied on that declaration for purposes of intermediate scrutiny interest balancing. Pet.App.26.

The statement that premises licensees are “just as susceptible as anyone else” to losing control and committing violent crimes is untrue. As shown below, licensees undergo searching scrutiny before obtaining a license, comparable groups of permit holders from other jurisdictions have repeatedly been shown to be far more law-abiding than the population as a whole, and most violent crime is committed by individuals with a criminal history who are ineligible to obtain a license.

If transport of locked, unloaded handguns by licensees is really a threat to public safety, then there should be some evidence that such violence by premises licensees has actually occurred while transporting their firearms to a range. But the record is devoid of even a single incident of that occurring.

Respondents possess the data regarding incidents (if any) in which a premises licensee unlocked his or her handgun, retrieved the separately carried ammunition, loaded the handgun, and started shooting while transporting a handgun to a range. There is a specific Patrol Guide Procedure, attached as Exhibit B to the Lunetta Declaration, which requires an investigation and immediate report to the License Division, Incident Section, whenever “a holder of a handgun license or rifle/shotgun permit is involved in an incident coming to the attention of the Department.” JA 114. Investigations must be conducted, and a report made, in any cases of improper display or discharge of a firearm. JA 121, 122.

However, respondents have not seen fit to provide the courts with the data in their possession—namely, any violent crimes committed by premises licensees while transporting a handgun to a range—preferring to rely on speculation.

The closest thing to a factual assertion to attempt to justify R.C.N.Y § 5-23(a) as promoting public safety is Inspector Lunetta’s assertion that:

Since the elimination of the Target license in 2001, investigations have revealed a large volume and pattern of premises license holders who are found in possession of their handguns in violation of the restrictions on their license.

JA 81. There are two problems with this statement.

First, what constitutes a “large volume and pattern” over those years? Surely the License Division keeps records of what it does and finds. Respondents could have provided some actual data to show the number and nature of these purported violations, but did not.

Second, improper transportation does not mean that public safety has been harmed. The Lunetta Declaration provides not one shred of evidence that these licensees committed violent crimes while transporting handguns. The Declaration does not say whether these handguns were merely being transported in a locked and unloaded condition to some unauthorized place, whether they were loaded or uncased, or whether they were used in actual crimes of violence.

The rationale is circular. Respondents attempt to

justify the regulation by noting that people sometimes violate it. But neither respondents' evidence nor the Second Circuit's opinion contains a single factual instance that any violation of the Rule has caused actual harm or injury to public safety.

**B. Licensees undergo extensive screening prior to obtaining a premises license.**

The New York State requirements for a premises license are quite restrictive, and the relevant portion of N.Y. Penal Law § 400.00(1) is worth setting forth at length:

Eligibility. ... No license shall be issued or renewed except for an applicant

- (a) twenty-one years of age or older [except for honorably discharged veterans];
- (b) of good moral character;
- (c) who has not been convicted anywhere of a felony or a serious offense or who is not the subject of an outstanding warrant of arrest...;
- (d) who is not a fugitive from justice;
- (e) who is not an unlawful user of or addicted to any controlled substance as defined in section 21 U.S.C. 802;
- (f) who being an alien (i) is not illegally or unlawfully in the United States or (ii) has not been admitted to the United States under a nonimmigrant visa subject to the exception in 18 U.S.C. 922(y)(2);
- (g) who has not been discharged from the Armed Forces under dishonorable conditions;

(h) who, having been a citizen of the United States, has not renounced his or her citizenship;

(i) who has stated whether he or she has ever suffered any mental illness;

(j) who has not been involuntarily committed [under numerous listed statutes relating to mental health] or has not been civilly confined in a secure treatment facility pursuant to article ten [sex offenders requiring civil commitment or supervision] of the mental hygiene law;

(k) who has not had a license revoked or who is not under a suspension or ineligibility order issued pursuant to [laws relating to suspension and revocation of licenses and orders to surrender firearms upon issuance of protective orders]; ...

(m) who has not had a guardian appointed for him or her pursuant to any provision of state law, based on a determination that as a result of marked subnormal intelligence, mental illness, incapacity, condition or disease, he or she lacks the mental capacity to contract or manage his or her own affairs; and

(n) concerning whom no good cause exists for the denial of the license.

Besides all felonies, § 400.00(1)(c) references “serious offenses” that make an individual ineligible for a license. These include:

any of the following offenses defined in the penal law: illegally using, carrying or possessing a pistol or other dangerous weapon; possession of burglar's tools; criminal possession of stolen property in the third degree; escape in the third degree; jostling; fraudulent accosting; endangering the welfare of a child; the offenses defined in article two hundred thirty-five [obscenity, disseminating indecent material to a minor]; issuing abortifacient articles; permitting prostitution; promoting prostitution in the third degree; stalking in the third degree; stalking in the fourth degree; the offenses defined in article one hundred thirty [sex offenses, sexual misconduct, rape, forcible touching, sexual abuse, female genital mutilation, sexually motivated felony, facilitating a sex offense with a controlled substance, sexual abuse, course of conduct against a child, predatory sexual assault, predatory sexual assault against a child]; the offenses defined in article two hundred twenty [criminal sale or possession of a controlled substance, use of child to commit controlled substance offense, criminal sale, or manufacture of methamphetamine, operating as a major trafficker].

N.Y. Penal Law § 265.00(17)(b).<sup>12</sup>

New York State is already among the most

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<sup>12</sup> Thirteen more serious offenses were recently added as N.Y. Penal Law § 265.00(17)(c).

restrictive states for mere possession of a handgun. Only four states besides New York require that an individual be licensed (or the equivalent) merely to own a handgun: Connecticut, Illinois, Massachusetts, and New Jersey.<sup>13</sup>

New York City imposes additional restrictions that go far beyond these state restrictions. An individual may be denied a license on grounds the “applicant has been arrested, indicted, or convicted for a crime or violation except minor traffic violations, in any federal, state or local jurisdiction.” 38 R.C.N.Y. § 5-10(a). There is no limitation on the severity of the violation; failing to obtain a dog license or spitting on the sidewalk could suffice. A license may also be denied if the applicant “has a poor driving history, has multiple driver license suspensions or has been declared a scofflaw by the New York State Department of Motor Vehicles,” *id.*, § 5-10(h); “has been terminated from employment under circumstances that demonstrate lack of good judgment or lack of good moral character,” *id.*, § 5-10(j); or “has failed to pay legally required debts such as child support, taxes, fines or penalties imposed by governmental authorities,” *id.*, § 5-10(l). In addition, the application may be denied if “[o]ther information demonstrates an unwillingness to abide by the law, a lack of candor towards lawful authorities, a lack of concern for the safety of oneself and/or other persons and/or for public safety, and/or other good cause for

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<sup>13</sup> NRA-ILA, *State Gun Laws*, <https://www.nraila.org/gun-laws/state-gun-laws/>. Maryland has a Handgun Qualification License but the license is not needed for handguns already possessed prior to October 31, 2013.

the denial of the license.” *Id.*, § 5-10(n).

According to instructions posted by the NYPD, other factors to be considered include “summonses” and “any medications taken in connection with” mental or physical conditions.<sup>14</sup> Respondents’ evidence showed that applicants are also asked questions about their name change history, outstanding warrants, residence history, and history of lost or stolen firearms. JA 83-84.

In other words, under the combination of New York State law and New York City rules, a license must be denied for a long list of disqualifiers, and may be denied for trivial violations or even perceived attitudes on the part of the applicant.

After the application and all required documents/forms have been received and reviewed, the applicant is scheduled for an in-person interview. JA 84. Co-habitants must sign a consent to the applicant having a handgun. 2d Cir. JA 98. Third parties may be interviewed as well. JA 84. It takes approximately six months for the process to be completed. *New Application Instructions*, *supra* n.14.

While most jurisdictions do not find it necessary or desirable to put their citizens through such an exhaustive, invasive, discretionary process in order to exercise their federal constitutional rights to own a handgun, license holders cannot have criminal records and are not the sort who are likely to start shooting up the public streets when transporting a handgun to a range for practice or training. That

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<sup>14</sup> NYPD, *New Application Instructions*, <https://licensing.nypdonline.org/new-app-instruction/>.



assessment is confirmed by data from other jurisdictions regarding carry permit holders.

**C. Carry permit holders from other jurisdictions are extraordinarily law-abiding.**

Professor David Kopel examined data from a number of “shall issue” states regarding the number of crimes committed by concealed carry permit holders in states that publish such data. Data from Minnesota, Michigan, Ohio, Louisiana, Florida, and Texas revealed that as a class concealed carry permit holders are vastly more law-abiding than the public at large. David B. Kopel, *Pretend “Gun-Free” School Zones*, 42 CONN. L. REV. 515, 564-69 (2009). A later study by Professor Kopel found that the same was true of Colorado. David Kopel, *Guns on University Campuses: The Colorado Experience*, THE WASHINGTON POST (Apr. 20, 2015).

More recent data from Texas and Florida, the two states with the largest numbers of carry permit holders, confirm that carry permit holders in these states are an extraordinarily law-abiding group.

In Texas, data for 2018 show total convictions of a long list of serious crimes, and the number of those crimes committed by carry license holders. Carry license holders were convicted of 163 out of a total of 41,180 such crimes, or 0.3958%.<sup>15</sup> There were 1,362,945 active license holders in 2018.<sup>16</sup> The

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<sup>15</sup> Texas Department of Public Safety, *Conviction Rates for Handgun License Holders Reporting Period: 01/01/2018 - 12/31/2018*, <https://www.dps.texas.gov/RSD/LTC/Reports/ConvictionRatesReport2018.pdf>.

<sup>16</sup> Texas Department of Public Safety, *Active License/Certified*

population 18 and older is estimated by the Census Bureau to be 74% of the total Texas population of 28,701,845, or 21,239,365 adult individuals.<sup>17</sup> Thus, carry license holders constituted 6.42% of the population 18 and older, but committed only 0.3958% of the crimes. The conviction rate of license holders is therefore about 1/16<sup>th</sup> of the rate for the adult population as a whole.

In Florida, carry licenses must be revoked when the licensee commits any disqualifying crime (all felonies plus others) or is disqualified because of mental health, substance abuse, domestic violence, or other reasons. Fla. Stat. § 790.06. 4,213,431 licenses were issued over the period October 1, 1987 through April 30, 2019.<sup>18</sup> Over that same period, 14,818 licenses have been revoked for all reasons, a rate of 0.35%.<sup>19</sup> As of June 30, 2018, the number of valid licenses statewide was 1,927,724.<sup>20</sup> In the preceding

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*Instructor Counts As of December 31, 2018*, <https://www.dps.texas.gov/rsd/LTC/reports/ActLicAndInstr/ActiveLicandInstr2018.pdf>.

<sup>17</sup> United States Census Bureau, *QuickFacts Texas*, <https://www.census.gov/quickfacts/tx>.

<sup>18</sup> Florida Department of Agriculture and Consumer Services, *Summary Report October 1, 1987-April 30, 2019*, [https://www.freshfromflorida.com/content/download/7499/118851/cw\\_monthly.pdf](https://www.freshfromflorida.com/content/download/7499/118851/cw_monthly.pdf) (“Summary Report”). Florida licenses are valid for seven years.

<sup>19</sup> *Id.*

<sup>20</sup> Florida Department of Agriculture and Consumer Services, *Number of Valid Florida Concealed Weapon Licenses As Reported at the End of Each Fiscal Year (June 30) Since Program Inception in October 1987*, [https://www.freshfromflorida.com/content/download/7504/118881/NumberOfValidCWLicenses\\_Fi](https://www.freshfromflorida.com/content/download/7504/118881/NumberOfValidCWLicenses_Fi)

year (July 1, 2017 through June 30, 2018), 1,860 licenses were revoked, an annual revocation rate of .0096%.<sup>21</sup> From 1987 through 2010, when the state stopped publishing this breakdown of the data, only 168 revocations were for a crime with a “Firearm Utilized.” Summary Report, *supra*, n.18.

Given the extraordinarily law-abiding character of carry permit holders in other jurisdictions, the supposition that premises licensees are likely to commit violent crimes while transporting their locked, unloaded handguns is implausible at best, and is certainly supported by no evidence.

**D. Most homicides and non-fatal shootings are committed by individuals with criminal records who are ineligible for premises licenses.**

Eliminating the right of premises licensees to transport handguns to places they can lawfully possess them is not tailored to reduce crime. Evidence and law enforcement experience confirm that most violent crimes are committed by repeat offenders, who are ineligible in New York to receive a carry permit. Depending on the individual’s particular criminal history, most of those people are ineligible even to possess a handgun. Felons, for example, cannot legally possess or purchase firearms under federal law. 18 U.S.C. § 922(g). Violent criminals don’t obey the law and they don’t get licenses.

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scalYearEndSince1987-1988.pdf.

<sup>21</sup> Florida Department of Agriculture and Consumer Services, *Applications and Dispositions by County July 1, 2017–June 30, 2018*, [https://www.freshfromflorida.com/content/download/76929/2217458/07012017\\_06302018\\_cw\\_annual.pdf](https://www.freshfromflorida.com/content/download/76929/2217458/07012017_06302018_cw_annual.pdf).

In 2006, an analysis of three years of homicide data by the New York Times revealed a compelling fact. According to the NYPD's Deputy Commissioner for Strategic Initiatives, more than 90% of the killers in New York City had criminal records, as did more than half of those killed. Jo Craven McGinty, *New York Killers, and Those Killed, by Numbers*, NEW YORK TIMES (Apr. 28, 2006).

A report produced by the NYPD showed similar results for the year 2012, the last year for which such a study was produced. In that year, 87% of homicide suspects had at least one prior arrest. POLICE DEPARTMENT CITY OF NEW YORK, MURDER IN NEW YORK CITY 2012 10.<sup>22</sup> Seven out of ten victims had prior arrests. *Id.* at 6.

Data from other cities confirm this pattern. In Baltimore, for the year 2015, police data showed that of all homicide suspects, “76.5 percent had prior criminal records,” and those homicide suspects averaged over nine arrests apiece. Kevin Rector, *Statistical snapshots from Baltimore's deadliest year: suspects, victims, and cops*, BALTIMORE SUN (Jan. 7, 2016).

The most recent annual report for Milwaukee homicides states that “Almost 100% of the 2015 known suspects had a criminal history” and adds that “The overwhelming majority of suspects have criminal histories going back to 2005.” MILWAUKEE HOMICIDE REVIEW COMMISSION, ANNUAL REPORT

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<sup>22</sup> <https://www1.nyc.gov/site/nypd/stats/reports-analysis/archive.page>.

2015, HOMICIDE AND NON-FATAL SHOOTINGS 48.<sup>23</sup> Moreover, 83% of the homicide victims had prior arrest histories. *Id.* at 42.

This was true not only of homicides. In Milwaukee in 2015, 235 out of 242 (97%) non-fatal shooting suspects had a criminal history. *Id.* at 49. As with homicides, the vast majority of non-fatal shooting victims (77%) had criminal histories. *Id.* at 43.

Premises licensees in New York City, by contrast, do not have criminal histories and have undergone background checks. Experienced law enforcement officers know very well that these are not the people who pose a public safety risk.

Even in intermediate scrutiny cases, courts must consider whether the “provisions were designed to address a real harm, and whether those provisions will alleviate it in a material way.” *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 195 (1997). Here there is no showing at all of a real harm actually committed by premises licensees transporting their unloaded, locked handguns. The courts below have balanced away important Second Amendment rights of law-abiding, licensed handgun owners by relying on a factually unsupported and implausible threat to public safety.

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<sup>23</sup> <http://city.milwaukee.gov/ImageLibrary/Groups/cityHRC/reports/2015AnnualReportFINAL.pdf>.

### III. THE RULE IS UNCONSTITUTIONAL UNDER THE TEXT, HISTORY, AND TRADITION ANALYSIS USED IN *HELLER*.

#### A. Carrying, transport, and use of firearms by law-abiding citizens was commonplace in the early Republic.

As this Court has observed, “When interpreting constitutional text, the goal is to discern the most likely public understanding of a particular provision at the time it was adopted.” *McDonald v. City of Chicago*, 561 U.S. 742, 828 (2010); *see also Alden v. Maine*, 527 U.S. 706, 741 (1999) (“We look first to evidence of the original understanding of the Constitution.”). Possessing, carrying, transporting, and using firearms (including handguns) as guaranteed by the Second Amendment was viewed as entirely ordinary, and was at some times and places nearly universal, in colonial times and in the early Republic. For a thorough study of that subject, *see* CLAYTON CRAMER, *ARMED AMERICA* (2006). There was no tradition or history at that time of banning peaceful carry or transport outside the home, or of prohibiting firearms from being taken out of a particular jurisdiction. Indeed, many of the Founding Fathers possessed, transported, and carried firearms, including handguns.

Patrick Henry stirred the Virginia Ratification Convention by declaring, “The great object is, that every man be armed.... Everyone who is able may have a gun.” 3 J. ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS* 386 (2d ed. 1836). As a lawyer before the Revolution, Henry lived “just north of Hanover town, but close enough for him to walk to

court, his musket slung over his shoulder to pick off small game for [his wife] Sarah's table." HARLOW GILES UNGER, *LION OF LIBERTY* 30 (2010).

George Washington owned perhaps fifty firearms.<sup>24</sup> After the Revolutionary war ended, Washington and his servant were riding on horseback from Alexandria to Mount Vernon. "*As was then the custom*, the General had holsters, with pistols in them, to his saddle." (emphasis added). A ruffian and reputed murderer forbade him from passing and threatened to shoot him. Washington handed his pistol to the servant, saying "If this person shoots me, do you shoot him," and rode on without incident.<sup>25</sup>

Our second President, John Adams, spent his youth playing games and sports, and "above all, in shooting, to which diversion I was addicted to a degree of ardor which I know not that I ever felt for any other business, study, or amusement."<sup>26</sup> A biographer states:

John's zest for shooting prompted him to take his gun to school, secreting it in the entry so that the moment school let out he might dash off to the fields after crows and squirrels.<sup>27</sup>

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<sup>24</sup> STEPHEN HALBROOK, *THE FOUNDERS' SECOND AMENDMENT* 316-17 (2008), citing Ashley Halsey, Jr., *George Washington's Favorite Guns*, *AMERICAN RIFLEMAN* 23 (February 1968).

<sup>25</sup> BENJAMIN TAYLOE, *OUR NEIGHBORS ON LAFAYETTE SQUARE* 47 (1872) quoted in HALBROOK at 317.

<sup>26</sup> ANNE BURLEIGH, *JOHN ADAMS* 8-9 (1969) (quoting *III DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS* 257 (1961)).

<sup>27</sup> *Id.* at 9 (citing *III DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS* 258-59 n.6).

Thomas Jefferson was an avid shooter and gun collector. His memorandum books kept between 1768 and 1823 show numerous references to pistols, guns, rifles, and related subjects. Included were a pair of “Turkish pistols ... so well made that I never missed a squirrel at 30 yds. with them.”<sup>28</sup>

Jefferson transported one or both of these Turkish pistols when traveling as President. In an 1803 letter, Jefferson wrote to an innkeeper at Orange Courthouse, between Monticello and Washington: “I left at your house ... a pistol in a locked case, which no doubt was found ... after my departure. I have written to desire Mr. Randolph or Mr. Eppes to call on you for it, as they come on to Congress, to either of whom therefore be so good as to deliver it.”<sup>29</sup>

James Madison, in a 1775 missive, extolled the marksmanship “skill of the Virginians” with the rifle:

The strength of this Colony will lie chiefly in the rifle-men of the Upland Counties.... The most inexpert hands rec[k]on it an indifferent shot to miss the bigness of a man’s face at the distance of 100 Yards. I am far from being among the best & should not often miss it on a fair trial at that distance.

CLAYTON CRAMER, *ARMED AMERICA* 151 (2006)  
(quoting I JAMES MADISON, WILLIAM T. HUTCHINSON

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<sup>28</sup> See references in HALBROOK at 318 n.40 (2008).

<sup>29</sup> Jefferson’s letter to Randolph also survives. Both letters are available on the Library of Congress website: <http://memory.loc.gov/cgi-bin/ampage?collId=mtj1&fileName=mtj1page029.db&recNum=210>; <http://memory.loc.gov/cgi-bin/ampage?collId=mtj1&fileName=mtj1page029.db&recNum=208>.



AND WILLIAM M.E. RACHAL, ED., THE PAPERS OF JAMES MADISON 153 (1962)).

Respondents and the Second Circuit did not cite below any laws from the Founding period that prohibited carrying or transporting handguns in a peaceable manner. In the first decades of the Republic, it was completely commonplace to travel with and to use handguns and other firearms for lawful purposes.

**B. The right to carry handguns outside the home was unanimously recognized by early court decisions.**

In the first 32 years after the conclusion of the War of Independence in 1781, no state had a concealed or open handgun carry ban. Prior to the Mexican-American war in 1846, only eight of the twenty-eight states then in the Union restricted concealed carry in any way, and all of them permitted open carry of handguns, rifles, and shotguns. Those eight states were Kentucky (1813), Louisiana (1813), Indiana (1820), Arkansas (1837-38), Georgia (1837), Tennessee (1838), Virginia (1838), and Alabama (1839). CLAYTON CRAMER, CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC 2-3 (1999). Handguns could not only be freely transported, they could be carried on or near the person, loaded and ready for use.<sup>30</sup>

In the first half of the nineteenth century, these restrictions on concealed carry were felt to be justified because the tradition and right to carry openly were

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<sup>30</sup> Not all of these states banned carrying concealed firearms. Tennessee's law applied only to Bowie knives and "Arkansas toothpicks." *Id.* at 109-10.

so firmly established. The purpose behind Louisiana's concealed carry statute was said to be:

[t]o prevent bloodshed and assassinations committed upon unsuspecting persons. It interfered with no man's right to carry arms (to use its words) "in full open view,".... This is the right guaranteed by the Constitution of the United States, and which is calculated to incite men to a manly and noble defence of themselves ... and of their country....

*State v. Chandler*, 5 La. Ann. 489, 490 (1850).

Kentucky's statute was declared unconstitutional in *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822). The statute provided that "that any person in this commonwealth, who shall hereafter wear a pocket pistol, dirk, large knife, or sword in a cane, concealed as a weapon, unless when travelling on a journey, shall be fined...." *Id.* Notably, the ban on concealed carry extended only to "pocket pistols," not all pistols, and there was an exception for traveling. Open carry was not affected by the statute. Nevertheless, the Court of Appeals of Kentucky held that it violated the right to bear arms provision of Kentucky's constitution. The court opined that "whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden by the explicit language of the constitution." *Id.* at 91-92. The right to bear arms "must be preserved entire," *id.* at 91, and all legislative acts "which diminish or impair it as it existed when the constitution was formed, are void." *Id.* at 92.

*State v. Reid*, 1 Ala. 612 (1840) considered the validity under the Alabama constitution of a statute

that prohibited concealed carry but not open carry. The Alabama Supreme Court upheld the statute precisely because armed self-defense was still allowed, stating:

A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional.

*Id.* at 616-17.

The Georgia Supreme Court, reviewing an indictment and conviction that did not charge that the pistol the individual was carrying was concealed, stated as a guiding principle that “The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description, and not *such* merely as are used by the *militia*, shall not be *infringed*, curtailed, or broken in upon, in the smallest degree....” *Nunn v. State*, 1 Ga. 243, 251 (1846) (emphasis in original). Because the statute at issue was confusingly drafted, the court held:

so far as the act of 1837 seeks to suppress the practice of carrying certain weapons *secretly*, that it is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void*....

*Id.* (emphasis in original).

In sum, when looking at the early statutes and case law regarding carry, the courts were uniform in acknowledging that citizens had a right to carry handguns, either openly, concealed, or both.

**CONCLUSION**

The decision below should be reversed.

Respectfully submitted,

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