

No. 18-280

IN THE
Supreme Court of the United States

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

v.

THE CITY OF NEW YORK AND THE NEW YORK CITY
POLICE DEPARTMENT-LICENSE DIVISION,
Respondents.

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

**BRIEF FOR AMICI CURIAE BRADY AND
TEAM ENOUGH IN SUPPORT OF NEITHER PARTY**

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INTEREST OF AMICI CURIAE¹

Brady is the nation's most longstanding nonpartisan, nonprofit organization dedicated to reducing gun violence through education, research, and legal advocacy. Having worked to prevent gun violence for 45 years, Brady has a substantial interest in ensuring that the Constitution and laws are interpreted to allow solutions that would keep individuals, families, and communities safe. Brady has filed amicus briefs in many cases involving the regulation of firearms, including *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *United States v. Hayes*, 555 U.S. 415 (2009), and *District of Columbia v. Heller*, 554 U.S. 570 (2008).

Team ENOUGH is a youth-led initiative that educates and mobilizes young people in the fight to end gun violence, and is sponsored by Brady. As young people who have grown up in an era in which school shootings and lockdown drills are a new norm, Team ENOUGH is committed to bringing common sense and safety to America's gun policy.

INTRODUCTION AND SUMMARY OF ARGUMENT

If ever there were a case for judicial caution and restraint, this is it.² Petitioners urge the Court to create an unprecedented and expansive rule of constitutional law enshrining a right to carry, and potentially to

¹ No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

² See *United States v. Masciandaro*, 638 F.3d 458, 476 (4th Cir. 2011) (Wilkinson, J.).

fire, lethal firearms in public when in armed confrontations. Such a rule could well lead courts to invalidate numerous violence-prevention laws across the country—measures quite different from the unique one at issue in this case—even though they are not before this Court and may never be. And petitioners advocate this radical expansion in a case that may not even present a live controversy and which may be resolved on statutory grounds.

The reading of the Second Amendment petitioners advance fails to appreciate the risks to public safety it would create. It runs counter to this Court’s jurisprudence construing rights to allow the government to preserve public safety even when far lesser risks are involved. It is also far broader than necessary to decide this case. The Court should decline petitioners’ call for judicial activism. Instead, the Court should reaffirm the longstanding and broad power of the People, through the organs of self-government, to adopt reasonable measures to protect public safety and to safeguard the most precious right of all—the right to live.

I. It may be unnecessary for the Court to decide the constitutional issues at all. New York City is repealing the challenged regulations, which may render the case moot. In addition, the challenged regulations may well be preempted by federal statutory law. If the case can be resolved on either of those grounds, it should be. Given the sweeping potential consequences of the reading of the Second Amendment petitioners advance—matters on which the American people are committed to addressing through democratic processes—the Court should not resolve the constitutional questions unless it becomes absolutely necessary to do so.

II. If the constitutional issues must be addressed, the Court’s decision should be limited to the issue directly at hand. The Court should reject petitioners’ effort to use this dispute, which involves a unique municipal transportation ordinance, into a vehicle to transform Second Amendment doctrine in a way that will imperil numerous public safety laws, as well as Americans’ ability and power to protect their communities.

If the Court entertains a broader discussion of Second Amendment rights, it should follow its traditional path of construing rights to avoid excessive costs to public safety. A right to lethal firearms in public merits even greater restraint. Petitioners wrongly suggest that every regulation of a fundamental constitutional right requires strict scrutiny, but this Court has never adopted such a mechanical approach.

What the Framers meant by “keep and bear arms” in 1791 may be debatable, but today’s reality is not. More than 1,000,000 people have been shot in America over the past decade, of whom more than 300,000 were killed. The causes of gun violence are complex, but a considerable body of knowledge, including both expert research and common sense, suggests that one significant cause is firearms in the public sphere. Americans are increasingly demanding legislative and policy solutions to this crisis, many of which are now being enacted or considered in local governments, the States, and Congress.

This reality is unmentioned by petitioners, as is the fact that courts and legislatures have long recognized government’s broad authority to restrict gun carrying in public spaces. A holding of this Court—or even dicta—that the Second Amendment broadly grants a right to carry loaded firearms in public spaces or requires

searching scrutiny could transform the Second Amendment into a super-right that abridges Americans' ability to exercise other fundamental rights, as well as their right to enact reasonable solutions to the problem of gun violence. The Court should preserve the rights of Americans to enact effective gun violence prevention measures to prevent bloodshed before it happens.

ARGUMENT

I. THE COURT SHOULD AVOID DECIDING THE CONSTITUTIONAL QUESTIONS PRESENTED

Petitioners present to this Court a breathtakingly broad vision of the Second Amendment—a right to carry loaded lethal firearms in anticipation of armed confrontation—that would likely lead to the invalidation, not only of the particular New York City regulations directly under challenge here, but also of numerous firearms and public safety regulations across the Nation. Petitioners are quite candid about their objective: to sweep away the Second Amendment mode of analysis that virtually every court of appeals has adopted, and to subject even the most mundane firearms regulations to strict scrutiny. *See* Pet. Br. 38-41.

This Court should decline petitioners' invitation, as this case may not present a true constitutional controversy, for at least two reasons: New York City's regulations may be preempted by federal law, and the City's imminent repeal of those regulations may soon render this case moot, or at least unworthy of this Court's plenary review. The Court should consider dismissing the writ of certiorari as improvidently granted or, alternatively, remanding this case to the court of appeals for consideration of the preemption and mootness issues in the first instance.

1. There is a significant question whether New York City’s challenged regulations are preempted by the Firearms Owners Protection Act (FOPA)—a provision that petitioners mention as giving support to their constitutional claim (Br. 7-8, 28) but do not otherwise discuss. FOPA provides, in pertinent part:

Notwithstanding any other provision of law or any rule or regulation of a State or any political subdivision thereof, any person who is not otherwise prohibited by this chapter from transporting, shipping, or receiving a firearm shall be entitled to transport a firearm for any lawful purpose *from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm* if, during such transportation the firearm is unloaded, and neither the firearm nor any ammunition being transported is readily accessible or is directly accessible from the passenger compartment of such transporting vehicle....

18 U.S.C. § 926A (emphasis added). This provision—which expressly preempts contrary state or local law—may resolve petitioners’ concerns; it may allow petitioners to carry their firearms (unloaded) to their second homes and to firing ranges. *See* Pet. Br. 28.

Given that there may be a statutory basis for resolution of this case, this Court should not proceed to resolution of the constitutional questions, at least in the first instance. “It is a well-established principle governing the prudent exercise of this Court’s jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.” *Northwest Austin Mun. Util.*

Dist. No. One v. Holder, 557 U.S. 193, 205 (2009); see *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). This Court followed a similar course in *Escambia County, Florida v. McMillan*, 466 U.S. 48 (1984); there, although the court of appeals had held that the challenged county election system violated the Fourteenth Amendment, this Court, invoking *Ashwander*, directed the court of appeals to first address a statutory question. See *id.* at 51-52.

Here, petitioners raised the preemption argument in their complaint, JA39-41 (¶¶ 57-58, 63) and in their motion for summary judgment (at 23-25), see Dist. Ct. ECF No. 44, but apparently abandoned it in the court of appeals. But if the Court were to proceed to the constitutional issues, it would be rewarding petitioners for engaging in strategic behavior designed to sidestep the principle of constitutional avoidance. Petitioners may *want* this Court to rule on a broad constitutional ground, but the *Ashwander* principle is too important to be cast aside in this manner. *Ashwander* ensures that this Court not remove matters from democratic decision-making by deciding weighty constitutional questions except as a matter of last resort, and only once it is clear that politically accountable branches of government (at all levels) have made it unavoidably necessary for the Court to do so. See *generally* Bickel, *The Least Dangerous Branch* 111-198 (2d ed. 1986); see also *United States v. Masciandaro*, 638 F.3d 458, 475-476 (4th Cir. 2011) (Wilkinson, J.).

2. There is also a substantial question whether this case is, or will soon be, moot. The City is engaged in notice-and-comment rulemaking that would eliminate the provisions of New York City law that petitioners challenge and would grant them the relief that

they seek. If the rule is so amended, there will be no live controversy.

Petitioners have suggested that the proposed amendments would not in fact moot this case, and that the City's action amounts to voluntary cessation. Whatever the merits of those arguments, they should be addressed by the lower courts in the first instance. Indeed, on prior occasions, when this Court was presented with weighty constitutional claims but the respondent took action that appeared to give the petitioner everything to which it was entitled, this Court has vacated and remanded to allow the court of appeals to consider mootness and related issues first. *See, e.g., Madison Cty., N.Y. v. Oneida Indian Nation of N.Y.*, 562 U.S. 42 (2011) (per curiam) (Court granted certiorari to consider Indian sovereign immunity but remanded after tribe waived immunity); *Kiyemba v. Obama*, 559 U.S. 131 (2010) (per curiam) (Court granted certiorari to consider judicial power to release Guantanamo detainee into the United States but remanded after government offered resettlement elsewhere).

That petitioner may be eager to secure a constitutional ruling is irrelevant if this case is moot. Mootness is an essential limit on the Court's power, and there must be a live controversy at every stage of the case for the Court to decide the merits. *Honig v. Doe*, 484 U.S. 305, 317 (1988). Like “[a]ll of the doctrines that cluster about Article III,” mootness relates to concerns “about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.” *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1178-1179 (D.C. Cir. 1982) (Bork, J., dissenting). Where, as here, this Court is presented with constitutional questions the resolution of which could have broad consequences—and which the nation is debating through polit-

ical channels of self-government—it is particularly important that the Court heed the wisdom of adhering “to a governmental structure designed to restrict the courts to matters that actually affect the litigants before them.” *Honig*, 484 U.S. at 341-342 (Scalia, J., dissenting).

II. THE SECOND AMENDMENT PRESERVES THE STATES’ POWER AND OBLIGATION TO PROTECT THE PUBLIC FROM GUN VIOLENCE

A. The Second Amendment Is Unique Among Constitutional Rights In Its Inherent Risk To Human Life

If this Court addresses the constitutional issues, its Second Amendment analysis should begin with the recognition that the risks created by firearms are unique among constitutional rights in their imminent lethality.³ To be sure, in some sense all constitutional rights entail a trade-off against security. But those risks pale in comparison to the consistent, destructive power of firearms, which can be and regularly are used to kill people in seconds.⁴

In 2017, more than 100,000 people were shot in the United States, almost 40,000 of them fatally, including

³ Lowy & Sampson, *The Right Not To Be Shot: Public Safety, Private Guns, and The Constellation of Constitutional Liberties*, 14 *Geo. L.J. & Pub. Pol’y* 187 (2016).

⁴ A semiautomatic handgun can shoot 20 rounds in 3.3 seconds. Palmer, *How Many Times Can You Shoot a Handgun in Seven Minutes*, *Slate* (Nov. 9, 2009), <http://bit.ly/2LF6yVK>. An assault rifle, with a high-capacity ammunition magazine, can be shot up to 65 times per minute, depending on the shooter’s skill and experience. Institute for Research on Small Arms in International Security, *Assault Rifle Fact Sheet #1*, <http://bit.ly/2vVjuwj>.

homicides, suicides, and unintentional shootings.⁵ Interpretation of the Second Amendment cannot be blind to those facts. The reality of the right to “keep and bear arms” is that inevitably owners of firearms will *use* those arms to shoot when they deem necessary—often at other persons. And firearms are often used and misused in ways far removed from lawful self-defense, with grave consequences for the public.

Even a gun that is legally possessed can become a cause of needless death or injury. Guns possessed in the home for self-defense can lead to “family fire”⁶ shootings of visitors or family members mistaken for burglars,⁷ and unintentional shootings, including of children.⁸ Guns are taken from the home by children to use in mass shootings in schools.⁹ They are also fre-

⁵ Nat’l Ctr. For Injury Prevention & Control, U.S. Centers for Disease Control and Prevention, *Web Based Injury Statistics Query & Reporting System (WISQARS) Injury Mortality Reports, 1999-2017, for National, Regional, and States (“CDC Data”)*, <http://bit.ly/2LCUh4g> (updated Jan. 18, 2019).

⁶ See <https://www.endfamilyfire.org/>.

⁷ See, e.g., Culver, *Virginia Man Shoots Suspected Intruder Who Turns Out To Be Acquaintance*, NBC Washington (May 9, 2019), <http://bit.ly/2JjK6zu>.

⁸ See, e.g., King, *2-Year Old Dies in Apparent Accidental Shooting*, Lufkin Daily News (May 2, 2019), <http://bit.ly/2JieTgm>; Rau, *Nashville Teen Charged In Accidental Shooting of Friend* (May 11, 2019), <http://bit.ly/2Hh6JT1>. See generally Luo & McIntire, *Children and Guns: The Hidden Toll*, N.Y. Times (Sept. 28, 2013), <https://nyti.ms/2HhjLzR>.

⁹ Larson, *Investigators Believe STEM Shooting Suspects Stole Guns From One of Their Parents, Sources Say*, Denver Post (May 8, 2019), <https://dpo.st/2vXhzHv>. See generally Cox & Rich, *The Gun’s Not in the Closet*, Wash. Post (Aug. 1, 2018) (80% of

quently used in suicides and murder-suicides.¹⁰ Guns are dropped,¹¹ stolen,¹² and misfired.¹³ A gun in the home is 22 times more likely to be used in a domestic

identified guns used in school shootings came from home), <https://wapo.st/30fLrN7>.

¹⁰ See, e.g., Morrano, *Cave Spring Middle School dead from apparent self-inflicted gun shot*, WFIR talk radio (May 6, 2019), <http://bit.ly/2JnwWlp>; Faram, *Three Sailors Dead In Apparent Murder-Suicide Shooting* (May 7, 2019), <http://bit.ly/2VAGHCW>; Sedovic, *Smith County Sheriff's Office Says Winona County Shooting was Double Homicide-Suicide, Identify Shooter* (May 7, 2019), <http://bit.ly/2HgDSy6>. See generally CDC Data, *supra* n.5, <http://bit.ly/2LCUh4g>; Brady, *The Truth About Suicide & Guns* 3-5 (2018), <http://bit.ly/2Wix9Cq>; Miller et al., *Household Firearm Ownership and Rates of Suicide Across U.S. States*, 62 J. Trauma 1029-1035 (2007) (states with higher gun ownership associated with higher suicide and gun suicide).

¹¹ See, e.g., Associated Press, *Police: Lincoln Man Drops Gun, Shoots Self in Genitals*, N.Y. Times (May 3, 2019), <https://nyti.ms/2JIBGb0>; 69 News, *Police: Gunfire Hits Downtown Easton Restaurant After Drunk Man's Gun Goes Off* (May 11, 2019), <http://bit.ly/2JihWfk>.

¹² See, e.g., Perry, *Springfield Teen Shot Himself With Stolen Gun, Police Say*, Springfield News-Sun (May 6, 2019), <http://bit.ly/2VgOeSt>; Lehman, *Shooting During Custody Exchange in Bethlehem Leaves Man in Critical Condition, Police Say*, The Morning Call (May 6, 2019), <http://bit.ly/2VqzeKc>; WKRG Staff, *Victim Identified, Suspect Arrested in Jackson Car Wash Murder*, News 5 WKRG (May 7, 2019), <http://bit.ly/2LGB1TF>.

¹³ See, e.g., D'Angelo, *Florida Man Shot In Checkout Lane When Gun In Wife's Purse Accidentally Fires*, Atlanta Journal Constitution (May 7, 2019), <https://on-ajc.com/2YrAdn8>; Terrones, *Child Injured in Accidental Shooting in Southwest Las Vegas*, Las Vegas Review-Journal (May 11, 2019), <http://bit.ly/2Q4r7JR>; Barrier, *Police: Shooting in Over-The-Rhine Store Appears Unintentional*, Local 2 WKRC (May 10, 2019), <http://bit.ly/2Q2j4NV>.

homicide, suicide, or unintentional shooting than in self-defense.¹⁴ The risks to women, especially abused women, are particularly dire.¹⁵

More generally, and outside the home, firearms greatly exacerbate risks to personal safety. Even trained officers miss their target far more than they hit, and misjudgments are compounded in confrontations.¹⁶ Civilians with less training create even greater

¹⁴ Kellermann et al., *Injuries and Deaths Due to Firearms in the Home*, 45 J. Trauma, Inj., Infection & Critical Care 263 (1998). States with more guns have more unintentional deaths from firearms and a mortality rate nine times higher other States. See Miller et al., *Firearm Availability and Unintentional Firearm Deaths*, 33 Accident Analysis & Prevention 477-484 (2001), <http://bit.ly/2E6BacN>; see also Dahlberg et al., *Guns in the Home and Risk of a Violent Death in the Home: Findings from a National Study*, 160 Am. J. Epidemiology 929 (2004), <http://bit.ly/2Jkz7FZ>.

¹⁵ The presence of a gun in the home of an abused woman makes it six times more likely that she will be killed. Campbell et al., *Assessing Risk Factors for Intimate Partner Homicide*, 250 NIJ J. 14, 16 (2003). In 2017, half of female homicides were committed with a firearm by an intimate partner. Petrosky et al., *Racial and Ethnic Differences in Homicides of Adult Women and the role of Intimate Partner Violence—United States, 2003-2014*, 66 Morbidity & Mortality Weekly Rep. 741 (2017), <http://bit.ly/2vYbTgd>. Abusers also threaten and control their victims with guns. Nearly one million women alive today have been shot, or shot at, by an intimate partner, while about 4.5 million have been threatened with a gun by an intimate partner. Sorenson & Schut, *Non-Fatal Gun Use in Intimate Partner Violence: A Systematic Review of the Literature, Trauma, Violence, and Abuse* (2016); see, e.g., *Deputies Investigate Domestic Violence Related Homicide in Olympia*, KIRO 7 News (May 9, 2019), <https://kiro.tv/30jee3h>.

¹⁶ A study found that police hit their target 18% of the time in gunfights, 30% when fire is not returned. Rostker et al., RAND Center on Quality Policing, *Evaluation of the New York City Po-*

risks.¹⁷ Guns turn quotidian confrontations into deadly affrays, especially when carried by people who lack impulse control or are under the influence of alcohol.¹⁸ People are shot and killed in the course of everyday life in virtually every place and activity imaginable—attending school, working, worshipping, shopping, even while walking a dog.¹⁹ Everyday annoyances at drivers

lice Department Firearm Training and Firearm-Discharge Review Process 14 (2008), <https://on.nyc.gov/2YqFNpz>.

¹⁷ See, e.g., Lee, *Teen Killed in Hunting Accident in Pittsfield Identified*, WLBT 3 (May 5, 2019), <http://bit.ly/2E6utHJ>.

¹⁸ See, e.g., Harris, *Fight Turns Deadly on Indy's East Side with One Dead and Three at Large*, RTV6 Indianapolis (May 8, 2019), <http://bit.ly/2VnIAhA>; *Man in Critical Condition After Being Shot by His Father Over a Dog*, ABC15 (May 7, 2019), <http://bit.ly/2JnyMmj>. One study found that a third of firearm buyers with prior alcohol convictions went on to commit a violent or firearm-related offense. See Wintemute et al., *Firearms, alcohol and crime: convictions for driving under the influence (DUI) and other alcohol-related crimes and risk for future criminal activity among authorised purchasers of handguns*, 24 *Injury Prevention* 68-72 (2018), <http://bit.ly/2VYirua>. Another study found that 9% of Americans with a self-reported history of angry, impulsive behavior possess firearms in their homes. See Swanson et al., *Guns, Impulsive Angry Behavior, and Mental Disorders: Results from the National Comorbidity Survey Replication*, 33 *Behav. Scis. & L.* 199 (2015); see also Wintemute, *Alcohol Misuse, Firearm Violence Perpetration, and Public Policy in the United States*, 79 *Preventive Medicine* 15 (2015), <http://bit.ly/2Q39rym>.

¹⁹ See, e.g., Hughes, *1 Dead and 8 Injured, 2 Suspects in Custody at Denver STEM School*, USA Today (May 7, 2019), <http://bit.ly/30cp9vP>; Gilbert, *Suspect in Custody After Student Shot at Savannah State University*, Savannah Morning News (May 7, 2019), <http://bit.ly/2LHLX3a>; Kaur et al., *Deadly Shooting at California Synagogue*, CNN US (May 1, 2019), <https://cnn.it/30ibnYD>; Osier, *Man Shot In Front of Church in North Long Beach*, Long Beach Post (May 7, 2019), <http://bit.ly/2HkztJC>; *2 Shot at Tulsa Shopping Center; Suspect Dead*, Tulsa 2 (May 10, 2019), <http://>

in traffic quickly become murders when guns are in cars.²⁰ The illustrative examples cited here all took place within *two weeks* of filing this brief,²¹ demonstrating the reality that, every day in America, almost 100 people are killed and 300 wounded in gunfire.²²

No other right exposes the public to such grave risks of lethal, imminent harm. Although some claim that laws allowing more gun carrying reduce crime,²³

bit.ly/2HheQza; Royer, *Police: Delivery Driver Shoots, Kills Manager at Highway 64 Furniture Store*, News Channel 3 (May 9, 2019), <http://bit.ly/2HqSkm2>; *Man Shot While Walking Dog in Ocean View*, News 3 (May 10, 2019), <http://bit.ly/2VwFwEJ>. See generally Bosman, *Here's the List of School Shootings So Far in 2019*, N.Y. Times (May 9, 2019), <https://nyti.ms/2LOS0Do>; Follman et al., *A Guide to Mass Shootings in America*, Mother Jones (Oct. 2, 2015), <http://bit.ly/2LBBOF7> (updated Feb. 15, 2019).

²⁰ Jacobo, *1-Year-Old Boy Shot in Apparent Houston Road Rage Incident, Police Say* (May 1, 2019), <https://abcn.ws/2HoB4ht>; Fox4news.com staff, *7-Year-Old Shot During Road Rage Incident in Dallas*, Fox 4 (May 4, 2019), <http://bit.ly/2VnLD9w>; Humes & Fultz, *Woman Faces Murder Charge After Apparent Road Rage Incident in Clayton County*, Fox 5 News (May 8, 2019), <http://bit.ly/2HksnEJ>; *Amazon Driver Shot at in Road Rage Incident on Popular Memphis Road, Police Say*, Fox13memphis (May 11, 2019), <http://bit.ly/2E3iQBa>; *Gunman at Large After Man Wounded in Possible Road Rage Shooting in Cypress*, KABC7 (May 6, 2019), <http://bit.ly/2HxMG1R>; Jackson, *Man Charged with Murder After Suspected Road Rage Shooting in Berkeley County*, Post & Courier (May 7, 2019), <http://bit.ly/2Q4tr3x>.

²¹ Additional examples are cited at Lowy & Sampson, *supra* n.3, and Gun Violence Archive (2019), <http://bit.ly/2JEvtX8>.

²² See CDC Data, *supra* n.5, <http://bit.ly/2LCUh4g>.

²³ See Lott, *More Guns Less Crime: Understanding Crime and Gun Control Laws* 160 (1998).

that assertion has been debunked.²⁴ Research suggests that tighter gun regulations are associated with reduced firearm death rates and criminal access to guns,²⁵ whereas more gun ownership and availability is associated with more homicides, suicides, unintentional

²⁴ See Donohue et al., *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis*, Nat'l Bureau of Econ. Research, Working Paper No. 23510 (Oct. 2018), <http://bit.ly/2WOYfI0>; Ayres & Donohue, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 Stan. L. Rev. 1193, 1296 (2003); Donohue, *The Impact of Concealed-Carry Laws*, in *Evaluating Gun Policy: Effects on Crime and Violence* 287, 324 (Ludwig & Cook, eds., 2003) ("most states experienced increases in crime from the passage of shall-issue laws."); Ludwig, *Concealed-Gun-Carrying Laws and Violent Crime: Evidence from State Panel Data*, 18 Int'l Rev. L. & Econ. 239 (1998); Duggan, *More Guns, More Crime*, 109 J. Pol'y Econ. 1086 (2001).

²⁵ See Donohue et al., *The Impact of Right to Carry Laws and the NRC Report: The Latest Lessons for the Empirical Evaluation of Law and Policy*, Nat'l Bureau of Econ. Research, Working Paper No. 18294 (2012, updated 2014), <https://bit.ly/2vU4EWP>. States with higher numbers of gun laws are associated with a lower rate of firearm fatalities. See Fleegler et al., *Firearm Legislation and Firearm-Related Fatalities in the United States* 173 JAMA Intern Med. 732, 737-738 (2013). More restrictive firearms laws are associated with lower rates of suicide, see Conner & Zhong, *State Firearm Laws and Rates of Suicide in Men and Women*, 25 Am. J. Preventative Med. 320, 322-323 (2003), with fewer guns diverted to criminals, see Webster et al., *Preventing the Diversion of Guns to Criminals Through Effective Firearms Sales Laws*, in *Reducing Gun Violence in America: Informing Policy With Evidence and Analysis* 109, 111-119 (Webster & Vernick, eds., 2013), <https://bit.ly/1xk4Lsb>; Webster, et al., *Preventing the Diversion of Guns to Criminals Through Effective Firearms Sales Laws*, in *Updated Evidence and Policy Developments on Reducing Gun Violence in America* 20, 21-22 (Webster & Vernick, eds., 2014), <http://bit.ly/2W0PVYD>.

shootings, and harm to society.²⁶ An analysis of 2010 data showed that America’s homicide rate was seven times higher than that of other high-income countries, driven by a gun homicide rate that was 25 times higher.²⁷ For example, more people are killed by gunfire in three days in America than in a year in Australia.²⁸ A seminal 1997 study found that America’s outsized lethal violence rate is not attributable to our crime rates, many of which are similar to or lower than those in

²⁶ Increase in gun prevalence may cause greater lethality and harm to the community. See Cook & Ludwig, *The Social Costs of Gun Ownership*, 90 J. Pub. Econ. 379, 387 (2006). “Multivariate analyses found that states with higher rates of firearm ownership had significantly higher homicide victimization rates[.]” Miller et al., *State-Level Homicide Victimization Rates in the US in Relation to Survey Measures of Household Firearm Ownership, 2001-2003*, 64 Soc. Sci. & Med. 656, 656 (2007). “The research suggests that households with firearms are at higher risk for homicide, and there is no net beneficial effect of firearm ownership.” Hepburn & Hemenway, *Firearm Availability and Homicide: A Review of the Literature*, 9 Aggression & Violent Behav. 417 (2004). “[I]n areas where household firearm ownership rates were higher, a disproportionately large number of people died from homicide.” Miller et al., *Rates of Household Firearm Ownership and Homicide Across US Regions and States, 1988-1997*, 92 Am J. Public Health 1988 (Dec. 2002). Living with a gun in the home increases the risk of homicide and suicide. See Dahlberg, 160 Am. J. Epidemiology at 929, 935, <http://bit.ly/2YqLYu0>.

²⁷ Hemenway & Grinshteyn, *Violent Death Rates: The U.S. Compared With Other High-Income OECD Countries, 2010*, 129 Am. J. Med. 266 (Mar. 2016), <http://bit.ly/2VgVca5>; see also Aizenman, *Deaths from Gun Violence: How the U.S. Compares With The Rest of the World*, NPR (Nov. 9, 2018), <https://n.pr/2Q1gHe0>.

²⁸ See Australian Bureau of Statistics, *3303.0 Causes of Death Australia, 2017* (Sept. 26, 2018), <https://bit.ly/2VW85Le>; GunPolicy.org, *Australia, Total Number of Gun Deaths*, <http://bit.ly/2LBDIpf>; *supra* n.5.

comparable countries, or to socioeconomic factors that we share, but can be explained at least in part by our widespread gun use.²⁹ Regardless of the benefits of gun possession, guns indisputably create risks, causing people to be killed and injured who would not have been if a gun were not present.

The Second Amendment’s uniquely lethal consequences necessitate the greatest caution before this Court invalidates a law enacted to protect Americans from gun violence. In particular, the Court should not import into the Second Amendment a mechanical formula that every regulation implicating a constitutional right requires strict scrutiny (Pet. Br. 40). Courts should “be careful—most careful—to ascertain the reach of the Second Amendment right”; it “is unique among all other constitutional rights to the individual because it permits the user of a firearm to cause serious personal injury—including the ultimate injury, death—to other individuals, rightly or wrongly.... A person wrongly killed cannot be compensated by resurrection.” *Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 816 (D.N.J. 2012), *aff’d sub nom. Drave v. Filko*, 724 F.3d 426 (3d Cir. 2013).

B. The Nation’s Constitutional Structure And History Presuppose Government’s Paramount Duty To Protect Public Safety

American institutions share a background assumption about the paramount purpose of government: the protection of lives. In examining petitioners’ claim that the Constitution guarantees virtually every American

²⁹ Zimring & Hawkins, *Crime is not the Problem: Lethal Violence in America* (1997), <http://bit.ly/2vVdFyX>.

the right to carry loaded firearms on their person for “confrontation” (Pet. Br. 42), the Court should consider the gravely adverse consequences of such a ruling to government’s ability to ensure personal security—indeed, to ensure that Americans can live.

1. The Constitution reflects the Framers’ recognition of government’s duty to protect public safety

The United States was founded upon the declaration that the core purpose of government is to protect life, liberty, and “Safety and Happiness.” Declaration of Independence ¶ 2 (U.S. 1776). Thomas Jefferson later reiterated that “the care of human life & happiness, & not their destruction, is the first and only legitimate object of good government.” Jefferson, *To the Republicans of Washington County, Maryland* (1809), <http://founders.archives.gov/documents/Jefferson/03-01-02-0088>.

These fundamental principles animated the Philadelphia Convention’s work in framing the Constitution. As James Madison put it, the purpose of the Constitutional Convention was to establish a government that would “provide for the safety, liberty and happiness of the Community.” 1 *The Records of the Federal Convention of 1787*, at 53 (Farrand ed. 1911). The Framers were influenced by John Locke and William Blackstone. Locke listed the right to live as the foremost natural right.³⁰ Blackstone explained that life “cannot legally be disposed of or destroyed by any individual.”³¹

³⁰ Locke, *The Second Treatise on Civil Government* 9-10 (1690) (Prometheus Books 1986).

³¹ 1 *Blackstone’s Commentaries* *129.

Notwithstanding petitioners' mistaken insistence that every piece of legislation touching on rights protected by the Bill of Rights requires strict scrutiny (Br. 40), this Court has consistently recognized that every provision in the Constitution must be construed in view of the state's bedrock interest in public safety. The First Amendment does not entitle one to falsely yell "Fire!" in a crowded theater, because the public has a greater right not to be exposed to the risk of being trampled by a mob heading for the exits. *See Schenck v. United States*, 249 U.S. 47, 52 (1919). Words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace" are not within the scope of speech protected by the Constitution. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). The Constitution does not protect speech or press likely to "incit[e] or produc[e] imminent lawless action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Expressive conduct with the intent to intimidate is not protected. *Virginia v. Black*, 538 U.S. 343 (2003). The constitutional right of assembly is qualified by "peaceably." U.S. Const. amend. I; *see Cox v. Louisiana*, 379 U.S. 536, 558 (1965).

The free exercise of religion is similarly constrained when life or safety is at risk. The Court has rejected the proposition that compulsory vaccination laws abridge principles of individual liberty. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). Bans on religious acts involving snake handling have been upheld because the Constitution does not preclude "a law prohibiting the p[rac]tice of a religious rite which endangers the lives, health or safety of the participants, or other persons." *Lawson v. Commonwealth*, 164 S.W.2d 972, 974 (Ky. Ct. App. 1942).

The “sacred” constitutional right to private property, *Wilkinson v. Leland*, 27 U.S. (2 Peters) 627, 657 (1829); U.S. Const. amend. V, is constrained to protect public safety. The rule of necessity allows entry onto the land of another if “it is or reasonably appears to be necessary to prevent serious harm.” *Restatement (Second) of Torts* § 197 (1965); see, e.g., *Ploof v. Putnam*, 71 A. 188, 189 (Vt. 1908). The nuisance doctrine also constrains property rights when public safety may be harmed. See *Camfield v. United States*, 167 U.S. 518, 522-523 (1897).

The Fourth, Fifth, and Sixth Amendments have all been construed to avoid unreasonable interference with the government’s obligation to protect safety. Public safety risks posed by even a single unsecured gun can outweigh Fifth Amendment rights. In *New York v. Quarles*, 467 U.S. 649, 651-653 (1984), the Court refused to exclude a suspect’s un-Mirandized response to an officer’s question—“the gun is over there”—because the danger created by an unlocated gun “presents a situation where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*.” *Id.* at 652-653. Even though “there was nothing to suggest that any of the officers were any longer concerned for their own physical safety,” *id.* at 655, the firearm, which the suspect had concealed in a supermarket, “obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it,” *id.* at 657. The police’s need to find and secure the gun “in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment’s privilege against self-incrimination.” *Id.*

These familiar examples refute petitioners' submissions that regulations of firearms must either be deemed presumptively unconstitutional, unless a close analogue can be found before the framing of the Constitution (Br. 23-25), or subject to strict scrutiny (*id.* 40-41). This Court has not adopted such an approach towards any other constitutional right.

Even the First Amendment does not require that every regulation diminishing the ability to exercise the right of free speech is either subject to strict scrutiny or presumptively constitutional. To the contrary, a wide array of regulations directly affecting speech are subject at most to intermediate scrutiny, even though they certainly make speaking more difficult. *See, e.g., Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 803-807 (1984); *see also Kovacs v. Cooper*, 336 U.S. 77 (1949); *Cox v. New Hampshire*, 312 U.S. 569 (1941).

The Court should not lose sight of the fact that “the precise content of most of the Constitution’s civil liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable.” *Anderson v. Creighton*, 483 U.S. 635, 643-644 (1987). A right to lethal firearms is no exception to that rule.

2. Throughout American history, guns have been regulated to protect public safety

The principle that a right to possess firearms is limited by the paramount interest in public safety has long been recognized by both legislatures and the courts. “[C]olonial and early state governments routinely exercised their police powers to restrict the time, place, and

manner in which Americans used their guns.”³² In the years after the founding, states began to pass laws prohibiting concealed carrying of weapons.³³ After the Civil War, many states wrote new constitutions, the majority of which explicitly empowered the state legislature to regulate the right to keep and bear arms, even when that right was also secured by the state constitution.³⁴ Even state legislatures that did not have explicit authority to regulate firearms had implicit authority to do so.³⁵ Several states outlawed the private carrying

³² Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 *Law & Hist. Rev.* 139, 162 (2007).

³³ See Cornell, *Symposium, Gun Control: Old Problems, New Paradigms: The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History*, 17 *Stan. L. & Pol’y Rev.* 571, 584-586 (2006); An Act to Prevent Persons in this Commonwealth from Wearing Concealed Arms, Except in Certain Cases (1813), reprinted in Cramer, *Concealed Weapon Laws of the Early Republic* 143-144 (1999); Act of Mar. 18, 1859 Ohio Laws 56, § 1; Ark. Act of Apr. 1, 1881, ch. XCVI, § 1, Ark. Acts 191; 1881 Colo. Rev. Stat § 149, pt. 229; Fla. Act of Feb. 12, 1885, ch. 3620, § 1; Ill. Act of Apr. 16, 1881 (codified in 38 Ill. Comp. Stat. § 54(d) (1882)); 1880 Ky. Gen. Stat. ch. 29, § 1; 1893 Neb. Cons. Stat. § 5604; 1879 N.C. Sess. Laws ch. 127 (codified in N.C. Crim. Code ch. 25 (1883)); N.D. Pen. Code § 457 (1895); An Act to Prevent Persons from Carrying Concealed Weapons, Laws of Oregon 1885, §§ 1-4, p. 33 (Feb. 18, 1885) (codified in Ore. Code ch. 8 (1892)); 1880 S.C. Acts 448, § 1; S.D. Terr. Pen. Code § 457 (1877); Tex. Act of Apr. 12, 1871; 1869-1870 Va. Acts ch. 349, pt. 510; Wash. Code § 929 (1881); W. Va. Code ch. 148, § 7 (1870).

³⁴ Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* 160-164 (Oxford Univ. Press 2006); see also Tex. Const. of 1876, art. I, § 23; Idaho Const. of 1889, art. I, § 11.

³⁵ See, e.g., Act of Apr. 1, 1881, ch. XCVI, § 1, Ark. Acts 191.

of military grade weapons during the Reconstruction era.³⁶

In 1874, shortly after the ratification of the Fourteenth Amendment, the Supreme Court of Georgia upheld a state law that forbade people from carrying pistols and certain other weapons into courts, places of worship, and election grounds. *Hill v. State*, 53 Ga. 472 (1874). The court emphasized that “[t]he preservation of the public peace, and the protection of the people against violence, are constitutional duties of the legislature,” and that “the guarantee of the right to keep and bear arms is to be understood and construed in connection and in harmony with these constitutional duties.” *Id.* at 477. The court further explained that expansive gun rights are inconsistent with the Framers’ vision of “a well ordered and civilized community”:

To suppose that the framers of the constitution ever dreamed, that in their anxiety to secure to the state a well regulated militia, they were sacrificing the dignity of their courts of justice, the sanctity of their houses of worship, and the peacefulness and good order of their other necessary public assemblies, is absurd. To do so, is to assume that they took it for granted that their whole scheme of law and order, and government and protection, would be a failure, and that the people, instead depending upon the

³⁶ Tennessee prohibited carrying, “publicly or privately, any... belt or pocket pistol, revolver, or any kind of pistol, except the army or navy pistol, usually used in warfare, which shall be carried openly in the hand.” 1879 Tenn. Pub. Acts. ch. 186. Wyoming, Arkansas and Texas enacted similar bans. 1876 Wyo. Comp. Laws ch. 52, § 1; Ark. Act of Apr. 1, 1881; Tex. Act of Apr. 12, 1871.

laws and the public authorities for protection, were each man to take care of himself, and to be always ready to resist to the death, then and there, all opposers.

Id. at 478-479.

The Texas Supreme Court’s decision in *English v. State*, 35 Tex. 473 (1872), was similar—and was relied on by this Court in *Heller* for the proposition that the Second Amendment has historical limitations, *see* 554 U.S. at 627. In upholding a statute regulating and in some cases prohibiting the carrying of deadly weapons, the *English* court found it “little short of ridiculous, that any one should claim the right to carry upon his person any of the mischievous devices inhibited by the statute, into a peaceable public assembly, as, for instance, into a church, a lecture room, a ball room, or any other place where ladies and gentlemen are congregated together.” 35 Tex. at 478-479.

These are not isolated examples. Courts construing the scope of the right to arms in state constitutions almost universally recognized the government’s broad authority to protect public safety, applying, as Professor Winkler has explained, a doctrinal framework that allowed for “reasonable regulation.” Winkler, *The Reasonable Right to Bear Arms*, 17 Stan. L. & Pol’y Rev. 593, 597-603 (2006); *see* Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683 (2007).

C. Strict Scrutiny Would Prevent The Government From Fulfilling Its Duty To Protect Public Safety

Petitioners’ call for stringent constitutional scrutiny of virtually every regulation affecting the possession and carrying of firearms would cripple government’s

ability and obligation to protect public safety in a way unprecedented in American history or jurisprudence. Petitioners' submission would make the Second Amendment a super-right, potentially destructive of other fundamental rights, including the rights to speak, assemble, worship, and live.

In arguing that the government has no greater power to regulate the use and possession of firearms in public spaces than in the home, petitioners contend (Br. 41) that any fundamental constitutional right is all “core,” and that the courts therefore may not distinguish among situations in which that right is exercised or at issue. As outlined below, petitioners' premise is demonstrably false. And although this Court in *McDonald* deemed Second Amendment rights “fundamental” for purposes of incorporation against the States through the Due Process Clause, *see* 561 U.S. at 767-769, it does not follow that every regulation affecting that right (or any other fundamental right incorporated through the Due Process Clause) requires strict scrutiny, or that the Second Amendment must be construed to apply with equal force in public spaces as in the home. Indeed, *McDonald* agreed that “[s]tate and local experimentation with reasonable firearms regulation will continue under the Second Amendment.” *Id.* at 785 (quoting Brief for State of Texas et al.)

This Court's jurisprudence provides numerous examples of regulations of fundamental rights that are not subject to strict scrutiny. Regulations of commercial speech warrant only intermediate scrutiny, and some forms of commercial speech may be banned because they are harmful to the public. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 563-564 (1980). And the Court has made clear that the First Amendment may apply differently

in public spaces than in the home, where it has greatest force. *See Stanley v. Georgia*, 394 U.S. 557, 564-565 (1969).

Similarly, the Fourth Amendment does not apply with equal force in every location. An arrest inside a home ordinarily requires a warrant. *Payton v. New York*, 445 U.S. 573, 583 (1980). But an arrest on a public street ordinarily does not, *United States v. Watson*, 423 U.S. 411, 422-423 (1976), given the lesser (but not nonexistent) right of privacy and the greater governmental interest in preserving public safety in public spaces.

Finally, the Court stressed in *Heller* that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” 554 U.S. at 626-627. Nowhere did the Court address whether such laws would survive strict scrutiny.

Far from adopting the mechanical view that every regulation affecting a constitutional right requires strict scrutiny, the Court has always engaged in a contextual analysis, informed by both functional and practical considerations and the history of how such regulations have traditionally been treated in American law. In *Watson*, for example, the Court stressed that “logic sometimes must defer to history and experience,” 423 U.S. at 429, and it considered both the long tradition allowing the police to make warrantless arrests of felons in public and the deleterious consequences to public safety if the police could not do so, *see id.* at 429-432. So too here, the Court should consider both the long tradi-

tion accepting reasonable regulation of firearms, especially when carried in public, as well as the seriously deleterious consequences to public safety that would flow from the uninhibited approach to gun rights that petitioners champion.

The Court should also bear in mind that the causes of gun violence are complex, and legislators and experts hotly debate how best to address the scourge of gun violence that plagues the nation. By its very nature, solutions demand predictive judgment, and this is the kind of matter on which this Court ordinarily allows legislatures breathing room, as long as they do not act in an arbitrary or unreasonable manner. *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997). The Constitution does not require peer-reviewed double-blind studies of gun deaths and injuries that have already occurred to allow a legislature to conclude that, to protect public safety, reasonable measures should be implemented to prevent gun violence before it happens. *Cf. City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438-439 (2002) (“municipalities must be given a reasonable opportunity to experiment with solutions to address the secondary effects of protected speech” (quotation marks omitted)).

D. The Greater Risks To The Public Warrant Caution In Expanding A Right To Guns Into Public Spaces

Although this case involves only a regulation that affects petitioners’ ability to transport locked, unloaded guns to second homes and ranges, petitioners seek to use it as an opportunity to create a vast new right to guns in public places. The Court should resist petitioners’ call for judicial activism. And it certainly should not, in this case, “formulate a rule of constitutional law

broader than is required by the precise facts to which it is to be applied”—another aspect of Justice Brandeis’s wise counsel in *Ashwander*, 297 U.S. at 347 (concurring opinion); see, e.g., *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008).

Petitioners’ unbounded vision of the Second Amendment finds no support in *Heller*. *Heller* articulated a Second Amendment right of “law-abiding, responsible citizens to use arms *in defense of hearth and home*.” 554 U.S. at 635 (emphasis added). The focus on the home was reiterated in *McDonald*: “In *Heller*, we held that the Second Amendment protects the right to possess a handgun *in the home* for the purpose of self-defense.” 561 U.S. at 791 (emphasis added).

Unsurprisingly, six courts of appeals have relied on *Heller* to uphold the constitutionality of laws regulating the carrying of guns in public.³⁷ Those courts have properly recognized that the government has broad authority to protect people from the risks of guns in public places. See, e.g., *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (“[A]s we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.”).

As those courts have recognized, extending a broad right to use firearms into public spaces carries a grave risk of injury and death to the public. Judge Wilkinson

³⁷ *Hightower v. City of Boston*, 693 F.3d 61 (1st Cir. 2012); *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013); *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc); *Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013).

properly urged caution before extending a right to arms to public spaces: “We do not wish to be even minutely responsible for some unspeakably tragic act of mayhem because in the peace of our judicial chambers we miscalculated as to Second Amendment rights. It is not far-fetched to think the *Heller* Court wished to leave open the possibility that such a danger would rise exponentially as one moved the right from the home to the public square. If ever there was an occasion for restraint, this would seem to be it.” *Masciandaro*, 638 F.3d at 475-476.

Indeed, “studies and data demonstrat[e] that widespread access to handguns in public increases the likelihood that felonies will result in death and fundamentally alters the safety and character of public spaces.”³⁸ The presence of firearms in the public sphere augments the risk associated with gun violence in at least two ways.

First, guns create dangers in the public sphere that may not be present, or as serious, in the home. See Cook & Ludwig, *Principles for Effective Gun Policy*, 73 Fordham L. Rev. 589, 594 (2004). “Unlike possession of a gun for protection within a residence, carrying a concealed firearm presents a recognized threat to public order, and is prohibited as a means of preventing physical harm to persons other than the offender.” *People v. Yarbrough*, 86 Cal. Rptr. 3d 674, 682 (Ct. App. 2008) (internal quotations omitted); see also *United*

³⁸ *Kachalsky*, 701 F.3d at 99; see also *Woollard*, 712 F.3d at 879 (citing a significant body of evidence that “limiting the public carrying of handguns protects citizens and inhibits crime by, inter alia: [d]ecreasing the availability of handguns to criminals via theft [and] [l]essening the likelihood that basic confrontations between individuals would turn deadly”).

States v. Walker, 380 A.2d 1388, 1390 (D.C. 1977) (noting “inherent risk of harm to the public of such dangerous instrumentality being carried about the community and away from the residence or business of the possessor”).

Firearms kept in the home may pose a threat to gun owners and their family members, friends, and houseguests.³⁹ But firearms carried in public present a potential threat to a much larger number of strangers, law enforcement officers, random passersby, and others. Guns in public places are also “used far more often to intimidate and threaten than they are used to thwart crimes.”⁴⁰ From 2007 through May 2019, at least 1,313 people were killed by individuals with concealed carry permits; that number includes 23 law enforcement officers and victims of 34 mass shootings.⁴¹

Second, public carrying of firearms is associated with increased violent crime. Experts have analyzed the effects of “right-to-carry” (or “shall-issue”) laws, which presumptively entitle citizens to carry concealed weapons either without a permit or if they meet certain criteria. They have concluded that “[t]otality of the evidence based on educated judgments about the best statistical models suggests that right-to-carry laws are associated with substantially higher rates” of violent

³⁹ Hepburn & Hemenway, 9 *Aggression & Violent Behav.* at 417; Miller et al., 92 *Am. J. Pub. Health* at 1988.

⁴⁰ Hemenway & Azrael, *The Relative Frequency of Offensive and Defensive Gun Uses: Results from a National Survey*, 15 *Violence & Victims* 257, 271 (2000).

⁴¹ Violence Policy Ctr., *Concealed Carry Killers*, <http://bit.ly/2HhaEiX> (updated May 10, 2019).

crime.⁴² Additional research found that right-to-carry laws were “associated with 13-15 percent higher aggregate violent crime rates ten years after adoption.”⁴³ These findings confirm earlier research connecting right-to-carry laws with increased crime rates.⁴⁴

Given these findings, “[n]o longer can any plausible case be made on statistical grounds that shall-issue laws are likely to reduce crime for all or even most states.” Ayres & Donohue, *Shooting Down the “More Guns, Less Crime” Hypothesis*, 55 *Stan. L. Rev.* 1193, 1296 (2003). Indeed, “guns did not seem to protect [even] those who possessed them from being shot in an assault.” Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 *Am. J. Pub. Health* 2034, 2037 (2009); *see also* Hemenway et al.,

⁴² Parker, *Right-to-Carry Gun Laws Linked to Increase in Violent Crime, Stanford Research Shows*, *Stanford News* (Nov. 14, 2014) (internal quotation omitted), <https://stanford.io/2Q5eKx9>; *see also* Aneja et al., *The Impact of Right to Carry Laws and the NRC Report: The Latest Lessons for the Empirical Evaluation of Law and Policy*, Nat’l Bureau of Econ. Research, Working Paper No. 18294, at 80-81 (Aug. 2012) (“[right-to-carry] laws increased every crime category by at least 8 percent, except murder”), <http://bit.ly/2WHYJjh>. Some statistical models “generated an estimate of a nearly 33 percent increase in assaults with firearms associated with [right-to-carry] laws.” Council of the District of Columbia, Comm. of the Whole, Report on Bill 20-930, at 69 (Dec. 2., 2014) (Letter from Webster to Mendelson, Chairman of the D.C. Council (Nov. 25, 2004)), <https://bit.ly/2VBRME5>.

⁴³ Donohue et al., Working Paper No. 23510, *supra* n.24.

⁴⁴ *See* Ayres & Donohue, *Yet Another Refutation of the More Guns, Less Crime Hypothesis—With Some Help From Moody and Marvell*, 6 *Econ J. Watch* 35, 41 (Jan. 2009); Ayres & Donohue, *More Guns, Less Crime Fails Again: The Latest Evidence from 1977-2006*, 6 *Econ. J. Watch* 218, 229 (May 2009); Miller et al., 33 *Accident Analysis & Prevention* at 477.

Gun Use in the United States: Results From Two National Surveys, 6 *Injury Prevention* 263, 266 (2000).

Instead, the majority of relevant research demonstrates that “policies to discourage firearms in public may help prevent violence.” McDowall et al., *Easing Concealed Firearms Laws: Effects on Homicide in Three States*, 86 *Crim. L. & Criminology* 193, 203 (1995); see Cook & Ludwig, 73 *Fordham L. Rev.* at 592 (“[E]vidence suggests that ... separat[ing] guns from violence would sharply reduce the number of victims killed in domestic violence, robberies, and routine altercations.”). The five States with the lowest gun death rates have laws that more tightly regulate public carrying by requiring permits for which good cause must be shown.⁴⁵ Connecticut’s law tightening carry permits “was associated with a 40% reduction in Connecticut’s firearm homicides rates during the first 10 years that the law was in place.” Rudolph et al., *Association Between Connecticut’s Permit-to-Purchase Handgun Law and Homicides*, 105 *Am. J. Pub. Health* 49, 49 (Aug. 2015). These studies strongly suggest that a constitutional principle forbidding these or other gun laws may well lead to deaths and injuries by gunfire that would not otherwise occur.

In light of all this evidence, the Court should not imperil current and future laws restricting guns in public spaces with broad language embracing a right to

⁴⁵ See Ctrs. for Disease Control & Prevention, Nat’l Ctr. for Health Statistics, *Firearm Mortality by State: 2017* (2017), <http://bit.ly/2LPvREC>; Giffords Law Ctr. to Prevent Gun Violence, *Concealed Carry*, <http://bit.ly/2LFXXIY>; see also Conn. Gen. Stat. § 29-28(b); Haw. Rev. Stat. Ann. § 134-9(a); Mass. Gen. Laws ch. 140, § 131; N.Y. Penal Law § 400.00(2)(f); R.I. Gen. Laws § 11-47-11(a); *Mosby v. Devine*, 851 A.2d 1031 (R.I. 2004).

carry firearms in the public sphere. Certainly it should not do so in this case, which concerns only a regulation of the transportation of *locked, unloaded* weapons from one place to another. Rather, the Court should reaffirm that state and local governments have broad authority to regulate the public carrying of weapons in order to protect the public from gun violence.

CONCLUSION

The Court should dismiss the writ of certiorari as improvidently granted or should remand for lower courts to address whether statutory grounds resolve the case and whether this case is moot. If the Court does address the Second Amendment questions, it should decline to endorse strict scrutiny and should instead apply a test that leaves intact the States' broad power to protect the public from violence.

Respectfully submitted.

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