No. 20-843

In The Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASS'N, *et al.*,
Petitioners,

v.

KEVIN P. BRUEN,
in His Official Capacity as
Superintendent of New York State Police, *et al.*,
Respondents.

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

BRIEF OF *AMICUS CURIAE* THE INDEPENDENT INSTITUTE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

The Independent Institute is a non-profit, non-partisan public-policy research and educational organization that translates ideas into profound and lasting action through publications, conferences, and multi-media programs. The Institute is committed to advancing a peaceful, prosperous, and free society grounded in the recognition of individual human worth and dignity. The Independent Institute's mission, philosophy, and work—including its publications—can be viewed at its website: https://www.independent.org.

The Independent Institute has a longstanding interest in Second Amendment issues. As questions about the proper scope of the Second Amendment return to the Court—in particular, the scope of the right beyond the four walls of a person's home—the Institute offers the following to aid the Court's analysis.

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[1] Pursuant to Supreme Court Rule 37, amicus curiae states that no counsel for any party authored this brief in whole or in part, and that no party other than amicus curiae and its counsel made any monetary contribution toward the preparation and submission of this brief. On May 27, 2021, Petitioner filed a blanket consent to the filing of all amicus briefs. On July 15, 2021, counsel for Respondent consented to the filing of this amicus brief.

INTRODUCTION & SUMMARY OF THE ARGUMENT

In 2008, this Court definitively pronounced that, because "the inherent right of self-defense has" always "been central to the Second Amendment," the Second Amendment enshrines "the individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 554 U.S. 570, 592, 628 (2008). Two years later, the Court reiterated that "the Second Amendment protects the right to keep and bear arms for the purpose of self-defense." *McDonald v. City of Chi.*, 561 U.S. 742, 749–50 (2010). Both *Heller* and *McDonald*, then, cemented the concept that the Second Amendment exists as a bulwark against attempts by a sovereign to erode the "fundamental, sacred, and unalterable law of self-preservation." *See* John Locke, SECOND TREATISE OF CIVIL GOVERNMENT § 149 (1690).

While *Heller* and *McDonald* addressed the right to defend oneself *inside* the home, Petitioners have systematically established that the Second Amendment also "protects a right to carry firearms *outside* the home." *See* Pet'rs' Br. 23 (emphasis added). Although *Heller*'s reasoning compels the conclusion that the Second Amendment preserves the right to bear arms in public, Justice Scalia's majority opinion nonetheless left open the extent to which the government may regulate the carrying of firearms in certain "sensitive places such as schools and government buildings . . . ." *Heller*, 554 U.S. at 626. Because the Court can, and should, conclusively endorse Petitioners' argument that the self-defense right extends beyond a home's four walls, it should take this occasion to clarify that the "sensitive place"

aside in *Heller* does not mean that the government has *carte blanche* to decree "gun free" any public area that it desires.[2]

Fealty to the Second Amendment means recognition of the following premises. First, because "individual self-defense is 'the *central component*' of the Second Amendment right," *McDonald*, 561 U.S. at 767 (quoting *Heller*, 554 U.S. at 599), gun-free zones that dilute (or eradicate) the ability of a person to defend himself violate the Second Amendment. Second, the litmus test of the Second Amendment's scope is the historical treatment of the self-defense right. And third, the philosophy underlying the Second Amendment and history of self-defense regulation in this country harmonize—public areas in which arms were traditionally banned were limited to those where the government had unique competency to protect the lives of people in those areas.

These three premises compel the conclusion that gun-free zones must be narrowly confined to the few public areas in which the government has demonstrated a distinct aptitude in keeping people safe. Besides the gun-free areas recognized at the time of the Founding (*e.g.*, courthouses), few areas qualify, and those that may (*e.g.*, certain well-

[2] This brief does not take a policy position on the establishment of gun-free zones. Many states allow firearms in polling places and legislative buildings, and that is their prerogative. This brief simply aims to establish the scope of a sovereign's authority to create gun-free zones, not whether exercising that authority is good policy.

secured areas in airports) are conspicuous for the degree to which they employ security measures to ensure the physical protection of everyone in the area. For these reasons, the Court should not only agree with Petitioners that the Second Amendment protects the right to bear arms outside the home but, in so doing, also explain that the Second Amendment does not leave room for the Government to eviscerate this right through the unbridled declaration of public gun-free zones.

It is important that the Court emphasize this point. Absent clear guidance, it is likely that jurisdictions displeased with a ruling that protects the right to carry firearms will attempt to sap that ruling of practical significance through profligate designation of "sensitive places" surrounded by broad buffer zones, making the lawful carrying of firearms effectively impossible in many areas. Past practice demonstrates that this risk is realistic. *See, e.g.*, *People v. Chairez*, 2018 IL 121417 ¶ 55 (striking down ban on carrying firearms within 1,000 feet of a public park and observing that "the State conceded at oral argument that the 1,000-foot firearm restriction around a public park would effectively prohibit the possession of a firearm for self-defense within a vast majority of the acreage in the City of Chicago because there are more than 600 parks in the city"); Br. for the District of Columbia, *et al.*, *Wrenn v. District of Columbia*, 2016 WL 3753117 (D.C. Cir. Jul. 13, 2016) (defending permitting system akin to New York's and arguing that presence of "sensitive places" "makes public carrying impossible for many people who live and work in the District").

ARGUMENT

I. AUTHORITY TO CREATE GUN-FREE ZONES MUST BE ASCERTAINED BY EXAMINING HISTORY'S TREATMENT OF THE SELF-DEFENSE RIGHT.

In interpreting the Second Amendment, this Court has adhered to "the principle that '[t]he Constitution was written to be understood by the voters.'" *Heller*, 554 U.S. at 576 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). Based upon that principle, the *Heller* Court concluded that the text of the Second Amendment means that: (1) the "right is exercised individually and belongs to all Americans," *id.* at 581; (2) the phrase "'bear arms' . . . unambiguously . . . refer[s] to the carrying of weapons outside of an organized militia," *id.* at 584; and (3) "the right . . . enable[s] individuals to defend themselves," *id.* at 594. *Heller* left no ambiguity as to this final point, stating explicitly that "self-defense" is "the *central component* of the right itself." *Id.* at 599. *McDonald* emphasized this principle, stating: "Self-defense is a basic right, recognized by many legal systems from ancient times to the present day" and one that is "deeply rooted in this Nation's history and tradition." 561 U.S. at 767–68 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

To bolster these points, the *Heller* majority meticulously canvassed the original understanding of the Second Amendment. In so doing, *Heller* examined, among other sources, "analogous arms-bearing rights in state constitutions that preceded and immediately followed adoption of the Second

Amendment," 554 U.S. at 600–01, as well as "how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century," *id.* at 605. The *McDonald* majority did the same on its way to holding that, because "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty," the Second Amendment "applies equally to the Federal Government and the States." *McDonald*, 561 U.S. at 778, 791.[3]

Because the *Heller* and *McDonald* Courts were presented with total bans on the possession of operative handguns in the home, they did not purport to "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment" outside the confines of the situation those cases presented. *Heller*, 554 U.S. at 626. To aid Second Amendment analysis in future cases, however, *Heller* and *McDonald* provided: (1) certitude that the Second Amendment enshrines an individual, fundamental right to self defense that predates the Constitution's ratification; and (2) instruction in how to ascertain which government regulations of that right survive Second Amendment scrutiny—*i.e.*, history and tradition.

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[3] Indeed, a rare point of agreement between the majority and dissenting opinions in *Heller* was that history matters. *See, e.g.*, *Heller*, 554 U.S. at 662–71 (Stevens, J., dissenting) (discussing, among other sources, the 1689 English Bill of Rights and Blackstone's Commentaries); *id.* at 683–87 (Breyer, J., dissenting) (discussing "colonial history").

As the Court takes up the question of the Second Amendment's scope *outside* the home, the self-defense principle and the historical-inquiry mode of analysis recognized in *Heller* and *McDonald* apply with the same force. For that reason, the government's regulation of the carrying of firearms outside the home—including the areas it may legitimately deem to be gun-free zones—cannot be allowed to erode or jettison the right of law-abiding citizens to defend themselves from the threat of violence. And this principle is borne out by the historical record, which demonstrates that gun-free zones have been permitted only in the unique, and uniquely rare, areas in which the government has the capacity to assure protection from violence.

II. HISTORY DEMONSTRATES THAT THE AUTHORITY TO CREATE GUN-FREE ZONES IS NARROWLY CIRCUMSCRIBED TO AREAS IN WHICH GOVERNMENT PROTECTION IS AT ITS APEX.

Because the *Heller* Court had before it a law that banned possession of functional handguns within the home, it had no occasion to discuss the historical practice of restricting guns in public areas. History, however, teaches that true gun-free zones were quite rare; for the most part, they included places where government officials met to conduct the core functions of government (*e.g.*, state legislatures and courthouses),[4] polling places, and schools—but,

[4] Zones in which government burecrats conduct ministerial affairs (*e.g.*, post offices and departments of motor vehicles), rather than those in which the core legislative, executive, and

regarding the final category, the prohibition applied only to students. The areas historically recognized as gun free, in turn, share a common trait: each offered some heighted assurance of governmental protection from violence. An account of the practices in England, the Pre-Revolutionary Colonies, and the founding-era United States is illustrative.

A. Pre-Revolution gun-free zones in England were limited to areas in which the King's security was at its peak.

Firearms laws have a lineage that extends back nearly to the Magna Carta. Indeed, England first codified its weapon restrictions in 1328, when Parliament enacted the Statute of Northampton. The Statute prohibited the carrying of arms "before the King's justices" and "other of the King's ministers doing their office." 2 Edw. 3, c. 3 (1328).[5] Stated

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judicial powers are executed, do not fall under this umbrella. Among other reasons, areas in the former category do not provide any comparable assurances of security as are typically seen in the latter.

[5] In full, the Statute of Northampton provided:

> [N]o man great nor small, of what condition soever he be, except the king's servants in his presence, and his ministers in executing of the king's precepts, or of their office, and such as be in their company assisting them, and also [upon a cry made for arms to keep the peace, and the same in such places where such acts happen], be so hardy to come before the King's justices, or other of the King's ministers doing their office, with force and arms. . . .

2 Edw. 3, c. 3 (1328).

differently (and in more contemporary terms), the Statute of Northampton prohibited the carrying of arms in places where the King's servants or ministers were conducting the business of the sovereign.

But, like the royal orders preceding the Statute, Parliament did not ban *everyone* from carrying weapons. Certain people (*i.e.*, the "king's servants" and "his ministers") were expressly exempted from the ban on being armed in these areas if they were in the King's presence or otherwise "executing [his] precepts" or "their office."

This point is critical. The Statute of Northampton did not prohibit the average person from carrying arms in a given area solely because of that area's "sensitivity." Rather, it did so because some areas were thoroughly secured by virtue of the Crown's protection. Indeed, among the King's armed servants and ministers were bailiffs and sheriffs; the former were appointed "to attend the judges and justices at the assises, and quarter sessions" while the latter were "the keeper of the king's peace, both by common

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Another part of the Statute, not relevant for this analysis, provided that a person may "bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere . . . ." *Id.* That offense was understood to mean "going or riding armed in affray of peace," and its purpose "was to punish people who go armed to terrify the King's subjects." Sir John Knight's Case (1686) 3 Mod. 117, 87 Eng. Rep. 75, 76 (K.B.).

law and special commission." 1 William Blackstone, *Commentaries* *332, *334.[6]

Sir Edward Coke's discussion of a knight who violated the Statute's prohibition helps illustrate this point. Coke describes Sir Thomas Figett, who was arrested after he "went armed under his garments, as well as in the palace [and] before the justice of the kings bench." Edward Coke, *Institutes of the Laws of England* 161–62 (1797). In his defense, Figett claimed there "had been debate" between him and another earlier in the week, "and therefore for doubt of danger, and safeguard of his life, he went so armed." *Id*. at 162. Figett's pleas that he needed to be armed for purposes of self defense fell on deaf ears, and he was ordered to forfeit his arms or suffer imprisonment. *Id*. This was not because there was a blanket ban on carrying arms, but rather because Figett had gone armed in the palace before the justices of the King's bench.[7]

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[6] Indeed, at the time of the Founding, England employed "Serjeant[s] of Arms." The Serjeants were tasked with securing the room and arresting individuals if necessary. Notably, a Serjeant at Arms would always be armed in the presence of the King. Both chambers of the United States Congress employed, and still employ, a similar individual.

[7] Any doubt as to whether the Statute of Northampton amounted to a general carry prohibition was put to rest in *Sir John Knight's Case*. Sir John Knight's Case (1685) 87 Eng. Rep. 75, 76, 3 Mod. 117 (K.B.). Sir John Knight was an Anglican and an opponent of the Catholic King. David B. Kopel, *The First Century of Right to Arms Litigation*, 14 GEO. J.L. & PUB. POL'Y 127, 135 (2016). He allegedly walked through the streets armed with guns and entered a church during a service while armed.

From the time of the Statute of Northampton through the American Founding, the principle that weapons-free zones must accompany increased sovereign security remained consistent. Indeed, "[b]y the first half of the seventeenth century, it was thus established that," although "a subject may not carry arms in a manner to terrorize other subjects or in a place like a palace where the Justices of the King's Bench were assembled," "[p]eaceably carrying arms in public was not proscribed." STEPHEN P. HALBROOK, THE RIGHT TO BEAR ARMS: A CONSTITUTIONAL RIGHT OF THE PEOPLE OR A PRIVILEGE OF THE RULING CLASS? 35 (2021).

B. Colonial, Founding-Era, and 19th Century gun-free zones were similarly limited.

1. The practice in colonial America was in accord with its English pedigree, and gun-free zones through the time of the Founding were limited in ways similar to the Statute of Northampton. For example, Maryland prohibited the bringing of weapons "into the howse of Assembly (while the howse is sett) . . . upon perill of such fine or censure

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Id. Knight was arrested, prosecuted, and then acquitted by a jury. *Id*. Everyone in the case agreed that, so long as weapons were not carried before judges or other government officials, the Statute of Northampton outlawed carrying only if done in a "terrifying" manner. *Id*. at 135–37. The jury agreed that Knight did not violate the statute because he was not carrying in a manner "to terrify the King's subjects." *Id*. (internal citation omitted).

as the howse shall thinke fit." 1647 Md. Laws 216; *see also* 1650 Md. Laws 273.

Roughly a century after Maryland's prohibition, Virginia enacted a law that echoed the Statute of Northampton. Specifically, Virginia's prohibition forbade most (but not all) people from "com[ing] before the Justices of any Court, or other of their Ministers of Justice, doing their office, with force and arms." 1786 Va. Acts 33, ch.21. Virginia's law allowed "the Ministers of Justice in executing the precepts of the Courts of Justice, or in executing of their office, and such as be in their company assisting them," to keep their weapons. Like the Statute of Northampton, Virginia's law also barred citizens from carrying arms "in other places," but only when such carrying was done "in terror of the country," *id.*, thus respecting a general right to peaceably carry but carving out a narrow exception for courts. This law was drafted by a Committee of Revisors, in which Thomas Jefferson played a leading role, and it was presented to the General Assembly by James Madison. *See* 2 Thomas Jefferson, *The Papers of Thomas Jefferson* 519–20 (Julian P. Boyd ed., 1951).

To be certain, the colonial era saw few restictions on the right to carry weapons. "The settlers had the liberty to carry their privately-owned arms openly or concealed in a peaceable manner," and nine of the thirteen original colonies declined to regulate the keeping or bearing of arms whatsoever. HALBROOK, *supra,* at 109. The few New World restrictions on the right to carry arms in certain areas, however, were limited in a way similar to the Statute of Northampton—*i.e.*, no weapons in areas near certain

core government operations in which security was assured by the government.

2. With America's Declaration of Independence from Britain, gun-free zones expanded slightly to meet the changing times. They were, however, still limited to areas in which the government provided the requisite security to compensate for the deprivation of the self-defense right. Accordingly, polling places developed into areas in which the government could appropriately limit the right of individuals to carry weapons.

In 1776, for example, Delaware enacted a law that prohibited individuals from bringing arms to an election. Del. Const. art. 28. The justification for such a law was "[t]o prevent any Violence or Force being used at the said Elections." *Id.* Delaware also prohibited the "Muster of the Militia" on Election Day, as well as the stationing of military and militia in, at, or near polling places. *Id.* In 1787, New York followed suit by prohibiting the "force of arms . . . to disturb or hinder any citizen of this State to make free election . . ." Act of Jan. 26, 1787 N.Y. Laws 345.

These prohibitions were aimed at preventing any impediment to the free, convenient, and peaceful electoral process. *Id.* The risk of such impediments was not conjectural; Delaware in particular had a tumultuous electoral history, one in which Tories and Whigs disarmed each other. HAROLD B. HANCOCK, THE LOYALISTS OF REVOLUTIONARY DELAWARE 48–50 (1977). The conflict continued after the war ended, and it spiraled into interference at elections. For instance, Charles Polk won two disputed elections in Sussex in 1787. He apparently

resented the interference by Whig militiamen at the first election, and advised his followers to carry firearms at the second. 3 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 62, 97 (MERILL JENSEN ED., 1976).

3. Finally, the *historical* limitation on the carrying of weapons in schools is consistent with the tradition of only limiting the right to carry weapons if others in the area were allowed to remain armed. Starting in the early 19th century, schools such as the University of Virginia, Dickinson College, Waterville College, the University of Nashville, La Grange College, and the University of North Carolina prohibited *students* from carrying weapons while on campus (without permission of school authorities). Critically, no similar prohibition applied to non-students or faculty members.

For instance, the University of Virginia's Board of Visitors—which included Thomas Jefferson and James Madison—set the following rule: "No Student shall, within the precincts of the University, . . . keep or use weapons or arms of any kind, or gunpowder . . . on pain of any of the minor punishments at the discretion of the Faculty, or of the board of Censors, approved by the Faculty." *Meeting Minutes of the University of Virginia Board of Visitors*, Oct. 24–25, 1824.[8] Misuse of weapons had

[8] *Meeting Minutes of University of Virginia Board of Visitors 4–5 Oct. 1824*, ROTUNDA (1824), https://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-04-02-02-4598. The University of Nashville had the following rule: "No student shall bring, or cause to be brought into College, or, on any occasion, keep in his room, . . . any fire-arms or ammunition of

criminal consequences: "Fighting with weapons which may inflict death . . . shall be punished by instant expulsion from the University, not remissible by the Faculty; and it shall be the duty of the Proctor to give information thereof to the civil magistrate, that the parties may be dealt with according to law." *Id.*

The parameters of such rules should be recognized. The universities themselves, or the State in the case of some public universities, set the rules. Penalties for mere possession of a weapon, which could include censure or expulsion, were decided by the schools, even though those who threatened violence were referred to the civil magistrates.

Moreover, the universities were free to authorize the use of firearms. There is a long tradition of schools promoting the shooting sports, and not just universities. President Theodore Roosevelt congratulated the New York schoolboy who was the best shot of the year. GEN. GEORGE W. WINGATE, WHY SCHOOL BOYS SHOULD BE TAUGHT TO SHOOT 13

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any kind; . . . upon penalty of such censure or punishment as the Faculty may judge the offence to deserve." 7 American Annals of Education and Instruction 185 (1837), https://babel.hathitrust.org/cgi/pt?id=iau.31858033351408&view=1up&seq=191. The University of North Carolina provided: "No Student shall keep a dog, or fire arms, or gunpowder. He shall not carry, keep, or own at the College, a sword, dirk, sword-cane, or any deadly weapon; nor shall he use fire arms without permission from the President." *Acts of the General Assembly and Ordinances of the Trustees, for the Organization and Government of the University of North-Carolina* ch. 5, § 13 (1838), https://docsouth.unc.edu/true/ncga/ncga.html.

(1907). In high school, Justice Scalia was on his school's rifle team.[9] While schools may be able to restrict student possession and use of firearms, authorized firearm use has always been part of the context. And finally, while states set the rules for *public* institutions, and therefore are constitutionally circumscribed in their authority to restrict the self-defense right, *private* schools remain free to set their own rules.

4. In the late 19th century, a small handful of states experimented with broader gun-free zone legislation that sought to bar individuals from carrying firearms in churches or social gatherings.[10] These laws were short-lived, represented deviatons from the laws of most other States, and should not provide any insight into the original meaning of the Second Amendment given their temporal distance from the Founding. As this Court has long recognized, post-enactment legal materials, such as statutes and treaties, have weight only to the extent they confirm the original understanding. *See Gamble v. United States*, 139 S. Ct. 1960, 1975–76 (2019)

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[9] *Xavier High School Posts Yearbook Photo of 1953 Graduate Antonin Scalia*, ABC7 (Feb. 13, 2016), https://abc7ny.com/antonin-scalia-supreme-court-justice-us-xavier-high-school/1200010/.

[10] *See* Public Statutes of the State of Tennessee, Since the Year 1858: Being in the Nature of A Supplement to the Code 108 (2d ed. Supp. 1872) (law from 1869); 1870 Tex. Laws 63; General Statutes of Oklahoma: A Compilation of All the Laws of a General Nature Including the Session Laws of 1907, at 451–52 (law from 1890).

("[T]he *Heller* Court turned to these later treatises only after surveying what it regarded as a wealth of authority for its reading—including the text of the Second Amendment and state constitutions. The 19th-century treatises were treated as mere confirmation of what the Court thought had already been established."); *see also Heller*, 554 U.S. at 614 (discussions that "took place 75 years after the ratification of the Second Amendment . . . do not provide as much insight into its original meaning as earlier sources").

C. The limited scope of gun-free zones around the time of the Founding coincides with the prevailing political philosophy at the time.

The careful balance drawn by these limited gun-free zones—*i.e.*, the self-defense right decreases only to the extent that the government's protective ability increases—sounds in the philosophy of Cesare Beccaria, an Italian philosopher who was highly regarded by the Founding generation.[11] Beccaria was

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[11] Thomas Jefferson, for instance, copied entire passages from Beccaria in his Commonplace Book, which has been called "the source-book and repertory of Jefferson's ideas on government." Stephen P. Halbrook, A RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES 50 (1989) (citation omitted). *See* Mark W. Smith, *Enlightenment Thinker Cesare Beccaria and His Influence on the Founders: Understanding the Meaning and Purpose of the Second Amendment's Right to Keep and Bear Arms*, 2020 PEPP. L. REV. 71. James Madison praised Beccaria as a "fame[d]" "philosophical legislator." John D. Bessler, *The Italian Enlightenment and the American Revolution: Cesare Beccaria's Forgotten Influence on American Law*, 37 HAMLINE J. PUB. L. &

particularly concerned with the idea that gun-free zones might embolden criminals who would recognize the vulnerability inherent in a regime that "disarm[ed] those only who are not disposed to commit the crime which the laws mean to prevent." Cesare Beccaria, *An Essay on Crimes and Punishments . . . With a Commentary Attributed to Mons. De Voltaire* 160–02 (1775). In other words, Beccaria understood that depriving an individual of the means to defend his life without replacing it with some meaningful form of protection only created an easy victim.

In Beccaria's view, it could not "be supposed[] that those who have the courage to violate the most sacred laws of humanity, and the most important of the code, will respect the less considerable and arbitrary injunctions" of gun prohibitions, "the violation of which is so easy, and of so little comparative importance." *Id.* Critically, Beccaria recognized that "the execution" of laws creating gun-free zones does little more than "deprive the subject of that personal liberty, so dear to mankind and to the wise legislator" while "subject[ing] the innocent to all the disagreeable circumstances that should

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POL'Y. 1, 31 (2016). Indeed, "[t]he first four American presidents all knew of and engaged with his ideas, with John Adams using a quote from *On Crimes and Punishments* in his closing argument at the Boston Massacre trials." Smith, *supra*, at 75–76. And "[o]utside the presidential circle, Benjamin Franklin, Charles Lee, Pennsylvania publisher William Bradford, Benjamin Rush, John Hancock, and Josiah Quincy, Jr. among others, also reported being influenced by Beccaria's treatise." *Id.* at 76.

only fall on the guilty." *Id.* In other words, "[i]t certainly makes the situation of the assaulted worse, and of the assailants better, and rather encourages than prevents murder, as it requires less courage to attack armed than unarmed persons." *Id.*

The Founders, and other influential figures of the Era, understood Beccaria's theory. Thomas Paine, for instance, wrote that "[t]he supposed quietude of a good man allures the ruffian," and while "arms like laws discourage and keep the invader and the plunderer in awe, . . . [h]orrid mischief would ensue were one half the world deprived of the use of [arms]," as "the weak will become a prey to the strong." HALBROOK, *supra*, at 151. And because they understood it, they made sure that gun-free zones were rare and always provided alternative means to prevent rampant victimization. This in turn animated the principle recognized by this Court several centuries later: that the "[s]elf-defense" right protected by the Second Amendment "is a basic right, recognized by many legal systems from ancient times to the present day," and, accordingly, it should not be infringed by the creation of a gun-free zone absent some assurance that the innocent will be protected while prohibited from carrying a weapon. *McDonald*, 561 U.S. at 767.

* * *

Heller and *McDonald* instruct that, to ascertain the scope of the Second Amendment right to self defense, history governs. And history, for purposes of gun-free zones, is largely unambiguous. Starting with the 14th century Statute of Northampton and continuing through the Founding Era, gun-free zones

were limited to places where the government: (1) was acting within the heartland of its core authority (*e.g.*, the King's court, the halls of Parliament, courthouses, or polling places);[12] and (2) made some arrangments to ensure that any restriction on the right to carry weapons for self defense was countered by increased measures to assure public safety (*e.g.*, bailiffs, sheriffs, and faculty). This history, in turn, should inform the Court's analysis as it determines the scope of the Second Amendment in areas that extend beyond the home.

III. MODERN ANALOGUES TO GUN-FREE ZONES RECOGNIZED THROUGHOUT HISTORY ARE FEW AND FAR BETWEEN.

If, as *Heller* and *McDonald* both teach, "individual self-defense is 'the *central component*' of the Second Amendment right," *McDonald*, 561 U.S. at 767 (quoting *Heller*, 554 U.S. at 599), then the government should only be permitted to restrict the Second Amendment's guarantee if it can provide physical defense comparable to the individual right to bear arms. Some of these areas, as noted above, have a lengthy historical pedigree, and all of those historical examples share a common trait—the sovereign was uniquely well-suited to ensure the physical safety of those within the subject areas.

To the extent the Court is inclined to expand the areas traditionally allowed to be designated gun free

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[12] As noted above, *supra* note 4, not all government areas (*e.g.*, post offices and departments of motor vehicles) fit this description.

into their modern analogues, it should do so only if every retraction of the *self*-defense right is counterbalanced by an assurance of equivalent *state*-based protection. It is, of course, no answer to point generally towards the existence of modern law enforcement. Although "[o]ne of the first duties of government is to afford . . . protection," *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), no law enforcement agency can do so with sufficient efficiency. According to the FBI's Uniform Crime Reporting Program, Washington, D.C. has the Nation's highest number of law enforcement officers per capita,[13] but, according to D.C. Metropolitan Police Department's most recent annual report, the average response time to a 911 call nonetheless exceeds seven minutes.[14]

Ideally, lawmakers tasked with designating gun-free zones would strike the appropriate balance. But if past is prologue, fully preserving the Second Amendment's self-defense right in this context will necessitate the Court's instruction. Without it, governments throughout the nation could, and likely will, use *Heller*'s stray sensitive-place dictum to erode the Second Amendment's protection by

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[13] Fed. Bureau of Investigation, Uniform Crime Reporting Program, *Crime in the U.S. 2019: Table 77*, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-77 (accessed July 18, 2021).

[14] Gov't of the Dist. of Columbia, Metro. Police Dep't, *2019 Annual Report*, https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/MPD%20Annual%20Report%202019_lowres.pdf.

designating any place they choose as gun free, and then creating a buffer zone around it for good measure. Simply put, the Court must not allow "*Heller*'s dicta" to be read "in a way that swallows its holdings." *See United States v. Skoien*, 614 F.3d 638, 654 (7th Cir. 2010) (Sykes, J., dissenting).

There are ways to create limited gun-free zones that remain faithful to the reasoning and history undergirding the Second Amendment. The most obvious way is to limit modern gun-free zones to areas in which the government has demonstrated a serious commitment and a realistic ability to ensure public safety. This can be accomplished by ensuring that would-be criminals are prevented by more than the normative power of a legal prohibition to remain unarmed through, *e.g.*, the provision of law enforcement officers and armed security, along with metal detectors or other defensive instruments.

Indeed, certain sensitive areas in airports[15] provide a paradigm for a modern gun-free zone that fully comports with the original understanding of the Second Amendment. Almost all commercial service airports in the United States are owned by local and state governments or by public entities such as airport authorities or multipurpose port

[15] The following are sensitive areas of airports: where screening begins, in the sterile area that follows, and when boarding or onboard the aircraft. *See* 49 C.F.R. § 1540.111(a). The entrance and ticketing areas of an airport are not sensitive areas; a person may also lawfully store unloaded firearms in baggage which is to be checked. *Id.* § 1540.111(c).

authorities.[16] For this reason, such sensitive areas are clean analogues to the government buildings historically designated as gun free. Government security, moreover, reaches its height in certain areas of airports. Just as the bailiffs, "Serjeant[s] of Arms," and sheriffs ensured security at Founding Era courthouses, Transportation Security Administration officers, air marshals, and armed police officers provide similar security in secured areas of airports. And, most critically, the metal detectors, luggage scanners, and K-9 units all provide an assurance that, if the law-abiding citizen must leave their arms behind as screening begins, they will not be easy fodder for criminals.

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[16] Although there is a growing trend to privatize airports, *see, e.g.*, Joseph Guinto, *Privatizing Airports Is a No-Brainer*, THE ATLANTIC (Aug. 18, 2020), https://www.theatlantic.com/ideas/archive/2020/08/sell-airports/615331/; Luis M. Camargo, *Airport Privatization Movement in the 21st Century* (S. Ill. Univ. Carbondale, Working Paper 9, 2013), http://opensiuc.lib.siu.edu/ps_wp/9; Mohul Ghosh, *Privatization Of These 3 Airports Approved By Govt; Adani Will Now Operate These 6 Airports*, Trak.in (Aug. 20, 2020), https://trak.in/tags/business/2020/08/20/privatization-of-these-3-airports-approved-by-govt-adani-will-now-operate-these-6-airports/, along with other traditionally public sectors, *see* THE VOLUNTARY CITY: CHOICE, COMMUNITY, AND CIVIL SOCIETY (DAVID T. BEITO ET AL. EDS., 2002); BRUCE L. BENSON, TO SERVE AND PROTECT: PRIVATIZATION AND COMMUNITY IN CRIMINAL JUSTICE (1998), the secure or "sensitive" areas of private airports and privatized public buildings, *see supra* note 15, retain a robust security presence. Therefore, no matter whether an airport or public building is privatized, the level of protection provided by the Government is still very high in constitutionally acceptable gun-free zones.

If the government cannot (or chooses not to) provide protection similar to that at airports in other areas, then designating those areas as "gun free" necessarily evicerates the self-defense right and, accordingly, constitutes a Second Amendment violation. As Justice Thomas has written:

> For those of us who work in marbled halls, guarded constantly by a vigilant and dedicated police force, the guarantees of the Second Amendment might seem antiquated and superfluous. But the Framers made a clear choice: They reserved to all Americans the right to bear arms for self-defense. I do not think we should stand by idly while a State denies its citizens that right, particularly when their very lives may depend on it.

Peruta v. County of San Diego, 137 S. Ct. 1995, 1999–2000 (2017) (Thomas, J., dissenting from denial of cert.).

For that reason, public parks cannot, in compliance with the Second Amendment, be designated as gun-free zones.[17] Nor can parking lots, houses of worship, or "buffer zones" around legitimate gun-free zones. And even if the

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[17] *Bridgeville Rifle & Pistol Club v. Small*, 176 A.3d 632, 654 (Del. 2017) (holding that, under Delaware's constitutional right to bear arms, the State's designation of public parks, which totaled 23,000 acres, as gun-free zones did "not just infringe—but destroy[ed]—the core . . . right of self-defense for ordinary citizens").

government may prevent *students* from carrying guns in schools, prohibiting all individuals, including non-student adults and teachers, from doing the same would violate the Second Amendment.[18]

This point bears emphasizing, particularly given the attention that has been paid to violence in schools since the tragedies, *e.g.*, at Columbine High School, Virginia Tech University, and Marjory Stoneman Douglas High School. Modern social science confirms the notion expressed by Cessare Beccaria. *See supra* at 18. Instead of curbing violent crime, the creation of gun-free zones without

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[18] For example, at least nine states—Idaho, Florida, Kansas, Missouri, Oklahoma, South Dakota, Tennessee, Texas and Wyoming—specifically exempt school employees from their ban on firearms on K-12 school grounds with approval from a school authority. *See, e.g.*, Idaho Code § 18-3302D(4)(g); Fla. Stat. § 1006.12; Kan. Stat. Ann. § 75-7c10; Mo. Rev. Stat. § 571.107; Okla. Stat. tit. 21 § 1277(H); S.D. Codified Laws § 13-64-1; Tenn. Code Ann. § 49-6-816; Tex. Penal Code § 46.03(a)(1); Wyo. Stat. Ann. § 21-3-132.

The Florida commission tasked with comprehensively studying the Parkland incident recommended that more teachers be armed: "School districts and charter schools should permit the most expansive use of the Guardian Program under existing law to allow personnel—who volunteer, are properly selected, thoroughly screened and extensively trained—to carry concealed firearms on campuses for self-protection and the protection of other staff and students." *See* Marjory Stoneman Douglas High School Public Safety Comm'n, *Initial Report* 104, http://www.fdle.state.fl.us/msdhs/commissionreport.pdf. The Florida legislature implemented these recommendations by passing an enactment requiring safe-school officers at each public school, which may include teachers with a high level of training. Fla. Stat. § 1006.12.

accompanying measures to ensure the safety of the law-abiding citizens who go into them creates victims. Indeed, ninety-four percent of mass public shootings since 1950 have occurred in "gun-free zones." Crime Prevention Rsch. Ctr., *Mass Public Shootings Keep Occurring In Gun-Free Zones* (June 15, 2018), https://bit.ly/2UPvTkU; *see generally* David B. Kopel, *Pretend "Gun-Free" School Zones: A Deady Legal Fiction*, 42 CONN. L. REV. 515 (2009). Parkland (seventeen killed),[19] Oregon Community College (nine killed),[20] Newtown (twenty-seven killed),[21] Virginia Tech (thirty-two killed),[22] and Columbine (thirteen killed)[23] were all gun free. So

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[19] *17 Killed in Mass Shooting at High School in Parkland, Florida*, NBC NEWS (Feb. 15, 2018), https://www.nbcnews.com/news/us-news/police-respond-shooting-parkland-florida-high-school- n848101.

[20] *Nine Victims and Gunman Dead in Mass Shooting at Ore. Community College*, WASH. POST (Oct. 2, 2015), https://www.washingtonpost.com/national/multiple-fatalities-reported-in-shooting-at-oregon-community-college/2015/10/01/b9e9cc4c-686c-11e5-9ef3-fde182507eac_story.html.

[21] *27 Dead in Newtown, CT., Elementary School Shooting*, MSNBC (Dec. 14, 2012), http://www.msnbc.com/msnbc/27-dead-newtown-ct-elementary-school-s.

[22] *Virginia Tech Shootings Fast Facts*, CNN (May 2, 2018), https://www.cnn.com/2013/10/31/us/virginia-tech-shootings-fast-facts/index.html.

[23] *Columbine High School Shootings Fast Facts*, CNN (Mar. 25, 2018), https://www.cnn.com/2013/09/18/us/columbine- high-school-shootings-fast-facts/index.html.

too were San Bernardino (fourteen killed)[24] and Fort Hood (thirteen killed in 2009 and three killed in 2014).[25]

CONCLUSION

Heller and *McDonald* established a principle and provided a parameter. The principle is that "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day," and one that is "deeply rooted in this Nation's history and tradition." *McDonald*, 561 U.S. at 768–69 (quoting *Glucksberg*, 521 U.S. at 721). The parameter is that, if a regulation of the Second Amendment is to survive constitutional scrutiny, it must be one that history has recognized.

The New York law at issue here, and the Second Circuit cases upholding it, tidily illustrate the mischief that can occur if the Court refrains from providing the requisite guidance to future courts in the Second Amendment context. Even if the Court announces that the right to bear arms extends outside of the home and into the public sphere, the "sensitive place" remark in *Heller*, if left unchecked,

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[24] *At Least 14 people Killed in Shooting in San Bernardino; Suspect Identified*, CNN (Dec. 3, 2015), https://www.cnn.com /2015/12/02/us/san- bernardino-shooting/index.html.

[25] *Army Major Kills 13 people in Fort Hood Shooting Spree*, History, https://www.history.com/this-day-in-history/army-major-kills-13-people-in-fort-hood-shooting-spree; *4 Dead, Including Shooter, at Fort Hood*, CNN (Apr. 3, 2014), https://www.cnn.com/2014/04/02/us/fort-hood-shooting/index.html.

provides another outlet for jurisdictions that may wish to test the bounds of this Court's Second Amendment jurisprudence. To prevent this from occurring, the Court should not only reverse the decision of the Second Circuit but also properly circumscribe the ability of governments to create gun-free zones.

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