No. 20-843

IN THE
# Supreme Court of the United States

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

v.

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

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

## BRIEF FOR RESPONDENTS


LETITIA JAMES
*Attorney General*
*State of New York*
BARBARA D. UNDERWOOD*
*Solicitor General*
ANISHA S. DASGUPTA
*Deputy Solicitor General*
JOSEPH M. SPADOLA
ERIC DEL POZO
*Assistant Solicitors General*

28 Liberty Street
New York, New York 10005
(212) 416-8020

barbara.underwood@ag.ny.gov
**Counsel of Record*

## QUESTION PRESENTED

A local licensing officer in New York State granted petitioners Robert Nash and Brandon Koch licenses to carry concealed handguns outside the home for hunting and target practice, and for self-defense in areas not "frequented by the general public." J.A. 41; *see* J.A. 114. Koch's license also allows him to carry a concealed handgun for self-defense while travelling to and from work. J.A. 114. The officer did not grant either petitioner an "unrestricted" license to carry a concealed handgun, because neither petitioner established a non-speculative need for armed self-defense in all public places.

The question presented is:

Whether the restrictions placed on petitioners' concealed-carry licenses violate the Second Amendment.

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

**Cases** **Page(s)**

**Cases** **Page(s)**

**Cases** **Page(s)**



**Constitutional Provisions**



**Laws**

**Laws** **Page(s)**

*States (Alphabetical)*

**Laws** **Page(s)**



**Rules**



**Miscellaneous Authorities**

**Miscellaneous Authorities** **Page(s)**

**Miscellaneous Authorities** **Page(s)**

**Miscellaneous Authorities** **Page(s)**

**Miscellaneous Authorities** **Page(s)**

**Miscellaneous Authorities** **Page(s)**

## INTRODUCTION

Because the Second Amendment "codified a *pre-existing* right" to keep and bear arms, *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), its contours follow "the historical understanding of the scope of the right," *id.* at 625. Given the many historical limits on publicly carrying firearms, this Court has confirmed that the Second Amendment does not confer an "unlimited" right "to carry arms for *any sort* of confrontation." *Id.* at 595. Petitioners' claim of an entitlement to carry concealed handguns anywhere (or virtually anywhere) in public thus defies both the historical record and this Court's precedents.

Over the last seven hundred years, Anglo-American governments have regularly restricted where and when concealable weapons may be carried in public. From the Middle Ages onward, laws on both sides of the Atlantic broadly restricted the public carrying of firearms and other deadly weapons, particularly in populous places. During the 1830s, many States began to allow firearm carrying even in crowded locales, by persons who had "reasonable cause" to fear for their safety. In the early twentieth century, New York and many other States imported this reasonable-cause standard into state firearm-licensing schemes. Since 1913, New York has allowed individuals to carry concealed handguns in public on a showing of "proper cause": a standard that can be met by establishing a non-speculative need for armed self-defense. *See Kachalsky v. County of Westchester*, 701 F.3d 81, 98 (2d Cir. 2012).

Petitioners claim that New York's law effectively bans the carrying of handguns for self-defense outside

the home, even though petitioners Nash and Koch received concealed-carry licenses that *do* allow handgun carrying for self-defense in certain places and circumstances. Both licenses authorize concealed carry for hunting and target practice, and for self-defense in "off road back country" areas, and Koch's license also authorizes concealed carry for self-defense while travelling to and from work. J.A. 41, 114. Nash and Koch did not receive unrestricted licenses because neither demonstrated a non-speculative need to carry a handgun virtually anywhere in public.

Neither history nor precedent supports petitioners' claimed entitlement under the Second Amendment to carry handguns "whenever and wherever" a confrontation may conceivably arise. Br. for Pet'rs (Pet. Br.) 30. New York's concealed-carry law "has a number of close and longstanding cousins." *Kachalsky*, 701 F.3d at 91. And it is *less* restrictive than many public-carry laws in place from before the founding through the nineteenth century.

Accepting petitioners' arguments would break with seven centuries of history and have devasting consequences for public safety. It would not simply invalidate longstanding "proper cause" laws like New York's. It would also jeopardize the firearm restrictions that all States and the federal government have adopted to protect the public in sensitive places where people typically congregate—settings like courthouses, airports, subways, sports arenas, bars, gaming facilities, houses of worship, and schools.

## STATEMENT OF THE CASE

### A. Statutory and Historical Background

**1a.** Anglo-American governments have regulated the public carrying of firearms for many centuries. This tradition includes the 1328 Statute of Northampton, which provided that "no Man great nor small" could "go nor ride armed by night nor by day, in Fairs, Markets," or "elsewhere," on pain of imprisonment and forfeiture of arms. 2 Edw. III, ch. 3 (1328).

Between 1692 and 1801, a number of American colonies and States adopted Northampton-type statutes.[1] Like their English precursors, these statutes allowed local officers to arrest and imprison anyone for carrying deadly weapons into the public square. *See Young v. Hawaii*, 992 F.3d 765, 794-95 (9th Cir. 2021) (en banc), *petition for cert. filed* (May 11, 2021) (No. 20-1639).

In 1836, Massachusetts enacted a statute limiting public carry to those with "reasonable cause" to fear for their safety. Mass. Rev. Stat. ch. 134, § 16 (1836). Between 1838 and 1871, Maine, Michigan, Minnesota, Oregon, Pennsylvania, Texas, Virginia, West Virginia, and Wisconsin also adopted reasonable-cause laws.[2]

---

[1] *E.g.*, Ch. 26, 1794 Mass. Acts 66 (Jan. 29, 1795); Act for Establishing Courts, 1699, N.H. Laws 1 (Fowle 1761); Ch. 9, 1686 N.J. Laws 289 (Leaming & Spicer, 2d ed. 1881); Ch. 22, 1801 Tenn. Laws 74 (Roulstone); Ch. 21, 1786, Va. Acts 33 (Davis 1794).

[2] *See* Me. Rev. Stat. ch. 169, § 16 (1841); Mich. Rev. Stat. ch. 162, § 16 (1846); Ch. 14, § 16, 1847 Va. Laws 127, 129; Minn. Rev. Stat. ch. 112, § 18 (1851); Or. Stat. ch. 16, § 17 (1853); Ch. 375, § 6, 1860 Pa. Laws 248, 250; Ch. 34, § 1, 1871 Tex. Gen. Laws (1st Sess.) 25; W. Va. Code ch. 153, § 8 (1868 [1870]); Act to Prevent Commission of Crimes, § 16, 1838 Wisc. Laws 379, 381.

Other States and localities restricted the public carrying of all firearms, whether "concealed or openly," particularly in towns and cities. Ch. 52, § 1, 1875 Wyo. Laws 352; *see also, e.g.*, Act Regulating Deadly Weapons, § 1, 1889 Idaho Laws 23. Dodge City, Kansas, and Tombstone, Arizona, for example, required people to leave their weapons at the city limits. Joseph Blocher, *Firearm Localism*, 123 Yale L.J. 82, 117 (2013). A visitor to Tombstone would have encountered a sign reading: "THE CARRYING OF FIREARMS STRICTLY PROHIBITED." Adam Winkler, *Gunfight: The Battle over the Right to Bear Arms in America* 165 (2011).

**b.** During the late nineteenth century, New York and other jurisdictions began regulating public carry through licensure, reviving the model of allowing individuals to go armed only with "the king's special licence." 4 Calendar of the Close Rolls, Edw. I, 1296-1302, at 318 (Sept. 15, 1299, Canterbury). New York required licenses for persons below eighteen to carry firearms in "any public street, highway or place" within any city, Ch. 46, § 8, 1884 N.Y. Laws 44, 47, or in any incorporated village, Ch. 140, § 2, 1889 N.Y. Laws 167, 167. Subsequently, it prohibited firearm possession by anyone below sixteen and required licenses for persons over sixteen. Ch. 92, § 2, 1905 N.Y. Laws 129, 129-30.

In the early twentieth century, New York City experienced several highly publicized shootings in public places and—as described in a 1911 New York Coroner's Office Report—a "marked increase in the number of homicides and suicides" committed with concealable firearms. *Revolver Killings Fast Increasing*, N.Y. Times, Jan. 30, 1911, at 4. From 1909 to 1910, the number of homicides by gunfire in New York City more than doubled. *Id.*

To stem the violence, the 1911 Coroner's Report recommended a universal licensing requirement for the sale and carrying of concealable firearms: a recommendation taken up in a bill endorsed by State Senator Timothy Sullivan. *Id.* After "numerous public hearings" and amendments, *The New Pistol Law* (Letter), N.Y. Times, Sept. 1, 1911, at 6, the bill passed almost unanimously, *Few Votes for the Revolver*, N.Y. Times, May 17, 1911, at 13. The resulting "Sullivan Law" expanded statewide licensing requirements and enhanced the penalties for possessing or carrying a concealable firearm. Ch. 195, § 1, 1911 N.Y. Laws 442, 443.

During the same period, Massachusetts incorporated into a statewide licensing scheme the "reasonable cause" standard that had existed in its law since 1836, and it began to issue licenses for concealed carry in public to persons who showed "good reason to fear an injury to [one's] person or property." Ch. 172, § 1, 1906 Mass. Acts 150, 150.

New York followed in 1913, amending the Sullivan Law to establish statewide standards for issuing licenses to possess and carry concealable firearms. Ch. 608, § 1, 1913 N.Y. Laws 1627, 1627-30. Like Massachusetts, New York conditioned concealed-carry licenses on a showing of "proper cause." *Id.* at 1629. This requirement accorded with the New York Coroner's finding that restricting handgun carrying to those with "some legitimate purpose" would save "hundreds of lives." *Revolver Killings Fast Increasing*, *supra.*

During the next two decades, a number of States across the Nation adopted similar good-cause licensing laws, some based on a model provision in the Uniform

Firearms Act.[3] The number of States with such laws has fluctuated over time.[4]

Today, the States besides New York that require proper cause (or a variation) to carry concealable firearms in public include California, Hawai'i, Maryland, Massachusetts, and New Jersey. These States include the most densely populated cities of the country,[5] consistent with the longstanding tradition of regulating public carry more closely in populous places. *See* Blocher, *supra*, 99-100.

**2.** Currently, New York requires a license to possess a handgun or to carry one in public, *see* Penal Law § 400.00, and it otherwise bars possessing any concealable "firearm," *id.* §§ 265.01(1), 265.03(3).[6] A "premises" license allows handgun possession in a home or business. *Id.* § 400.00(2)(a)-(b). A "carry" license allows carrying a concealed handgun in public.

---

[3] *E.g.*, Act 82, § 7, 1936 Ala. Laws 51, 52; Ch. 207, § 7, 1925 Ind. Laws 495, 496-97; No. 313, § 6, 1925 Mich. Pub. Acts 473, 474; Ch. 266, § 8, 1923 N.D. Acts 379, 380-81; Ch. 64, § 2, 1925 N.J. Laws 185, 186; Ch. 260, § 8, 1925 Or. Laws 468, 471; Act 158, § 7, 1931 Pa. Laws 497, 498-99; Ch. 208, § 7, 1935 S.D. Sess. Laws 355, 356; Ch. 172, § 1, 1935 Wash. Sess. Laws 599, 600-01; *see* Uniform Firearms Act § 7 (1926).

[4] *See* Everytown for Gun Safety, *Gun Law Navigator, Permitting Process*, Image 7 (listing fourteen States and the District of Columbia as having good-cause licensing laws in 1991) (last visited Sept. 13, 2021).

[5] *See* Jed Kolko, *The Downtown Decade: U.S. Population Density Rose in the 2010s*, N.Y. Times, Sept. 1, 2021; U.S. Census Bureau, Population Density of the 50 States, the District of Columbia, and Puerto Rico: 1910–1920.

[6] The term "firearm" includes handguns and certain short-barreled rifles and shotguns. Penal Law § 265.00(3). Ordinary rifles and shotguns are not subject to licensure in New York, except in New York City. *See* 38 R. City of N.Y. § 3-02.

*Id.* § 400.00(2)(c)-(f). Certain general eligibility requirements apply to both types of licenses, *id.* § 400.00(1), to limit handgun access to "law-abiding, responsible citizens," *Heller*, 554 U.S. at 635. Petitioners do not challenge those requirements.

New York concealed-carry licenses "shall be issued" where applicants meet general eligibility requirements and have certain kinds of employment, including state and local judges, correctional facility employees, and bank messengers. Penal Law § 400.00(2)(c)-(e). For all other qualified applicants, concealed-carry licenses "shall be issued" if the applicant shows "proper cause." *Id.* § 400.00(2)(f).

New York courts have defined "proper cause" to include "carrying a handgun for target practice, hunting, or self-defense." *Kachalsky*, 701 F.3d at 86. Where an applicant demonstrates proper cause to obtain a license for specific purposes, the licensing officer may restrict the license to those purposes. *O'Connor v. Scarpino*, 83 N.Y.2d 919, 921 (1994). A license may be restricted to specific activities, such as hunting and target shooting. *E.g.*, *O'Brien v. Keegan*, 87 N.Y.2d 436, 438-40 (1996). Or it may be restricted to specific locations where a person has shown a need for self-defense, such as "between [his] home and his place of employment," *Babernitz v. Police Dep't*, 65 A.D.2d 320, 324 (1st Dep't 1978), or in areas not "frequented by the general public" (J.A. 41). An "unrestricted" license allows concealed carry anywhere not specifically prohibited by state or federal law. *See, e.g., Van Vorse v. Teresi*, 257 A.D.2d 938, 939 (3d Dep't 1999).

*Heller* explained that self-defense is the central component of the Second Amendment right. 554 U.S. at 600. To establish proper cause for a New York

concealed-carry license for self-defense, an applicant must show a self-defense need that is "actual and articulable," as opposed to "speculative or specious." *Kachalsky*, 701 F.3d at 98.

Like the common law, New York law limits when a person may use deadly force in self-defense. Deadly force may be used for self-defense when one reasonably believes it necessary to defend oneself from "the use or imminent use of unlawful [and deadly] physical force" by another person. Penal Law § 35.15(1), (2)(a). Even then, when outside the home there is a duty to retreat, if feasible. *Id.* § 35.15(2)(a)(i). Deadly force is also permissible for self-defense during an attempted or ongoing kidnapping, forcible rape, or robbery, *id.* § 35.15(2)(b), or to prevent or terminate the burglary of one's own dwelling, *id.* §§ 35.15(2)(c), 35.20(3).

When an applicant asserts proper cause to carry a handgun in public for self-defense, a licensing officer in the applicant's county of residence assesses whether the applicant has a non-speculative reason to believe that he or she will encounter "objective circumstances justify[ing] the use of deadly force" under New York law. *Kachalsky*, 701 F.3d at 100. In most counties—including Rensselaer County, where petitioners live—licensing officers are state court judges; in New York City and two nearby counties, they are local police commissioners or the sheriff. Penal Law § 265.00(10).

New York courts have developed "a substantial body of law instructing licensing officials on the application of [the proper-cause] standard." *Kachalsky*, 701 F.3d at 86. This standard "requires consideration of all relevant factors" bearing on the applicant's need to carry a firearm for self-defense or other purposes, such as "the occupation, the background and the place of work"

of the applicant, *Babernitz*, 65 A.D.2d at 322, and the "population density, composition, and geographical location" of the area where the applicant proposes to carry, *In re O'Connor*, 154 Misc. 2d 694, 698 (Cnty. Ct. 1992); *see O'Connor*, 83 N.Y.2d at 921 (upholding license restrictions).

New York's licensing process affords applicants "ample opportunity to submit evidence" and "to respond to all factors considered and issues raised by" the licensing officer. *Bando v. Sullivan*, 290 A.D.2d 691, 692 (3rd Dep't 2002); *see also Anderson v. Mulroy*, 186 A.D.2d 1045 (4th Dep't 1992). Applicants may, and often do, return with new information to establish their eligibility after a license denial, or to show that restrictions on their license should be removed. *E.g.*, *Sibley v. Watches*, 194 A.D.3d 1385, 1389 (4th Dep't 2021) (denial of license application did not bar reapplication).

Self-defense considerations differ across New York State, which contains sparsely populated counties and New York City—the country's largest and most densely populated city. *See In re O'Connor*, 154 Misc. 2d at 698; *see also* Br. of the City of New York as Amicus Curiae.[7] Based on New York City's density of residents and public-safety officers, the City's Police Department has determined that establishing a non-speculative need to carry a handgun for self-defense in the City entails demonstrating "extraordinary personal danger, documented by proof of recurrent threats to life or safety." 38 R. City of N.Y. § 5-03; *see* Penal Law § 400.00(6) (requiring license-holders from other counties who wish to carry handguns in New York City to obtain

[7] For example, New York City is roughly 10,000 times more densely populated than New York's least populated county, Hamilton County.

special permit from police commissioner). This more exacting showing is not required elsewhere in New York State, contrary to petitioners' suggestion (Pet. Br. 16-18).

Nor does the requirement to "demonstrate a special need for self-protection distinguishable from that of the general community," *Klenosky v. New York City Police Dep't*, 75 A.D.2d 793, 793 (1st Dep't 1980), *aff'd*, 53 N.Y.2d 685 (1981), preclude license grants to ordinary New Yorkers (Pet. Br. 18, 41). Distinguishing oneself from the general community entails proffering facts that are particular to the individual. *See Kachalsky*, 701 F.3d at 88. Rather than citing general background conditions or a mere "generalized desire to carry a concealed weapon," *id.* at 86 (quotation marks omitted), an applicant must identify "particularized" facts, specific to his or her personal circumstances, establishing a self-defense need that is not "speculative," *id.* at 98-99. The inquiry resembles the federal courts' analysis of article III standing, for which a plaintiff must establish a "concrete, particularized" injury, rather than a "speculative fear." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409-10 (2013). As in the article III standing context, this "personal and individual" justification can be of a type "widely shared" by a "large number of people," *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 & n.7 (2016).

If a handgun-license application is denied in whole or in part, the applicant may challenge the denial in state court as "arbitrary and capricious" or otherwise contrary to law. N.Y. C.P.L.R. 7803(3). Reviewing courts will not defer to the licensing officer's interpretations of law, including of the "proper cause" standard. *E.g.*, *Gaul v. Sober*, 186 A.D.3d 1821, 1822 (3d Dep't 2020) (annulling licensing denial based on incorrect

interpretation of governing law); *Babernitz*, 65 A.D.2d at 322 (same, for failure to consider all factors relevant to proper cause); *Parker v. Randall*, 120 A.D.3d 946, 947 (4th Dep't 2014) (same, for inadequate explanation of reasons for not finding proper cause).

A valid concealed-carry license, including a restricted license like the ones petitioners possess here, exempts the holder from criminal prohibitions on possessing a handgun in public. *See* Penal Law § 265.01-b (unloaded handgun); *id.* § 265.03(3) (loaded handgun); *id.* § 265.20(a)(3) (exemption); *People v. Parker*, 52 N.Y.2d 935 (1981). When a licensee violates the restrictions imposed by the licensing officer, purely administrative remedies apply, *People v. Thompson*, 92 N.Y.2d 957, 959 (1998), such as cancellation of the license, *see O'Brien*, 87 N.Y.2d at 439.[8]

### B. Factual and Procedural Background

**1.** Petitioners Robert Nash and Brandon Koch live in Rensselaer County, an area in New York State's capital region that contains both rural areas and the mid-size city of Troy. They allege that they applied for unrestricted licenses to carry concealed firearms in public for self-defense and other purposes, and were granted licenses restricted to "Hunting, Target only." They further allege that the licensing officer denied their requests to remove the "hunting and target" restrictions and to issue them unrestricted licenses. J.A. 122-125.

---

[8] While there is no criminal penalty for violating the *regulatory* conditions imposed by a licensing officer, it is a misdemeanor to violate the statutory limits of a firearm license. Penal Law § 400.00(15), (17).

In support of removing the restrictions, Nash and Koch each submitted a letter describing himself as law-abiding and as having taken firearm safety courses.[9] J.A. 40, 111. Nash also asserted that "a recent string of robberies in the area" prompted him to seek an unrestricted license. J.A. 40, 49. Neither petitioner alleged that he took a course on, or otherwise understands, New York's limitations on the use of deadly force.

After holding individual hearings, the licensing officer issued letter determinations. The determinations declined to remove the "hunting and target" restrictions from each license, but clarified that petitioners could carry for self-defense in certain places. Specifically, the licensing officer "note[d] that the restrictions DO ALLOW you to carry concealed for purposes of off road back country, outdoor activities similar to hunting, for example fishing, hiking & camping etc." J.A. 41, 114.

The letter to Nash "emphasize[d] that the restrictions are intended to prohibit" Nash from carrying for self-defense in locations "typically open to and frequented by the general public." J.A. 41. The letter to Koch provided that Koch "may also carry to and from work." J.A. 114. The complaint alleges that Koch does

---

[9] The letters and subsequent determinations were attached as exhibits to the proposed pleading petitioners filed with their unopposed motion to amend the complaint. J.A. 94-114. Although the motion was granted and the amended complaint was filed, the exhibits were not included, seemingly due to a clerical error. *See* J.A. 24-25. The amended complaint nonetheless refers to the exhibits as "attached." J.A. 123, 125. And in deciding respondents' motion to dismiss, the district court relied on the facts "taken from the Amended Complaint *and exhibits attached thereto*." Pet. App. 5 n.2 (emphasis added); *see* Pet. App. 9.

not qualify for a concealed-carry permit based on category of employment (J.A. 124), thus acknowledging that Koch articulated individualized safety concerns that the licensing officer found adequate. *See* Penal Law § 400.00(2) (licensing criteria).

Nash and Koch do not allege that they sought judicial review of the licensing determinations in state court. *See* J.A. 122-126. Petitioner New York State Rifle and Pistol Association (NYSRPA) alleges that at least one unnamed NYSRPA member was denied a license to carry a handgun in public for self-defense based on lack of proper cause, but NYSRPA alleges nothing about the circumstances asserted in that application or whether the member sought state court judicial review. J.A. 126.

**2.** Petitioners claim that New York's "proper cause" requirement violates the Second Amendment facially and as applied to them. J.A. 126-127. Although petitioners allege that New York bans the "vast majority" of state residents from publicly carrying handguns for self-defense (J.A. 121), the complaint is silent on the total number of concealed-carry licenses in New York and the rate at which applications are granted.[10] Nor

---

[10] If the Court deems this information relevant to the constitutional question, it should remand for factfinding. See *infra* 47-48. Although concealed-carry license applications are processed by the counties and not the State, and the State does not have records of application numbers or grant rates, a preliminary analysis we have conducted—using records kept by the New York State Police for most of the State, and by the New York City Police Department for New York City—suggests that license grant rates are far different from what petitioners imply.

Comparing the annual number and type of license grants to the number of fingerprint checks sought for use in the application

was this evidence developed below, because petitioners sought a result that did not depend on such facts (J.A. 61, 117): abrogation of a prior and binding Second Circuit decision holding that New York's public-carry statute satisfies intermediate scrutiny and thus does not violate the Second Amendment, *see Kachalsky*, 701 F.3d 81.

In *Kachalsky*, the Second Circuit proceeded from an understanding that the Second Amendment protects a right to carry firearms outside the home. *Id.* at 89-92. Based on the "longstanding tradition of states regulating firearm possession and use in public," *id.* at 94, the court concluded that such regulation is "enshrined within the scope of the Second Amendment," and that intermediate scrutiny is the appropriate standard for reviewing public-carry laws like New York's, *id.* at 96 (quotation marks and brackets omitted). And the court concluded that New York's law satisfies intermediate scrutiny because it is substantially related to important,

---

process (an imperfect proxy for applications) suggests the following.

In the two-year period 2018-2019, statewide and inclusive of New York City, at least 65% of applicants received an unrestricted license, and at least 93% of applicants received either an unrestricted license or instead a restricted license allowing public carry for specified purposes. During those two years, there were approximately 37,800 grants of unrestricted licenses and 54,198 grants of either unrestricted or restricted licenses.

In the same two-year period, in Rensselaer County, where petitioners reside, approximately 36% of applicants received an unrestricted license, and approximately 94% of applicants received either an unrestricted or a restricted license. During those two years, there were approximately 480 grants of unrestricted licenses and 1,247 grants of either unrestricted or restricted licenses.

"indeed compelling, governmental interests in public safety and crime prevention." *Id.* at 97-98.

After *Kachalsky*, the First, Third, Fourth, and Ninth Circuits all upheld state good-cause licensing laws like New York's.[11] Two circuits struck down public-carry laws more restrictive than New York's.[12]

The district court here granted respondents' motion to dismiss, agreeing that *Kachalsky* foreclosed petitioners' claims. Pet. App. 3-12. The Second Circuit affirmed on the same ground. Pet. App. 1-2.

This Court granted certiorari "limited to the following question: Whether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment." Order (Apr. 26, 2021). Because the license applications were denied only in part, this brief has restated the Question Presented to reflect that fact. See *supra i*.

## SUMMARY OF ARGUMENT

**I.** Text, history, and tradition establish that the conditions placed on petitioners' ability to carry

---

[11] *See Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018); *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013).

[12] *See Wrenn v. District of Columbia*, 864 F.3d 650, 655-56 (D.C. Cir. 2017) (invalidating law requiring evidence of having suffered "serious threats of death or serious bodily harm," physical attacks, or property theft from their person); *Moore v. Madigan*, 702 F.3d 933, 940-41 (7th Cir. 2012) (invalidating "flat ban" on public carry, as contrasted to New York's "less restrictive" standard).

concealable firearms in public accord with the Second Amendment.

**A.** *Heller* recognized that the Second Amendment confers an individual right "to keep and bear arms," 554 U.S. at 595, "for the core lawful purpose of self-defense," *id.* at 630. But it does not follow that the right entitles individuals to carry handguns as a matter of course in all or nearly all public spaces, on the theory that self-defense is potentially needed everywhere. Like all constitutional rights, the right to carry firearms for self-defense is "not unlimited," *id.* at 595, but rather incorporates the limitations embedded within the "historical understanding of the scope of the right," *id.* at 625.

**B.** History shows that local officials have long had wide latitude to decide where and under what circumstances firearms could be carried in public, and to restrict the carrying of concealable firearms, particularly in populous areas. Petitioners do not dispute that public-carry laws have continuously been in place throughout the Anglo-American world for more than seven hundred years. Instead, they argue that those laws restricted only the carrying of firearms under circumstances "apt to terrify the People." Pet. Br. 6. But petitioners ignore the overwhelming historical evidence that, in England and America, the mere carrying of firearms in populous areas was sufficient to meet that standard.

**C.** The terms of the individual petitioners' concealed-carry licenses confirm that New York's law is less restrictive than its historical antecedents, and thus does not violate any historically rooted constitutional norms. A local licensing officer, acting pursuant to New York law, granted licenses authorizing Nash and Koch

to carry handguns for hunting and target practice, but also for self-defense in "back country" areas, where law-enforcement officials are not readily available and where the public-safety risks created by handguns are attenuated. J.A. 41, 114. The licensing officer also allowed Koch to carry while commuting. J.A. 114. While many historical public-carry laws would not have permitted even this, *no* jurisdiction would have allowed what petitioners seek: the right to carry a handgun everywhere (or virtually everywhere)—including the crowded and populous areas of cities and towns—based on speculation that a confrontation warranting the use of deadly force might suddenly arise.

**II.** The preceding analysis confirms that New York's concealed-carry regime falls well within the range of traditional restrictions on the right to bear arms. But if the history did not conclusively demonstrate that New York's law complies with the Second Amendment, and means-ends scrutiny were therefore to apply, New York's law would pass that test too.

**A.** Intermediate scrutiny would be the appropriate tier of review if means-ends scrutiny were to apply. *Heller* explicitly forecloses rational-basis review. And this Court has also impliedly foreclosed strict scrutiny, by identifying "presumptively lawful" restrictions on publicly carrying firearms and assuring that "nothing in [*Heller*] should be taken to cast doubt on those," 554 U.S. at 626-27 & n.26; *see also McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (plurality op.). Strict scrutiny's treatment of laws as presumptively invalid clashes with *Heller*'s acknowledgement that States possess longstanding authority to limit public carrying of firearms. Moreover, New York's "proper cause" law evokes the kind of time, place, and manner regulation

on expression that this Court has long reviewed under intermediate scrutiny in other contexts.

**B.** New York's law satisfies intermediate scrutiny. New York has compelling interests in reducing violent crime and gun violence. The challenged law substantially furthers those urgent goals, as a wealth of empirical studies confirms. And it does so in a tailored manner, by allowing individuals to carry handguns in times and places for which they have established a non-speculative need for armed self-defense, hunting, or target shooting.

Because this case reaches the Court at the pleading stage, the Court should remand for further factual development if there is any doubt about whether New York's law satisfies intermediate scrutiny. A remand also would be appropriate if this Court were to deem relevant the number or percentage of concealed-carry applications that New York licensing officers find "proper cause" to grant. On remand, New York could demonstrate the falsity of petitioners' unsupported allegation that New York's licensing regime flatly prohibits law-abiding citizens from carrying handguns in public for self-defense (*e.g.*, Pet. Br. 3).

## ARGUMENT

### I. Text, History, and Tradition Establish That the Restrictions Placed on Petitioners' Concealed-Carry Licenses Comport with the Second Amendment.

Petitioners spend most of their brief addressing a question not disputed here: whether the Second Amendment embodies a right to carry arms outside the home for self-defense. Pet. Br. 25-40. The Second Circuit assumed that this was so. Pet. App. 2; *see Kachalsky*, 701 F.3d at 89-93. And respondents do not dispute the point.

Respondents' position is that any right to bear arms outside the home permits a State to condition handgun carrying in areas "frequented by the general public" (J.A. 41) on a showing of a non-speculative need for armed self-defense in those areas. This condition accords with a settled practice dating from medieval England through this Nation's founding and beyond.

#### A. The text of the Second Amendment does not enshrine an unqualified right to carry concealed firearms in virtually any public place.

In *Heller*, this Court explained that the Second Amendment right to "keep and bear arms" entails the right to "have weapons" and to "carry[] arms for a particular purpose—confrontation." 554 U.S. at 583-84. But *Heller* stressed that "[l]ike most rights," the Second Amendment right is "not unlimited." *Id.* at 626. It is not an entitlement to carry "any weapon whatsoever in any manner whatsoever and for whatever purpose," *id.*, or "for *any sort* of confrontation," *id.* at 595; *see McDonald*, 561 U.S. at 786 (plurality op.). Rather, the Second

Amendment "codified a *preexisting* right," *Heller*, 554 U.S. at 592, and is limited by the "historical understanding of the scope of the right," *id.* at 625.

One historical limit is the government's latitude to restrict the carrying of concealable weapons in public places. More than a century ago, this Court stated that the Second Amendment right to bear arms "is not infringed by laws prohibiting the carrying of concealed weapons." *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897). And *Heller* gave as a first "example" of the Second Amendment's historical limits the "prohibitions on carrying concealed weapons" that were upheld by "the majority of the nineteenth-century courts to consider the question." 554 U.S. at 626; *see also Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1272 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (explaining that *Heller* deemed "laws against concealed carry" to be "constitutionally permissible").

This Court has also emphasized that "nothing in [*Heller*] should be taken to cast doubt" on "longstanding prohibitions" on publicly carrying firearms "in sensitive places such as schools and government buildings," and has described those as "presumptively lawful." 554 U.S. at 626-27 & n.26. In *McDonald*, a plurality of the Court "repeat[ed] those assurances." 561 U.S. at 786.

The scope of the Second Amendment right to bear arms thus cannot be deduced from the proposition, not disputed here, that it entails an individual right to carry arms for self-defense beyond the home. History and tradition play a crucial role in defining the scope of that right. And they conclusively confirm the validity of New York's handgun-licensing law.

### B. History and tradition confirm that governments may restrict the carrying of concealed firearms in public places.

New York's "proper cause" requirement falls well within the mainstream of historical restrictions on carrying firearms in public. Public-carry laws existed during all the historical periods that this Court identified as significant to understanding the "pre-existing right" that the Second Amendment codified: from medieval England through the amendment's ratification, and on through its incorporation via the Fourteenth Amendment. *See Heller*, 554 U.S. at 592-595, 605-19; *McDonald*, 561 U.S. at 753-78 (plurality op.); *see also* Br. for Amici Curiae Professors of History and Law (History Profs. Amicus Br.). Petitioners thus cannot show that New York's law is an "extreme" outlier (Pet. Br. 3, 47) akin to the ban on home handgun possession invalidated in *Heller*.

The unconstrained public-carry regime that petitioners would impose on all the States has no antecedent in our Nation's history. Petitioners argue that the Second Amendment confers an entitlement to carry a handgun "whenever and wherever" a need for self-defense could hypothetically arise. Pet. Br. 30. But no Anglo-American jurisdiction in the last seven hundred years has maintained a public-carry regime of this type. The slaveholding South provides the closest analogue. Yet even there, States restricted the concealed carrying of firearms. *See State v. Smith*, 11 La. Ann. 633, 634 (1856).

**1.** Petitioners do not dispute that public-carry regulations have continuously been a part of the Anglo-American legal tradition: from the Northampton-style laws in place throughout the founding era, to the

reasonable-cause laws that arose in the early nineteenth century, to the analogous good-cause regimes of the early twentieth century. Instead, petitioners erroneously contend that the Statute of Northampton and its American analogues were "widely understood" (Pet. Br. 5) to restrict only carrying "dangerous and unusual Weapons, in such a Manner as will naturally cause a Terror to the People," 1 William Hawkins, *A Treatise of the Pleas of the Crown* 135 (1716).

But as Hawkins explained, rules attached even to the public carrying of "common weapons"—which was generally permitted in "such Places" and on "such Occasions" where it would not cause the "least Suspicion of an Intention to commit any Act of Violence or Disturbance of the Peace." *Id.* at 136. And as other contemporary legal commentators explained, carrying common weapons *would* raise such a suspicion in places of gathering like fairs and markets, where the carrying of arms was widely understood "to be an Affray and Fear of the People, and a Means of the Breach of the Peace." Michael Dalton, *Country Justice* 380 (1727); *accord* Ferdinando Pulton, *Pace Regis et Regni* 4 (1610).

Local officials responsible for keeping the peace were instructed to "[a]rrest all such persons as they shall find to carry Daggers or Pistols" within their jurisdictions. Joseph Keble, *An Assistance to Justices of the Peace, for the Easier Performance of Their Duty* 224 (1683). The offender could not "excuse wearing such Armour in Publick, by alledging that such a one threatened him, and that he wears for the Safety of his Person from his Assault." 1 Hawkins (1716), *supra*, 136; *see also* Edward Coke, *The Third Part of the Institutes of the Laws of England* 161-62 (1797) (no

exception "for doubt of danger, and safeguard of [one's] life").

Likewise, in founding-era America, legal reference guides advised local officials to "arrest all such persons as in your sight shall ride or go armed." John Haywood, *A Manual of the Laws of North-Carolina* pt. 2, at 40 (3d ed. 1814). Those guides made clear that carrying firearms could be a criminal offense even though the offender "may not have threatened any person in particular, or committed any particular act of violence." James Ewing, *A Treatise on the Office & Duty of a Justice of the Peace* 546 (1805); *see* John Niles, *The Connecticut Civil Officer* 12, 146 (1823). And they specified that going armed "among any great Concourse of the People" was by itself a ground for arrest, on equal footing with carrying "dangerous or unusual weapons" or participating "in an Affray" (i.e., fighting). James Davis, *The Office and Authority of a Justice of the Peace* 13 (1774).

These established prohibitions did not extend to carrying firearms in "unpopulated and unprotected enclaves," such as "in the countryside." Patrick J. Charles, *The Faces of the Second Amendment Outside the Home*, 60 Clev. St. L. Rev. 1, 19 (2012). Many early Americans lived in such areas and, as petitioners point out (Pet Br. 6), carried firearms for self-protection. But it does not follow that early Americans had an unfettered right to carry firearms in virtually any public place on the speculation that a confrontation might occur at a moment's notice. Within "any great Concourse of the People," local officials retained the authority to arrest and imprison anyone who carried firearms. Davis, *supra*, 13. Anecdotes about founding fathers carrying guns and supporting "the right to do so" (Pet. Br. 6) cannot overcome these clear historical limitations.

Nor does the much-debated *Sir John Knight's Case* support petitioners' view that the founding generation understood the right to bear arms as extending anywhere a need for self-defense might conceivably arise.[13] *See* 87 Eng. Rep. 75 (K.B. 1686). Sir John Knight—a wealthy merchant and alderman—was arrested for carrying firearms on the streets of Bristol and into a church located outside the city walls. *Id.* at 76; *see also* Tim Harris, *The Right to Bear Arms in English and Irish Historical Context*, in *A Right to Bear Arms?* 24-25 (Tucker et al. eds., 2019). In his defense, Knight argued not that he lacked an "intent to terrorize" (Pet. Br. 6),[14] but that he had left his weapons with a servant outside the church, Harris, *supra*, 25. He also claimed that he generally rode from his country estate to Bristol with "a Sword and Gun," because he had recently been attacked and threatened, but that he always left those weapons "at the end of the Town when he came in, and tooke them thence when he went out." *Id.* Thus, Knight's defense does not suggest that entering town armed or "going to church with pistols" (Pet. Br. 6) was legally acceptable. Harris, *supra*, 27.

---

[13] Petitioners rely exclusively on the cursory summaries in the *English Reports*. *See* Pet. Br. 5, 8, 30, 32. But those summaries "were never intended to be comprehensive case studies and were not used as such." Br. of Amicus Curiae Patrick J. Charles 24-25.

[14] Petitioners are not aided by the King's Bench's statement that the Statute of Northampton prohibited the carrying of firearms "where the crime shall appear to be malo animo" (Pet. Br. 6 (citing 90 Eng. Rep. 330))—i.e., committed with wrongful intent. That statement did not call into question the settled principle that the "appear[ance]" of wrongful intent arose from the very act of carrying firearms in populous areas. See *supra* 22-23. That act was a "great offense" partly because it suggested that the King was "not willing or able to protect his subjects." 87 Eng. Rep. at 76.

Moreover, petitioners' unbounded conception of the right to bear arms conflicts with the common law of self-defense. The common law generally permitted the use of deadly force in self-defense only "when certain and immediate suffering would be the consequence of waiting for the assistance of the law." 4 William Blackstone, *Commentaries on the Laws of England* 184 (1769). An individual thus "retain[ed] the right of repelling force by force" when "absolutely necessary," because "the intervention of the society in his behalf, may be too late to prevent an injury." 2 St. George Tucker, *Blackstone's Commentaries* 145 n.42 (1803).

For this reason, the common law contemplated that someone "assaulted on the Highway" could use deadly force "without giving back to the Wall," while a person "assaulted in a Town" had to "retreat as far back as he can without apparent Hazard of his Life." Giles Jacob, *The Laws of Appeals and Murder* 47 (1719). In this respect, the common law treated remote highways—but *not* populated areas—more like the home, from which a person attacked "'need not fly as far as he can, as in other cases.'" *People v. Tomlins*, 213 N.Y. 240, 243 (1914) (quoting 1 Sir Matthew Hale, *Pleas of the Crown* 486 (1736)). Otherwise, individuals were expected to seek "the assistance of the law," rather than carry or use guns for "preventive defence." 4 Blackstone, *supra*, 184.

Many laws authorized public carry during long-distance travel for similar reasons. The narrow scope of the exception—which did not include travel "within the ordinary line of the person's duties, habits, or pleasure," *Eslava v. State*, 49 Ala. 355, 357 (1873)—reinforces that there was no general right to carry in everyday circumstances. *See also* Ch. 9, 1686, N.J. Laws at 290 (narrow travel exception); Ch. 13, 1821 Tenn. Pub. Acts

15 (same). Other narrow public-carry authorizations—like those allowing arms carrying to assist law enforcement, *see* Coke, *supra*, 160-61—also underscore there was no such general right.

Petitioners misplace their reliance (Pet. Br. 6-8) on colonial statutes that required persons qualified to bear arms to travel armed under certain circumstances. These statutes aimed to protect the community in an era without professional police to serve that function. *See* Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law*, 80 Law & Contemp. Probs. 11, 27-28 (2017). And a *duty* to carry arms to perform a communal law-enforcement function, in specified circumstances, does not imply a general *right* to carry arms for self-defense wherever one goes.

As petitioners acknowledge, many historical laws prohibited public carry in circumstances "apt to terrify the People." Pet. Br. 6, 8, 32. And historical sources show that carrying firearms into places like churches, towns, fairs, and markets was inherently deemed to "strike[] a feare and terror in the king's subjects." Dalton, *supra*, 380. But however these laws were interpreted and enforced, their existence confirms that local officials have long possessed discretion to define the "Places" and "Occasions" where carrying firearms would not raise legitimate concerns of "Violence or Disturbance of the Peace," 1 Hawkins (1716), *supra*, 136, and therefore may be permitted.

**2.** Petitioners likewise misstate the significance of the system of enforcing early American reasonable-cause laws through "sureties." "[B]efore the age of police forces or an administrative state," sureties were a "common enforcement tool." Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry*, 125

Yale L.J. Forum 121, 131 (2015). They were "part of the penalty inflicted" for "certain gross misdemeanors," 4 Blackstone, *supra*, 248, and also a "preventive" measure, Julius Goebel & T. Raymond Naughton, *Law Enforcement in Colonial New York (1664-1776)*, at 513-14 (Patterson Smith 1970).

Under early American reasonable-cause laws, "any person" who feared "injury" or a "breach of the peace" could complain to a magistrate that another person was carrying a firearm in public. *See* Mass. Rev. Stat. ch. 134, § 16. And background law provided that merely carrying firearms in populous areas breached the peace. See *supra* 22-23. Thus, anyone publicly carrying a firearm could be haled before a magistrate and required to post a surety if unable to establish "reasonable cause" for being armed. *See Young*, 992 F.3d at 819-20. If the surety was not posted, the person could be imprisoned; if the surety was posted but its terms were violated, the money was forfeited. *Id.* at 820 (citing Mass. Rev. Stat. ch. 134, §§ 4, 17).

It is implausible to infer from this a broad right to carry firearms into the public square without a specific self-defense need (Pet. Br. 32). Such conduct was enough to require a surety on pain of imprisonment. These consequences operated as a "severe constraint" on carrying weapons in public. *Young*, 992 F.3d at 820. In substance, people could carry in public free of restriction "only if they could demonstrate good cause," *id.*—a direct precursor of the licensing criterion at issue here.

Petitioners place great weight (Pet. Br. 43-44) on certain state court decisions from the antebellum South, but those cases do not establish a national consensus on the meaning of the Second Amendment.

In the rest of the country and even in some parts of the South, state legislatures were enacting—and courts were upholding—robust public-carry laws. *See Young*, 992 F.3d at 802-08 (discussing cases).

At least five state court decisions from the late nineteenth century upheld laws that restricted open as well as concealed carry. *See id.* at 808; *see also* 3 *The American and English Encyclopedia of Law* 408-15 (1887). And although some of those cases relied on the since-abrogated view that the right to bear arms related only to military service (*see* Pet. Br. 35-36),[15] they still show that restrictions on carrying firearms in places where people "congregated together" were broadly accepted around the country, *English v. State*, 35 Tex. 473, 478-79 (1871) (describing the contrary view as "little short of ridiculous"); *see also State v. Huntly*, 25 N.C. 418, 422-23 (1843) (confirming that carrying guns required a "lawful purpose" and stating that "[n]o man" carried a gun as an "every day accoutrement[]").

This geographic variation is consistent with our Nation's tradition of public-carry regulations that "suit local needs and values." *McDonald*, 561 U.S. at 785 (plurality op.). And it refutes petitioners' view that the Second Amendment demands one homogeneous approach to public carry. Some States—including petitioners' amici—have opted to relax their public-carry laws over time. *Compare, e.g.*, Ch. 34, § 1, 1871 Tex. Gen. Laws (1st Sess.) 25 (requiring reasonable cause for open or concealed carry), *with* Tex. Penal Code § 46.02 (no license required for concealed carry as of fall 2021); and Act 82, § 7, 1936 Ala. Laws

---

[15] The same is true of some of the commentators on whom petitioners rely. *See* Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 271-72 (1880).

51, 52 (adopting good-cause licensing scheme), *with* Ala. Code § 13A-11-75 (adopting scheme not requiring good cause, half-century later). But those changes simply represent choices to replace one constitutionally permissible policy with another. They do not signify that these States had previously been violating their residents' Second Amendment rights.

**3.** Finally, history refutes petitioners' argument that the Second Amendment is offended by the "discretion" that New York law affords to local licensing officers (*see* Pet. Br. 3, 13, 24, 42). From medieval England onward, local sheriffs and magistrates have been entrusted with the "power to execute" public carry restrictions. 2 Edw. 3, c. 3 (1328); *see also* Ch. 21, 1786, Va. Acts at 33; Mass. Rev. Stat. ch. 134, § 16. And that power included determining when public arms-carrying would be permitted and how to punish offenders. *See generally* A.J. Musson, *Sub-Keepers and Constables: The Role of Local Officials in Keeping the Peace in Fourteenth-Century England*, 117 Eng. Hist. Rev. 1 (2002). Thus, in authorizing local licensing officers to administer the State's public-carry law in a manner attentive to local conditions, New York has followed a long historical tradition.

History also does not support petitioners' suggestion that the discretion in "proper cause" laws—including New York's—was intended as a means to disarm "disfavored groups" like Black Americans and immigrants (Pet. Br. 2-3, 10-11). For example, the historical record refutes petitioners' attempt to conflate all public-carry laws with the "Black Codes" that certain Southern States enacted after the Civil War to ban Black Americans from possessing firearms. *See also* History Profs. Amicus Br.

In some parts of the postbellum South, restrictions on publicly carrying firearms were critical for protecting freedmen from violence and intimidation perpetrated by whites. *See* Mark Anthony Frassetto, *The Law & Politics of Firearms Regulation in Reconstruction Texas*, 4 Tex. A&M L. Rev. 95, 122 (2016). Texas's reasonable-cause law, which passed in 1871 with the unanimous support of that State's Black legislators, helped to suppress the Ku Klux Klan and otherwise protect freedmen against racial violence. *See id.* at 106-08. Union military governors and Republican lawmakers likewise restricted the public carrying of firearms to protect Black citizens from the "dire problem" of white-supremacist "gun violence against freedmen." Carole Emberton, *The Limits of Incorporation*, 17 Stan. L. & Pol'y Rev. 615, 621 (2006); *see* Second Military Dist. Gen. Order No. 10 (Charleston, S.C. Apr. 11, 1867) (banning public from "carrying deadly weapons"); Fourth Military Dist. Gen. Order No. 28 (Vicksburg, Miss. Sept. 9, 1867) (banning assemblies of "armed organizations or bodies"). And more broadly, for over seven centuries, Anglo-American jurisdictions used public-carry restrictions to maintain safety in places where people gather to worship and conduct business. *See* Br. of Amici Curiae Faith Leaders.

History likewise fails to substantiate petitioners' assertion that New York's Sullivan Law aimed to "disarm newly arrived immigrants" (Pet. Br. 42-43), rather than to stem a precipitous rise in gun violence. There is "nothing in the legislative record that even remotely suggests the Sullivan Law was enacted with anti-immigrant intent." Patrick J. Charles, *A Historian's Assessment of the Anti-Immigrant Narrative in NYSRPA v. Bruen*, Duke Ctr. for Firearms Law (Aug. 4, 2021). For example, the 1911 Coroner's Report that

prompted the law provided statistics *refuting* the view "that foreigners are responsible for a majority of the shooting affrays in New York," explaining that "out of 79 persons arrested for homicide" in 1910, "38 were American born, 22 were Italian and 9 were Chinese." *Violent Deaths in City Last Year 2,483*, N.Y. Tribune, Jan. 30, 1911, at 4 (describing the report); *see also* Charles, *A Historian's Assessment*, *supra* (refuting as without basis petitioners' claim that 70% of people initially prosecuted under Sullivan Law had Italian surnames).

Nor can petitioners state a Second Amendment claim simply by speculating that New York's law "*could be* used to selectively disarm" people. Pet. Br. 42 (emphasis added). Petitioners have not alleged that they fall within a protected class or were subjected to discriminatory bias in licensing.

Contrary to petitioners' assertions, the discretion of New York licensing officers is neither "boundless" nor "unreviewable" (Pet. Br. 42). New York courts will set aside a licensing decision that is "arbitrary and capricious" or otherwise contrary to law. *Gaul*, 186 A.D.3d at 1822; *see* N.Y. C.P.L.R. 7803(3). Moreover, the iterative nature of the licensing process allows for deficiencies in an application to be corrected both before and after a judicially reviewable licensing determination. See *supra* 9. What is required to show a non-speculative need for self-defense may differ depending on local conditions, but that is the result of the wide range of conditions across the State. The "variations in population density, composition, and geographical location" that inform a "licensing officer's discretion," *In re O'Connor*, 154 Misc. 2d at 698, also inform any reasonable evaluation of the need for armed self-defense.

In sum, the proper-cause standard's ability to account for local conditions accords with history and *Heller*'s analysis. The variation in conditions in differing locales also explains the restrictions that were placed on petitioners' own licenses here.

### C. Petitioners' concealed-carry licenses are consistent with the historical scope of the right to bear arms.

**1.** The terms of petitioners' own concealed-carry licenses refute their claims that New York gave them "no outlet" to exercise their right to bear arms, or "flatly prohibit[ed]" them from doing so (Pet. Br. 2-3). Koch's and Nash's licenses expressly authorize them to carry loaded handguns for hunting, for target shooting, and during "off road back country, outdoor activities similar to hunting, for example fishing, hiking & camping etc."; and Koch also may carry "to and from work." J.A. 41, 114. Petitioners otherwise are not authorized to carry their loaded handguns in areas "frequented by the general public." J.A. 41.

These conditions are perfectly consistent with the limitations historically imposed on the public carrying of firearms. Indeed, New York's standard is less restrictive than many of the public-carry laws that existed from fourteenth-century England through the founding era. Those laws broadly prohibited carrying firearms where people typically congregated, such as at fairs and markets. See *supra* 3, 21-26.

A direct historical comparison proves the point. During the colonial and founding eras, in much of the country, petitioners would not have been allowed to carry firearms in public as extensively as their current licenses allow. Colonial New Jersey, for example, would

not have allowed petitioners "privately to wear any pocket pistol" or to "ride or go armed with sword, pistol, or dagger"—unless they were "strangers, travelling upon their lawful occasion thro' this Province, behaving themselves peaceably." Ch. 9, 1686, N.J. Laws at 290.

Under a Virginia law enacted just three years before the Second Amendment was drafted, petitioners would have faced imprisonment and forfeiture of arms if they chose to go "armed by night []or by day, in fairs or markets," or "in other places" where people congregated and where carrying firearms would be deemed "in terror of the Country." Ch. 21, 1786, Va. Acts at 33. Similarly, a Massachusetts law enacted four years after the Second Amendment's ratification would have subjected petitioners to imprisonment if they entered populous areas "armed offensively, to the fear or terror of the good citizens of this Commonwealth." Ch. 26, 1794 Mass. Acts 66 (Jan. 29, 1795). And the statutory phrase "armed offensively" unquestionably encompassed carrying firearms. *See, e.g.*, 1 William Hawkins, *A Treatise of the Pleas of the Crown* 492 (7th ed. 1795) (describing "guns" and "pistols" as "offensive weapons").

Petitioners would not have fared much better in the nineteenth century. While they might have been able to carry their handguns openly in parts of the slaveholding South (assuming they were white males), petitioners would have been stymied by various States' reasonable-cause laws. See *supra* 3, 26-27. Simply stating that there were "robberies in the area," as Nash did here (J.A. 41),[16] would not remotely have qualified

[16] The complaint provides no information about the "robberies" that allegedly took place in Nash's neighborhood (J.A. 123), including whether they actually involved any use of force.

as "reasonable cause" to carry a concealed firearm in populous areas.

In mid-nineteenth century Texas, Nash would have been required to establish an "immediate and pressing" danger that would "alarm a person of ordinary courage." Ch. 34, § 2, 1871 Tex. Gen. Laws (1st Sess.) 25. In Alabama, during the same period, he would have needed to show cause to fear "some specific attack," not merely that he regularly traversed a locality with "a reputation for lawlessness." *Chatteaux v. State*, 52 Ala. 388, 389 (1875). Under this standard, Nash would not have been permitted to carry based on a vague reference to robberies, nor would Koch likely have been permitted to carry to and from work, as he currently may do. These examples and others render untenable petitioners' claim that they now face unprecedented restrictions on their right to carry firearms in public.

**2.** Ultimately, New York's law is a historically grounded approach to protecting sensitive places of the type that every State, the federal government, and this Court have recognized the need to safeguard. *E.g.*, *Heller*, 554 U.S. at 626. Like the licensing regime challenged here, sensitive-place laws restrict public carry in places where people typically congregate and where law-enforcement and other public-safety professionals are presumptively available.

Many States that are amici supporting petitioners maintain such restrictions in places as varied as riverboat casinos, racetracks, bingo halls, theaters, bars and restaurants, sports arenas, amusement parks, student dorms, childcare centers, and mental-health facilities. *See* Br. of J. Michael Luttig et al. as Amici Curiae (Luttig Amicus Br.) 26-27 (cataloguing state restrictions "that go far beyond government buildings

and schools").[17] New York's proper-cause requirement functionally restricts concealed carry in the same kind of places.

Moreover, New York's licensing-based approach has much deeper historical roots than a categorical approach that specifies a predetermined set of forbidden places. From the Statute of Northampton onward, historical public-carry laws restricted arms carriage either generally, without specifying any particular locations, *see* Ch. 9, 1686, N.J. Laws at 290; Mass. Rev. Stat. ch. 134, § 16—or through an open-ended list of restricted locations that typically included fairs, markets, and any "part elsewhere," 2 Edw. III, ch. 3 (1328); *see also* Ch. 21, 1786, Va. Acts 33. In either case, however, local officials decided whether carrying weapons in a specific location warranted an arrest, based on the particular circumstances. New York's scheme gives similar discretion to local officers, but they exercise it at the time of issuing the license rather than after the conduct has already occurred; and applicants may challenge the licensing decision by appeal or choose to return to the licensing officer with more information.

While petitioners concede that public carry can be prohibited in certain "sensitive places" (Pet. Br. 38, 45), that concession collides with their argument that public carry must be permitted "whenever and wherever" a need for self-defense could arise (*id.* at 30). In theory, the need for self-defense "may suddenly arise" anywhere. *Id.* at 27 (quotation marks omitted). Law-enforcement and public-safety officials cannot thwart

---

[17] *See also* Giffords Law Center to Prevent Gun Violence, *Location Restrictions* (last visited Sept. 13, 2021).

all possible acts of violence in even the most sensitive places. If the scope of an individual's right to carry firearms in public hinges solely on whether law enforcement "may be too late to prevent injury" (*id.* at 30 (quoting 2 Tucker, *supra*, 145 n.42)), public carry cannot be restricted in *any* location.

Thus, carried to its logical conclusion, petitioners' argument directly conflicts with this Court's assurances in *Heller* and *McDonald* that prohibitions on firearms in sensitive locations like schools and government buildings are presumptively lawful. Accepting petitioners' extreme and ahistorical position would invite a flood of challenges to state and federal laws restricting handgun carrying in sensitive places. These lawsuits would produce a host of constitutional decisions that are unpredictable, "if not entirely subjective," *Crawford v. Washington*, 541 U.S. 36, 63 (2004), and could easily invalidate many place-based restrictions that are vital to public safety.[18] *See* Luttig Amicus Br. 26-30.

## II. The Challenged New York Licensing Law Also Satisfies Means-Ends Scrutiny

Because New York's "proper cause" requirement falls comfortably within the range of historical public-carry laws that circumscribe "the scope of the [Second Amendment] right," *Heller*, 554 U.S. at 625, the requirement is consistent with the Constitution. New

[18] Lawsuits have already attacked firearm restrictions in or around a post office, *Bonidy v. United States Postal Serv.*, 790 F.3d 1121 (10th Cir. 2015); federal courthouse, *United States v. Giraitis*, 127 F. Supp. 3d 1 (D.R.I. 2015); place of worship, *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244 (11th Cir. 2012); and school, *S.B. v. Seymour Cmty. Sch.*, 97 N.E.3d 288 (Ind. Ct. App. 2018), among many others.

York's law also satisfies intermediate scrutiny—the proper level of review if means-ends scrutiny were to apply.

Numerous courts of appeals have applied means-ends scrutiny after concluding that a state law implicated a Second Amendment right. *But see Young*, 992 F.3d at 813-18 (Bybee, J.) (holding that historical analysis alone validated state "good cause" licensing criterion). And scholars have explained why means-ends scrutiny is appropriate when history and tradition offer unclear guidance about a gun regulation's validity. *See* Br. of Second Amendment Law Profs. as Amici Curiae (Law Profs. Amicus Br.) 18-20. New York's law would survive under any of these approaches.

### A. Intermediate scrutiny is the appropriate level of review.

**1.** New York's "general interest in preventing crime" and protecting public safety is indisputably compelling. *United States v. Salerno*, 481 U.S. 739, 750 (1987); *see Birchfield v. North Dakota*, 136 S. Ct. 2160, 2178 (2016).[19] As for how close a fit the Constitution requires between this interest and New York's chosen means to realize it, *Heller* expressly demands something more than rational-basis review. *See* 554 U.S. at 628 n.27.

---

[19] New York's interests also extend to preventing harmful intimidation and threats by persons carrying handguns in public, "to protect the public sphere on which a constitutional democracy depends." Joseph Blocher & Reva Siegel, *When Guns Threaten the Public Sphere*, 116 Nw. U. L. Rev. 139, 141 (2021); *see also* Luttig Amicus Br. 21-22 (citing evidence that public-carry laws help to curb political violence).

*Heller* also impliedly forecloses strict scrutiny, by identifying a non-exhaustive set of "presumptively lawful" gun regulations, including "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Id.* at 626 & n.26. For a law to survive strict scrutiny, the government must prove that any "plausible, less restrictive alternative" would be "insufficient to secure" its compelling objective. *United States v. Playboy Entmt. Grp.*, 529 U.S. 803, 824-26 (2000). Under that standard, the viability of the "presumptively lawful" measures that *Heller* identified would "be far from clear," 554 U.S. at 688 (Breyer, J., dissenting)—as would the validity of many other commonplace and non-controversial restrictions on carrying firearms in specific public places. See *supra* 34-36. Indeed, strict scrutiny treats laws as "presumptively invalid." *Playboy Entmt.*, 529 U.S. at 817 (quotation marks omitted). And that precept clashes with this Court's recognition of the "longstanding" power of States to limit public carrying of firearms, *Heller*, 554 U.S. at 570; *see also id.* at 626.

*Heller* acknowledged the "problem of handgun violence in this country" and the "variety of tools" the Second Amendment leaves "for combating that problem." 554 U.S. at 636. *McDonald* reiterated that the Second Amendment "by no means eliminates" the States' "ability to devise solutions to social problems that suit local needs and values." 561 U.S. at 785 (plurality op.). Applying strict scrutiny to public-carry regulations would be inconsistent with States' discretion to devise and adopt such solutions. Intermediate scrutiny, by contrast, respects *Heller* and *McDonald* and the flexibility those holdings envisioned.

**2.** Intermediate scrutiny is thus the appropriate level of means-ends scrutiny to apply to laws regulating the public carrying of handguns. "To withstand intermediate scrutiny," a law "must be substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). The government must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 771 (1993). In the Second Amendment context, this standard has been exacting enough to invalidate assorted firearms restrictions since *Heller*. *See* Law Profs. Amicus Br. 30 (giving examples).

As implemented, New York's concealed-carry licensing system is akin to the types of time, place, and manner regulation of expression that this Court has long subjected to intermediate scrutiny. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989). In 1871, Texas's Supreme Court explained that good-cause laws regulate the right of public carry, "without taking it away," by specifying "the place, the time and the manner in which certain deadly weapons may be carried as means of self-defense." *English*, 35 Tex. at 477-78. Similarly, as administered by local officials, founding-era Northampton-style prohibitions limited carriage to specific "Places" and "Occasions," to prevent disturbance of the peace. 1 Hawkins (1716), *supra*, 136.

The same is true of petitioners' handgun licenses here. These licenses allow Koch and Nash to carry handguns for hunting and target practice, and also in specified times and places for self-defense. Each petitioner may "carry concealed for purposes of off road back country, outdoor activities." J.A. 41, 114. Although Nash may not carry his handgun in places "frequented by the general public" (J.A. 41), Koch "may also carry

to and from work" (J.A. 114). It was not improper for a licensing officer to "restrict the use[s]" of petitioners' licenses "to the purposes that justified the issuance." *O'Connor*, 83 N.Y.2d at 921. Although petitioners did not obtain the unrestricted permits they now claim the Second Amendment requires, if they show a non-speculative need for armed self-defense in additional times and places, they may obtain corresponding modifications of the restrictions on their licenses.

More broadly, New York's law shares a critical feature of the time, place, and manner restrictions on speech that garner intermediate scrutiny. These regulations are not aimed at suppressing protected activity, "but rather at the *secondary effects*" of that activity "on the surrounding community." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986); *see Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984) (upholding ban on overnight protests on National Mall that was intended to keep park "attractive and intact"). New York's "proper cause" requirement, similarly, does not seek to inhibit handgun carrying for lawful self-defense—the "*central component*" of any public-carry right, *Heller*, 554 U.S. at 599—but rather aims to limit the violence attending handgun *misuse*.

New York's handgun-licensing law was enacted in 1911 after a "marked increase in the number of homicides" committed with concealable firearms. *Revolver Killings Fast Increasing*, *supra*. Two years later, the "proper cause" requirement was added, consistent with the New York Coroner's recommendation that restricting handgun carrying to those with "some legitimate purpose" would save "hundreds of lives." *See id.* When examining this regime in the 1960s, a New York legislative committee explained that New York's public-

carry laws are not "ends in themselves," but rather are a "means to the worthwhile end of preventing crimes of violence"; and the committee emphasized that New York's regime "preserve[d] legitimate interests," including "the right of self defense." *Report of the N.Y. State Joint Legislative Comm. on Firearms & Ammunition* 12 (1965).

This undisputed intent "to prevent crime" and preserve "the quality of urban life," *City of Renton*, 475 U.S. at 48 (quotation marks omitted), reinforces the propriety of intermediate scrutiny here. And contrary to petitioners' suggestion (Pet. Br. 47, 50), the more "exacting" standard for compelled-speech laws that "chill association," *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021), is irrelevant to a handgun-licensure law that does no such thing.

**3.** Applying intermediate scrutiny here would not impermissibly "create a hierarchy of protected rights" within the Second Amendment or the Constitution generally (Pet. Br. 45). Laws that burden individual rights—from freedom of speech to equal protection—typically receive means-ends scrutiny when the government asserts a countervailing interest. The precise level of scrutiny depends on the nature or depth of the interference or the regulation's apparent motivation. *See* Law Profs. Amicus Br. 26-30 (giving examples).

This Court has cautioned against subjecting the Second Amendment "to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald*, 561 U.S. at 780 (plurality op.). Applying a sui generis approach grounded exclusively in history could prove unworkable in practice—and it could imperil federal restrictions on gun possession that

would survive means ends scrutiny, but lack traditional analogues. *See, e.g.*, *United States v. Marzzarella*, 614 F.3d 85, 96-101 (3d Cir. 2010) (defaced serial number); *United States v. Reese*, 627 F.3d 792, 801-05 (10th Cir. 2010) (possession by person subject to domestic-violence protection order).

Nor does *Heller* foreclose the application of intermediate scrutiny. *Heller* had no occasion to decide the issue when the law challenged there—an "absolute prohibition of handguns held and used for self-defense in the home"—would have failed under "any of the standards of scrutiny the Court has applied to enumerated constitutional rights." 554 U.S. at 628, 636.

In attacking the application of intermediate scrutiny (Pet. Br. 48), petitioners misplace their reliance on *Heller*'s rejection of a "freestanding 'interest-balancing' approach" resembling "none of the traditionally expressed levels" of judicial scrutiny, 554 U.S. at 634. The Second Circuit did not employ—nor does New York propose—a freefloating weighing of an individual's right to bear arms against the State's interest in preventing firearm misuse, to determine which is paramount. Means-ends scrutiny does not assess whether the State's interests outweigh the individual's interests, but rather whether the State's chosen means properly serve its avowed goals, in a manner compatible with the individual's Second Amendment rights.

The courts of appeals agree: all ten circuit courts to have decided the issue since *Heller* have adopted multi-step frameworks that incorporate heightened scrutiny at the second step, after determining whether a law falls within the Second Amendment's scope. *See* Law Profs. Amicus Br. 13-16 (collecting authority).

### B. Intermediate scrutiny is satisfied here.

**1.** New York's "proper cause" requirement substantially furthers the State's profound interests in promoting public safety and preventing gun violence. *See Jeter*, 486 U.S. at 461. The law thus withstands intermediate scrutiny. If the Court is in any doubt, however, a remand would be appropriate "to permit the parties to develop a more thorough factual record." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 668 (1994).

This case remains at the pleading stage. *See* Pet. App. 3. Petitioners sought a result directly at odds with governing circuit precedent (J.A. 61, 117), and so the case never proceeded to the stage where the State assembled a complete and current factual record to justify its law.

But sources amenable to judicial notice confirm that New York's "proper cause" requirement represents a valid exercise of state authority. When applying intermediate scrutiny, the Court may consult a provision's history, "studies and anecdotes pertaining to different locales," and "simple common sense." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) (quotation marks omitted). These sources leave no doubt that the "proper cause" requirement substantially furthers New York's public-safety goals.

A wealth of empirical evidence supports New York's judgment that limiting the public carrying of handguns to those who have proper cause reduces the risk of gun violence to the public. *Kachalsky* examined the "studies and data" New York introduced there, which "demonstrat[ed] 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." 701 F.3d at 99.

Research from before and after *Kachalsky* shows that jurisdictions that restrict public carry experience lower rates of gun-related homicides and other violent crimes than those that do not;[20] that gun owners are more likely to be shot during an assault when publicly carrying their weapons;[21] and that more legal handguns in circulation may produce an "arms race" in which wrongdoers also carry guns more often, thus making street crime more lethal.[22] And New York's handgun laws—including its licensure law—in fact have contributed to a dramatic decline in homicide and shooting rates in New York City over the past several decades. *See* Br. of Amicus Curiae Citizens Crime Comm'n.

Petitioners do not address, much less attempt to refute, any of this research. Petitioners instead suggest that the Second Circuit was insufficiently critical when addressing such evidence in *Kachalsky*, characterizing

---

[20] *See, e.g.*, Emma E. Fridel, *Comparing the Impact of Household Gun Ownership and Concealed Carry Legislation on the Frequency of Mass Shootings and Firearms Homicide*, 38 Justice Q. 892 (2021); John J. Donohue et al., *Right-to-Carry Laws and Violent Crime*, 16 J. Empirical Legal Stud. 198 (2019); Michael Siegel et al., *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, 107 Am. J. Pub. Health 1923 (2017); *see also* Br. of Amici Curiae Social Scientists and Public Health Researchers.

[21] *See, e.g.*, Charles C. Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 Am. J. Pub. Health 2034 (2009); David Hemenway & Sara J. Solnick, *The Epidemiology of Self-Defense Gun Use: Evidence from the National Crime Victimization Surveys 2007-2011*, 79 Preventative Med. 22 (2015).

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

the intermediate scrutiny adopted by the court as "relaxed." Pet. Br. 21. But that court did not shy away from scrutinizing New York's law; rather, it merely observed that a legislature is better equipped than the judiciary to amass and evaluate the data bearing on a complex policy question. *See Kachalsky*, 701 F.3d at 97. And this Court has likewise held that legislative determinations on empirical questions outside the judiciary's expertise are "entitled to deference" in constitutional analysis. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010); *see City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) ("[T]he Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems.").

New York's licensing restriction is sufficiently tailored to its ends to pass constitutional muster. In particular, it does not burden "substantially more" protected activity "than is necessary to further the government's legitimate interests." *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (quotation marks omitted).

As the Second Circuit summarized, "instead of forbidding anyone from carrying a handgun in public," New York's "more moderate approach" allows concealed carry by "individuals having a bona fide reason to possess handguns" in public. *Kachalsky*, 701 F.3d at 98-99; *see also id.* at 91 ("New York's proper cause requirement does not operate as a complete ban on the possession of handguns in public."). That category includes a "merchant or storekeeper" within a "place of business," state judges serving in New York City, bank messengers, and correctional employees. Penal Law § 400.00(2)(b)-(e). It also includes other eligible individuals who have "an actual and articulable" need for self-defense that is not "merely speculative." *Kachalsky*,

701 F.3d at 98 (discussing Penal Law § 400.00(2)(f)). Moreover, the law respects gradations of need: a licensing officer may tailor a concealed-carry permit to the self-defense needs that an applicant specifically establishes.

Here, for example, the licensing officer authorized Nash and Koch to carry their handguns in unpopulated areas where law-enforcement officers may be slow to arrive and public-safety risks are attenuated. J.A. 41, 114. Nash also demonstrated a safety need to carry his weapon "to and from work." J.A. 114. But neither petitioner established any concrete need to carry his weapon in areas "frequented by the general public" (J.A. 41), where police officers may be more plentiful and different public-safety concerns exist. Koch simply sought "unrestricted carry for personal protection" (J.A. 112), and Nash alluded vaguely to a "string of robberies" that included one apparent burglary, for which a premises license would be sufficient for armed self-defense (J.A. 40). *See also Klenosky*, 75 A.D.2d at 794 (rejecting reliance on generalized "fear of burglary" by applicant who was offered, but refused, a premises license).

The denial of unrestricted carry licenses on these facts is qualitatively "consistent with the right to bear arms" for self-defense, in that no right to use a gun for self-defense accrues "until the objective circumstances justify the use of deadly force." *Kachalsky*, F.3d at 100; *see* Penal Law § 35.15(2)(a) (justifying deadly force only when actor reasonably believes that another "person is using or about to use deadly physical force"). Requiring a concealed-carry applicant to show a non-speculative need for self-defense permissibly screens for individuals who are at least somewhat likely to face a threat of deadly force—while sifting out those persons who

simply wish "to carry arms for *any sort* of confrontation," *Heller*, 554 U.S. at 595.

**2.** There is no merit to petitioners' attempts to liken New York's law to the law that *Heller* invalidated: an "absolute prohibition of handguns held and used for self-defense in the home." 554 U.S. at 636. Petitioners assert—incorrectly and without support—that New York "flatly prohibit[s]" carrying handguns in public (Pet. Br. 3) by making it "effectively impossible" to secure a license to do so (*id.* at 18). Those erroneous statements echo the complaint's equally unsupported allegation that New York's law "operates as a flat ban on the carrying of firearms by *typical* law-abiding citizens." J.A. 127. The complaint itself undermines these assertions by revealing that petitioners—by their accounts, typical law-abiding citizens (J.A. 41, 111)—received licenses to carry handguns for self-defense in public at specified times and places.

Petitioners err in arguing that proper-cause regimes that do not guarantee gun access for "'each *typical* member'" of society amount to a wholesale ban on public carry (Pet. Br. 41 (quoting *Wrenn*, 864 F.3d at 665)). Petitioners base this argument on a judicial decision invalidating a good-cause law requiring applicants to demonstrate previous "serious threats of death or serious bodily harm," actual physical attacks, or property theft from their person to obtain a carry license. *Wrenn*, 864 F.3d at 655-56. New York State law makes no such demands.

In sum, the deep historical roots of New York's licensing regime evidence its validity, and New York's law also satisfies means-ends scrutiny. Moreover, there is no merit to petitioners' bare assertion that the "proper cause" requirement precludes the "vast bulk" of

applicants from receiving concealed-carry licenses (Pet. Br. 2). If this case were to proceed further, New York could refute petitioners' unsupported assertion with evidence about license grants relative to overall applications, broken down by region. See *supra* n.10.

In addressing the Second Amendment question, this Court should address the law that New York actually maintains, not petitioners' unsupported and inaccurate characterizations of that law. Federalism and respect for state law foreclose invalidating a state statute, "[i]n the absence of evidence," on the basis of spurious "factual assumptions." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 457 (2008).

## CONCLUSION

This Court should affirm. Alternatively, the Court should remand for further factual development.

Respectfully submitted,

LETITIA JAMES
*Attorney General*
*State of New York*
BARBARA D. UNDERWOOD*
*Solicitor General*
ANISHA S. DASGUPTA
*Deputy Solicitor General*
JOSEPH M. SPADOLA
ERIC DEL POZO
*Assistant Solicitors General*
barbara.underwood@ag.ny.gov

September 2021

* *Counsel of Record*