No. 20-843

IN THE
Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ROBERT NASH, BRANDON KOCH,

Petitioners,

v.

KEVIN P. BRUEN, in His Official Capacity as Superintendent of New York State Police, and RICHARD J. MCNALLY, JR., in His Official Capacity as Justice of the New York Supreme Court, Third Judicial District, and Licensing Officer for Rensselaer County,

Respondents.

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

BRIEF OF THE LEAGUE OF WOMEN VOTERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The League of Women Voters (the "League") is a nonpartisan, community-based organization that promotes political responsibility by encouraging Americans to participate in the electoral process. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League now has more than 500,000 members and supporters, and is organized in more than 750 communities and in every State. Over the last 100 years, the League has actively engaged in advocacy asserting that voting rights are essential to a functioning democracy.

The League has long recognized that the right to vote is meaningless without the right to vote safely. The unchecked carrying of concealed firearms imperils the electoral process at multiple stages, from the threat of violence at registration to voter intimidation at the polls.

The New York laws under review simply require individuals interested in carrying a concealed firearm in public to obtain a license. N.Y. Penal Law §§ 265.01 (prohibiting "possess[ing] any firearm"); 265.20(a)(3) (excepting from that prohibition individuals who hold a "license"). A concealed carry license "shall" be issued to "any person" when "proper cause exists." N.Y. Penal Law § 400.00(2)(f). In line with New York's "interest in regulating handgun possession for public safety," the "proper cause" requirement has been interpreted to require applicants to show more than a "speculative

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus* and its counsel made a monetary contribution to this brief's preparation and submission. All parties have consented to the filing of this brief.

or specious—need for self-defense." *Kachalsky v. County of Westchester*, 701 F.3d 81, 98 (2nd Cir. 2012).

Because this case concerns the ability of state and local governments to adopt reasonable, commonsense firearm regulations that guard the safety of the voting process, it implicates a core component of the League's mission.

INTRODUCTION

Amicus agrees with Respondents that the New York laws are consistent with the Second Amendment. Moreover, the laws protect and advance a core government interest that this Court has repeatedly recognized. By requiring New Yorkers to show proper cause before allowing them to carry concealed weapons throughout the state—including in politically charged scenarios—the laws vindicate the State's compelling interest in promoting public order to safeguard the integrity of the electoral process.

In *Heller*, this Court held that, "[l]ike most rights, the right secured by the Second Amendment is *not unlimited*." *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (emphasis added). Indeed, from "Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id*. This holding exemplifies the well-established principle that core constitutional rights may at times be cabined in service of other compelling interests. *See generally* Mark D. Rosen, *When Are Constitutional Rights Non-Absolute?*

McCutcheon, Conflicts, and the Sufficiency Question, 56 William & Mary L. Rev. 1535, 1541 n.15 (2015).

Heller's recognition of "longstanding prohibitions on the possession of firearms," 554 U.S. at 573, derives from an enduring and robust common law tradition of regulating firearms, including to protect public order. Under the 14th century's Statute of Northampton, Englanders were forbidden from bringing "arms" to "fairs" and "markets." Statute of Northampton 1328, 2 Edw. 3, c. 3 (Eng.). Blackstone attributed that Statute's ban on public arms to even deeper roots, traceable to the "laws of Solon," under which any "Athenian was finable who walked about the city in armour." 4 William Blackstone, *Commentaries on the Laws of England* 149 (1769). This "ancient common law" prerogative "in regulating weapons to . . . preserve public order" has been accepted by "all sides of the modern gun debate." Joseph Blocher & Reva Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under Heller*, 116 N.W. L. Rev. 1, 28 (2021).

Laws that reasonably restrict the proliferation of guns in public places—like the New York laws at issue here—"protect against disruption, intimidation, or other injury to the . . . activities that are critical to the survival and health of the social order as a whole," from "child-rearing to education, commerce, worship, . . . and governing." *Id.* at 37, 40. In referencing the longstanding and "presumptively lawful" regulations "forbidding the carrying of firearms in sensitive places," *Heller* specifically noted laws banning guns in "schools" and "government buildings"—public settings

that house activities vital to a functioning democratic society, including election-related activities. 554 U.S. at 626; *see also Hill v. State*, 53 Ga. 472, 475 (1874) (describing the "practice of carrying arms at courts, elections, and places of worship" as "so improper in itself, so shocking to all sense of propriety, so wholly useless and full of evil"). The New York laws under review, which advance public order in light of local conditions, including with respect to elections, is fully consistent with this centuries-long tradition.

SUMMARY OF THE ARGUMENT

The right to vote lies at the heart of our democracy. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'") (quoting *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 701 (1819) (describing the right to vote as "sacred"). This is perhaps the greatest distinction between our Nation, where it is a "fundamental premise that all political power flows from the people," *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 824 (2015), and countries where "[p]olitical power grows out of the barrel of a gun," Mao Tse-Tung, *Problems of War and Strategy*, Selected Works Vol. II (Nov. 6, 1938).

Yet, for as long as the right to vote has existed, some have sought to undermine or overpower those who seek to exercise that right. *See*, *e.g.*, *Dubuclet v. Louisiana*, 103 U.S. 550, 552 (1880) ("citizens of color . . . were prevented, hindered, and controlled and

intimidated from voting . . . by threats of violence to them or their families")); *Taylor v. Beckham*, 178 U.S. 548, 552 n.1 (1900) (gubernatorial candidate alleged his opponent "intimidated and alarmed" voters by instructing persons "armed with rifles, bayonets, and gatling guns" to appear in and around polling places); *see also* Alexander Keyssar, *The Right to Vote* 84 (Revised ed. 2009) (a "wave" of voter-intimidation "terror" swept the South in the late nineteenth century, during which time "military, or paramilitary . . . organizations such as the Ku Klux Klan mounted violent campaigns against blacks who sought to vote or hold office"); *id.* ("In 1870 alone, hundreds of freedmen were killed, and many more badly hurt, by politicized vigilante violence."). More recent precedent makes clear that such threats are hardly a thing of the past. *See Burson v. Freeman*, 504 U.S. 191, 206 (1992) ("[A]n examination of the history of election regulation in this country reveals a persistent battle against" the "evil[]" of "voter intimidation"); *Spencer v. Pugh*, 543 U.S. 1301, 1302 (2004) (the "threat of voter intimidation" is "undoubtedly serious").

Given the intolerable threat to our democratic process posed by voter intimidation, federal and state laws uniformly posit that such intimidation has no place in our electoral process. Federal law punishes voter intimidation through an array of civil and criminal penalties. *See infra* at pp. 12–14. All fifty States and the District of Columbia also criminalize voter intimidation. *See infra* at p. 13.

But, as this Court has recognized, such laws "deal with only the most blatant and specific attempts to

impede elections." *Burson*, 504 U.S. at 206–07 (quotation marks omitted). A State is well within its rights to recognize that firearms indiscriminately distributed—for example, on a "speculative or specious" basis, as New York law prohibits—can intimidate and exclude voters and other participants in the democratic process. Just as the "display of a gun instills fear in the average citizen," *McLaughlin v. United States*, 476 U.S. 16, 17–18 (1986), so does knowledge that guns have been widely dispersed—and then concealed.

Such fears are well-founded. Empirical evidence demonstrates that guns can turn ordinary disagreements into deadly ones. As conflicts arise at every phase of the electoral process—between voters who support opposing candidates, between protesters and counter-protesters at politically charged rallies, or with election officials counting votes—voters frightful of mixing guns with unrest may limit voting-related activity or even sit out of the electoral process entirely.

Laws like the New York laws at issue here prevent voter intimidation and protect the democratic process by assuring citizens that the electoral process is safe. *See Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015) (explaining that if a law regulating firearms "reduces the perceived risk from a mass shooting, and makes the public feel safer as a result, that's a substantial benefit"); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder."). And as

this Court has held, "preventing" the "evil[]" of "voter intimidation" qualifies as a "compelling" governmental interest that can justify imposing limits on other constitutional rights. *Burson*, 504 U.S. at 206.

That is not to say that New York's approach is required or even suitable in every locality. New York's laws protect New Yorkers' right to vote and provide those voters confidence that they can safely participate in the electoral process. But regionalism has always featured prominently in the states' varied approaches to regulating guns, reflecting the flexibility enabled by federalism. *See* Joseph Blocher, *Firearm Localism*, 123 Yale L. J. 82, 99–100 (2013) ("It is no surprise, then, that the vast majority of gun control regulations in the United States are local, and are tailored to the particular risks of gun use in densely populated areas."). Thus, this case is not about whether the Constitution compels New York's specific approach to regulating firearms; no one is arguing that. Rather, this case concerns whether the Second Amendment prohibits New York—a State with some of the most densely populated areas in the world—from adopting a regime designed to advance public safety, which, among other things, helps secure the electoral process. It does not, and the decision below should be affirmed.

ARGUMENT

I. THE RIGHT TO VOTE AND ENGAGE IN ELECTION-RELATED ACTIVITY INCLUDES THE RIGHT TO DO SO SAFELY

A. Threats and Force Have Long Been Used to Intimidate Voters

The right to vote is the right from which all other rights flow. *See Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966) ("[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.") (quotation marks omitted).

Nonetheless, voter intimidation has been a "recurring problem throughout the history of the United States." Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. Rev. L. & Soc. Change 173, 177 (2015); *see Ex parte Yarbrough*, 110 U.S. 651, 666 (1884) ("In a republican government, like ours, where political power is reposed in representatives of the entire body of the people, chosen at short intervals by popular elections, the temptations to control these elections by violence . . . is a constant source of danger."). In response to early Reconstruction-era voting reforms,

for example, minority voters faced a "sustained campaign of voter intimidation through terrorism and violence," in which "[e]ven the simple act of voting could provoke violence." Cady & Glazer, *Voters Strike Back*, at 184–85; *see Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 218–19 (2009) (Thomas, J., concurring in the judgment) ("Almost immediately following Reconstruction, blacks attempting to vote were met with coordinated intimidation and violence."). Intimidation in the form of "violence and harassment" also has long been deployed along and across political lines, for example, to target and frighten known supporters of the opposing political party. Cady & Glazer, *Voters Strike Back*, at 184–85. In 1874, "more than five thousand men fought in the streets of New Orleans, in a battle between supporters of Louisiana's Republican governor . . . [and] a group allied with the Democrats." Jelani Cobb, *Our Long, Forgotten History of Election-Related Violence*, The New Yorker (Sept. 14, 2020), https://bit.ly/3huCj1j.

In the 20th century and onward, voter intimidation has continued to plague the electoral process, Cady & Glazer, *Voters Strike Back*, at 215, often through the use of firearms to threaten or imply the risk of violence. *See*, *e.g.*, Giffords Law Center, *Preventing Armed Voter Intimidation: A State-by-State Analysis* (Sept. 2020), at 3 (explaining that "attempts to disenfranchise and intimidate voters with firearms [have] continue[d]" into 2020 (cleaned up)); *Paynes v. Lee*, 377 F.2d 61, 63 (5th Cir. 1967) (two white men "assailed" a black citizen "and threatened to destroy or annihilate [him], his possessions and his family should

he . . . attempt to become a registered voter"); People for the American Way, *The Long Shadow of Jim Crow: Voter Intimidation and Suppression in America Today* (Aug. 2004), at 1 ("In every national American election since Reconstruction, . . . voters . . . have faced calculated and determined efforts at intimidation."), https://bit.ly/3l05UAQ; Coalition to Stop Gun Violence, *Guns Down at the Polls: How States Can and Should Limit Firearms at Polling Places* (2020), at 6 (documenting "instances of armed intimidation" at state "polling locations" in 2016 and 2018), https://bit.ly/3Cq80kl; ACLED, *Demonstrations & Political Violence in America: New Data for Summer 2020* (Sept. 2020), at 14 (noting the "growing presence of armed individuals" in 2020 at issue-based rallies, which "intimidate perceived 'enemies'"), https://bit.ly/38OEGqU; Nicholas Reimann, *Voter Intimidation Ramping Up as Election Day Approaches—Here are the Claims Being Investigated*, Forbes (Oct. 21, 2020) (reporting that in 2020, several Republican voters in New Hampshire "received letters . . . threatening to have their houses burned down" if the Republican nominee would not concede the election, and further reporting that a man in Maryland was "arrested after . . . telling his Biden-supporting neighbors, 'This is a warning to anyone reading this letter if you are a Biden[] supporter you will be targeted"), https://bit.ly/3EchWQj.

For example, in 2009, a federal district court entered a default judgment against a member of the New Black Panther Party who stood outside of a polling place, heavily armed, and yelled racial slurs at voters. *See United States v. New Black Panther Party*

for Self-Defense, No. 09 Civ. 65-SD (E.D. Pa. May 18, 2009). In a similar example from the 1980s, a group called the "National Ballot Security Task Force" hired individuals, at the behest of political actors, to visit the polls and "openly flash[] their guns" in front of voters. Brentin Mock, *How Voter Intimidation Could Get Uglier*, Bloomberg CityLab (Oct. 7, 2020), https://bloom.bg/3fM8uZl. That particular episode led to a federal consent decree that for a time largely prohibited "ballot security" groups from conducting such activities. *Id.*

That federal consent decree expired in 2017. *See generally Democratic Nat'l Comm. v. Republican Nat'l Comm.*, No. 18-1215, 2019 WL 117555 (3d Cir. Jan. 7, 2019). So-called ballot security groups and other organized armed groups have since reemerged en masse. Even before the consent decree was lifted, many of these groups "defined their mission in confrontational, militaristic terms." Cady & Glazer, *Voters Strike Back*, at 225. Such efforts led *amicus* to file suit in 2020 against a "private mercenary contractor . . . for voter intimidation in Minnesota," after it discovered that the contractor stood to "hire and deploy armed [persons] to polling sites in the state." League of Women Voters, *Voting Rights Organizations Celebrate Important Victory in Case to Stop Illegal Voter Intimidation in Minnesota* (Oct. 24, 2020), https://bit.ly/3DgbG9R. Minnesota's Attorney General intervened and obtained a court order prohibiting armed personnel from congregating at or near polling places. *See* Office of Minn. Attorney General, *Attorney General Ellison Wins Assurance Atlas Aegis Will Not Recruit or Provide Private*

Security for Minnesota Elections (Oct. 23, 2020), https://bit.ly/2XUov9y.

Put simply, the Nation remains vulnerable to voter intimidation. And as demonstrated below, there is a long history of states implementing regulatory measures to combat outright voter intimidation, *see infra* at pp. 12–14, and of this Court recognizing that states have a compelling interest in securing the integrity of the electoral process through additional measures, *see infra* at pp. 28–29.

B. Voter Intimidation Prohibitions Are Widespread and Important But Do Not Alone Secure Electoral Safety

Reflecting the broad, clear consensus that voter intimidation should not be tolerated at any stage of the electoral process, federal law has long provided an array of civil and criminal penalties for voter intimidation. Many of these provisions designate force and threats of force as dangers to the voting process. *See*, *e.g.*, 42 U.S.C. § 1985(3) (prohibiting any conspiracy "to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person"); 18 U.S.C. § 245(b)(1)(A) (imposing criminal penalties on anyone who, "by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with . . . any person because he is or has been . . . voting or qualifying to vote"). Recognizing the acute risk of coercion when the threat of gun violence is implied, federal law forbids even trained federal officers from

being present at a polling site while armed. *See* 18 U.S.C. § 592 ("troops or armed" officers may not be present "at any place where a general or special election is held"). Notably, federal voter intimidation laws are not limited to behavior occurring at the polls; Congress has sensibly recognized that intimidation can and does take place at any stage of the voting process. *See*, *e.g.*, 52 U.S.C. § 10101(a)(2)(B) (prohibiting interference with "registration" or any "other act requisite to voting"); 18 U.S.C. § 594 (not limiting violations to intimidation at the polls); 52 U.S.C. § 10307(b) (same); 52 U.S.C. § 20511(1) (same).

Likewise, voter intimidation—at any phase in the electoral process—is a crime in all fifty states as well as the District of Columbia. *See* Everytown For Gun Safety Support Fund, *Election Protection: Preventing and Responding to Illegal Armed Voter Intimidation and Election Interference* (Oct. 6, 2020), https://bit.ly/3kjO7Eq (collecting laws).

Despite this consensus on the evils of voter intimidation, this Court has recognized that "[i]ntimidation and interference laws" can "fall short of serving a State's . . . interests" in preventing intimidating tactics, as such laws "deal only with the most blatant and specific attempts to impede elections." *Burson*, 504 U.S. 206–07. The Department of Justice, too, has recognized that while "[v]oter intimidation warrants prompt and effective redress by the criminal justice system," these cases are "difficult to prosecute." Dep't of Justice, *Federal Prosecution of Election Offenses* (Dec. 2017), at 50. That is because, among other things, intimidation can occur "subtl[y]"

or "without witnesses" and because victimized voters "must testify, publicly and in an adversarial proceeding, against the very person who intimidated them." *Id.*

Thus, despite the widespread agreement that voter intimidation has no place in our democracy, voter intimidation laws alone cannot alone secure the vote and prevent intimidation. Indeed, when citizens who are fearful of being exposed to threats, force, and armed violence decline to participate in the voting process in the first place, then the damage of voter intimidation can be done without a crime ever being committed.

By requiring more than a specious basis for a concealed-carry license, New York laws help prevent the unchecked carrying of guns in public places. That approach thwarts not only criminally actionable intimidation at the polls, but also the chilling effect on voters concerned for their safety from the widespread availability of concealed firearms, which would interfere with citizens' right to vote. *Cf. Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986) ("[States] should be permitted to respond to potential deficiencies in the electoral process with foresight, rather than reactively.").

II. FIREARM PROLIFERATION IMPERILS THE ELECTORAL PROCESS

The electoral process relies on, and in turn sustains, public order. Citizens fearful of gun violence in electoral-related public spaces like voting booths and campaign rallies may well be deterred from

participating. As discussed below, this Court has recognized that the sight of a gun may be enough to intimidate and it is widely accepted in the empirical literature that the mere presence of a gun—whether visible or concealed—can turn commonplace disagreements deadly.

Accordingly, firearms left to proliferate freely—that is, absent measures of the kind New York has put in place to regulate the issuance of concealed carry licenses—may undermine citizens' confidence in public order. As demonstrated below, firearms have the potential to disrupt—and in many documented cases, have *already* disrupted—each and every phase of the voting process: from rallies that occur before an election, to the voting booth on election day, to ballot-counting centers after-the-fact. In short, firearm proliferation imperils the electoral process.

A. Handgun Proliferation Reasonably Creates Fear that Voting-Related Conflict and Unrest Will Turn Violent

No one disputes that the "display of a gun instills fear in the average citizen." *McLaughlin v. United States*, 476 U.S. 16, 17–18 (1986). Indeed, every state and the District of Columbia criminalizes displaying "a gun to threaten or intimidate a member of the public." Everytown Law, *Election Protection* (Oct. 6, 2020), https://bit.ly/3ABx5b4.

Non-brandished firearms can also intimidate, and when firearms are permitted to proliferate in public spaces, citizens may rightfully become fearful that commonplace altercations will turn deadly. *See*

Wollard v. Gallagher, 712 F.3d 865, 879 (4th Cir. 2013) ("[r]educ[ing] the number of handguns carried in public" helps "lessen[] the likelihood that basic confrontations between individuals . . . turn deadly," as incidents that might "end with people upset, but not lethally wounded, take on deadly implications when handguns are involved."); *see also*, *e.g.*, Anthony A. Braga, et al., *Firearm Instrumentality: Do Guns Make Violent Situations More Lethal?*, 4 Ann. Rev. of Criminology 147 (Jan. 2021) (reviewing "considerable evidence" supporting the unremarkable fact that "guns contribute to fatalities that would otherwise have been nonfatal assaults"). The mere act of carrying a firearm in public makes it several times more likely that the individual will be shot during an assault when compared to a victim not wielding a firearm. *See* Charles C. Branas, et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 Am. J. Pub. Health 2034, 2037 (Nov. 2009). And a recent comprehensive analysis of firearms at political rallies found that "armed demonstrations are *nearly six times as likely to turn violent or destructive* compared to unarmed demonstrations." *Armed Assembly: Guns, Demonstrations, and Political Violence in America*, ACLED & Everytown for Gun Safety Support Fund (Aug. 2021), at 2 (emphasis added); *see also infra* at pp. 19–22 (discussing armed violence at issue-based rallies).

Historically, firearm regulations have long been justified as an established means of preventing guns from terrorizing the public. *See*, *e.g.*, 1 William Hawkins, *A Treatise of the Pleas of the Crown* (1716), 134—35, §§ 1, 4 (explaining that the Statute of

Northampton sought to prevent carrying weapons in a manner that would "naturally cause a Terror to the People"); 1795 Mass. Acts 436, ch. 2 (making it illegal for anyone to "ride or go armed . . . to the fear or terror of the good citizens of this Commonwealth"). Although Petitioners dispute the types of firearms likely to have caused such terror, they accept that firearms have long been limited in public spaces to prevent intimidating the populace. Pet. Br. at 8.

Thus, and particularly given the rise in mass shooting events over the last twenty years, citizens may be increasingly reluctant to enter public spaces where they risk being caught in crossfire. *See*, *e.g.*, James Densley & Jillian Peterson, *We've Analyzed 53 Years of Mass Shooting Data: Attacks Aren't Just Increasing, They're Getting Deadlier*, L.A. Times (Sept. 1, 2019) ("Our research spans more than 50 years, yet 20% of the . . . cases in our database occurred in the last five years," and "[m]ore than half . . . occurred since 2000"), https://lat.ms/3EAKUd0. As of this July, "there have been more than 1,800 people injured or killed in mass shootings so far in 2021" and the "number of mass shootings in the country is 20 percent higher than where we were in 2020, which itself was 30 percent higher than the previous high." Philip Bump, *2021 Has Already Been a Very Bad Year for Mass Shootings*, Wash. Post (July 7, 2021), https://wapo.st/3mVGWVA.

Indeed, this Court and others have upheld laws that maintain the public's confidence in core governmental objectives—even if the ill sought to be avoided would not otherwise affect all those at risk.

See, *e.g.*, *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2340 (2021) (recognizing the "legitimate state interest" in maintaining "public confidence" in the electoral process); *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 444–55 (2015) (upholding law preventing judicial candidates from soliciting campaign funds under strict scrutiny, finding that the law advanced the "State's compelling interest in *preserving public confidence* in the integrity of the judiciary") (emphasis added); *Friedman*, 784 F.3d at 412 (upholding firearm regulation and explaining that if the law "makes the public feel safer" that is a "substantial benefit").

In sum, the prospect of firearms in the public square, particularly in the often charged context of voting, reasonably frightens the average citizen. This Court has recognized as much, empirical research substantiates that this fear is justified, and history confirms that addressing this fear has long been a goal of firearms regulations.

B. The Intimidating Effect of Firearms Potentially Disrupts Every Phase of the Electoral Process

The presence of firearms—brandished or hidden—increases the risk that conflict turns deadly. And conflict inheres at every stage of the electoral process. Throughout the life cycle of an election, an engaged citizenry is invited to disagree on matters of the utmost importance. Vigorous disagreement signals a democracy's health, but can also precipitate heated confrontations. Absent the involvement of firearms, such confrontations generally end unremarkably. But where firearms are introduced into the equation,

citizens rightly begin to fear that ordinary electoral-related conflicts pose danger. Even "one violent incident," or the risk thereof, "could not only claim lives but deter countless would-be voters from venturing to polling places in the future." Joseph Blocher & Alan Chen, *Why Do States Ban "Electioneering" but Allow Guns at Polling Places?*, Slate (Jan. 5, 2021), https://bit.ly/3yQyB92; *see Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1221 (11th Cir. 2009) ("The cost of a disturbed election is too high to allow the State only to react to disturbances but not to prevent disturbances.").

Those with interests antithetical to our democracy have long recognized that the threat of violence can be deployed to intimidate participants in the electoral process. In the early days of our Republic, "[s]ham battles were frequently engaged in to keep away elderly and timid voters of the opposition." *Burson*, 504 U.S. at 202. These tactics have bled into the modern era. In 2020, several states saw armed groups appear at election facilities and events and interfere with the electoral process. *See infra* at pp. 20–27.

Further, and importantly, a suppressive effect is not necessarily dependent on suppressive intent—particularly "in a nation where 58% of American adults report that they or someone they care for has been impacted by gun violence." Brady Center to Prevent Gun Violence, *Guns at Polling Places: Preventing Armed Voter Intimidation* (2020), https://bit.ly/3yOYtRU. For instance, in 2016, a man carrying a firearm stood outside of a Virginia polling

place. A woman who saw the man while voting told a reporter, "I had my 9-year-old son with me. I felt intimidated." When the man was informed that his gun was frightening others, he "felt really bad," but by that time the damage was done. *See* Ryan J. Reilly, *A Guy in a Trump Shirt Carried a Gun Outside of a Virginia Polling Place—Authorities Say That's Fine*, Huff. Post (Nov. 4, 2016), https://bit.ly/38I3AJ5.

Intentional or not, firearms have the potential to disrupt every phase of the electoral process.

1. Before Elections

The electoral activities that occur before elections—including rallies, protests, debates, and registration events—are ripe for disruption by gun-related intimidation. The American Bar Association recognized in 2020 that armed groups have started to "become fixtures at demonstrations around the country." ABA Resolution, *Opposition to Guns in Polling Places* (July 23, 2021), https://bit.ly/3ixjhYZ; *see also Armed Assembly: Guns, Demonstrations, and Political Violence in America*, ACLED & Everytown for Gun Safety Support Fund, at 1 ("In the past year and a half, the sight of demonstrators and counter-demonstrators armed with firearms has become more common, and the risk of violent escalation has remained high.").

This armed presence has, in too many cases, caused death. During the past election cycle, "guns carried by individuals with a diverse range of political views have featured at protests on at least 70 occasions, and they have been involved in at least 21

incidents that left 22 Americans dead." ABA Resolution, *Opposition to Guns in Polling Places* (July 23, 2021), https://bit.ly/3ixjhYZ. The presence of firearms, concealed or otherwise, does not bode well for peaceful yet contentious protests; the "presence of guns . . . has raised the stakes" of potential deadly violence occurring at these otherwise peaceful demonstrations. Tess Owen, *We Tracked the Shocking Amount of Gun Violence at U.S. Protests*, Vice (Oct. 1, 2020), https://bit.ly/2X0tmFS. When "you have groups of protesters and counterprotesters of hotly contested issues, with one or both sides bringing guns into the mix, it's just a volatile combination." *Id.*

Between January 2020 and June 2021, there were "at least 560 demonstrations" that "included the presence of an armed individual," and "one out of every six" of those demonstrations "included reports of violent or destructive activity." *Armed Assembly: Guns, Demonstrations, and Political Violence in America*, ACLED & Everytown for Gun Safety Support Fund, at 3. In short, the presence of guns turned demonstrations deadly. While a fatality was reported at only "one out of every 2,963 demonstrations where no firearm was identified," that ratio jumped to "one out of every 62 demonstrations where there was a firearm identified." *Id.*

For example, at a July 2020 get-out-the-vote rally, "armed men . . . attacked a rally" for a congressional candidate, injuring his aide. *Id.* Commenting generally on get-out-the-vote efforts and other public election events, the Department of Homeland Security recently concluded that "[o]pen-air, publicly accessible

parts of physical election infrastructure, such as campaign-associated mass gatherings . . . and voter registration events, would be the most likely flashpoints for potential violence." Dep't of Homeland Sec., *Homeland Threat Assessment* (Oct. 2020), at 18.

2. During Elections

The actual voting period—from the start of early voting through election day—is a critical point at which intimidation and gun-related threats affect voters. This may occur in one-off skirmishes as well as through organized, politically motivated group efforts.

Spontaneous political skirmishes at polling sites are regular occurrences. Absent firearms, contentious encounters are much more easily controlled. *See, e.g.*, ABC News, *Fight Breaks Out at Polling Place* (Nov. 8, 2016), https://bit.ly/3jMYxw6 (voters arrived to "loud screams" at a polling place in Florida after an argument between a voter and campaign volunteer "escalated into a fight," wherein a voter charged the volunteer and the volunteer pepper sprayed the voter); WREG Memphis, *Video Shows Candidate, Campaigner in Ballot Brawl at Mississippi Polling Site* (Nov. 4, 2020), https://bit.ly/3xz8Pof (a candidate and a "rival campaign supporter" "got into a fist fight" and "brawl" at a Mississippi polling place). But when guns are present, whether brandished or concealed, the political fray may quickly escalate into tragedy.

This is all the more true when organized groups—especially groups known for being heavily armed—congregate for the purpose of intimidating voters to either stay away or vote a certain way. For example.

experts have "identified a major realignment of militia movements in the US from anti-federal government writ large to mostly supporting one candidate." Hampton Stall, et al., *Standing By: Right-Wing Militia Groups & the US Election*, ACLED (Oct. 2020), at 5. This fervent support for a particular candidate has rendered these groups more inclined toward "violent action aimed at dominating public space around [] election[s]." *Id.* at 2. A study tracking over 80 such militias found that while many were "latent" (in that they "threaten[ed] more violence than they commit[ted]"), many were not. *Id.* at 7. In one instance, members of the "Michigan Wolverine Watchman militia," were arrested in connection with an attempt, in the runup to the 2020 election, to kidnap and perhaps assassinate Michigan's Governor. *See id.* at 21.

These organized groups do not hide their violent objectives. A former FBI counterintelligence specialist commented that many of these militia groups use "the language of violent conflict in both their public and in their private communications online." Brentin Mock, *How Voter Intimidation Could Get Uglier*, Bloomberg (Oct. 7, 2020), https://bloom.bg/3fM8uZl. They are "calling for a physical response and presence to polling places," such that "the specter of people who are violent in nature and have violent agendas and often come armed with guns is . . . a very real possibility." *Id.* To take one example, the leader of one such militia said the following at a rally, on the subject of his perceived political opponents: "We're going to make these people fear us again. We should have been shooting a long time ago instead of standing off to the

side." Mike Giglio, *A Pro-Trump Militant Group has Recruited Thousands of Police, Soldiers, and Veterans*, The Atlantic (Nov. 2020), https://bit.ly/2VLEDcB.

3. After Elections

Once votes have been submitted, concealed firearms continue to pose a threat to the electoral process, as they threaten to turn unrest into violence during the vote-counting process and in response to the announced results.

One member of the Oath Keepers, currently one of the largest anti-government extremist groups, was asked how he would respond if his preferred candidate lost the election. He responded he would accept the result, "as long as we believe the vote was fair. And if both sides can't come to an agreement, then you're going to have a conflict." Mike Giglio, *A Pro-Trump Militant Group has Recruited Thousands of Police, Soldiers, and Veterans*, The Atlantic (Nov. 2020), https://bit.ly/2VLEDcB.

On January 6, 2021, America watched as "rioters" responded to the reported election results by storming the U.S. Capitol, "crushing through windows, pressing up stairways, and sending lawmakers and law enforcement running for their lives." Clare Hymes, et al., *What We Know About the "Unprecedented" Capitol Riot Arrests*, CBS News (Aug. 11, 2021), https://cbsn.ws/3yFwXa0. Thus far, over 570 individuals have been arrested. *Id*. Several police agencies "made arrests of people allegedly carrying guns." Tom Driesbach & Tim Mak, *Yes, Capitol Rioters Were Armed*, NPR (Mar. 19, 2021),

https://n.pr/3lS9QFU. A member of the Capitol Police was assaulted during the violent outburst, collapsed later that evening, and died the next day. *See* Evan Hill, et al., *Officer Brian Sicknick Died After the Capitol Riot—New Videos Show How He was Attacked*, N.Y. Times (Mar. 24, 2021), https://nyti.ms/3yQD1M6. At least "a dozen members or associates of the Oath Keepers are facing conspiracy charges in connection with the siege." Ryan Lucas, *Who Are the Oath Keepers? Militia Group, Founder Scrutinized in Capitol Riot Probe*, NPR (Apr. 10, 2021), https://n.pr/3ySbEkS.

This insurrection was destructive, both in terms of physical harm and harm to public confidence in the security of election-related gatherings. Without the District of Columbia's strict limitations on concealed carry, the damage on all sides could have been far worse.[2] *See*, *e.g.*, Cassidy McDonald, *Handguns, Crowbars, Tasers and Tomahawk Axes: Dozens of Capitol Rioters Wielded "Deadly or Dangerous" Weapons, Prosecutors Say*, CBS News (May 27, 2021) (reporting that some "riot defendants said they refrained from bringing firearms to the city that day, citing D.C.'s strict gun laws"), https://cbsn.ws/3lxLxek.

The events of January 6 did not arise out of whole cloth, and the circumstances that led to those events

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[2] *See*, *e.g.*, D.C. Code § 7-2509.07 (prohibiting concealed carry in a number of public spaces, including, the capitol, within 1,000 feet of public demonstrations, near the White House, on public transit, or any "location or circumstance that the [Police Chief] determines by rule"); *id.* at § 22-4504.1 (prohibiting open carry throughout the District of Columbia).

have not vanished. "[T]he possibility of armed violence" arose "in the context of attempts to intimidate election officials," including with respect to counting ballots in the November 2020 election. ABA Resolution, *Opposition to Guns in Polling Places* (July 23, 2021), https://bit.ly/3ixjhYZ. In the days and weeks after the 2020 election:

- Around 100 individuals in Phoenix, some armed, protested outside a building where officials were counting votes. *Id.*
- Vermont election officials received a voice message threatening them with "execution by firing squad." *Id.*
- Armed individuals went to the home of Michigan's Secretary of State and shouted obscenities. *Id.*
- The Arizona Secretary of State reported that a "man called my office saying I deserve to die and wanting to know 'what [I was] wearing so [I would] be easy to get.' It was one of at least three such threats today." *Election Officials Under Attack*, Brennan Center for Justice (June 16, 2021), at 6.

In short, "[n]o one should be under the illusion that this is a problem that will fade as 2020 recedes into the rearview mirror." *Id.*

A recent survey from June 2021 found that "one in three election officials feel unsafe because of their job, and nearly one in five listed threats to their lives as a

job-related concern." *Id*. at 3–4. These threats of violence coupled with the unchecked proliferation of guns threatens a crisis in staffing elections. *Id*. at 5.

III. THE NEW YORK LAWS UNDER REVIEW ADVANCE THE COMPELLING INTEREST IN SECURING THE ELECTORAL PROCESS AND ARE CONSISTENT WITH THE SECOND AMENDMENT

A. New York Law Furthers the Well-Established Compelling Interest in Securing the Electoral Process from Intimidation and Disruption

No constitutional right exists in a vacuum. Rather, most constitutional rights, including the Second Amendment, have the potential to interfere with other fundamental rights and compelling interests, such as the right to vote. *See Heller*, 554 U.S. at 626; *see also* Mark D. Rosen, *When Are Constitutional Rights Non-Absolute? McCutcheon, Conflicts, and the Sufficiency Question*, 56 William & Mary L. Rev. 1537, 1555 (2015) ("[I]f rights can conflict, then one or both rights must give way." (emphasis omitted)). That is why legislatures may enact laws designed to align the coexistence of constitutional rights with other important objectives. Such "laws can (and do) survive" even "strict scrutiny with considerable frequency." Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand. L. Rev. 793, 797 (2006).

The Constitution provides that States may prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. Art. I, § 4, cl. 1. Accordingly, this Court has held that "[c]ommon sense, as well as constitutional law, compels the conclusion that the government must play an active role in structuring elections," *Burdick*, 504 U.S. at 433, and that "substantial regulation of elections" is necessary if elections "are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes," *Storer v. Brown*, 415 U.S. 724, 730 (1974).

This Court has long recognized that States—in keeping with their role as the primary guardians of elections—have a compelling interest in preventing voter intimidation, alleviating other disruptions that unduly influence voters, and protecting the integrity of the voting process. *See*, *e.g.*, *Burson*, 504 U.S. at 199, 206 (upholding a state law that banned electioneering near polling places against a First Amendment challenge, and holding that states have a "compelling interest[]" in "preventing voter intimidation," "protecting voters from . . . undue influence," and "preserving the integrity of [the] election process") (quotation marks omitted); *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1887 (2018) (confirming that states have a compelling interest in preserving the voting booth as "an island of calm in which voters can peacefully contemplate their choices" and ensuring "that partisan discord not follow the voter" into a "polling place") (quotation marks omitted); *Brnovich*, 141 S. Ct. at 2340 ("Ensuring that

every vote is cast freely, without intimidation or undue influence, is . . . a valid and important state interest").

Those precedents addressing the boundaries of constitutional rights demonstrate that New York can enact firearm regulations that serve the compelling interest of securing the right to vote without violating the Second Amendment. As detailed *supra*, the proliferation of firearms in electoral-related spaces threatens the right to vote, including by deterring participation for fear of harm and violence. If states may preserve the integrity of the electoral process by regulating the intimidating effects of speech without running afoul of the First Amendment, then they may similarly do so by regulating the intimidating effects of guns without running afoul of the Second. Guns are deadlier than speech, easier to conceal, capable of inflicting harm at greater distances, and can undermine the public safety that states have a compelling interest in protecting. *See*, *e.g.*, *Brigham City v. Stuart*, 547 U.S. 398, 403–04 (2006) (public safety justified restrictions on the Fourth Amendment right to protection of the home); *New York v. Quarles*, 467 U.S. 649, 655 (1984) (public safety justified restrictions on Fifth Amendment *Miranda* rights); *United States v. Salerno*, 481 U.S. 739, 755 (1987) (public safety justified restrictions on the Eighth Amendment right to bail).

The challenged New York laws promote one compelling interest (public order) in furtherance of securing another (the integrity of the democratic process). Imposing reasonable constraints on concealed carry does not render the Second

Amendment a second-class right; to the contrary, it comports with this Court's long-held recognition that constitutional rights may sometimes be regulated in order to preserve and protect the electoral process.

B. New York's Laws are Constitutionally Permissible, But Not Required

Importantly, this case is not about any limitation on concealed carry in the home or whether the measures New York has adopted to regulate concealed carry are compelled. No party, including *amicus*, argues for that. Rather, this case stands only for the point that that the Second Amendment does not *prohibit* New York from passing laws tailored to local conditions that preserve public order, public confidence in such order, and the fundamental rights dependent on that order—such as the fundamental right to vote.

To be sure, New York's concealed carry law may not be desired by every locality nationwide. But that is why the United States has long been home to significant regional variation in firearm regulation:

> [P]erhaps no characteristic of gun control in the United States is as 'longstanding' as the stricter regulation of guns in cities than in rural areas. In the Founding era, many cities—Philadelphia, New York, and Boston prominent among them—regulated or prohibited the firing of weapons and storage of gunpowder within city limits, even while the possession and use of guns and gunpowder were permitted in rural areas.

Joseph Blocher, *Firearm Localism*, 123 Yale L. J. 82, 85 (2013). One need not even assume that guns pose a greater risk of physical harm in urban areas to appreciate the possibility that "urban residents have concluded . . . that gun control will make them safer," or that the differences may just boil down to culture: where "members of the rural gun culture see firearms as a positive and beneficial part of life, members of the urban gun culture see them as threats." *Id.* at 102–03.

Variation in firearm laws is not a constitutional defect; it is a virtue. Indeed, "even if it is impossible to bridge gun culture and gun control culture, it is also unnecessary." *Id.* Our system of federalism is built to encourage New York to enact regulations consistent with the needs of New York and, in so doing, act as a "laborator[y] for experimentation." *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2214 (2016). The Constitution wisely does not require New York, with 20 million people packed into 54,000 square miles, to pass a law suitable to Wyoming's 580,000 people spread out over nearly 100,000 square miles. *Cf. Galvan v. Super. Ct.*, 452 P.2d 930, 938 (Cal. 1969) ("That problems with firearms are likely to require different treatment in San Francisco County than in Mono County should require no elaborate citation of authority."). Even within New York, the local officers who assess concealed carry applications consider local "population density" and other "geographical" variations: "The circumstances which exist in New York City are significantly different than those which exist in Oswego or Putnam Counties. Such circumstances must be considered in the exercise of

the licensing officer's discretion." *Application of O'Connor*, 585 N.Y.S.2d 1000, 1003–04 (Co. Ct. 1992).

New Yorkers may own and bear a firearm in a variety of settings: at home, in connection with a job, out hunting, and, when "proper cause" is shown, in public. New York thus ensures that—given local circumstances—the right to bear arms can coexist with public order and New Yorkers' right to vote without fear of encountering firearms obtained on "speculative or specious" grounds.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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