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 OF ARIZONA, MISSOURI, ALABAMA, ALASKA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WEST VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

This brief is filed on behalf of twenty-six states: Arizona, Missouri, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia and Wyoming.[1] The undersigned Attorneys General are their respective states' chief legal officers and have authority to file briefs on behalf of the states they represent.

Through their Attorneys General, the *Amici* States have a special responsibility to safeguard their citizens' fundamental rights, including their right to bear arms in self-defense outside the home. The Second Circuit's misinterpretation of the Second Amendment threatens the liberty of citizens in every State, not just New York. Moreover, the States have a unique perspective that should aid the Court in weighing the value and importance of the rights implicated by the questions presented. The *Amici* States are charged with advancing their substantial interests in public safety, preventing crime, and reducing the harmful effects of firearm violence while ensuring that their citizens can exercise their enumerated constitutional right to bear arms. The *Amici* States offer this brief to highlight empirical research and their experiences with permit systems for applicants that meet objective criteria, and to call the Court to restore the original public meaning of the right to bear arms.

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[1] This brief is filed under Supreme Court Rule 37.4 and does not require the consent of the parties.

SUMMARY OF ARGUMENT

New York's handgun permit regime, with its "proper cause" requirement, unconstitutionally prevents the vast majority of law-abiding citizens from exercising their fundamental, enumerated right to defend themselves when it is most necessary—before they become a victim. For this reason alone, the law is invalid *per se*. Due to the subjective nature of New York's "proper cause" test and officials requiring citizens to document future danger (including past violence where the same regime prohibited their right to self-defense), the regime fails muster under any level of scrutiny. *Amici* States demonstrate that New York's subjective-issue regime for handgun carry permits must be struck down and enjoined because their experience with shall-issue regimes shows better outcomes, and the Second Amendment's text and history guarantee individuals the right to confront danger when and where it arises.

First, empirical data and the States' experience with objective-issue (or "shall"-issue) regimes demonstrate that subjective-issue regimes undermine the very public-safety purposes that they purport to advance. Citizens that receive permits are significantly more law-abiding than the public at large, and studies link objective-issue regimes with decreased murder rates and no rise in other violent crimes. And critically, the ability to carry a firearm for self-defense in case of confrontation—central to the right this Court recognized in *Heller*—is statistically the best way for citizens to protect themselves from criminal harm: defensive gun uses leave the intended victim unharmed more frequently than any other option and almost never require

firing a shot. New York's subjective-issue regime thus burdens citizens' constitutional rights while detracting from, much less advancing, a government interest.

Second, New York's requirement that its citizens prove they have "proper cause" to carry a handgun in public is incompatible with the original public meaning of the Second Amendment. The enumerated right to bear arms supplies all the "proper cause" that citizens need. In 2008, this Court recognized that the Second Amendment includes the right of law-abiding citizens to keep and bear weapons in self-defense. *District of Columbia* v. *Heller*, 554 U.S. 570 (2008). Unlike present-day New York, the Founding generation carried weapons openly and only prohibited concealed weapons out of concern for "secret advantages and unmanly assassinations." *State* v. *Chandler*, 5 La. Ann. 489, 490 (1850). Early precedents bear out the rule that a legislature may prohibit concealed weapons *only* so long as "it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms." *Nunn* v. *State*, 1 Ga. 243, 251 (1846).

Yet, in practice, New York's "proper cause" requirement enacts a near-total ban. Ordinary citizens must *document* an extraordinary and individualized danger that does not affect similarly situated persons, and even then, they must avoid practices considered too risky in the subjective eyes of the licensing official. *E.g.*, *Campisi* v. *Shea*, No. 153703/2020, 2020 WL 7230659, at *1 (N.Y. Sup. Ct. Dec. 8, 2020). Persons with limited mobility must show their disability sets them apart from other disabled citizens to wear a firearm for protection.

Klenosky v. *N.Y. City Police Dep't*, 428 N.Y.S.2d 256 (N.Y. App. Div. 1st 1980), *aff'd*, 421 N.E.2d 503 (N.Y. 1981). New York's "proper cause" regime, the only permit available for public carry, denies New Yorkers their right to "carry weapons in case of confrontation." *Heller*, 554 U.S. at 591–92. In practical effect, it requires New Yorkers to prove that they have *already* become victims of violent crimes *before* they may protect themselves from becoming victims of violent crimes. This is backwards and unconscionable. The Court should reaffirm the original public meaning of the Second Amendment and strike New York's "proper cause" requirement as *per se* unconstitutional.

ARGUMENT

I. Empirical Research And The Experience Of Other States Demonstrates That New York's Restrictive Licensing Regime Fails Constitutional Tailoring.

New York's subjective-issue regime for handgun carry permits burdens a fundamental right without advancing the government's objectives of public safety and crime prevention and is therefore unconstitutional under any applicable level of scrutiny. As the Second Circuit previously recognized, "New York's proper cause requirement places substantial limits on the ability of law-abiding citizens to possess firearms for self-defense in public," and is specifically tuned to deny the exercise of this right to all but a select few citizens. *Kachalsky* v. *Cty. of Westchester*, 701 F.3d 81, 86, 93 (2d Cir. 2012) (New York's requires that an applicant "'demonstrate a special need for self-protection distinguishable from that of the general community

or of persons engaged in the same profession.'"). *By definition*, New York's "special need" requirement completely prohibits the vast majority of its citizens from exercising the right it restricts, since most necessarily will have "ordinary" and not "special" needs. Yet, as the experience of forty-two states with objective, "shall-issue" licensing demonstrates, the denial of this right to law-abiding citizens is not statistically linked to decreased crime or increased public safety.

This Court has regularly looked to the several states for guidance and to "provide testimony to the unreasonableness of a single state's law "and to the ease with which the State can adopt less burdensome means" to accomplish its objectives. *Hodgson v. Minnesota*, 497 U.S. 417, 455 (1990); *see also Tennessee v. Garner*, 471 U.S. 1 (1985); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963). Here, *Amici* States write not merely to suggest "less burdensome means," but to demonstrate that subjective-issue regimes such as New York's plainly do not accomplish—and even detract from—the objective of increased public safety.

This is a particularly important point because, as the Ninth Circuit previously recognized, "the right to bear arms must guarantee *some* right to self-defense in public" if the verbs to "keep" and to "bear" in the Second Amendment are to be given meaning.[2] *Young*

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[2] This Court has previously addressed the importance of giving meaning to each word when interpreting a statute imposing a minimum sentence on a person who "uses or carries a firearm" in a violent or drug trafficking crime. *Bailey* v. *United States*, 516 U.S. 137, 149–150 (1995) ("uses" and "carries" must refer to distinct actions).

v. *Hawaii*, 896 F.3d 1044, 1068–70 (9th Cir. 2018) (noting that *Heller* pointed to statutes severely restricting carrying outside the home as "close" to the outright handgun ban this Court overturned), *rev'd in part en banc*, 992 F.3d 765 (9th Cir. 2021), *petition for cert. filed*, No. 20-1639 (U.S. May 11, 2021). And the circuit court upholding New York's law acknowledged that it "places substantial limits" on that very right. *Kachalsky*, 701 F.3d at 93. Indeed, in *Heller* this Court rejected a "unitary meaning of 'keep and bear Arms'" and found that the Second Amendment "guarantee[s] the individual right to possess *and carry* weapons in case of confrontation." 554 U.S. at 591–92 (emphasis added). Such language must recognize the right to carry arms in public as the sort of "confrontation" in case of which one must *carry* weapons is much more likely outside of one's home than in.[3]

Thus, while New York's subjective regime is *per se* unconstitutional, *see infra* Part II, if this Court instead sees fit to analyze it under any level of scrutiny, New York must demonstrate that placing such a burden on its citizens' rights advances the state's proffered public safety interests.[4] It cannot.

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[3] "[A] Chicagoan is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment on the 35th floor of the Park Tower." *Moore* v. *Madigan*, 702 F.3d 933, 937 (7th Cir. 2012).

[4] Even under intermediate scrutiny, the burdens of the law must be substantially related to the achievement of the government's objectives. *E.g.*, *Craig* v. *Boren*, 429 U.S. 190, 197–204 (1976) (examining statistical evidence to determine whether a gender classification was "substantially related to achievement of the statutory objective.").

Forty-two states employ objective permit regimes that allow issuance of a permit to any individual who meets a certain set of objective criteria, which can include fingerprinting, a background check, a mental health records check, and training in firearms handling and/or laws regarding the use of force. Such regimes are also known as "shall-issue," as the laws typically mandate the relevant authority's issuance of a permit to those who meet the established criteria.[5] These regimes began with New Hampshire in 1923, and by 1995 half of all states had adopted one.[6] And every state that has adopted objective-issue has maintained it, establishing a national standard for public safety.[7] There is no historical foundation for New York's law, and on that basis alone, it should be enjoined. Even under a free-standing interest balancing test of the sort *Heller* rejected, New York cannot justify its anomalous and burdensome subjective-issue regime by arguing that the regime substantially reduces crime and increases public safety. It does not. New York accordingly cannot justify adding a subjective element that burdens its citizens' rights by bureaucratic whim.

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[5] *Concealed Carry Permit Information By State*, USA Carry, https://www.usacarry.com/concealed_carry_permit_information.html (last visited July 19, 2021).

[6] *See Concealed Carry | Right to Carry*, NRA-ILA, n.9, https://www.nraila.org/get-the-facts/right-to-carry-and-concealed-carry/ (last visited July 19, 2021).

[7] Larry Arnold, *The History of Concealed Carry, 1976-2011*, Texas Handgun Association, https://txhga.org/texas-ltc-information/a-history-of-concealed-carry/ (last visited July 19, 2021).

A. Concealed Carry Permit Holders Are Overwhelmingly Law-Abiding And "Shall Issue" Regimes Do Not Increase Crime.

If New York's justification were true and adopting a shall-issue permit regime leads to more crime, then the permit holders themselves must be responsible for at least a large portion of that increase. But the states' experience shows the opposite. Indeed, this link is a threshold requirement to the credibility of any claim that an increase in the issuance of concealed carry permits causes more crime; if holders of concealed carry permits are not participating in crimes, then issuing the permits cannot have caused the crime. The simple truth is that permit holders are less likely than members of the general public to commit violent crimes, and neither Washington, D.C., nor any State that has a shall-issue permit regime has experienced widespread trouble from those who go through the licensing process.

Four years after a decision concluding that "the individual right to carry common firearms beyond the home … falls within the core of the Second Amendment" in *Wrenn* v. *District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017), even the anti-gun Violence Policy Center ("VPC") has failed to identify a single permit holder responsible for an unlawful lethal incident in Washington, D.C.[8] Contrary to

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[8] *Concealed Carry Killers*, Violence Policy Center: Concealed Carry Killers, http://concealedcarrykillers.org/ (last updated Dec. 16, 2020) (identifying zero killings since the 2017 ruling in *Wrenn*, but listing the 2013 D.C. Navy Yard Shooter, a former Navy sailor with a federal security clearance who had a concealed carry permit in Texas but whose permit played no part in the shooting as (1) it was not valid in the jurisdiction

alarmist predictions otherwise, the sky is not falling despite concealed carry permits now being available without a "good reason" requirement. And nationwide, VPC data shows that "America's 18 million concealed-carry permit holders accounted for 801 firearm-related homicides over a 15-year span … roughly 0.7% of all firearm-related homicides during that time." Amy Swearer & Cooper Conway, *Debunking the Myth of "Concealed-Carry Killers,"* Heritage Foundation (Nov. 5, 2019).[9]

Those who obtain firearms-carry permits are, and remain, overwhelmingly more law-abiding than the general population. That conclusion makes perfect sense, as permit holders must typically pass background and other checks prior to being issued a license under state regimes. Permit holders "are at fairly low risk of misusing guns, consistent with the relatively low arrest rates observed," and "therefore, we expect relatively little public safety impact if courts invalidate laws that prohibit gun carrying outside the home…." Philip J. Cook et. al., *Gun Control After Heller: Threats and Sideshows from A Social Welfare Perspective*, 56 UCLA L. Rev. 1041, 1082 (2009).

And data from the States bears this out. David Kopel conducted an expansive study in 2009 examining just how law-abiding permit holders are. Despite each state having slightly different reporting methods, the outcomes are clear: materially lower rates of crime among licensees than non-licensees.

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where the shooting occurred, and (2) the weapon used was a shotgun, not a concealed handgun).

[9] *Available at* https://www.heritage.org/firearms/commentary/debunking-the-myth-concealed-carry-killers.

Minnesota, for example, reports one handgun crime per 1,423 licensees. Michigan reported 161 charges involving handguns out of approximately 190,000 licensees in 2007-08 (from an estimated 25 to 35 criminal incidents), while the general population produced 1,018 violent crimes per 190,000 people.[10] Ohio reported 639 license revocations, including licensees who moved from Ohio, out of 142,732 permanent licenses issued from 2004 to 2009. Louisiana reported a firearm misuse rate of slightly more than 1 in 1,000 licensees. Florida reported 27 firearm crimes per 100,000 licenses. And Texas reported that concealed handgun licensees are 79% less likely to be convicted of crimes than non-licensees. David B. Kopel, *Pretend "Gun-Free" School Zones: A Deadly Legal Fiction*, 42 Conn. L. Rev. 515, 564-69 (2009) (providing state-level data).

Even the data cited by proponents of subjective regimes is not to the contrary when properly analyzed for the effects of having lawful permit holders carrying *outside the home* (*e.g.*, excluding suicides).[11]

For instance, the VPC's "Concealed Carry Killers" database inflates its numbers by counting deaths, nearly half of which are suicides, that are wholly irrelevant to an individual's right to carry a firearm outside the home. Professor Clayton Cramer's 2012

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[10] General population data calculated based on the FBI's reported rate for Michigan in 2008. *2008 Crime in the U.S.*, FBI: UCR, https://ucr.fbi.gov/crime-in-the-u.s/2008 (last visited July 19, 2021).

[11] Suicide, though tragic, is not the focus of carry-permit laws; suicide does not require (or typically entail) bringing a firearm into a public space, and is a self-inflicted act that does not generally imperil the public at large.

study examined this list and found that, in addition to suicides, the list included deaths in the licensee's home or business, where no permit is required; deaths in subjective-issue states where objective-issue permitting played no part; incidents involving rifles or other long guns, not handguns; and incidents where no firearm was used.[12] Professor Cramer's data shows that concealed weapon license holders were responsible for less than 1 murder per 400,000 licenses per year during the pertinent study period, while the national average in 2011 was 18.8 per 400,000.

Similarly, the Brady Campaign often relies on "violent deaths" data from the Centers for Disease Control and Prevention ("CDC"), but a quick review of CDC data shows that it includes suicides and other causes of death with no bearing on public handgun carry: "The majority (65.1%) of deaths were suicides, followed by homicides (23.5%), deaths of undetermined intent (9.5%), legal intervention deaths (1.3%) (i.e., deaths caused by law enforcement and other persons with legal authority to use deadly force …)." Shane P.D. Jack, Ph.D., et al., *Surveillance for Violent Deaths – National Violent Death Reporting System, 27 States, 2015*, CDC (Sept. 18, 2018).[13] With roughly two-thirds of all deaths in these studies identified as *not* homicide, it is no wonder that a CDC study concluded that there was "insufficient evidence to determine the effectiveness

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[12] Clayton E. Cramer, *Violence Policy Center's Concealed Carry Killers: Less Than It Appears*, (June 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2095754.

[13] *Available at* https://www.cdc.gov/mmwr/volumes/67/ss/ss6711a1.htm.

of any of the firearms laws or combinations of laws … on violent outcomes." Robert A. Hahn, Ph.D., et al., *First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws*, CDC (Oct. 3, 2003).[14]

The numbers directly refute the idea that the public bears some heightened risk when lawful permit holders carry guns outside their homes. When inapposite data is properly accounted for, it becomes apparent that those who choose to subject themselves to, and subsequently pass, the scrutiny of an objective carry permit regime overwhelmingly obey the law and keep the peace. This group of citizens is a boon, not a threat, to public safety.

B. Shall-Issue Regimes Do Not Increase Crime But Do Increase Victim Safety.

The population-level data on licensed carry is extensive, and the weight of the evidence confirms that objective, non-discriminatory licensed-carry laws have two results: (1) statistically significant reductions in some types of violent crime, or (2) no statistically significant effect on overall violent crime. This has held true despite the overwhelming increase in the number of concealed handgun permits issued in the past decade. "Since 2007, the number of concealed handgun permits has soared from 4.6 million to over 12.8 million, and murder rates have fallen from 5.6 killings per 100,000 people to just 4.2, about a 25 percent drop[.]" Kellan Howell, *Murder rates drop as concealed carry permits*

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[14] *Available at* https://www.cdc.gov/mmwr/preview/mmwrhtml/rr5214a2.htm.

soar: report, Wash. Times, (July 14, 2015).[15] An even longer view shows that "the national violent crime and homicide rates in 2018 were … substantially lower than their historical heights in the early 1990s, when far fewer Americans had concealed-carry permits." Swearer, *Debunking the Myth of "Concealed-Carry Killers"*, *supra* n.9.

Arizona's experience with an objective-issue regime is telling. Arizona implemented a licensed concealed carry regime in 1994 and then a right-to-carry for all law-abiding citizens, even without a license, in 2010.[16] 1994 is also the earliest year for which the FBI has made its Uniform Crime Reports ("UCR") data available on its website.[17] In 1994, Arizona experienced 10.5 murders per 100,000 people, while the nationwide rate was 9 murders per 100,000, ranking Arizona 37th among the states in order of ascending murder rates. By 2016, Arizona's murder rate was 5.5 per 100,000, nearly matching the national rate of 5.3 (placing Arizona 29th). What's more, while Arizona's relative rank fluctuated, the steady drop in murder rates was never interrupted

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[15] *Available at* https://www.washingtontimes.com/news/2015/jul/14/murder-rates-drop-as-concealed-carry-permits-soar-/.

[16] Howard Fischer, *Brewer signs bill allowing concealed weapons without permit*, Ariz. Daily Sun, (Apr. 17, 2010) https://azdailysun.com/news/local/state-and-regional/brewer-signs-bill-allowing-concealed-weapons-without-permit/article_a02026a2-2635-5b66-8296-9152aa5723d0.html.

[17] *Crime in the U.S.* (1995 through 2016), FBI: UCR, https://ucr.fbi.gov/crime-in-the-u.s (last visited July 19, 2019). All data referenced in the following comparative discussion of Arizona's murder rates is from this source unless otherwise specified.

by an increase of more than 1 incident per 100,000 people.

"The most significant, certain conclusion to be drawn is that neither large nor small states evidence obvious long-term increases in murder rates after passage of these laws." Clayton E. Cramer & David B. Kopel, *"Shall Issue": The New Wave of Concealed Handgun Permit Laws*, 62 Tenn. L. Rev. 679, 709 (1995). "The experience of the carry reform states plainly shows that homicide rates will not *increase* as a result of crimes committed by persons with carry permits." *Id.* Twenty-five years after Cramer and Kopel's research, a synthesis of numerous studies echoed these findings that "the best available studies provide *inconclusive evidence for the effect of shall-issue laws*" on total homicides, firearm homicides, robberies, assaults, rapes, and mass shootings. Rosanna Smart, et al., *The Science of Gun Policy: A Critical Synthesis or Research Evidence on the Effects of Gun Policies in the United States* 300–02, 307 (2d ed., RAND Corp. 2020).

Nearly the only outlier to this evidence is the work of John Donohue, but scholars have called the validity of his results into question, and "[Aneja, Donohue, and Zhang] have admitted that they estimated the wrong model" in *The Impact of Right to Carry Laws and the NRC Report* (2014). Carlisle E. Moody, et al., *The Impact of Right-to-Carry Laws on Crime: An Exercise in Replication*, 4 Rev. of Econ. & Finance 33, 35 (2014). These flaws were underscored by Moody et al.'s research, which determined that "[t]he most robust result," confirmed even by Donohue's "county and state data sets is that the net effect of [right-to-carry] laws is to decrease murder." *Id.* at 42. Further, analysis of Donohue's

own data showed that objective-issue permit regimes, referred to by Moody as "right-to-carry" laws, statistically "decrease rape" and "reduce the victim costs of crime." *Id.* And analysis of Donohue's 2019 research using synthetic modeling shows that the results are "an artifact of poorly supported modeling choices" and corrected analysis "indicates that [right-to-carry] laws have had no significant effect on violent crime rates." William English, *The Right to Carry Has Not Increased Crime*: *Improving an Old Debate Through Better Data on Permit Growth Over Time*, 35 (July 14, 2021);[18] Gary Kleck, *The Effect of Right-to-Carry Laws on Crime Rates: A Critique of the Research of Donohue et al.*, 34–35 (Mar. 23, 2021) ("Donohue's application of the synthetic control method did not generate meaningful estimates of the effect of [right-to-carry] laws on violent crime rates, and the results he obtained—meaningful or not—were inconsistent with an interpretation that the laws caused increases in violent crime.").[19]

Indeed, a study in the Journal of the American College of Surgeons contradicts Donohue's latest findings after analyzing data from both the Department of Justice and the Centers for Disease Control:

> This study demonstrates no statistical association between the liberalization of state level firearm carry legislation over 3 decades and the rates of homicides, firearm

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[18] *Available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3887151.

[19] *Available at* https://ssrn.com/abstract=3810840 or http://dx.doi.org/10.2139/ssrn.3810840.

> homicides, or other violent crime, using a rigorous statistical model … Based on our data, policy efforts aimed at injury prevention and the reduction of firearm-related violence should likely investigate other targets for potential intervention.

Mark E. Hamill, et al., *State Level Firearm Concealed Carry Legislation and Rates of Homicide and Violent Crime*, 228 J. of the Am. Coll. of Surgeons 1, 7 (Jan. 2019). Thus, multiple cutting edge sources confirm the "strong evidence that the dramatic growth in the ability to carry firearms for self-defense in recent decades has not exacerbated crime" at the population level. English, *The Right to Carry Has Not Increased Crime* at 36.

And perhaps more importantly, research shows that, at the individual level, having a firearm ready markedly improves outcomes for victims of crimes. A 2013 review by the National Research Council reveals that the victims of crime who resist with a gun are less likely to suffer serious injury than victims who either resist in other ways or offer no resistance at all. National Research Council, *Priorities for Research to Reduce the Threat of Firearm-Related Violence* 15–16 (2013) ("Studies that directly assessed the effect of actual defensive uses of guns … found consistently lower injury rates among gun-using crime victims compared with victims who used other self-protective strategies"). "Defensive use of guns by crime victims is a common occurrence" and "[a]lmost all national survey estimates indicate that defensive gun uses by victims are at least as common as offensive uses by criminals, with estimates of annual uses ranging from about 500,000 to more than 3 million … in the context of about

300,000 violent crimes involving firearms in 2008." *Id.* at 15. Surveys indicate approximately 25.3 million Americans have had to use a gun in self-defense, and 74.8% "of defensive gun uses take place outside of the home." William English, *2021 National Firearms Survey*, 9 (July 14, 2021).[20]

Numerous studies have found that robbery victims who resist with firearms are significantly less likely to have their property taken or be injured. Gary Kleck, *Targeting Guns: Firearms and their Control* 170 (1997). "Robbery and assault victims who used a gun to resist were less likely to be attacked or to suffer an injury than those who used any other methods of self-protection or those who did not resist at all." *Id.* at 171. Moreover, "victim resistance with a gun almost never provokes the criminal into inflicting either fatal or nonfatal violence." *Id.* at 174. Similarly, "rape victims using armed resistance were less likely to have the rape attempt completed against them than victims using any other mode of resistance," and defensive gun use did not increase the victim's risk of "additional injury beyond the rape itself." *Id.* at 175. The ability to carry a gun out of the home is of particular help to women and disabled Americans because a firearm "serves as a force multiplier against more powerful or more numerous assailants," and the majority (51.2%) of defensive incidents "involve more than one assailant." English, *2021 National Firearms Survey* at 9, 12.

Moreover, it is typically necessary only to display a firearm, rather than pull the trigger, to prevent completion of a crime. In the vast majority of

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[20] *Available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3887145.

defensive uses, the gun is not even fired, and fewer than one in a thousand defensive gun uses results in the death of a criminal. Kleck, *Targeting Guns* at 178.

Empirical data also refute the misperception that citizens licensed to carry firearms are likely to have the weapon used against them in a violent encounter. U.S. Bureau of Justice Statistics figures indicate that, in confrontations with criminals, 99% of victims who are licensed to carry maintain control of their firearms. *See* Kleck, *Targeting Guns* at 168–69. A critic of defensive gun uses cites a statistical association between gun possession by "urban adults" and the risk of being shot as victims of a crime, but had to acknowledge "the potential of reverse causation." *See* Charles C. Branas, et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 Am. J. Pub. Health 2034, 2037, 2039 (2009). Regardless of the effectiveness of defensive gun use, one would expect a positive statistical correlation between victim gun possession and victim injury because those urban residents most at risk of victimization (*e.g.*, those residing in a dangerous neighborhood) are also most likely to arm themselves for protection. This is known as reverse causation—going to the doctor has an extremely high positive association with being ill, but that hardly proves that going to the doctor causes illness.

New York's regime, which fails to decrease crime while also putting law-abiding citizens at a personal disadvantage when faced with a criminal attack, is not just a poor fit for, but completely antithetical to, New York's stated justification of promoting public safety. Concealed-carry permit holders in shall-issue jurisdictions are disproportionately law-abiding, and

evidence shows no ill effects on public safety from shall-issue permitting but a dramatic improvement in the personal safety of those who can protect themselves from crime because they do carry. The data from 42 states' objective-issue systems demonstrates more success on every front including personal liberty, public safety, and individual security. Decades of evidence refute any public-safety or crime-reduction justification New York may advance for a policy so burdensome to the Second Amendment rights of the majority of its law-abiding citizens. In other words, if subjective- or may-issue were a medical standard of care, it would be obsolete, and any legislature employing it would be guilty of malpractice.

II. New York's "Proper Cause" Requirement Violates the Original Meaning of the Second Amendment by Enacting an Effective Total Ban on Carrying Firearms in Self-Defense.

In addition to undermining its own public-safety goals, New York's permitting regime is also *per se* unconstitutional as a near-total ban on the right to "bear" firearms in self-defense outside the home. U.S. Const. amend. II. Law-abiding citizens wishing to carry handguns on their person in New York have recourse to only one permissible pistol license—the concealed-carry license. *Kachalsky*, 701 F.3d at 85–86 (citing N.Y. Penal Law § 400.00 & 265.20). That license will only issue when the applicant has proven that she has "proper cause" to bear a pistol, which under New York Law means that she must "sufficiently demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." *Williams* v. *Bratton*, 656 N.Y.S.2d 626

(N.Y. App. Div. 1st 1997). New York's "proper cause" requirement effectively ensures that its citizens cannot "'repe[l] force by force' when 'the intervention of society in [their] behalf, may be too late to prevent an injury.'" *Heller*, 554 U.S. at 595. (quoting 1 William Blackstone, Commentaries 145–46, n.42 (1803)). This limitation "makes it impossible for citizens to use [firearms] for the core lawful purpose of self-defense and is hence unconstitutional." *Id.* at 630.

A. New York's blanket ban on all forms of public carry violates the original meaning of the Second Amendment.

A near-total ban on all forms of "bearing" a firearm in public in self-defense violates the original meaning of the Second Amendment. States, like New York, that prohibit open carry cannot also prohibit virtually all forms of concealed carry, leaving private citizens with no real options for self-protection outside the home.

The Second Amendment states that "the right of the people to keep and *bear* Arms, shall not be infringed." U.S. Const. amend. II (emphasis added). By its plain text, the "right of the people to keep and bear Arms" "refers to carrying for a particular purpose—confrontation." *Heller*, 554 U.S. at 584. This "familiar meaning" indicates carrying "upon the person or in the clothing or in a pocket, for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another person." *Id.* (quoting *Muscarello* v. *United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). Indeed, "carrying beyond the home, even in populated areas, even without special need, falls

within the Amendment's coverage, indeed within its core." *Wrenn*, 864 F.3d at 664. "Confrontations are not limited to the home." *Moore*, 702 F.3d at 936.

Compelling evidence of the Second Amendment's original meaning confirms that the right to bear arms outside the home in self-defense was a central component of that right. In *Heller*, following the text and history of the Second Amendment, this Court held that the federal constitution "guarantee[s] the individual right to possess and *carry* weapons in case of confrontation." 554 U.S. at 592 (emphasis added). Courts that have upheld licensing regimes requiring citizens to have "a reason to possess the weapon for a lawful purpose," *Kachalsky*, 701 F.3d at 98, misunderstand *Heller's* import. The Second Amendment protects the "core lawful purpose of self-defense." *Heller*, 554 U.S. at 630. Permitting government actors to determine, on a case-by-case basis, who has "proper cause" to exercise a fundamental right contradicts the Second Amendment's original public meaning.

The right to bear arms in self-defense pre-dates our written Constitution, and the Second Amendment's text indicates it "is not a right granted by the Constitution." *United States* v. *Cruikshank*, 92 U.S. 542, 553 (1876). Instead, this common-law right descends from our English heritage, arising in response to abuses by the Stuart Kings who used "select militias loyal to them to suppress political dissidents, in part by disarming their opponents." *Heller*, 554 U.S. at 592. The Glorious Revolution gave rise to the English Bill of Rights, which granted that "the Subjects which are Protestants, may have Arms for their Defence suitable to their Conditions, and as allowed by Law." 1 W. & M., ch. 2, § 7, in 3

Eng. Stat. at Large 441. At the Founding, the colonists understood this right to bear arms as a "natural right of resistance and self-preservation" held by all Englishmen. 1 William Blackstone, Commentaries 136, 139 (1765). Thus, when King George III attempted to disarm the colonists in the most rebellious areas, it prompted outcries that he was violating their English right to keep and bear arms. *Heller*, 554 U.S. at 594–95; Va. Gazette (Williamsburg), Aug. 5, 1775, at 2, col. 1 (noting the "many attempts in the northern colonies to disarm the people, and thereby deprive them of the only means of defending their lives and property"). It should go without saying that, when King George tried to disarm the American colonists, he was most concerned about their bearing firearms *outside* the home—and the colonists were outraged at that very aspect of his policy.

With this historical understanding, the Founding generation enshrined the right to bear arms in their constitutions and laws. "Americans understood the 'right of self-preservation' as permitting a citizen to 'repe[l] force by force' when 'the intervention of society in his behalf, may be too late to prevent an injury.'" *Heller*, 554 U.S. at 595 (quoting 1 William Blackstone, Commentaries 145–46, n.42 (1803)). "The inherent right of self-defense" is "central to the Second Amendment right." *Id.* at 628. And this inherent right to self-defense was always clearly understood to encompass self-defense outside the home. This Court's survey of those provisions shows that, by 1820, nine States expressly guaranteed the right to bear arms in defense of *themselves*, or of himself and the State. *Id.* at 602–03. Justice James Wilson observed that Pennsylvania's "right of

citizens to bear arms, in defence of themselves and the State," Pa. Const., art. IX, § 21 (1790), recognized the natural right of defense "of one's *person* or house." *Id.* at 585 (citing 2 Collected Works of James Wilson 1142, & n.x (K. Hall & M. Hall eds. 2007)) (emphasis added). This widespread adoption of a "citizen's right to self-defense is strong evidence that that is how the founding generation conceived of the right." *Id.* at 603. As the founding generation clearly recognized, "'[s]elf-defense has to take place wherever the person happens to be,' and in some circumstances a person may be more vulnerable in a public place than in his own house." *Peruta* v. *California*, 137 S. Ct. 1995, 1998–99 (2017) (Thomas, J., dissenting from denial of certiorari) (quoting Eugene Volokh, *Implementing the Right To Keep and Bear Arms for Self–Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. Rev. 1443, 1515 (2009)).

Early American precedents also confirm that citizens had a right to defend their persons outside the home, as well as in their home. In Missouri, it was "known to every jury man" that the "right is to bear arms in defense of ourselves." *State* v. *Shoultz*, 25 Mo. 128, 155 (1857). Louisiana courts recognized that the Second Amendment "is calculated to incite men to a manly and noble defence of themselves, if necessary, and of their country[.]" *Chandler*, 5 La. Ann. at 490. Georgians also knew prohibiting arms in public deprived the "citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms." *Nunn*, 1 Ga. at 251.

As this Court noted in *Heller*, these precedents do generally permit state legislatures to regulate the *manner* of "bearing" arms outside the home. *See* 554

U.S. at 570. Yet those same precedents emphasized that such regulation of the manner of carrying weapons outside the home may *not* operate to render the underlying right to "bear arms" ineffective. "But so far as it cuts off the exercise of the right of the citizen altogether to *bear arms*, *or*, under the color of prescribing the *mode*, renders the right itself useless[,]" such a restriction is unconstitutional. *Nunn*, 1 Ga. 243 at 1. The *Nunn* decision noted that *Bliss* v. *Commonwealth*, 12 Ky. 90 (1822), similarly concluded that "whatever restrains the full and complete exercise of that right, though not an entire destruction of it, is forbidden by the explicit language of the Constitution." *Id.* at 248. The Alabama Supreme Court came to a similar conclusion, holding that "[a] statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional." *State* v. *Reid*, 1 Ala. 612, 616–17 (1840). The Supreme Court of Tennessee, although operating under the view the Second Amendment related solely to soldiers' weapons, struck down a pistol prohibition because it "in effect is an absolute prohibition against keeping such a weapon, and not a regulation of the use of it." *Andrews* v. *State*, 50 Tenn. 165, 187 (1871).

Thus, as the D.C. Circuit noted in *Wrenn*, early state-court precedents approved a personal right to carry in self-defense and prohibitions that did not amount to total bans. 864 F.3d at 658 (collecting cases). Reviewing this history of the original public meaning of the Second Amendment, *Heller* made clear that the central component of the Second

Amendment is the right to self-defense when confrontation arises. 554 U.S. at 584.

B. New York's "proper cause" requirement operates in practice as an effective total ban on carrying outside the home.

New York's "proper cause" requirement operates as an effective total ban for law-abiding citizens until after the need for protection has passed. Under New York City Police Department regulations, an applicant can show proper cause through "extraordinary personal danger, *documented by proof of recurrent threats* to life or safety," before receiving a permit. *Kaplan* v. *Bratton*, 673 N.Y.S.2d 66, 68 (N.Y. Ap.. Div. 1st 1998) (emphasis added). Although there are many exceptions to the criminal possession charges in Chapter 265, the only time an ordinary citizen can possess a pistol without a permit is when she is "voluntarily surrendering such weapon [to the proper authority]." N.Y. Penal Law § 265.20 (1)(f). Law-abiding citizens cannot receive a permit without showing why they have a special need for protection that transcends the Second Amendment's "core lawful purpose of self-defense." *Heller*, 554 U.S. at 630.

In practice, proving "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession," *Williams*, 656 N.Y.S.2d at 270, is a herculean task. A county judge denied a permit for a World War II veteran with an honorable discharge and good character, who had trained in the use of small arms and previously been licensed, because "the only cause for the issuance of such a license to him [was] his desire to use a pistol for target

practice." *Moore* v. *Gallup*, 45 N.Y.S.2d 63, 66 (N.Y. App. Div. 3d 1943), *aff'd*, 59 N.E.2d 439 (N.Y. 1944). That judge explained it would set "a dangerous precedent" "if all citizens of good moral character were to be licensed to carry pistols upon a simple showing of desire to engage in unregulated and unsupervised target practice." *Id.*; *but see Andrews*, 50 Tenn. at 178 (noting right to bear arms includes "the right to practice their use, in order to attain to [] efficiency.").

Likewise, in New York, attorneys handling large sums of money with menacing (and sometimes criminal) clients do not satisfy good cause. Even a middle-aged criminal/divorce attorney with an artificial leg who faced "threats from dissatisfied clients" did not "distinguish [him] from other attorneys engaged in similar practice." *Klenosky*, 428 N.Y.S.2d 256; *Bernstein v. Police Dep't of City of N.Y.*, 445 N.Y.S.2d 716, 717 (N.Y. App. Div. 1st 1981) (denying permit to attorney "carry[ing] large amounts of cash in areas 'noted for criminal activity'"); *Williams v. Bratton*, 656 N.Y.S.2d 626, 627 (N.Y. App. Div. 1st 1997) (real estate attorney handling "large sums of cash in closing situations" and checks totaling $74,000 insufficient).

Merchants, doctors, and elevator repairmen traveling or working in high-crime areas cannot meet this standard. An electrician's application for a permit renewal was denied even though he "transport[ed] valuable tools, equipment and high valued materials" in undesirable areas and routinely gave his employees between $1,000 and $3,000 to feed parking meters and other expenses. *Campisi*, 2020 WL 7230659, at *1. The licensing officer found that "his choice to distribute the coins and/or cash as

a convenience for his employees" was an "avoidable risk" failing to satisfy proper cause. *Id.* at *2; *see also Martinek* v. *Kerik*, 743 N.Y.S.2d 80, 81 (N.Y. App. Div. 1st 2002) (denying permit to bank president "travel[ing] to and from high crime areas for the purpose of inspecting buildings and between bank branches for the purpose of transporting large sums of cash"); *Theurer* v. *Safir*, 680 N.Y.S.2d 87, 88 (N.Y. App. Div. 1st 1998) ("[T]ravel[ing] in high-crime areas to distribute petty cash to company employees and collect [Cash On Delivery's] does not establish proper cause."); *Kaplan*, 673 N.Y.S.2d at 67 (N.Y. App. Div. 1st 1998) (denying permit to nurse fearing for her personal safety when "travel[ing] at night in New York City to meet with patients or to attend to emergencies at the [three] hospitals"); *Fondacaro* v. *Kelly*, 652 N.Y.S.2d 604, 604–05 (N.Y. App. Div. 1st 1996) (rejecting doctor's need to "protect and defend his life when he is called to perform emergency surgery and [must traverse] the streets of this city at all hours of the day and night.") (brackets in original); *Milo* v. *Kelly*, 621 N.Y.S.2d 322, 322–23 (N.Y. App. Div. 1st 1995) (denying permit to elevator repair company owner showing $4,000 weekly cash deposits, "work[ing] in areas noted for criminal activity," and who was "occasionally called upon for night-time emergencies").

Selling firearms and working in private security is also insufficient cause. *Knight* v. *Bratton*, 13 N.Y.S.3d 799, 801 (N.Y. Sup. Ct. 2015) (traveling federal firearm licensed dealer citing need to prevent theft of firearms and tactical equipment failed to show he was "in any greater danger than a dealer who sells other police-related products, e.g.

handcuffs, batons or police uniform"); *Bando* v. *Sullivan*, 735 N.Y.S.2d 660, 661 (N.Y. App. Div. 3d 2002) (plans to start private security business insufficient because in "responding to a customer's alarm as an armed civilian, [he] would pose a 'greater hazard' to responding law enforcement."); *Ferrara* v. *Safir*, 723 N.Y.S.2d 655 (N.Y. App. Div. 1st 2001) ("chief executive officer of a body-guard business for movie stars" failed to show his job "places him in extraordinary personal danger, or other special need for self-protection distinguishable from that of the general community").

Even specific threats to personal safety may not constitute proper cause. A funeral director allegedly documented thousands of dollars in weekly cash deposits, gang members threatening her, vandalism to her work van within a year of the application, and personal-safety concerns so severe that the "NYPD assigned a police officer to essentially be Ms. Sumowicz['s] 'body guard.'" App. Br. *Sumowicz* v. *Kelly*, No. 5104, 2004 WL 5473987, *19–21 (N.Y. App. Div. 1st June 10, 2004). Still, New York courts held that she failed to establish that she was in greater danger than those in a similar occupation. *Sumowicz* v. *Kelly*, 787 N.Y.S.2d 654 (N.Y. App. Div. 1st 2005); *see also Mudrick* v. *City of New York*, No. 155756/2019, 2020 WL 4586304, at *1 (N.Y. Sup. Ct. Aug. 10, 2020) (security threat assessment finding an environment "predisposed to nefarious/adversarial actions presenting with little or no notice" and "media articles detailing notoriety in the financial sector" did not demonstrate "extraordinary personal danger"); *In re Bastiani*, 881 N.Y.S.2d 591, 594 (N.Y. Cty. Ct. 2008) (dismissing two occasions woman feared for safety including an

attempted robbery); *Acosta* v. *Kelly*, No. 101573/04, 2005 WL 6742221 (N.Y. Sup. Ct. Apr. 5, 2005) (former Sanitation Police officer denied a permit despite alleging the need to "protect himself and his family" because he had "made thousands of vehicle impoundments and numerous arrests for illegal dumping" and had seen "'unidentified' defendants involved in these prior impoundments and arrests.").

All these cases demonstrate that New York's "proper cause" requirement does not regulate how one bears a firearm but whether one can bear a firearm at all. As such, it effects a near-total ban for virtually all ordinary citizens. As in *Heller*, any prohibition that "makes it impossible for citizens" to engage in self-defense violate the Second Amendment. 554 U.S. at 630.

* * *

Citizens should not have to be murdered, raped, or robbed before they can avail themselves of their "natural right of resistance and self-preservation"—by then, it is too late. *See* 1 William Blackstone, Commentaries 136, 139 (1765). "Self-defense has to take place wherever the person happens to be, and in some circumstances a person may be more vulnerable in a public place than in his own house." *Peruta*, 137 S. Ct. at 1998–99 (Thomas, J., dissenting from denial of certiorari) (quotation omitted). New York has rendered this "natural right of resistance and self-preservation" meaningless anywhere outside the home. Under a proper historical analysis of the Second Amendment, New York's regime is *per se* unconstitutional.

CONCLUSION

The Second Circuit's judgment should be reversed.

Respectfully submitted,

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