DECEMBER 2021
VOL. 24 NO. 9

A Congressional Digest Publication

Supreme Court Debates

A Pro & Con Monthly

Handguns in Public

"Good Cause" Requirements for Concealed-Carry Permits

Do New York State's Restrictions on Handgun Concealed-Carry Licenses Violate the Second Amendment to the Constitution?

Also in this issue:

Environmental Regulation, Religious Freedom, Abortion and Other Recent Cases Granted *Certiorari*

And more ...

Pro & Con®

Contents

This Month's Feature

Handguns in Public

"Good Cause" Requirements for Concealed-Carry Permits

Do New York State's Restrictions on Handgun Concealed-Carry Licenses Violate the Second Amendment to the Constitution?

Pros

Cons

December 2021

Vol. 24 ■ No. 9

Supreme Court Debates
A Pro & Con® Monthly
(ISSN 1099-5390) is an independent publication featuring controversies before the Supreme Court, Pro & Con®. It is not an official organ, nor is it controlled by any party, interest, class, or sect. Published monthly, September through May, and made available exclusively through **Congressional Digest Debates Online**, a Pro & Con® service.

Published by:
The Congressional Digest Corporation
Washington, D.C.
CongressionalDigest.com

Founder:
Alice Gram Robinson

Publisher:
Page Robinson

Editor in Chief:
Anthony Zurcher

Subscription Rates:
1 yr: $801 and up
NOTE: Available exclusively as part of the **Congressional Digest Debates Online** service, which also includes *Congressional Digest*
Single Copies: $19.95 – available on the Web

Subscription Orders:
Visa and MasterCard accepted
Web: CongressionalDigest.com
Phone: (301) 528-7777
Email:
info@CongressionalDigest.com
Fax: (240) 599-7679

Foreword

HANDGUNS IN PUBLIC

"Good Cause" Requirements for Concealed-Carry Permits

Thirteen years ago, in *District of Columbia v. Heller*, the U.S. Supreme Court established that the Second Amendment to the Constitution guarantees an individual right to possess handguns for personal protection. Two years later, in *McDonald v. City of Chicago*, the court affirmed that the right applied to citizens across the nation.

"The right to carry handguns ... is a fundamental right that should be rigorously protected."

Since then, lower federal courts have taken different views on the scope of the *Heller* and *McDonald* rulings. Some have given individual states and municipalities broad power to continue to regulate handgun possession. Others have struck down laws as violating the core principles of the Second Amendment. One area where there has been such a difference of opinion is on whether governments can require individuals to prove "good cause" before obtaining a permit to carry concealed handguns in public places.

In the District of Columbia, the circuit court there held that citizens need not show "evidence of a specific threat" to get an unrestricted handgun permit. Meanwhile, the 2nd Circuit Court of Appeals held that a New York state law with similar requirements was reasonable given the state's interests in public safety and crime prevention.

Several years after that 2012 New York case, *Kachalsky v. County of Westchester*, two residents of Troy, N.Y., who were denied unrestricted concealed-carry licenses filed another lawsuit against the state, again claiming that the New York law violated their Second Amendment rights. After a district court and the 2nd Circuit ruled against them, with both courts citing the *Kachalsky* decision, the two men, along with a New York gun club, appealed to the U.S. Supreme Court, which granted *certiorari* on April 26, 2021.

During oral arguments, the petitioners' lawyer said that the Second Amendment's right to "bear arms" protects an individual's right to carry firearms in public. He pointed to early U.S. history and English law prior to the country's founding as evidence that carrying weapons in public was lawful. The right to carry handguns, he concluded, is a fundamental right that should be rigorously protected.

New York's lawyer countered that over the course of U.S. history, states have frequently regulated where individuals can carry firearms. The state law in question, she noted, has been on the books for more than 100 years. In both *Heller* and *McDonald*, she said, the justices held that there were certain locations, such as schools and government buildings, where firearms could be prohibited entirely.

Last term, the Supreme Court considered a New York City law limiting the possession of handguns outside the home. That case was ultimately dropped when the city changed the statute in question, perhaps hoping to prevent the increasingly conservative court from setting a new precedent on handgun possession.

Now, however, the justices will have the opportunity to rule on the New York state regulation — and similar laws in states such as California and Massachusetts. Their decision has the potential to make public carrying of handguns considerably easier across the country — or to continue the current patchwork of laws, where some states closely regulate concealed-carry licenses while others make them much more readily available.

Environmental Regulation, Religious Freedom and Abortion on the Docket

West Virginia v. EPA, Carson v. Makin, Whole Women's Health v. Jackson and Others

Below is the status of key cases granted certiorari *by the U.S. Supreme Court for consideration during the October 2021 (Oct. 4, 2021, to Oct. 3, 2022) term, as of Nov. 28, 2021. Cases are organized by certiorari date within each section.*

Abortion

Dobbs v. Jackson Women's Health Organization — This case was granted *certiorari* on May 17, 2021, and is scheduled to be argued on Dec. 1. At issue is whether all pre-viability bans on elective abortion violate the Constitution.

Whole Women's Health v. Jackson — This case was granted *certiorari* on Oct. 22, 2021, and was argued on Nov. 1. To be decided is whether a Texas law restricting abortion that delegates enforcement to the general public can evade federal court review.

Capital Punishment

United States v. Tsarnaev — This case was granted *certiorari* on March 22, 2021, and was argued on Oct. 13. Before the court is whether Boston Marathon bomber Dzhokhar Tsarnaev's death penalty sentence should be thrown out because jurors were not asked about their exposure to news coverage of the attack before the trial and were informed during sentencing of previous murders involving Tsarnaev's brother.

Criminal Procedure

Brown v. Davenport — This case was granted *certiorari* on April 5, 2021, and was argued on Oct. 5. At issue is whether shackling a defendant during trial is a constitutional violation that affords that defendant post-conviction relief.

Egbert v. Boule — This case was granted *certiorari* on Nov 5, 2021, and has yet to be scheduled for argument. To be decided is whether a federal immigration officer can be sued for constitutional violations when that officer pushes a private citizen to the ground and threatens him with a tax audit.

Election Law

Federal Election Commission v. Ted Cruz for Senate — This case was granted *certiorari* on Sept. 30, 2021, and is scheduled to be argued on Jan. 19, 2022. Before the court is whether a limit on the amount candidates for federal office can be repaid for personal loans made to their campaigns violates First Amendment free-speech protections.

Environment

West Virginia v. Environmental Protection Agency (EPA) — This case was granted *certiorari* on Oct. 29, 2021, and has not yet been scheduled for argument. At issue is whether a provision of the Clean Air Act allows the EPA to enact broad new regulations on carbon emissions as long as it considers cost, non-air impacts and energy requirements.

First Amendment

City of Austin v. Reagan National Advertising — This case was granted *certiorari* on June 28, 2021, and was argued on Nov. 10. To be decided is whether a city ordinance that only allows digital signs on the advertised business's property and nowhere else violates free speech protections.

Government

Federal Bureau of Investigation (FBI) v. Fazaga — This case was granted *certiorari* on June 7, 2021, and was argued on Nov. 8. Before the court is whether the state-secrets privilege prevents individuals from bringing suit against the FBI for allegedly using an undercover informant to surveil Muslims based solely on their religion.

United States v. Vaello-Madero — This case was granted *certiorari* on March 1, 2021, and was argued on Nov. 9. At issue is whether Congress violated the Due Process clause of the Fifth Amendment when it did not include Puerto Rico in the Supplemental Security Income program that provides aid to low-income elderly and infirm citizens.

United States v. Zubaydah — This case was granted *certiorari* on April 26, 2021, and was argued on Oct. 6. To be decided is whether the government can assert state-secrets protections to prevent the release of sensitive information requested by a Guantánamo Bay prisoner who is suing CIA contractors for allegedly torturing him. *Featured in* *State Secrets*, SUPREME COURT DEBATES (Nov. 2021).

Gun Control

New York State Rifle & Pistol Association, Inc. v. Bruen — This case was granted *certiorari* on April 26, 2021, and was argued on Nov. 3. Before the court is whether New York's decision to deny concealed-carry permits to individuals whom it determines do not have a need for self-protection violates the Second Amendment. *Featured in* Handguns in Public, SUPREME COURT DEBATES (Dec. 2021).

Health Care

Becerra v. Gresham — This case was granted *certiorari* on Dec. 4, 2020, and has been removed from the argument calendar pending action from the Biden administration. At issue is whether the federal government can authorize states to create work requirements for individuals enrolled in the Medicaid program that provides health insurance for those with low incomes.

Ruan v. United States — This case was granted *certiorari* on Nov. 5, 2021, and has not yet been scheduled for argument. To be decided is whether a doctor can be charged with illegally prescribing a controlled substance if that physician believed that the prescription was in keeping with professional standards.

Indian Law

Denezpi v. United States — This case was granted *certiorari* on Oct. 18, 2021, and has yet to be scheduled for argument. Before the court is whether the constitutional prohibition on double jeopardy prohibits an individual from being prosecuted for the same crime in the Court of Indian Offenses and in U.S. federal district court.

Religion

Carson v. Makin — This case was granted *certiorari* on July 2, 2021, and is scheduled to be argued on Dec. 8. At issue is whether the Constitution prohibits states from exempting religious schools from a program that provides students with money to attend private schools.

Ramirez v. Collier — This case was granted *certiorari* on Sept. 8, 2021, and was argued on Nov. 1. To be decided is whether a state's decision to allow a pastor to enter the execution chamber of a condemned inmate but not to speak or make physical contact with that inmate violates the First Amendment freedom of religion.

Shurtleff v. City of Boston — This case was granted *certiorari* on Sept. 30, 2021, and is scheduled to be argued on Jan. 18, 2022. Before the court is whether a city's decision to deny a request to fly a Christian flag on city property when requests from secular groups are routinely granted violates First Amendment religious freedoms.

THE SUPREME COURT'S *HELLER* DECISION

The Court Establishes a Right to Possess Handguns

The Second Amendment states that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed."

Before the Supreme Court's 2008 opinion in *District of Columbia v. Heller*, the right generally had been understood by federal courts to be intertwined with military or militia use. That understanding was formed with little Supreme Court guidance: Before *Heller*, the Supreme Court had barely opined on the scope of the Second Amendment, making its last substantive remarks on the right in its 1939 ruling in *United States v. Miller*. In *Miller*, the Supreme Court evaluated a criminal law banning possession of a certain type of firearm, asking whether it bore a "reasonable relationship to the preservation or efficiency of a well-regulated militia" such that it garnered Second Amendment protection.

This passage spawned a longstanding debate over whether the Second Amendment provides an individual right to keep and bear arms versus a collective right belonging to the states to maintain militias, with the vast majority of the courts embracing the collective right theory. Indeed, before the *Heller* litigation began only one circuit court — the 5th Circuit in *United States v. Emerson* (2001) — had concluded that the Second Amendment protects an individual's right to keep and bear arms.

The Supreme Court's landmark 5-4 decision in *Heller* upturned the earlier majority view with its holding that the Second Amendment guarantees an individual right to possess firearms for historically lawful purposes, such as self-defense in the home. But in *Heller* the court did not define the full scope of that right, leaving lower courts to fill in the gaps. Indeed, the court has said little on the matter, most notably by holding that the Second Amendment right is incorporated through the Fourteenth Amendment to apply to the states in *McDonald v. City of Chicago* (2010).

Beyond *McDonald*, the court has largely declined to grant *certiorari* to the numerous Second Amendment cases percolating in the lower federal courts with one exception: In *Caetano v. Massachusetts*, the Supreme Court — in a single, two-page ruling — granted a petition for *certiorari* and issued an unsigned, *per curiam* [from the court] opinion vacating the decision of the Massachusetts Supreme Court that had upheld a state law prohibiting the possession of stun guns. But the court's opinion did little to clarify Second Amendment jurisprudence, principally noting that the state court opinion directly conflicted with *Heller* without discussing the matter in further detail.

District of Columbia v. Heller

Before *Heller*, the District of Columbia had a web of regulations governing the ownership and use of firearms that, taken together, amounted to a near-total ban on handguns in the District.

One law generally barred the registration of most handguns. Another law required persons with registered firearms to keep them "unloaded and either disassembled or secured by a trigger lock, gun safe, locked box or other secure device." And a third law prohibited persons within the District of Columbia from carrying (openly or concealed, in the home or elsewhere) an unlicensed firearm.

In 2003, six D.C. residents challenged those three measures as unconstitutional under the Second Amendment, arguing that the Constitution provides an individual right to bear arms. In

particular, the residents contended that the Second Amendment provides individuals a right to possess "functional firearms" that are "readily accessible to be used ... for self-defense in the home."

The challenge made its way to the Supreme Court, which in a 5-4 decision authored by Justice Antonin Scalia, affirmed the D.C. Circuit's conclusion that the Second Amendment provides an individual right to keep and bear arms for lawful purposes.

The majority arrived at this conclusion after undertaking an extensive analysis of the founding-era meaning of the words in the Second Amendment's prefatory and operative clauses. Applying that interpretation to the challenged D.C. firearm laws, the court concluded that the District's functional ban on handgun possession in the home and the requirement that lawful firearms in the home be rendered inoperable were unconstitutional.

Textual Analysis

The majority analyzed the Second Amendment's two clauses and concluded that the prefatory clause, indeed, announces the amendment's purpose. And though there must be some link between the stated purpose and the command in the operative clause, the court concluded that "the prefatory clause does not limit ... the scope of the operative clause." Accordingly, the court assessed the meaning of the Second Amendment's two clauses: "A well regulated Militia, being necessary to the security of a free State ..." and "... the right of the people to keep and bear arms, shall not be infringed."

Beginning with the operative clause, the Supreme Court first concluded that the phrase the "right of the people," as used in the Bill of Rights, universally communicates an individual right, and thus the Second Amendment protects a right that is "exercised individually and belongs to all Americans."

Next, the court turned to the meaning of "to keep and bear arms." "Arms," the court said, has the same meaning now as it did during the 18th century: "any thing that a man wears for his defense, or takes into his hands, or use[s] in wrath to cast at or strike another," including weapons not specifically designed for military use.

The court then turned to the full phrase "keep and bear arms." To "keep arms," as understood during the founding period, the court said, was a "common way of referring to possessing arms, for militiamen and everyone else." And "bearing arms," during the founding period as well as currently, the court said, means to carry weapons for the purpose of confrontation; but even so, the court added, the phrase does not "connote participation in a structured military organization."

Taken together, the court concluded that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." The court added that its textual analysis was supported by the amendment's historical background, which was relevant to its analysis because, the court reasoned, the Second Amendment was "widely understood" to have codified a preexisting individual right to keep and bear arms.

Turning back to the prefatory clause, the Supreme Court majority concluded that the term "well-regulated militia" does not refer to state or congressionally regulated military forces as described in the Constitution's Militia Clause; rather, the Second Amendment's usage refers to all "able-bodied men" who are "capable of acting in concert for the common defense." And the security of a free "state," the court opined, does not refer to the security of each of the several states, but rather the security of the country as a whole.

Coming full circle to the court's initial declaration that the two clauses must "fit" together, the majority concluded that the two clauses fit "perfectly" in light of the historical context showing that "tyrants had eliminated a militia consisting of all the able-bodied men ... by taking away the people's arms."

Thus, the court announced, the reason for the Second Amendment's codification was "to prevent elimination of the militia," which "might be necessary to oppose an oppressive military force if the constitutional order broke down." But the reason for codification, the court clarified, does not define the entire scope of the right the Second Amendment guarantees. This is so because, the court explained, the Second Amendment codified a preexisting right that included using firearms for self-defense and hunting, and thus the preexisting right also informs the meaning of the Second Amendment.

Scope of the Right

After announcing that the Second Amendment protects an individual's right to possess firearms, the Supreme Court explained that, "like most rights, the right secured by the Second Amendment is not unlimited."

Nevertheless, the court left for another day an analysis of the full scope of the right. The court did clarify, however, that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings or laws imposing conditions and qualifications on the commercial sale of firearms," among other "presumptively lawful" regulations. And as for the kind of weapons that may obtain Second Amendment protection, the court noted that *United States v. Miller* (1939) limits Second Amendment coverage to weapons "in common use at the time" that the reviewing court is examining a particular firearm, which, the court added, "is fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons."

Second Amendment Analysis of D.C.'s Firearms Regulations

Finally, the Supreme Court applied the Second Amendment, as newly interpreted, to the contested D.C. firearm regulations — which amounted to a near-total handgun ban — and concluded that they were unconstitutional.

First, the court declared that possessing weapons for self-defense is "central to the Second Amendment right," yet the District's handgun ban prohibits "an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose." Moreover, the handgun prohibition extended into the home, where, the court added, "the need for defense of self, family, and property is most acute."

Additionally, the requirement that firearms in the home be kept inoperable is unconstitutional because, the court concluded, that requirement "makes it impossible for citizens to use them for the core lawful purpose of self-defense." Thus, the court ruled, the District's handgun ban could not survive under any level of scrutiny that a court typically would apply to a constitutional challenge of an enumerated right.

"Good Cause" Requirements for Concealed-Carry Licenses

Some states and localities have enacted measures requiring a person seeking a concealed carry license to demonstrate "good cause" for needing one. The courts that have reviewed such measures have produced divergent rulings on the extent to which the ability to carry a concealed firearm is protected by the Second Amendment and what level of scrutiny should be applied to such laws.

For instance, in *Kachalsky v. County of Westchester* (2nd Cir. 2012), the 2nd Circuit considered a challenge by persons who were denied an unrestricted concealed-carry license under New York law. According to the state's concealed carry requirements, an applicant must demonstrate "proper cause" to obtain a concealed carry license — a restriction that had been construed by the New York state courts to require an applicant seeking an unrestricted concealed-carry license for self-defense purposes to "demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession."

The plaintiffs in *Kachalsky* argued that the concealed carry law is unconstitutional by preventing them from "carry[ing] weapons in public to defend themselves from dangerous confrontation." But the 2nd Circuit rejected that contention.

Assuming that the Second Amendment applied and employing intermediate scrutiny on account of the gun restriction affecting activities outside the home, *Kachalsky* held that the New York statute was substantially related to the government's interests in public safety and crime prevention. And requiring persons to show an objective threat to personal safety before obtaining a concealed-carry license, the court reasoned, is consistent with the right to bear arms, particularly given that "there is no right to engage in self-defense with a firearm until the objective circumstances justify the use of deadly force."

California has a somewhat similar law as that upheld in *Kachalsky*: An officer "may" issue a concealed-carry license to applicants who have demonstrated good moral character and good cause for the license. But when two California counties' policies for determining good cause were challenged under the Second Amendment, the 9th Circuit, sitting *en banc* in *Peruta v. County of San Diego* (9th Cir. 2016) concluded that the Second Amendment "does not extend to the carrying of concealed firearms in public by members of the general public." Accordingly, because concealed carry is not encompassed by the Second Amendment, the 9th Circuit held that California's good-cause requirement withstood constitutional scrutiny.

Breaking with the 2nd and 9th Circuits, the D.C. Circuit in *Wrenn v. District of Columbia* (D.C. Cir. 2017) held that the right of law-abiding citizens to carry a concealed firearm in public (i.e., "concealed carry") is a core component of the Second Amendment and struck down the District's good-cause concealed-carry regime.

The District of Columbia's framework regulating concealed carry authorized the chief of the Metropolitan Police Department to issue a concealed-carry license to a person who, as relevant here, has "good reason to fear injury to his or her person or property" or "any other proper reason for carrying a pistol." Demonstrating the requisite fear "at a minimum require[s] a showing of a special need for self-protection distinguishable from the general community as supported by evidence of specific threats or previous attacks that demonstrate a special danger to the applicant's life." Other "proper reasons" where a concealed-carry license could be granted included employment requiring handling cash or other valuables to be transported by the applicant.

In striking down the District's law, the D.C. Circuit first held that the core right in the Second Amendment for law-abiding citizens to keep and bear arms for self-defense extends beyond the home. But instead of choosing a level of scrutiny under which to analyze the law, the court ruled that the District's law effectively is a "total ban" on the exercise of that core right and thus is *per se* unconstitutional.

In particular, the court reasoned that the District's law "destroys the ordinarily situated citizen's" self-defense needs by requiring law-abiding citizens to demonstrate a need for self-protection that is "distinguishable" from other law-abiding members of the community. Thus, the court concluded that it "needn't pause to apply tiers of scrutiny, as if strong showings of public benefits could save this destruction of so many commonly situated D.C. residents' constitutional right to bear common arms for self-defense in any fashion at all."

After the D.C. Circuit declined the District's request to rehear the case *en banc*, the District announced that it would not seek Supreme Court review, thus leaving the circuit split intact.

Excerpted from the March 2019, Congressional Research Service Report Post-*Heller* Second Amendment Jurisprudence.

DISTRICT COURT HOLDING ON NEW YORK HANDGUN LAW

Constitutionality of "Proper-Cause" Limits on Concealed-Carry Permits

New York law generally prohibits the possession of a firearm absent a license. A general member of the public may apply for a handgun carry license to carry a concealed handgun for the purposes of self-defense, which a licensing officer must approve.

A licensing officer must determine whether a person meets the statutory requirements of New York Penal Law Section 400.00 before the officer can grant a license. New York Penal Law Section 400.00(2)(f) requires that an applicant show that "proper cause exists for the issuance thereof." Some licensing officers note restrictions on the license, such as "hunting and target," and refer to those licenses as "restricted licenses." These licenses "allow the licensee to carry a firearm only when engaged in those specified activities" but do not "permit the carrying of a firearm in public for the purpose of self- defense."

Licensing officers have "some discretion in determining what constitutes 'proper cause,'" but "this discretion is cabined by the significant body of New York case law." Under that case law, the applicant must "demonstrate a special need for self-protection distinguishable from that of the general community" to satisfy the proper cause standard.

Case Background

Plaintiffs Robert Nash and Brandon Koch do not fall within any exception under New York Penal Law Section 265.20 to New York's ban on carrying firearms in public. While they meet many of the statutory requirements to obtain a handgun carry license under New York Penal Law Section 400.00, Nash and Koch do not satisfy the "proper-cause" requirement because they do not "face any special or unique danger to [their] life" nor are they "entitled to a Handgun Carry License by virtue of [their] occupation, pursuant to Penal Law Section 400.00(2)(b)-(e)." Instead, Nash and Koch "desire to carry a handgun in public for the purpose of self-defense."

On or about September 2014, Plaintiff Nash "applied to the Licensing Officer ... for a license to carry a handgun in public"; his application was granted on March 12, 2015, but he was "issued a license marked 'Hunting, Target only.'" Nash's license does not permit him to "carry a firearm outside of his home for the purpose of self-defense."

On Sept. 5, 2016, Nash requested that the licensing officer, Defendant Richard McNally, "remove the 'hunting and target' restrictions from his license and issue him a license allowing him to carry a firearm for self-defense." In support of his request, Nash "cited a string of recent robberies in his neighborhood and the fact that he had recently completed an advanced firearm safety training course."

On Nov. 1, 2016, "after an informal hearing, McNally denied Nash's request." McNally denied the request because Nash "failed to show 'proper cause' to carry a firearm in public for the purpose of self-defense, because he did not demonstrate a special need for self-defense that distinguished him from the general public." Currently, Nash "refrains from carrying a firearm outside the home for self-defense" but "would carry a firearm in public for self-defense in New York were it lawful for him to do so."

Plaintiff Koch "was granted a license to carry a handgun in public by the Licensing Officer" in 2008. The license, however, was "marked 'Hunting & Target'"; Koch is therefore unable "to carry a firearm outside of his home for the purpose of self-defense." In November 2017, Koch requested that McNally "remove the 'hunting and target' restrictions from his license

and issue him a license allowing him to carry a firearm for self-defense." Koch cited "his extensive experience in the safe handling and operation of firearms and the many safety training courses he had completed" in support of his request.

On Jan. 16, 2018, McNally denied Koch's request because he "failed to show 'proper cause' to carry a firearm in public for the purpose of self-defense, because he did not demonstrate a special need for self-defense that distinguished him from the general public." Koch "continues to refrain from carrying a firearm outside the home for self-defense" but "would carry a firearm in public for self-defense in New York were it lawful for him to do so."

Kachalsky v. County of Westchester

Defendants move to dismiss plaintiffs' claims on the grounds that plaintiffs' Second Amendment claims are directly contrary to the 2nd Circuit's holding in *Kachalsky v. County of Westchester* (2nd Cir. 2012).

In *Kachalsky*, the court held that "New York's handgun licensing scheme ... requiring an applicant to demonstrate 'proper cause' to obtain a license to carry a concealed handgun in public" did not violate the Second Amendment.

The facts of that case are substantially identical to the facts presently before the court. There, a licensing officer denied the plaintiffs' applications for handgun carry licenses because they failed to demonstrate "proper cause" within the meaning of Section 400.00(2)(f), as they did not "show any facts demonstrating a need for self-protection distinguishable from that of the general public."

The plaintiffs challenged that determination arguing, *inter alia* [among other things], that the protections afforded by the Second Amendment entitled them to an unrestricted permit without establishing proper cause and that individuals of "good standing" in their community need not prove anything more to demonstrate "proper cause."

The district court granted the state's cross-motion for summary judgment, holding that Section 400.00(2)(f) "does not burden recognized protected rights under the Second Amendment" and explaining further that, even if "Section 400.00(2)(f) could be read to implicate such rights, the statute, as applied to plaintiffs, does not violate the Second Amendment under intermediate scrutiny." — *Kachalsky v. Cacace* (Southern District N.Y. 2011).

The plaintiffs appealed on the grounds that "the proper-cause provision, on its face or as applied to them, violates the Second Amendment as interpreted by the Supreme Court in *District of Columbia v. Heller* (2008)." The 2nd Circuit, however, affirmed the district court's application of intermediate scrutiny, holding that "New York has substantial, indeed compelling, governmental interests in public safety and crime prevention," and "the proper cause requirement is substantially related to these interests."

Here, plaintiffs' constitutional challenge to Section 400.00(2)(f) is virtually identical to that in *Kachalsky*, and, as plaintiffs acknowledge, this court is required to follow the binding precedents set by the 2nd Circuit. Plaintiffs acknowledge that the result they seek is contrary to *Kachalsky* but believe that case was wrongly decided for the reasons explained by the District of Columbia Circuit in *Wrenn v. District of Columbia* (D.C. Cir. 2017).

In *Wrenn*, a divided panel held invalid a District of Columbia statute which "direct[ed] the District's police chief to promulgate regulations limiting licenses for the concealed carry of handguns ... to those showing a 'good reason to fear injury to [their] person or property' or 'any

other proper reason for carrying a pistol.'" The court dispensed with tiers-of-scrutiny analysis altogether to reach the conclusion that "the law-abiding citizen's right to bear common arms must enable the typical citizen to carry a gun." Plaintiffs, seeking to have *Kachalsky* overturned, initiated this litigation.

Accordingly, because the 2nd Circuit has expressly upheld the constitutionality of Section 400.00 (2)(f), plaintiffs' claims must fail. Plaintiffs acknowledge that "the result they seek is contrary to *Kachalsky*," do not dispute that the precedential effect of its holding binds this court and have not advanced any other factual allegations suggesting legally plausible claims. The Amended Complaint must therefore be dismissed.

New York State Rifle & Pistol Association, Robert Nash and Brandon Koch v. George P. Beach II and Richard J. McNally Jr. *was heard by Judge Brenda K. Sannes of the U.S. District Court for the Northern District of New York. Excerpted from the Dec. 17, 2018, decision that New York's denial of unlimited concealed-carry permits to Nash and Koch was constitutional.*

Do New York State's Restrictions on Handgun Concealed-Carry Licenses Violate the Second Amendment to the Constitution?

PROS

New York State Rifle & Pistol Association *et al.*, Petitioners
Paul D. Clement, Counsel of Record

Robert Nash and Brandon Koch both live in Rensselaer County in central New York and applied for permits from the state to carry concealed handguns. The state agency granted them "restricted" licenses that allowed them to possess their firearms at home, while hunting or at a target range. In addition, Koch was allowed to carry his handgun to and from work for self-defense. The two men, joined by the New York State Rifle & Pistol Association, filed suit against New York challenging the decision. They asserted that the state law requiring concealed-carry applicants to show "proper cause" for needing the weapons for self-defense violated their Second Amendment right to bear arms. After both a federal district court and the 2nd Circuit U.S. Court of Appeals ruled in favor of New York state, Koch, Nash and the gun association appealed to the U.S. Supreme Court, which granted certiorari on April 26, 2021. Paul D. Clement is a partner with the law firm Kirkland & Ellis and a distinguished lecturer in law at Georgetown University. He served as U.S. solicitor general from June 2005 to June 2008. The following is excerpted from the Brief for Petitioners as submitted to the U.S. Supreme Court on July 13, 2021.

New York's denial of petitioners' applications for licenses to carry handguns for self-defense plainly violated their rights under the Second Amendment. That conclusion is compelled by the text, history and tradition of the Second Amendment, all of which confirm that the right it secures encompasses a right to carry handguns outside the home for self-defense.

The text of the Second Amendment guarantees a right "to keep and bear arms." It is elementary that "to bear arms implies something more than the mere keeping." — Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* (1880). Otherwise, those words would serve no purpose at all, which would violate the cardinal principle of constitutional interpretation. Their purpose and meaning is clear; the reference to bearing arms secures the preexisting, fundamental right to "carry weapons in case of confrontation." — *District of Columbia v. Heller* (2008).

Of course, confrontations and the need for self-defense — at the time of the founding and today — are hardly limited to the home. To confine the Second Amendment to the home or keeping arms thus would defy both its text and common sense.

The historical record overwhelmingly confirms that the Second Amendment protects a right to carry firearms outside the home. In the centuries before the founding, the English right upon which the Second Amendment was based was uniformly understood to protect a right to carry ordinary arms for a range of lawful purposes, chief among them self-defense. That understanding was only amplified on this side of the Atlantic, where the dangers and potential need for self-defense both inside and outside the home were magnified. Carrying arms was commonplace in early America, and it was regarded as an exercise of the fundamental, inherent right of every individual to defend himself. The same leading commentators and court decisions on which this court relied in *Heller* endorsed that view.

Following the Civil War, both the consensus that the Second Amendment is not a homebound right and the continued temptation of governments to selectively disarm the public were on full display. As freedmen in the South were subjected to waves of atrocities, typically preceded by attempts on the part

of local authorities to disarm them, Congress and the federal officials entrusted with protecting them insisted that securing their Second Amendment rights was critical to ensuring that they could protect themselves. That belief was premised on the understanding that the Second Amendment guaranteed the right to carry arms outside the home for self-defense. In short, from long before the founding to long after, the right protected by the Second Amendment was widely understood to encompass the right to carry arms abroad, not just to keep them at home.

Given that text, history and tradition, New York's effort to deprive petitioners and other law-abiding New Yorkers of that right, unless they can satisfy a government official that they have an especially great need to exercise that right, is unconstitutional. Simply put, the state cannot reserve for a happy few a right that the Constitution protects for all "the people." Moreover, the substantial discretion afforded government officials exacerbates the constitutional difficulties and reflects the law's origins as a mechanism to selectively disarm the people.

The constitutional infirmities here are plain whether this court keeps the focus on text, history and tradition or applies heightened scrutiny. As with the District of Columbia's ban in *Heller*, New York's law effectively criminalizes the exercise of a fundamental right and is wholly antithetical to the Second Amendment. It cannot survive "under any of the standards of scrutiny that" this court has "applied to enumerated constitutional rights." — *Heller*. The 2nd Circuit concluded otherwise only by subjecting the law to a form of "scrutiny" that is heightened in name only. Any faithful reading of text, history, tradition and precedent forecloses New York's attempt to prohibit petitioners from carrying handguns for self-defense just because the state is not convinced that they really need to exercise that fundamental right.

I. The Second Amendment Protects the Right to Carry Arms Outside the Home for Self-Defense.

The Second Amendment secures to the people the right to carry arms outside the home for self-defense. That conclusion is compelled by the constitutional text and confirmed by all the same historical sources this court relied on in *Heller* to conclude that the amendment secures an individual right. Those sources demonstrate beyond peradventure that the Second Amendment means what it says: "The people" have the right not just to "keep" arms but to "bear" them for self-defense.

A. The Text of the Second Amendment Secures the Right to Carry Arms, Not Just to Keep Them.

The Second Amendment secures "the right of the people to keep and bear Arms." By its terms, that phrase secures two distinct rights. Collapsing those two distinct rights would violate cardinal principles of interpretation and the bedrock principle of constitutional interpretation that the framers did not waste words in our founding document generally or in securing the fundamental rights of the people in particular.

In interpreting each of those distinct rights, the court is "guided by the principle that" the Second Amendment's "words and phrases were used in their normal and ordinary, as distinguished from technical, meaning." — *Heller*. Following that guiding principle, *Heller* concluded that to "'keep arms' was simply a common way of referring to possessing arms," typically (though certainly not exclusively) at home. By contrast, "at the time of the founding, as now, to 'bear' meant to 'carry,'" which typically involves conduct outside the home.

The prospects for confrontations outside the home and the corresponding need to bear arms for self-defense were heightened in colonial America and the early republic.

"Exposed as our early colonists were to the attacks of savages, the possession of arms became an indispensable adjunct to the agricultural implements employed in the cultivation of the soil. Men went armed into the fields, and went armed to church. There was always public danger." — John Ordronaux, *Constitutional Legislation in the United States: Its Origin, and Application to the Relative Powers of Congress, and of State Legislatures* (1891).

Writing shortly after ratification, St. George Tucker reported that, "in many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than a European fine gentleman without his sword by his side." — Tucker's Blackstone Appendix 19. And Tucker tied that practice directly to the constitutional text, explaining that an American going armed was exercising "the right to bear arms" that was "recognized and secured in the Constitution itself."

The surrounding text reinforces that conclusion. As *Heller* explained, the Second Amendment's prefatory clause — "[a] well regulated Militia, being necessary to the security of a free State" — performs a "clarifying function" with respect to the meaning of its operative clause. Every justice in *Heller* agreed that the right to bear arms was codified at least in part to ensure the viability of the militia. Militia service, of course, necessarily includes bearing arms outside the home.

In short, there can be little doubt that, by protecting the right to "bear arms," the plain text of the Second Amendment secures the right to carry arms outside the home. After all, it is "extremely improbable that the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen." — *Peruta v. California* (2017).

"It would take serious linguistic gymnastics — and a repudiation of this court's decision in *Heller* — to claim that the phrase 'bear Arms' does not extend the Second Amendment beyond the home." — *Rogers v. Grewal* (2020).

B. History and Tradition Confirm That the Second Amendment Protects the Right to Carry Arms Outside the Home for Self-Defense.

History and tradition surrounding the ratification of the Second Amendment make abundantly clear that the founding generation understood the amendment to enshrine a right to carry arms outside the home for self-defense.

As *Heller* put it, "the right secured in 1689 ... was by the time of the founding understood to be an individual right protecting against both public and private violence." And it is "clear and undeniable" that, when the founding generation enshrined that right in the Constitution, it understood the right to entitle the people to "have arms for their own defense" and "use them for lawful purposes" wherever the need should "occur." — *Legality of the London Military Foot-Association* (1780).

As *Heller* explained, "the predecessor to our Second Amendment" is the provision of the 1689 English Bill of Rights that provided that Protestant Englishmen "may have Arms for their Defense suitable to their Conditions, and as allowed by Law." That "right of having and using arms for self-preservation and defense" was decidedly not confined to the home.

To be sure, like the right to keep arms and virtually every other constitutional right, the right to carry arms was not unlimited or a right to "carry any weapon whatsoever in any manner whatsoever and for whatever purpose." — *Heller*. But by the time of the founding, the right to bear typical arms suited for self-defense and the ability of Parliament to restrict the display of unusual arms designed to terrorize had already been reconciled.

The people repeatedly enshrined the same understanding into early laws. No colony or state in the early republic affirmatively prohibited the people from carrying firearms, either openly or concealed, let alone attempted to foreclose all avenues for carrying arms in self-defense. To the contrary, some state and local laws affirmatively encouraged or required such carrying. And early restrictions targeted only conduct that terrorized the public.

And under the early "surety" laws, "everyone started out with robust carrying rights," *Wrenn v. District of Columbia* (D.C. Cir. 2017), and a surety could be demanded only upon proof of "reasonable cause" to believe someone was going to abuse that right. Even then, one against whom a surety complaint was sustained was free to continue carrying arms so long as he paid the surety. The most common laws of the time thus expressly embodied an understanding that the people had the right to carry arms and only its abuse was or could be prohibited.

The overwhelming weight of judicial authority in the nation's early years espoused the same view. And case after case in the early years of our nation — including many of the cases on which *Heller* relied — recognized a right to carry arms for self-defense subject only to the narrow conception of [the 1328 Statute of] Northampton [prohibiting the carrying of weapons in public] articulated by the King's Bench.

Then and now, the vast majority of states left the right of the people to carry arms for self-defense undisturbed. Thus, many of the early judicial decisions addressed the limited reach of Northampton-like prohibitions or statutes that addressed the manner of carrying.

For example, when opining on the scope of the common-law Northampton offense in an 1843 case that *Heller* invoked, the North Carolina Supreme Court reiterated that "the carrying of a gun per se constitutes no offence"; Northampton prohibited only carrying a "weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people." — *State v. Huntly* (1843).

When striking down a prohibition on concealed carry in 1822, the Kentucky Supreme Court concluded that there could be no "reasonable doubt but the provisions of the act import a restraint on the right of the citizens to bear arms" protected by the state's Second Amendment analog — a provision that *Heller* described as arising in "the most analogous linguistic context" close in time to the founding. When reaching the same conclusion in 1833, the Tennessee Supreme Court likewise confirmed — in another case on which *Heller* relied — that "the freemen of this state have a right to keep and to bear arms for their common defence" and that "it would be going much too far" to prohibit the carrying of weapons entirely. — *Simpson v. State* (Tenn. 1833). Courts that sustained concealed-carry restrictions were of the same view.

To be sure, a few decisions, mostly in the second half of the 19th century, suggested (often in *dicta* [non-binding language in a court opinion]) that the people may not have a constitutional right to carry handguns. But each relied on the erroneous premise that the Second Amendment protects only military arms and protects no individual right to self-defense whatsoever.

These decisions have, of course, been "sapped of authority by *Heller*." — *Wrenn*. They are no more helpful to determining whether carry bans violate the Second Amendment than cases decided before *Reed v. Reed* (1971) are to determining whether sex-based classifications violate the Fourteenth Amendment. What remains relevant is that all the courts that correctly understood the Second Amendment to protect the individual right to keep and bear arms uniformly understood that right to include the right to carry arms for self-defense outside the confines of one's home.

That consensus understanding remained evident on both sides of the Civil War. In the Antebellum period, the prospect that emancipated individuals could keep and bear arms contributed to Chief Justice [Roger] Taney's grave error. And efforts to protect the constitutional rights of the newly emancipated in the South from the threat of selective disarmament underscored that this understanding persisted in "the aftermath of the Civil War." — *Heller*.

As Congress and the public "debated whether and how to secure constitutional rights for newly free slaves," their discussions confirmed the widespread view that the Second Amendment secured a right to carry arms for self-defense. — *Heller*. Indeed, the Second Amendment would have been of little value to the freedman if it did not enshrine a right to both keep and carry arms, as the violence perpetrated against them was by no means confined to their homes.

Consistent with that understanding, when Congress passed the Freedmen's Bureau Act in 1866, it specifically identified "the constitutional right to bear arms," not just to keep them, as among the rights "secured to and enjoyed by all the citizens ... without respect to race or color, or previous condition of slavery." And when Congress enacted the Ku Klux Klan Act five years later, it specifically targeted those who "conspire together, or go in disguise upon the public highway or upon the premises of another for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws." As the generation that ratified the Fourteenth Amendment well understood, the freedmen's need for — and right to — armed self-defense was critical not just on their own premises but on the public highways where armed and disguised marauders were likely to attack them.

Post-civil war commentators — again including many discussed in *Heller* — confirmed what the facts on the ground made evident. Most states, then and now, respected the right to carry and did not attempt to restrict it, let alone preclude it.

Given that wealth of historical authority, it is little surprise that *Heller* accepted the premise that the Second Amendment protects a right to carry arms outside the home. Indeed, several portions of *Heller* make sense only on that understanding.

For instance, the court went out of its way to note that "nothing in our opinion should be taken to cast doubt on ... laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." — *Heller*. That caveat would have been nonsensical if the Second Amendment does not protect the right to carry arms outside the home at all. The court also likened the [District of Columbia's] handgun ban to the "severe restrictions" on the carrying of firearms that were struck down in *Nunn v. State* (Ga. 1846) and *Andrews v. State* (Tenn. 1871). — *Heller*. Describing such restrictions as severe and akin to the law invalidated in *Heller* would make little sense if the Second Amendment did not protect the right to carry arms outside the home.

This court's opinion in *Caetano v. Massachusetts* (2016) likewise makes sense only on the understanding that the Second Amendment is not a homebound right. There, the court vacated a decision of the Massachusetts Supreme Judicial Court affirming the conviction of a woman found outside her home in possession of a stun gun that she obtained to defend herself from an abusive ex-boyfriend, concluding that the state court failed to follow this court's precedent in determining whether a stun gun is a protected arm. That vacatur would have sent the Supreme Judicial Court on a fool's errand if the Second Amendment does not protect the right to possess arms outside the home in the first place.

More fundamentally, the notion that the Second Amendment's protections do not extend beyond the curtilage of one's home is incompatible with the entire thrust of *Heller* and *McDonald v. City of Chicago* (2010). As *McDonald* explained, "in *Heller*, we held that individual self-defense is 'the central component' of the Second Amendment right" and that "citizens must be permitted 'to use handguns for the core lawful purpose of self-defense.'"

As history confirms, both the founders who framed and the people who ratified the Second Amendment certainly understood that the need for self-defense is not and has not ever been confined to the home. That was true at the framing when the republic was still relatively untamed, it was true in the wake of the Civil War when Congress acted to protect the rights of new citizens on the public highways, and it is true today.

In sum, from long before the founding through well after the ratification of the Fourteenth Amendment, the overwhelming weight of authority confirmed that the Second Amendment means exactly what it says: "The people" have the right not just to "keep" arms in their homes, but to "bear" them outside their homes for self-defense.

II. New York's Restrictive Carry Regime Violates the Second Amendment.

New York's law is no more compatible with the right to bear arms than the District of Columbia's invalidated ordinance was with the right to keep arms. For all the reasons just explained, New York's approach cannot be reconciled with the Second Amendment's "text, history and tradition." — *Heller v. District of Columbia* (*Heller II)* (D.C. Cir. 2011). By denying petitioners any outlet to exercise their constitutionally protected right to carry arms for self-defense and criminalizing the exercise of a fundamental right, New York's approach is fundamentally incompatible with the Second Amendment. And just like the District's ban on possessing handguns, New York's ban on carrying handguns for self-defense fails "any of the standards of scrutiny that" this court has "applied to enumerated constitutional rights." — *Heller*.

The Second Amendment declares that the right "to keep and bear arms" belongs to "the people." As *Heller* explained, that term "unambiguously refers to all members of the political community, not an unspecified subset." In other words, "the Second Amendment right is exercised individually and belongs to all Americans."

New York's restrictive licensing scheme cannot be reconciled with that guarantee. Because "the [Second] Amendment is for law-abiding citizens as a rule ... it must secure gun access at least for each typical member of that class." — *Wrenn*. Yet, in contrast to the constitutionally compliant norm in the vast majority of the country, the default in New York is that law-abiding citizens may not carry handguns for self-defense; that exercise of a fundamental constitutional right is instead a crime.

One can get out from New York's criminal prohibition only by satisfying a "proper-cause" standard that, by design, restricts the right to a small subset of "the people" whose defining feature is that they are "distinguishable from ... the general community." — *Kachalsky v. County of Westchester* (2nd Cir. 2012). Thus, for most of "the people," New York "totally bans" carrying handguns, just like the District of Columbia did with respect to keeping handguns. — *Heller*.

This court would not tarry long over a law that reserved First Amendment rights to those with an unusually compelling need to worship or criticize the government or a law that reserved Fourth Amendment rights to those with a special need for privacy. The result should be no different when it comes to the Second Amendment. Such efforts to reserve fundamental constitutional rights to a select few are incompatible with the framers' decision to secure those rights for all "the people."

New York's regime is all the more troubling because the threshold "proper-cause" determination is left to the broad discretion of a licensing officer. The Second Amendment, like the rest of the Bill of Rights, protects individuals against government actors. Requiring law-abiding individuals to secure the permission of a government official under a highly discretionary standard impermissibly converts a right into a privilege. When the government licenses constitutionally protected activity, clarity is at a premium lest licensing authorities use their discretionary authority to reserve rights guaranteed for all to the politically powerful or well connected. Simply put, when it comes to fundamental constitutional rights, discretion is a vice, not a virtue. Yet New York leaves it to the practically unreviewable discretion of a licensing officer to decide who may exercise the fundamental right to carry a handgun for self-defense.

The prospect that the substantial discretion that New York's Sullivan Law gives to local officials could be used to selectively disarm individuals is far from hypothetical. It is arguably the law's *raison d'etre* [reason to be]. As noted, the law was passed with an avowed intent, supported by everybody from city hall to *The New York Times*, to disarm newly arrived immigrants, particularly those with Italian surnames. Moreover, even today, the regime operates selectively, with the occasional celebrity or well-connected individual securing a carry license. But the vast majority of "the people" protected by the Second Amendment are told that they have failed to show a "proper cause" in the form of demonstrating to a public official a far greater need to exercise a constitutional right than their fellow law-abiding citizens.

To be clear, petitioners have not been denied licenses because they are insufficiently trained or trustworthy to carry a firearm. To the contrary, both Nash and Koch have been licensed to carry firearms for purposes less constitutionally and historically central than self-defense. New York allows them to carry firearms for purposes of hunting and target practice but not self-defense. If *Heller* had traced the Second Amendment back to a preexisting right to hunt or reaffirmed an individual right to shoot targets, the distinctions drawn by New York might be minimally defensible. But given *Heller*'s actual reasoning, New York's decision to license petitioners for other purposes, but not the constitutionally vital and historically rooted purpose of self-defense, is a non-starter.

Just as with the District's regime in *Heller*, "few laws in the history of our nation have come close to the severe restriction of" New York's restrictions on carrying handguns — and "some of those few have been struck down." Indeed, the laws *Heller* identified as "severe" outliers are even more relevant here because they involved restrictions on carrying arms, not keeping them. In singling out those laws as "severe restrictions" on the right, *Heller* invoked the Alabama Supreme Court's admonition that "a statute which, under the pretense of regulating ... requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional."

As with the District's regime in *Heller*, "it is no answer to say" that carrying "other firearms (i.e., long guns) is allowed." Because "the American people have considered the handgun to be the quintessential self-defense weapon" both inside and outside the home, "a complete prohibition" on the

right to carry handguns for self-defense "is invalid." Indeed, many of the 19th-century cases *Heller* invoked struck down restrictions on carrying handguns even though carrying long guns remained permissible.

As those decisions illustrate, while "the Constitution leaves [states] a variety of tools for combating" handgun violence, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." — *Heller*. Denying law-abiding citizens the right to carry handguns for self-defense is one of those policy choices.

The 2nd Circuit concluded otherwise only by employing a form of scrutiny that is heightened in name only and is alien to "any of the standards that" this court has "applied to enumerated constitutional rights." The court got off on the wrong foot from the start by positing that something "less than" strict scrutiny should apply to New York's regime because the right to carry arms is purportedly not at the "core" of the Second Amendment. — *Kachalsky*. The Second Amendment does not create a hierarchy of protected rights; by its terms, it puts the right to "keep" arms and the right to "bear" arms on equal footing. One is no more or less the "core" of the Second Amendment than freedom of speech, but not press or religion, is the "core" of the First Amendment.

The text of the provisions of the Bill of Rights reflects what the founding generation thought to be at the core of the fundamental rights of the people secured against the government. It is not for the courts to decide that some fundamental rights are "core" rights that really merit protection while others are too "peripheral" to be fully honored.

The 2nd Circuit's demotion of the right to carry arms has no more grounding in history than in constitutional text. That is plain from the strained analogies the court tried to draw. To say New York's prohibition on carrying handguns at all is "similar" to laws "prohibiting the use of firearms on certain occasions and in certain locations" is "akin to saying that because the government traditionally could prohibit defamation, it can also prohibit speech criticizing government officials." — *Heller II*.

Such limited restrictions about sensitive places or special circumstances just reinforce that the right to carry for self-defense was the rule (and remains the rule in the vast majority of states). The 2nd Circuit's analogy to 19th century concealed-carry laws was equally flawed, as the court simply ignored the fact that such laws were upheld only because, unlike New York, those states still permitted carrying arms openly.

That leaves only the 2nd Circuit's claim that *Heller* itself relegated everything save keeping arms in the home for self-defense to second-class status. That is fanciful. *Heller* squarely held that the Second Amendment "guarantees the individual right to possess and carry weapons in case of confrontation."

To be sure, *Heller* observed that "the need for defense of self, family and property is most acute" in the home. But nowhere did it suggest that the need "is not acute" — let alone nonexistent — "outside the home." — *Moore v. Madigan* (7th Cir. 2012). Indeed, in its nearly 50-page analysis of the scope of the right, the court referred to the "home" or "homestead" a grand total of three times, in each instance quoting a historical source that recognized a right to keep and bear arms to defend both one's home and one's person and family.

In all events, whether it can be characterized as core or peripheral, the right to carry arms is undoubtedly a fundamental and constitutionally enumerated right. This court has already held as much. — *McDonald*. At a bare minimum, restrictions on such fundamental rights necessitate the same exacting scrutiny that this court applies to burdens on other constitutional rights in contexts where it declined to apply strict scrutiny. Yet the 2nd Circuit did not even apply that. Instead, the court insisted that "the proper cause requirement passes constitutional muster if it is substantially related to the achievement of an important governmental interest" — a test that the court viewed as entailing "substantial deference" to the legislature and virtually no tailoring to protect the rights of the people. — *Kachalsky*.

As this court just explained in *Americans for Prosperity Foundation v. Bonta* (2021), that is decidedly not what intermediate scrutiny entails. Considering the same "substantially related to a sufficiently important interest" formulation, the court explained that while such "exacting scrutiny does not require that [laws] be the least-restrictive means of achieving their ends, it does require that they be narrowly tailored to achieve the government's asserted interest."

New York has taken the extreme step of banning typical, law-abiding citizens from carrying any type of handgun anywhere unless they can distinguish themselves from their fellow law-abiding citizens, even though they have an equally valid constitutional right to keep and bear arms. That is not a serious effort to avoid "burdening substantially more [protected conduct] than is necessary to further the government's legitimate interests." — *McCullen v. Coakley* (2014). Indeed, such bans are the antithesis of tailoring, narrow or otherwise. Thus, just like the District's ban on keeping handguns in the home, New York's ban on carrying handguns fails "any of the standards of scrutiny that" this court has "applied to enumerated constitutional rights." — *Heller*.

In the end, the 2nd Circuit's analysis is nothing more than the kind of "interest-balancing" that *Heller* rejected. Indeed, the 2nd Circuit was quite candid that, in its view, "assessing the risks and benefits of handgun possession and shaping a licensing scheme to maximize the competing public-policy objectives" is a job for the legislature. — *Kachalsky*. But as *Heller* admonished, the Second Amendment "is the very product of an interest-balancing by the people" that neither the legislature nor the judiciary may "conduct for them anew." And under any faithful reading of text, history, tradition and this court's precedent, the Second Amendment plainly forecloses New York's refusal to let petitioners carry handguns for self-defense just because the state is not convinced that they have demonstrated an unusual need to exercise fundamental rights guaranteed to all.

Reply Brief

The following is excerpted from the Reply Brief of the Petitioners as submitted to the U.S. Supreme Court on Oct. 14, 2021.

The Second Amendment protects "the right of the people to keep and bear arms." Both that text and a wealth of historical authority from both sides of the Atlantic confirm that the Constitution enshrines not just a homebound right to keep arms but a right to bear them outside the home, where the need for self-defense is acute.

Indeed, the historical record is so overwhelming that the state no longer disputes that the Second Amendment protects the right to carry handguns outside the home for self-defense. While the state treats that concession as a non-event, it contradicts its earlier arguments and fatally undermines the reasoning of the decision the state seeks to preserve. The state now retreats to the equally indefensible claims that the right vanishes in "populous areas" and extends only to those with a "non-speculative need" to exercise it.

Those misguided claims depend on ignoring constitutional text and rewriting history through selective quotation, excising from the law books anything that does not fit the state's revisionist narrative, including much of the material relied upon in *District of Columbia v. Heller* (2008). The state takes its revisionism so far as to claim there is no example in all Anglo-American history of the carry rights petitioners seek. In fact, at least 43 states allow just that, while, as in *Heller*, only a few jurisdictions follow New York's lead of presumptively denying a right that the Constitution guarantees to all.

When the state is not rewriting the historical record, it is attacking arguments petitioners did not make, while defending a law it did not pass and licenses it did not issue. The state proceeds as if its law restricts the right to carry only at Yankee Stadium and petitioners demand a right to carry always and everywhere. But very nearly the opposite is true. Petitioners do not challenge any of New York's many separate laws prohibiting handguns in specific, sensitive places. They contest New York's effort to treat virtually the entire Empire State as a sensitive place and to prohibit petitioners from carrying their handguns for self-defense virtually anywhere, even (contrary to the state's repeated claims) in remote "back country" areas.

The incompatibility of New York's outlier regime with the text, history and tradition of the Second Amendment is obvious and suffices to resolve this case. By effecting "a complete prohibition" on carrying handguns outside the home for self-defense via a regime suffused with discretion, the Sullivan Law flunks any applicable level of scrutiny. — *Heller*. But it speaks volumes that the state does not even

try to defend its law under strict scrutiny or as narrowly tailored (even though this court just reaffirmed that even intermediate scrutiny demands narrow tailoring).

The state instead urges the court to craft a *sui generis* [unique] form of scrutiny that is heightened in name only and far more lax than the scrutiny that applies to invasions of other textually guaranteed fundamental rights. But the Second Amendment is not "a second-class right." — *McDonald v. City of Chicago* (2010). The court should reverse the decision below and hold that petitioners have a right to do what even the state now concedes the Constitution protects: bear arms outside the home for self-defense.

Arizona, Missouri, Alabama *et al.*, *Amici Curiae*
Drew C. Ensign, Counsel of Record

Arizona, Missouri and Alabama are joined in this brief by 23 other states. Drew C. Ensign has served as the deputy solicitor general in the Office of the Arizona Attorney General since March 2019. The following is excerpted from the Amici Curiae *Brief for Petitioners as submitted to the U.S. Supreme Court on July 20, 2021.*

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* (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* (La. Ann. 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-defense, or of his constitutional right to keep and bear arms." — *Nunn v. State* (Ga. 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. 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 Department* (N.Y. App. Div. 1st 1980).

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*. 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 backward 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.

Gun Owners of America, Gun Owners Foundation and Heller Foundation, *Amici Curiae*
William J. Olson, Counsel of Record

Gun Owners of America, Gun Owners Foundation and the Heller Foundation are gun-rights advocacy groups with a focus on research and public education on Second Amendment protections and gun laws. William J. Olson heads a law practice in Virginia where he specializes in constitutional, firearms, nonprofit, health and election law. The following is excerpted from the Amici Curiae *Brief for Petitioners as submitted to the U.S. Supreme Court on July 20, 2021.*

Insofar as this court has issued no substantive Second Amendment firearms decisions in the decade since *District of Columbia v. Heller* (2008) and *McDonald v. City of Chicago* (2010), this case takes on great significance. The decision of the 2nd Circuit cannot be allowed to stand. The analysis of the Second Amendment in the *Kachalsky v. County of Westchester* (2nd Cir. 2012) decision completely missed the mark, illustrating the anti-gun instincts of most lower federal judges.

At one point, the court in *Kachalsky* recognized that "in *Heller*, the Supreme Court concluded that the Second Amendment codifies a preexisting 'individual right to possess and carry weapons in case of confrontation,'" but then its decision ultimately disregarded that right. It was deemed sufficient that New York occasionally grants a license to the rich and well connected to keep it from being considered a complete ban on carrying.

Indeed, New York's licensing system creates what could be viewed as a "select militia" while disarming the people's militia protected by the Second Amendment. Since this case involved bearing firearms outside the home, it was said to involve a non-core right that could be easily overtaken by government assertions of public safety, even though the effective ban makes New Yorkers less safe on the streets. The fact that the licensing scheme has existed for over a century does nothing to demonstrate its constitutionality — just that New Yorkers have been longsuffering.

The *Kachalsky* decision employs interest-balancing, which *Heller* and *McDonald* rejected. As Justice Antonin Scalia explained, the Second Amendment interest-balancing has already been done — by the people in ratifying the Constitution. Rather, this court should employ here the test defined by then-Judge [Brett] Kavanaugh — "text, history, and tradition." The rights that *Kachalsky* authorized New York to infringe were preexisting rights given the people, as the Declaration of Independence asserts, by our creator. Rights not given by the government cannot be taken by the government.

Since the 2nd Circuit in *Kachalsky* did its best to evade the faithful application of the principles set out in those two cases, these *amici* trust that this court will use this case to restore order to Second Amendment jurisprudence. Should this court rule for petitioners, these *amici* urge that great care be given to the language of the decision so as to guard against lower federal courts working hard to circumvent and narrow application of this decision to future challenges, as those courts have done with *Heller* and *McDonald*.

Do New York State's Restrictions on Handgun Concealed-Carry Licenses Violate the Second Amendment to the Constitution?

CONS

Kevin P. Bruen *et al.*, Respondents
Barbara D. Underwood, Counsel of Record

In 1911, the state of New York enacted a law regulating the sale and possession of concealable firearms. Known as the "Sullivan Law" after its sponsor in the state senate, Timothy Sullivan, the measure required the state's residents who wanted to posses handguns to obtain licenses and increased penalties for those who did so without authorization. Two years later, the state amended the law to specify that those who sought concealed-carry permits must show "proper cause" for their request. The state's regulating agency then considers the request and tailors the permit for purposes such as hunting, target practice, home protection or personal defense away from the home. Today, states such as California, New Jersey, Massachusetts, Maryland and Hawaii have similar statutes. Following the U.S. Supreme Court's decision in District of Columbia v. Heller *(2008), which established a Second Amendment right to carry handguns, two New York residents who received only limited concealed-carry permits filed suit against the state and Superintendent of New York State Police Kevin P. Bruen. They alleged that the law violated their Second Amendment right to carry a concealed handgun in most public places. After both a federal district court and the 2nd Circuit U.S. Court of Appeals ruled in favor of New York state, the two men appealed to the U.S. Supreme Court, which granted certiorari on April 26, 2021. Barbara D. Underwood has served as New York solicitor general since January 2007. The following is excerpted from the Brief for Respondents as submitted to the U.S. Supreme Court on Sept. 14, 2021.*

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

Petitioners spend most of their brief addressing a question not disputed here: whether the Second Amendment embodies a right to carry arms outside the home for self-defense. The 2nd Circuit assumed that this was so. And respondents do not dispute the point.

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

A. The Text of the Second Amendment Does Not Enshrine an Unqualified Right to Carry Concealed Firearms in Virtually Any Public Place.

In *Heller*, this court explained that the Second Amendment right to "keep and bear arms" entails the right to "have weapons" and to "carry arms for a particular purpose — confrontation." But *Heller* stressed that "like most rights," the Second Amendment right is "not unlimited." It is not an entitlement to carry "any weapon whatsoever in any manner whatsoever and for whatever purpose" or "for any sort of confrontation." Rather, the Second Amendment "codified a preexisting right" and is limited by the "historical understanding of the scope of the right."

One historical limit is the government's latitude to restrict the carrying of concealable weapons in public places. More than a century ago, this court stated that the Second Amendment right to bear arms "is not infringed by laws prohibiting the carrying of concealed weapons." — *Robertson v. Baldwin* (1897). And *Heller* gave as a first "example" of the Second Amendment's historical limits the "prohibitions on carrying concealed weapons" that were upheld by "the majority of the nineteenth-century courts to consider the question."

This court has also emphasized that "nothing in [*Heller*] should be taken to cast doubt" on "longstanding prohibitions" on publicly carrying firearms "in sensitive places such as schools and government buildings" and has described those as "presumptively lawful." In *McDonald v. City of Chicago* (2010), a plurality of the court "repeated those assurances."

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

B. History and Tradition Confirm That Governments May Restrict the Carrying of Concealed Firearms in Public Places.

New York's "proper-cause" requirement falls well within the mainstream of historical restrictions on carrying firearms in public. Public-carry laws existed during all the historical periods that this court identified as significant to understanding the "preexisting right" that the Second Amendment codified: from medieval England through the amendment's ratification, and on through its incorporation via the Fourteenth Amendment. Petitioners thus cannot show that New York's law is an "extreme" outlier akin to the ban on home handgun possession invalidated in *Heller*.

The unconstrained public-carry regime that petitioners would impose on all the states has no antecedent in our nation's history. Petitioners argue that the Second Amendment confers an entitlement to carry a handgun "whenever and wherever" a need for self-defense could hypothetically arise. But no Anglo-American jurisdiction in the last 700 years has maintained a public-carry regime of this type. The slaveholding South provides the closest analogue. Yet even there, states restricted the concealed carrying of firearms.

Petitioners do not dispute that public-carry regulations have continuously been a part of the Anglo-American legal tradition: from the Northampton-style laws in place throughout the founding era, to the reasonable-cause laws that arose in the early 19th century, to the analogous good-cause regimes of the early 20th century. Instead, petitioners erroneously contend that the [1328] Statute of Northampton [prohibiting the carrying of weapons in public] and its American analogues were "widely understood" to restrict only carrying "dangerous and unusual Weapons, in such a Manner as will naturally cause a Terror to the People." — William Hawkins, *A Treatise of the Pleas of the Crown* (1716).

But as Hawkins explained, rules attached even to the public carrying of "common weapons." And as other contemporary legal commentators explained, carrying common weapons would raise such a suspicion in places of gathering like fairs and markets, where the carrying of arms was widely understood "to be an Affray and Fear of the People, and a Means of the Breach of the Peace." — Michael Dalton, *Country Justice* (1727).

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

These established prohibitions did not extend to carrying firearms in "unpopulated and unprotected enclaves," such as "in the countryside." — Patrick J. Charles, *The Faces of the Second Amendment Outside the Home* (2012). Many early Americans lived in such areas and carried firearms for self-protection. But it does not follow that early Americans had an unfettered right to carry firearms in virtually any public place on the speculation that a confrontation might occur at a moment's notice.

Nor does the much-debated *Sir John Knight's Case* support petitioners' view that the founding generation understood the right to bear arms as extending anywhere a need for self-defense might conceivably arise. Sir John Knight was arrested for carrying firearms on the streets of Bristol [England] and into a church located outside the city walls. In his defense, Knight argued not that he lacked an "intent to terrorize," but that he had left his weapons with a servant outside the church. He also claimed that he generally rode from his country estate to Bristol with "a Sword and Gun" because he had recently been attacked and threatened, but that he always left those weapons "at the end of the Town when he came in, and tooke them thence when he went out." Thus, Knight's defense does not suggest that entering town armed or "going to church with pistols" was legally acceptable.

Moreover, petitioners' unbounded conception of the right to bear arms conflicts with the common law of self-defense. The common law generally permitted the use of deadly force in self-defense only "when certain and immediate suffering would be the consequence of waiting for the assistance of the law." — William Blackstone, *Commentaries on the Laws of England* (1769). Many laws authorized public carry during long-distance travel for similar reasons.

Petitioners misplace their reliance on colonial statutes that required persons qualified to bear arms to travel armed under certain circumstances. These statutes aimed to protect the community in an era without professional police to serve that function. And a duty to carry arms to perform a communal law-enforcement function, in specified circumstances, does not imply a general right to carry arms for self-defense wherever one goes.

As petitioners acknowledge, many historical laws prohibited public carry in circumstances "apt to terrify the People." And historical sources show that carrying firearms into places like churches, towns, fairs and markets was inherently deemed to "strike a feare and terror in the king's subjects." — Dalton.

Petitioners likewise misstate the significance of the system of enforcing early American reasonable-cause laws through "sureties." Under early American reasonable-cause laws, "any person" who feared "injury" or a "breach of the peace" could complain to a magistrate that another person was carrying a firearm in public. And background law provided that merely carrying firearms in populous areas breached the peace. Thus, anyone publicly carrying a firearm could be hauled before a magistrate and required to post a surety if unable to establish "reasonable cause" for being armed. If the surety was not posted, the person could be imprisoned; if the surety was posted but its terms were violated, the money was forfeited.

It is implausible to infer from this a broad right to carry firearms into the public square without a specific self-defense need. Such conduct was enough to require a surety on pain of imprisonment. These consequences operated as a "severe constraint" on carrying weapons in public. — *Young v. Hawaii* (9th Cir. 2021). In substance, people could carry in public free of restriction "only if they could demonstrate good cause" — a direct precursor of the licensing criterion at issue here.

Petitioners place great weight on certain state court decisions from the antebellum South, but those cases do not establish a national consensus on the meaning of the Second Amendment. In the rest of the country and even in some parts of the South, state legislatures were enacting — and courts were upholding — robust public-carry laws.

At least five state court decisions from the late 19th century upheld laws that restricted open as well as concealed carry. And although some of those cases relied on the since-abrogated view that the right to bear arms related only to military service, they still show that restrictions on carrying firearms in places where people "congregated together" were broadly accepted around the country. — *English v. State* (1871).

This geographic variation is consistent with our nation's tradition of public-carry regulations that "suit local needs and values." — *McDonald*. And it refutes petitioners' view that the Second Amendment

demands one homogeneous approach to public carry. Some states — including petitioners' *amici* — have opted to relax their public-carry laws over time. But those changes simply represent choices to replace one constitutionally permissible policy with another. They do not signify that these states had previously been violating their residents' Second Amendment rights.

Finally, history refutes petitioners' argument that the Second Amendment is offended by the "discretion" that New York law affords to local licensing officers. From medieval England onward, local sheriffs and magistrates have been entrusted with the "power to execute" public-carry restrictions. And that power included determining when public arms-carrying would be permitted and how to punish offenders. Thus, in authorizing local licensing officers to administer the state's public-carry law in a manner attentive to local conditions, New York has followed a long historical tradition.

History also does not support petitioners' suggestion that the discretion in "proper-cause" laws — including New York's — was intended as a means to disarm "disfavored groups" like Black Americans and immigrants. In some parts of the postbellum South, restrictions on publicly carrying firearms were critical for protecting freedmen from violence and intimidation perpetrated by whites.

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

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

Contrary to petitioners' assertions, the discretion of New York licensing officers is neither "boundless" nor "unreviewable." New York courts will set aside a licensing decision that is "arbitrary and capricious" or otherwise contrary to law. — *Gaul v. Sober* (3rd Dept. 2020).

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

C. Petitioners' Concealed-Carry Licenses Are Consistent With the Historical Scope of the Right to Bear Arms.

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

These conditions are perfectly consistent with the limitations historically imposed on the public carrying of firearms. During the colonial and founding eras, in much of the country, petitioners would not have been allowed to carry firearms in public as extensively as their current licenses allow. Petitioners would not have fared much better in the 19th century. While they might have been able to carry their handguns openly in parts of the slaveholding South (assuming they were white males), petitioners would have been stymied by various states' reasonable-cause laws. Simply stating that there were "robberies in the area," as Nash did here, would not remotely have qualified as "reasonable cause" to carry a concealed firearm in populous areas.

In mid-19th century Texas, Nash would have been required to establish an "immediate and pressing" danger that would "alarm a person of ordinary courage." In Alabama, during the same period, he would have needed to show cause to fear "some specific attack," not merely that he regularly traversed a locality with "a reputation for lawlessness." — *Chatteaux v. State* (Ala. 1875). Under this standard, Nash would not have been permitted to carry based on a vague reference to robberies, nor would Koch

likely have been permitted to carry to and from work, as he currently may do. These examples and others render untenable petitioners' claim that they now face unprecedented restrictions on their right to carry firearms in public.

Ultimately, New York's law is a historically grounded approach to protecting sensitive places of the type that every state, the federal government and this court have recognized the need to safeguard. Like the licensing regime challenged here, sensitive-place laws restrict public carry in places where people typically congregate and where law-enforcement and other public-safety professionals are presumptively available.

Moreover, New York's licensing-based approach has much deeper historical roots than a categorical approach that specifies a predetermined set of forbidden places. From the Statute of Northampton onward, historical public-carry laws restricted arms carriage either generally, without specifying any particular locations, or through an open-ended list of restricted locations that typically included fairs, markets and any "part elsewhere." In either case, however, local officials decided whether carrying weapons in a specific location warranted an arrest, based on the particular circumstances. New York's scheme gives similar discretion to local officers, but they exercise it at the time of issuing the license rather than after the conduct has already occurred; and applicants may challenge the licensing decision by appeal or choose to return to the licensing officer with more information.

While petitioners concede that public carry can be prohibited in certain "sensitive places," that concession collides with their argument that public carry must be permitted "whenever and wherever" a need for self-defense could arise. In theory, the need for self-defense "may suddenly arise" anywhere. Law enforcement and public-safety officials cannot thwart all possible acts of violence in even the most sensitive places. If the scope of an individual's right to carry firearms in public hinges solely on whether law enforcement "may be too late to prevent injury," public carry cannot be restricted in any location.

Thus, carried to its logical conclusion, petitioners' argument directly conflicts with this court's assurances in *Heller* and *McDonald* that prohibitions on firearms in sensitive locations like schools and government buildings are presumptively lawful.

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

Because New York's "proper-cause" requirement falls comfortably within the range of historical public-carry laws that circumscribe "the scope of the [Second Amendment] right," *Heller*, the requirement is consistent with the Constitution. New York's law also satisfies intermediate scrutiny — the proper level of review if means-ends scrutiny were to apply.

Numerous courts of appeals have applied means-ends scrutiny after concluding that a state law implicated a Second Amendment right. And scholars have explained why means-ends scrutiny is appropriate when history and tradition offer unclear guidance about a gun regulation's validity. New York's law would survive under any of these approaches.

A. Intermediate Scrutiny Is the Appropriate Level of Review.

New York's "general interest in preventing crime" and protecting public safety is indisputably compelling. — *United States v. Salerno* (1987). As for how close a fit the Constitution requires between this interest and New York's chosen means to realize it, *Heller* expressly demands something more than rational-basis review.

Heller also impliedly forecloses strict scrutiny by identifying a nonexhaustive set of "presumptively lawful" gun regulations, including "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." For a law to survive strict scrutiny, the government must prove that any "plausible, less restrictive alternative" would be "insufficient to secure" its compelling objective. — *United States v. Playboy Entertainment Group* (2000).

Under that standard, the viability of the "presumptively lawful" measures that *Heller* identified would "be far from clear" — as would the validity of many other commonplace and noncontroversial

restrictions on carrying firearms in specific public places. Indeed, strict scrutiny treats laws as "presumptively invalid." — *Playboy Entertainment*. And that precept clashes with this court's recognition of the "longstanding" power of states to limit public carrying of firearms. — *Heller*.

Intermediate scrutiny is thus the appropriate level of means-ends scrutiny to apply to laws regulating the public carrying of handguns. As implemented, New York's concealed-carry licensing system is akin to the types of time, place and manner regulation of expression that this court has long subjected to intermediate scrutiny.

In 1871, Texas's Supreme Court explained that good-cause laws regulate the right of public carry, "without taking it away," by specifying "the place, the time and the manner in which certain deadly weapons may be carried as means of self-defense."

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

More broadly, New York's law shares a critical feature of the time, place and manner restrictions on speech that garner intermediate scrutiny. These regulations are not aimed at suppressing protected activity, "but rather at the secondary effects" of that activity "on the surrounding community." — *City of Renton v. Playtime Theatres, Inc.* (1986). New York's "proper-cause" requirement, similarly, does not seek to inhibit handgun carrying for lawful self-defense but rather aims to limit the violence attending handgun misuse.

New York's handgun-licensing law was enacted in 1911 after a "marked increase in the number of homicides" committed with concealable firearms. Two years later, the "proper-cause" requirement was added, consistent with the New York coroner's recommendation that restricting handgun carrying to those with "some legitimate purpose" would save "hundreds of lives." This undisputed intent "to prevent crime" and preserve "the quality of urban life," *City of Renton*, reinforces the propriety of intermediate scrutiny here. And contrary to petitioners' suggestion, the more "exacting" standard for compelled-speech laws that "chill association," *Americans for Prosperity Foundation v. Bonta* (2021), is irrelevant to a handgun-licensure law that does no such thing.

Applying intermediate scrutiny here would not impermissibly "create a hierarchy of protected rights" within the Second Amendment or the Constitution generally. Laws that burden individual rights typically receive means-ends scrutiny when the government asserts a countervailing interest. The precise level of scrutiny depends on the nature or depth of the interference or the regulation's apparent motivation.

This court has cautioned against subjecting the Second Amendment "to an entirely different body of rules than the other Bill of Rights guarantees." — *McDonald*. Applying a *sui generis* [unique] approach grounded exclusively in history could prove unworkable in practice — and it could imperil federal restrictions on gun possession that would survive means-ends scrutiny but lack traditional analogues.

Nor does *Heller* foreclose the application of intermediate scrutiny. *Heller* had no occasion to decide the issue when the law challenged there would have failed under "any of the standards of scrutiny the court has applied to enumerated constitutional rights."

In attacking the application of intermediate scrutiny, petitioners misplace their reliance on *Heller*'s rejection of a "freestanding 'interest-balancing' approach" resembling "none of the traditionally expressed levels" of judicial scrutiny. The 2nd Circuit did not employ — nor does New York propose — a free-floating weighing of an individual's right to bear arms against the state's interest in preventing firearm misuse to determine which is paramount.

Means-ends scrutiny does not assess whether the state's interests outweigh the individual's interests, but rather whether the state's chosen means properly serve its avowed goals in a manner compatible with the individual's Second Amendment rights.

The courts of appeals agree: All 10 circuit courts to have decided the issue since *Heller* have adopted multistep frameworks that incorporate heightened scrutiny at the second step, after determining whether a law falls within the Second Amendment's scope.

B. Intermediate Scrutiny Is Satisfied Here.

New York's "proper-cause" requirement substantially furthers the state's profound interests in promoting public safety and preventing gun violence. The law thus withstands intermediate scrutiny. If the court is in any doubt, however, a remand would be appropriate "to permit the parties to develop a more thorough factual record." — *Turner Broadcasting System, Inc. v. Federal Communications Commission* (1994).

A wealth of empirical evidence supports New York's judgment that limiting the public carrying of handguns to those who have proper cause reduces the risk of gun violence to the public. *Kachalsky v. County of Westchester* (2nd Cir. 2012) examined the "studies and data" New York introduced there, which "demonstrated that widespread access to handguns in public increases the likelihood that felonies will result in death and fundamentally alters the safety and character of public spaces."

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

Petitioners do not address, much less attempt to refute, any of this research. Petitioners instead suggest that the 2nd Circuit was insufficiently critical when addressing such evidence in *Kachalsky*, characterizing the intermediate scrutiny adopted by the court as "relaxed." And this court has likewise held that legislative determinations on empirical questions outside the judiciary's expertise are "entitled to deference" in constitutional analysis. — *Holder v. Humanitarian Law Project* (2010).

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

As the 2nd Circuit summarized, "instead of forbidding anyone from carrying a handgun in public," New York's "more moderate approach" allows concealed carry by "individuals having a bona fide reason to possess handguns" in public. — *Kachalsky*. Moreover, the law respects gradations of need: a licensing officer may tailor a concealed-carry permit to the self-defense needs that an applicant specifically establishes.

Here, for example, the licensing officer authorized Nash and Koch to carry their handguns in unpopulated areas where law-enforcement officers may be slow to arrive and public-safety risks are attenuated. Nash also demonstrated a safety need to carry his weapon "to and from work." But neither petitioner established any concrete need to carry his weapon in areas "frequented by the general public," where police officers may be more plentiful and different public-safety concerns exist. Koch simply sought "unrestricted carry for personal protection," and Nash alluded vaguely to a "string of robberies" that included one apparent burglary, for which a premises license would be sufficient for armed self-defense.

The denial of unrestricted carry licenses on these facts is qualitatively "consistent with the right to bear arms" for self-defense in that no right to use a gun for self-defense accrues "until the objective circumstances justify the use of deadly force." — *Kachalsky*.

There is no merit to petitioners' attempts to liken New York's law to the law that *Heller* invalidated: an "absolute prohibition of handguns held and used for self-defense in the home." Petitioners assert — incorrectly and without support — that New York "flatly prohibits" carrying handguns in public by making it "effectively impossible" to secure a license to do so. Those erroneous statements echo the complaint's equally unsupported allegation that New York's law "operates as a flat ban on the carrying of firearms by typical law-abiding citizens." The complaint itself undermines these assertions by revealing

that petitioners — by their accounts, typical law-abiding citizens — received licenses to carry handguns for self-defense in public at specified times and places.

In sum, the deep historical roots of New York's licensing regime evidence its validity, and New York's law also satisfies means-ends scrutiny. Moreover, there is no merit to petitioners' bare assertion that the "proper-cause" requirement precludes the "vast bulk" of 48 applicants from receiving concealed-carry licenses. If this case were to proceed further, New York could refute petitioners' unsupported assertion with evidence about license grants relative to overall applications, broken down by region.

In addressing the Second Amendment question, this court should address the law that New York actually maintains, not petitioners' unsupported and inaccurate characterizations of that law.

United States of America, *Amicus Curiae*
Brian H. Fletcher, Counsel of Record

The United States is an amicus *in this case because of the issues of constitutional law involved. Brian H. Fletcher is a law professor at Stanford University and served as acting U.S. solicitor general from August 11, 2021, until Elizabeth B. Prelogar's nomination was confirmed by the U.S. Senate on Oct. 28. The following is excerpted from the* Amicus Curiae *Brief for Respondents as submitted to the U.S. Supreme Court on Sept. 21, 2021.*

New York's longstanding proper-cause requirement does not violate the Second Amendment.

The Second Amendment protects an individual right to keep and bear arms, but that right is not absolute. For centuries, legislatures in England, the colonies and the states have protected public safety by adopting reasonable regulations governing who may possess weapons, which weapons they may possess, where and when weapons may be carried, and how they may be manufactured, sold and stored.

A court considering a challenge to an arms regulation should begin with text, history and tradition. This court's decision in *District of Columbia v. Heller* (2008) instructs that those sources may definitively validate or invalidate the challenged law: The court struck down a uniquely restrictive law banning possession of handguns in the home but emphasized that the Second Amendment permits a wide range of measures that are fairly supported by our nation's tradition of gun regulation.

Text, history and tradition will not conclusively determine the validity of some laws — especially new measures adopted to address new conditions. In such cases, courts should apply the judicial method reflected in the relevant history and tradition by asking whether the challenged law is a reasonable regulation — or, to put it in modern terms, whether the law survives intermediate scrutiny.

Federal law illustrates the types of regulations that legislatures may constitutionally adopt. Congress has disarmed felons and others who may be dangerous or irresponsible. It has forbidden the carrying of arms in sensitive places, such as courthouses and school zones. And it has extensively regulated commerce in arms. All those regulations pass constitutional muster.

New York's proper-cause requirement is likewise constitutional. Throughout the nation's history, legislatures have adopted regulations to address the distinctive risks posed by the public carrying of concealed or concealable arms. New York's law — which is itself a century old — fits squarely within that long tradition. And even if that tradition left any doubt, New York's proper-cause requirement would also satisfy intermediate scrutiny. It serves public-safety interests of the highest order. It applies only to the carrying of arms in public. It covers handguns but not most rifles and shotguns. And instead of prohibiting the carrying of handguns entirely, it allows those who need to carry them for self-defense to do so.

Cons,

Everytown for Gun Safety, *Amicus Curiae*
Jonathan E. Taylor, Counsel of Record

Everytown for Gun Safety, founded in 2013 and financed by former New York City Mayor Michael Bloomberg, is the largest gun-control advocacy group in the United States. Jonathan E. Taylor is a principal with the law firm Gupta Wessler, where he specializes in appellate and constitutional litigation. The following is excerpted from the Amicus Curiae *Brief for Respondents as submitted to the U.S. Supreme Court on Sept. 21, 2021.*

The petitioners contend that New York's century-old public-carry regime violates the historical scope of the constitutional right to keep and bear arms. Under that regime, individuals who satisfy basic eligibility criteria are entitled to obtain a license to keep and carry a firearm at home or at work and to carry a firearm in public, including for self-defense, if they have shown a bona fide need for doing so.

In arguing that New York's regime is unconstitutional, the petitioners devote much of their historical discussion to addressing whether the right extends outside the home. But that is not the question. The question is not whether the Second Amendment — which protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home," *District of Columbia v. Heller* (2008) — has any application outside the home. Rather, it is whether New York's law (as applied to the petitioners) is compatible with the Second Amendment (as applied to the states by the Fourteenth Amendment). On that question, the petitioners offer only a selective, skewed and incorrect view of the history.

This brief seeks to set the record straight. Public-carry laws like the one at issue here enjoy an almost singularly impressive historical lineage among firearms regulations. We begin with the English history — the centuries-old prohibition on carrying firearms in populated public places dating back to the Statute of Northampton in 1328. The petitioners try to alter the meaning of this English prohibition, claiming that it "prohibited the carrying of arms only with intent to terrorize." But the historical materials reveal otherwise.

We then turn to America: Contrary to the petitioners' telling, the history shows that, from our nation's founding to its reconstruction, many states and cities enacted laws prohibiting carrying a firearm in populated public places (either generally or without good cause) and that these laws operated as criminal prohibitions.

Next, we discuss the 19th-century American case law. Although the petitioners cherry-pick a few cases to support their view, those cases emanate almost exclusively from the slaveholding South — a part of the country that took an outlier approach to public carry and that included wide variability even within the region.

Finally, we address the petitioners' efforts to direct the court's attention to laws from the postbellum South that "disarmed disfavored groups." Those overtly racist laws in no way undermine the separate tradition of regulating public carry by all citizens. And the petitioners' attempt to characterize New York's law as discriminating against Italian-Americans is simply mistaken.

When taken as a whole, the historical record here is overwhelming — so much so that the outcome follows almost *a fortiori* [with greater reason or more convincing force] from this court's cases. Not only is there a long tradition of regulating public carry, but even the uncontested history is longstanding: The petitioners do not dispute that dozens of states and cities from the mid-19th century to the early-20th century enacted laws that were at least as restrictive as New York's law. When this unrebutted history is added to the long tradition of public-carry regulations, there can be no doubt that New York's law is constitutional.

If Justice Brett Kavanaugh is correct that "history and tradition show that a variety of gun regulations have co-existed with the Second Amendment right and are consistent with that right," then the regulation here must surely be among them. — *Heller v. District of Columbia* (D.C. Cir. 2011). A contrary conclusion would undermine not just public safety but public confidence in originalism itself.

Cons,

To set aside the body of historical evidence in this case, while claiming the mantle of originalism, would only serve to diminish it — reducing the methodology to little more than an exercise in picking out one's friends in a crowd of historical sources.

BEFORE THE COURT IN *New York State Rifle & Pistol Association v. Bruen*

The Justices Weigh in on Concealed-Carry Permits

At 10 a.m. on Nov. 3, 2021, the U.S. Supreme Court heard oral arguments for case number 20-843 *New York State Rifle & Pistol Association, Inc.* et al. *v Kevin P. Bruen* et al. At 11:58 a.m., arguments were concluded, and the case was submitted for judgment. Following are excerpts from the arguments of Paul Clement, counsel of record for New York State Rifle & Pistol Association *et al.*, and Barbara Underwood, New York state solicitor general. Questions were presented from the nine Supreme Court justices via teleconference.

Argument on Behalf of New York State Rifle & Pistol Association *et al.*

CHIEF JUSTICE ROBERTS: Mr. Clement, you talked about the right applying in any location typically open to the general public. I'd like to get some sense about what you believe could be off limits, like university campuses. Could they say you're not allowed to carry on a university campus?

MR. CLEMENT: I think the answer to your question is yes. And I think that what I would say, though, first of all, is the language I was talking about, any location open to the general public, that's right from the license denial ... so that wasn't loose language on my part. That's right there from where we are told, in capital letters, where we cannot carry, any location, all caps, typically open to —

CHIEF JUSTICE ROBERTS: Well, what sort of place do you think they could be excluded from? In other words, you can get a permit, but the state can impose certain restrictions — for example, any place in which alcohol is served. Can they say you cannot carry your gun at any place where alcohol is served?

A: Probably the right way to look at those cases would be look at them case by case and say, OK, this court in *Heller*, for example, said sensitive places include government buildings and schools. I think those, you can probably tap into a pretty good tradition. I think any place that served alcohol would be a tougher case for the government. I think we would have a stronger case. They might be able to condition the license holder on not consuming any alcohol. There might be a variety of laws.

CHIEF JUSTICE ROBERTS: What about a football stadium?

MR. CLEMENT: I think, again, football stadium, you probably take it on its own and look to the historical analogs. But if I could offer some general principles, I think there's two principles. One is, you know, restriction of access to the place is something that I think would be consistent with the way government buildings have worked and schools have worked. Not any member of the general public can come in there. They restrict access. With or without a gun, if you're an adult that has no business to be in a school, you're excluded. So I think that's a factor that would support treating that as a sensitive place. A second principle that I would offer is these sensitive place restrictions really are a different animal than a carry restriction because I think a true sensitive place restriction is not just going to limit your ability to carry concealed, but it's going to be, say, this is a place where no weapons are allowed. Whether they're firearms or other weapons, no weapons are allowed. And then the third point that I would say — and this is just an analogy, but I think it's a useful analogy — is I think the way to think about this is a little like

the nonpublic forum doctrine in the First Amendment, which is you start with the place and you try to understand, is this a place where, given the nature of the place, its function, its restrictions on access, that weapons are out of place?

JUSTICE KAGAN: But what the chief justice is trying to do is figure out how those cash out in the real world. So I'll give you a few more. New York City subways.

A: So, I think that the question of whether you could restrict arms in the subways, you'd have to go through the analysis, I think, and say, is there a restriction on access generally?

JUSTICE KAGAN: No, I mean, I got the analysis, all three parts of it. How does it cash out? What does it mean?

A: I don't know how those are going to cash out in particular cases because I think the way that you would normally deal with that is you'd look at all the briefing we had in this case on the history of these various things. And so, on behalf of my individual clients, I suppose I could give away the subway because they're not in Manhattan. They're in Rensselaer County.

JUSTICE KAGAN: But you can't say, there are 50,000 people in one place, a ballpark, they're all on top of each other, we don't want guns there. The city or the state couldn't do that?

A: I think they might well be able to because, again, you can't get into Yankee Stadium without a ticket. I don't know enough about Yankee Stadium. But a lot of these stadiums are not run by the government anyway. So, if a private entity wants to restrict access, I don't know where the state action is for there to be a second —

JUSTICE KAGAN: Suppose the state says no protest or event that has more than 10,000 people.

A: I think that might be trickier. Maybe they could justify that under strict scrutiny, but I don't think that would be a sensitive-places restriction.

Argument on Behalf of Kevin P. Bruen *et al.*

MS. UNDERWOOD: In total, from the founding era through the 20th century, at least 20 states have at one time or another either prohibited all carrying of handguns in populous areas or limited it to those with good cause. New York's law fits well within that tradition of regulating public carry. It makes a carry license available to any person not disqualified who has a non-speculative reason to carry a handgun for self-defense. New York is not an outlier in the extent to which the state restricts the ability to carry firearms in public, and it's not an outlier in asking a licensed applicant to show good cause for a carry license.

JUSTICE THOMAS: General Underwood, you seem to rely a bit on the density of the population. You say, I think, that states like New York have high-density areas. And implicit in that is that the more rural an area is, the more unnecessary a strict rule is. So, when you suggest that, how rural does the area have to be before your restrictions shouldn't apply?

A: I think the way the New York statute works is consistent with a reasonable rule, which is that there's not a cutoff, there's not a number at which things change, but that unrestricted licenses are much more readily available in less densely populated upstate counties than they are in dense metropolitan areas. And that is a virtue of the system of having licenses handled by licensing officers who are part of the local community and who take the density of population into account, as well as many other factors.

JUSTICE THOMAS: Mr. Nash lives in quite a low-density area. That's why I'm interested in where your cutoff is. It's one thing to talk about Manhattan or NYU's [New York University's] campus. It's another to talk about rural upstate New York.

A: He actually lives in what I would call an intermediate area. He lives in Rensselaer County, which is not that far from Albany, and it contains the city of Troy and a university and a downtown shopping district, but it also contains substantial rural areas. And that is precisely what the licensing officer here was taking into account when he made the differentiation between, don't take it to the shopping mall, don't take it downtown, but you can take it in the sort of back-country areas. ...

JUSTICE ALITO: I want you to think about people who work late at night in Manhattan. It might be somebody who cleans offices, it might be a doorman at an apartment, it might be a nurse or an orderly, it might be somebody who washes dishes. None of these people has a criminal record. They're all law-abiding citizens. They get off work around midnight, maybe even after midnight. They have to commute home by subway, maybe by bus. When they arrive at the subway station or the bus stop, they have to walk some distance through a high-crime area, and they apply for a license, and they say: Look, nobody has said I am going to mug you next Thursday. However, there have been a lot of muggings in this area, and I am scared to death. They do not get licenses, is that right?

A: That is in general right, yes. If there's nothing particular to them, that's right.

JUSTICE ALITO: How is that consistent with the core right to self-defense, which is protected by the Second Amendment?

A: Because the core right to self-defense, as this court said, doesn't allow for all to be armed for all possible confrontations in all places.

JUSTICE ALITO: No, it doesn't, but does it mean that there is the right to self-defense for celebrities and state judges and retired police officers but pretty much not for the kind of ordinary people who have felt need to carry a gun to protect themselves?

A: Mr. Nash had a concern about his parking lot, and he got a permit. I think the extra problem in Manhattan is that your hypothetical quite appropriately entailed the subways, entailed public transit, and there are lots of people on the subways even at midnight, as I can say from personal experience, and the particular specter of a lot of armed people in an enclosed space —

JUSTICE ALITO: There are a lot of armed people on the streets of New York and in the subways late at night right now, aren't there?

A: I don't know that there are a lot of armed people. ...

JUSTICE ALITO: How many illegal guns were seized by the New York Police Department last year? Do you have any idea?

A: I don't have that number, but I'm sure it's a substantial number.

JUSTICE ALITO: But all these people with illegal guns, they're on the subway, they're walking around the streets, but the ordinary, hard-working, law-abiding people I mentioned, no, they can't be armed?

A: I think the subways are protected by the transit police because the idea of proliferating arms on the subway is precisely, I think, what terrifies a great many people. The other point is that proliferating guns in a populated area where there is law enforcement jeopardizes law enforcement because, when they come, they now can't tell who's shooting, and the shooting proliferates and accelerates. And, in the end, that's why there's a substantial law enforcement interest in not having widespread carrying of guns.

GLOSSARY
Definition of Common Legal Terms Used in *Supreme Court Debates*

Appellate court — The intermediary level of the U.S. federal judicial system, between the district court and the U.S. Supreme Court. There are 13 circuit courts, which review the decisions of the lower courts to determine if the law was correctly applied.

Bill of Rights — The first 10 amendments to the U.S. Constitution, guarantees of individual freedoms, were ratified in 1791 to address concerns of those who thought the powers of the federal government required explicit limitations.

Certiorari – A written order from a higher court, such as the U.S. Supreme Court, to review a lower court's decision.

Dictum — Text in a court's opinion that is not considered essential to the decision or binding precedent.

District court — The lowest level of the U.S. federal judicial system, comprised of 94 courts located in every U.S. state and the District of Columbia.

Eighth Amendment — A part of the Bill of Rights, it prohibits the imposition of "excessive" bail and fines and bans "cruel and unusual" punishment. The amendment has been cited by opponents of capital punishment as grounds for curtailing or abolishing the practice.

En banc — In the circuit court system, an *en banc* rehearing is when all the judges on the appellate court together review the decision of a three-judge panel at the request of one of the parties. Such requests are rarely granted.

Fifth Amendment — A part of the Bill of Rights, it guarantees the right to a grand jury review of criminal charges and prohibits being tried for the same crime after an acquittal. It prevents individuals from being forced to testify against themselves, giving rise to the term "pleading the Fifth." It also prevents persons from being deprived of "life, liberty, or property" without due process of law.

First Amendment — A part of the Bill of Rights, it prohibits the establishment of a state religion and protects the right of individuals to practice their faith. It also establishes the right to free speech and a free press, and the rights of individuals to assemble and communicate with and lobby government officials.

Fourteenth Amendment — Passed following the U.S. Civil War, it guarantees the rights of citizenship to all born or naturalized in the United States and ensures that they have the "equal protection of the laws." The Supreme Court has interpreted this as extending the protections of the Bill of Rights to cover state actions in addition to those of the federal government.

Fourth Amendment — A part of the Bill of Rights, it protects individuals from "unreasonable" government searches that are conducted without probable cause and judge-issued warrants.

Habeas corpus — A legal challenge to the state's authority to hold a person in custody.

Mens Rea — A "knowledge of wrongdoing" by an individual that in some instances is a necessary component of a criminal act.

Ninth Amendment — A part of the Bill of Rights, it clarifies that "the people" retain rights outside of those explicitly defined by the Constitution. The amendment has been interpreted by the Supreme Court to include a "right to privacy."

Per curiam decision — An unsigned opinion issued by the court.

Prima facie — Evidence in a trial that is, without direct contradiction, enough to prove the case.

Scienter — The intent or knowledge of "wrongdoing," which is often an essential element of a criminal offense.

Second Amendment — A part of the Bill of Rights, it protects the personal right to own a firearm, noting that a "well-regulated militia" is "necessary to the security of a free State."

Sixth Amendment — A part of the Bill of Rights, it guarantees the right to a speedy trial by an impartial jury on clearly defined charges with the assistance of legal counsel and the ability to present defense witnesses and confront witnesses supporting the prosecution.

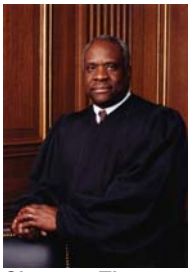
Stare decisis — The legal doctrine holding that courts should defer to previous judicial decisions when considering cases involving similar questions of law.

Supreme Court — The highest court of legal authority in the United States, the Supreme Court is comprised of nine justices nominated by the president and confirmed by the Senate to lifetime appointments.

Tenth Amendment — A part of the Bill of Rights, it assigns powers not explicitly given to the U.S. government to the states or the people. Advocates for a smaller federal government point to this amendment as supporting their views, although the Supreme Court only recently has begun to entertain that idea.

Supreme Court of the United States

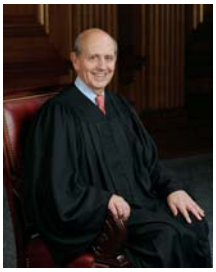
John D. Roberts, Chief Justice
State: Maryland | *Appointed by:* G.W. Bush | *Appointment Date:* Sept. 29, 2005



Clarence Thomas
State: Georgia
Appointed by: G. Bush
Appointment Date: Oct. 23, 1991

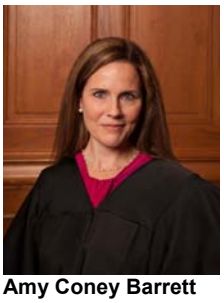
Sonia Sotomayor
State: New York
Appointed by: Obama
Appointment Date: Aug. 6, 2009

Brett Kavanaugh
State: Maryland
Appointed by: Trump
Appointment Date: Oct. 6, 2019



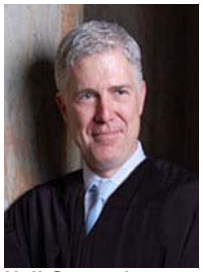
Stephen Breyer
State: California
Appointed by: Clinton
Appointment Date: Aug. 3, 1994

Elena Kagan
State: New York
Appointed by: Obama
Appointment Date: Aug. 7, 2010



Amy Coney Barrett
State: Indiana
Appointed by: Trump
Appointment Date: Oct. 26, 2020

Samuel A. Alito Jr.
State: New Jersey
Appointed by: G.W. Bush
Appointment Date: Jan. 31, 2006



Neil Gorsuch
State: Colorado
Appointed by: Trump
Appointment Date: Apr. 10, 2017