

No. 20-843

In the Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC.,
ET AL., PETITIONERS

v.

KEVIN P. BRUEN, IN HIS OFFICIAL CAPACITY AS
SUPERINTENDENT OF THE NEW YORK STATE POLICE,
ET AL.,

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

**BRIEF FOR THE AMERICAN BAR ASSOCIATION
AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.3, the American Bar Association (“ABA”), as *amicus curiae*, respectfully submits that the decision of the Second Circuit should be affirmed consistent with the authority State and local governments have long enjoyed to fashion firearm carry regulation in light of public safety and other local considerations, within constitutional constraints.¹

The ABA is the largest voluntary association of attorneys and legal professionals in the world. Its members come from all fifty States, the District of Columbia, and the United States territories. Its membership includes attorneys in law firms, corporations, nonprofit organizations, and local, State, and federal governments, as well as judges, legislators, law professors, law students, and associates in related fields.² The ABA’s mission is “to serve

¹ Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief, in whole or in part, and that no person other than *amicus* or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Petitioners granted blanket consent for *amicus* briefs, and *amicus* received Respondents’ consent to file this brief.

² Neither this brief nor the decision to file it should be interpreted to reflect the views of any member of the judiciary associated with the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession.”³

Consistent with its mission, the ABA has studied firearm regulation for over a century, and began debating and issuing firearms policies following the assassination of President John F. Kennedy in 1963. As the ABA recently observed in a letter to Congress, approximately “40,000 Americans a year die from gun violence—including homicides, suicides, and unintentional shootings,” but this “staggering death toll is not inevitable” and can be addressed by evidence-based policies that are fully consistent with the Constitution.⁴ To better inform lawmakers, agencies, and the public, the ABA has issued numerous policy statements and reports on firearms regulation, gun violence, and the Second Amendment.⁵ These policy statements and reports are based on a significant foundation of research directed by the ABA’s Standing Committee on Gun Violence and conducted in coordination with other sections of the ABA, including the Section of Civil Rights and Social Justice, the Commission on Domestic and Sexual Violence, the Section of Litigation, the Section

³ Am. Bar Ass’n, *ABA Mission and Goals*, https://www.americanbar.org/about_the_aba/aba-mission-goals/ (last visited Sept. 18, 2021).

⁴ Letter from Patricia Lee Refo, President of the ABA, to the Committee on the Judiciary, U.S. Senate (Mar. 29, 2021), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/gun-violence-senate-judiciary.pdf (last visited Sept. 18, 2021).

⁵ *See, e.g.*, ABA Report with Recommendation 10E (Standing Committee on Gun Violence) (adopted Aug. 1994), https://www.americanbar.org/groups/public_interest/gun_violence/policy/94A10E/ (last visited Sept. 18, 2021).

of Criminal Justice, and the Section of State and Local Government Law. In formulating such policies, the ABA has called upon prosecutors, defense lawyers, judges, and other practitioners who deal every day with the consequences of gun violence and have a strong interest in clarity and stability in this area of the law.

Based on that extensive study and the input of a wide range of participants, ten years ago the ABA adopted a policy on concealed carry (the “Concealed Carry Policy”),⁶ which urged States that allow the carrying of concealed firearms in public to adopt “may issue” licensing regimes. The Concealed Carry Policy advocates a grant of broad discretion to law enforcement authorities to determine, within defined standards and subject to judicial review, whether a permit or license should be issued. In the same vein, the ABA has opposed State “shall issue” legislation that would limit such discretion by requiring issuance of a license or permit to persons simply because they satisfy minimum requirements. Moreover, in recent years, the ABA has adopted several additional policies favoring strengthened regulation of the carrying of firearms in and around certain public places, including courtrooms and courthouses, other government buildings, and polling places and election offices.⁷

⁶ ABA Report with Resolution 11A115 (Standing Committee on Gun Violence) (Aug. 2011), https://www.americanbar.org/groups/public_interest/gun_violence/policy/11A115/ (last visited Sept. 18, 2021).

⁷ ABA Report with Resolution 19A105 (Standing Committee on Gun Violence) (Aug. 2019), https://www.americanbar.org/groups/public_interest/gun_violence/policy/19A105/ (last visited Sept. 18, 2021); ABA Report with Resolution 19M106A (Standing Committee on Gun Violence) (Jan. 2019), https://www.americanbar.org/groups/public_interest/gun_violence/policy/19M106A/ (last visited July 29, 2021); ABA Report with Resolution 21M111 (Standing Committee on Gun

In addition to in-depth study of the most effective forms of firearm carry regulation, the ABA’s advocacy for certain regulatory regimes is founded on the longstanding principle that State and local governments—whose jurisdictions vary in population size, density, and conditions—should be able to exercise their discretion in fashioning requirements tailored to local needs, within constitutional limits. By the same token, the ABA has consistently opposed federal legislation that would interfere with and weaken State protections, such as legislation requiring States to grant reciprocity to carry licenses issued by other States with weaker standards,⁸ or legislation preventing States from permitting liability against gun dealers and manufacturers.⁹

SUMMARY OF ARGUMENT

As this Court has recognized, the right of State and local governments to tailor firearms regulations to their judgments about public safety in light of local needs is a critical component of a State’s police powers. State and local governments have, over centuries, experimented with diverse approaches to the regulation of concealed carry, and these approaches have evolved over time in response to changes in local conditions and judgments about how best to protect the public’s safety in the public

Violence) (July 2021), https://www.americanbar.org/groups/public_interest/gun_violence/policy/21m111/ (last visited Sept. 18, 2021); see also ABA Standing Committee on Gun Violence, *Gun Violence Laws and the Second Amendment: A Report of the American Bar Association*, Am. Bar Ass’n, (Feb. 6, 2015), available at https://www.americanbar.org/content/dam/aba/images/abanews/GunViolenceWhitePaper_020615.pdf (last visited Sept. 18, 2021).

⁸ ABA Report with Resolution 11A115, *supra* note 6.

⁹ Refo, *supra* note 4.

square.¹⁰ Based on its extensive study of firearms issues, the ABA believes that overturning the decision below would disrupt the reliance interests of State and local governments in their continued regulatory flexibility over concealed carry issues.

In exercising their broad police power to protect public health and safety in the context of concealed carry, State and local governments take into account their communities' particular characteristics, including varying levels of population density, access to first-responder services, and other local conditions. They also weigh a number of factors, including the risk that everyday confrontations and minor annoyances might escalate into life-threatening events, the risk that more guns in the public square will cause more guns to fall into the hands of criminals or others who should not possess guns, and the risk that law enforcement encounters with persons with concealed weapons could result in miscommunication and potential injury or death. In addition, many States use concealed carry regulations as a tool to protect victims and potential victims of domestic and intimate partner violence, as evidence shows that such violence spills beyond the home into public spaces. In the ABA's view, it would be disruptive to centuries of settled practice—and deleterious to the protection of human life—to revoke State and local governments' flexibility to balance these interests in fashioning concealed carry regulation.

Respecting State and local government reliance interests is fully compatible with the Second Amendment. In-

¹⁰ See Saul Cornell, *The Early American Origins of the Modern Gun Control Debate: The Right to Bear Arms, Firearms Regulation, and the Lessons of History*, 17 *Stan. L. & Pol'y Rev.* 571, 580–82 (2006).

deed, when this Court held in *Heller* that law-abiding, responsible citizens are guaranteed the right to possess a handgun in the home for self-defense, the Court explained that its decision did not invalidate “longstanding prohibitions on the possession of firearms” such as those prohibiting possession by felons or the mentally ill, among other “presumptively lawful regulatory measures.” *D.C. v. Heller*, 554 U.S. 570, 626 & n.26 (2008). Among such “longstanding” and “presumptively lawful” prohibitions is concealed carry regulation, an essential tool States have used for centuries to stem gun violence.

ARGUMENT

I. THE COURT SHOULD NOT DISTURB STATE AND LOCAL GOVERNMENTS’ LONGSTANDING ABILITY TO TAILOR FIREARM CARRY REGULATION TO LOCAL CONDITIONS AND NEEDS, WITHIN CONSTITUTIONAL CONSTRAINTS

A. Consistent With Their Longstanding Authority, State And Local Governments Have Taken Diverse Approaches To Carry Regulation And These Approaches Have Evolved Over Time

This Court’s decision in *McDonald* emphasized the right to experiment with and tailor firearms regulations, recognizing that the Second Amendment “*limits* (but by no means eliminates) [a State’s] ability to devise solutions to social problems that suit local needs and values” and that “[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment.” *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 784–85 (2010); *see also Bond v. United States*, 564 U.S. 211, 221 (2011) (Constitution’s “federal structure allows local policies more sensitive to the diverse needs of a heterogeneous society, permits innovation and experimentation, . . . and makes government more responsive by

putting the States in competition for a mobile citizenry”) (citation omitted). The diversity of State regulatory approaches to concealed carry, and the evolution of these approaches over time, demonstrate the many nuanced ways in which State legislatures have addressed public-safety needs and local conditions. This history affords State and local governments strong reliance interests in retaining their authority to continue to adjust their regulatory approaches as judgments about safety and other local needs continue to develop.

In adopting its Concealed Carry Policy, the ABA traced the history of State regulatory approaches. That research shows that many States have long recognized the dangers associated with the carrying of hidden, loaded weapons. By the early 19th century, it became commonplace for those States to adopt laws prohibiting concealed carry, which have long survived judicial scrutiny.¹¹ As the *Heller* Court observed, “the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.” 554 U.S. at 626. It was in reference to these historical cases that the *Heller* Court noted that “commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Id.*

¹¹ ABA Report with Resolution 11A115, *supra* note 6 (citing Cornell, *supra* note 10).

“May issue” laws draw their historical lineage from public carry regulations adopted by a number of American colonies and States between 1692 and 1801,¹² as well as “good cause” laws passed in several States in the early- and mid-19th century.¹³ In the early 20th century, many States adopted concealed carry laws giving law enforcement discretion to grant concealed carry permits based on statutory factors, such as whether the applicant has a justifiable need to carry a concealed weapon. These laws, largely modeled on the Uniform Act to Regulate the Sale and Possession of Firearms, permitted the grant of a license only when those officials determined that an applicant had “good reason to fear an injury to his person or property.”¹⁴

New York’s history of firearms regulation reaches further back yet. As the Second Circuit noted in *Kachalsky v. County of Westchester* in upholding New York’s concealed carry regime, “New York’s efforts in regulating the possession and use of firearms predate the Constitution.” 701 F.3d 81, 84 (2d Cir. 2012). New York’s current “may issue” regulatory scheme dates back to amendments passed in 1913 to the State’s Sullivan Law, which required that a license applicant demonstrate “good moral character, and that proper cause exists for the issuance [of the

¹² *E.g.*, 1794 Mass. Acts 66, Ch. 26 (Jan. 29, 1795); Act for Establishing Courts, 1699, N.H. Laws 1 (Fowle 1761); 1686 N.J. Laws 289, Ch. 9 (Leaming & Spicer, 2d ed. 1881); 1801 Tenn. Laws 74, Ch. 22 (Roulstone); 1786, Va. Acts 33, Ch. 21 (Davis 1794).

¹³ Massachusetts, for example, passed its “good cause” law in 1836. 1836 Mass. Laws 748, 750, ch. 134, § 16.

¹⁴ Cody J. Jacobs, *Guns in the Private Square*, U. Ill. L. Rev. 1098, 1104 (2020).

license].” 1913 Laws of N.Y., ch. 608, at 1627–30; *see also Kachalsky*, 701 F.3d at 85.

Only in the 1980’s did State legislatures begin to pass “shall issue” concealed carry laws in earnest—before that time, “may issue” licensing regimes were in fact predominant in the United States.¹⁵ For example, as of 1987, concealed carry was generally prohibited in 16 States, the District of Columbia, and three U.S. territories; 26 States and two U.S. territories had “may issue” licensing regimes; seven States had “shall issue” laws; and only one State (Vermont) allowed “permitless” carry.¹⁶ “Permitless” carry is of even more recent vintage: Only in 2003 did Alaska become the second State not to require a permit to carry a concealed weapon.¹⁷ Indeed, of the 21 “permitless” carry States, 18 revoked their permit requirements only in the last six years—including five in 2021 alone.¹⁸

¹⁵ Larry Arnold, *The History of Concealed Carry, 1976–2011*, Tex. Handgun Ass’n, <https://txhga.org/texas-ltc-information/a-history-of-concealed-carry/> (last visited Sept. 18, 2021).

¹⁶ William J. Krouse, *Gun Control: Concealed Carry Legislation in the 115th Congress*, Congressional Research Service (Jan. 30, 2018), <https://fas.org/sgp/crs/misc/IN10852.pdf>.

¹⁷ Alaska Stat. § 11.61.220(a).

¹⁸ Ark. Code Ann. §§ 5-73-101, 5-73-120(c)(4) (2019); Idaho Code § 18-3302 (2015); Iowa Code § 724.5 (2021); Kan. Stat. Ann. § 21-6302(4) (2015); Ky. Rev. Stat. Ann. §§ 237.110, 527.020 (2019); Me. Rev. Stat. tit. 25, § 2001-A et seq. (2015); Miss Code Ann. § 97-37-7(24) (2016); Mo. Rev. Stat. §§ 571.030 (2016); Mont. Code Ann. § 45-8-316 (2021); 2017 NH SB 12 (2017); N.D. Cent. Code §§ 62.1-02-04 – 62.1-02-05, 62.1-04-01 – 62.1-04-05 (2017); Okla. Stat. tit. 21, §§ 1277, 1290.1 – 1290.26 (2019); S.D. Codified Laws §§ 23-7-7 – 23-7-8.6, 22-14-23, 13-32-7 (2019); Tenn. Code Ann. § 39-17-1307 (2021); Texas Penal Code

Today, at least 21 States, such as Alabama, Minnesota, Nebraska, and South Carolina, operate a “shall issue” permitting regime;¹⁹ and at least six States, such as California, Massachusetts, New Jersey, and New York, and the District of Columbia have a “may issue” permitting regime.²⁰

Even within these broad categories, States take distinct approaches in light of their particular judgments and needs. Among the “shall issue” States, there is wide variability in the basic terms of issuance, including differences in eligibility considerations, the extensiveness of background checks, and ongoing eligibility monitoring. Moreover, of “shall issue” States, several including Alabama, Colorado, Georgia, Oregon, and Virginia, grant limited discretion to the issuing authority to deny a license based, for example, on a “reasonable suspicion that the person may use a weapon unlawfully or in such other manner that would endanger the person’s self or others.”²¹ By contrast, several “shall issue” States, such as Louisiana,

§ 46.02 (2021); Utah Code Ann. § 76-10-523 (2021); W. Va. Code § 61-7-3 (2016); Wyo. Stat. Ann. § 6-8-104 (2016).

¹⁹ Ala. Code § 13A-11-75; Minn. Stat. § 624.714; Neb. Rev. Stat. Ann. §§ 28-1202, 69-2427 – 69-2449; S.C. Code Ann. §§ 23-31-210 – 23-31-240, 16-23-20, 16-23-420, 16-23-430, 16-23-460, 16-23-465.

²⁰ Cal. Penal Code §§ 25400 – 25700, 26150 – 26225; Mass. Gen. Laws ch. 140, §§ 131, 131C, 131P, ch. 269, § 10; N.J. Stat. Ann. §§ 2C:58-3, 2C:58-4, 2C:39-5; N.Y. Penal Law §§ 265.01, 265.20, 400.00; D.C. Code Ann. § 22-4506. Because Connecticut and Delaware’s approaches can be categorized as “shall issue” or “may issue” based on different factors, they have been left out of these tallies.

²¹ Ala. Code § 13A-11-75(a)(1)(a); Colo. Rev. Stat. §§ 18-12-203, 18-12-215; Ga. Code Ann. § 16-11-126 – 16-11-130; Or. Rev. Stat. §§ 166.291 – 166.297, 166.370; Va. Code Ann. §§ 18.2-308 – 18.2-308.015, 18.2-283, 18.2-283.1, 18.2-287.01.

Nevada, Ohio, and Wisconsin, grant no such discretion whatsoever.²²

The several “may issue” jurisdictions also exhibit variation. In California, good cause must exist for issuance of a concealed carry license.²³ New Jersey requires “a justifiable need to carry a handgun.”²⁴ New York requires proper cause, which has been defined as “an actual and articulable—rather than merely speculative or specious—need for self-defense.” *Kachalsky*, 701 F.3d at 98. (This “proper cause” standard applies to applications for *unrestricted* concealed carry licenses. New York also provides licenses for keeping firearms at one’s home and business, and licenses for concealed carry in certain types of employment. In addition, a licensing officer may deny an *unrestricted* license, but permit concealed carry in specified settings.²⁵) All but one of the “may issue” jurisdictions also require applicants to be of good character in order to receive a concealed carry license. And all but three of the “may issue” jurisdictions (in addition to over a dozen “shall issue” jurisdictions and a similar number of “permitless” carry States) require applicants or individuals

²² La. Rev. Stat. Ann. §§ 40:1379.1, 40:1379.3, 40:1379.3.1; Nev. Rev. Stat. Ann. §§ 202.3653 – 202.369; Ohio Rev. Code Ann. §§ 2923.11 – 2923.1213; Wis. Stat. § 175.60.

²³ Cal. Penal Code § 26225. Good cause exists “if there is convincing evidence of a clear and present danger to life or of great bodily [harm] to the applicant, his (or her) spouse, or dependent child, which cannot be adequately dealt with by existing law enforcement resources, and which danger cannot be reasonably avoided by alternative measures, and which danger would be significantly mitigated by the applicant’s carrying of a concealed firearm.” *Gifford v. City of Los Angeles*, 88 Cal. App. 4th 801, 803 (2001).

²⁴ N.J. Rev. Stat. § 2C:58-4(c) (2013).

²⁵ See N.Y. Penal Law § 400.00; see also *infra* note 26.

carrying concealed weapons to demonstrate knowledge of firearm safety, including some jurisdictions that require live fire training.

Further variation exists within States. In New York, for example, the statutory scheme permits New York City to set stricter licensing standards than other, less densely populated parts of the State. In recognition of the heightened dangers posed by firearms in dense urban settings, New York City does not recognize concealed carry permits issued in other parts of the State. N.Y. Penal Law § 400.00(6). Instead, New York City is permitted to set more stringent regulations, such as the categorical denial of licenses to individuals who have been the subject of an order of protection or who have a history of one or more incidents of domestic violence. 38 R.C.N.Y. §§ 5-10(f), (g); *see Taveras v. New York City, New York*, No. 20 CIV. 1200 (KPF), 2021 WL 185212 (S.D.N.Y. Jan. 17, 2021) (discussing same licensing scheme relating to rifles and shotguns).²⁶

²⁶ Because petitioners Nash and Koch reside in Rensselaer County, not New York City, their license applications were evaluated under the state's general licensing statute. Both petitioners were already licensed to keep firearms in their dwellings and engaged in concealed carry for hunting and target practice. J.A. 121-125. Petitioners' applications for unrestricted concealed carry were considered by a state court judge (state court judges serve as licensing officers in Rensselaer and most other New York counties). The judge's discretion to determine "proper cause" was, as petitioners have explained, "cabined by the significant body of New York case-law defining that term." J.A. 103. After considering the facts and circumstances presented in their written submissions and individual hearings, the judge found that petitioners failed to establish proper cause to support their requests for unrestricted concealed carry, but stated that petitioners' hunting and target practice licenses permitted them to engage in concealed carry for "off road, back country activities similar to hunting,

Furthermore, each State’s regulatory approach to concealed carry does not exist in a vacuum; rather, regulating concealed carry is part of a State’s broader set of policy decisions regulating the use of deadly force. Many “may issue” States, for instance, couple their concealed carry policy with a more restrictive deadly force policy, imposing a duty to retreat before using deadly force if outside of one’s home.²⁷

This variation in State and local approaches, and their continued evolution over time, reflect State and local lawmakers’ judgments about how public safety is best addressed in light of local needs and conditions. The Court should not disturb States’ longstanding reliance interests in this regulatory flexibility. And given the complexity and nuance across different States’ approaches, it would not be an easy matter for courts to draw clear lines between valid and invalid regulatory regimes.

B. State And Local Governments’ Diverse Approaches To Carry Regulation Reflect Evolving Judgments About How Best To Protect Public Safety

This Court has long recognized that States enjoy broad police power authority to protect and promote public health and safety. *See Berman v. Parker*, 348 U.S. 26, 32 (1954) (“Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate

for example, fishing, hiking [and] camping,” and, in addition, Petitioner Koch was licensed to engage in concealed carry to and from his work. J.A. 114; J.A. 41. There is no indication that petitioners invoked their right to judicial review to challenge the judge’s application of the proper cause standard to the facts presented.

²⁷ *See, e.g.*, Cal. Penal Code § 198.5; Mass. Gen. Laws Ann. ch. 278, § 8A; N.Y. Penal Law § 35.15.

the scope of the power and do not delimit it.”); *see also* *United States v. Morrison*, 529 U.S. 598, 599 (2000) (holding that police power—including “the suppression of violent crime”—is “undeniably left reposed to the States and denied the central Government”).

The application of this police power entails the flexibility, within constitutional limits, to take local needs and conditions into account. Constitutional rights apply across the nation, but the application of those rights to different settings and circumstances necessarily varies and reflects State and local governments’ legitimate, particularized judgments. Recognizing these differences in application “does not mean creating separate rights, at least not any more than the various rules governing speech regulations in public parks, military bases, and schools indicate a multiplicity of First Amendment rights.”²⁸

The ABA’s view on the importance of preserving State and local regulatory flexibility with respect to concealed carry is ultimately rooted in the experiences of the ABA’s broad and diverse membership. As the largest voluntary association of attorneys and legal professionals in the country (and the world), those experiences are drawn from rural, suburban, and urban America; an array of vantage points (including prosecutors, defense counsel, judges, and law enforcement officials); and expertise in particular topics, such as domestic violence.

²⁸ Joseph Blocher, *Firearm Localism*, 123 *Yale L.J.* 82, 128 (2013); *see also* Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 *Tex. L. Rev.* 1129, 1133 (1999).

1. *Different Approaches To Carry Regulation Appropriately Reflect Differences In Conditions And Needs Across States And Localities*

The ABA recognizes that differences in conditions and needs across States and localities require different responses to public-safety threats. Certain local conditions, including differences in geography and population density, render certain regulatory responses effective and appropriate where they may not be so elsewhere.

The ABA’s policies have been crafted with this in mind: States should have the flexibility to effectively regulate in the public interest and respond to their communities’ specific circumstances. Thus, for example, policies best-suited to rural areas—where individuals are more likely to be distant from law enforcement and responsible for being their own first responders—may be different than policies best-suited for urban areas—where law enforcement is readily at hand. As one court observed, the fact “[t]hat problems with firearms are likely to require different treatment in San Francisco County than in Mono County should require no elaborate citation of authority.” *Galvan v. Superior Ct. of City & Cnty. of San Francisco*, 70 Cal. 2d 851, 864 (Cal. 1969). On an even more localized level, both the ABA and States across the country have recognized that certain sensitive places, such as schools and courthouses, require different restrictions on concealed carry than other public spaces.²⁹ Justice Scalia reaffirmed as much in *Heller*, stating that “nothing in our opinion should be taken to cast doubt on longstanding . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.” 554 U.S. at 626.

²⁹ ABA Report with Resolution 19M106A, *supra* note 7; ABA Report with Resolution 19A105, *supra* note 7.

A departure from precedent here that restricted this flexibility would upset public-safety strategies that State legislatures, local governments, and law enforcement authorities have set out and relied upon to suit their particular local conditions for decades, or even centuries. The broad introduction of concealed firearms to areas with historically low gun ownership, for example, could have significant impacts on the number and distribution of police officers. It would also change policing strategies in those places. Although there are areas of the country where, as Justice Thomas noted in *Staples v. United States*, “the common experience [is] that owning a gun is usually licit and blameless conduct,” 511 U.S. 600, 613 (1994), that is less true in other communities where guns—particularly concealed handguns—are strongly associated with violent crime.³⁰ In such settings, police officers responding to a scene would have to make difficult distinctions between the bad actor with a gun and other armed citizens.

Distinguishing between armed civilians and armed criminals would not be the sole challenge faced by law enforcement: In New York City and other large cities, any use of a firearm, even in lawful self-defense or by a police officer, poses grave risks to bystanders. This is particularly true because few confrontations involve only precise shots. Even the NYPD, composed of professionals trained to use firearms under pressure and only when truly necessary for public safety, had an average hit rate of only 18% during gunfights between 1998 and 2006;

³⁰ See Blocher, *supra* note 28, at 92, 94 (noting that the fifty metropolitan areas with more than one million residents suffer a disproportionate share of gun violence, while owning a disproportionately small number of guns).

when there was no return fire, the successful hit rate increased only to 30%.³¹ In a city of over 8 million people (not counting commuters and tourists), with 27,800 residents crammed into each square mile,³² each misfired shot carries the serious potential for needless loss of life.³³

In such densely populated areas, the ability to easily turn to firearms can escalate the everyday confrontations and minor annoyances that characterize dense urban living into life-threatening events.³⁴ Shooting deaths associated with road rage, for example, are on the rise in the

³¹ See Bernard D. Rostker et al., *Evaluation of the New York City Police Department Firearm Training and Firearm-Discharge Review Process* 14 (2008), RAND Center on Quality Policing, http://www.nyc.gov/html/nypd/downloads/pdf/public_information/RAND_FirearmEvaluation.pdf.

³² NYU Furman Ctr., *State of New York City's Housing & Neighborhoods 2020*, (2020), <https://furmancenter.org/stateofthecity/view/citywide-data>.

³³ See, e.g., *Woman Struck in Face with Stray Bullet Inside Brooklyn Apartment*, ABC7 N.Y. (July 9, 2021), <https://abc7ny.com/stray-bullet-woman-shot-through-window-east-new-york-shooting/10874347/>; *She Was Resting With Her Sons. Then a Shot Was Fired*, N.Y. Times (Oct. 1, 2020), <https://www.nytimes.com/2020/10/01/nyregion/nyc-shootings-murders-crime.html>; *20-Year-Old Tourist Killed by Stray Bullet in Brooklyn*, N.Y. Times (Oct. 25, 2020), <https://www.nytimes.com/2020/10/25/nyregion/tourist-killed-brooklyn.html>; *4-Year-Old Girl Among 3 Hit by Stray Bullets in NYC's Times Square*, HuffPost (May 9, 2021), https://www.huffpost.com/entry/times-square-shooting_n_6097d0afe4b0f73e530ead88.

³⁴ It is therefore unsurprising that “may issue” States have higher population densities than the national average. Measured in average population per square mile: United States (93.8); New York (428.7), California, (253.7), Connecticut (744.7), Delaware (508.0), District of Columbia (11,280.0), Hawaii (226.6), Maryland (636.1), Massachusetts (901.2), and New Jersey (1,263.0). *Historical Population Density*

United States; in 2020, an average of 42 people a month were shot and killed or wounded in road rage incidents.³⁵ Transplanting such incidents from freeways to subway cars would multiply the risk to innocent bystanders with no way to escape. A highway in Wyoming is not a subway car in Manhattan—nor must it be regulated like one.

Constricting the ability of State and local lawmakers to tailor concealed carry regulations to local conditions would also upset the reliance interests of everyday Americans who have chosen to live in certain communities because of the prevalence or absence of guns there. Americans have divergent views on the safety that guns either offer or threaten, and have made choices about where to live and raise families as a result. Prohibiting States from setting certain standards for the issuance of concealed carry licenses negates choices that individuals have made to live in areas where concealed carry is or is not widely permitted, and places the cost of reliance on those who

Data (1910-2020), U.S. Census (April 26, 2021), <https://www2.census.gov/programs-surveys/decennial/2020/data/apportionment/population-density-data-table.pdf> (last visited Sept. 18, 2021). New York's population density of 438.7 residents per square mile is approximately 4.67 times higher than the nationwide average density of 93.8 residents per square mile, while the other listed States range from 2.42 times the national average (Hawaii) to 13.46 times the national average (New Jersey). The District of Columbia stands even further afield with a population density of 120.26 times the national average density.

³⁵ Jenni Bergal, *Cops Scramble to Deal With Deadly Road Rage During Pandemic*, Pew (July 13, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/07/13/cops-scramble-to-deal-with-deadly-road-rage-during-pandemic>; see, e.g., *Man Shot in Head During Caught-on-Camera Road Rage Shooting in Brooklyn*, Eyewitness News ABC 7 NY (June 25, 2019), <https://abc7ny.com/man-shot-in-head-during-caught-on-camera-nyc-road-rage-shooting/5363195/>.

chose to root themselves in communities with more stringent standards. *See Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 855 (1992) (“The inquiry into reliance counts the cost of a rule’s repudiation as it would fall on those who have relied reasonably on the rule’s continued application.”).

2. State And Local Concealed Carry Regulations Reflect Important Public-Safety Concerns

In developing its Concealed Carry Policy and related policies, the ABA has identified a number of public-safety interests that underlie “may issue” permitting regimes and that reinforce the importance of preserving State and local government flexibility to continue to adjust regulation to respond to changing threats and conditions.

First, States that require good cause for carrying a concealed firearm are concerned with the public-safety risks of broadly introducing more guns into the public sphere under a “shall issue” approach. Concealed carrying “increases the chance that everyday disputes will escalate into deadly encounters, and the risk that accidental shootings will occur where large numbers of people are gathered.”³⁶ As already noted, these risks are magnified in urban environments characterized by crowded streets and subways.³⁷

³⁶ ABA Report with Resolution 11A115, *supra* note 6.

³⁷ There is no comprehensive federal database of firearm homicides committed by concealed carry licensees, but the Violence Policy Center has documented at least 37 mass shootings (resulting in 183 deaths) perpetrated by concealed carry licensees between 2007 and 2020. Concealed carry licensees have also killed at least 24 law enforcement officers in that same period. *See* Violence Policy Center: Concealed Carry Killers, <https://concealedcarrykillers.org/concealed-carry-killers-background/> (last visited Sept. 18, 2021). Such

Second, the increased circulation of firearms via concealed carry heightens the risk that such firearms will be lost or stolen and then used by criminals, persons in crisis, or those not competent to handle them, such as children. *See Woollard v. Gallagher*, 712 F.3d 865, 879–80 (4th Cir. 2013) (citing the decreased availability of handguns to criminals via theft as a public-safety goal served by “may issue” regimes). At the margin, with more citizens walking the streets, going to work, and running errands carrying firearms, there is an increased risk that bystanders, co-workers, or other individuals can misappropriate the weapons—or come across them by accident—and cause serious injury to themselves or others.

Third, as the ABA has observed, the “concealed carrying of firearms also places law enforcement officers at heightened risk of gun violence.”³⁸ An officer’s encounter with a person carrying a concealed handgun inherently increases the risk of miscommunication and potential discharge. And, as noted earlier, increased firearm possession in the public sphere could complicate an officer’s response to a scene. An officer responding to a shooting could mistake an armed civilian for the shooter, or be delayed in identifying the bad actor. For example, when a man shot and killed three people at a Walmart in the Denver area in 2017, law enforcement noted that shoppers

incidents show that lax standards for the issuance of concealed carry licenses can miss individuals whose concealed carry poses a real threat to public safety.

³⁸ ABA Report with Resolution 11A115, *supra* note 6.

drawing weapons in self-defense “absolutely” slowed the process of identifying the suspect.³⁹

Fourth, empirical evidence shows that “shall issue” regimes are associated with greater gun violence. For example, “shall issue” concealed carry laws are associated with an 11.7% higher handgun homicide rate and 13–15% higher violent crime rate than States with “may issue” systems.⁴⁰ Likewise, the evidence does not support the view that expanding concealed carry has any public-safety benefits. Firearms are rarely used successfully for self-defense,⁴¹ and carrying a firearm may in fact increase a victim’s risk of firearm injury during the commission of a crime.⁴² A 2014 FBI-Texas State University study of 160 active shooter incidents found that only one incident involved a successful intervention by an armed civilian with

³⁹ Kevin Simpson, *Shoppers Pulled Guns in Responses to Thornton Walmart Shooting, But Police Say That Slowed Investigation*, The Denver Post (Nov. 2, 2017), <https://www.denverpost.com/2017/11/02/shoppers-pulled-weapons-walmart-shooting/>.

⁴⁰ Michael Siegel, et al., *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, 107 Am. J. Pub. Health 1923, 1927–28 (2017); John J. Donohue, Abhay Aneja, and Kyle D. Weber, *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis*, 16 J. Empirical Legal Studies 198, 240 (2019).

⁴¹ David Hemenway and Sara J. Solnick, *The Epidemiology of Self-Defense Gun Use: Evidence from the National Crime Victimization Surveys 2007–2011*, 79 Preventive Medicine 22, 25 (2015).

⁴² Charles C. Branas, et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 Am. J. Pub. Health 2034, 2037–38 (2009).

a valid firearms permit.⁴³ Of those 160 incidents, unarmed civilians—often a teacher or principal—were four times more successful in safely restraining an active shooter than armed civilians.⁴⁴ The ABA examined this issue closely in the context of proposals to arm school teachers. The evidence showed that the chances of an armed teacher ending an active shooter situation were “remote,” while the chances of causing bystander injury or complicating police response were greater.⁴⁵

One further study suggests that an Arizona law repealing requirements for a concealed carry license and the completion of a training course made it 11% more likely that an Arizonan would be killed or injured by a gun and 24% more likely to be fatally shot if involved in a violent crime.⁴⁶ The researchers concluded that Arizona’s new law led to an increased prevalence of concealed firearms in the community but did not act as a deterrent to homicide.⁴⁷

Finally, the increasingly prevalent phenomena of armed protests aptly illustrates why it is important for State and local governments to retain flexibility to make

⁴³ J. Pete Blair and Katherine W. Schweit, Tex. State Univ. and Fed. Bureau of Investigation, U.S. Dep’t of Just., *A Study of Active Shooter Incidents in the United States Between 2000 and 2013* 11, 14 (2014), <https://www.fbi.gov/file-repository/active-shooter-study-2000-2013-1.pdf/view>.

⁴⁴ *Id.* at 11.

⁴⁵ ABA Report with Resolution 19M106A, *supra* note 7.

⁴⁶ Rashna Ginwalla et al., *Repeal of the Concealed Weapons Law and its Impact on Gun Related Injuries and Death*, 76 *J. Trauma Acute Care Surg.* 569, 571 (2013).

⁴⁷ *Id.* at 573.

continued regulatory adjustments. In the past year, paramilitary groups and other protesters from across the political spectrum have carried firearms in and around public places, including State capitols, polling places, and election offices, with the effect of intimidating other protesters, law enforcement, and government officials. In 2021, the ABA adopted a policy urging federal and State governments to prohibit the carrying of firearms in and around these spaces, but the question of how to address armed protests in the streets more generally remains.⁴⁸ Recent research indicates that protests involving firearms were six times more likely to turn violent than unarmed protests.⁴⁹ State and local governments must retain authority and flexibility to fashion an appropriate response.

These public-safety considerations, which often involve predictive judgments applied to evolving facts on the ground, are precisely of the type that have historically grounded State and local governments' exercise of their police powers to promote public safety and preserve human life. In the ABA's view, it is critical that State and local governments continue to be allowed to make and act upon these judgments.

⁴⁸ ABA Report with Resolution 21M111, *supra* note 7.

⁴⁹ The Armed Conflict Location & Event Data Project and Everytown for Gun Safety Support Fund, *Armed Assembly: Guns, Demonstrations, and Political Violence in America* (2021), <https://everytownresearch.org/report/armed-assembly-guns-demonstrations-and-political-violence-in-america/>.

3. State And Local Governments Use Carry Regulation And Other Firearms Restrictions To Protect Victims Of Domestic Violence

Curtailling State and local governments' flexibility with respect to concealed carry regulation could have serious consequences for victims of domestic violence—particularly victims of intimate partner violence. Domestic violence is not confined to the home; it happens in various public settings and its results can be lethal, especially when firearms are involved.

The Centers for Disease Control and Prevention's ("CDC") most recent surveillance report on violent deaths—which analyzed data in the CDC's National Violent Death Reporting System for 2017 covering 34 States, four California counties, the District of Columbia, and Puerto Rico—found that 63.7% of the homicides known to be related to intimate partner violence involved a firearm.⁵⁰ Moreover, of all homicides known to be related to intimate partner violence, approximately 20% occurred outside the home, including around 6% on public streets and highways, and 10% in other public locations such as parking lots and public garages; public transit; playgrounds, parks, hotels, commercial and retail areas; hospitals; bars and nightclubs; and other public venues.⁵¹

Accordingly, States have taken various approaches to using concealed carry regulations and other firearms restrictions to protect victims of domestic violence. In some

⁵⁰ Emiko Petrosky et al., *Surveillance for Violent Deaths – National Violent Death Reporting System, 34 States, Four California Counties, the District of Columbia, and Puerto Rico, 2017*, 69 Surveillance Summaries 8, at 10 (2020), <https://www.cdc.gov/mmwr/volumes/69/ss/pdfs/ss6908a1-H.pdf>.

⁵¹ *Id.* at 11.

States, a respondent to a domestic violence restraining order (“DVRO”) may not possess firearms, and certain of those States have gone one step further by enacting laws that require or allow for the relinquishment or recovery of firearms already possessed by a respondent to a DVRO. As of 2016, 35 States and the District of Columbia authorized courts to prohibit firearm possession by those under final DVROs, and many States also extended that prohibition to *ex parte* DVROs, *i.e.*, emergency restraining orders issued when a judge deems the petitioner to need immediate protection.⁵² State policymakers have thus fashioned these nuanced regulations according to their judgments regarding the best way to protect victims of domestic violence.

New York is a prime example of a State with strong domestic violence laws that uses carry regulation as a tool to protect victims of domestic violence. Under N.Y. Penal Law § 400.00(1), officers charged with issuing concealed carry permits must not only consider an applicant’s prior convictions, but also determine whether the applicant is of “good moral character” and consider other criteria, including prior convictions. New York’s legislature adopted several factors that would protect victims of domestic abuse, including the “good moral character” factor, permitting issuing officers to consider criteria that may reveal a documented pattern of physical abuse of vulnerable household members and therefore render an individual unfit to carry a firearm in public. This “good moral character” determination is a powerful tool to protect victims

⁵² April M. Zeoli et al., *Removing Firearms From Those Prohibited from Possession by Domestic Violence Restraining Orders: A Survey and Analysis of State Laws*, 20 *Trauma, Violence, & Abuse* Vol. 114, 115 (2019).

of domestic violence. Considering prior convictions alone typically would not suffice to prevent an abuser from possessing a firearm and injuring a partner or other relative because victims of domestic violence often do not pursue charges, typically out of fear, intimidation, or financial dependence on their abuser.⁵³ As such, the “good moral character” requirement could disqualify individuals from concealed carry licenses where they have a history of domestic violence incidents, but charges have not been pursued. Moreover, as discussed earlier, New York State has even permitted New York City, as an urban setting where the population density heightens the danger posed by firearms in the public, to set even more stringent regulations, including the categorical denial of licenses to individuals who have been the subject of a DVRO or who have any history of domestic violence. *See supra* at 11–12.

State and local governments have a strong interest in tailoring their carry regulations in a way that will best protect victims of domestic violence and account for local public-safety considerations and should maintain the latitude and flexibility to do so.

II. RESPECTING STATE AND LOCAL GOVERNMENT RELIANCE INTERESTS IS FULLY COMPATIBLE WITH THE SECOND AMENDMENT

Heller held that law-abiding, responsible citizens are guaranteed the right to possess a handgun in the home for self-defense. 554 U.S. at 628. In so holding, Justice Scalia’s opinion for the Court was careful to note that the decision should not be read to invalidate “longstanding prohibitions on the possession of firearms,” such as those prohibiting possession by felons or the mentally ill, among

⁵³ Amy E. Bonomi et al., “*Meet Me at the Hill Where We Used to Park*”: *Interpersonal Processes Associated with Victim Recantation*, 73 *Social Science & Medicine*, Volume 1054, 1054–55 (2011).

other “presumptively lawful regulatory measures.” *Id.* at 626 & n.26. *Heller* thus readily accommodates the flexibility that State and local lawmakers have long enjoyed in adapting carry regulations to local needs. As shown by the weight of the historical record, *see supra* at 7–9, “may issue” concealed carry licensing regimes are among those “longstanding” and “presumptively lawful regulatory measures.” *Heller*, 554 U.S. at 626 & n.26.

Since *Heller*, seven Courts of Appeals have considered “may issue” licensing regimes. The statutes upheld as constitutional include N.Y. Penal Law § 400.00(2)(f) and four other substantially similar laws. *See Kachalsky v. Cnty. of Westchester*, 701 F.3d 81, 84 (2d Cir. 2012) (upholding N.Y. Penal Law § 400.00(2)(f)); *Drake v. Filko*, 724 F.3d 426, 431–32 (3d Cir. 2013) (upholding N.J.S.A. § 2C:58-4(c), requiring applicants to demonstrate a “justifiable need” to publicly carry a handgun for self-defense); *Woollard v. Gallagher*, 712 F.3d 865, 880–81 (4th Cir. 2013) (upholding Md. Code Ann., Pub. Safety § 5–306(a)(5)(ii), requiring applicants to demonstrate a “good and substantial reason” and whether “the permit is necessary as a reasonable precaution for the applicant against apprehended danger” to obtain a concealed carry permit); *Peruta v. Cnty. of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (en banc) (upholding California Penal Code § 26150(a)(2), requiring applicants for a concealed carry license to show “good cause exists for issuance”); *Gould v. Morgan*, 907 F.3d 659, 676–77 (1st Cir. 2018) (upholding Mass. Gen. Laws ch. 140, § 131, requiring applicants to demonstrate a “proper purpose” for carrying a firearm in public).

Two circuit courts found concealed carry licensing regimes unconstitutional, but the laws at issue were distinguishable from New York’s statute. *See Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012) (overturning “a flat

ban on carrying ready-to-use guns outside the home”); *Wrenn v. District of Columbia*, 864 F.3d 650, 666 (D.C. Cir. 2017) (overturning law so restrictive as to impose “a total ban on most D.C. residents’ right to carry a gun” for self-defense outside the home).

The ABA, in line with *Heller* and the circuits discussed above, “reject[s] the notion that the Second Amendment bars efforts to stem gun violence.”⁵⁴ Concealed carry regulations, like those at issue here, are just the type of “longstanding” and “presumptively lawful” regulations of which *Heller* spoke.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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⁵⁴ *Gun Violence Laws and the Second Amendment*, *supra* note 7, at 1.