No. 20-843

IN THE

Supreme Court of the United States

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

v.

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

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

BRIEF FOR BRADY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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September 21, 2021

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INTERESTS OF *AMICUS CURIAE*[1]

Brady is the nation's most longstanding nonpartisan, nonprofit organization dedicated to reducing gun violence through education, research, and legal advocacy. Brady has a substantial interest in ensuring that the Constitution is construed to protect Americans' fundamental right to live and to recognize the authority of democratically elected officials to address the nation's gun violence epidemic. Brady has filed amicus briefs in many cases involving the regulation of firearms, including *District of Columbia v. Heller*, 554 U.S. 570 (2008), *United States v. Hayes*, 555 U.S. 415 (2009), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

INTRODUCTION AND SUMMARY OF ARGUMENT

Americans' Second Amendment rights must be drawn so as to not infringe on the right of every individual to live, which necessarily includes a right not to be shot.

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[1] Pursuant to Rule 37.6, Brady affirms that no counsel for a party authored this brief in whole or in part, and that no person other than Brady, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties consented in writing to the filing of this brief.

ARGUMENT

I. Petitioners Seek a Right to Decide Who Lives and Who Dies in the Public Square.

John Locke, a philosopher who deeply influenced the Founders, explained that, while in the state of nature, man has power "to do whatever he thinks fit for the preservation of himself and others,"[2] this "he gives up when he joins in . . . political society."[3] And a fundamental part of that social contract is "[t]he preservation of the public peace, and protection of the people against violence, . . . *constitutional duties of the legislature*." *Hill v. State*, 53 Ga. 472, 474 (Ga. 1874) (emphasis added). Treating the Second Amendment as blanket permission to carry guns in the public square—as Petitioners urge—would render the social contract illusory.

Petitioners seek the right not just to carry guns, but to carry guns for use in armed confrontation in public spaces. Br. for Pet'rs (Pet. Br.) 26. That means a right for a person, even if untrained and unreliable, to judge whether another person poses a threat, and, if so, to shoot him or her. But *Heller* made clear: "we do not read the Second Amendment to protect the right of citizens to carry arms for ***any sort*** of confrontation." *Heller*, 554 U.S. at 595.

The Constitution was written, and governments exist, to remove us from "that state of barbarism in

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[2] John Locke, *Second Treatise of Civil Government* § 128, pp. 63–64 (J. Gough ed. 1947).

[3] *Id.*

which each claims the right to administer the law in his own case." *See, e.g.*, *English v. State*, 35 Tex. 473, 477 (1871) (case cited in *Heller*, 554 U.S. at 627). "To suppose that the framers of the constitution ever dreamed, that in their anxiety to secure to the state a well regulated militia, they were sacrificing . . . the peacefulness and good order of . . . necessary public assemblies, is absurd." *Hill v. State*, 53 Ga. at 478. Any such argument assumes that the framers "took it for granted that their whole scheme of law and order, and government and protection, would be a failure." *Id.*

A right to carry guns to fire in public spaces imperils public peace and order, undermining the very purpose of a well-regulated militia. Joseph Story, who is cited at least nine times by the *Heller* majority, in his treatise on the framing of the Constitution, explains that militias were expected to "execute the laws of the Union, suppress insurrections," and "preserv[e] the internal peace of the nation." Joseph Story, *Commentaries on the Constitution of the United States* §§ 1196, 1201–04 (1833). Such state-organized guardians of the public peace bear no resemblance to the private vigilantes who have misappropriated the American militia tradition.[4]

As the Supreme Court of Washington observed over a century ago, "[a]rmed bodies of men are a menace to the public. Their mere presence is fraught with danger, and the state has wisely reserved to itself

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[4] *See, e.g.*, Joe Barrett, *Militia Member Sentenced in Alleged Plot to Kidnap Michigan Gov. Gretchen Whitmer*, The Wall Street Journal (Aug. 25, 2021), tinyurl.com/MilitiaKidnap.

the right to organize, maintain, and employ them." *State v. Gohl*, 46 Wash. 408, 412 (1907). Petitioners' position today seeks to render ordinary citizens co-equal arbiters of deadly violence alongside legitimate state authorities, radically expanding *Heller* and threatening numerous other constitutional rights. While "[i]n the rudest state of nature a man governs himself," *Ogden v. Saunders*, 25 U.S. 213, 345–46 (1827) (Marshall, C.J.), that is simply not the bargain that Americans have struck.

II. Courts Limit Conflicting Constitutional Rights, and an Overly Broad Right to Bear Arms Conflicts with the Right to Live Safely.

Petitioners' brief suggests that the scope of Second Amendment rights, including the purported right to carry firearms in public without limitation, can be determined in a vacuum and without reference to Americans' other rights. It cannot. The person who may be shot, rightly or wrongly, by someone who chooses to exercise their supposed right to "armed confrontation," also has rights. Among the foremost rights Americans enjoy is the right to live safely, or, as the framers expressed it, to "domestic Tranquility."[5]

Civil society exists for many purposes, but chief among them is removing Americans from the state of nature, a life "poor, nasty, brutish, and short." Thomas Hobbes, *Leviathan* ch, 1, at 9 (1651); *see also Ware v. Hylton*, 3 U.S. 199, 211 (1796) (laws are "the

[5] U.S. Const. preamble.

offspring of the social state; not the incident of a state of nature" and the American revolution "did not reduce the inhabitants of America to a state of nature"). "A basic step in organizing a civilized society is to take that sword out of private hands and turn it over to an organized government, acting on behalf of all the people." *Robertson v. U.S. ex rel. Watson*, 560 U.S. 272, 282–83 (2010) (Roberts, C.J., dissenting) (citing Locke, *Second Treatise* § 128). As this Court has explained, entering civil society, the political ***common***wealth, means giving up the sword.

The state may deputize armed citizens to carry out the prerogatives of the state, as the Framers intended, through a well-regulated militia. Such militias are tasked to preserve the public peace.[6] Those bearing concealed firearms in public for private confrontation, in contrast, may use deadly force whenever they deem it warranted, threatening the public peace and other Americans' right to live safely. Even if there is a right to shoot, there is a right not to be shot.[7] Otherwise, what is meant by "Life, Liberty, and the pursuit of Happiness"?

This Court should recognize, as it has in other contexts, that conflicting constitutional rights must be delineated so as to not infringe upon one another, and public safety is paramount.

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[6] *See* Section I, *supra*.

[7] *See generally* Jonathan Lowy & Kelly Sampson, *The Right Not to be Shot: Public Safety, Private Guns, and the Constellation of Constitutional Liberties*, 14 Geo. J.L. & Pub. Pol'y 187 (2016).

A. The Right to Live Safely Is a Foundational Constitutional Right.

America's founding documents evidence the value the Framers placed on the right to live safely. The Declaration of Independence famously describes as "self-evident" all Americans' "unalienable Rights," including "Life." The Constitution's Preamble identifies, among its principle goals, "domestic tranquility" and the "general welfare." This Court recognizes the "primary concern of every government," "the safety and indeed the lives of its citizens." *United States v. Salerno*, 481 U.S. 739, 755 (1987).

This Court limits constitutional rights when they endanger public safety. In *New York v. Quarles*, this Court found a "'public safety' exception" to the *Miranda*-warning requirement before asking a suspect for the location of a firearm, because a gun "presents a situation where concern for public safety must be ***paramount***." 467 U.S. 649, 653 (1984) (emphasis added). Securing public safety is not a platitude; it is a core purpose of the government. In *Schenck v. United States*, 249 U.S. 47, 52 (1919), this Court found that the First Amendment does not confer the right to yell "Fire!" in a crowded theater, because it risks theater-goers being trampled as they flee for the exits. In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), this Court found that the fighting words doctrine does not protect speech whose "very utterance" merely "tend[s] to incite an immediate breach of the peace."

Limits on state power likewise evidence our constitutional right to live safely. Government actors cannot use violence absent due process: meaningful consideration of whether violence is warranted. Absent immediate danger, Americans' fundamental right to safety precludes resort to violence because we enjoy "a constitutional right not to be shot on sight" by state actors "if [we] did not put anyone else in imminent danger." *Weinmann v. McClone*, 787 F.3d 444, 448 (7th Cir. 2015); *see also Yates v. Cleveland*, 941 F.2d 444, 447 (6th Cir. 1991) ("Yates 'had a right not to be shot [by state actors] unless he was perceived to pose a threat to the pursuing officers or to others[.]'") (quoting *Robinson v. Bibb*, 840 F.2d 349, 351 (6th Cir. 1988)). This Court found an American's "fundamental interest in his own life" so obvious that it "need not be elaborated upon." *Tennessee v. Garner*, 471 U.S. 1, 9 (1984). If a right to live safely can trump a state actor's ability to exercise government power, it surely can limit any (putative) private Second Amendment rights.

B. Courts Routinely Limit Conflicting Constitutional Rights.

Even if the Second Amendment protected some right to carry guns in public (it does not), it should be constrained to not infringe on each American's right to life safely. Courts routinely limit conflicting constitutional rights, and a broad rule frames those decisions: courts avoid giving absolute priority to one professed right to the exclusion of others, particularly where safety is implicated.

We have, for example, a robust body of law to resolve tensions between Fourth Amendment rights and law enforcement's "paramount governmental interest in ensuring public safety." *See Scott v. Harris*, 550 U.S. 372, 383 (2007). These tests have been applied to, e.g., traffic stops,[8] warrantless entry in pursuit of dangerous suspects,[9] and drug-testing law enforcement officers.[10]

Nor are such approaches limited to the Fourth Amendment. In *Nebraska Press Association v. Stuart*, this Court resolved "a confrontation between prior restraint imposed to protect one vital constitutional guarantee [Sixth Amendment rights] and the explicit command of another that the freedom to speak and publish shall not be abridged." 427 U.S. 539, 547, 570 (1976) ("[I]t is inconceivable that the authors of the Constitution were unaware of the potential conflicts between the right to an unbiased jury and the

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[8] *See Terry v. Ohio*, 392 U.S. 1, 27 (1968) ("[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.").

[9] *See Lange v. California*, 141 S. Ct. 2011, 2021 (2021) ("When the totality of circumstances shows an emergency—such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home—the police may act without waiting.").

[10] *See Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 677 (1989) ("[W]e believe the Government has demonstrated that its compelling interests in safeguarding our borders and the public safety outweigh the privacy expectations of employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs or that require the incumbent to carry a firearm.").

guarantee of freedom of the press."). *Garcetti v. Cebellos*, 547 U.S. 410, 423 (2006), called upon this Court to resolve "the competing interests surrounding the speech and its consequences" where government employees spoke as private citizens on public issues. And students may be disciplined for threatening to shoot other students in school without infringing the First Amendment because school safety so demands. *See D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 764 (8th Cir. 2011) ("The First Amendment did not require the District to wait and see whether D.J.M.'s talk about taking a gun to school and shooting certain students would be carried out.").

The Second Amendment's potential confrontation with public safety warrants particular scrutiny. Every year, guns kill nearly 40,000 Americans, including more than 1,600 children.[11] The economic impact of gun violence is estimated to cost Americans $280 billion each year.[12] And Americans killed by guns have no remedy for unjustified infringement of their right to live. Although their survivors may pursue a civil action for wrongful death and the state may prosecute, the dead have no recourse. *Piszczatoski v. Filko*, 840 F. Supp. 2d 813, 816 (D.N.J. 2012) ("A person wrongly killed cannot be compensated by resurrection."), *aff'd sub nom. Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), *cert. denied sub nom. Drake v. Jerejian*, 134 S. Ct. 2134 (2014).

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[11] *Key Statistics*, Brady United (Sept. 18, 2021), https://tinyurl.com/BradyKeyStats.

[12] *The Economic Cost of Gun Violence*, Everytown Research & Policy (Feb. 17, 2021), tinyurl.com/GunViolenceCost.

A decision that unduly restricts gun safety laws not only threatens the direct victims of gun violence, but engenders indirect harms and impairs other constitutional rights. For example, since the Columbine High School shooting in 1999, more than 250,000 students have been directly exposed to school gun violence,[13] and most U.S. teenagers, regardless of direct exposure, reported being either "somewhat" or "very worried" that they may experience a school shooting.[14] Outside of the school gates, 79% of American adults report experiencing stress at the possibility of a mass shooting, with 33% reporting that fear of a mass shooting prevents them from going certain places.[15] Political assemblies are no exception—in 2011, at a constituent event in Tucson, Arizona, a gunman shot Congresswoman Gabby Giffords, killed six people, including a federal judge, and injured eleven others.[16] But meeting and conferring with one's political representatives, preachers, and community depends on being and feeling safe. Said otherwise, reasonable gun laws

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[13] John W. Cox, *More Than 256,000 Students Have Experienced Gun Violence at School Since Columbine*, Wash. Post (Aug. 13, 2021), tinyurl.com/SchoolViol.

[14] Nikki Graf, *A Majority of U.S. Teens Fear a Shooting Could Happen at Their School, and Most Parents Share Their Concern*, Pew Research Center (Apr. 18, 2018), tinyurl.com/TeenFear.

[15] Sophie Bethune, Elizabeth Lewan, *One-Third of U.S. Adults Say Fear of Mass Shootings Prevents Them from Going to Certain Places or Events*, Am. Psychol. Ass'n (Aug. 15, 2019), tinyurl.com/MassFear.

[16] *See Gabby's Story*, Giffords.com, tinyurl.com/GiffordsStory.

ensure Americans' "freedom and confidence to participate in community life" in civil society.[17] Gun safety laws protect "the citizenry's liberty to exercise a wide range of constitutional freedoms, including speech, peaceable assembly, travel, and others."[18]

Lower courts should continue to consider the special risks inherent when the Second Amendment conflicts with the public safety. While "other fundamental rights . . . have been held to be evaluated under a strict scrutiny test, such as the right to marry and the right to be free from viewpoint discrimination," *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015), evaluation of Second Amendment rights is particularly "serious business" as any "miscalculat[ion]" made "in the peace of . . . judicial chambers" can mean "some unspeakably tragic act of mayhem." *United States v. Masciandaro*, 638 F.3d 458, 475–76 (4th Cir. 2011); *accord Piszczatoski* 840 F. Supp. 2d at 816 (finding that the Second Amendment "is unique among all other constitutional rights . . . because it permits the user of a firearm to cause . . . the ultimate injury, death").

C. An Overly Broad Right to Bear Arms Conflicts with the Right to Live Safely.

Modern guns are indisputably deadly, making the Second Amendment unique in its opportunity to

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[17] Reva B. Siegel, J. Blocher, *Why Regulate Guns?*, 48 J.L. Med. & Ethics 11, 14 (2020).

[18] *Id.* at 13.

deprive Americans of their basic right to live safely, not to mention other key constitutional rights. For example, a citizen's right to free assembly and speech is impaired where exercise of that right needlessly exposes him to gun violence on the streets of Kenosha.[19] A citizen's freedom of religion is impaired where there exists an unreasonable risk of deadly violence bearing down upon his place of worship.[20] And a citizen's freedom of sexual orientation is impaired where he must live in fear of being targeted, robbed, and shot on account of his orientation.[21] In each of these cases, reasonable gun safety laws may further other core constitutional values.

While other *amici* may expound on this issue in greater detail, firearm technology bears here in three ways. ***First***, modern guns' ease-of-use and availability means quotidian altercations routinely become deadly in seconds.[22] A skilled shooter could only hope to fire

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[19] *See* Josiah Bates, *Teen Gunman Charged After 2 Killed During Kenosha Protests*, TIME (Oct. 14, 2020), tinyurl.com/KenoshaTeen.

[20] *See* Campbell Robertson, Christopher Mele, and Sabrina Tavernise, *Eleven Killed in Synagogue Massacre; Suspect Charged with Twenty-Nine Counts*, N.Y. Times (Oct. 27, 2018), tinyurl.com/ElevenKilled.

[21] *See* Asia Simone Burns, *Police Say DeKalkb Gunman Used Anti-Gay Slur Before Shooting Man*, Atlanta Journal-Constitution (June 6, 2019), tinyurl.com/DeKalbGunman.

[22] Ryan Parker et al., *Bell Gardens Mayor Daniel Crespo Fatally Shot at Home; Wife Released*, L.A. Times (Sept. 30, 2014), tinyurl.com/MayorShot; Lisa Roose-Church, *'Stand Your Ground' Defense Raised in Road Rage Case*, Detroit Free Press, (Oct. 7, 2014), tinyurl.com/SYGDefense; Lisa Buie, *Curtis*

three rounds per minute using a Revolutionary-era musket, while modern rifles can fire an estimated 45 rounds in the same time.[23] This creates a vicious cycle: shoot fast—without taking time to assess the situation—or risk being shot. ***Second***, the power of modern weapons means that even where a bullet "misses" vital locations, it still pulverizes organs, bones, muscles and flesh, rendering more injuries fatal.

Third, the fact that, today, there are more privately held guns than people in the U.S.,[24] means that most everyone faces greater risks of gunfire than they did in the Eighteenth Century when the Constitution was ratified. These realities heighten the threat that an overly broad right to bear arms poses to the public safety, and to citizens' rights to live safely.

III. Politically Accountable Branches Should Weigh Competing Constitutional Rights to Guns and to Safety.

The Constitution created a federal government; charged it with handling foreign affairs, regulating interstate commerce, collecting taxes, promoting

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Reeves, Suspect in Movie Theater Shooting, Released on Bail, Tampa Bay Times (July 11, 2014), tinyurl.com/ShooterBail.

[23] Christopher Ingraham, *What 'Arms' Looked Like When the 2nd Amendment Was Written*, Wash. Post (Jun. 13, 2016), tinyurl.com/2AArms.

[24] Aaron Karp, *Estimating Global Civilian-Held Firearms Numbers*, Small Arms Survey (2018), tinyurl.com/KarpSurvey.

science, and similar tasks[25]; and preserved state authority to ensure the safety of the citizens of each state.[26] The Constitution also articulates individual rights and provides for state militias to secure those rights and the safety of the people. Recognizing that state governments would need to weigh their obligation to keep citizens safe against specific individual rights, the Constitution makes clear that states retain police power authority to reasonably regulate constitutional rights, such as the right to bear arms, to protect public safety. In fact, "[t]he police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community." *Kovacs v. Cooper*, 336 U.S. 77, 83 (1949). In *Kovacs*, New Jersey exercised the police power to regulate a constitutional right in furtherance of the public tranquility. *See also Prime Media, Inc. v. City of Brentwood, Tenn.*, 398 F.3d 814, 823 (6th Cir. 2005) (Tennessee exercising the police power to regulate a constitutional right in furtherance of public safety). Such regulations stand on well-trodden constitutional ground.

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[25] U.S. Const. art. I, § 8, cl. 1, 3, 8.

[26] U.S. Const. amend. X; *see also Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25 (1905) ("According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.").

A. Legislatures Have Long Weighed Competing Rights When Individuals Seek to Carry Firearms in Public.

Legislatures have long regulated the possession, brandishing, carrying, and use of deadly weapons in furtherance of public safety. With regard to carrying deadly weapons, legislatures have regulated ***who*** may lawfully carry ***which*** weapons ***where*** in the public sphere. These laws advance other core societal and constitutional values, such as the right to live without the unreasonable fear of violent confrontation.

Legislatures have long circumscribed the carrying of dangerous or unusual weapons.[27] New Jersey, for instance, banned trap guns (guns with mechanically automated triggers that fire themselves) in 1771, finding that "most dangerous" trap guns "ha[ve] too much prevailed" in the state.[28] The legacy of proscriptions of dangerous or unusual weapons dates back to at least sixteenth century England. *See An Act Concerning Crossbows and Handguns*, 33 Hen. 8, c. 6 (1541) (Eng.), *in* 3 Statutes of the Realm 832 (proscribing the use or possession of "any Crossbow, handgun, hagbutt or demy hake," because they were often used in "detestable and shameful murders,

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[27] *See* Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 L. & Contemp. Probs. 55, 67 (2017) ("Such laws in the country's early decades were aimed in part at pistols and offensive knives, like most concealed carry laws.").

[28] Act of Dec. 21, 1771, ch. DXL, § 10, 1771 N.J. Laws 343, 346.

robberies, felonies, riot and rout" "to the great peril and continual fear and danger" of the people).

Similarly, legislatures routinely regulated dangerous or unusual weapons that either did not exist or were not commonly available as of the Second Amendment's adoption. Indeed, as technology made guns deadlier and their presence in public areas more dangerous, legislatures acted to restore public safety. For example, in the years following the rise of the Tommy Gun, infamous "in bloody incidents such as the St. Valentine's Day Massacre,"[29] a national push arose to address machine-gun violence. By 1934, at least twenty-eight states regulated the use or carrying of machine guns.[30] The lesson from the regulatory responses of states to the commercialization, then criminal adoption, of machine guns is that "new technologies bred new laws when circumstances warranted."[31] Such laws have long been, and remain, plainly within the ambit of legislatures regulating the right to bear arms in furtherance of public safety and the right not to be shot. *See, e.g.*, *Heller*, 554 U.S. at 624 (rejecting any reading of the Second Amendment that "would mean that the National Firearms Act's restrictions on machineguns . . . *might* be unconstitutional") (emphasis added).

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[29] *Thompson Submachine Gun*, Encyclopedia Britannica (last accessed July 8, 2021), tinyurl.com/ThompsonMG.

[30] *See also* Spitzer, *supra* note 27, at 67 n.79 (collecting legislation).

[31] Spitzer, *supra* note 27, at 68.

Legislatures similarly recognized the threat to public safety engendered by the advent of semi-automatic weapons at the start of the twentieth century, and, between 1927 and 1934, at least ten state legislatures regulated the possession and carrying of these weapons.[32] These laws were intended to respond to the threat to public safety posed by firearms equipped to shoot more than five-to-eighteen rounds in rapid succession without the need to reload.[33] Legislatures protected public safety by regulating ownership and possession of firearms.

In fact, more than a century ago, at least four state legislatures circumscribed the right to bear arms based on public safety, and outlawed the keeping or bearing of pistols altogether.[34] Still other legislatures

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[32] Act of Apr. 27, 1927, ch. 326, 1927 Mass. Acts 413, 413 (covering firearms capable of "rapid fire and operated by a mechanism"); Act of Apr. 10, 1933, ch. 190, 1933 Minn. Laws 231, 232 (covering firearms "capable of automatically reloading after each shot is fired"); Uniform Machine Gun Act, ch. 206, § 1, 1933 S.D. Sess. Laws 245, 245 (covering weapons that may fire more than five rounds without reloading); Act of July 2, 1931, § 1, 1931 Ill. Laws 452, 452 (eight rounds); Act of July 7, 1932, no. 80, § 1, 1932 La. Acts 336, 337 (eight rounds); Act of Mar. 2, 1934, no. 731, § 1, 1934 S.C. Acts 1288, 1288 (eight rounds); Act of Apr. 22, 1927, ch. 1052, 1927 R.I. Pub. Laws 256, 256 (twelve rounds); Act of June 2, 1927, No. 372, 1927 Mich. Pub. Acts 887, 888 (sixteen rounds); Act of Mar. 7, 1934, ch. 96, § 1, 1934 Va. Acts 137, 137 (sixteen rounds); Act of Apr. 8, 1933, no. 64, 1933 Ohio Laws 189, 189 (eighteen rounds).

[33] *See supra* note 32.

[34] Act of June 11, 1870, ch. XIII, § 1, 1870 Tenn. Pub. Acts 28, 28 ("[I]t shall not be lawful for any person to publicly or privately carry a dirk, swordcane, Spanish stiletto, belt or pocket pistol or

proscribed the concealed carrying of pistols in public spaces.[35] These laws contained exceptions directed to, e.g., the bearing of pistols in the course of duty as a militiaman, in one's home, or upon reasonable fear of an immediate and pressing unlawful attack.[36]

As the New York legislature explained in adopting the instant statute, "[s]tatutes governing firearms and weapons are not desirable as ends in themselves. Such legislation is valuable only as a means to the worthwhile end of preventing crimes of violence before they occur."[37] New York simply kept its side of the social contract, protecting public safety. It did so at the minimal expense of requiring a showing of a non-

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revolver."); Act of Apr. 12, 1871, ch. XXXIV, § 1, 1871 Tex. Gen. Laws 25, 25 (codified at 1879 Tex. Crim. Stat. 24) (prohibiting the "carrying on or about [an individual's] person, saddle, or in his saddle bags, any pistol, dirk, dagger, slung-shot, sword-cane, spear, brass-knuckles, bowie-knife, or any other kind of knife manufactured or sold for the purposes of offense or defense"); Act of Apr. 1, 1881, ch. XCVI, § 1, 1881 Ark. Acts 191, 191 (codified at Ark. Code Ann. ch. 48 § 1498 (1894)); Act of Mar. 13, 1872, ch. 100, § 62, 1872 Kan. Sess. Laws 210, 210 (codified at Kan. Gen. Stat. § 1003 (1901)).

[35] *See, e.g.*, New Jersey Act, ch. 9 (1686), *reprinted in* Aaron Leaming & Jacob Spicer, *The Grants, Concessions, and Original Constitutions of the Province of New Jersey*, 289, 289–90 (1881) (proscribing the concealed carrying of "any pocket pistol, skeines, stilettoes, daggers or dirks, or other unusual or unlawful weapons").

[36] *See, e.g.*, Act of Apr. 12, 1871, ch. XXXIV, § 1, 1871 Tex. Gen. Laws 25, 25.

[37] State of New York., Report of the N.Y. State Joint Legislative Comm. on Firearms & Ammunition 12 (1965).

speculative need for self-defense when in public spaces.

B. Legislatures Are Best Suited to Harmonize Public Safety and Second Amendment Rights.

Legislatures have a long history of determining how best to harmonize public safety and constitutional rights. They, not courts, are best suited to this task for three reasons. First, the weighing of such interests should be left to politically accountable bodies, who may properly receive and reflect constituents' priorities. This Court has long recognized the "proper roles" of the political and judicial bodies.[38] Legislatures are accountable to the voters, and their determination of how to integrate public safety and gun rights best reflects their constituents' priorities. The federal courts, however, "who have no constituency—have a duty to respect legitimate policy choices made by those who do."[39]

Second, legislatures are best positioned to conduct comprehensive investigations concerning, collect the appropriate quantum of information required for, and deliberate on a timeline befitting broad policy decisions that relate to public safety and gun violence. The courts, to the contrary, operate within the

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[38] *See, e.g.*, *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991).

[39] *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

purview of a specific, individualized case or controversy.[40] This requirement "narrows the scope of judicial scrutiny to specific facts" and "maintains proper separation of powers between courts and legislatures."[41] Where the legislature has undertaken its deliberative process and spoken, the law so crafted must be accorded great deference.[42]

Third, legislatures are best positioned to tailor local weapons regulation to local needs and circumstances. For example, residents of urban areas are disproportionality more likely to be exposed to public gun violence, less likely to own a gun, and more likely to be in favor of gun regulation than residents of rural areas.[43] Therefore, reasonable gun regulation should be permitted to account for geographic distinctions when regulating gun rights in furtherance of the public safety. In view of these circumstances, and as set forth below,[44] courts have long deferred to the legislative weighing of these competing interests. Indeed, *Heller* reaffirmed

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[40] *See Doe v. Duling*, 782 F.2d 1202, 1205 (4th Cir. 1986) ("Federal courts are principally deciders of disputes[—w]e address particular 'cases' or 'controversies' . . . .").

[41] *Id.*

[42] *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) ("[C]ourts must accord substantial deference to the predictive judgments of Congress.") (internal quotation omitted).

[43] Carl T. Bogus, *Gun Control and America's Cities: Public Policy and Politics*, 1 Alb. Gov't L. Rev. 440, 464 (2008) ("Only 29% of urban residents own a gun while 56% of rural residents do so.").

[44] *See* Section III(C), *infra.*

longstanding constitutional guardrails on the right to bear arms' ability to trump such legislative determinations.[45]

Here, the voters of New York have spoken. In 1911, in the midst of a "marked increase" in fatal shootings, a New York coroner's investigative report suggested legislation that would "result in materially decreasing acts of violence in which revolvers figure."[46] New York thereafter enacted the Sullivan Law,[47] the predecessor to New York's law today. One court explained:

> [T]he Legislature has now picked out one particular kind of arm, . . . the favorite weapon of the turbulent criminal class, and has said that in our organized communities . . . where the public peace is protected by the officers of organized government, the citizen may not have that particular kind of weapon without a permit . . . . Whether it is a wise law, whether it will accomplish the purpose for which it was intended, . . . is not the business of the court to inquire. If it fails to accomplish the purpose intended, . . .

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[45] *See* Section III(D), *infra*.

[46] *Revolver Killings Fast Increasing*, N.Y. Times (Jan. 30, 1911), tinyurl.com/RevolverKillings (citing coroner's report).

[47] Ch. 195, § 1, 1911 N.Y. Laws 442, 443 (codifying former N.Y. Penal Law § 1897 ¶ 3).

> it can easily be repealed by the same law-making power which enacted it.

People ex rel. Darling v. Warden of City Prison, 139 N.Y.S. 277, 286 (App. Div. 1913). In 1965, the New York joint legislative committee responsible for the instant statute concluded that, although violent crimes had increased year-over-year, "no sane person doubts that the increase would be enormously greater" absent New York's gun control laws.[48]

The law the legislature then created comports with a longstanding tradition of tailoring local regulation to local circumstances. It delegates licensing authority to local officials who best understand local public safety exigencies.[49]

Here, both individual named plaintiffs corresponded and held a conference with their local licensing authorities—New York judges.[50] In both cases, although the challenged restrictions remained, the authorities clarified that the licenses permitted Plaintiffs to "carry concealed for purposes of off road back country, outdoor activities similar to hunting, for example fishing, hiking & camping etc."[51] Plaintiff

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[48] Report of the N.Y. State Joint Legislative Comm. on Firearms & Ammunition 11 (1965).

[49] *Id.* at 17–18.

[50] JA 40–41, 111–14.

[51] JA 41, 114.

Brandon Koch was permitted to carry a concealed firearm to and from work.[52]

Critically, this individualized, tailored guidance belies Petitioners' allegation that, for the average New Yorker, "there is no outlet to carry handguns for self-defense at all."[53] The legislature plainly adopted a statute that allowed for, and the licensing judge plainly issued, a circumscribed determination permitting Petitioners to carry concealed weapons, licenses narrowly limited only as necessary to protect public safety.

C. Courts Routinely Uphold Reasonable Regulation of the Right to Bear Arms to Ensure Public Safety.

American courts have long limited constitutional rights when they conflict with the paramount interest of public safety,[54] and the Second Amendment is no exception.[55] Second Amendment analysis, therefore,

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[52] JA 114.

[53] Pet. Br. 2.

[54] *See*, *Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 300 (1981) (finding the "[p]rotection of the health and safety of the public [to be] a paramount governmental interest" *vis-à-vis* Fifth Amendment rights); *New York v. Quarles*, 467 U.S. at 653 (finding "public safety must be paramount" over *Miranda* rights); *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2178 (2016) (finding states have a "paramount interest" in public safety over Fourth Amendment rights).

[55] *See, e.g.*, *Norman v. State*, 159 So. 3d 205, 223 (Fla. Dist. Ct. App. 2015) ("[T]he government has a substantial interest in

"must begin with the recognition that the risks created by firearms are unique among constitutional rights inasmuch as firearms pose a risk of imminent lethality."[56] Where legislatures have ***reasonably*** weighed these interests, courts routinely uphold regulations concerning, e.g.: carrying guns, carrying concealed guns, carrying weapons prone to criminal use, and carrying guns in sensitive areas.

Some examples:

In *State v. Chandler*, 5 La. Ann. 489 (1850), the Supreme Court of Louisiana held that a statute outlawing concealed knives, pistols, and other weapons did not interfere with the right to bear arms. *Id.* at 489–90. The court accepted the legislature's need "to counteract a vicious state of society, growing out of the habit of carrying concealed weapons, and to prevent bloodshed and assassinations committed upon unsuspecting persons," as reasonable grounds for regulating the carrying of weapons. *Id.*

Similarly, in *English v. State*, the Texas Supreme Court upheld a law prohibiting carrying "any pistol" or Bowie knife, among other weapons.[57] The court acknowledged the heightened risk that guns and knives posed to public safety: "[n]o . . . travesty . . . could so misconstrue [the Second Amendment] as to

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regulating firearms as a matter of public safety . . . ."), *aff'd*, 215 So. 3d 18 (Fla. 2017).

[56] Lowy & Sampson, *supra* note 7, at 191.

[57] Act of Apr. 12, 1871, ch. XXXIV, § 1, 1871 Tex. Gen. Laws 25, 25.

make it cover and protect that pernicious vice, from which so many murders, assassinations, and deadly assaults have sprung, and which it was doubtless the intention of the legislature to . . . prohibit." *Id.* at 476. The court found Petitioners' current argument, which would revert us to "that state of barbarism in which each claims the right to administer the law in his own case," *id.* at 477, "little short of ridiculous," *id.* at 478. *Heller* cited *English* as part of the "historic tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Heller*, 554 U.S. at 627.

Likewise, in *Hill v. State*, the Supreme Court of Georgia upheld a law prohibiting the carrying of certain knives and "any . . . pistol or revolver, or any kind of deadly weapon, to" courts, houses of worship, polling places, "or any other public gathering." 53 Ga. at 474. It did so because "[t]he preservation of the public peace, and the protection of the people against violence, are constitutional duties of the legislature." *Id.* at 477. That, in turn, meant that the guarantee of "the right to keep and bear arms is to be understood and construed in connection and in harmony with these constitutional duties." *Id.* at 476–77.[58] Indeed,

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[58] The court likewise relied on the need to limit Second Amendment rights where they conflict with other constitutional guarantees: "[i]f the temple of justice is turned into a barracks, and a visitor . . . is compelled to mingle in a crowd of men loaded down with pistols . . . or bristling with guns and bayonets, his right of free access to the courts is just as much restricted as is the right to bear arms infringed by prohibiting the practice before courts of justice." *Hill v. State*, 53 Ga. at 478. In fact, the court recognized that the runaway expansion of the right to keep and bear arms could foreseeably infringe upon other core

150 years ago, the Georgia Supreme Court made clear that one factor in assessing the reasonableness of regulations on carrying guns in public was that to bring guns to public areas was itself *prima facie* unreasonable. Carrying arms in public "is a thing so improper in itself, so shocking to all sense of propriety, so wholly useless and full of evil, that it would be strange if the framers of the constitution have used words broad enough to give it a constitutional guarantee." *Id.* at 475–76.[59]

In *Fife v. State*, the Supreme Court of Arkansas upheld a statute criminalizing (with some exceptions) the carrying of any pistol, dirk, or Bowie knife. 31 Ark. 455, 456 (1876). The court found that, in light of the "public mischief which the Legislature intended by the act to prevent" and propensity of the covered pistols to be implicated in "private quarrels and brawls," the statute was a proper exercise of the state's police power and did not infringe of the right to bear arms. *Id.* at 461.

In *Isaiah v. State*, the Supreme Court of Alabama upheld a statute criminalizing a person's carrying a pistol "on premises not his own or under his control." 176 Ala. 27, 28 (1911). The court found that such a provision "does not deprive a person of the right to bear arms in defense of himself or the state," but

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constitutional rights, such as the right to peaceably meet and worship god or to access courts of justice. *Id.* at 477–78.

[59] The Georgia Supreme Court's prior decision in *Nunn v. State*, 1 Ga. 243 (1846), while striking down a ban on openly carrying pistols, ***upheld a ban on the concealed carrying of pistols***. 1 Ga. at 251.

"merely prevents the carrying of arms for offensive purposes." *Id.* The court accepted the legislature's reasonable "regulation" of how and where guns could be carried, finding as sufficient justification the "legislative intent to conserve the safety of the people and to advance the public morals by averting as far as may be the carrying about the person, away from the places described, of an instrument so associated with the destruction of the public peace and welfare." *Id.* at 37–38.

D. *Heller* Reaffirmed Longstanding Constitutional Guardrails on the Second Amendment.

In *Heller*, this Court made clear that "[l]ike most rights, the right secured by the Second Amendment is ***not*** unlimited." 554 U.S. at 626 (emphasis added). "[T]he 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," *id.*, and the New York law at issue today lies neatly in that legislative tradition. Indeed, this Court, for more than a century, has held that "the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons." *Robertson v. Baldwin*, 165 U.S. 275, 281–82 (1897).

While emphasizing the sanctity of the home, *Heller* reaffirmed the longstanding obligation of state legislatures to ensure public safety by, among other things, regulating the use and possession of guns in public. *Heller* recounted 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.* at 626. *Heller* explained that this Court did "***not*** read the Second Amendment to protect the right of citizens to carry arms for ***any sort*** of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose." *Id.* at 595 (emphasis added). *Heller*, in fact, noted that "[t]he Constitution leaves the [states] a variety of tools for combating th[e] problem [of handgun violence], including some measures regulating handguns." *Id.* at 636.

Thus, courts have properly interpreted *Heller* as affirming the longstanding constitutional limits on the Second Amendment, and upheld reasonable gun regulations like that at issue in New York. *See, e.g.*, *Powell v. Tompkins*, 783 F.3d 332, 346 (1st Cir. 2015) ("Nowhere in its dual decisions did the Supreme Court impugn legislative designs that comprise so-called general prohibition or public welfare regulations aimed at addressing perceived inherent dangers and risks surrounding the public possession of loaded, operable firearms."); *Culp v. Raoul*, 921 F.3d 646, 654 (7th Cir. 2019) ("[*Heller*] underscored the propriety of the longstanding prohibitions on the possession of firearms by felons and the mentally ill, while also observing that most courts throughout the 19th century held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.") (internal quotations omitted); *Young v. Hawaii*, 992 F.3d 765, 826 (9th Cir. 2021) ("Hawaii's restrictions have deep roots in the Statute of Northampton and subsequent English and American emendations, and do not infringe what the

Court called the 'historical understanding of the scope of the right.'") (quoting *Heller*, 554 U.S. at 625); *United States v. Bryant*, 711 F.3d 364, 369 (2d Cir. 2013) (quoting *Heller*, 554 U.S. at 626–27); *Mance v. Sessions*, 896 F.3d 699, 703–04 (5th Cir. 2018) (quoting *Heller*, 554 U.S. at 626–27).

Heller did not undermine longstanding gun laws regulating who may possess firearms and when and where they may be carried or the authority of the legislative bodies that enact them. The pervasive nature of gun violence in America, both in the volume of victims and severity of injuries, would be incomprehensible to the Framers and an era known for the arquebus, blunderbuss, and musket. Killing forty-nine people in swift succession as happened at the Pulse nightclub,[60] thirty in ten minutes as happened at Virginia Tech,[61] twenty-three in twelve minutes as happened in Killeen,[62] or thirteen in ten

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[60] Gal Tziperman Lotan et al., *Orlando Nightclub Shooting Timeline: Four Hours of Terror Unfold*, Capital Gazette (May 31, 2017), tinyurl.com/PulseShooting.

[61] *Mass Shootings at Virginia Tech, Report of the Review Panel*, Virginia Tech Review Panel, ch. III (Apr. 16, 2007), tinyurl.com/VTShooting. This concerns the Norris Hall shootings beginning at about 9:40 am ET. Earlier in the day, the shooter also shot and killed two students in a residence hall. In total, thirty-three people, including the shooter, were shot and killed on Virginia Tech's campus on April 16, 2007.

[62] Emani Payne, *27 Years Later: Luby's Massacre Survivors Share Their Stories*, KCEN-TV (Nov. 13, 2018), tinyurl.com/LubyShooting.

minutes as happened in Fort Hood,[63] was not contemplated. Nor were guns used to kill more than one hundred people (children, students, women, men) each day, every day, day after day, for year after year after year.[64] The framers would surely have found the use of guns to kill children in their schools—Sandy Hook (twenty-six dead, excluding perpetrator), Parkland (seventeen), Columbine (thirteen), Sante Fe (ten), Marysville (four), Red Lake (seven), Nickel Mines (five)—a failure of the social contract, not a necessary cost of the Second Amendment.

State legislatures, including in New York, exercise their longstanding authority to promote the public safety and safeguard the right to live, and *Heller* provides no foundation upon which to second-guess or invalidate a state's authority to enact these protections. *Heller*, rather, reaffirms that, where a regulation reflects a "longstanding prohibition" on the

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[63] Sydney Isenberg, *10 Years Later: A Timeline of the Fort Hood Shooting that Took the Lives of 13 People*, ABC 25 (Nov. 4, 2019), tinyurl.com/FHShooting.

[64] *See Firearm Violence Prevention*, Centers for Disease Control and Prevention (captured Sept. 16, 2021), tinyurl.com/ViolPrevention (documenting 109 firearm-related deaths each day in the United States in 2019, the most recent year for which data is available); *see also The Facts That Make Us Act*, Brady, tinyurl.com/BradyStat (captured Sept. 16, 2021) (collecting studies covering the previous five years, finding that, on average, 106 people are shot and killed each day); *Gun Violence in America*, Everytown Research & Policy (Apr. 27, 2021), tinyurl.com/GVinAmerica ("Every day, more than 100 Americans are killed with guns and more than 230 are shot and wounded." (emphasis omitted)).

possession, carrying, bearing, or use of certain classes of weapons, such as those prone to criminal or interpersonal violence, the Second Amendment is not infringed.[65]

The common law has long recognized that the cornerstone of civil society is the "mutual bond and obligation" between citizen and state, that the citizen conduct himself in accord with the law and the state "govern and protect" the citizen.[66] This mutual bond was enshrined in early state constitutions,[67] the Declaration of Independence,[68] and the United States Constitution.[69] Repudiating this Court's longstanding Second Amendment guardrails would attenuate, even stress, this bond between citizen and state. That is not hyperbole; this country already suffers a hundred gun violence deaths per day. That number will increase if

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[65] *Heller*, 554 U.S. at 626–27 ("[N]othing 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 arms.").

[66] *Calvin's Case*, 7 Co. Rep. la, 4b, 77 Eng. Rep. 377, 382 (1608).

[67] *See, e.g.*, Pa. Const. of 1776, Declaration of Rights, art. VIII ("[E]very member of society hath a right to be protected in the enjoyment of life, liberty and property . . . .").

[68] *See* Section II(A), *supra*.

[69] The constitutional right to protection was incorporated into three clauses of the Fourteenth Amendment—the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clause. *See* Steven Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 Duke L.J. 507, 510–11 (1992).

virtually anyone can carry concealed weapons virtually anywhere. To hobble democratically elected legislatures from enacting reasonable regulation to protect Americans' right to life would effect a marked departure from this Court's Second Amendment jurisprudence as acknowledged and reaffirmed in *Heller*.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court below.

Respectfully submitted,

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September 21, 2021