No. 20-843

IN THE

Supreme Court of the United States

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

Petitioners,

—v.—

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

Respondents.

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

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Since its founding in 1920, the ACLU has frequently appeared before this Court in cases involving the exercise of First Amendment rights, both as direct counsel and as amicus curiae. *See, e.g.*, *Hague v. Congress of Industrial Organizations*, 307 U.S. 496 (1939); *Snyder v. Phelps*, 562 U.S. 443 (2011); *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038 (2021). The New York Civil Liberties Union (NYCLU) is the statewide affiliate of the ACLU and has approximately 112,000 members across New York State. Because any constitutional rule prohibiting states from restricting the carriage of guns in public would pose substantial risks to the fulsome exercise of rights and liberties essential to self-government, and in particular to freedoms of assembly, association, and speech, the proper resolution of this case is a matter of substantial interest to the ACLU, the NYCLU, and their members.

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[1] The parties have consented to the filing of this brief, either by blanket consent filed with the clerk or individual consent. No counsel for either party authored this brief in whole or in part. No persons or entities, other than *amici* themselves, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This is a case about the Second Amendment, but its resolution also implicates fundamental First Amendment values—the freedoms of assembly, association, and speech. States have many justifications for regulating the public carrying of weapons, concealed or otherwise. But one especially important justification is that such restrictions facilitate civic engagement, by promoting safety and reducing the chances that the disagreements inevitable in a robust democracy do not lead to lethal violence. Accordingly, in assessing the validity of New York's regulation of the carrying of concealed weapons in public, the Court should give due regard to the state's important interest in facilitating a wide-open public debate.

This interest in maintaining confidence in the safety of public spaces is reflected in the history of gun regulation at the time of the Founding. Restrictions on the public carrying of weapons, as a way of maintaining the peace and safety of public places, can be traced to the "King's Peace" in England. The Statute of Northampton, for example, prohibited bearing arms at fairs, markets, and other public places. Such laws fostered trust in the safety of spaces of public exchange and enabled people to gather to engage in commerce, associate with friends, hear and discuss the news, exchange ideas, and form opinions.

State laws at the time of the Founding and at the time of the adoption of the Fourteenth Amendment, which shed light on the original public meaning of these provisions, also restricted public carry, often to a greater extent than the challenged New York law. Strict regulations on concealed carry were

widespread among the states at these times and were justified in part by concern that heated public disputes might otherwise result in lethal violence. Some gun restrictions were motivated by racial animus and targeted Black people, which would violate the Equal Protection Clause today. But even states with regulations animated by invidious discrimination regulated public carry of guns more generally. Both at the Founding and at the time of the Fourteenth Amendment, stringent restrictions on public carry were commonplace and understood as important to preserving a public square in which people were safe to exercise their most important rights.

This historically-supported interest makes normative sense, and the Court should therefore respect New York's choice to regulate public carry in the interest of furthering public safety. Self-government depends on the ability of the people to participate fully in civic, political, and economic life. People need to feel safe to vote, to go to school and work, to walk the streets, and to assemble, associate, and speak freely in public. While these rights have not always been equally available to all, the goal of maintaining the peace to allow all people to participate in public life, including to speak out on political, religious, and other sensitive topics, is critically important to our democracy. States have a compelling interest in assuring their populace that they can do so, even in furtherance of controversial causes, without fear that doing so will prompt lethal violence. States should have leeway to determine that unregulated concealed carry will undermine that confidence.

New Yorkers have made a judgment that their interest in protecting the public sphere upon which a

healthy constitutional democracy depends is best served by limiting unrestricted concealed carry licenses to those who can demonstrate an actual and articulable need for self-defense. The law is tailored to allow for regional variations, licenses for those who demonstrate such a need, and judicial review. New York's law furthers important values reflected in the First Amendment and is consistent with the Second Amendment.

ARGUMENT

I. REGULATING PUBLIC CARRY IS PART OF A LONGSTANDING ANGLO-AMERICAN COMMITMENT TO PRESERVING THE PEACE THAT ENABLES CIVIC LIFE.

Throughout Anglo-American history, governments have closely regulated the carrying of arms in public places in order to preserve the peace necessary for a robust civic life. In *District of Columbia v. Heller*, this Court made clear that the right to bear arms is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." 554 U.S. 570, 626 (2008). In particular, *Heller* recognized that courts have long upheld "prohibitions on carrying concealed weapons." *Id.* at 626-27. While states today not surprisingly vary in their regulations on carrying of weapons in public places, strict limits on the public carrying of firearms, including outright prohibitions on concealed carry, are deeply rooted in the Anglo-American legal tradition that informs the Second Amendment's original public meaning. And such restrictions were long understood as an important means of ensuring the peace that makes possible civic engagement. There is no evidence that the Framers of the Second

or Fourteenth Amendment understood the Second Amendment, or its incorporation against the states, to upend this historical tradition.

A. Broad Bans on Public Carry, and Concealed Carry in Particular, Were Longstanding in English Law.

In the English legal tradition, the "King's Peace" was the soil in which public life took root, albeit in the shadow and service of the Crown.[2] Transplanted to American soil, "the peace" does not concern the majesty of the crown, but the health of the "'body politic,"'[3] and the "'social compact"' that "authorize[s] the establishment of laws requiring each citizen to so conduct himself, and so use his property, as not unnecessarily to injure another." *Munn v. Illinois*, 94 U.S. 113, 124 (1876) (quoting Mass. Const., preamble). In a republic founded on enlightenment ideals, "the laws were found a better protection for persons and property, than arms." *Talbot v. Jansen*, 3 U.S. 133, 140 (1795).

Laws protecting public spaces from the threat presented by people carrying weapons are as old as the concept of "the peace" itself. English laws have

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[2] See Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under* Heller, 116 Nw. U. L. Rev. 139, 165 (2021) (*When Guns Threaten the Public Sphere*).

[3] Saul Cornell, *History, Text, Tradition, and the Future of Second Amendment Jurisprudence: Limits on Armed Travel Under Anglo-American Law, 1688-1868*, 83 Law & Contemp. Probs. 73, 88 (2020) (*History, Text, Tradition*) (quoting Joseph Backus, *The Justice of the Peac*e 23 (Hartford, B. & J. Russell 1816) ("The term, peace, denotes that condition of the body politic, in which no person suffers, or has just cause to fear any injury[.]")).

long protected "the peace" by restricting the carrying of arms in places of commerce and exchange, such as "fairs and markets."[4] It was a breach of the peace *per se* for people to carry weapons in spaces protected by the peace; acts of violence were further breaches.[5] As the public life of England expanded, monarchs extended public-carry restrictions from the royal household to apply along the main travel routes until, ultimately, the King's Peace "becomes, after the Norman Conquest, the normal and general safeguard of the public order" for the entire nation.[6]

"A key piece of legislation to enforce the King's Peace was the Statute of Northampton, which prohibited appearing armed before representatives of the King's authority and expressly banned traveling armed at 'Fairs, Markets, or elsewhere.'"[7] As the centers of public life developed from "fairs and markets" into towns and cities, those jurisdictions adopted prohibitions on carrying arms to keep the peace there as well.[8]

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[4] David Feldman, *The King's Peace, the Royal Prerogative and Public Order: The Roots and Early Development of Binding Over Powers*, 47 Cambridge L.J. 101, 106 (1988) (The King's Peace).

[5] See Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government* 14 (2005) ("As in any other house, carrying weapons in church broke the church's peace, and so did any act of violence committed by an outsider within it.").

[6] *Id.* at 15-16 (quoting Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I* 45 (1898)); see *The King's Peace*, at 102, 105-06.

[7] *History, Text, Tradition*, 83 Law & Contemp. Probs. at 81.

[8] See, e.g., *Heller*, 554 U.S. at 587 n.10 ("In the 21st Year of King Edward the Third, a Proclamation Issued, that no Person should bear any Arms within London, and the Suburbs") (quoting J.

These public spaces were not just arenas for commercial exchange, but also for communication:

> By the thirteenth century, markets had become such popular affairs that kings, prelates, and municipal officials took considerable pains to use them to disseminate news and directives, by means of formal proclamations made while markets were in session . . . . well aware of the role markets played in forming opinions and shaping perceptions about what went on in the world at large.[9]

In light of this understanding, public carry bans were intended to promote a climate conducive to both financial and intellectual exchange.[10] For example, the express purpose of an Elizabethan-era royal proclamation calling for enforcement of the Statute of Northampton's prohibition on carrying concealable weapons "not only in Cities and Townes, [but] in all partes of the Realme in common high[ways]," was to

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Brydall, *Privilegia Magnatud apud Anglos* 14 (1704) (Privilege XXXIII))); Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 Law & Contemp. Probs. 11, 21 (2017) (*The Right to Keep and Carry*) ("Localities, most notably the city of London, enacted their own specific bans on traveling armed with concealed weapons. London law prohibited traveling 'by Night or by Day' with a 'Hand-Gun, having therewith Powder and Match.'") (quoting William Bohun, *Privilegia Londini: Or the Laws Customs, and Privileges of the City of London* 110 (1702)).

[9] James Masschaele, *The Public Space of the Marketplace in Medieval England*, 77 Speculum 383, 390-91 (2002).

[10] *See When Guns Threaten the Public Sphere*, 116 Nw. U. L. Rev. at 164-65.

protect people who, "desirous to live in a peaceable manner, are in feare and danger of their lives."[11]

Accordingly, while "[d]isagreement about the historical record is common in Second Amendment scholarship. . . the ground of agreement . . . [is] that terror, not just physical violence, could justify regulating the carrying of weapons."[12] And as the widespread prohibition on concealable weapons illustrates, the mere apprehension of weapons carried in public—and not just brandishing weapons or other intentional acts of intimidation, *see* Pet. Br. 5—was deemed sufficient to cause "terror" and undermine confidence in the peace.

On both sides of the Atlantic, eighteenth and nineteenth-century authorities recognized that the 1689 English Bill of Rights did not preclude broad restrictions on public carry, particularly concealed carry. Thus, in a chapter of his Commentaries titled "Of Offences Against The Public Peace,"[13] Blackstone noted that the Statute of Northampton limited public carry to preserve the peace "in like manner" to the statute in ancient Athens that prohibited even being "seen to walk the City-Streets with a sword by his Side, or having about him other Armour," but

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[11] *The Right to Keep and Carry*, 80 Law & Contemp. Probs. at 21 (quoting *By the Quenne Elizabeth I: A Proclamation Against the Common Use of Dagges, Handgunnes, Harquebuzes, Calliuers, and Cotes of Defense* 1 (Christopher Barker, London 1579) (alterations in original) (internal quotations omitted))

[12] *When Guns Threaten the Public Sphere*, 116 Nw. U. L. Rev. at 166 (emphases omitted).

[13] 4 William Blackstone, *Commentaries on the Laws of England*, 149 (quoting John Potter, *Archaeologiae Graecae, or, The Antiquities of Greece* , bk. 1, ch. 26).

provided a narrow exception "in case of Exigency."[14] In keeping with that tradition, this Court has noted that among the constitutional guarantees "inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions . . . . the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons." *Robertson v. Baldwin*, 165 U.S. 275, 281-282 (1897).

In sum, the English tradition recognized substantial latitude on the part of the State to regulate public carry of weapons. That history informs the original understanding of the Second Amendment, particularly in light of the absence of any evidence indicating that the Framers understood the amendment to be rejecting this tradition.

B. Prohibitions on Concealed Public Carry Were Also Common Means of Promoting a Civic Life in the Period from the Founding Through Adoption of the Fourteenth Amendment.

The history of gun regulation from the time surrounding adoption of the Second Amendment through the adoption of the Fourteenth Amendment (by which the Second Amendment applies to the states) confirms that strict regulation of public carrying of weapons remained common and was seen as a permissible choice of states under the Second and Fourteenth Amendments.

In our self-governing republic, maintaining safety and "the peace" in public spaces furthers the "exercise of rights so vital to the maintenance of democratic

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[14] 1 John Potter, *Archaeologiae Graeca, or, The Antiquities of Greece* 182 (7th ed. 1751).

institutions." *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147, 161 (1939). The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.") (internal quotation and citation omitted); *see also Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038, 2046 (2021) ("Our representative democracy only works if we protect the 'marketplace of ideas.'"). When the Second and Fourteenth Amendments were adopted, states had long chosen to restrict carrying of weapons in public as an integral part of that protection. Neither amendment sought to alter that longstanding tradition.

Strict regulation of public carry—open or concealed—was common throughout the historical period relevant to determining the original public meaning of the Second and Fourteenth Amendments. Many early American laws reflected the "concern that the mere presence of firearms in the public square presented a danger to the community." *Young v. Hawaii*, 992 F.3d 765, 794 (9th Cir. 2021) (en banc) (Bybee, J.), *petition for certiorari filed,* No. 20-1639 (May 25, 2021). Broad bans on public carry, patterned after the Statute of Northampton, were regular features of colonial and early American law—both before and after ratification of the Second Amendment. *Id.* at 794-98. And states and territories alike maintained broad public carry bans up to—and indeed long after—the ratification of the Fourteenth Amendment. Even in the "Wild West," towns often imposed strict prohibitions on the carrying of weapons to prevent the threat of violence

from inhibiting public life.[15] For example, when Dodge City, Kansas, formed a municipal government in 1878, "the first law it passed prohibited carrying guns in town because "[c]ultivating a reputation of peace and stability was necessary, even in boisterous towns, if it were to become anything more transient than a one-industry boom town."[16]

An 1836 Massachusetts law that broadly prohibited carrying weapons in public—with a limited exception for people with "reasonable cause to fear an assault or other injury or violence to his person, or to family or property"[17]—served as a model for other states.[18] The law prohibited both open and concealed carry.[19] As Massachusetts Judge Peter Oxenbridge Thacher explained in 1837, "[w]here the practice of wearing secret arms prevails, it indicates either that the laws are bad; or that they are not executed with vigor; or, at least, it proves want of confidence in their protection."[20] Several states adopted versions of

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[15] Adam Winkler, *Gunfight: The Battle Over the Right to Bear Arms in America* 163-66 (2011) (Gunfight).

[16] Matt Jancer, *Gun Control Is as Old as the Old West*, Smithsonian, Feb. 5, 2018, https://www.smithsonianmag.com/history/gun-control-old-west-180968013/.

[17] 1836 Mass. Acts 750, ch. 134, § 16.

[18] *See* Saul Cornell, *The Right to Carry Firearms Outside the Home: Separating Historical Myths from Historical Realities*, 39 Fordham Urb. L.J. 1695, 1719-25 (2012); *see also id.* at 1722 & n.141 (collecting state laws patterned after Massachusetts's 1836 law).

[19] *See id.* at 1720.

[20] Peter Oxenbridge Thacher, *To Charges to the Grand Jury of the County of Suffolk for the Commonwealth of Massachusetts, at the Opening of the Terms of the Municipal Court of the City of Boston on Monday, December 5th, A.D. 1836, And On Monday, March 13th A.D.*, at 27 (Boston, Dutton & Wentworth 1837).

Massachusetts' ban. *See Young*, 992 F.3d at 799-800 (citing statutes from Wisconsin, Maine, Michigan, Virginia, Minnesota, Oregon, Pennsylvania, Texas, West Virginia, Arizona, and Idaho). Throughout the 19th century, states and territories enacted laws that either restricted public carry to those who could demonstrate a particularized need, or adopted stricter bans, akin to the Statute of Northampton. *Id.* at 801 ("The statutes we have discussed thus far, however, did not prohibit only the *concealed* carrying of such weapons."); *id.* at 799-800 (collecting and analyzing state statutes).

There is no indication that the Fourteenth Amendment was intended to upset that tradition. And laws enacted soon after the Civil War amendments demonstrate that the original public meaning of the Fourteenth Amendment permitted such restrictions. Post-Civil War Texas, for example—where gun violence, particularly directed against Black people and Republicans, frequently disrupted public life—enacted public carry regulations based on the Massachusetts model.[21] The Texas legislature first banned firearms in what *Heller* later described as "sensitive places," including "any church or religious assembly," "any school room or other place where persons are assembled for educational, literary, or scientific purposes," any "social party," "any election precinct on the day or days of any election," or "any other public assembly." 1870 Tex. Gen. Laws 63, ch. XLVI, § 1. When this attempt to preserve safety in specific places and

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[21] Mark Anthony Frassetto, *The Law and Politics of Firearms Regulation in Reconstruction Texas*, 4 Tex. A&M L. Rev. 95, 98-106, 115 (2016) (*Firearms Regulation in Reconstruction Texas*) (citation omitted).

institutions proved confusing and difficult to enforce,[22] Texas imposed a total ban on concealed carry and permitted open carry of pistols only by those with "reasonable grounds for fearing an unlawful attack on his person, and that such ground of attack shall be immediate and pressing."[23] 1871 Tex. Gen. Laws 25, ch. XXXIV, § 1 (providing exception to criminal liability where accused could show that "the weapon was borne openly and not concealed beneath the clothing").

Texas' restriction on open and concealed carry remained in place "for over one hundred years," even as "[i]ts constitutionality [was] attacked . . . without success in many cases." *Collins v. State*, 501 S.W.2d 876, 877 (Tex. Crim. App. 1973). In rejecting an early challenge to the Texas law, the Texas Supreme Court dismissed as "little short of ridiculous" the contention that people had a right to carry concealable weapons into "a peaceable public assembly, as, for instance into a church, a lecture room, a ball room, or any other place where ladies and gentlemen are congregated together." *English v. State*, 35 Tex. 473, 478-79 (1871). The *English* Court further noted that such broad restrictions were "not peculiar to our own state" and that other states had regulations on public carry "more rigorous than the act under consideration." *Id.* at 479. It relied on Bishop and Blackstone—the same legal commentators the *Heller* Court cited more than

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[22] *Firearms Regulation in Reconstruction Texas*, 4 Tex. A&M L. Rev. at 104-05.

[23] The law further provided that a person charged with unlawful carry bore the burden of proving that the threat they faced was "immediate and pressing" and "of such a nature as to alarm a person of ordinary courage," and that the asserted threat did not have "origin in a difficulty first commenced by the accused." 1871 Tex. Gen. Laws 25, ch. XXXIV, § 2.

a century later—to find that the Texas prohibitions were rooted in history and tradition. *Id.* at 475-76. Even after recognizing a broad right to keep arms in the home, the Texas Supreme Court continued to uphold regulations on public carry as consistent with an individual's right to keep and bear arms.[24] *See Waddell v. State*, 37 Tex. 354, 355-56 (1873); *Baird v. State*, 38 Tex. 599, 600-02 (1873); *Masters v. State*, 653 S.W.2d 944, 946-47, aff'd 685 S.W.2d 654 (1985), cert. denied, 106 S.Ct. 155 (1985).

Like so many other laws in our country, some gun restrictions were enacted or enforced with invidious animus against Black people. Before the Civil War, some states prohibited Black people, both free and enslaved, from possessing guns at all.[25] And some Reconstruction-era "Black Codes," which restricted the rights of newly freed slaves, imposed similar prohibitions on Black people. At the same time, some states permitted white men to bear arms openly. Such laws, of course, would plainly violate the Equal Protection Clause today. But restrictions on public carry were by no means limited to such invidious discrimination. Both before and after the Civil War,

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[24] Contrary to Petitioners' claim that English has been "sapped of authority by *Heller*," Pet. Br. 35, the Texas courts have "universally" upheld the state's strict public carry regulations against challenges that the law violated a provision of the Texas Constitution that "[a]s is easily seen . . . gives the right to keep and bear arms directly to the individual," *Masters*, 653 S.W.2d at 946 & n.5 (referencing Tex. Const. Art. I, § 23). Petitioners note that the Texas Constitution permits the state legislature to regulate the right to keep and bear arms. Pet. Br. 35 n.4. So does the Second Amendment, which is not "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626.

[25] Carol Anderson, *The Second: Race and Guns in a Fatally Unequal America* 70-71 (2021).

concealed carry bans limited the rights of all people to carry in many states.[26] In Tennessee, for example, the state supreme court upheld the legislature's authority to regulate the carrying of concealed weapons as "dangerous to the peace," against a challenge based on a provision of the Tennessee Constitution that reserved the right to keep and bear arms only to "the free white men of this state." *Aymette v. State*, 21 Tenn. 154, 158-59 (1840).

To be sure, in recent decades, a number of states have chosen to adopt more permissive concealed carry regimes.[27] But that does not change the original public meaning of either the Second or Fourteenth Amendments. This case concerns only what the Second and Fourteenth Amendments permit, not what they require. The fact that some states have chosen a more liberal approach does not undermine the historical understanding that the Second and Fourteenth Amendments allow states to enact restrictive public carry laws.

II. THE SECOND AMENDMENT PERMITS STATES TO IMPOSE REASONABLE REGULATIONS ON PUBLIC CARRY TO PRESERVE THE SAFETY AND PEACE CONDUCIVE TO CIVIC LIFE.

As the history recounted above reflects, the carrying of weapons in public places is a legitimate concern, and states have long chosen to restrict such public carry to provide breathing space for public

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[26] *Gunfight* at 166-67.

[27] *See* William J. Krouse, Cong. Rsch. Serv., IN10852, *Gun Control: Concealed Carry Legislation in the 115th Congress* 1-2 (2018).

life—including the full exercise of First Amendment rights. Democratic self-governance depends on the free-flowing, sometimes heated exchange of ideas in which individuals "stand up in public for their political acts" and engage in "harsh criticism." *Doe v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring). Vigorous exchange of ideas fosters "civic courage, without which democracy is doomed." *Id.*; *see also Mahanoy Area School Dist.*, 141 S. Ct. at 2046 ("[F]ree exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will."). Streets, sidewalks, parks, and other public spaces remain essential venues for airing views that may be controversial or unpopular. *See McCullen v. Coakley*, 573 U.S. 464, 476 (2014). States may reasonably determine that allowing the carrying of guns in the public sphere risks turning agitated speech into combustible disorder and even lethal violence. The soundness of that judgment is supported not only by the history recounted above, but by more recent experience.

A. States May Reasonably Conclude That the Proliferation of Guns in Public Chills First Amendment Activity.

States have every reason to believe that the open or concealed carrying of guns will chill the exercise of First Amendment rights by threatening the eruption of violence. Social science research shows that the presence of weapons is likely to make both the carrier and non-carrier more aggressive.[28] For example, an

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[28] *See, e.g.*, Arlin James Benjamin, Jr., Sven Kepes & Brad J. Bushman, *Effects of Weapons on Aggressive Thoughts, Angry Feelings, Hostile Appraisals, and Aggressive Behavior: A Meta-*

analysis of more than 30,000 public demonstrations in the United States between January 2020 and June 2021 found that demonstrations in which people are carrying arms are more than six times as likely to escalate into violence or destruction as unarmed demonstrations.[29] Research also shows that "most Americans are not impervious to the psychological effects of guns in their community, and that by a margin of more than 3 to 1, more guns make others in the community feel less safe rather than more safe," with women and members of minority groups substantially more likely to report feeling less safe than men and whites.[30]

Analytic Review of the Weapons Effect Literature, 22 Personality & Soc. Psyc. Rev. 347, 347 (2018) ("[R]esults indicate that the mere presence of weapons increased aggressive thoughts, hostile appraisal, and aggression") (publishing meta-analysis of weapons effect studies from 1967 to 2017, including 151 effect-size estimates from 78 independent studies); Leonard Berkowitz & Anthony LePage, *Weapons as Aggression-Eliciting Stimuli*, 12 J. of Personality & Soc. Psych. 202 (1967) (finding that participants applied more electric shocks to others when in the presence of a gun, even if it was not in their possession).

[29] Roudabeh Kishi et al., *Armed Assembly: Guns, Demonstrations, and Political Violence in America*, Armed Conflict Location & Event Data Project (Aug. 2021) at 2, https://acleddata.com/acleddatanew/wp-content/uploads/2021/08/Report_Armed-Assembly_ACLED_Everytown_August2021.pdf.

[30] *See* Matthew Miller, Deborah Azrael & David Hemenway, *Community Firearms, Community Fear*, 11 Epidemiology 709, 709 (2000) (finding fifty percent of respondents said they would feel less safe if more people in their community owned guns, compared to fourteen percent who would feel more safe; women were 1.7 more likely to report feeling less safe, and minorities were 1.5 times more likely); *see also* Brief of the NAACP Legal Defense and Education Fund and the National Urban League as Amici Curiae (NAACP LDF Amicus Br.) § II.

One cannot know whether or when an armed person will turn to violence in response to a remark that offends him.[31] A permissive public carry regime thus presents the risk that the price of public speech and assembly rises from the "harsh criticism" that speakers "have traditionally been willing to pay," *Doe*, 561 U.S. at 228 (Scalia, J., concurring), to confronting an agitated person or group wielding a gun or guns.[32]

Recent experience illustrates the risks of both open and concealed carry. In Oregon, a state with permissive open carry laws, armed groups prevented the state senate in 2019 from voting on a carbon emissions tax by threatening to stage an armed protest outside the capitol building during the legislative session.[33] In Michigan, which also permits open carry, hundreds of armed protesters massed outside the capitol in April 2020 during a senate vote

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[31] *See, e.g.*, Harvard Injury Control Research Center, *Gun Threats and Self-Defense Gun Use*, https://www.hsph.harvard.edu/hicrc/firearms-research/gun-threats-and-self-defense-gun-use-2/ (citing David Hemenway, Matthew Miller & Deborah Azrael, *Gun Use in the United States: Results from Two National Surveys*, 6 Injury Prevention 263 (2000)).

[32] *See, e.g.*, James A. Shepperd et al., *The Anticipated Consequences of Legalizing Guns on College Campuses*, 5 J. Threat Assessment & Mgmt. 21, 26, 28-29 (2018) (finding that gun-owners, including people who own for protection, and non-owners reported that "they would feel less safe having heated interactions if legislation allowed guns on campus" and "that guns on campus would harm classroom debate and harm the classroom learning environment," while people who own guns for protection also reported that "allowing guns on campus would [also] . . . lead to grade inflation").

[33] *See* Gregory P. Magarian, *Conflicting Reports: When Gun Rights Threaten Free Speech*, 83 Law & Contemp. Probs. 169, 181 (2020).

on whether to extend emergency measures related to COVID-19.[34] Some were able to enter the building while holding guns and stand above legislators as the vote took place.[35] Threats of similar protests twice subsequently prevented the Michigan legislature from deciding on whether to bar guns from the capitol.[36]

Permissive concealed carry can have similarly pernicious consequences. The following are a few representative examples of disputes from 2020 that escalated dangerously because of concealed weapons:

- On May 30, 2020, Jeffrey Long fired shots into the air at a protest calling for the removal of a statute of a Confederate general in Salisbury, North Carolina. Long had a concealed carry permit when he disrupted the protest.[37]
- In July 2020, Daniel Perry was driving for a rideshare service when he encountered a Black

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[34] Craig Mauger, *Protesters, Some Armed, Enter Michigan Capitol in Rally Against COVID-19 Limits*, Det. News (Apr. 30, 2020), https://www.detroitnews.com/story/news/local/michigan/2020/04/30/protesters-gathering-outside-capitol-amid-covid-19-restrictions/3054911001/.

[35] *When Guns Threaten the Public Sphere*, 116 Nw. U. L. Rev. at 149-50.

[36] *Id.* at 151-153.

[37] Josh Bergeron, *Men charged after 'Fame' protests get probation*, Salisbury Post (Feb. 17, 2021), https://www.salisburypost.com/2021/02/17/men-charged-after-fame-protests-get-probation/; Howard Graves, *North Carolina Protest Shooting Suspect Appears To Have Ties to Organized Neo-Confederacy, Hate Groups*, Southern Poverty L. Ctr. (June 2, 2020), https://www.splcenter.org/hatewatch/2020/06/02/north-carolina-protest-shooting-suspect-appears-have-ties-organized-neo-confederacy-hate.

Lives Matter protest in Austin, Texas. When approached by a group of Black Lives Matter protestors, Perry shot and killed one of the protestors from his car. Perry had a permit to carry a concealed weapon. The protester he shot had been carrying an "assault-style weapon" and also had a handgun license. Another protester shot at Perry's car with a handgun as it sped away.[38]

- In July 2020, Vincent Scavetta pointed a gun at another shopper at a Palm Beach County Walmart who had asked him to put on a mask and had made pro-masking comments. Scavetta had a valid concealed carry permit.[39]
- In July 2020, a white couple pointed a gun at a Black woman who was with her 15 year-old daughter during an argument in the parking lot of a Chipotle restaurant in Orion Township,

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[38] Bill Gates, *Do Uber and Lyft allow drivers to carry weapons while driving?*, KXAN (July 31, 2020), https://www.kxan.com/news/local/austin/do-uber-and-lyft-allow-drivers-to-carry-weapons-while-driving/; David Montgomery & Manny Fernandez, *Garrett Foster Brought His Gun to Austin Protests. Then He Was Shot Dead.*, N.Y. Times (July 26, 2020), https://www.nytimes.com/2020/07/26/us/austin-shooting-texas-protests.html; Bryant Bingamon, *Daniel Perry Will Stand Trial for Murder of BLM Protester Garrett Foster*, Austin Chron. (July 2, 2021), https://www.austinchronicle.com/daily/news/2021-07-02/daniel-perry-will-stand-trial-for-murder-of-blm-protester-garrett-foster/.

[39] Kristina Webb, *No charges for man who pulled gun in mask dispute at Royal Palm Walmart*, Palm Beach Post (Aug. 31, 2020), https://www.palmbeachpost.com/story/news/crime/2020/08/31/no-charges-vincent-scavetta-royal-palm-walmart-mask-dispute/3448875001/.

Michigan. Both members of the couple had valid concealed carry permits.[40]

- On August 29, 2020, a Black Lives Matter protest in Tallahassee, Florida, was disrupted when a counter-protestor pulled out a handgun. The counter-protestor argued with some of the 150 protestors and subsequently raised a gun at multiple protestors, inducing panic. The counter-protestor had a valid concealed carry permit at the time of the incident.[41]
- On October 10, 2020, attendees of a "BLM-Antifa Soup Drive" and a "Patriot Rally" converged in downtown Denver. The confrontation resulted in homicide when Matthew Dolloff, a security guard for a news crew, shot Lee Keltner, an attendee of the "Patriot Rally." Dolloff had a valid concealed carry permit.[42]

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[40] Alan Yuhas & Michael Levenson, *Couple Charged After Videos Show White Woman Pulling Gun on Black Woman*, N.Y. Times (July 2, 2020), https://www.nytimes.com/2020/07/02/us/michigan-woman-pulls-gun.html.

[41] Tori Lynn Schneider & Alicia Devine, *TPD: Man who pulled gun on protesters was 'lawfully defending himself,' will not face charges*, Tallahassee Democrat (Aug. 30, 2020), https://www.tallahassee.com/story/news/2020/08/30/tallahassee-police-no-charges-after-gun-pulled-during-protest/5674055002/.

[42] Brian Maass, *Suspected Protest Shooter Matthew Dolloff Had Valid Concealed Weapons Permit*, CBS (Oct. 12, 2020), https://denver.cbslocal.com/2020/10/12/matthew-dolloff-shooting-protest-elbert-county-concealed-carry-permit-lee-keltner/; Julia Cardi, *Judge: Evidence of Victim's Radical Beliefs in Protest Shooting Not Relevant—For Now*, Denver Gaz. (Aug. 6, 2021), https://denvergazette.com/news/local/judge-evidence-of-victim-s-

- In November 2020, two men from Virginia drove in a vehicle displaying a QAnon decal to the Philadelphia Convention Center, where ballots were being counted in the presidential election. The men exited their vehicle, and walked around with guns purportedly to "'straighten things out' as vote counting continued." One of the men, Joshua Macias, carried a concealed handgun that was licensed in Virginia.[43]

In contrast to these examples, the District of Columbia's strict public carry regulations may have helped limit violence during demonstrations, even in the January 6, 2021 insurrection at the United States Capitol, as some protestors discussed where to store their weapons, knowing it would be illegal to bring them to the protest.[44]

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radical-beliefs-in-protest-shooting-not-relevant-for-now/article_f7a8e8b0-f71d-11eb-92f0-abcff2ed3eb0.html.

[43] Chris Palmer et al., *Two Men Outside Philly Vote Count in Hummer with QAnon Stickers Face Weapons Charges, Police Say*, Phila. Inquirer (Nov. 6, 2020), https://www.inquirer.com/news/qanon-arrest-philadelphia-plot-election-2020-20201106.html

[44] *See* Alexander Mallin & Will Steakin, *Oath Keepers Stashed Weapons at Hotel for Potential Jan. 6 Violence*, Prosecutors Indicate, ABC (Apr. 13, 2021), https://abcnews.go.com/US/oath-keepers-stashed-weapons-hotel-potential-jan-violence/story?id=77048420 (citing "communications allegedly showing members [of the 'Oath Keepers,' a right-wing paramilitary organization] discussing storing their weapons at a Comfort Inn in Arlington, Virginia, knowing that possessing such arms within Washington, D.C., would be illegal"); Defendant's Reply Regarding Reconsideration of Detention at 7, *United States v. Thomas Edward Caldwell*, No. 1:21-cr-00028-APM, (D.D.C. March 10, 2021), ECF No. 69 (asserting that "the recommendations from the 'national leader' of the Oath Keepers seems [sic] fairly straight forward: Do everything to protect your

As these examples make vivid, states have a sound basis for determining that liberal public carry may jeopardize the safety vital to a robust civic life.

B. New York's Concealed Carry Regulation Reasonably Furthers the Peace and Safety Conducive to Robust Civic Engagement, and Therefore Does Not Contravene the Second Amendment.

As New York maintains, the restriction on public carry at issue in this case serves a vital interest in "protect[ing] the public sphere on which a constitutional democracy depends."[45] New York's commitment to free expression predates and exceeds the United States Constitution's protection of free speech. *See Immuno AG. v. Moor-Jankowski*, 567 N.E.2d 1270, 1277-78 (N.Y. 1991); *see also Holmes v. Winter*, 3 N.E.3d 694, 698 (N.Y. 2013) (noting roots of New York's expansive protection of press freedom in the 1735 jury acquittal of publisher John Peter Zenger on libel charges). In the state constitution of 1821, New Yorkers adopted strong protections for free speech, press, and religious liberty that the state constitution maintains today. *Compare* N.Y. Const. of 1821, art. VII, §§ 3, 8, *with* N.Y. Const., art. I, §§ 3, 8. As then-Judge Kaye wrote, "This State, a cultural center for the Nation, has long provided a hospitable climate for the free exchange of ideas." *Immuno AG*, 567 N.E.2d at 1277.

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physical safety with defensive equipment but obey Washington, D.C.'s strict weapons laws") (emphasis original).

[45] Resp. Br. 37 n.19 (quoting *When Guns Threaten the Public Sphere*, 116 Nw. U. L. Rev. at 141).

New York has also long regulated guns in public spaces. The 1787 New York bill of rights, for example, provides "[t]hat all elections shall be free and that no person by force of arms nor by malice or menacing or otherwise presume to disturb or hinder any citizen of this State to make free election." Act of Jan. 26, 1787, ch. 1, § 9, 1787 N.Y. Laws. New York's constitution does not protect a right to bear arms; however, since 1909, a state statute has closely tracked the language of the Second Amendment. N.Y. Civ. Rights Law § 4. For more than a century, that statute has co-existed with both a total ban on concealed carry, *see* 1881 Laws of N.Y., ch. 46, § 8, at 47, and with the law challenged today, which dates to 1913, *see* Ch. 608, § 1, 1913 N.Y. Laws 1627, 1627-30.

New Yorkers have determined that civic and public engagement in the state are best served by robust protections for free expression on the one hand, and strict limits on public carrying of weapons, on the other. That determination, well within the historical tradition that informed the original understandings of both the Second and Fourteenth Amendments, is consistent with the right recognized by this Court in *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

New York has tailored its regulatory scheme to provide greater access to public carry than many states and localities historically allowed. *See supra* Section I. New York law provides for concealed handgun licenses to those who can demonstrate "an actual and articulable—rather than merely speculative or specious—need for self-defense." *Kachalsky v. County of Westchester*, 701 F.3d 81, 98 (2d Cir. 2012). The law allows handgun owners such as petitioners to receive restricted licenses that allow for hunting, target-shooting, or backcountry self-

defense without the same showing of need required for an unrestricted concealed carry license. J.A. 41, 114. And the law provides for a localized licensing scheme, which recognizes that prevailing needs and risks may vary among rural, suburban, and urban counties. *See Application of O'Connor*, 154 Misc. 2d 694, 698 (Cnty. Ct. 1992).

In short, New York's regulation of public carry is well within the mainstream of policy choices made by states throughout American history.[46] Strict limits on carrying weapons in public, adopted to foster safety and "the peace" conducive to a thriving public life, are part of a longstanding tradition. As noted above, these laws have sometimes been enforced in racially discriminatory ways, as in the City of New York's "stop-and-frisk" program. *See Floyd v. City of New York*, 959 F. Supp. 2d 540, 606 (S.D.N.Y. 2013). Discriminatory law enforcement, of gun laws, or any other laws, is an Equal Protection problem, and warrants serious attention from courts, the police, and our political leaders, NAACP LDF Amicus Br. § III.[47] The question before the Court in this case, however, is whether the Second Amendment permits the state to regulate concealed carry.

Some states have adopted more liberal regimes with respect to open and concealed carry. Others have laws similar to New York's. "In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as

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[46] *See History, Text, and Tradition*, 83 Law & Contemp. Probs. at 88.

[47] This case does not present—and therefore we do not address—the question of whether any aspects of the challenged licensing scheme and enforcement of the law violate anti-discrimination, Equal Protection or Due Process protections.

laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). "Disenfranchising the American people on this life and death subject would be the gravest and most serious of steps." *Kolbe v. Hogan*, 849 F.3d 114, 150–51 (4th Cir. 2017) (Wilkinson, J., concurring). States should not be prohibited from seeking to further public peace and a robust civic life by limiting concealed carry to those who demonstrate a specific need. The Second Amendment has not prevented states from making this reasonable policy choice before and it should not now. New York's regulation should be upheld.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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Respectfully Submitted,

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