No. 20-843

IN THE

Supreme Court of the United States

NEW YORK STATE RIFLE
& PISTOL ASSOCIATION, INC., *et al.*,

Petitioners,

v.

KEVIN P. BRUEN, IN HIS OFFICIAL
CAPACITY AS SUPERINTENDENT
OF THE NEW YORK STATE POLICE, *et al.*,

Respondents.

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

BRIEF OF J. MICHAEL LUTTIG, PETER KEISLER, CARTER PHILLIPS AND STUART GERSON, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

NANCY A. TEMPLE
KATTEN & TEMPLE, LLP
209 South LaSalle Street,
Suite 950
Chicago, Illinois 60604

RICHARD D. BERNSTEIN, ESQ.
Counsel of Record
1875 K Street, NW
Washington, DC 20006
(202) 303-1000
rbernsteinlaw@gmail.com

Counsel for Amici Curiae

September 13, 2021

307451

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Table of Contents

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

STATUTES

Page

OTHER AUTHORITIES

Cited Authorities

Page

INTEREST OF *AMICI CURIAE*

Amici include J. Michael Luttig, Peter Keisler, Carter Phillips, Stuart Gerson, and others listed in Appendix A.[1] *Amici* speak only for themselves personally, and not for any other entity or person.

Amici have an interest in preserving our historical, traditional, and constitutional system of governance regarding the Second Amendment's right to bear arms in public. As history and tradition demonstrate beyond peradventure, legislatures have, since long before the founding and continuously thereafter up to the present day, decided how to strike the delicate balance between the Second Amendment's twin concerns for self-defense and public safety in assessing the permissible restrictions on the public carry of loaded guns. There is no more constitutionally persuasive example of this than is evident in the founding era statutory restrictions on the carry of loaded guns in public places ("public-places carry"). This brief will assist the Court by demonstrating historical, textualist, and structural reasons why the Court should affirm.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1897, this Court said that it had already long been "well-recognized" that "the right of the people to keep and

1. All parties consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person other than *amici* made a monetary contribution to its preparation or submission.

bear arms (art. 2 [of the Bill of Rights]) is not infringed by laws prohibiting the carrying of concealed weapons." *Robertson v. Baldwin,* 165 U.S. 275, 281-82 (1897). This Court repeated the same in *District of Columbia v. Heller,* 544 U.S. 570, 626 (2008) ("*Heller I*"). Among others, then-Judge Kavanaugh agreed in his dissent in *Heller v. District of Columbia*, 670 F.3d 1244, 1278 (D.C. Cir. 2011) ("*Heller II*"). Despite this, petitioners now invite this Court to create a new right to carry loaded guns "whenever and wherever" the need for self-defense may arise. Pet. Br. at 29-30. The Court should reject petitioners' invitation.

Text, history, and tradition – without resort to any judicial balancing – show that a constitutional right to bear arms outside the home, in public and in public places, has never been unrestricted and indeed, has historically been restricted in many public places.

"The *best historical support* for . . . a legislative power to" restrict gun possession in a particular way are "founding-era laws explicitly imposing" such restrictions. *Kanter v. Barr,* 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., concurring) (emphasis added). Numerous founding era statutes restricted or regulated public-places carry. This case thus presents the precise opposite interpretive issue from *Heller I,* where no colony-wide or state-wide founding era statute regulated possession of handguns in the home. *See Heller I,* 554 U.S. at 631-32, 634.

In Part I *infra, amici* show that the historical boundaries that have been traditionally laid out throughout history establish the constitutional limitations on the Second Amendment's right to "bear arms." A

cardinal textualist interpretive principle is that limits are as important as purposes in defining rights. *E.g., United States v. Rodriguez*, 480 U.S. 522, 525-26 (1987) (per curiam). Petitioners jettison this fundamental principle with their boundary-less and boundless argument that because one purpose of the Second Amendment is to allow for self-defense, the right to carry loaded guns should extend to all public places "whenever and wherever" there could arise an occasion for defense of self. Pet. Br. at 29-30. As then-Judge Kavanaugh explained in *Heller II*, in the Second Amendment, "the right" itself embodied a *pre-existing "balance"* between self-defense *and* "*public safety*." 670 F.3d at 1271 (Kavanaugh, J., dissenting) (emphasis added). The purpose of self-defense, by itself, no more defines the *historical* boundaries of the right embodied in the Second Amendment than does the purpose of public safety, by itself. Rather, under a history-and-tradition test, the *historical understanding* of those boundaries determines whether legislative restrictions on carrying loaded guns in public places are permissible.

In Part II *infra, amici* show that, as part of the centuries of historical support, the founding era gun-carry statutory restrictions make affirmance all but required. These founding era statutes establish that, as originally understood, "the right" to carry loaded guns either concealed or openly, in public and in the vast majority of public places, was not only limitable, but often limited, by the government.

The writings of some 19th-century lower court judges and commentators decades after 1791 do not, and must not be allowed to, supersede the democratic judgments and decisions embodied in these founding era statutory

restrictions. Moreover, as this Court itself acknowledged in *Heller I,* "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *Heller I,* 554 U.S. at 626 (citing courts and commentators).

In Part III, *amici* show that petitioners would improperly replace the legislatures, which have traditionally struck the balance between the right of self-defense and the need for public safety to determine the constitutionally permissible limits on the public carry of handguns, with the federal courts, to which petitioners would accord new, exclusive, and unjustified power. Today, neither this Court, nor any other federal court, has the authority to curtail or prevent legislatures from choosing a historically-rooted option for reducing the occurrence of, and the harms caused by, gun violence in public. Consider how, for example, statutory restrictions in the District of Columbia on public-places carry reduced the violence and bloodshed on January 6, 2021. Many riot defendants have since said they came to the District of Columbia aware of the District's gun laws, and accordingly left their guns at home. Petitioners' "whenever and wherever" approach, Pet. Br. at 29-30, would invalidate the existing statutes that have protected and continue to protect the Nation's seat of government by restricting the carrying of loaded guns on the streets of Washington, D.C.

Likewise, the absolutist interpretation of the Second Amendment urged by petitioners would invalidate myriad state laws in almost all of the states that are *amici for petitioners themselves*. The laws in those states *restrict* concealed and/or open carry in dozens of locations open to

the public. These multiple-location restrictions extend to everything from parks, to businesses open to the public, to religious houses of worship.

Under a history-and-tradition test, it would be virtually impossible to distinguish between laws with multiple-location restrictions and New York's "proper cause" laws. Both satisfy the history-and-tradition test because both are lineal descendants of the *even broader* founding era statutory restrictions, or neither does. To distinguish between the two kinds of statutes would require junking the history-and-tradition test altogether, after which the Court would be forced to resort to judicial balancing for each of the broad variations of public-places carry location restrictions now extant in virtually every state.

Wading through that thicket would take decades and, in the end, inevitably be unprincipled. Instead, based on the broad founding era statutory restrictions and the centuries-old unbroken history and tradition of public-carry restrictions, the Court should sustain both "[p]roper cause" laws and laws with multiple-location restrictions.

ARGUMENT

I. HISTORICAL BOUNDARIES INHERE IN THE SECOND AMENDMENT'S RIGHT TO "BEAR ARMS."

Petitioners devote much space to two arguments that provide neither textual nor historical justification to ignore the historical boundaries of the right to carry loaded guns in public. The proper and historical limitations on

the Second Amendment right are evident in the relevant founding era statutory restrictions on public-places carry discussed *infra* in Part II.A.

A. As the Second Amendment Allows, New York's Laws Impose Limits on Carrying Loaded Guns Outside the Home.

"Like most rights, the right secured by the Second Amendment is not unlimited." *Heller I,* 554 U.S. at 626. Petitioners repeatedly contend, however, that New York denies the right to "bear" arms because it "totally bans" carrying guns "*at all*" and "anywhere" outside the home. Pet. Br. at 40-41 (internal quotations omitted), 45 (emphasis in original), 47-48. This hyperbolic assertion is simply incorrect. As respondents have documented, New York extends the right to carry loaded guns to various places outside the home, but just not to all places outside the home.

To start, as respondents have demonstrated, New York routinely grants licenses to carry loaded guns to hunt, learn, practice, or engage in sport at ranges, and for owners and staff to exercise self-defense at their businesses. Petitioners admit that New Yorkers, including the individual petitioners, are routinely granted licenses to carry guns "*outside the home* for hunting and target practice." Pet. Br. at 18-19, 43 (emphasis added). The licenses of individual petitioners also expressly allow "concealed-carry for purposes of off road back country, outdoor activities similar to hunting, for example, fishing, hiking and camping." J.A. 41, 114. And petitioner Koch was licensed "to carry to and from work." J.A. 114.

In addition to the above routine licensing of public-place carry in many places outside the home, respondents have demonstrated that New York provides for gun owners to obtain unrestricted licenses to carry guns in public places generally, upon a showing of "proper cause." Accordingly, petitioners' "total ban" strawman is just that, a strawman.

B. This Court Should Not Reset the Historical Boundaries Embodied in the Second Amendment Based Exclusively on the Purpose of Self-Defense Because Those Boundaries Are the Product of the Historical and Traditional Balance Between Self-Defense and Public Safety.

Petitioners contend that the scope of the Second Amendment right to carry loaded guns is essentially boundless – extending to public places "*whenever and wherever*" an occasion for self-defense may arise. Pet Br. at 29-30 (emphasis added). But, as Justice Scalia wrote in concurring in *McDonald v. City of Chicago,* 561 U.S. 742 (2010), "*traditional restrictions* go to show *the scope of the right* . . . ." *Id.* at 802 (Scalia, J., concurring) (emphasis added). Accordingly, although one "purpose" of the Second Amendment is to aid in self-defense, Pet. Br. at 22-23, there are other purposes as well, including public safety. It cannot be gainsaid that no single purpose dictates how far and to which public places the right to carry loaded guns extends outside the home.

Textualist principles of statutory construction also properly apply to interpret the Second Amendment's text. *See Heller I,* 554 U.S. at 578. One such fundamental

principle is that no legislative enactment "pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the [law's] primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam) (emphasis in original).

Here, "the Second Amendment . . . codified a *pre-existing* right." *Heller I*, 554 U.S. at 592 (emphasis in original). As then-Judge Kavanaugh explained in *Heller II*, "the scope of the Second Amendment right" embodies and "maintain[s] the *balance historically and traditionally struck* in the United States between *public safety and* the individual right to keep [and bear] arms . . . ." 670 F.3d at 1271 (emphasis added). Under a history-and-tradition test, the boundaries of the Second Amendment right are governed by "the historical understanding of the scope of the right," *id.* at 1280 (Kavanaugh, J., dissenting), not by contemporary explication of but one side of that balance that has been struck historically.

It would violate neutral principles of adjudication to allow the single purpose of self-defense completely to override the other purposes of the Second Amendment, such as public safety, which have also been carefully weighed together with self-defense for over two centuries in setting the historical boundaries of "the right." As Justice Scalia and Bryan Garner wrote: "The most destructive (and most alluring) feature of purposivism is its manipulability." A. Scalia & B. Garner, *Reading Law* 18 (2012).

Petitioners both misread and overread *Heller I*'s reliance upon the Second Amendment's purpose of self-defense, in any event. *Heller I* relied upon the self-defense purpose of the Second Amendment only to show "that the Second Amendment conferred an *individual right* to keep and bear arms." 554 U.S. at 595 (emphasis added). Immediately thereafter, *Heller I* was at pains to emphasize, as if in anticipation of petitioners' argument, that "[o]f course [that] right was not unlimited . . . . Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation." *Id.* (emphasis in original). *Heller I* focuses on limitations on the Second Amendment right in Part III of its opinion, which does *not* mention self-defense. *See id.* at 626-28. Instead, *Heller I*'s Part III approvingly cites the 19th-century authorities that "held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *Id.* at 626.

Heller I also flatly stated that "schools and government buildings" are outside the boundaries of the right to bear arms. 554 U.S. at 626. This despite the fact that, as history confirmed *before* (and after) the ratification of the Second Amendment, the occasion for self-defense can often arise in schools and government buildings.[2] Consequently, boundlessly extending the right to carry loaded guns to all public places "whenever and wherever," Pet. Br. at 30, an occasion for self-defense could arise outside the home, as petitioners urge, is not merely inconsistent with, but contradicts, the historical and traditional boundaries of

2. *See* "History of School Shootings in the United States," available at https://www.k12academics.com/school-shootings/history-school-shootings-united-states.

the right to bear arms, as well as the boundaries already defined by this Court.

II. THE MANY FOUNDING ERA STATUTES PROVIDE THE BEST HISTORICAL SUPPORT POSSIBLE FOR LEGISLATIVE LIMITS ON PUBLIC CARRY.

Then-Judge Kavanaugh himself described how "governments appear to have *more* flexibility and power to impose gun regulations under a test based on text, history, and tradition than they would under strict scrutiny." *Heller II,* 670 F.3d at 1274 (emphasis in original). Among the examples that then-Judge Kavanaugh used to prove "the point" was that "the Court in *Heller [I]* affirmatively *approved* a slew of gun laws," including "concealed-carry laws . . . . The Court approved them based on a history-and tradition-based test . . . " *Id.* at 1278 (emphasis in original); *accord Heller I,* 554 U.S. at 626 (citing cases, Kent, and an edition of Blackstone).

The history-and-tradition interpretive approach owes its legitimacy to its foundational reliance on the "history formed by *democratic decisions,*" *McDonald,* 561 U.S. at 805 (Scalia, J., concurring) (emphasis added), including those democratic decisions embodied in statutes. Despite this, petitioners tellingly limit their argument's discussion of founding era state statutes to a single incomplete and misleading paragraph. *See* Pet. Br. at 31-32.

As has been demonstrated by respondents and other *amici* in support of respondents, there are centuries of state statutes and other history supporting restrictions on public-places carry. This *amici* brief focuses on founding

era statutes because, as then-Judge Barrett wrote, "[t]he *best historical support* for a legislative power to" restrict gun possession "would be founding-era laws explicitly imposing – or explicitly authorizing the legislature to impose – such a ban." *Kanter,* 919 F.3d at 454 (Barrett, J., concurring) (emphasis added). Here, the founding era statutory restrictions provide the single "best historical support" for New York's restrictions on concealed-carry and open carry in most public places.

A. Each of Three Categories of Founding Era Statutes Shows That Legislatures Regulated the Carrying of Loaded Guns in Most Public Places.

The founding era statutes show that the carrying of loaded guns in public was a matter committed to "the arena of public debate and legislative action," *Washington v. Glucksberg,* 521 U.S. 702, 720 (1996). To be sure, many in the founding generation understood the value of guns for self-defense. Self-defense is indisputably one purpose of the Second Amendment. But that is not the issue before the Court. The issue is whether the founding generation understood the matter of carrying loaded guns in public places as having been removed from the arena for public debate by "the right" to bear arms embodied in the Second Amendment. Petitioners argue they did. The founding era statutory restrictions show that the founding generation understood the very opposite.

There were three basic variations of founding era statutes that restricted or regulated the carrying of guns in public places. First, statutes in three jurisdictions categorically restricted both concealed and open carry

of guns in public places. *See* 1686 N.J. Laws 289, 290, at 9 (barring "privately to wear any pocket *pistol*" and providing that "no planter shall ride or go armed with sword, *pistol* or dagger") (emphasis added); 1699 N.H. Laws 1 ("or any other who shall go *armed* offensively"); 1792 N.C. Laws 60, ch. 3 (no person may "go nor ride *armed* by night or by day, in fairs, markets, nor in the presence of the King's Justices, or other ministers, *nor in no parts elsewhere*") (emphasis added). By themselves, these founding era statutes restricting public-places carry distinguish this case from *Heller I*. In the founding era, as *Heller I* observed, *no* colony-wide or state-wide statute restricted individual possession of guns in the home. *See Heller I,* 554 U.S. at 634 (it was a "false proposition" in that case that there were "somewhat similar restrictions in the founding period"); *see also id.* at 631-32 (at most "a single law, in effect in a single city" restricted possession of handguns in the home).

Second, other founding era statutes in three other jurisdictions also restricted public-places carry. *See, e.g.,* 1786 Va. Laws 33, ch. 21 ("nor go nor ride armed by night nor by day, in fairs or markets, *or in other places,* in terror of the Country") (emphasis added); 1795 Mass. Acts 436, ch. 2 ("ride or go armed offensively, to the *fear or* terror of the good citizens of this Commonwealth") (emphasis added); 1692 Mass. Laws No. 6, at 11-12 ("ride or go armed offensively before their Majestic Justices, or their Officers or Ministers doing their Office, *or elsewhere,* by Night or day, in *Fear or* Affray of their Majesties Liege People") (emphasis added); 1801 Tenn. 259, 260-61, ch. 22 ("if any persons shall *publicly* ride or go armed to the terror of the people, or *privately* carry any dirk, large knife, pistol or any other dangerous weapon, to the *fear* or terror of *any person*") (emphasis added).

And it was unquestionably the mere carrying of the gun in a public place that was proscribed by these statutes – "ride or go armed" or "privately carry." These statutes did not even address the use of the gun. The only arguable additional element of these offenses was the subjective fear or terror of any person – whether intended by the person carrying the gun or not.[3] Of course, if petitioners prevail in this case, many Americans who have lived all their lives in states without public-places carry will find themselves in "fear" and "terrified." Fearful, and many terrified, both by seeing people around them openly carrying loaded guns and by knowing that there is likely a dramatically greater number of persons surrounding them who will be carrying concealed weapons just in case there is a violent outbreak, to which they will respond with gunfire. This specter promises that America and Americans would "live on edge" from now on, wherever they go. The legislatures that enacted this second variation of founding era statutory restrictions effectively anticipated the absolutist argument made by petitioners, and legislatively responded that the limits of the right to bear arms of course allow for restrictions on public-places carry that would cause fear or terror in others.

---

3. Pet. Br. at 7 miscites James Wilson. Wilson said the common-law crime of "an affray" can occur "where a man arms himself with dangerous and unusual weapons, in such a manner, as will naturally diffuse a terrour among the people." *Collected Works of James Wilson*, Vol. 2, Ch. IV, at 1137. This is irrelevant as none of the seven founding era statutes discussed above required an affray. The 1692 Massachusetts statute restricts public carry "in *fear or* affray" of the people. 1692 Mass. Laws No. 6, at 11-12 (emphasis added). The 1699 New Hampshire statute punished "affrayers . . . *or any other* who shall go armed offensively." 1699 N. H. Laws 1 (emphasis added). Wilson did not address any founding era statute.

This limitation, too, belies petitioners' arguments that there was a historical right to carry loaded guns "whenever and wherever," Pet. Br. at 29-30, in public. When an individual is understood to have a "right" to engage in an activity in public, statutes do not prohibit engaging in that activity in public because of another's expected or actual fearful reaction. For example, no founding era statute precluded political speech in public based on what was expected to be, or actually were, the viewers' or listeners' fearful reactions.

Petitioners do not cite a single item of persuasive contrary founding era evidence that counters the historical support for public-carry restrictions provided by the founding era statutes. They do not cite anyone or any source that contemporaneously opposed or even criticized *any* founding era statutory restriction as infringing the right to carry. Neither do they cite any proponent or opponent stating that the Second Amendment was codifying a right that would nullify any existing or prior statutory restriction in any state or city. Nor do they cite a state constitutional provision from the founding era that nullified such a restriction. This silence in the face of these founding era proscriptions and limitations confirms that carrying loaded guns in most public places was not a matter of right, but rather was a matter intended by the Framers to be left for debate and decision within the legislative arena.

New York's current statute is a lineal descendant of the first two variations of founding era statutory restrictions cited *supra*. Although today's "exclusions need not mirror limits that were on the books in 1791," *Kanter,* 919 F.3d at 465 (Barrett, J., dissenting) (internal quotations and

citation omitted), New York's statute is *less* restrictive than the founding era statutory restrictions, by allowing anyone to obtain a license to carry loaded guns in public, upon a showing of "proper cause."

Nor is New York's statute unconstitutional under the Second Amendment because it delegates "broad discretion," Pet. Br. at 42, to the State's administrative officials to decide when "proper cause" has been shown. "Of course, in ordinary cases, the distribution of powers among the branches of a State's government raises no questions of federal constitutional law . . . ." *Bush v. Gore,* 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring, joined by Scalia & Thomas, JJ.). In particular, the Second Amendment, like the First, does not address the roles of the branches of a State's government in affording "individual liberties *more expansive* than those conferred by the Federal Constitution," *Pruneyard Shopping Center v. Robbins,* 447 U.S. 74, 81 (1980) (emphasis added).

As petitioners admit, the First Amendment cases they cite apply only to the use of administrative discretion to restrict "constitutionally protected activity." Pet. Br. at 42; *see Lakewood v. Plain Dealer Publishing Co.,* 486 U.S. 750, 763-64 (1988) ("unbridled discretion" enabled newspaper distribution decisions "based on the content of the speech or viewpoint of the speaker"). The founding era statutory restrictions establish, however, that carrying loaded guns in public places is *not* a "constitutionally protected activity." *See supra,* at 11-14. Petitioners do not allege a single instance where a New York administrative official made a concealed-carry decision based on anyone's speech, or any other constitutionally-infirm discrimination. *See* Pet. Br. at 16-20.

Petitioners also misplace reliance on the third category of founding era statutes, which *compelled* carrying guns in some public places. *See* Pet. Br. at 28. The import of these various compulsory-carry statutes is precisely the opposite of what petitioners contend. The Second Amendment embodies a right that "is exercised *individually*." *Heller I,* 554 U.S. at 579-80 (emphasis added). As First Amendment jurisprudence teaches, government compulsion is antithetical to a right that is exercised individually. *See Janus v. American Federation of State, County, & Mun. Employees, Council 31,* 138 S. Ct. 2448, 2463-64 (2018). Thus, that these handful of statutes *compelled* the carrying of guns in some public places is not evidence that the Founders believed the Second Amendment created an individual right to carry guns in public. Rather, it is affirmative evidence from the founding period that the carrying of guns in public places was not an individual right, but rather was a matter left for debate and decision in the legislative arena.

There may be other gun regulations where, as in *Heller I,* current legislative restrictions have no founding era statutory support. *See New York State Rifle & Pistol Ass'n, Inc. v. City of New York,* 140 S. Ct. 1525, 1541 (2020) (Alito, J., dissenting, joined by Thomas & Gorsuch, JJ.) (relying on absence of "laws in force around the time of the adoption of the Second Amendment that prevented gun owners from practicing outside city limits"). Because of the panoply of founding era statutes that did regulate and restrict public-places carry of loaded guns, however, New York's "proper cause" law has founding era support.

B. Scattered and Selected 19th-Century Authorities and Commentary Cannot Change the Scope of the Right to Carry Guns in Public.

Petitioners all but ignore the founding era statutory restrictions on, and prohibitions of, public-places carry, and instead urge the Court to base reversal of the lower court's decision on cherry-picked 19th-century authorities and commentary. Petitioners cite state court opinions that do not begin until 1822 – 31 years after the Second Amendment's ratification.[4] None of these cited opinions of course constitutes a democratic act of the people or their legislative representatives. Accordingly, these judicial opinions are not "democratic decisions," *McDonald,* 561 U.S. at 805 (Scalia, J., concurring), and cannot displace the original understanding evidenced by the democratic decisions of the founding era statutes.

Further, the hyperbole in the opinions cited by petitioners shows that these opinions reflect merely the personal prescriptions of what the law *should* be by the judges who authored these opinions, not what the law was at the founding and therefore is today. For example, the majority opinion in *Bliss v. Commonwealth,* 12 Ky. 90 (1822), asserts that "the liberty of the citizens to bear arms" has "no limits" at all, *id.* at 92 – a position that this Court rejected in *Heller I*, *see* 554 U.S. at 626. The hyperbole in *Bliss* even analogized a concealed-carry ban

4. In *U.S. Term Limits, Inc. v. Thornton,* four justices stated that even Joseph Story's 1833 treatise was *not* evidence of "the original understanding" because "he was not a member of the Founding generation" and too much time had passed "after the framing." 514 U.S. 779, 856 (1995) (Thomas, J., joined by Rehnquist, C.J., and O'Connor & Scalia, JJ., dissenting).

to a hypothetical statute providing that soldiers, "when in conflict with an enemy, [would] not [be] allowed the use of bayonets." *Id.* At the same time that it indulged such hyperbole, *Bliss* did not even mention any of the actual founding era statutory restrictions. *See id. Bliss* is hardly persuasive authority, if authority at all, for petitioners' absolutist interpretation.

The legal treatises cited by petitioners contain similar personal opinions by their authors and likewise ignore the founding era statutory restrictions. *See, e.g.,* St. George Tucker, *Blackstone's Commentaries* app'x 19 (William Young Birch & Abraham Small, eds. 1803) (relying on the "law of nature" and questioning whether English restrictions on public-places carry "*ought*" to apply in America) (emphasis added). No court should permit the *unenacted* policy preferences of *unelected* judges and commentators from any era to supersede the enacted democratic decisions reflected in the founding era statutes.

In any event, *Heller I* has already confirmed that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." 554 U.S. at 626 (citing cases, and Kent and Blackstone treatises). The same is true concerning cases upholding statutory prohibitions on open carry. *See Young v. Hawaii,* 992 F.3d 765, 802-07 (9th Cir. 2021) (en banc) (per Bybee, J.). And to whatever extent the personal views of commentators are relevant on the question of the founding era's original understanding, the commentaries of Blackstone, Coke, and Carpenter all approved statutory restrictions on public-places carry. *See id.* at 792-93 (reviewing treatises).

The Fourteenth Amendment incorporated the Second Amendment as applicable to the States. But the Fourteenth Amendment did not change the meaning or scope of the Second Amendment. *See McDonald*, 561 U.S. at 767-68. Nonetheless, petitioners misplace reliance on federal 1866 and 1871 statutes and their legislative history, as well. Pet. Br. at 36-37. These statutes protected the right to bear arms against racial discrimination, 14 Stat. at 176-77, and imposed criminal and civil liability on those who deprived others of equal protection, and privileges and immunities, including on public highways. 17 Stat. at 13-14. Neither statute, nor either's legislative history, even addresses the extent to which the right to bear arms extended outside the home to public places.

III. PETITIONERS WOULD HAVE THIS COURT USURP THE CONSTITUTIONAL ROLE OF THE LEGISLATURES.

A. Restricting Loaded Guns in Public Places Is a Vital, Historically-Rooted, Legislative Option for Minimizing Gun Violence on America's Streets and in Public Places.

Petitioners contend that it violates the Second Amendment to restrict "law-abiding individuals" from carrying loaded guns on the streets and in other public places. Pet. Br. at 41-42. But the historical boundaries of the Second Amendment, most notably including those boundaries apparent in the founding era statutory restrictions on public-places carry, have traditionally applied so as to restrict law-abiding citizens from carrying guns in public.

This is also shown by other historical boundaries approved by *Heller I*, such as in the prohibition on "dangerous and unusual weapons." 554 U.S. at 627 (quotations and citation omitted). Thus, not even law-abiding Americans have a Second Amendment right to purchase machine guns. Even as to ordinary weapons, law-abiding citizens are subject to "laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27.

In any event, no one – including a legislature or a court – can predict that law-abiding individuals would remain so were this Court to sanction the public carry of loaded guns wherever and whenever the need for self-defense might arise. One consequence of such a holding by this Court would be that countless more law-abiding citizens would *begin* to carry guns on our streets and in our public places for the first time. Today, as in the past, much gun violence is spontaneous, occurring when passions run high in settings from the political, to bars and sporting events, to road rage, to recent impassioned and angry disagreements over whether we can be required to wear masks and quarantine. The law-abiding can become the law-less in an instant, in the impassioned moments of everyday disagreements, as we see every day of the week.

It has historically been the role of the legislatures, not the courts, to determine which laws best reduce the incidences of violence and crime. One of the most illustrative examples have been the vital, historically-rooted legislative decisions that have curbed political violence by restricting the carrying of loaded guns in public places. *See, e.g.*, *Armed Assembly: Guns, Demonstrations, and Political Violence*, at 3 (August 2021) ("*Armed Assembly*"), https://

acleddata.com/acleddatanew/wp-content/uploads/2021/08/Report_Armed-Assembly_ACLED_Everytown_August2021.pdf (unarmed demonstrations are less than one-fifth as likely to involve violence and one-fortieth as likely to involve fatalities as armed demonstrations); *id.* at 7 (demonstrations are less than one-fifth as likely to be armed in states that restrict open carry than in states that do not).

Perhaps the most powerful example of such legislative decisions is the District of Columbia's public-places carry restrictions, which indisputably prevented even more bloodshed and doubtless saved many lives during the January 6, 2021, insurrection in the Nation's Capital. Indeed, the statutes that make public-places carry illegal in the streets of the District of Columbia[5] may well have prevented a massacre that day. The D.C. Metropolitan Police Chief had publicly warned protesters on January 4, 2021, that carrying guns in the District "w[ould] not be tolerated," and in court afterward many "riot defendants . . . said they *refrained from bringing firearms*

5. Under home-rule delegation, in the District of Columbia in public areas: (1) Open carry is illegal throughout the District. D.C. Code § 22-4504.1. (2) Only persons with a District of Columbia license, not a license from another jurisdiction, may carry concealed weapons. D.C. Code § 22-4504. (3) Even District license holders are restricted from carrying concealed guns in multiple locations, including (a) on the broadly-defined Capitol Grounds, and (b) within 1,000 feet of "a demonstration in a public space," (c) on the streets near the White House, (d) on public transit, and (e) "[a]ny prohibited location or circumstance that the Chief [of Police] determines by rule." D.C. Code § 7-2509.07. Carrying a loaded gun on the broadly-defined Capitol Grounds is also a federal crime. 40 U.S.C. §§ 5104(e)(1)(A)(i); 5102(a).

to the city that day [January 6, 2021], citing D.C.'s strict gun laws."[6]

Many of the January 6, 2021 protesters who would become rioters that day did not come to Washington planning to break the law, but incited to do so, many did. "[M]ost – even some at the forefront of the action – were ardent, but disorganized Trump supporters swept up in the moment and acting individually." "Inside the Capitol Riot: An Exclusive Video Investigation," *New York Times* (June 30, 2021), https://www.nytimes.com/2021/06/30/us/jan-6-capitol-attack-takeaways.html. However, "[o]n several occasions, a calculated move by a more organized actor – for example, a Proud Boy identifying a weakness in the police line near a set of stairs – set off a surge by the mob." *Id.* As a Proud Boy leader bragged, his group had gotten "the normies all riled up." *Id.*

There can be little doubt that if petitioners' boundaryless approach to carrying loaded guns in public prevails, demagogues and extremists will have opportunity after opportunity in the years ahead to "rile-up" normally law-abiding individuals who will arrive on the streets *legally* armed with loaded guns, only to find themselves incited in the moment to use those guns *illegally* during their political protests, whether in self-defense or otherwise.

---

6. "Handguns, crowbars, Tasers and tomahawk axes: Dozens of Capitol rioters wielded 'deadly or dangerous' weapons, prosecutors say," *CBS News* (May 27, 2021), https://www.cbsnews.com/news/capitol-riot-weapons-deadly-dangerous/; "Leave your guns at home, Washington police warn pro-Trump rally-goers," *Reuters* (Jan. 4, 2021), https://www.reuters.com/article/us-usa-election-protests/leave-your-guns-at-home-washington-police-warn-pro-trump-rally-goers-idUSKBN2992JI (emphasis added).

This is assuredly not what the Framers of the Second Amendment intended.

Consider, as well, the exceedingly greater difficulties the police and the national guard would have faced if a substantial number of the January 6, 2021, protesters had been armed with loaded guns. And imagine the difficulties law enforcement would face if future protesters – whether motivated by conspiracy theories, police shootings, or anything else – arrived on the streets legally armed with loaded guns.

Adopting petitioners' "whenever and wherever" right to carry would be to throw gasoline on the fires of our Nation's future political conflicts. Although the January 6, 2021, attack on the Capitol itself was unprecedented, political violence in our streets unfortunately is not. *See, e.g., Armed Assembly,* at 3 (from January 2020 through June 2021, *armed* protesters participated in more than 560 public demonstrations, often resulting in violence).

Indeed, elected officials and others have continued to make statements long *after* January 6, 2021 that threaten more political violence.[7] An American Enterprise Institute poll, taken after January 6, 2021, shows that *29% of all Americans* agreed that "[i]f elected leaders will not

7. Rep. Madison Cawthorn recently stated: "[I]f our election systems continued to be rigged and continue to be stolen, then it's going to lead to one place – and it's bloodshed." Somnez, F., "Rep. Madison Cawthorn falsely suggests elections are 'rigged', says there will be 'bloodshed' if system continues on its path, *Washington Post* (Aug. 30, 2021)*; see also* "Gaetz: Second Amendment about waging 'armed rebellion' if necessary," *New York Post* (May 27, 2021).

protect America, the people must do it themselves even if it requires violent actions."[8] As the Deputy Attorney General wrote to all federal prosecutors and the FBI on June 25, 2021, "[i]n recent months there has been a significant increase in the threat of violence against Americans who administer free and fair elections throughout our Nation." Https://www.justice.gov/opa/press-release/file/1406331/download.

Some *amici* for petitioners even *advocate* for a country where protesters armed with guns take to the streets both to confront their armed political opponents and to threaten and, if necessary, violently stop "the rulers of the nation" who are "abusing their powers." *See, e.g.,* Brief *Amicus Curiae* of Black Guns Matter in Support of Petitioners, at 11, 13; Brief *Amicus Curiae* of Gun Owners of America, Inc., *et al.,* in Support of Petitioners ("Gun Owners Br."), at 15, 17. Can this possibly be what the Second Amendment wrought? Of course it is not.

As Justice Jackson wrote: "The choice is not between order and liberty. It is between liberty with order and anarchy without either." *Terminiello v. Chicago,* 337 U.S. 1, 37 (1949) (Jackson, J., joined by Burton, J., dissenting). Demagogues want "people [to] lose faith in the democratic process when they see public authority flouted . . . ." *Id.* at 24. Curtailing political and other public violence requires

8. "After the ballots are counted: Conspiracies, political violence and American exceptionalism, Findings from the January 2021 American Perspectives Survey," Daniel A. Cox (Feb. 11, 2011), publicly available at https://www.americansurveycenter.org/research/after-the-ballots-are-counted-conspiracies-political-violence-and-american-exceptionalism/#Political_Violence_and_Democracy.

judicial support for "the authority of local governments which represent the free choice of democratic and law-abiding elements, of all shades of opinion . . . who, whatever their differences, submit them to free elections which register the results of their free discussion." *Id.*

"The system of federalism established by our Constitution provides a way for people with different beliefs to live together in a single nation." *Obergefell v. Hodges,* 576 U.S. 644, 741 (2015) (Alito, J., joined by Roberts, C.J., and Scalia and Thomas, JJ.). Different legislatures, chosen by the people of different states, have made different choices about whether having individuals carry loaded guns on the streets and in other public places promotes or inhibits our living together as a people. These different choices, and the power to make them, were the intendment of Our Federalism.

B. The Second Amendment Interpretation Urged by Petitioners Would Either Invalidate the Multiple-Location Restrictions On Public-Places Carry In Dozens of States Or Require Decades of Case-By-Case, Location-By-Location Judicial Balancing.

Under a properly applied history-and-tradition analysis, a legislature has discretion to require "proper cause" for a license to carry loaded guns in the streets and in most public places, as New York has, as this brief demonstrates. Another permissible legislative option is to expressly restrict the carrying of loaded guns in multiple, named locations. Both options are lineal descendants of the legislative authority to restrict public-places carry reflected in the broader restrictions that

were imposed in the founding era statutes. *See supra*, at 11-15. Under petitioners' "whenever and wherever" approach, Pet. Br. at 29-30, however, both New York's laws *and* the multiple-location restrictions in dozens of states would fall.

Most states – including almost all of the states that are *amici* for petitioners – that generally issue licenses for, or otherwise allow, concealed and/or open carry, nonetheless have *multiple-location restrictions* on such carry that go far beyond government buildings and schools. For example, Missouri, a lead *amicus* for petitioners, has *17* statutory subsections that restrict concealed carry. Mo. Rev. Stat. 571.107.1. The locations subject to Missouri's restrictions include airports, child care facilities, bars, riverboat casinos, amusement parks, churches and other places of religious worship, all privately-owned locations including businesses that post a notice, sports arenas, and within 25 feet of a polling place. *Id.*

Other states that are *amici* for petitioners also have varying multiple-location restrictions on concealed and/or open carry. These varying restrictions include restrictions similar to Missouri's, and also restrictions on carrying loaded guns on public transit, in parks, financial institutions, health care facilities, mental health facilities, port areas, theaters, restaurants, inns and hotels, student residence halls, bingo halls, and gambling facilities; at a racetrack, "any athletic event," and any outdoor music festival; at or near demonstrations, protests, and licensed public gatherings; within 1,000 feet of a place of execution, 1,000 feet of a school, and 150 feet of a polling place;

"on a public street;"[9] and more. Giffords Law Center to Prevent Gun Violence, https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/location-restrictions/ (cataloging restrictions by state).

The many state laws with multiple-location restrictions would be unconstitutional if this Court were to agree with petitioners that there is a Second Amendment right to carry loaded guns "whenever and wherever" there might arise the need for self-defense. Pet. Br. at 30; *see also* Brief of *Amicus Curiae* Madison County Society Foundation, Inc. in Support of Petitioners, at 10-19 (arguing that the "vast majority" of location restrictions are unconstitutional, including restrictions for churches, schools, and post offices); *accord* Brief of Firearms Policy Coalition, *et al.*, as *Amici Curiae* Supporting Petitioners, at 27. Petitioners' approach also would render unconstitutional the federal statutory location restriction that bans the carrying of loaded guns on airplanes. *See* 49 U.S.C. § 46505. This ban is constitutional precisely because it is, like New York's law, a lineal descendant of the *broader* founding era statutory restrictions. *Supra,* at 11-15.

Ultimately, therefore, petitioners' substitution of the single boundary-less purpose of self-defense for the balance of self-defense and public safety struck in the founding era statutes, as well as historically and traditionally in the law since before the founding and to the present day, would invalidate scores of laws throughout the nation that

9. Utah precludes open carry "on a public street" if a round is in the gun's firing position. Utah Code §§ 76-10-502, 76-10-505(1)(b).

restrict carrying loaded guns in public places. This would belie then-Judge Kavanaugh's statement that *Heller I* did not "cause major repercussions throughout the Nation." *Heller II,* 670 F.3d at 1270 n.3 (Kavanaugh, J., dissenting).

Perhaps aware of the boundlessness of their view of the Second Amendment, petitioners suggest that the Court should leave for another day whether the Second Amendment somehow allows restrictions of carrying loaded guns in an *unnamed*, few "sensitive places or special circumstances." Pet. Br. at 45-46. However, an exception for any sensitive place or special circumstance would invariably require a judicial balancing test, to be applied public location by public location. Resort to judicial balancing of the twin concerns of the Second Amendment – self-defense and public safety – would both contradict petitioners' solitary focus on self-defense and require renouncement of the use of history, tradition, and original understanding as the proper tools for interpreting the Second Amendment.

The fraught judicial balancing by the courts would open a Pandora's box of challenges to the constitutionality of the many multiple-location restrictions discussed above, at 26-27. *Amici* for petitioners already are previewing what is inside that Pandora's box, and it is not something the Court should want. *See, e.g.,* Brief of *Amicus Curiae* The Independent Institute in Support of Petitioners (arguing that *this Court* should (a) decide for *each* public location, whether police protection is strong enough to justify a location restriction, and (b) ultimately rule that *all* location restrictions are unconstitutional except *inside* government buildings, polling places, and airports – and inside schools, but only for students).

The Court would struggle to divine some "judicial" principle that would distinguish among the almost-infinite number of public locations and then decide as to which there is an unfettered right to carry a gun and as to which there is not. For example, there are likely to be more unarmed bystanders on a typical urban street at most times of the day than in a typical bank, small business, or house of worship, or, at many hours of the day, in a nearby bar or restaurant. And political violence occurs more often in the streets than in any of the other public locations covered by the restrictions discussed above at 26-27.

The Court also would have to decide whether the aggregate number and corresponding breadth of multiple-location restrictions in a given state go too far and, if so, somehow choose which among the too-many restrictions to invalidate. The Court further would have to decide if and where states could ban "groups" of individuals from carrying loaded guns in public. The Brief of *Amici Curiae* Professors of Second Amendment Law Supporting Petitioners, at 23, already argues that "individuals *and small groups* ha[ve] the unfettered right to carry." (Emphasis added.)

On top of all this, the Court would have to resolve challenges to location restrictions for public-places carry of (a) more powerful guns, (b) high-capacity magazines, and (c) armor-piercing bullets. The Brief of *Amicus Curiae* George K. Young Supporting Petitioners already argues that the right to carry in public places applies to every gun, including AR-15 rifles, provided only that the gun is not carried in a threatening manner or into a place that is unusual for that specific gun. *See also id.* at 29 (conceding only that in some "areas it may be permissible to prohibit carrying a long gun while wearing tactical armor"); Gun Owners Br. at 26, 28-29 (right is to both open

and concealed-carry and includes "rifles and shotguns"). In sum, the Court would be consigned to decades of case-by-case balancing for public-places carry restrictions for myriad combinations of different public places, numbers of carriers, guns, magazine capacities, and ammunitions.

The Court should not want to establish itself in this way as the National Review Board for Public-Carry Regulations. The Court recently declined under the guise of the First Amendment to substitute judicial decision for the traditional election districting powers of legislatures. The caution of *Rucho v. Common Cause,* 139 S. Ct. 2484 (2019), applies equally here:

> The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life. That intervention would be unlimited in scope and duration – it would recur over and over again . . . . Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role.

139 S. Ct. at 2507.

There is of course no reason for the Court to establish itself as a *de facto* National Review Board here, and there is every reason for it not to do so. There is overwhelming and uncontradicted evidence that the original understanding of the Second Amendment was that there is not an absolute, unfettered right to carry loaded guns in public -- an understanding that underpins

the centuries-old, unbroken history and tradition of regulating the public-places carry of loaded firearms. Both this original understanding and this history and tradition of public-carry regulation of firearms contradict petitioners' claim to a right to carry guns in public "wherever and whenever" the need for self-defense might arise. The Court should rule to preserve and protect what has forever been our system of governance under which elected and accountable legislatures determine whether, and if so, when and where to allow public-places carry. This system of governance, which was intended by the Framers, has worked exceedingly well before the founding and for the over two and a quarter centuries since.

CONCLUSION

The Court should affirm.

Respectfully submitted,

Nancy A. Temple
Katten & Temple, LLP
209 South LaSalle Street,
Suite 950
Chicago, Illinois 60604

Richard D. Bernstein, Esq.
Counsel of Record
1875 K Street, NW
Washington, DC 20006
(202) 303-1000
rbernsteinlaw@gmail.com

Counsel for Amici Curiae

September 13, 2021

APPENDIX

APPENDIX

LIST OF AMICI CURIAE*

J. Michael Luttig, Circuit Judge, United States Court of Appeals, 1991-2006; Assistant Attorney General, Office of Legal Counsel and Counselor to the Attorney General, 1990-1991; Assistant Counsel to the President, The White House, 1980-1981.

Peter Keisler, Acting Attorney General, 2007; Assistant Attorney General for the Civil Division, 2003-2007; Principal Deputy Associate Attorney General and Acting Associate Attorney General, 2002-2003; Assistant and Associate Counsel to the President, The White House, 1986-1988.

Carter Phillips, Assistant to the Solicitor General, 1981-1984.

Stuart M. Gerson, Acting Attorney General, 1993; Assistant Attorney General for the Civil Division, 1989–1993; Assistant United States Attorney for the District of Columbia, 1972–1975.

Christine Todd Whitman, Administrator, Environmental Protection Agency, 2001–2003; Governor, New Jersey, 1994–2001.

---

* The views expressed are solely those of the individual *amici*, and for each *amicus*, reference to prior and current positions is solely for identification purposes.

Lowell Weicker, Governor, Connecticut, 1991-1995; United States Senator from Connecticut, 1971-1989; Representative of the Fourth Congressional District of Connecticut in the United States House of Representatives, 1969-1971.

Constance Morella, Representative of the Eighth Congressional District of Maryland in the United States House of Representatives, 1987- 2003; Permanent Representative from the United States to the Organisation for Economic Co-operation and Development, 2003-2007.

Christopher Shays, Representative of the Fourth Congressional District of Connecticut in the United States House of Representatives, 1987- 2009.

Donald Ayer, Deputy Attorney General 1989-1990; Principal Deputy Solicitor General, 1986-88; United States Attorney, Eastern District of California, 1982-1986; Assistant United States Attorney, Northern District of California, 1977-1979.

John Bellinger III, Legal Adviser to the Department of State, 2005-2009; Senior Associate Counsel to the President and Legal Adviser to the National Security Council, The White House, 2001-2005.

Edward J. Larson, Counsel, Office of Educational Research and Improvement, United States Department of Education, 1986-1987; Associate Minority Counsel, Committee on Education and Labor, United States House of Representatives, 1983-1986; formerly University of

Georgia Law School Professor; currently Hugh & Hazel Darling Chair in Law at Pepperdine University.

Trevor Potter, Commissioner, Federal Election Commission, 1991-1995, Chairman, 1994; Assistant General Counsel, FCC, 1984-1985; Attorney, United States Justice Department, 1982-1984; currently, President, Campaign Legal Center.

Alan Charles Raul, Associate Counsel to the President, The White House, 1986-1988; General Counsel of the Office of Management and Budget, 1988-1989; General Counsel of the United States Department of Agriculture, 1989-1993; Vice Chairman of the Privacy and Civil Liberties Oversight Board, 2006-2008.

Paul Rosenzweig, Deputy Assistant Secretary for Policy, Department of Homeland Security, 2005-2009; Office of Independent Counsel, 1998-1999; United States Department of Justice, 1986-1991; currently Professorial Lecturer in Law, The George Washington University Law School.

Robert Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, 1981-1984.

Stanley Twardy, United States Attorney for the District of Connecticut, 1985–1991.

Richard Bernstein, Appointed by the United States Supreme Court to argue in *Carmell v. Texas*, 529 U.S. 513, 515 (2000); *Montgomery v.Louisiana*, 136 S. Ct. 718, 725 (2016).