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 AMICUS CURIAE EVERYTOWN FOR GUN SAFETY IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Amicus curiae Everytown for Gun Safety (formally Everytown for Gun Safety Action Fund) is the nation's largest gun-violence-prevention organization.[1] Everytown was founded in 2014 as the combined effort of Mayors Against Illegal Guns, a national bipartisan coalition of mayors combating illegal guns and gun trafficking, and Moms Demand Action for Gun Sense in America, an organization formed after the murder of twenty children and six adults in an elementary school in Newtown, Connecticut. Everytown also includes a large network of gun-violence survivors who are empowered to share their stories and advocate for responsible gun laws, as well as a national movement of high-school and college students working to end gun violence. Everytown's mission includes defending gun laws through the filing of amicus briefs that provide historical context and doctrinal analysis that might otherwise be overlooked.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petitioners contend that New York's century-old public-carry regime violates the historical scope of the constitutional right to keep and bear arms. Under that regime, individuals who satisfy basic eligibility criteria are entitled to obtain a license to keep and carry a firearm at home or at work, and to carry a firearm in public, including for self-defense, if they have shown a bona fide need for doing so. N.Y. Penal Law § 400.00(2)(a)-(f).

In arguing that New York's regime is unconstitutional, the petitioners devote much of their historical discussion

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[1] No party's counsel authored this brief in whole or in part and no one other than amicus and its counsel made a monetary contribution to its preparation or submission. The petitioners granted blanket consent and the respondents consented in writing to this brief's filing.

to addressing whether the right extends outside the home. But that is not the question. The question is not whether the Second Amendment—which protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home," *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)—has any application outside the home. Rather, it is whether New York's law (as applied to the petitioners) is compatible with the Second Amendment (as applied to the states by the Fourteenth Amendment). On that question, the petitioners offer only a selective, skewed, and incorrect view of the history.

This brief seeks to set the record straight. Public-carry laws like the one at issue here enjoy an almost singularly impressive historical lineage among firearms regulations. The respondents' brief and an amicus brief by Professors of History and Law review the robust historical record in detail. Rather than duplicate that review here, this brief has a more limited focus: to explain specifically why the petitioners' contrary historical account is incorrect, and to underscore the ramifications of adopting their position.

We begin with the English history—the centuries-old prohibition on carrying firearms in populated public places dating back to the Statute of Northampton in 1328. The petitioners try to alter the meaning of this English prohibition, claiming (at 6) that it "prohibited the carrying of arms only with intent to terrorize." But the historical materials reveal otherwise. We then turn to America: Contrary to the petitioners' telling, the history shows that, from our nation's founding to its reconstruction, many states and cities enacted laws prohibiting carrying a firearm in populated public places (either generally or without good cause), and that these laws operated as criminal prohibitions. Next, we discuss the 19th-century American case law. Although the petitioners cherry-pick

a few cases to support their view, those cases emanate almost exclusively from the slaveholding South—a part of the country that took an outlier approach to public carry, and that included wide variability even within the region.

Finally, we address the petitioners' efforts (at 13) to direct the Court's attention to laws from the postbellum South that "disarm[ed] disfavored groups." Those overtly racist laws in no way undermine the separate tradition of regulating public carry by all citizens. And the petitioners' attempt to characterize New York's law as discriminating against Italian-Americans is simply mistaken.

When taken as a whole, the historical record here is overwhelming—so much so that the outcome follows almost *a fortiori* from this Court's cases. As Justice Alito has noted, the Court in *Heller* "recognized that history supported the constitutionality" of laws "prohibiting possession by felons and other dangerous individuals," including the mentally ill. *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1540-41 (2020) (Alito, J., dissenting); *see Heller*, 554 U.S. at 626-27. And yet "[b]ans on ex-felons possessing firearms were first adopted in the 1920s and 1930s," Winkler, Heller*'s Catch-22*, 56 U.C.L.A. L. Rev. 1551, 1563 (2009), while "limits on the possession of firearms by the mentally ill also are of 20th Century vintage," *United States. v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc); *see Kanter v. Barr*, 919 F.3d 437, 458 (7th Cir. 2019) (Barrett, J., dissenting) (noting "the dearth of felon-disarmament laws in the eighteenth and nineteenth centuries").

Here, by contrast, not only is there a long tradition of regulating public carry, but even the *uncontested* history is longstanding: The petitioners do not dispute that dozens of states and cities from the mid-19th-century to the early-20th century enacted laws that were at least as restrictive

as New York's law. When this unrebutted history is added to the long tradition of public-carry regulations, there can be no doubt that New York's law is constitutional. If Justice Kavanaugh is correct that "history and tradition show that a variety of gun regulations have co-existed with the Second Amendment right and are consistent with that right," then the regulation here must surely be among them. *Heller v. District of Columbia*, 670 F.3d 1244, 1274 (D.C. Cir. 2011) (*Heller II*) (Kavanaugh, J., dissenting). A contrary conclusion would undermine not just public safety but public confidence in originalism itself. The virtue of a historical approach, according to Justice Scalia, is that it depends on a fixed "body of evidence" rather than first principles that "can be found to point in any direction the judges favor." *McDonald v. City of Chicago*, 561 U.S. 742, 804 (2010) (Scalia, J., concurring). To set aside the body of historical evidence in this case, while claiming the mantle of originalism, would only serve to diminish it—reducing the methodology to little more than an exercise in picking out one's friends in a crowd of historical sources.

ARGUMENT

I. The petitioners' cramped reading of the Statute of Northampton contradicts the historical record.

As Judge Bybee recently chronicled, there is a long Anglo-American tradition of broadly regulating public carry in populated areas—a tradition that reaches back to at least 1328, when England first enacted the Statute of Northampton. *See Young v. Hawaii*, 992 F.3d 765, 786-94 (9th Cir. 2021) (en banc) (recounting English history); *see also* Br. for Professors of History and Law (History Profs. Br.) 3-10.

The petitioners do not meaningfully engage with much of this history. Instead, relying on just two sources—a case from 1686 and an isolated snippet from a treatise—

they claim that England recognized an expansive right to carry loaded firearms in the public square. Specifically, they contend that the Statute of "Northampton prohibited the carrying of arms only with intent to terrorize," and allowed the carrying of "ordinary arms for self-defense." Pet. Br. 5-6. But that understanding is not correct. To the contrary, the historical record shows that English law—outside of narrowly circumscribed exceptions—prohibited the bare act of carrying firearms in populous public places.

A. The Statute of Northampton's text, structure, and widely held understanding show that there was no "intent to terrorize" requirement.

The starting point is the statute itself. On its face, the Statute of Northampton provided that "no Man great nor small" shall "go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere." 2 Edw. 3, 258, ch. 3 (1328) . This broad prohibition was reenacted many times over the ensuing decades, and was reflected "in one of England's first treatises," which described the law as mandating that "'no one, of whatever condition he be, go armed in the said city or in the suburbs, or carry arms, by day or by night.'" *Young*, 992 F.3d at 792 (quoting Carpenter & Whittington, *Liber Albus: The White Book of the City of London* 335 (1419) (Henry Thomas Riley ed., 1862)). Likewise, Lord Coke—"widely recognized by the American colonists 'as the greatest authority of his time on the laws of England,'" *Payton v. New York*, 445 U.S. 573, 593-94 (1980)—said that the statute made it unlawful "to goe nor ride armed by night nor by day . . . in any place whatsoever." Coke, *The Third Part of the Institutes of the Laws of England* 160 (E. & R. Brooke ed., 1797).

Coke explained that the statute's text included "three special exceptions." *Id.* at 161. It exempted the King's

servants, those executing the King's orders, and those responding to a hue and cry. Coke identified only a single unwritten exception: using arms at home, he explained, "is by construction excepted out of this act," "for a man's house is his castle." *Id.* But outside the home, the statute applied even to a person who, "for doubt of danger," went armed "to safeguard . . . his life." *Id.* at 162; *see also id.* at 161 (noting that it was "prohibited by this Act" for one to "assemble force," including taking up arms, "to go with him to Church, or market, or any other place," even if "he be extremely threatened"). The statute was thus "strictly enforced as a prohibition on going armed in public," and any violation was punished as "a misdemeanor resulting in forfeiture of arms and up to thirty days imprisonment." Charles, *The Second Amendment in Historiographical Crisis*, 39 Fordham Urb. L.J. 1727, 1804 (2012).[2]

Historical accounts confirm the plain meaning of the statute. Writing several centuries after the statute was first enacted, Blackstone explained that "[t]he offence of riding or going armed with dangerous or unusual weapons is a crime against the public peace, *by terrifying* the good people of the land; and is particularly prohibited by the statute of Northampton." 4 Blackstone, *Commentaries on the Laws of England* 148-49 (1769) (emphasis added).[3]

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[2] A separate statute imposed more significant penalties for carrying arms with aggressive or menacing intent. *See* 25 Edw. 3, c. 2 § 13 (1350) (making it a felony to go armed "against any other"). Northampton, by contrast, did not include any similar qualification.

[3] Blackstone traced this prohibition to "the laws of Solon," under which "every Athenian was finable who walked about the city in armour." *Id.* at 149. He cited a source that in turn made clear that this prohibition on "walk[ing] the City-streets with a Sword by his side" applied "unless in case of Exigency," Potter, *The Antiquities of Greece* 170 (1697)—the only exception listed, and one that is inconsistent with an "intent to terrorize" requirement.

Terror, in other words, was the *natural consequence* of publicly carrying arms, not an additional element of the offense. *See* Ruben & Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 Yale L.J.F. 121, 129-30 (Aug. 25, 2015). As one English court put it in 1615: "Without all question, the sheriff hath power to commit . . . if contrary to the Statute of Northampton, he sees any one to carry weapons in the high-way, in terrorem populi Regis; he ought to take him, and arrest him, *notwithstanding he doth not break the peace in his presence*." *Chune v. Piott*, 80 Eng. Rep. 1161, 1162 (K.B. 1615) (emphasis added); *see also* Coke, *Institutes* 162 (recounting Sir Thomas Figett's case).

The best reading of *Chune*—a case that the petitioners ignore—is that the phrase "in terrorem populi Regis" described the *effect* of carrying a firearm in public. It did not signal an additional, atextual requirement of an "intent to terrorize." Otherwise, it would make little sense for the court to have emphasized the sheriff's power to arrest "any" person the sheriff "sees" carrying weapons in public, without exception, "notwithstanding" whether the sheriff also sees them break the peace. *Id.* Sir Thomas Figett's case confirms the same point: he was imprisoned for going "armed under his garments" to "safeguard" "his life," a concealed act that would not have been intended to terrorize. Coke, *Institutes* 162.[4]

Nor can there be any doubt that the statute covered handguns. Although the petitioners seize on Blackstone's

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[4] Even though concealed carry, on its own, does not demonstrate an intent to terrorize, the possibility of unseen weapons throughout public spaces is one that will, in Blackstone's words, "terrif[y] the good people of the land." *See* Br. of J. Michael Luttig et al. (Luttig Br.) 13 (underscoring the terrorizing effect of knowing that many will be carrying concealed weapons in public).

reference to "dangerous or unusual weapons," *see* Pet. Br. 7, that phrase was widely understood to include handguns. In 1579, Queen Elizabeth I proclaimed that the statute prohibited the carrying of "Dagges, Pistolles, and such like, not on[]ly in Cities and Towns, [but] in all partes of the Realme in common high[ways]." *By the Queene Elizabeth I: A Proclamation Against the common use of Dagges, Handgunnes, Harquebuzes, Calliuers, and Cotes of Defence* (London, Christopher Barker 1579). Fifteen years later, she reiterated that carrying such weapons in populated areas—whether "secretly" or "open[ly]"—was "to the terrour of all people professing to travel and live peaceably." *By the Queene Elizabeth I: A Proclamation Against the Carriage of Dags, and for Reformation of Some Other Great Disorders* 1 (London, Christopher Barker 1594); *see also Rex v. Harwood*, Quarter Sessions at Malton (Oct. 4-5, 1608), *reprinted in* North Riding Record Society, Quarter Sessions Records 132 (1884) (man arrested for "outragious misdemeanours" by going "armed" with "pistolls[] and other offensive weapons"). The same understanding was later adopted across the Atlantic. *See* 1836 Mass. Laws 748, 750 ch. 134, § 16 (proscribing public carry of a "pistol" or "other offensive and dangerous weapon"); *State v. Huntly*, 25 N.C. 418, 422 (1843) ("A gun is an 'unusual weapon'" at common law because "[n]o man . . . carries it about with him, as one of his every day accoutrements.").[5]

[5] Although *Heller* holds that commonly owned firearms may not be categorically prohibited, and says that uncommon weapons (like machine guns) may be, *see* 554 U.S. at 627, its passing reference to sources discussing the English public-carry prohibition should not be read as somehow definitively resolving the proper scope of that historical prohibition or whether it covered carrying a loaded handgun in populated public places. *See* Frassetto, *Meritless Historical Arguments in Second Amendment Litigation*, 46 Hastings Const.

B. The petitioners' arguments to the contrary rely on a misreading of two historical sources.

As against all this evidence, the petitioners support their contrary reading by (1) isolating and misreading a lone 17th-century prosecution, and (2) taking a selective quotation from one commentator out of context. Neither comes anywhere near rebutting the plain text and historical record.

1. The petitioners assert that the prosecution and ultimate acquittal of Sir John Knight in 1686 shows that the statute "proscribed only going armed 'to terrify the King's subjects'"—not "the carrying of arms simpliciter." Pet. Br. 5-6, 30 (quoting *Sir John Knight's Case,* 87 Eng. Rep. 75, 76 (K.B. 1686)). As respondents and amici history professors explain, this is an overreading of the case. *See* Resp. Br. 24; History Profs. Br. 7; *see also Young*, 992 F.3d at 790-91 (noting that Knight was acquitted by a sympathetic jury, but "was required to pay a surety for good behavior—making Knight's 'acquittal' more of a conditional pardon").

If anything, Knight's prosecution refutes the petitioners' historical arguments because it confirms that the statute's prohibition covered the carrying of "a gun" (in particular, "pistols"). *Id.* And contrary to the petitioners' assertion (at 5) that the statute had "almost gone in desuetudinem" when Knight was prosecuted (an odd claim for a law as narrowly targeted as the petitioners contend that the statute was), the prohibition continued to

L.Q. 531, 552 (2019) ("[Using] a twenty-first century Supreme Court decision as an interpretive tool for understanding eighteenth- and nineteenth-century sources . . . is fundamentally inconsistent with the core originalist canon that legal texts have a fixed meaning established when a text was adopted."). The evidence just discussed establishes conclusively that English law prohibited exactly that.

be enforced long after his acquittal, *see Rex v. Edward Mullins*, Middlesex Sessions, (K.B. 1751) (reporting 1751 conviction), and did not require that a person "break the peace" to violate the statute, *Chune*, 80 Eng. Rep. at 1162.

2. The petitioners also rely on a sentence from the Hawkins treatise saying that "no wearing of arms is within the meaning of this Statute, unless it be accompanied by circumstances as are apt to terrify the People." Pet. Br. 6. But the illustrations that follow confirm the narrowness of the exception: Hawkins explains that "persons of quality are in no danger of offending against this statute by wearing common weapons, or having their usual number of attendants with them for their ornament or defence, in such places, and upon such occasions, in which it is the common fashion to make use of them," and nor would wearing "privy coats of mail" be barred. 1 Hawkins, *A Treatise of the Pleas of the Crown* 489 (1721) (1824 reprint).[6] These narrow illustrations stand in contrast to the broad rule that one could not carry arms in public, and that doing so could not be "excuse[d]," as Hawkins wrote, "by alleging that such a one threatened him, and that he wears for the safety of his person from his assault." *Id.*

Thus, far from establishing an "intent to terrorize" requirement, the language on which the petitioners rely shows the opposite. It indicates that, in contrast to the exceptions delineated, carrying a handgun or other dangerous or unusual weapon in public *itself* constituted "circumstances as are apt to terrify the People"—the same understanding of the statute that Blackstone had.

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[6] Only a small minority—aristocrats—were "persons of quality." *See* Oxford English Dictionary Online, https://www.oed.com/ (defining "quality," in A.I.5.a, as "Nobility, high birth or rank, good social position; chiefly in phrase person . . . of quality"; and providing examples dating to 1579).

More generally, the petitioners' reading of the Statute of Northampton is at odds with its structure. The statute expressly exempted the King's officers and those assisting law enforcement, and (as just noted) implicitly exempted the public carrying of common weapons by aristocrats and their attendants in dignified circumstances. *Id.*; Carpenter & Whittington, *Liber Albus*, at 335 (explaining that "no one" could "carry arms, by day or by night, except the vadlets of the great lord of the land, carrying the swords of their masters in their presence, and the serjeants-at-arms [of the royal family]," and those responsible for "saving and maintaining the peace"); Coke, *Institutes* 161-62. If the statute "prohibited the carrying of arms only with intent to terrorize," as the petitioners claim (at 6), these exceptions would have been unnecessary. The petitioners have no answer.

In short, all of the available historical materials—the statutory text, structure, case law, and contemporaneous accounts—point in the same direction: For centuries before America's founding, England broadly prohibited carrying guns in populated places, regardless of whether accompanied by a threat or other menacing conduct.

II. The petitioners' attempts to diminish the robust American tradition of restricting public carry are without historical foundation.

A. Early American Northampton-style laws

The petitioners' misreading of the English history also infects their interpretation of the early American history. The petitioners do not dispute that numerous states and colonies enacted Northampton-style laws in the Founding era and beyond. *See, e.g.*, 1686 N.J. Laws 289, 289-90, ch. 9; 1694 Mass. Laws 12, no. 6; 1786 Va. Laws 33, ch. 21; 1792 N.C. Laws 60, 61, ch. 3; 1801 Tenn. Laws 710, § 6; 1821 Me. Laws 285, ch. 76, § 1; 1852 Del. Laws 330, 333, ch. 97, § 13.

Their argument, instead, is the same argument that they made with respect to Statute of Northampton itself: that these prohibitions required evil intent.

But here, too, history proves otherwise. These early American laws, like their English predecessor, broadly prohibited carrying a firearm in public, commanding constables to "arrest all such persons as in your sight shall ride or go armed." Haywood, *A Manual of the Laws of North-Carolina* pt. 2 at 40 (1814). And, as was true in England, prosecution did not require the defendant to have "threaten[ed] any person" or "committed any particular act of violence." Ewing, *A Treatise on the Office & Duty of a Justice of the Peace* 546 (1805). There was thus no requirement that the "peace must actually be broken, to lay the foundation for a criminal proceeding." Bishop, *Commentaries on the Criminal Law* 550 (1865).[7]

Unable to rebut this history, the petitioners cite other "Founding-era laws" mandating carrying firearms as part

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[7] The petitioners stress (at 31) that some of these laws prohibited going armed "offensively." Massachusetts, for instance, authorized justices of the peace to arrest of anyone who "shall ride or go armed Offensively." 1694 Mass. Laws 12, no. 6. But by using that word, Massachusetts ensured that the law applied to "offensive weapons," as in England—not all arms. Constable oaths of the 18th century described this law with similar language. *See* Charles, *The Faces of the Second Amendment Outside the Home*, 60 Clev. St. L. Rev. 1, 34 n.178 (2012). One treatise noted that anyone "going or riding with offensive Arms may be arrested." Bond, A Compleat Guide for Justices of the Peace 181 (1707). Under the law, then, a person could publicly carry a hatchet or horsewhip, but not a pistol. *See* Hawkins, *Treatise of the Pleas of the Crow*n 665 (hatchets and horsewhips were not "offensive weapons," while "guns" and "pistols" were); *King v. Hutchinson*, 168 Eng. Rep. 273, 274 (1784) (firearms were offensive weapons); *Rex v. Harwood*, *reprinted in* North Riding Record Society 132 (prohibition covered "pistolls[] and other offensive weapons").

of militia service or public defense. Pet. Br. 8, 31. But the duty to carry arms when compelled by the government (or acting under governmental authority) does not create a reciprocal civilian right to carry arms in public. This Court recognized as much in the militia context 135 years ago. *Presser v. Illinois*, 116 U.S. 252, 267 (1886). And it did the same in *Heller*, explaining that "weapons of war," not typically possessed by law-abiding citizens for lawful purposes, fall outside the Second Amendment's scope—even though governments may mandate their use in the military or militia. 554 U.S. at 625. To the extent that these laws have any bearing on this case, it is as "affirmative evidence" 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," because "government compulsion is antithetical to a right that is exercised individually." Luttig Br. 16; *see also Young*, 992 F.3d at 796.

Roaming even further afield, the petitioners quote St. George Tucker's observation (in a passage criticizing a federal prosecution of whiskey-tax protestors for treason) that "[i]n many parts of the United States" it was not uncommon for men to carry a "rifle or musket" outside their homes. Pet. Br. 27. This observation is of limited significance to the constitutional question. There is no question that *some* state and local governments, at *some* points in our history, have chosen to broadly allow public carry. Many have chosen to do so today. But it is equally true that (1) these policy choices tell us little about whether the U.S. Constitution requires that result, and (2) many other states and cities have gone the other way, confirming that there is no constitutional barrier to doing so. After all, "the Constitution establishes a federal republic where local differences are cherished as elements of liberty, rather than eliminated in a search for national

uniformity" on every issue on public policy. *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015).

B. Good-cause (or Massachusetts model) laws

Northampton-style statutes are not the only historical precedents for New York's proper-cause requirement. In the early-and-mid-19th century, many states, starting with Massachusetts, enacted a variant of Northampton that expanded the ability of individuals to publicly carry, allowing those who had "reasonable cause to fear an assault" to do so, while continuing to generally prohibit carrying firearms and other weapons in public. 1836 Mass. Laws 748, 750 ch. 134, § 16; *see* Resp. Br. 3 (citing ten such state laws). These statutes generally provided that, absent such "reasonable cause," no person could "go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon." 1836 Mass. Laws 748, 750 ch. 134, § 16. And, like the Northampton-style laws, there was no requirement that a person engage in additional threatening conduct beyond bare public carry.[8]

The petitioners discuss these laws only to assert (at 32) that the laws "embodied an understanding that that the people had a *right* to carry arms, and only its *abuse* was or

[8] Nineteenth-century accounts describe prosecutions under these laws when the person was carrying a concealed weapon—a form of carry that, by itself, does not indicate any menacing conduct (and is the only form of carry at issue here). *See City Intelligence*, Boston Courier (Mass.), Mar. 7, 1853, at 4 (reporting arrest for "carrying a concealed weapon," a "loaded pistol"); *City Items*, Richmond Whig (Va.), Sept. 25, 1860, at 3 (person was "arraigned" and "required [to] give security" for "carrying a concealed weapon"); *Recorders Court*, Oregonian (Portland, Or.), Aug. 6, 1867, at 4 (reporting conviction and imprisonment for "carrying a concealed weapon"); *Arrested for Carrying Concealed Weapons*, Mineral Point Tribune (Wis.), Aug. 11, 1870 (arrest and prosecution for carrying concealed weapon).

could be prohibited." But the fact that many of these laws used surety bonds as punishment triggered by a citizen complaint does not mean that the laws allowed carrying firearms in public without good cause.[9] Instead, these laws operated as criminal restrictions on public carry without any requirement of breaching the peace. *See* Resp. Br. 26-27; History Profs. Br. 15 n.8. In his *Young* opinion, Judge Bybee explained how they worked: "Upon complaint, a magistrate could issue a warrant for the apprehension of the person accused of threatening the peace," who " would be brought before the court where he could present his defense. If [he] did not have 'reasonable cause' to fear for himself, his family, or his property," he could be forced to post a surety. 992 F.3d at 819-20.

Further, these laws were characterized by legislatures as criminal laws. Massachusetts' legislature, for example, placed its restriction in part of the Code entitled "Of Proceedings in Criminal Cases," and cited an earlier enactment of Northampton. 1836 Mass. Laws 748, 750, ch. 134, § 16. The Minnesota legislature titled the section "Persons carrying offensive weapons, how punished." 1851 Minn. Laws at 527-28, §§ 2, 17, 18. Other states did similarly. *See, e.g.*, 1846 Mich. Laws 690, ch. 162 § 16; 1847 Va. Laws 127, ch. 14, § 16; 1871 Tex. Laws 1322, art. 6512.

Contemporaneous evidence, moreover, indicates that, although many violations were *punished* with sureties, these laws were enforced as criminal prohibitions on public carry without reasonable cause. As Judge Bybee explained in *Young*—and contrary to the petitioners' assertion (at 32) that "one against whom a surety complaint was sustained was free to continue carrying

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[9] Other states, however, like Virginia, West Virginia, and Texas, did not use a citizen-complaint enforcement mechanism.

arms [if] he paid the surety"—"[t]he surety provision allowed people against whom a complaint had been made to carry in public, but only if they could demonstrate good cause." 992 F.3d at 820. And "[t]he penalties for failing to show good cause were severe—including fines and imprisonment." *Id.*; *see also* Cornell, *The Right to Carry Firearms Outside of the Home: Separating Historical Myths from Historical Realities,* 39 Fordham Urb. L.J. 1695, 1721 (2012) (noting that a state judge's grand-jury instruction "unambiguously interprets [Massachusetts'] law as a broad ban on the use of arms in public").

C. Early-20th-century "good cause" laws

Even setting aside the Massachusetts-model laws, many early-20th-century laws indisputably prohibited carrying a firearm in public without good cause. *See* History Profs. Br. 24-25. To name a few: In 1906, Massachusetts modernized its 1836 law to prohibit carrying a handgun in public without a license, which could be issued only upon a showing of "good reason to fear an injury to [one's] person or property." 1906 Mass. Acts 150, §§ 1, 2. In 1909, Alabama made it a crime for anyone "to carry a pistol about his person on premises not his own or under his control," but allowed a defendant to "give evidence that at the time of carrying the pistol he had good reason to apprehend an attack," which the jury could consider as mitigation or justification. 1909 Ala. Laws 258, no. 215, §§ 2, 4. And in 1913, the same year that New York enacted its law, Hawaii prohibited public carry absent "good cause." 1913 Haw. Laws 25, act 22, § 1.

A decade later, in 1923, the U.S. Revolver Association published a model law, which several states adopted, requiring a person to demonstrate a "good reason to fear an injury to his person or property" before they could

obtain a permit to carry a concealed firearm in public.[10] The NRA's future president, Karl T. Frederick, was "one of the draftsmen" of this law. *3rd Report of Commission on Uniform Act to Regulate the Sale & Possession of Firearms,* Nat'l Conf. on Unif. State L. 573 (1926). West Virginia also enacted a public-carry licensing law around this time, prohibiting all carry absent a showing of good cause. 1925 W.Va. Laws 25 (Extraordinary Session).[11]

D. Blatantly discriminatory laws

In the face of this extensive record, the petitioners' claim (at 2) that "severe restrictions on the right to carry arms typically arose only in the context of efforts to disarm disfavored groups, like blacks in the South and immigrants in the Northeast." But the petitioners' selective account of a limited set of postbellum southern laws overlooks the fact that the vast majority of public-carry laws—even during that same period—applied to the general population (or only the state's white population). *See* Resp. Br. 29-30.

To begin, both the Statute of Northampton and its American successors expressly applied to all citizens. So too did the antebellum state laws regulating public carry throughout the North, which were not focused on minority groups, but were generally applicable. Some laws, in fact, applied *only* to white citizens—like Virginia, which had separate laws regulating firearms possession by enslaved

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[10] *See* 1923 Conn. Laws 3707, ch. 252; 1923 N.H. Laws 138, ch. 118; 1925 Ind. Laws 495, ch. 207; History Profs. Br. 24-25 (citing additional laws).

[11] These laws were seen as a moderate form of gun regulation. Other jurisdictions went further, prohibiting public carry with no good-cause exception. *See, e.g.*, 1890 Okla. Laws 495, art. 47, §§ 2, 5.

persons and free blacks, 1805 Va. Acts 51, and Oregon, which prohibited non-white immigration.

Even laws from the Civil War-era and Reconstruction-era South confirm that the petitioners' historical account is mistaken. The petitioners are correct that southern states enacted overtly racist "Black Codes" prohibiting Blacks from engaging in various activities, including keeping or carrying arms. But the petitioners do not explain "how that history informs the issue" here. *Young*, 992 F.3d at 822 n.43. And "these states also enacted racially neutral complete prohibitions on carrying concealed weapons," enforced against white citizens. Frassetto, *The Non-Racist and Anti-Racist History of Firearms Public Carry Regulation*, 74 SMU L. Rev. F. (forthcoming in 2021), at 5 & n.35, *available at* https://perma.cc/JDL5-8CBX.

The petitioners' account of these laws is also wrong on its own terms. The petitioners suggest (at 10-13) that anti-slavery activists and newly freed slaves believed that carrying arms in public was necessary for self-defense. But while these groups opposed discriminatory laws like the Black Codes, they *supported* generally applicable public-carry regulations. Radical Republican governors in the Reconstruction-era South passed laws prohibiting public carry precisely because they were seen as a way of protecting Black freedmen from racist violence. *Id.* at 6 nn. 44-52; *see* Resp. Br. 30.

As for the petitioners' claim that early-20th-century laws existed to disarm immigrants, it fares no better. *See* Pet. Br. 13-14, 42-43. For starters, the petitioners rely on the 1911 Sullivan Law, not the 1913 law that created the licensing standard at issue here. But more importantly, as respondents explain, although there was significant anti-Italian discrimination in early-20th-century New York,

the petitioners fail to substantiate their assertions that the public-carry law was (1) primarily motivated to disarm Italian immigrants and (2) enforced disproportionately against them. *See* Resp. Br. 30-31. The petitioners simply disregard the many other reasons motivating the law's passage, including a doubling of New York City's homicide rate, and several high-profile murders and assassination attempts. *See id.* at 4-5, 31, 40; Charles, *A Historian's Assessment of the Anti-Immigrant Narrative in* NYSRPA v. Bruen, Duke Center for Firearms Law (Aug. 4, 2021), *available in* https://perma.cc/H7NG-W4UJ ("[T]he entire evidentiary basis for the anti-immigrant narrative of the Sullivan Law comes from unsubstantiated allegations made in two books.").

In the end, the petitioner's flawed historical account gets one thing right: this Court should not look to blatantly racist historical laws to justify modern gun regulations. But the petitioners' desired approach—hand-selecting a few undeniably racist laws and disregarding the broad array of generally applicable historical laws—has no support in this Court's cases. Nor does it have any support in the theoretical underpinnings of originalism as an interpretive methodology. It is not difficult to imagine a litigant taking the same flawed approach to undercut the originalist account of other constitutional provisions. But this Court has never held that the Constitution's original public meaning can be discarded simply because a litigant identified an odious or discriminatory historical law.

III. The petitioners cherry-pick a handful of cases from the slaveholding South, which took an outlier approach to public carry and exhibited wide variability even within the region.

Just as the petitioners try to use select laws from the postbellum South to represent all gun laws, they try to use

select cases from the antebellum South (none of which struck down a good-cause-carry law) to represent all views on the right to bear arms. But these cases show only that some southerners took a different view of public carry; they do not stand for the proposition that public-carry restrictions throughout the country were widely understood to contravene the right to bear arms.

As the First Circuit noted in *Gould v. Morgan*, 907 F.3d 659, 669 (1st Cir. 2018), many states in the South adopted a more permissive approach to public carry than the rest of the country, generally allowing white citizens to carry firearms in public so long as the firearms were not concealed. *See, e.g.*, 1854 Ala. Laws 588, § 3272; 1861 Ga. Laws 859, § 4413. This alternative (and minority) tradition owes itself to the South's peculiar history and the prominent institution of slavery. It reflects "a time, place, and culture where slavery, honor, violence, and the public carrying of weapons were intertwined." Ruben & Cornell, *Firearm Regionalism*, 125 Yale L.J.F. at 125.

So it is no retort to say, as the petitioners do, that New York's law is not a longstanding regulation because a few southern state courts suggested otherwise in the mid-19th century. But even if this Court were to focus on just the South, and to ignore the rest of the country, it would see that courts and legislatures throughout the region took varying stances toward public carry.

Virginia, for example, indisputably enacted a law prohibiting public carry absent good cause in 1847, after enacting a broad Northampton-style prohibition at the Founding. 1847 Va. Laws at 129, § 16 (making it illegal for any person to "go armed with any offensive or dangerous weapon without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property"); 1786 Va. Laws 33, ch. 21. South Carolina

enacted a Northampton-style law during Reconstruction. 1870 S.C. Laws 403, no. 288, § 4. Around the same time, Texas prohibited public carry with an exception for good cause—a prohibition enforced with possible jail time and accompanied by narrow exceptions that confirmed the law's breadth. 1871 Tex. Laws 1322, art. 6512 (prohibiting public carry absent an "immediate and pressing" need for self-defense, while exempting travelers "carrying arms with their baggage" and people carrying guns on their "own premises" and "place of business"). And West Virginia, added to the Union during the Civil War, similarly allowed public carry only upon a showing of good cause. 1870 W. Va. Laws 702, 703, ch. 153, § 8. The petitioners do not meaningfully respond to these laws.

Southern case law, too, reveals a lack of uniformity. Although a few antebellum decisions interpreted state constitutions in a way that can be read to support a right to carry openly, even in populated public places, several post-War cases held the opposite. In the years immediately following the ratification of the Fourteenth Amendment, the Texas Supreme Court, for instance, twice upheld that state's good-cause requirement. *English v. State*, 35 Tex. 473 (1871); *State v. Duke*, 42 Tex. 455 (1874) (upholding under state constitution). The court remarked that the law—which prohibited carrying "any pistol" in public absent good cause—made "all necessary exceptions," including for self-defense, and noted that it would be "little short of ridiculous" for a citizen to "claim the right to carry" a pistol in "place[s] where ladies and gentlemen are congregated together." *English*, 35 Tex. at 477-79. Further, the court observed, the good-cause law was "not peculiar to our own state," for nearly "every one of the states of this Union ha[d] a similar law upon their statute books," and many had laws that were "more rigorous" in regulating public carry. *Id.* at 479.

When this Court considered Texas's law in 1894, it took a similar view. After noting that the law "forbid[s] the carrying of weapons" absent good cause and "authoriz[es] the arrest, without warrant, of any person violating [it]," the Court concluded that a person arrested under the law is not "denied the benefit" of the right to bear arms. *Miller v. Texas*, 153 U.S. 535, 538 (1894).[12]

Other courts upheld similar good-cause laws against constitutional attacks. *See, e.g.*, *State v. Workman*, 35 W. Va. 367, 367 (1891) (upholding West Virginia's good-cause requirement, which the court had previously interpreted, in *State v. Barnett*, 34 W. Va. 74 (1890), to require specific, credible evidence of an actual threat of violence, and not an "idle threat"). Even when a law wasn't directly challenged as unconstitutional, as in Virginia, courts "administered the law, and consequently, by implication at least, affirmed its constitutionality." *Id.* (referring to Virginia and West Virginia courts). And Alabama, in 1911, upheld a state prohibition on the carrying of a pistol "about his person on premises not his own or under his control." *Isaiah v. State*, 176 Ala. 27, 28 (1911).

The petitioners seek to dismiss a few of these cases based on certain aspects of their reasoning, but the point remains: These laws were enacted by sovereign state legislatures not long after the Fourteenth Amendment was ratified, and they were upheld as fully consistent with the constitutional right to bear arms, with courts noting that most other states had enacted similar laws.

In contrast, the petitioners identify no historical case (southern or otherwise) invalidating a good-cause law as

[12] Only after reaching this conclusion did this Court then hold that, "even if" the defendant were denied the right to bear arms, the right did not apply to the states (a holding later reversed in *McDonald*). *Id.*

unconstitutional.[13] Even *Andrews v. State*, 50 Tenn. 165 (1871), on which the petitioners rely, does not go so far. The Tennessee Supreme Court there invalidated a law that forbade "carrying of [a] weapon publicly or privately, without regard to time or place, or circumstances," which "in effect [was] an absolute prohibition against *keeping* such a weapon, and not a regulation of the use of it." *Id.* at 187 (emphasis added). "Under this statute," the court explained, "if a man should carry such a weapon about his own home, or on his own premises," he would violate law. *Id.* In striking down that prohibition, the court did not cast doubt on the constitutionality of a law like New York's, even as applied to "applications for concealed-carry licenses for self-defense." Pet. Br. i. Quite the contrary: The court reaffirmed that the legislature "may by a proper law regulate the carrying of this weapon publicly" "in such a manner as may be deemed most conducive to the public peace." *Andrews*, 50 Tenn. at 187-88. It simply held that the carrying of arms must be permitted "where it was clearly shown that [they] were worn *bona fide* to ward off or meet imminent and threatened danger to life or limb, or great bodily harm." *Id.* at 191. New York's law accords with this principle.

In the end, the petitioners' reliance on southern case law rests almost entirely on a handful of cases that, in upholding concealed-carry prohibitions, expressed the

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[13] The sole case that could reasonably be viewed as calling into question a law like New York's is *Bliss v. Commonwealth* in which the Kentucky Supreme Court took an absolutist view of the right to carry firearms in public. 12 Ky. (2 Litt.) 90 (1822). *Bliss*'s reading was not followed by any other 19th-century courts. *See, e.g.*, *State v. Reid*, 1 Ala. 612, 619 (1840); *Nunn v. State*, 1 Ga. 243, 251 (1846); *Commonwealth v. Murphy*, 166 Mass. 171, 173 (1896) (noting that *Bliss*'s interpretation of the right "has not been generally approved").

view that the right to bear arms protects the right, under some circumstances, to openly carry a weapon in public. *See Reid*, 1 Ala. at 619 (1840) (tying open carry to self-defense, stating that "it is only when carried openly, that [weapons] can be efficiently used for defence"); *Nunn*, 1 Ga. at 251 (striking down a broad, statewide prohibition on openly carrying weapons based on the erroneous view that the Second Amendment applied to the states before 1868, but upholding a concealed-carry ban). These cases do not require the invalidation of New York's law as applied to the petitioners' applications for concealed-carry licenses. Indeed, as this Court stated over a century ago, "the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons." *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897); *see also Heller*, 554 U.S. at 626 ("[T]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.").[14]

IV. A law that is less restrictive of public carry than laws enacted in dozens of states and cities—both before and after the Fourteenth Amendment's ratification—is constitutional under *Heller*.

Finally, the petitioners do not deny the extraordinary upshot of their position: that *dozens* of state and local laws—passed both before and after the Fourteenth Amendment's ratification in 1868—were unconstitutional.

Heller states that courts should look at "how the Second Amendment was interpreted from immediately

[14] Nor do the southern cases support a broad general right to carry, because even within the South, open carry was rare. *See State v. Smith*, 11 La. Ann. 633, 634 (1856) (referring to "the extremely unusual case of the carrying of such weapon in full open view").

after its ratification through the end of the 19th century," by "examin[ing] a variety of legal and other sources to determine the public understanding of [the] legal text." 554 U.S. at 605; *see id.* at 610-19 (analyzing "Pre-Civil War Case Law," "Post-Civil War Legislation," and "Post-Civil War Commentators"); *see also Heller II*, 670 F.3d at 1274 n.6 (Kavanaugh, J., dissenting) ("It is not uncommon for courts to look to post-ratification history and tradition to inform the interpretation of a constitutional provision."). For that reason, a regulation need not "mirror limits that were on the books in 1791" (or, as here, 1868) to qualify as longstanding under *Heller*. *Skoien*, 614 F.3d at 641.

To the contrary, *Heller* indicates that even "early twentieth century regulations" qualify as longstanding. *Fyock v. City of Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015). As Justice Alito has explained, *Heller* "recognized that history supported the constitutionality" of laws "prohibiting possession by felons" and the mentally ill, *N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. at 1540-41 (Alito, J., joined by Thomas & Gorsuch, JJ., dissenting) (citing *Heller*, 554 U.S. at 626)—even though they were not first enacted until the 20th century, *see Skoien*, 614 F.3d at 640-41. *Heller* also "deemed a ban on private possession of machine guns to be obviously valid" even though Congress didn't begin to regulate machine guns until the 1930s. *Friedman*, 784 F.3d at 408.

Under this Court's approach, then, this is an easy case. No matter how one reads the English history and the early American history, or how one interprets the Massachusetts model laws, there can be no doubt that there are over a dozen state laws and over a dozen municipal ordinances from the mid-to-late 19th century and early 20th century that were more restrictive than (or

virtually identical to) the regime challenged here.[15] It is undisputed that these laws either entirely prohibited public carry in populous places or required good cause for doing so. These laws—by themselves—are enough to uphold New York's law under *Heller*.

On the other side of the ledger, the petitioners do not point to any historical evidence supporting their claims that public carry in populous places was widely permitted. And even if they could marshal some historical support for their claims, and some cities took a more permissive view of public carry as a policy matter, that doesn't mean that the Constitution mandates that result. It just means that there's *more than one* longstanding public-carry tradition in this country—and *both are constitutional*. That is exactly what one would expect in our federalist system.

Were it otherwise, the consequences could be significant—not just for public-carry laws, or even public-safety laws more broadly, but for originalism itself. For if even this historical record were somehow inadequate in the eyes of a majority of this Court to allow for state and local governments to reach different policy views, it would mean that the historical record could almost always "be found to point in any direction the judges favor"—thereby defeating the very asserted justification for adopting an originalist methodology in the first place. *McDonald*, 561 U.S. at 804 (Scalia, J., concurring). This Court should not go down that road.

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[15] *See* 1859 N.M. Laws 94, § 2; 1871 Tex. Laws 1322, art. 6512; 1875 Wyo. Laws 352, ch. 52, § 1; 1891 W. Va. Laws 915, ch. 148, § 7; 1888 Idaho Laws 23, § 1; 1889 Ariz. Laws 16, ch. 13, § 1; 1901 Mich. Laws 687, § 8; 1903 Okla. Laws 643, ch. 25, art. 45, § 584; 1906 Mass. Sess. Laws 150 § 1; 1909 Ala. Laws 258, no. 215, §§ 2, 4; 1909 Tex. Laws 105; 1913 Haw. Laws 25, act 22, § 1; 1913 N.Y. Laws 1627; *see also* History Profs. Br. 19-25 (citing numerous state laws and 20 local laws).

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

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