18-0386-cv

United States Court of Appeals

for the

Second Circuit

LIBERTARIAN PARTY OF ERIE COUNTY, MICHAEL KUZMA, RICHARD COOPER, GINNY ROBER, PHILIP M. MAYOR, MICHAEL REBMANN, EDWARD L. GARRETT, DAVID MONGIELO, JOHN MURTARI, WILLIAM CUTHBERT,

Plaintiffs-Appellants,

– v. –

ANDREW M. CUOMO, as Governor of the State of New York, BARBARA D. UNDERWOOD, as Attorney General of the State of New York, JOSEPH A. D'AMICO, as Superintendent of the New York State Police, DENNIS M. KEHOE, individually and as Wayne County pistol permit licensing officer, M. WILLIAM BOLLER, individually and as Erie County pistol permit licensing officer, MATTHEW J. MURPHY, III,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF OF *AMICUS CURIAE* EVERYTOWN FOR GUN SAFETY IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Everytown for Gun Safety has no parent corporations. It has no stock, and therefore, no publicly held company owns 10% or more of its stock.

/s/ Nicole Gueron
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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Everytown for Gun Safety is the nation's largest gun violence prevention organization, with more than five million members spread across all fifty states, including hundreds of thousands of New York residents. It 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. Currently, the mayors of 66 New York towns and cities are members of Mayors Against Illegal Guns. Everytown's mission includes defending gun laws through the filing of *amicus* briefs that provide historical context and doctrinal analysis which might otherwise be overlooked. Everytown has filed such briefs in several recent cases, including in cases, like this one, involving challenges to gun licensing laws. *See, e.g.*, *Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537 (10th Cir. 2016); *Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016); *N.Y. St. Rifle & Pistol Ass'n v. Beach*, 18 Civ 0134 (N.D.N.Y. 2018).

[1] Pursuant to F.R.A.P. 29(a)(4)(E), *amicus curiae* states that no counsel for a party authored this *amicus* brief in whole or in part, and that no party, party's counsel, or person or entity other than *amicus curiae* and its counsel contributed money that was intended to fund preparing or submitting this *amicus* brief. All parties consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

This case presents a fundamental question: is New York State's firearms licensing law, N.Y. Penal Law § 400.00, permissible under the Second Amendment to the United States Constitution? Under Supreme Court precedent, confirmed by multiple circuit court decisions, the answer is yes.

To evaluate the statute, courts in this Circuit, like most in the country, must engage in a two-step inquiry. First, the court asks whether the licensing law "burdens conduct protected by the Second Amendment." *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 254 (2d Cir. 2015), *citing Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012). If the challenged statute does not "implicate conduct within the scope of the Second Amendment, [the] analysis ends[.]" *Id*. If such conduct *is* implicated, the court moves to the second step, in which it must "determine and apply the appropriate level of scrutiny" to the law at issue. *Id.*

The District Court erred at the first step of review by determining that New York's firearms licensing law burdens conduct protected by the Second Amendment. *Libertarian Party of Erie Cty. v. Cuomo*, 300 F. Supp. 3d 424, 441 (W.D.N.Y. 2018). It does not. The District Court misapplied the constitutional analysis established by *Heller*, *NYSRPA*, and *Kachalsky*—it failed to inquire whether the challenged law is consistent with the "historical understanding of the scope of

the right." *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008). Instead, the District Court erroneously deemed that inquiry "irrelevant" at step one of the analysis, applying only the ahistorical "common use" test. *See, e.g. NYSRPA*, 804 F.3d at 255 (applying "common use" and "typical possession" tests to prohibitions of hardware such as assault weapons and large-capacity magazines). As *amicus curiae* will show, this was clear error. Application of the "common use" test to a licensing law, without an investigation into the longstanding status of the law, is inconsistent with the two-step test set forth by *Heller* and its progeny.

New York Penal Law § 400.00 is a longstanding and presumptively constitutional law regulating both firearms possession and the carrying of firearms in public. As this brief demonstrates, these firearms regulations easily satisfy the Second Amendment's step one inquiry. *First*, this brief sets out the history of the Sullivan Act of 1911, the earliest version of N.Y. Penal Law § 400.00. Rather than being passed for "nefarious" reasons, as Appellants suggest, the Act was passed with bipartisan and widespread support to address the growing problem of gun violence. *Next*, this brief will turn to the longstanding history of similar regulations—both throughout the United States and in England. *Finally*, this brief will turn to a discussion of early-twentieth century regulations on the possession or purchase of firearms, beginning with the passage of the Sullivan Act. This period includes the

passage of many of the regulations adjudged "longstanding" and thus "presumptively lawful" by the Supreme Court in *Heller*.

The disputed statute at issue here is a modern version of the Sullivan Act that reflects our country's long history of reasonable regulations on the bearing of arms. Its provisions are the type of longstanding regulations identified in *Heller*; it does not burden conduct traditionally considered within the ambit of the Second Amendment's protections, and therefore survives the first step of the test enumerated by this Court in *Kachalsky* and *NYSRPA*. This Court should affirm the decision of the District Court, while correcting the lower court's step one methodology and applying the proper constitutional analysis to hold that New York's firearms licensing law does not burden conduct protected by the Second Amendment.

ARGUMENT

I. THE DISTRICT COURT FAILED TO CONDUCT THE PROPER ANALYSIS UNDER STEP ONE OF THIS COURT'S SECOND AMENDMENT ANALYSIS, WHICH REQUIRES CONSIDERATION OF A HISTORICAL UNDERSTANDING OF THE SCOPE OF THE RIGHT

As set forth in *NYSRPA*, determination of the constitutionality of a statute regulating firearms "requires a two-step inquiry." *NYSRPA*, 804 F.3d at 254. Step one requires an analysis of whether a challenged licensing regulation burdens conduct protected by the Second Amendment. *Id*. To answer this question, courts must assess whether the law is consistent with the "historical understanding of the

scope of the right," *Heller*, 554 U.S. at 625, and consider whether the law is one of the "presumptively lawful regulatory measures" such as "prohibitions on the possession of firearms by felons and the mentally ill, ... laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, [and] laws imposing conditions and qualifications on the commercial sale of arms." *NYSRPA*, 804 F.3d at 253. Such "longstanding" laws, the Supreme Court has explained, are tradition-based "exceptions" to the scope of the Second Amendment due to their "historical justifications." *Heller*, 554 U.S. at 635; *see McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (reiterating *Heller*'s assurances that the decision "did not cast doubt on . . . longstanding regulatory measures"); *see also Kachalsky*, 701 F.3d at 91 (upholding New York State law regulating public carry of arms, which has "a number of close and longstanding cousins," unlike the law held unconstitutional in *Heller*).

The District Court erred by foregoing this historical analysis in favor of the "common use" and "typical possession" test normally applied in challenges to prohibitions on *types* of weapons. *See Libertarian Party of Erie Cty.*, 300 F. Supp. 3d at 441–42. Unlike the Second Circuit in *Kachalsky*, the District Court engaged in no analysis of the historical underpinnings of N.Y. Penal Law § 400.00. *Compare Libertarian Party of Erie Cty*, 300 F. Supp. 3d at 441-42 *with Kachalsky* at 84-85, 94-96. Instead, it held that, under the framework outlined in *NYSRPA*, deciding if

New York's licensing laws were "longstanding" or "presumptively lawful" was "irrelevant at [step one] of the analysis." *Libertarian Party of Erie Cty, id.*

This was clear error. Ignoring the historical underpinning of a challenged licensing regulation simply does not comport with the framework set out in *Heller* and its progeny. *Heller*, 554 U.S. at 635; *see also Drake v. Filko*, 724 F.3d 426, 429–30 (3d Cir. 2013) (requirement that applicants demonstrate "justifiable need" to publicly carry arms qualifies as a "presumptively lawful," "longstanding" regulation and does not burden conduct "within the scope of the Second Amendment's guarantee").

In the years since the Second Circuit's decision in *Kachalsky*, in which this Court found the history presented was "highly ambiguous," and "d[id] not directly address the specific question before [the Court]," 701 F.3d at 91, historians and legal scholars have produced a substantial amount of historical research which reinforces the constitutionality of New York's public carry law and strongly supports the state's permit to purchase requirement. *See e.g.*, Repository of Historical Gun Laws, Duke University School of Law, https://law.duke.edu/gunlaws/ (archive published in 2017 documenting weapons laws from AD 605 to 1934). This history shows that laws like New York's are not regulatory outliers, but rather belong to a centuries-long historical tradition of regulating firearms. *Kachalsky*, at 96 ("[u]nderstanding the

scope of the constitutional right is the first step in determining the yard stick by which we measure the state regulation").

Accordingly, this Court should conclude that the District Court erred in deeming first-step historical analysis "irrelevant," and that N.Y. Penal Law § 400.00 passes constitutional muster under the first step of analysis as a "longstanding" and "presumptively lawful" regulation that does not burden conduct protected by the Second Amendment.

II. PROPER STEP-ONE HISTORICAL ANALYSIS DEMONSTRATES THAT NEW YORK'S PERMITTING REQUIREMENTS DO NOT "BURDEN CONDUCT PROTECTED BY THE SECOND AMENDMENT"

What does it mean for a law to be considered "longstanding" under *Heller*? It does not require that a law "mirror limits that were on the books in 1791." *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (en banc). Rather, laws may qualify as longstanding even if they "cannot boast a precise founding-era analogue," *N.R.A. v. BATF*, 700 F.3d 185, 196 (5th Cir. 2012), because a regulation that has "long been accepted by the public" is "not likely to burden a constitutional right." *Heller v. D.C.*, 670 F.3d 1244, 1253 (D.C. Cir. 2011) ("*Heller II*"); *see United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) ("[L]ongstanding limitations are exceptions to the right to bear arms" and "are presumptively lawful because they regulate conduct outside the scope of the Second Amendment."); *United States v. Booker*, 644 F.3d 12, 23-24 (1st Cir. 2011) (noting that the Supreme Court in *Heller*

indicated that the "modern federal felony firearm disqualification law" should be considered sufficiently longstanding even though it is "firmly rooted in the twentieth century and likely bears little resemblance to laws in effect at the time the Second Amendment was ratified").

Like regulations upheld by this and other courts, New York's requirement that those seeking to carry firearms in public receive a license after a showing of need is a longstanding regulation which falls outside the scope of the Second Amendment. Likewise, the requirement that firearm owners obtain licenses to possess[2] firearms is a longstanding, presumptively lawful condition on the sale and possession of arms. Laws like the one challenged here have been widely accepted in the United States for hundreds of years and have been in effect in New York for over a century. New York Penal Law § 400.00 is thus longstanding and constitutional under *Heller*, and succeeds at the first step of the constitutional analysis required by this Court.

A. The History of the Sullivan Act and the Origin of N.Y. Penal Law § 400.00

New York has long regulated the possession and sale of firearms; indeed, as *Kachalsky* set forth, New York's efforts predate the Constitution. 701 F.3d at 84. New York's modern system of firearm regulation has its roots at the turn of the

[2] Unlike some other states' licensing regulations, New York's statute uses the word "possess," rather than "purchase." *Amicus* treat these terms as highly similar, if not indistinguishable, as both lead to the same result: a requirement that individuals undergo a background check prior to owning a firearm.

twentieth century, when homicide rates in New York City began to rise. *Revolver Killings Fast Increasing*, N.Y. TIMES, January 30, 1911 at 4, ADD239. In response, New York State Senator Timothy Sullivan announced his intentions to make carrying concealed firearms a felony during the New York State Democratic Convention in 1910. Richard Welch, KING OF THE BOWERY, BIG TIM SULLIVAN, TAMMANY HALL, AND NEW YORK CITY FROM THE GILDED AGE TO THE PROGRESSIVE ERA, 144 (2008).

While named for Sullivan, the majority of the Act's provisions originated in a set of recommendations made to the State Legislature by the New York City Coroner's Office, which saw, firsthand, the toll increasing gun violence caused. Welch, at 145. Specifically, the Coroner's office proposed that firearms dealers should be "made to pay a high license," and "any one desiring to purchase a revolver should be compelled to go to the police to get a permit." *Revolver Killings Fast Increasing*, 4, ADD239. Once there, he would "have to give his name and address, and be questioned as to what use he would make of the revolver." *Id.*

Widely-publicized shootings—including an assassination attempt on New York City Mayor William Jay Gaynor—led to widespread support for action to address gun violence. *Stronger Ban on Pistols*, N.Y. TIMES, February 17, 1911 at 3, ADD244; *see also Story of Shooting Told by Witnesses*, N.Y. TIMES, Aug. 10, 1910 at 3, ADD242. In response to the increase in gun violence, many notable citizens of

the city, including anti-Tammany Hall crusader Henry Clews, John D. Rockefeller Jr., Jacob Schiff, John Wanamaker, firearms innovator Hudson Maxim, and the then-Republican New York Times Editorial Board supported the bill. *Stronger Ban on Pistols*, at 3, ADD244; *see also Topics of the Times*, N.Y. TIMES, April 27, 1911 at 8, ADD245. Indeed, the New York Times noted that the proposed bill "cannot too soon become a law." *Id.*

On May 10, 1911, the Act passed the New York State Senate with only five dissenting votes. *Ban Hidden Weapons on Sullivan's Plea*, N.Y. TIMES, May 11, 1911 at 3, ADD222. Five days later, the New York State Assembly passed the bill by an overwhelming and bipartisan 123-7 votes, and on May 29, 1911, Governor John Alden Dix signed the bill into law, effective September 1, 1911. *Weapons Bill Passes*, N.Y. TIMES, May 16, 1911 at 1, ADD247; *see also Stricter Weapons Law*, N.Y. TIMES, May 30, 1911 at 1, ADD243.

The Sullivan Act made it unlawful for any person to possess, unlicensed, "any pistol, revolver, or other firearm of a size which may be concealed upon the person." 1911 Laws of N.Y., ch. 195, § 1, at 443 (codifying N.Y. Penal Law § 1897, ¶ 3), ADD66. It was later amended to provide a standard for issuing permits either to publicly carry or possess weapons: requiring issuance of a permit (1) to carry when an applicant "is of good moral character and [where] proper cause exists for the issuance thereof," and (2) to possess when the licensing magistrate was "satisfied of

the good moral character of the applicant and provided that no good cause exists for the denial of such applicant." 1913 N.Y. Laws 1627, Ch. 608, ADD73. These provisions survive to this day, and are challenged on appeal. N.Y. Penal Law § 400.00.

Although the Sullivan Act was passed in the early twentieth century, the regulations it imposed were not novel. Rather, the Act was an iteration of a longstanding tradition of laws that have been enacted, accepted, and enforced in America since colonial times. We turn now to this history. *First*, we detail the centuries-long history regulating the public carrying of arms, which is now embodied in N.Y. Penal Law § 400.00(2)(f) (requiring that applicants for public carry licenses have "good moral character" and that "proper cause exists for the issuance thereof"). *Second*, we show that the Sullivan Act's permitting requirement to possess firearms was followed by other states' enactment of similar laws, and analogous regulations, since deemed "longstanding" under *Heller*.

B. Laws Requiring a Showing of Need to Carry a Firearm in Public are Longstanding and Presumptively Lawful

i. Both Founding-Era England and the American Colonies Broadly Regulated Public Carry in Populated Areas

Because the Second Amendment protects a "right inherited from our English ancestors," *Peruta v. Cnty. of San Diego*, 824 F.3d 919, 927 (9th Cir. 2016) (en banc), it is appropriate to begin with English history. English regulation on the

carrying of arms stretches back to at least 1328, when England enacted the Statute of Northampton, providing 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), ADD219.

In 1716, William Hawkins clarified the scope of this prohibition, stating that "a Man cannot excuse the wearing of such Armour in Publick by alledging that such a one threatened him, and that he wears it for the Safety of his Person from his Assault." 1 William Hawkins, A Treatise on the Pleas of the Crown, 136. Blackstone described the crime stating: "The offence of riding or going armed with dangerous or unusual weapon is a crime against the public peace, by terrifying the good people of the land," and compared the English regulation to the Law of Solon in ancient Athens, which read, "[h]e shall be fined, who is seen to walk the City-Streets with a sword by his Side, or having about him other Armour, *unless in the case of Exigency*." John Potter, The Antiquities of Greece 182 (4th ed. 1722) (emphasis added); 4 Blackstone Commentaries 149.

The American colonies adopted England's tradition of public-carry regulation. The first iteration was a 1686 New Jersey law that sought to prevent the "great fear and quarrels" induced by "several persons wearing swords, daggers, pistols," and "other unusual or unlawful weapons." 1686 N.J. Laws 289, 289–90, ch. 9, ADD1. To combat this "great abuse," the law provided that no person "shall

presume privately to wear any pocket pistol" or "other unusual or unlawful weapons," and "no planter shall ride or go armed with sword, pistol, or dagger," except for "strangers[] travelling" through. *Id.* This was only the start of a long history of regulation "limiting gun use for public safety reasons." Meltzer, Open Carry for All, 123 Yale L.J. 1486, 1523 (2014). As against this history, "there are no examples from the Founding era of anyone espousing the concept of a general right to carry." *Id.*

Many states enacted laws mirroring the Statute of Northampton both before and after the Constitution's adoption; eight years after New Jersey's law, Massachusetts enacted its own version, authorizing justices of the peace to arrest anyone who "shall ride or go armed Offensively before any of Their Majesties Justices, or other [of] Their Officers or Ministers doing their Office, or elsewhere." 1694 Mass. Laws 11, ADD4; *see also* 1699 N.H. Laws 1, ADD6; 1786 Va. Laws 35, ch. 49, ADD13; 1792 N.C. Laws 60, ch. 3, ADD14; 1801 Tenn. Laws 260-261, § 6, ADD18. Other states continued to enforce the Statute of Northampton through their common law.[3]

[3] *See* A Bill for the Office of Coroner and Constable (Mar. 1, 1682), reprinted in *Grants, Concessions & Original Constitutions* 251 (N.J. constable oath) ("I will endeavour to arrest all such persons, as in my presence, shall ride or go arm'd offensively."), ADD221; Niles, *The Connecticut Civil Officer* 154 (1833) (noting crime of "go[ing] armed offensively," even without threatening conduct), ADD235; VERMONT TELEGRAPH, Feb. 7, 1838 (observing that "[t]he laws of New England" provided a self-defense right "to individuals, but *forb[ade] their going armed* for the purpose"), ADD246. Northampton also applied in Maryland. Md. Const. of 1776, art. III, § 1, ADD212.

ii. In the Early Nineteenth Century, Numerous States Enacted Laws Generally Prohibiting Public Carrying of Firearms, With Narrow Exceptions for Those With a Specific Need for Self Defense

In the early nineteenth century, several states began to enact laws that functioned much like N.Y. Penal Law § 400.00, which affirmed the prohibition on the carrying of arms in public, with an exception for those who could show they had a need to carry. In 1836, Massachusetts amended its public-carry prohibition to provide a narrow exception for those having "*reasonable cause* to fear an assault or other injury, or violence to his person, or to his family or property." 1836 Mass. Laws 748, 750, ch. 134, § 16 (emphasis added), ADD20. Without "reasonable cause," no person could "go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon." *Id.* The law was understood to restrict carrying a firearm in public without good cause; as one judge explained in a grand jury charge appearing in the contemporary press in 1837, there was little doubt at the time that "no person may go armed… *without reasonable cause* to apprehend an assault or violence to his person, family, or property." Cornell, *The Right to Carry Firearms Outside of the Home*, 39 Fordham Urb. L.J. 1695, 1720 & n.134 (2012) (emphasis added).

Within a few decades, many states (all but one outside the slaveholding South) had adopted nearly identical laws.[4] Most copied the Massachusetts law verbatim, permitting a narrow self-defense exception. *See, e.g.*, 1851 Minn. Laws at 527–28, §§ 2, 17, 18, ADD27; 1873 Minn. Laws. 1025, § 17 (same after the 14th Amendment's ratification), ADD46. At least one state (Virginia) used slightly different language. 1847 Va. Laws at 129, § 16 ("If any person shall 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, he may be required to find sureties for keeping the peace."), ADD26. Semantic differences aside, these laws were understood, and were enforced, to do the same thing: broadly restrict the public carrying of firearms, with a limited exception for those who could show cause to go armed.[5]

[4] *See, e.g.*, 1838 Wisc. Laws 381, § 16, ADD21; 1841 Me. Laws 709, ch. 169, § 16, ADD22; 1846 Mich. Laws 690, 692, ch. 162, § 16, ADD23; 1847 Va. Laws 127, 129, ch. 14, § 16, ADD26; 1851 Minn. Laws 526, 528, ch. 112, § 18, ADD27; 1853 Or. Laws 218, 220, ch. 16, § 17, ADD29; 1861 Pa. Laws 248, 250, § 6, ADD30.

[5] Newspaper articles describe criminal prosecutions under these laws even when the person was carrying a concealed weapon—a form of public carry that, by itself, does not indicate menacing conduct beyond bare carry. *See, e.g.*, City Intelligence, BOSTON COURIER (Boston, Mass.), Mar. 7, 1853, at 4 (reporting arrest and charge against person for "carrying a concealed weapon," a "loaded pistol"), ADD226; City Items, RICHMOND WHIG (Richmond, Va.), Sept. 25, 1860, at 3 (reporting that person was "arraigned" for "carrying a concealed weapon" and "required [to] give security"), ADD227; Recorders Court, OREGONIAN (Portland, Or.), Aug. 6, 1867, at 4 (reporting conviction for "carrying a concealed weapon," resulting in two-day imprisonment), ADD238.

iii. Laws Enacted Post-Civil War Continue to Affirm That Bearing Arms in Public Required "Good Cause"

Laws enacted after the Civil War continued to affirm that bearing arms required a demonstration of good cause. In 1871, Texas prohibited public carry with an exception for good cause—a prohibition enforced with possible jail time, with narrow exceptions. 1871 Tex. Laws 25, ch. 34 § 1 (prohibiting public carry absent an "immediate and pressing" self-defense need, while exempting one's "own premises" and "place of business, and travelers "carrying arms with their baggage"), ADD43. The constitutionality of Texas's good cause requirement was twice unanimously affirmed by the Texas Supreme Court, first by a court made up entirely of Republican appointees and then after the end of Reconstruction by a court made up entirely of Democratic appointees, showing bipartisan agreement on the constitutionality of good cause laws. *See English v. State*, 35 Tex. 473 (1872); *State v. Duke*, 42 Tex. 455 (1874). Similarly, West Virginia allowed public carry only upon a showing of "reasonable cause to fear violence to his person, family, or property." 1870 W. Va. Laws 702, 703, ch. 153, § 8, ADD35; *see also State v. Barnett*, 34 W. Va. 74 (1890) (upholding state's "good cause" requirement).

Several states also incorporated a necessity element in their regulations on the carrying of concealed weapons. Kentucky limited the carrying of concealed weapons to where "the person has reasonable grounds to believe his person, or the person of some of his family, or his property, is in danger from violence or crime,"

or if he was "required by [his] business or occupation to travel during the night." 1871 Kentucky Acts 89, ch. 1888 § 2, ADD38; *see also* 1878 Mississippi 175, ch. 46 § 1 (exception to general prohibition on concealed weapons where user had been threatened with attack, or had "good and sufficient reason" to believe they would be attacked), ADD50. Alabama had a similar "necessity" requirement, in 1873, the Alabama Supreme Court held that a defendant, arrested and charged with the concealed carrying of a pistol, had the right to do so if there was "necessity" due to the "danger incident" to his travel from his home to his place of business in the city. *Eslava v. State*, 49 Ala. 355, 356 (1873). However, that right ended once he reached the city, and if he continued "to bear [the pistol] concealed about his person," he was guilty. *Id.* While these statutes applied to the concealed carrying of weapons, they likely functioned in a similar manner to the Northern, Western, Texan, and West Virginian laws cited *supra*, because the open carrying of weapons was apparently rare: the Louisiana Supreme Court, for example, referred to "the extremely unusual case of the carrying of such weapon in full open view." *State v. Smith*, 11 La. Ann. 633, 634 (1856); *see also State v. Huntly*, 25 N.C. 418, 422 (1843) ("[a] gun is an "unusual weapon"… no man amongst us carries it about with him, as one of his every day accoutrements… and never we trust will the day come when any deadly

weapon will be worn or wielded in our peace loving and law-abiding State, as an appendage of manly equipment").[6]

By the mid-to-late nineteenth century, several states adopted laws prohibiting carrying firearms in populated cities while allowing public carriage in rural areas;[7] many cities also imposed local public-carry bans.[8] "A visitor arriving in Wichita, Kansas, in 1873," for example, "would have seen signs declaring, 'LEAVE YOUR

[6] Other states limited the method of public carry to ways that would be practical only in a situation of imminent danger. Tennessee prohibited carrying arms other than "openly in [the user's] hands." 1871 Tenn. Laws 81, ch. 90, § 1, ADD41. Arkansas enacted similar restrictions. 1881 Ark. Laws 191, 192, ch. 96, § 1-2 (forbidding carrying of any arms except "such pistols as are used in the army or navy of the United States," and requiring that they be worn or carried "uncovered," and "in [the user's] hand"), ADD52.

[7] See 1869 N.M. Laws 312, Deadly Weapons Act of 1869, ch. 32, § 1 "making it "unlawful for any person to carry deadly weapons, either concealed or otherwise, on or about their persons within any of the settlements of this Territory" while providing a narrow self-defense exception), ADD31; 1876 Wyo. Laws 352, ch. 52, § 1 (prohibiting carrying firearms "concealed or openly" "within the limits of any city, town or village"), ADD48; 1888 Idaho Laws 23, § 1 (making it unlawful "to carry, exhibit or flourish any … pistol, gun or other-deadly weapons, within the limits or confines of any city, town or village or in any public assembly"), ADD55; 1889 Ariz. Laws 16, ch. 13, § 1 (prohibiting "any person within any settlement, town, village or city within this Territory" from "carry[ing] on or about his person, saddle, or in his saddlebags, any pistol."), ADD57; 1890 Okla. Laws 495, art. 47, §§ 2, 5 (crime for anyone "to carry upon or about his person any pistol, revolver," or "other offensive" weapon, except for carrying "shotguns or rifles for the purpose of hunting, having them repaired, or for killing animals," or to use in "military drills, or while travelling or removing from one place to another"), ADD59; 1903 Okla. Laws 643, ch. 25, art. 45, § 584, ADD64.

[8] *See, e.g.*, Washington, D.C., Ordinance ch. 5 (1857), ADD208; Nebraska City, Neb., Ordinance no. 7 (1872), ADD199; Nashville, Tenn., Ordinance ch. 108 (1873), ADD197; Los Angeles, Cal., Ordinance nos. 35–36 (1878), ADD196; Salina, Kan., Ordinance no. 268 (1879), ADD203; La Crosse, Wis., Ordinance no. 14, § 15 (1880), ADD195; Syracuse, N.Y., Ordinances ch. 27 (1885), ADD206; Dallas, Tex., Ordinance (1887), ADD194; New Haven, Conn., Ordinances § 192 (1890), ADD200; Checotah, Okla., Ordinance no. 11 (1890), ADD193; Rawlins, Wyo., Ordinances art. 7 (1893), ADD201; Wichita, Kan., Ordinance no. 1641 (1899), ADD210; San Antonio, Tex., Ordinance ch. 10 (1899), ADD204; When and Where May a Man Go Armed, S.F. BULLETIN, Oct. 26, 1866, at 5 ("[San Francisco] ordains that no person can carry deadly weapons"), ADD252.

REVOLVERS AT POLICE HEADQUARTERS, AND GET A CHECK.'" Winkler, Gunfight 165 (2011). Dodge City was no different. A sign read: "THE CARRYING OF FIREARMS STRICTLY PROHIBITED." *Id.*

iv. In the Early Twentieth Century, Many States Enact Laws Coupling the Carrying of Concealed Weapons With a "Good Cause" Requirement

In the early twentieth century, the United States Revolver Association drafted a model law to guide the legislative efforts of other states (the "U.S.R.A. Model Act"). Among many other regulations, the U.S.R.A. Model Act prohibited carrying concealed weapons without a permit, the issuance of which required a showing of necessity. See Charles V. Imlay, The Uniform Firearms Act, 12 A.B.A. J. 767, 767 (1926), ADD229.

Pennsylvania, North Dakota, South Dakota, Washington, and Alabama adopted the U.S.R.A. Model Act and required that an applicant for a concealed carry license show "good reason to fear an injury to his person or property," or had "any other proper reason for carrying a firearm," and that he was a "suitable person to be so licensed." 1931 Pa. Laws 497, 498-499, Act 158 § 7, ADD168; 1923 N.D. Acts 379, 381 ch. 226 § 8, ADD106; 1935 S.D. Sess. Laws 355, 356 ch. 208 § 7, ADD178; 1935 Wash. Sess. Laws 599, 600-601 ch. 172 § 7, ADD183; 1936 Ala. Laws 51, 52 § 7, ADD190; 1925 Or. Laws 468, 471 ch. 260 § 8, ADD143; *see also* 1923 Cal. Acts 695, 698-699 ch. 339 § 8 (requiring that the "person applying therefor

is of good moral character, and that good cause exists for the issuance thereof"), ADD197. Michigan, similarly, required that an applicant for a concealed carry license show that he or she was a "suitable person" to be granted such a license," and that there was "reasonable cause therefor." 1925 Mich. Pub. Acts 473, 473-474, No. 313 § 5, ADD129. New Jersey would issue concealed carry permits once the issuing judge was "satisfied of the sufficiency of the application," and "of the need of such person carrying concealed upon his person." 1925 N.J. Laws 185, 186, ch. 64 § 2, ADD135. And Indiana enacted a version of a background check, requiring that the permit application was "signed by two resident householders and freeholders of the county in which the applicant live[d]," and also that "the applicant is a suitable person to be granted a permit under the law." 1925 Ind. 495, 497 ch. 207 § 7, ADD122. Despite semantic variants, these laws all required a showing of "cause," and the suitability of the license applicant prior to carrying arms in public.

Against this historical backdrop of U.S. states enacting good cause public carry licensing standards, it is clear that the requirements in the Sullivan Act were no anomaly. 1913 N.Y. Laws 1627, 1628, Ch. 608, ADD71. Rather, they are widely-accepted regulations that the states throughout the United States have historically—through their common law and their legislatures—enacted. Because New York's current licensing requirements track this history, the public carry licensing provisions of N.Y. Penal Law § 400.00 are longstanding and constitutional

under *Heller*, and succeed at the first step of the constitutional analysis required by this Court.

We now turn to the longstanding history of another provision of the Sullivan Act challenged on appeal: the licensing requirement for the possession of firearms.

C. The Sullivan Act's Licensing Requirement to Possess Firearms is Longstanding and Presumptively Constitutional

i. After Passage of the Sullivan Act, Other States Began Passing Laws Requiring a License, or Government Approval, to Purchase Firearms

The Sullivan Act's requirement that firearm owners obtain a permit only after showing their good moral character and that "no good cause exists for the denial of such applicant" is consistent with a longstanding tradition. The Sullivan Act preceded, and indeed precipitated, the passage of those laws identified as longstanding in *Heller*. After the Sullivan Act's enactment, many states followed New York's lead by enacting laws requiring government licensing or approval prior to purchasing firearms. In 1913, Oregon made it a misdemeanor for "any person, firm or corporation" to "sell at retail, barter, give away or dispose of" a handgun unless the recipient had a permit, issued by a government official. 1913 Or. Laws 497, ch. 256 s. 1, ADD76. Such a permit would be issued only if the applicant had provided "an affidavit from at least two reputable freeholders as to the applicant's good moral character." *Id* at s. 2. Delaware enacted a similar law in 1918, requiring persons purchasing firearms be "positively identif[ied]" by "at least two freeholders

resident in the County where the sale [wa]s made," and specifically required that the arms seller could not act as one of the identifying freeholders. 1918-1919 Del. Laws 55, 55-56 ch. 28 § 1, ADD83.

Other states required that the license issuer—often the sheriff or deputy sheriff—make the "good moral character" determination, or otherwise decide to grant the license. *See, e.g.* 1925 Haw. Sess. Laws 790, 793, ch. 128 § 2136, ADD115. Montana required persons wishing to "purchase, borrow, or otherwise acquire possession of any firearm" to obtain a permit from the county sheriff, who would not issue the same until he was "satisfied" that the applicant was "of good moral character" and did not "desire such firearm or weapon for any unlawful purpose." 1918 Mont. Laws 6, 7 ch. 2 § 3 (spelling modernized), ADD79. Violations were punishable by a fine of no less than $50.00, imprisonment for not less than ten days and no more than six months, or both. *Id.* at 9, § 7. North Carolina required that clerks of the Superior Courts issue a permit to purchase a pistol only where they were "fully satisf[ied]" "by affidavits, oral evidence, or otherwise, as to the good moral character of the applicant," and, moreover, that the applicant "require[d] the possession of such weapon… for protection of the home." 1919 N.C. Sess. Laws 397, 398 ch. 197, § 3, ADD87. Missouri required that any purchaser of a "firearm of a size which may be concealed upon the person" obtain a permit issued by the circuit clerk of the county, who had been satisfied that the person applying

was "of good moral character," "lawful age," and "that the granting of the same will not endanger the public safety." 1921 Mo. Laws 691, 692 § 2, ADD91.

Several more states followed New York's lead in the late 1920's. In 1927, Michigan required that any purchaser of a pistol first obtain a license, which would be denied to any person not "nineteen years of age or over," who had not resided in-state for "six months or more," and "in no event," would a permit issue to a felon or someone "adjudged insane." 1927 Mich. Pub. Acts 887, 887-88, Act 372 § 2, ADD149. New Jersey required purchasers of pistols or revolvers to secure a "permit to purchase or carry," and provided that such permit would be denied if the applicant was not a "person of good character" or of "good repute in the community in which he lives." 1927 N.J. Laws 742, 746 ch. 321 § 9, ADD161.

States' enactment across the country of licensing laws similar to New York's statute shows that New York was no regulatory outlier. Rather, many other jurisdictions drafted and passed laws that regulated precisely the same ownership of arms. Because a regulation that has "long been accepted by the public," in New York and elsewhere, is "not likely to burden a constitutional right," *Heller II*, 670 F.3d 1253, N.Y. Penal Law § 400.00 falls outside the scope of conduct protected by the Second Amendment.

ii. Analogous Laws Requiring a Waiting Period and Background Checks Are "Close And Longstanding Cousins" of the Sullivan Act

Finally, the Court should look to "close and longstanding cousins" of the Sullivan Act's license to possess requirement to confirm that it does not burden conduct protected by the Second Amendment. *Kachalsky*, 701 F.3d at 91 (distinguishing law regulating public carry of arms, which has "a number of close and longstanding cousins," from law held unconstitutional in *Heller*).

In response to the regulations imposed on firearm owners by the Sullivan Act and other states' moves towards a permit-to-purchase system, the United States Revolver Association drafted the U.S.R.A. Model Act.[9] The U.S.R.A. Model Act introduced several of the regulations identified as "longstanding" in *Heller*. 554 U.S. 626-627. Among other things, the legislation articulated many of the modern categories of people prohibited from possessing and purchasing firearms, such as felons, non-citizens, and minors; required the licensing of firearms dealers; required sellers to transmit detailed sales records to local law enforcement; created a registration system for newly purchased arms; and imposed a one day waiting period between filing the paperwork to purchase a firearm and receipt. *See* Charles V. Imlay, *The Uniform Firearms Act*, 12 A.B.A. J. 767, 767 (1926); ADD229. During

[9] *See supra* at 20-21 for discussion regarding the U.S.R.A. Model Act's coupling of a necessity requirement to a license to concealed carry firearms.

this mandatory "waiting period" between the time of purchase and delivery of a firearm, records were collected by the dealer and submitted to law enforcement for review as part of its background check on the purchaser. *See Sportsmen Fight Sullivan Law*, 23 J. Criminology 665 (1932), ADD241. The National Conference of Commissioners on Uniform State Laws approved a revised version of this law as the Uniform Firearms Act in 1926. *Id.* The regulations set forth by the Uniform Firearms Act were supported by influential firearms organizations, including the National Rifle Association, which lobbied fiercely for its adoption. *Id*. Almost immediately, several states enacted variations of the regulations on prohibited persons set forth in the U.S.R.A. Model Act.[10] New York adopted similar regulations in its rules, while maintaining the Sullivan Act's licensing requirement for the possession of firearms that predated the U.S.R.A. Model Act. *See* N.Y. Penal Code § 400.00(c)-(j) (no license shall issue to an applicant "convicted anywhere of a felony or a serious offense," who is "a fugitive from justice," or has been "involuntarily committed to a facility" under the mental hygiene law). In 2008, the Supreme Court held that many of the U.S.R.A. Model Act's regulations—

[10] *See, e.g.*, 1923 Cal. Stat. 695, 696-97 § 2 (California), ADD97; 1923 Conn. Pub. Acts 3707 ch. 252 § 3, ADD103; 1923 N.D. Laws 379, 380 ch 266 § 5 (North Dakota), ADD106; 1923 N.H. Laws 138, ch. 118 § 6 (New Hampshire), ADD112; 1925 Ind. Acts 495, 495-496 ch. 207 § 4 (Indiana), ADD122; 1925 Mich. Pub. Acts 473, 474 §§ 6-7 (Michigan), ADD129; 1925 Or. Laws 468 ch. 260 § 2 (Oregon), ADD143; 1931 Tex. Gen. Laws 447, 448 ch. 267 § 4 (Texas), ADD174; 1931 Pa. Laws 497, 499 § 9 (Pennsylvania), ADD168; 1935 S.D. Sess. Laws 355, 356 § 9 (South Dakota), ADD178; 1935 Wash. Sess. Laws 599, 601 § 9 (Washington), ADD183; 1936 Ala. Laws 51, 53 § 9 (Alabama), ADD190.

"prohibitions on the possession of firearms by felons and the mentally ill," and "laws imposing conditions and qualifications on the commercial sale of arms," among the non-"exhaustive" list—were "longstanding," and "presumptively lawful" under the Second Amendment. *Heller*, 554 U.S. at 626–27. If the regulations imposed by the U.S.R.A. Model Act are considered sufficiently "longstanding" so as to fall beyond the scope of the Second Amendment, the license-to-possess requirement of N.Y. Penal Law § 400.00—which predated the creation of the U.S.R.A Model Act—also passes this test, and is "presumptively lawful" under *Heller*.

* * *

A long tradition of laws throughout the United States and in pre-founding England makes clear that "good moral character" and "good cause" requirements for firearm carrying, possession, and ownership were historically accepted and understood as lawful regulations on the right to bear arms. N.Y. Penal Law § 400.00; *see Drake*, 724 F.3d at 429-430 (requirement that applicants demonstrate "justifiable need" to publicly carry handgun qualifies as "presumptively lawful," "longstanding" regulation not burdening the Second Amendment); *Heller*, 554 U.S. 570, 626-627 ("longstanding," "presumptively lawful" regulatory measures are beyond scope of the Second Amendment). Laws requiring good cause to carry weapons in public have roots going back to the founding and are clearly outside the scope of the Second Amendment. Accordingly, a licensing law with such

limitations is constitutional and falls beyond the scope of the Second Amendment. As applied to New York's firearms possession licensing law, it is clear that the requirement that permits to possess firearms issue only to those with "good moral character" for "whom no good cause exists for the denial" fits squarely within our historical tradition, and does not burden conduct protected by the Second Amendment. Were it otherwise, the licensing rules, and other, analogous regulations enacted by a majority of states and many cities by the early twentieth century, would have been unconstitutional. This Court should apply the proper step one analysis and hold that New York's firearms licensing system for both possession and public carry is longstanding, presumptively lawful, and does not burden conduct protected by the Second Amendment.

CONCLUSION

For the forgoing reasons this Court should apply the correct step one standard and affirm the District Court's decision at both steps of the two-part Second Amendment analysis.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of F.R.A.P. 29(a)(5) and Local Rule 32.1(a)(4)(A) because it contains 6,988 words, excluding the parts of the brief exempted by F.R.A.P. 32(f), as counted using the word-count function on Microsoft Word.

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