

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

NEW YORK STATE RIFLE & PISTOL)
ASSOCIATION, INC., ET AL.,)
Petitioners,)
v.) No. 20-843
KEVIN P. BRUEN, IN HIS OFFICIAL)
CAPACITY AS SUPERINTENDENT OF)
NEW YORK STATE POLICE, ET AL.,)
Respondents.)

Pages: 1 through 122
Place: Washington, D.C.
Date: November 3, 2021

HERITAGE REPORTING CORPORATION
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1220 L Street, N.W., Suite 206
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9 NEW YORK STATE POLICE, ET AL.,)
10 Respondents.)
11 - - - - -

12
13 Washington, D.C.
14 Wednesday, November 3, 2021

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16 The above-entitled matter came on for
17 oral argument before the Supreme Court of the
18 United States at 10:00 a.m.

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1 APPEARANCES:
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9 Respondents.
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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: Justice
Gorsuch is participating remotely this morning.

We will hear argument this morning in
Case 20-843, New York State Rifle & Pistol
Association versus Bruen.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONERS

MR. CLEMENT: Mr. Chief Justice, and
may it please the Court:

The text of the Second Amendment
enshrines a right not just to keep arms but to
bear them, and the relevant history and
tradition, exhaustively surveyed by this Court
in the Heller decision, confirm that the text
protects an individual right to carry firearms
outside the home for purposes of self-defense.

Indeed, that history is so clear that
New York no longer contests that carrying a
handgun outside of the home for purposes of
self-defense is constitutionally protected
activity. But that concession dooms New York's
law, which makes it a crime for a typical

1 law-abiding New Yorker to exercise that
2 constitutional right.

3 This Court in *Heller* labeled the very
4 few comparable laws that restricted all outlets
5 for carrying firearms outside the home for
6 self-defense outliers that were rightly
7 condemned in decisions like *Nunn* against
8 Georgia.

9 New York likens its law to a
10 restriction on weapons in sensitive places. But
11 the difference between a sensitive place law and
12 New York's regime is fundamental. It is the
13 difference between regulating constitutionally
14 protected activity and attempting to convert a
15 fundamental constitutional right into a
16 privilege that can only be enjoyed by those who
17 can demonstrate to the satisfaction of a
18 government official that they have an atypical
19 need for the exercise of that right.

20 That is not how constitutional rights
21 work. Carrying a firearm outside the home is a
22 fundamental constitutional right. It is not
23 some extraordinary action that requires an
24 extraordinary demonstration of need.

25 Petitioners here seek nothing more

1 than their fellow citizens in 43 other states
2 already enjoy, and those states include some of
3 the most populous cities in the country. Those
4 states, like New York, limit the firearms in
5 sensitive places but do not prohibit carrying
6 for self-defense in any location typically open
7 to the general public.

8 I'm happy to continue by point --

9 JUSTICE THOMAS: Mr. Clement, sorry to
10 interrupt you. The -- if we analyze this and
11 use history, tradition, the text of the Second
12 Amendment, we're going to have to do it by
13 analogy.

14 So can you give me a regulation in
15 history that is a base -- that would form a
16 basis for legitimate regulation today? If we're
17 going to do it by analogy, what would we
18 analogize it to? What would that look like?

19 MR. CLEMENT: Well, Your Honor, I
20 suppose, if you're going to reason by analogy,
21 then you could, you know, go back and you could
22 find analogous restrictions relatively early in
23 our nation's history about prohibiting certain
24 types of firearms or having firearms in -- or
25 any weapon, really, in certain sensitive

1 locations, and I think you could reason in that
2 way.

3 Here, I think the reasoning works the
4 opposite direction, which is you typically have
5 a baseline right to carry for self-defense, and
6 the only historical analogs that really
7 restricted the right of a typical law-abiding
8 citizen to carry for self-defense to the same
9 degree as the New York law here were those laws,
10 very few, typically post-Reconstruction laws
11 that purported to eliminate any right to carry,
12 openly or concealed. And those court -- those
13 -- those laws were essentially invalidated by
14 every court that was applying an individual
15 rights view of the Second Amendment.

16 And those decisions, of course, were
17 exhaustively considered by this Court in Heller.
18 And those decisions were praised for their
19 understanding of the Second Amendment and the
20 relationship between the prefatory clause and
21 the operative clause.

22 And, equally important, the -- those
23 laws were set forth by this Court and singled
24 out by this Court as the very few restrictions
25 historically that were comparable to what the

1 District of Columbia was doing in Heller.

2 JUSTICE THOMAS: So if we look at the
3 -- you mentioned the founding and you mentioned
4 post-Reconstruction. But, if we are to analyze
5 this based upon the history or tradition, should
6 we look at the founding, or should we look at
7 the time of the adoption of the Fourteenth
8 Amendment, which then, of course, applies it to
9 the states?

10 MR. CLEMENT: So, Justice Thomas, I
11 suppose, if there were a case where there was a
12 contradiction between those two, you know, and
13 the case arose in the states, I would think
14 there would be a decent argument for looking at
15 the history at the time of Reconstruction as --
16 you know, and -- and -- and giving preference to
17 that over the founding.

18 I think, for this case and for Heller
19 and I think for most of the cases that will
20 arise, I don't know that the original founding
21 history is going to be radically different from
22 that at Reconstruction.

23 But I guess what I would say is I do
24 think that's about where it stops, because the
25 point here isn't to look at history for the sake

1 of studying history. The point is to look at
2 the history that's relevant for understanding
3 the original public meaning of the Second
4 Amendment and the Fourteenth Amendment.

5 JUSTICE KAGAN: Mr. Clement, how could
6 it stop there? In *Heller*, we made very clear
7 that laws that restricted felons from carrying
8 or possessing arms and laws that forbade
9 mentally ill people from doing the same -- we,
10 you know, basically put the stamp of approval on
11 those laws. And those laws really came about in
12 the 1920s, didn't they?

13 MR. CLEMENT: You know, Justice Kagan,
14 I -- I -- I think some of those laws in their
15 current form took that shape in the 1920s, but I
16 also think there was a tradition from the
17 beginning for keeping certain people outside of
18 the group of people that were eligible for
19 possession of firearms.

20 I -- you know, I think, obviously,
21 there is a different tradition with respect to
22 felons, in part, because, you know, you start at
23 the time of the framing, and most felonies are
24 capital crimes. So, you know, the -- the -- the
25 need to disenfranchise felons for firearm

1 possession was a little different at the
2 framing. So I think you do need to make those
3 kind of adjustments, but I think those
4 adjustments can be made.

5 I think, really, there are two reasons
6 to at least be skeptical of post-1871 history.
7 I mean, the first is I just don't really
8 understand why it's terribly relevant in forming
9 the original public meaning of the Constitution.
10 But, of course, the second reason is it's just
11 about that time that the collective rights view
12 started to creep into the decisions of some
13 state supreme courts.

14 And I think -- so in *Heller* is a
15 perfect example that this Court didn't
16 absolutely stop its analysis in 1871, but, when
17 it looked at those later sort of postbellum
18 state supreme court decisions, the ones that
19 relied on a collective rights view were given
20 very short shrift. And I think that's the
21 appropriate way to sort of deal with these
22 historical analogs.

23 JUSTICE BREYER: Well, I have two --
24 two questions. One -- one is on history. I
25 mean, it's law office history. In *McDonald*, we

1 had professors of history ran departments in the
2 English Civil War and they all said the history
3 in Heller was wrong.

4 You've read the briefs here. I don't
5 know. You read the briefs of the historian of
6 the Air Force, and she says it's this way and
7 the other ones say it's the other way. How are
8 we supposed to deal with that?

9 There's a good case -- this is a
10 wonderful case for showing both sides. So I'm
11 not sure how to deal with the history.

12 And my other question is I'm not sure
13 what New York does. We're talking here about
14 outside New York City. New York says we have
15 about 90,000 licenses to carry concealed weapons
16 or maybe it's 40,000 or maybe it's 10,000. But
17 there's been no trial. There's been no
18 proceeding. All it is is dismissed law in the
19 -- so -- so -- so how are we supposed to find
20 out, A, what the history is, which is my minor
21 question, really -- there's a lot of debate on
22 that -- but, second, how are we supposed to know
23 what we're talking about in terms of what New
24 York does since they say they give thou --
25 including to one of your clients, they give a

1 license to carry a concealed weapon? So there
2 are concealed weapon licenses all over the
3 place.

4 So -- so what are we supposed to do
5 about those two things?

6 MR. CLEMENT: Well, Justice Breyer,
7 let me start with the major question, which is
8 -- because I think that's actually very
9 straightforwardly answered -- which is there's
10 no serious question about the experience of the
11 individual Petitioners in this case.

12 And they both sought unrestricted
13 licenses and they were both denied unrestricted
14 licenses, notwithstanding that they satisfy
15 every other requirement that the state has to be
16 licensed for a concealed carry.

17 And so I'm happy to debate why the
18 state statistics don't really prove anything
19 particularly relevant, but I think they're
20 irrelevant for a more fundamental reason. I
21 mean, you know, if there were a debate between
22 the parties about whether 95 percent or
23 90 percent of the citizens of New York were
24 denied their confrontation rights in criminal
25 trials, but you had before you two individuals

1 who were clearly denied the right to confront
2 the witnesses against them, you wouldn't worry
3 about the other 95 percent --

4 JUSTICE KAGAN: Well, I have to say --

5 MR. CLEMENT: -- or the other --

6 JUSTICE KAGAN: -- Mr. Clement --

7 MR. CLEMENT: -- 90 percent.

8 JUSTICE KAGAN: -- that's not really
9 the way your brief is written. The way your
10 brief is written is to say, you know, this is a
11 -- a -- a -- a regulatory scheme that deprives
12 most people of the right to carry arms in
13 self-defense. And your brief puts a lot of
14 emphasis on that, like don't believe the state
15 that they are going to really take seriously
16 people's need for self-defense because they
17 always reject these licenses.

18 You know, if you had a bunch of
19 statistics which suggest that the state is quite
20 sensitive to people's need for self-defense and
21 gives these licenses a significant amount of the
22 time, you might think differently about the
23 regulatory scheme, wouldn't you? I mean, that's
24 the way your brief reads to me.

25 MR. CLEMENT: Well, Justice Kagan, two

1 points.

2 One is I wouldn't feel any differently
3 with respect to my two individual clients, who
4 were denied their right to exercise their Second
5 Amendment rights.

6 But, more broadly, the reason I'm so
7 confident that this regime is problematic on its
8 face is because, on its face, at least as
9 interpreted by the highest court in New York,
10 the requirement you need to show in order to
11 carry concealed for self-defense but not for
12 hunting and target practice is you have to show
13 that you have a need for self-defense that
14 distinguishes you from the generalized
15 community, from the general community.

16 So New York's law on its face says
17 that the only way that you can carry for
18 self-defense is if you demonstrate your
19 atypicality with respect to your need for
20 self-defense. And that's --

21 JUSTICE BREYER: So what do they say?
22 Because, look, Mr. Koch can. He has his
23 license. He can carry it for self-defense under
24 the license to and from work and, as you say,
25 can carry it for hunting, target practice, et

1 cetera, concealed, and in your opinion, is it
2 supposed to say you can carry a concealed gun
3 around the streets or the town or outside just
4 for fun? I mean, they are dangerous, guns. I
5 mean, so what's it supposed to say?

6 MR. CLEMENT: It's -- it's supposed to
7 be what New York says that they give to lots of
8 applicants at least in other counties, which is
9 an unrestricted license, which basically means
10 that somebody who has demonstrated to the state
11 that they're of good moral character, that they
12 have all the necessary training, whatever the
13 state requires --

14 JUSTICE BREYER: So 40,000 --

15 MR. CLEMENT: -- whatever the state --

16 JUSTICE BREYER: -- or 50,000 or
17 60,000 is not enough. You have to show you have
18 a good moral character, and then, if you just
19 would like to carry a concealed weapon, which is
20 a dangerous thing, as I said, you can just do
21 it, just that's what the Fourth -- that's -- in
22 your opinion, that's what you want, no
23 restrictions?

24 MR. CLEMENT: Well, certainly, New
25 York is entitled to have laws that say that you

1 can't have weapons in sensitive places, in
2 addition to whatever regulation --

3 JUSTICE BREYER: No, no, I'm not
4 saying --

5 MR. CLEMENT: -- for carrying that.

6 JUSTICE BREYER: Right, right. I'm
7 not saying that.

8 MR. CLEMENT: And -- and -- and New
9 York has those laws, and we don't challenge
10 those. What we would -- what we're asking for
11 -- I mean, one way to think about it is we're
12 asking that the regime work the same way for
13 self-defense as it does for hunting.

14 When my clients go in and ask for a
15 license to concealed carry for hunting purposes,
16 what they have to tell the state is they have an
17 intent to go hunting. They don't have to say:
18 I have a really good reason to go hunting. I
19 don't have to say I have a better reason to go
20 hunting than anybody else in my general
21 community. And it's there --

22 JUSTICE BREYER: Yeah. Well, the
23 difference, of course, you have a concealed
24 weapon to go hunting. You're out with an intent
25 to shoot, say, a deer or a rabbit, which has its

1 problems. But, here, when you have a
2 self-defense just for whatever you want to carry
3 a concealed weapon, you go shooting it around
4 and somebody gets killed.

5 MR. CLEMENT: With respect, Justice
6 Breyer, that's not been the experience in the 43
7 jurisdictions that allow their citizens to have
8 the same rights that my -- my clients are
9 looking for. This is not something where we're
10 asking you to take some brave new experiment
11 that no jurisdiction in Anglo-American history
12 have -- have --

13 JUSTICE SOTOMAYOR: Mr. Clement --

14 MR. CLEMENT: -- have ever done.

15 JUSTICE SOTOMAYOR: -- may I -- you're
16 talking about 43 other jurisdictions. And I
17 suspect that when we get into those 43 other
18 jurisdictions that there are going to be a
19 handful that are identical.

20 The one thing that I've looked at in
21 this history is the plethora of regimes that
22 states pick, and that starts in English law,
23 through the colonies, through post-Constitution,
24 to post-Civil War, to the 19th Century, to even
25 now, those 43 states that you're talking about,

1 most of them didn't give unrestricted rights to
2 carry in one form or another until recent times.

3 Before recent times, there were so
4 many different regulations. What it appears to
5 me is that the history tradition of carrying
6 weapons is that states get a lot of deference on
7 this. And the one deference that you don't --
8 haven't addressed is the question presented is
9 what's the law with respect to concealed
10 weapons.

11 In 1315, the British Parliament
12 specifically banned the carrying of concealed
13 arms. In colonial America, at least four, if
14 not five, states restricted concealed arms.
15 After the Civil War, there were many, many more
16 states, some include it in their constitution,
17 that you can have a right to arms but not
18 concealed.

19 You can go to Alabama, Georgia, and
20 Louisiana, which are now more open -- are more
21 free in granting the right to carry guns, but
22 they prohibited through their history concealed
23 weapons, the carrying of concealed weapons.

24 It seems to me that if we're looking
25 at that history and tradition with respect to

1 concealed arms that there is not the same
2 requirement that there is in the home.

3 One of the things Heller pointed to
4 was there were few regulations that prohibited
5 the carrying or the keeping of arms in homes.
6 But that's not true with respect to the
7 regulations about keeping of arms outside of
8 homes.

9 Putting aside the -- the prohibitions,
10 regulations on sensitive places, regulations on
11 the types of people, it seems to me that I don't
12 know how I get past all that history --

13 MR. CLEMENT: Well, Justice --

14 JUSTICE SOTOMAYOR: -- without you
15 sort of making it up and saying there's a right
16 to control states that has never been exercised
17 in the entire history of the United States as to
18 how far they can go in saying this poses a
19 danger.

20 MR. CLEMENT: So, Justice Sotomayor,
21 there's a lot to that question. I'll try to
22 take it, you know, sequentially if I can.

23 I mean, you know, let's start with
24 concealed carry restrictions. I mean, it is
25 true that during time periods where open carry

1 was allowed that some states did specifically
2 restrict concealed carry on the precise theory
3 that if we allow you to carry open, then, if
4 you're carrying concealed, you're probably up to
5 no good.

6 And Heller did exhaustively survey
7 those cases, and what it concluded is that if a
8 state allows open carry, then it can prohibit
9 concealed carry, I suppose vice versa, and --

10 JUSTICE SOTOMAYOR: But you're asking
11 us to make the choice for the legislature.
12 We're only looking at concealed here.

13 MR. CLEMENT: We are not asking you to
14 make that, and --

15 JUSTICE SOTOMAYOR: Well, yeah, you
16 are, because you're conditioning history on a
17 different fact.

18 MR. CLEMENT: I don't think we're
19 asking to -- for anybody to make that choice.
20 In fact, the relief we've asked for is to have
21 an unrestricted license because, under New York
22 law as it currently exists, that's the only way
23 that you can have a carry right for a handgun.

24 But, in framing our relief in the
25 complaint, we, you know, framed it so that there

1 are other relief consistent with the decision.
2 So, if New York really wanted to say, you know,
3 no, we have a particular problem with concealed
4 carry, notwithstanding that traditionally that's
5 the only way we allow people to carry, if they
6 want to shift to an open carry regime, they
7 could do that consistent with everything we've
8 said here.

9 Now I don't think anybody expects that
10 to happen because, if you look at the New York
11 law specifically, it's a law that prohibits the
12 carrying of handguns except for permit holders,
13 and then its provisions about permit holders
14 speak specifically to concealed carry.

15 So that's why we've framed our request
16 the way we have. But what we're doing, I think,
17 is completely consistent with the majority
18 decision in Heller's analysis of the historical
19 cases. We've said that those very few states
20 that tried to prohibit both concealed carry and
21 open carry and so gave no outlet for the right
22 to carry a firearm for self-defense outside the
23 home, those were the laws that the Heller
24 majority identified as being analogous to the
25 D.C. restriction in Heller that was invalidated.

1 JUSTICE SOTOMAYOR: I do know that
2 many of the laws conditioned or retained the
3 right of the state to decide which people were
4 eligible. And the historians -- to carry the
5 arms, that you had to be subject to the approval
6 of the local sheriff or the local mayor, et
7 cetera. And during the Civil War, that was used
8 to -- to deny Black people the right to hold
9 arms. We now have the Fourteenth Amendment to
10 protect that.

11 But why is a good cause requirement
12 any different than that discretion that was
13 given to local officials to deny the carrying of
14 firearms to people that they thought it was
15 inappropriate, whether it was the mentally ill
16 or any other qualification? I -- that's how I
17 see the good cause as fitting in -- within that
18 tradition.

19 MR. CLEMENT: So -- so let me make a
20 point about how it's so different from that
21 tradition, but then also let me make a
22 historical point.

23 This -- it's radically different to
24 say that if you are a typical New Yorker, so you
25 qualify -- you satisfy every other

1 qualification, you're not a felon, you don't
2 have any mental health problems, you've done
3 everything else we've asked you, but you are
4 typical in the sense that you don't have an
5 atypical need to carry for self-defense, I don't
6 think there's any historical analog to that.

7 As to the historical examples, with
8 all due respect, I -- I don't think I read the
9 surety laws the same way that you do. Those
10 surety laws, which were only in -- in -- in
11 place in a minority of jurisdictions, but,
12 nonetheless, I think they help us because those
13 surety laws, first of all, start with the
14 proposition that there's a baseline right for
15 every person, every member of the people,
16 protected by the Second Amendment, to carry.

17 And what they do is, if somebody,
18 essentially, as a complainant, can come into
19 court and say that somebody is -- has a
20 propensity to use them in an offensive or
21 violent way, then, if you satisfy a neutral
22 fact-finder, then you don't automatically get to
23 disarm that person. You put them to the choice
24 of posting a surety, and then they can continue
25 to possess their firearm.

1 CHIEF JUSTICE ROBERTS: Mr. Clement,
2 you -- in your opening, you talked about the
3 right applying in any location typically open to
4 the general public.

5 I'd like to get some sense about what
6 you believe could be off limits, like university
7 campuses. Could they say you're not allowed to
8 carry on a university campus?

9 MR. CLEMENT: So, Mr. Chief Justice, I
10 -- I think the answer to your question is yes.
11 And I think that what I would say, though, first
12 of all, is the language I was talking about, any
13 location open to the general public, that's
14 right from the license denial on Joint Appendix
15 page 40 -- 41. So that wasn't loose language on
16 my part. That's -- that's right there from
17 where we are told, in capital letters, where we
18 cannot carry, any location, all caps, typically
19 open to --

20 CHIEF JUSTICE ROBERTS: Well, what
21 sort of place do you think they could be
22 excluded from? In other words, you can get a
23 permit, but the state can impose certain
24 restrictions, for example, any place in which
25 alcohol is served.

1 MR. CLEMENT: So --

2 CHIEF JUSTICE ROBERTS: Can they say
3 you cannot carry your gun at any place where
4 alcohol is served?

5 MR. CLEMENT: So, Mr. Chief Justice, I
6 think you -- probably the right way to look at
7 those cases would be look at them case by case
8 and say, okay -- this Court in Heller, for
9 example, said sensitive places include
10 government buildings and schools. I think
11 those, you can probably tap into a pretty good
12 tradition.

13 I think any place that served alcohol
14 would be a -- a -- a -- a -- you know, a tougher
15 case for the government. I think we would have
16 a stronger case. They might be able to
17 condition the license holder on not consuming
18 any alcohol. There might be a variety of laws.
19 And we could have those debates, but --

20 CHIEF JUSTICE ROBERTS: What about a
21 football stadium?

22 MR. CLEMENT: I -- I -- I -- I think,
23 again, football stadium, you probably take it on
24 its own and -- and look to the historical
25 analogs. But here's -- I guess, if I could

1 offer some general principles, I think there's
2 two principles.

3 One is, you know, restriction of
4 access to the place is something that I think
5 would be consistent with the way government
6 buildings have worked and schools have worked.
7 Not any member of the general public can come in
8 there. They restrict access. With -- with or
9 without a gun, if you're an adult that has no
10 business to be in a school, you're excluded. So
11 I think that's a factor that would support
12 treating that as a sensitive place.

13 A second principle that I would offer
14 is these sensitive place restrictions really are
15 a different animal than a carry restriction
16 because I think a true sensitive place
17 restriction is not just going to limit your
18 ability to carry concealed, but it's going to
19 be, say, this is a place where no weapons are
20 allowed. You know, whether they're firearms or
21 other weapons, no weapons are allowed.

22 And then the third point that I would
23 say -- and this is just an analogy, but I think
24 it's a useful analogy -- is I think the way to
25 think about this is a little like the nonpublic

1 forum doctrine in the First Amendment, which is
2 you -- you start with the place and you try to
3 understand is this a place where, given the
4 nature of the place, its function, its
5 restrictions on access, that weapons are out of
6 place? And, if so, that's probably a sensitive
7 place --

8 JUSTICE KAGAN: So -- but --

9 MR. CLEMENT: -- where the state can
10 say --

11 JUSTICE KAGAN: -- but I think --

12 JUSTICE BARRETT: But what --

13 JUSTICE KAGAN: -- what the Chief
14 Justice is trying to do is figure out how those
15 cash out in the real world. So I'll give you a
16 few more. New York City subways.

17 MR. CLEMENT: So, you know, I -- I
18 think that the -- the question of whether you
19 could restrict arms in the subways, you know, I
20 mean, you -- you'd have to go through the
21 analysis, I think, and say, you know, is there a
22 restriction on access generally? I suppose it's
23 --

24 JUSTICE KAGAN: No, I mean, I got the
25 analysis --

1 MR. CLEMENT: Okay.

2 JUSTICE KAGAN: -- all three parts of
3 it. How does it cash out? What does it mean?

4 MR. CLEMENT: You know, I -- I don't
5 know how those are going to cash out in
6 particular cases because I think the way that
7 you would normally deal with that is you'd, you
8 know, look at all the briefing we had in the
9 this case on the history of these various
10 things.

11 And so, you know, on behalf of my
12 individual clients, I suppose I could give away
13 the subway because they're not looking to go --
14 you know, they're not in Manhattan.

15 JUSTICE KAGAN: The Chief Justice --

16 MR. CLEMENT: They're in Rensselaer
17 County.

18 JUSTICE KAGAN: -- started with
19 universities, and you said that that would be
20 all right. Did you mean that?

21 MR. CLEMENT: Yeah, I -- I -- I --
22 yes, I -- I -- I --

23 JUSTICE KAGAN: Because --

24 MR. CLEMENT: -- I did mean that.

25 JUSTICE KAGAN: -- because -- because

1 that's open for -- you know, anybody can walk
2 around the NYU campus.

3 MR. CLEMENT: Well, NYU doesn't have
4 much of a campus.

5 (Laughter.)

6 JUSTICE KAGAN: I -- I would -- I
7 would go back to New York, and I think you'll
8 find that that's wrong. Similarly, the Columbia
9 campus.

10 MR. CLEMENT: Columbia's got a campus,
11 and I don't know whether they restrict access
12 there at all. And -- and, you know -- and
13 maybe, you know, if they don't restrict access
14 to parts of the campus, maybe those are parts of
15 the campus where they wouldn't enforce the
16 policy anyways.

17 The point I'm trying to make, though
18 --

19 JUSTICE KAGAN: But you can't say, you
20 know, there are 50,000 people in one place, you
21 know, a -- a -- a ballpark, there are 50,000
22 people in one place, they're all on top of each
23 other, we don't want guns there. That's -- you
24 -- you couldn't -- the -- the -- the city or the
25 state couldn't do that?

1 MR. CLEMENT: I think they might well
2 be able to, because, again, you can't get into
3 Yankee Stadium without a ticket. I'd have to
4 understand in, you know, many of these
5 jurisdictions -- you know, I don't know every
6 jurisdiction. I don't know enough about Yankee
7 Stadium. But, you know, a lot of these stadiums
8 are not run by the government anyway. So, if a
9 private entity wants to restrict access, I don't
10 know where the state action is for there to be a
11 second --

12 JUSTICE KAGAN: Suppose the state says
13 no protest or event that has more than 10,000
14 people.

15 MR. CLEMENT: I -- I -- I think that
16 might be, you know, trickier. Maybe they could
17 justify that under strict scrutiny, but I don't
18 think that would be a sensitive places --

19 JUSTICE BARRETT: But why not?

20 MR. CLEMENT: -- restriction.

21 JUSTICE BARRETT: I mean, I guess it's
22 about the level of generality, all these
23 questions that Justice Kagan's asking you or
24 that the Chief asked you, if -- if you concede,
25 as I think the historical record requires you

1 to, that states did outlaw guns in sensitive
2 places, can't we just say Times Square on New
3 Year's Eve is a sensitive place? Because now
4 we've seen, you know, people are on top of each
5 other, we've -- we've had experience with
6 violence, so we're making a judgment, it's a
7 sensitive place.

8 MR. CLEMENT: So here -- here's what I
9 would suggest, that the right way to think about
10 limiting guns in Times Square on New Year's Eve
11 is not as a sensitive place but as a time,
12 place, and manner restriction.

13 And that might be a perfectly
14 reasonable time, place, and manner restriction,
15 but I don't think that's -- the sensitive places
16 doctrine, as I understood it, from -- and,
17 obviously, it's a brief reference in the Heller
18 decision, so I -- I may not fully understand it
19 -- but I understood that those were certain
20 places where they were just no weapon zones all
21 of the time because of the nature of that
22 institution.

23 And I think it's probably worth
24 thinking about rallies and Times Square, that
25 there may be restrictions, but they would be

1 done --

2 JUSTICE ALITO: Well, Mr. Clement --

3 MR. CLEMENT: -- under the rubric of

4 --

5 JUSTICE ALITO: -- could we --

6 MR. CLEMENT: -- time, place, and

7 manner.

8 JUSTICE ALITO: -- could we start with

9 the purpose of the personal right to keep and

10 bear arms? And the core purpose of that right,

11 putting aside the military aspect, is

12 self-defense.

13 So starting with that, could we

14 analyze the sensitive place question by asking

15 whether this is a place where the state has

16 taken alternative means to safeguard those who

17 frequent that place?

18 If it's a -- if it's a place like a

19 courthouse, for example, a government building,

20 where everybody has to go through a magnetometer

21 and there are security officials there, that

22 would qualify as a sensitive place.

23 Now that doesn't provide a mechanical

24 answer to every question, and -- but it -- would

25 that be a way of analyzing -- of -- of beginning

1 to analyze this?

2 MR. CLEMENT: Justice Alito, that
3 might be a way of analyzing it. The reason I'm
4 a little bit reluctant to go that route as
5 opposed to really think about the nature of the
6 place and the restrictions that are associated
7 with its core activity is because I worry that,
8 if you went that direction, then the state would
9 say: Well, you know, this part of the city, we
10 have a lot of police officers, and so you really
11 don't need to exercise your own individual
12 self-defense right there because we -- we have
13 your back. And I --

14 JUSTICE ALITO: Well, I don't know --

15 MR. CLEMENT: -- and I don't think
16 that's --

17 JUSTICE ALITO: -- I don't know what
18 the -- I don't know what those places would be,
19 but continue.

20 MR. CLEMENT: Well, I think my friends
21 would tell you that, you know, the whole City of
22 New York is that way.

23 And I -- I -- I think there are a lot
24 of people in New York, and New York may have a
25 lot of reasons to have regulations that are a

1 little bit different than in upstate New York,
2 where my individual Petitioners reside, but I
3 don't think that they can take all those people
4 in New York and deny them of their fundamental
5 constitutional --

6 JUSTICE BREYER: So how --

7 MR. CLEMENT: -- rights.

8 JUSTICE BREYER: -- how do we do this?

9 JUSTICE KAGAN: But you just said --

10 JUSTICE BREYER: How --

11 CHIEF JUSTICE ROBERTS: Justice
12 Breyer.

13 JUSTICE BREYER: How? I mean, so far,
14 we've been -- and to my mind, I think NYU does
15 have a campus. You're not certain. All right?

16 (Laughter.)

17 JUSTICE BREYER: You think that in New
18 York City people should have considerable
19 freedom to carry concealed weapons. I think
20 that people of good moral character who start
21 drinking a lot and who may be there for a
22 football game or -- or some kind of soccer game
23 can get pretty angry at each other, and if they
24 each have a concealed weapon, who knows?

25 And there are plenty of statistics in

1 these briefs to show there's some people who do
2 know, and a lot of people end up dead, okay? So
3 what are we supposed to do? To sort of float
4 around, like with NYU, and say, hey, oh, this is
5 the rule, it seems to work out in upstate New
6 York, we don't know, of course, and we do know
7 that your client is carrying a concealed weapon
8 because he has a right to in some instances?

9 And even following Heller and
10 following the history, which I thought was
11 wrong, even so, what are we supposed to say in
12 your opinion that is going to be clear enough
13 that we will not produce a kind of gun-related
14 chaos?

15 MR. CLEMENT: So, Justice Breyer, I
16 would sort of point you to two things that maybe
17 would give you some comfort. I mean, one is the
18 experience of the 43 states, and there are
19 amicus briefs on both sides getting into the
20 empirical evidence, but there really isn't a
21 case that those 43 states that include very
22 large cities like Phoenix, like Houston, like
23 Chicago, they have not had demonstrably worse
24 problems with this than the five or six states
25 that have the regime that New York has. So

1 that's one place to look.

2 The other place that I think you would
3 find some -- some -- something persuasive there
4 is their own amicus brief on their side by the
5 City of Chicago, because the City of Chicago is
6 in a shall issue jurisdiction, and the City of
7 Chicago goes on to sort of, you know,
8 essentially brag about all of the ways that
9 they've done, consistent with that regime, to
10 reduce crime in Chicago that probably doesn't
11 have a direct analog in downstate Illinois.

12 But, of course, you know, one of the
13 problems with this case --

14 JUSTICE KAGAN: I mean, most people
15 think that Chicago is, like, the -- the world's
16 worst city with respect to gun violence, Mr.
17 Clement.

18 MR. CLEMENT: Chicago in their
19 corporate --

20 JUSTICE KAGAN: And Chicago doesn't
21 think that, but everybody else thinks it about
22 Chicago.

23 MR. CLEMENT: And nobody thinks that
24 about Phoenix, and nobody thinks that about
25 Houston, and nobody thinks that about Dallas,

1 and nobody thinks that about San Diego, which,
2 even though it's in a restricted state, is a
3 shall issue jurisdiction.

4 JUSTICE SOTOMAYOR: Mr. Clement?

5 CHIEF JUSTICE ROBERTS: Thank you, Mr.
6 Clement.

7 Justice Thomas, anything further?

8 JUSTICE THOMAS: Mr. Clement, where
9 does Mr. Nash live?

10 MR. CLEMENT: Mr. Nash lives in
11 Rensselaer County, New York, which --

12 JUSTICE THOMAS: Is that close to NYU?

13 MR. CLEMENT: That is nowhere near
14 NYU, Justice Thomas. And, you know, I think, if
15 you -- if you look at their -- the county
16 website, they talk about there are 153,000
17 people spread over 955 square miles. And yet
18 that's the context in which my individual
19 clients are being denied their Second Amendment
20 rights.

21 CHIEF JUSTICE ROBERTS: Justice
22 Breyer, anything further?

23 Justice Alito?

24 Justice Sotomayor?

25 JUSTICE SOTOMAYOR: Counselor, your

1 client is permitted to -- Mr. Nash, one of the
2 two -- to carry when engaged in outdoor
3 activities of any kind, like camping, hunting,
4 and fishing, on back roads, with the few --
5 substantially lesser number of people.

6 Tell me how many places in Rensselaer
7 County does your client have a self-defense
8 risk.

9 MR. CLEMENT: Well --

10 JUSTICE SOTOMAYOR: A serious -- I
11 mean, at what point do we look at the
12 restriction and the burden it places? Meaning,
13 yes, I'm sure it has a center of town, I'm sure
14 it may have a shopping center or two, but it's
15 not like he's totally restricted from carrying a
16 gun. He's just restricted from carrying one
17 basically in those sensitive places --

18 MR. CLEMENT: Well --

19 JUSTICE SOTOMAYOR: -- because the
20 rest of his home is pretty distant from each --
21 from other homes.

22 MR. CLEMENT: So, Justice Sotomayor,
23 just so we start on the same wavelength or the
24 same page, literally, page 41 of the Joint
25 Appendix, this tells Mr. Nash where he can carry

1 concealed. And what the officer, McNally, told
2 him was: "I emphasize that the restrictions are
3 intended to prohibit" -- italicized -- "you from
4 carrying concealed in ANY LOCATION" -- all
5 caps -- "ANY LOCATION typically open to and
6 frequented by the general public."

7 Now I would submit --

8 JUSTICE SOTOMAYOR: That's the point.

9 MR. CLEMENT: -- that's -- that's a
10 pretty broad number of places in Rensselaer
11 County. And it would include, I fear, most of
12 the roads in the county at night when you're
13 traveling and might think that you have a need.

14 I mean, if -- if Mr. Nash has a
15 relative whose car breaks down and has to have a
16 -- a change of tire and he wants to go out and
17 assist them with that and wants to make sure
18 that he is -- he -- he is in a position to
19 defend himself, I don't think he can do it
20 consistent with this license restriction.

21 And at the end of the day, I think
22 what it means to give somebody a constitutional
23 right is that they don't have to satisfy a
24 government official that they have a really good
25 need to exercise it or they face atypical risks.

1 CHIEF JUSTICE ROBERTS: Justice Kagan,
2 anything further?

3 JUSTICE KAGAN: Mr. Clement, you --
4 you said, I think, in passing that it would be
5 fine if New York banned open carry so long as it
6 allowed concealed carry. Is that correct?

7 MR. CLEMENT: Certainly, that's
8 consistent with the relief we're looking for.
9 We're looking for some outlet to exercise our
10 constitutional right to carry firearms outside
11 the home.

12 JUSTICE KAGAN: How is it consistent
13 with the history? I mean, the history seems
14 very clear to me that it's sort of like the
15 exact opposite of how we think about it now, in
16 other words, that there are lots of places that
17 wanted people to display their arms as a matter
18 of transparency, and what they prohibited was
19 the concealed carry.

20 So I'm thinking, like, if you look to
21 the history, you end up with a completely
22 different set of rules from the ones that you're
23 suggesting with respect to concealed versus
24 open. And it's a -- it's an example, I think,
25 of -- of the difficulties of looking to history,

1 where people were operating on such different,
2 to use your term, wavelengths.

3 MR. CLEMENT: So, Justice Kagan, first
4 of all, I would have thought that, you know, we
5 sort of crossed the bridge to use history in
6 this context in Heller.

7 But, if we're going to look to history
8 --

9 JUSTICE KAGAN: No, I think --

10 MR. CLEMENT: -- I actually think, if
11 --

12 JUSTICE KAGAN: -- Mr. Clement, the
13 question is how to use history and, you know,
14 where do you look, you know, how far do you
15 look. Do you look to the 1920s when all these
16 felon laws were passed, as well as public
17 purpose laws of exactly the same kind as New
18 York.

19 So one question is, how far up do you
20 look? Another question is, you know, with what
21 sense of flexibility do you look? And I think
22 that this is an example of that. It's like, no,
23 we're not going to ask for an exact analog
24 because we realize that the world has changed
25 and regulatory schemes are very different

1 because regulatory interests are very different.

2 If we tried to copy history, we would
3 find ourselves in a world in which the only
4 thing that a state could do is tell people, you
5 know, you can't carry it concealed, you have to
6 carry it open.

7 MR. CLEMENT: So, Justice Kagan, let
8 me give you an example of how I think the Court
9 should use history in this context, and I'll go
10 exactly to the Georgia statute that was at issue
11 in Nunn against Georgia. Now that was a statute
12 that, on its face, prohibited carrying
13 simpliciter. So it didn't say open. It didn't
14 say concealed.

15 Now the court that analyzed that
16 reversed -- vacated the indictment of somebody
17 under the statute because the statute didn't
18 specify and they didn't think that person had
19 carried concealed, but when they looked at it,
20 they interpreted it in light of the context at
21 the time and they thought, boy, it is not
22 consistent with the Second Amendment that
23 Georgia actually -- that court actually thought
24 directly applied to the state, which is
25 interesting, but -- but they said that's not

1 consistent with the Second Amendment to prohibit
2 any means for carrying.

3 Then, consistent with kind of the
4 norms of the time, kind of almost as like a
5 severability holding, dare I say it, they said,
6 well, all right, the open carry, that's allowed.
7 I mean, rather, that's -- that's -- we're going
8 to say that to the extent this statute prohibits
9 open carry, that's unconstitutional, but to the
10 extent that it prohibits concealed carry, that's
11 constitutional.

12 Now the -- the -- the fundamental
13 problem with the law that carries over as a
14 direct analogy is it gave no outlet to exercise
15 the constitutional right to carry for
16 self-defense. The norms of the time had a
17 favoring for open carry over concealed. I will
18 grant you that the norms of the time have
19 flipped, and, certainly, in New York, based on
20 the rest of their licensing regime, I assume
21 that they would prefer that my client -- clients
22 carry concealed rather than openly.

23 But I think that's the way you can use
24 the history, and you can use it with some
25 contextual sensitivity, but you cannot sort of,

1 you know, throw it all out, because I do think
2 the analogy is pretty clean between a law that
3 prohibits any form of carry and what New York is
4 doing here.

5 And, of course, that was one of the
6 laws that this Court specifically looked to in
7 the Heller decision as well.

8 JUSTICE KAGAN: And -- and when you
9 look at this history in the properly contextual
10 way, do you see no difference between the kind
11 of regulation that was allowed in the home and
12 the kind of regulation that was allowed in
13 public places? Because it seems to me that the
14 history -- and -- and Justice Sotomayor
15 developed it at some length -- but the history
16 is replete with that distinction, that the --
17 and, indeed, Heller recognizes that.

18 Heller recognizes that the home is a
19 very special place, both because -- you know,
20 for similar reasons for the Fourth Amendment but
21 also because the need for self-defense is so
22 much greater there.

23 MR. CLEMENT: So I -- I -- I think, in
24 terms of -- I'm not going to tell you that the
25 context doesn't matter at all. I mean, take the

1 sensitive places law, right? They just -- they
2 don't really affect the keep right the way that
3 they affect the carry right, unless you try to
4 say the entirety of Manhattan is a sensitive
5 place, and then they might affect both. But, in
6 general, the -- the analysis is going to be
7 slightly different.

8 But I would say that, you know, I
9 don't think those differences are material here.
10 I think, if the District, instead of just
11 banning handguns inside the home, had adopted a
12 permitting regime that required District
13 residents to show that they had an atypical need
14 to possess a handgun inside the home, I'm not
15 sure anything in Heller would have been
16 different because it's just inconsistent with a
17 constitutional right to either ban the exercise
18 of it or say that it's a privilege that you can
19 only exercise if you show that you are atypical
20 from the rest of the people who are equally
21 protected by the constitutional right.

22 JUSTICE KAGAN: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Gorsuch?

25 JUSTICE GORSUCH: Mr. Clement, are you

1 -- are you able to hear me?

2 MR. CLEMENT: Loud and clear.

3 JUSTICE GORSUCH: Great. Some of your
4 amici have asked us to provide further guidance
5 to lower courts in cases beyond your own. And
6 so, putting aside your -- your case for the
7 moment, they've pointed out that some lower
8 courts have refused to apply the history test,
9 for example, and said they will not extend
10 Heller outside the home until this Court does.

11 Other courts have applied intermediate
12 scrutiny and variations of that. Some have
13 suggested that strict scrutiny would be
14 appropriate to treat this right comparably to
15 other rights under our modern tiers of scrutiny.

16 I -- I -- I -- I'd just be curious
17 what -- what -- what views you have about all
18 that.

19 MR. CLEMENT: Thank you, Justice
20 Gorsuch. I -- I think we would start with the
21 idea that text, history, and tradition is an
22 appropriate way to deal with this right. That's
23 what the Court said in Heller.

24 I think this Court would allow the
25 Court to make clear that the same analysis

1 applies outside of the home. And I think this
2 case, like Heller, is such an outlier that the
3 Court wouldn't have to say too much more unless
4 it wanted to.

5 I think, if it wanted to, though, it
6 would already, I think, go a long way to
7 correcting some of the mistakes in the lower
8 court to say that text, history, and tradition
9 is the test, not part of the test but the test
10 inside and outside the home.

11 And if this Court prefers to go the
12 level of scrutiny route, I would simply say two
13 things. One, we would prefer strict scrutiny as
14 being consistent with a fundamental
15 constitutional right. But, even if it's going
16 to be intermediate scrutiny, probably the
17 single-most important thing to remind the lower
18 courts is that intermediate scrutiny requires
19 narrow tailoring.

20 And a law like this that takes a
21 person who has no proclivity whatsoever, unlike
22 the surety laws, to misuse firearms and says you
23 simply can't carry them for self-defense
24 anywhere frequented by the public because you
25 haven't demonstrated an atypical need, I mean,

1 that's about as untailored a law as I can
2 imagine.

3 So I think, if you did one of those
4 two things -- either make clear that it's text,
5 history, and tradition outside the home as well
6 as inside or made clear that narrow tailoring is
7 an integral component of the test -- that would
8 go a long way to clearing up some of the
9 confusion in the lower courts.

10 JUSTICE GORSUCH: And I know you --
11 you've had a substantial debate with your
12 friends on the other side about the Statute of
13 Northampton. We haven't heard about that today,
14 and I just wanted to give you a chance.

15 MR. CLEMENT: Thank you, Justice
16 Gorsuch. I'd say just a couple of quick things
17 about the Statute of Northampton.

18 First of all, I think that it was very
19 clear from the Knight's Case and the treatises
20 that this Court relied on in Heller that by the
21 time of the framing of the English Bill of
22 Rights, that was not a general prohibition on
23 carrying outside the home but was a prohibition
24 on either carrying unusual and dangerous weapons
25 or using common weapons in a way that terrorized

1 the public. And so I don't think that that
2 supports the other side's position here.

3 And the second thing I would say is
4 that probably the single-most obvious point
5 about the history is there just are no reported
6 cases on this side of the Atlantic, not in
7 actual reporters, not in newspaper reports about
8 crimes of the day, that show anybody being
9 prosecuted for a violation of the Northampton
10 crime simply by carrying common firearms for
11 self-defense.

12 And the one U.S. early court that
13 dealt with this, the common law equivalent of
14 the statute, was State against Huntly in North
15 Carolina, which was an opinion that was cited
16 favorably in the majority opinion in Heller, and
17 that case went out of its way to say that simply
18 carrying firearms per se is not an offense; it's
19 the intent to terrorize the people that is
20 prohibited by Northampton.

21 JUSTICE GORSUCH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh.

24 JUSTICE KAVANAUGH: Mr. Clement, I
25 have several questions.

1 First, I want to make sure I
2 understand your main problem here with this
3 permitting regime, as I understand it, is the
4 discretion that's involved with the permitting
5 officials, and your point that that's just not
6 how we do constitutional rights, where we allow
7 basic blanket discretion to grant or deny
8 something for all sorts of reasons.

9 But I understand you would not object
10 or do not object to the regimes that are used in
11 many of the other 42 states, the shall issue
12 regimes. I mean, there could be particular
13 problems with those, but I do not understand you
14 to object to shall issue regimes.

15 Is that accurate?

16 MR. CLEMENT: That's accurate, Justice
17 Kavanaugh. And as you say, they're the -- you
18 know, especially if you have something like good
19 moral character, there is the possibility for
20 discretionary abuse in those regimes as well.

21 But the thrust of this case is, you
22 know, we -- we'd like what they're having. We'd
23 like what the people in the other 43 states are
24 allowed to do and exercise their rights, and in
25 many of those states, it's shall issue.

1 And -- and that is, of course -- you
2 know, New York purports to have effectively a
3 shall issue regime with respect to hunting. The
4 only other caveat I wanted to add is it's the
5 discretion combined with the atypicality
6 requirement.

7 So, if they came up with some, you
8 know, sort of, like, magic wand that gave them a
9 precise reading of typicality, and so there was
10 no discretion, but the standard was still at the
11 end of the day you have to show that you are
12 atypical from the rest of the people protected
13 by the Second Amendment, we would have a problem
14 with that as well.

15 JUSTICE KAVANAUGH: Right. A shall
16 issue regime with an atypicality requirement
17 would be no good in your view?

18 MR. CLEMENT: Exactly.

19 JUSTICE KAVANAUGH: Yeah.

20 MR. CLEMENT: Even if it could be
21 somehow if you could come up with some objective
22 standard of typicality.

23 JUSTICE KAVANAUGH: Okay. And the
24 issue before us, as I understand it, is the
25 permitting regime. We don't have to answer all

1 the sensitive places questions in this case,
2 some of which will be challenging no doubt, is
3 that accurate?

4 MR. CLEMENT: That's 100 percent
5 accurate. And it's -- so there's sort of a
6 market test of the accuracy of that, which is
7 New York does have sensitive place laws, and we
8 have not challenged them in this litigation.

9 JUSTICE KAVANAUGH: And then, to
10 follow up on Justice Thomas's question and also
11 Justice Gorsuch's, we should focus on American
12 law and the text of the Constitution and we
13 don't start the analysis in a vacuum, but we
14 start it with the text, which you say grants a
15 right to carry, and then historical practice can
16 justify certain kinds of regulations, but the
17 baseline is always the right established in the
18 text. And there will be tough questions, as the
19 questions -- arguments revealed, about what the
20 historical practice shows, but the default or
21 baseline is the text, correct?

22 MR. CLEMENT: That -- that -- that's
23 absolutely right, Justice Kavanaugh. And, of
24 course, that's no different from something like
25 the First Amendment, where, of course, you start

1 with the text, and it's very emphatic text, you
2 know, no law abridging speech, but then you look
3 to history and tradition just to realize, oh,
4 well, there's a long tradition of treating
5 defamation and libel different going back to the
6 framing, so you use that history to inform the
7 text, but the focus is on the text.

8 JUSTICE KAVANAUGH: And last question,
9 following up on Justice Gorsuch's question, is
10 he points out some courts have used intermediate
11 scrutiny or strict scrutiny. You know, those
12 are balancing tests. I think Professor Alicea's
13 amicus brief is very helpful on that. There's
14 well-developed law in other areas.

15 But it'll be no surprise to you I have
16 concern that that would just be a balancing test
17 that would leave -- make it a policy judgment
18 basically for the courts.

19 And I don't know why we would -- you
20 say you'd be okay with that, but I'm not sure
21 why we would smuggle all that into here and then
22 it would just be a policy judgment that would be
23 unanchored from the historical practice.

24 MR. CLEMENT: So, Justice Kavanaugh,
25 two points just in response to that.

1 One, you know, as -- as you articulate
2 the concerns with interesting balancing, that
3 might be a reason that if you're going to go
4 with the level of scrutiny's approach, you would
5 go to strict scrutiny, where I just think
6 there's less play in the joints.

7 But the second --

8 JUSTICE KAVANAUGH: Well, I mean,
9 maybe. But what's a compelling interest? Do
10 you have a compelling -- there's a lot of play
11 in the joints in -- in some of the other areas,
12 so I don't know that you want to open that door.

13 MR. CLEMENT: And -- and -- and -- and
14 the second point I was going to make, though,
15 Justice Kavanaugh, which is maybe more consonant
16 with the thrust of the question is, you know,
17 whatever was the case in Heller, where I -- I
18 sort of read the majority opinion as actually
19 already rejecting interesting balancing, but
20 whatever was the case in Heller, you know, we
21 now have this 13 years of experience with lower
22 courts applying the test.

23 And in -- in our view, you know,
24 they've made a muddle of it and the -- you know,
25 it's -- it's probably -- the experience of the

1 last 13 years is probably a very good reason to
2 prefer a text, history, and tradition approach
3 to this area of the law.

4 JUSTICE KAVANAUGH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Barrett?

7 JUSTICE BARRETT: Mr. Clement, I have
8 one question.

9 So a couple times, in response to my
10 question about Times Square and New Year's Eve
11 and then just now as well to Justice Kavanaugh,
12 you made reference to the First Amendment. And,
13 obviously, a lot of the questions that have been
14 asked have been focused on how do we -- how can
15 the state fairly regulate, because everybody
16 agrees there have to be some regulations, and it
17 might not be the case that we can always find
18 exact historical analogs, so we're turning to
19 the First Amendment.

20 In response to me, you said, well,
21 that might be analogous to a time, place, and
22 manner restriction. So do you think the First
23 Amendment and the, you know, edifices that we
24 have structured around it would be a helpful
25 place to look? Is that what you're suggesting?

1 MR. CLEMENT: Well, I'm suggesting
2 that there is a lot of useful teaching in the
3 First Amendment. I'm not sure I'm suggesting
4 you should just take sort of doctrines lock,
5 stock, and barrel from the First Amendment.

6 But, you know, I mean, going back, you
7 know, well over a hundred years to, like,
8 Robertson, when the Court was just talking in
9 dictum about the First and the Second Amendment,
10 it drew the analogy between allowing some
11 restrictions on the Second Amendment and, in the
12 First Amendment context, the First Amendment
13 being consistent with libel and defamation.

14 As I suggested to the Chief Justice, I
15 think the way you think about a nonpublic forum
16 and why that's different from First Amendment
17 purposes from a park, I think, could be useful
18 in some of these contexts.

19 You know, if you focus on the nature
20 of the location, you might say this is
21 inappropriate for weapons. But, in the same way
22 as in the First Amendment, you just don't get to
23 say, well, we're going to make it a nonpublic
24 forum by saying no First Amendment activity
25 there. You can't just take a location and say

1 we're going to make this a sensitive place by
2 saying no Second Amendment activity there.

3 So those kind of analogies, and,
4 lastly, the analogy being you look at a law that
5 says no concealed carry in a particular place on
6 one night of the year quite differently from a
7 law like this that says there's really no way
8 for a typical New Yorker to conceal carry
9 anywhere that the general public is allowed to
10 go.

11 Those -- under the First Amendment,
12 those are radically different laws, and I think,
13 under the Second Amendment, those are radically
14 different laws.

15 JUSTICE BARRETT: Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 General Underwood.

19 ORAL ARGUMENT OF BARBARA D. UNDERWOOD

20 ON BEHALF OF THE RESPONDENTS

21 MS. UNDERWOOD: Mr. Chief Justice, and
22 may it please the Court:

23 For centuries, English and American
24 law have imposed limits on carrying firearms in
25 public in the interest of public safety. The

1 history runs from the 14th Century statute of
2 Northampton, which prohibited carrying arms in
3 fairs and markets and other public gathering
4 places, to similar laws adopted by half of the
5 American colonies and states in the founding
6 period, to later state laws that relaxed
7 restrictions for people who had a concrete need
8 for armed self-defense.

9 Starting as early as the early 1800s,
10 states began taking different approaches to
11 regulating firearm-carrying in public. Some
12 states provided that a person who carried
13 firearms in public without reasonable cause
14 could be arrested and required to post a bond.
15 Other states made it a misdemeanor to carry a
16 handgun without reasonable grounds to fear an
17 attack.

18 Other states and territories began --
19 banned carrying handguns in towns and cities
20 altogether or restricted it to situations of
21 immediate threat. And in the early 1900s, many
22 states made good cause a requirement for a
23 license to carry a concealed handgun while also
24 prohibiting in some cases the open carrying of
25 handguns.

1 In total, from the founding era
2 through the 20th Century, at least 20 states
3 have at one time or another either prohibited
4 all carrying of handguns in populous areas or
5 limited it to those with good cause.

6 New York's law fits well within that
7 tradition of regulating public carry. It makes
8 a carry license available to any person not
9 disqualified who has a non-speculative reason to
10 carry a handgun for self-defense.

11 New York is not an outlier in the
12 extent to which the state restricts the ability
13 to carry firearms in public, and it's not an
14 outlier in asking a licensed applicant to show
15 good cause for a carry license.

16 Many ordinary people have received
17 carry licenses in New York State. If the Court
18 has questions about how the law works in
19 practice, it should remand for fact-finding, and
20 if the Court finds the history ambiguous, it
21 should review the law under intermediate
22 scrutiny and uphold it.

23 JUSTICE THOMAS: General Underwood,
24 you seem to rely a bit on the density of the
25 population. You say, I think, that states like

1 New York have high-density areas.

2 And implicit in that is that the more
3 rural an area is, the more unnecessary a strict
4 rule is. So, when you are -- when you suggest
5 that, how rural does the area have to be before
6 your restrictions shouldn't apply?

7 MS. UNDERWOOD: Well, I -- I think the
8 way the New York statute works is consistent
9 with a reasonable rule, which is that there's
10 not a cutoff, there's not a number at which
11 things change, but that licenses -- unrestricted
12 licenses are much more readily available in more
13 -- in less densely populated upstate counties
14 than they are in dense metropolitan areas.

15 And that is a virtue of the system of
16 having licenses handled by licensing officers
17 who are part of the local community and who take
18 the density of population into account, as well
19 as the -- many other factors.

20 JUSTICE THOMAS: Well, the -- Mr. Nash
21 lives in a -- quite a low-density area. That's
22 why I'm interested in where your cutoff is.
23 It's one thing to talk about Manhattan or NYU's
24 campus. It's another to talk about rural
25 upstate New York.

1 MS. UNDERWOOD: He actually lives in
2 what I would call an intermediate area. He
3 lives in Rensselaer County, which is not that
4 far from Albany, and it contains the City of
5 Troy and a university and a downtown shopping
6 district, but it also contains substantial rural
7 areas.

8 And that is precisely what the
9 licensing officer here was taking into account
10 when he made the differentiation between, you
11 know, don't take it to the shopping mall, don't
12 take it downtown, but you can take it in the --
13 in the sort of back-country areas.

14 JUSTICE THOMAS: Thank you.

15 CHIEF JUSTICE ROBERTS: General, you
16 -- you mentioned that the -- the gun is -- I --
17 I guess permits are read -- more readily
18 available in a less populated area.

19 MS. UNDERWOOD: Unrestricted permits
20 --

21 CHIEF JUSTICE ROBERTS: Unrestricted
22 permits.

23 MS. UNDERWOOD: -- are -- are more
24 readily available in less populated areas, yes.

25 CHIEF JUSTICE ROBERTS: Now Heller

1 relied on the right to defense as a basis for
2 its reading of the -- of the Second Amendment,
3 or that was its reading.

4 Now I would think that arises in more
5 populated areas. If you're out in the woods,
6 presumably, it's pretty unlikely that you're
7 going to run into someone who's going to rob you
8 on the street. On the other hand, there are
9 places in a -- in a densely populated city where
10 it's more likely that that's where you're going
11 to need a gun for self-defense and, you know,
12 however many policemen are assigned, that, you
13 know, there are high-crime areas.

14 And it seems to me that what you're
15 saying is that's probably the last place that
16 someone's going to get a permit to carry a gun.

17 How is that -- regardless of what we
18 think of the policy of that, how is that
19 consistent with Heller's reasoning that the
20 reason the Second Amendment applies a -- a
21 direct personal right is for self-defense?

22 MS. UNDERWOOD: Well, I'll say a
23 couple of things about that.

24 One, we -- if you go right to history
25 and tradition, the history was to regulate most

1 strenuously in densely populated places. That's
2 what fairs and markets are. So we have history.

3 But we also have a rationale for that
4 history, which is that where there is dense
5 population, there is also the deterrent of lots
6 of people and there is the availability of law
7 enforcement. In -- in England, the idea was
8 that it was the King's Peace and it was, in
9 fact, an insult to the king for people to take
10 things into their own hands and --

11 CHIEF JUSTICE ROBERTS: Well, but
12 that's not always true. It depends, obviously,
13 in the jurisdiction and all that, but simply
14 because a place is -- well, it's paradoxical
15 that you say a place is a high-crime area, but
16 don't worry about it because there are a lot of
17 police around.

18 MS. UNDERWOOD: Well, and the other
19 thing is that this is -- that these regulations
20 are all an effort to accommodate the right, to
21 -- to recognize and -- and respect the right of
22 self-defense while regulating it to protect the
23 public safety. And in areas where people are
24 packed densely together, as the questioning that
25 just happened displays, the risks of harm from

1 people who are packed shoulder to shoulder, all
2 having guns, are much more acute than they are
3 at --

4 CHIEF JUSTICE ROBERTS: Oh, sure, and
5 I can understand, for example, a regulation that
6 says you can't carry a gun into, you know,
7 Giants Stadium, just because a lot of things are
8 going on there and it may not be safe to have --
9 for people to have guns.

10 On the other hand, if the purpose of
11 the Second Amendment is to allow people to
12 protect themselves, that's implicated when
13 you're in a high-crime area. It's not
14 implicated when you're out in the woods.

15 MS. UNDERWOOD: Well, I -- I think it
16 is implicated when you're out in the woods.
17 It's just a different set of problems. I mean,
18 you're --

19 CHIEF JUSTICE ROBERTS: Yeah, deer.

20 MS. UNDERWOOD: -- you're deserted
21 there and you can't -- and law enforcement is
22 not available to come to your aid if something
23 does happen. But --

24 CHIEF JUSTICE ROBERTS: Well, how many
25 muggings take place in the forest?

1 (Laughter.)

2 MS. UNDERWOOD: If we -- if we --

3 CHIEF JUSTICE ROBERTS: How many do
4 you think?

5 MS. UNDERWOOD: I don't know, but I
6 will tell you that our licensing officer told us
7 that rapes and -- and robberies happen on the
8 deserted bike paths and that he has some concern
9 about that.

10 So, I mean, I take your point that
11 there is a different risk in the city, but there
12 is also a different public safety consideration,
13 and that is why the licensing officer is meant
14 to take into account not just the risk but also
15 the -- the population and the availability of
16 law enforcement and all these considerations.

17 I -- I won't say that the risk -- I
18 think it's not correct to characterize the risk
19 as atypical. The risk has to be specific to the
20 person, that what -- what the cases say is that
21 you can't just say I'm afraid because -- based
22 on facts that are not specific to you.

23 But what Mr. Nash did was convince the
24 licensing officer that his trip to a deserted
25 parking lot every night was sufficient to --

1 CHIEF JUSTICE ROBERTS: What if it's
2 -- what if it's one of these, you know, crime
3 waves, whether it's, you know, a celebrated
4 spate of murders carried out by a particular
5 person -- I don't know who that is -- you know,
6 the Son of Sam or somebody else? Is that a good
7 reason to -- is that -- is that a atypical
8 reason? Is that a justification? Some random
9 person is going around shooting people. I'd
10 like to have a firearm even though I didn't feel
11 the need for one before?

12 MS. UNDERWOOD: Well, I think that it
13 would have to be brought home to you in
14 particular, to your route, to your parking lot,
15 to your -- you know, your apartment building,
16 but something specific to you rather than it's
17 happening in the world at large. So --

18 JUSTICE KAVANAUGH: I don't --

19 MS. UNDERWOOD: -- that's -- that's
20 what meant by something non-speculative.

21 JUSTICE ALITO: Could I -- could I --
22 could I explore what that means for ordinary
23 law-abiding citizens who feel they need to carry
24 a firearm for self-defense?

25 So I want you to think about people

1 like this, people who work late at night in
2 Manhattan, it might be somebody who cleans
3 offices, it might be a doorman at an apartment,
4 it might be a nurse or an orderly, it might be
5 somebody who washes dishes.

6 None of these people has a criminal
7 record. They're all law-abiding citizens. They
8 get off work around midnight, maybe even after
9 midnight. They have to commute home by subway,
10 maybe by bus. When they arrive at the subway
11 station or the bus stop, they have to walk some
12 distance through a high-crime area, and they
13 apply for a license, and they say: Look, nobody
14 has told -- has said I am going to mug you next
15 Thursday. However, there have been a lot of
16 muggings in this area, and I am scared to death.

17 They do not get licenses, is that
18 right?

19 MS. UNDERWOOD: That is in general
20 right, yes. If there's nothing particular to
21 them, that's right.

22 JUSTICE ALITO: How is that consistent
23 with the core right to self-defense, which is
24 protected by the Second Amendment?

25 MS. UNDERWOOD: Because the core right

1 to self-defense doesn't -- as -- as this Court
2 said, doesn't allow for all to -- to be armed
3 for all possible confrontations in all places.

4 JUSTICE ALITO: No, it doesn't, but
5 does it mean that there is the right to
6 self-defense for celebrities and state judges
7 and retired police officers but pretty much not
8 for the kind of ordinary people who have a real,
9 felt need to carry a gun to protect themselves?

10 MS. UNDERWOOD: Well, if that ordinary
11 person -- Mr. Nash had a -- a concern about his
12 parking lot, and he got a permit. I think the
13 extra problem in Manhattan is that you -- your
14 hypothetical quite appropriately entailed the
15 subways, entailed public transit, and there are
16 lots of people on the subways even at midnight,
17 as I can say from personal experience, and the
18 particular specter of a lot of armed people in
19 an enclosed space --

20 JUSTICE ALITO: There are -- there are
21 a lot of armed people on the streets of New York
22 and in the subways late at night right now,
23 aren't there?

24 MS. UNDERWOOD: I don't know that
25 there are a lot of armed people.

1 JUSTICE ALITO: No?

2 MS. UNDERWOOD: I think there are
3 people --

4 JUSTICE ALITO: How many -- how many
5 --

6 MS. UNDERWOOD: -- there are people
7 with illegal guns if that's what you're --

8 JUSTICE ALITO: Yeah, that's what I'm
9 talking about.

10 MS. UNDERWOOD: -- referring to.
11 Yeah.

12 JUSTICE ALITO: How many illegal guns
13 were seized by the -- by the New York Police
14 Department last year? Do you -- do you have any
15 idea?

16 MS. UNDERWOOD: I don't have that
17 number, but I'm sure there's a -- it's a
18 substantial number.

19 JUSTICE ALITO: But the people -- all
20 -- all these people with illegal guns, they're
21 on the subway --

22 MS. UNDERWOOD: I don't -- I don't --

23 JUSTICE ALITO: -- they're walking
24 around the streets, but the ordinary
25 hard-working, law-abiding people I mentioned,

1 no, they can't be armed?

2 MS. UNDERWOOD: Well, I think the
3 subways, when there are problems on the subways,
4 are protected by the -- the -- the transit
5 police, is what happens, because the idea of
6 proliferating arms on the subway is precisely, I
7 think, what terrifies a great many people.

8 The other point is that proliferating
9 guns in a populated area where there is law
10 enforcement jeopardizes law enforcement because,
11 when they come, they now can't tell who's
12 shooting, and the -- the -- the -- the shooting
13 proliferates and accelerates. And, in the end,
14 that's why there's a substantial law enforcement
15 interest in not having widespread carrying of
16 guns in densely --

17 JUSTICE KAVANAUGH: On the standard of
18 particular to them, just to follow up on the
19 other questions, why isn't it good enough to say
20 I live in a violent area and I want to be able
21 to defend myself?

22 MS. UNDERWOOD: Well, what happens in
23 these license hearings is that a question is
24 asked: What -- what exactly do you mean?
25 Because it -- it's --

1 JUSTICE KAVANAUGH: Well, the
2 statistics.

3 MS. UNDERWOOD: Well, it depends on
4 how large an area you describe. You could say,
5 I live in a violent area, and that could be all
6 of New York City, and -- or it could be your
7 particular neighborhood, and the closer it gets
8 to your particular neighborhood, the better your
9 -- the better your claim is, or your block.

10 Now I know that -- that one of the
11 Petitioners made an assertion about robberies on
12 his block. I also know that there was a hearing
13 about that. And he evidently did not convince
14 the licensing officer that they were
15 sufficiently recent or relevant or couldn't be
16 dealt with adequately by his own premises
17 license, which he would be entitled to have
18 without any -- any justification or proper cause
19 at all.

20 So what I know happens is that those
21 claims are examined by a licensing officer.

22 JUSTICE KAVANAUGH: How --

23 MS. UNDERWOOD: Now this gets to your
24 -- to questions about discretion and whether
25 that's effectively handled. But --

1 JUSTICE KAVANAUGH: Well, that's the
2 real concern, isn't it, with any constitutional
3 right? If it's the discretion of an individual
4 officer, that seems inconsistent with an
5 objective constitutional right.

6 I mean, what if you're a runner and
7 you say I run a lot, and, as you correctly
8 pointed out earlier, there are a lot of serious
9 violent crimes on running paths. It's a real
10 problem. Is that good enough?

11 MS. UNDERWOOD: Well, probably. I
12 mean, that's -- that's the --

13 JUSTICE KAVANAUGH: And I walk --

14 MS. UNDERWOOD: -- counterpart to
15 Nash's -- Nash's claim, but --

16 JUSTICE KAVANAUGH: Probably, though
17 --

18 MS. UNDERWOOD: -- if that's the
19 question --

20 JUSTICE KAVANAUGH: Yeah.

21 MS. UNDERWOOD: -- that -- that is not
22 the way this case was tried. That's not the way
23 this claim was framed. And if the question is
24 does the system actually operate in the way that
25 we're describing, then this case should be

1 remanded for a hearing to determine whether it
2 does.

3 JUSTICE KAVANAUGH: And what's the
4 problem with the shall issue regimes from your
5 perspective that exist in many other states,
6 including very populous states, you know,
7 Florida, Illinois?

8 MS. UNDERWOOD: The problem with the
9 shall issue regimes is that they multiply the
10 number of firearms that are being carried in
11 very densely populated places, and there is a
12 much higher risk -- with -- without assuming any
13 ill intent on the part of the carriers of
14 weapons, they -- they greatly proliferate the
15 likelihood that mistakes will be made, fights
16 will break out --

17 JUSTICE KAVANAUGH: But --

18 MS. UNDERWOOD: -- guns will be sold.

19 JUSTICE KAVANAUGH: -- has that
20 happened in those states? I mean, can you make
21 a comparative judgment? Because it seems like
22 before you impose more restrictions on
23 individual citizens and infringe their
24 constitutional rights based on this theory, you
25 should have to show, well, in those other states

1 that have shall issue regimes, actually, there
2 is a lot more accidents, crime. And I don't see
3 any real evidence of that.

4 MS. UNDERWOOD: Yeah, I think the --
5 there is a brief from the social scientists that
6 addresses this, but this law has been in place
7 since 19 -- for over a hundred years, starting
8 when the -- at -- at a time when the -- when the
9 law was not as well understood in this area as
10 -- as -- as it is now.

11 And so it's a little bit anachronistic
12 to talk about before you put this law in place
13 you should have evidence. But I -- I believe
14 there is evidence about the success that New
15 York has had in keeping -- in -- in -- that is
16 -- in keeping gun violence down that is
17 attributable to the reduced number of guns that
18 are being carried and particularly in these
19 densely populated places. So --

20 JUSTICE KAGAN: General, you know, one
21 of the things that strikes me about this area is
22 that, on the one hand, it -- it seems completely
23 intuitive to me and I think to many people. I
24 mean, if you think about Justice Thomas's
25 questions about less populated areas, the rural

1 areas of New York versus the cities, I mean, it
2 seems completely intuitive that there should be
3 different gun regimes in New York than in
4 Wyoming or that there should be different gun
5 regimes in New York City than in rural counties
6 upstate.

7 But it's a -- it's -- it's a hard
8 thing to -- to match with our notion of
9 constitutional rights generally.

10 I mean, Mr. Clement makes a big point
11 of this in his brief about how we would never
12 really dream of doing that for the First
13 Amendment or other constitutional rights, allow
14 that level of local flexibility that you're
15 basically saying we should allow in this
16 context.

17 So I guess I just want to hear you say
18 why you think that is. You know, what
19 justification is there for allowing greater
20 flexibility here?

21 MS. UNDERWOOD: Well, I think one
22 point is that there is a very wide range of sort
23 of distribution of rural and urban, different
24 kinds of areas, not just across the whole state
25 but within counties.

1 And so delegating the decision-making
2 with appropriate criteria to somebody who is
3 local, which is what this is, these are local
4 judges, in most of the states, they're --
5 they're judges, to make the relevant
6 fact-findings, to make the relevant inquiry.
7 This is a -- this is an interactive process in
8 which these individuals and others are told I'm
9 not going to lift the restrictions now, but if
10 you come back, if you have more to -- to say
11 about this, you know, feel free to come back.

12 It's an ongoing process. It's one
13 reason why there isn't so much appellate
14 litigation, is that it is -- is that that is
15 what happens.

16 So it's hard to see how you could
17 specify everything in advance and have it be a
18 clear on/off switch and still take adequate
19 account of, on the one hand, the need for
20 self-defense and, on the other hand, the strong
21 public safety concerns. And that's why I think
22 this system --

23 JUSTICE SOTOMAYOR: I don't think that
24 was Justice Kagan's question.

25 MS. UNDERWOOD: Oh, I'm sorry.

1 JUSTICE SOTOMAYOR: It was on a
2 broader level, I believe. She can correct me if
3 I'm wrong. The issue is no other constitutional
4 right do we condition on permitting different
5 jurisdictions to pass different regulations or
6 -- but do we have any other constitutional right
7 whose exercise in history has been as varied as
8 gun possession and use?

9 MS. UNDERWOOD: Well, I think that's
10 -- that's right, both at the level -- the local
11 level and at the -- at the state-to-state level.
12 We have a strong history here of a range of
13 responses from state to state that is based on
14 local conditions and local concerns.

15 And what we have within New York is an
16 effort to recognize we have the same -- almost
17 the same range of different kinds of spaces
18 within the state, and this is the effort to
19 accommodate that.

20 And if the history warrants taking
21 local conditions and local population density
22 and so forth into account, it's hard to think of
23 another way to -- to effectively do that.

24 There is, after all, appellate review
25 available here, all the way to the central, you

1 know, to the highest state court.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas, anything further?

5 JUSTICE THOMAS: But there are --
6 let's just take, for example, hunting. That's
7 something, I think, we can agree on. You can't
8 hunt in, I'm sure, with a gun in Central Park.
9 But I'm certain that there are places in upstate
10 New York or even in western New York where you
11 can. I -- I don't know.

12 MS. UNDERWOOD: Including Rensselaer
13 County, yes.

14 JUSTICE THOMAS: Yeah. So I think
15 what we're asking is, if you can have that
16 difference for the purpose of hunting
17 specifically, why can't you have a similar
18 tailored approach for Second Amendment based
19 upon, if it's density in New York City, if
20 that's a problem, the subway, then you have a
21 different set of concerns in upstate New York?

22 MS. UNDERWOOD: Well, hunting permits
23 work for particular locations, for particular
24 areas, and -- but it's all one statewide regime,
25 I mean, and so too here licenses are handled

1 locally. It's not exactly the same, but it's
2 the same model that licensing of -- of -- of
3 handguns -- to carry a handgun for self-defense
4 is handled locally under a single set of
5 criteria but with reference to local conditions.
6 I think that's my answer to the question.

7 CHIEF JUSTICE ROBERTS: Justice
8 Breyer?

9 JUSTICE BREYER: Are we considering
10 here just the upper state New York law? We're
11 not considering New York City, are we?

12 MS. UNDERWOOD: I don't see any reason
13 to be considering New York City.

14 JUSTICE BREYER: Okay. So it's not in
15 the case?

16 MS. UNDERWOOD: The Petitioners are
17 not from --

18 JUSTICE BREYER: They're -- they're
19 not, okay. All right.

20 MS. UNDERWOOD: Yeah.

21 JUSTICE BREYER: Now, if you're trying
22 to get uniformity, doesn't the First
23 Amendment -- isn't it filled with -- local
24 statutes use the word "may," parade permits,
25 event permits.

1 MS. UNDERWOOD: Yes.

2 JUSTICE BREYER: So it's not special?

3 MS. UNDERWOOD: Correct. In a -- in a

4 --

5 JUSTICE BREYER: Can -- can you think

6 of --

7 MS. UNDERWOOD: -- in -- in the areas

8 where permitting happens, which includes First

9 Amendment areas --

10 JUSTICE BREYER: Yeah.

11 MS. UNDERWOOD: -- it could be

12 parades, it could be solicitation for charity,

13 there are various areas where First Amendment

14 activity is --

15 JUSTICE BREYER: All right. So -- so

16 my -- my -- what I'm driving towards -- and I --

17 and I thought also there is a brief here -- I

18 think it's the social scientists, I don't

19 remember the name of it -- which says in

20 instances where -- and they do it

21 statistically -- they are more liberal in

22 allowing people to carry concealed weapons who

23 are good character people and there is a greater

24 risk of -- of crime or harm, where that happens,

25 there are more deaths of innocent people.

1 What is that brief? I'd like to go
2 back and look at the figures.

3 MS. UNDERWOOD: Yeah, I believe it is
4 --

5 JUSTICE BREYER: Do you know?

6 MS. UNDERWOOD: -- a brief of social
7 scientists, but --

8 JUSTICE BREYER: All right. I'll find
9 it.

10 MS. UNDERWOOD: Yeah.

11 JUSTICE BREYER: But do you think it's
12 useful to -- were we to have a trial, could we
13 go into that? I mean, I think the -- the great
14 problem would be, fine, let's have some absolute
15 rules, rules, uniform national rules. I'm not
16 sure we have those in the First Amendment, but
17 assume we do.

18 What are they? What are those rules?

19 MS. UNDERWOOD: Well, I think they
20 would end up being factors that have to be taken
21 into account because the range of situations is
22 so different both on the -- on the need side, on
23 the -- on the -- and on the -- on the -- on the
24 counter- -- on the public safety side.

25 So I think it's very hard. In fact,

1 that's one of the things that I think is hard
2 about the suggestion that a sensitive place
3 regime could replace a system like this.

4 JUSTICE BREYER: All right. If you
5 had to guess on how many carry -- conceal carry
6 licenses are given in the area under
7 consideration, upstate New York or outside of
8 New York City, in a given year or around -- any
9 way you want to put it, are they in the tens of
10 thousands?

11 MS. UNDERWOOD: Well, in --

12 JUSTICE BREYER: Are they in the five
13 --

14 MS. UNDERWOOD: So I -- I can't do it
15 statewide -- I have statewide estimates --

16 JUSTICE BREYER: Yeah. Uh-huh.

17 MS. UNDERWOOD: -- not estimates, I
18 have permits I -- I -- for Rensselaer County and
19 for statewide. It would be possible to get
20 more, but we don't -- I don't have that.

21 JUSTICE BREYER: Are they -- are they
22 rough? What are they?

23 MS. UNDERWOOD: So -- so -- and this
24 is in Footnote 10 of our brief. In the two-year
25 period, 2018 to 2019, in -- in the state, there

1 were approximately 37,800 grants of --

2 JUSTICE BREYER: Okay. I get the idea
3 -- rough idea. And if, in fact, it were
4 remanded, I guess we could go into that in more
5 depth?

6 MS. UNDERWOOD: That's correct.
7 That's correct. We have the grants. Of course,
8 there are licenses that weren't granted in those
9 years that are still valid. So that doesn't
10 tell you how many -- how many licenses there are
11 out there altogether. The thing we had to
12 estimate was the grant rate because we don't
13 have application data. We had to -- we had to
14 estimate that from other information. But we
15 have the permits.

16 CHIEF JUSTICE ROBERTS: Justice Alito?

17 JUSTICE ALITO: Is it correct that the
18 non-speculative standard applies throughout the
19 state?

20 MS. UNDERWOOD: It --

21 JUSTICE ALITO: It applies equally in
22 New York City and in the most rural location in
23 upstate New York?

24 MS. UNDERWOOD: Well, it has been --
25 the law has been interpreted to mean that,

1 although the experience of granting licenses,
2 the experience with license applications is that
3 it is apparently more readily satisfied upstate.

4 JUSTICE ALITO: So the -- the
5 individual officers have a degree of discretion?

6 MS. UNDERWOOD: Well, yes, they are
7 asked -- like -- like judges on many issues,
8 they are asked to take into account certain
9 factors. They can be reversed if they took the
10 wrong factors into account or if they failed to
11 take the specified factors into account.

12 It's not unguided discretion, but it
13 is discretion --

14 JUSTICE ALITO: What --

15 MS. UNDERWOOD: -- in the sense that
16 --

17 JUSTICE ALITO: -- what -- what
18 guarantees, if any, are there in your regime
19 that a licensing officer is not taking into
20 account improper factors?

21 MS. UNDERWOOD: I mean, this is a
22 question about the judicial system generally.
23 If he correctly records the factors that he took
24 into account, they -- they write letters or
25 opinions which may or may not fully disclose --

1 one assumes will disclose what they thought was
2 important. When there's a -- there's a -- often
3 there are not just the papers, but there are the
4 -- if -- if he denies a license, he will say
5 why. He has to say why.

6 JUSTICE ALITO: We've been presented
7 in your brief and all the other briefs in this
8 case with an enormous amount of history,
9 citations to all sorts of statutes and other
10 sources.

11 Would you be willing to concede that
12 maybe you got a little bit overly enthusiastic
13 in your summary of some of the historical
14 sources that you cited in your brief?

15 I'm going to give you an --

16 MS. UNDERWOOD: We did our best to be
17 accurate --

18 JUSTICE ALITO: -- I'm going to give
19 you -- well, I'm going to give you an --

20 MS. UNDERWOOD: -- in reporting what
21 we reported. I don't know what you have in
22 mind.

23 JUSTICE ALITO: Yeah. Well, I'm going
24 to give you an example, which is -- you know,
25 it's troubling. I can see how it would slip

1 through. I'm not accusing you personally of
2 anything.

3 But, on page 23, you say that in
4 founding-era America, legal reference guides
5 advised local officials to "arrest all such
6 persons as in your sight shall ride or go
7 armed." And this is a citation to John Haywood,
8 A Manual of the Laws of North Carolina, 1814.

9 So I looked at this manual, and what
10 it actually says is "you shall arrest all such
11 persons as in your sight shall ride or go armed
12 offensively." And somehow that word
13 "offensively" got dropped --

14 MS. UNDERWOOD: Well, our --

15 JUSTICE ALITO: -- from your brief.

16 MS. UNDERWOOD: I will --

17 JUSTICE ALITO: Do you think that's an
18 irrelevant word?

19 MS. UNDERWOOD: I think it would have
20 been better to put it in and make an
21 explanation, but I do think it's an irrelevant
22 word because we have substantial authority for
23 the proposition that guns were deemed to be
24 offensive weapons.

25 And that's why we have this dispute

1 about whether saying -- I mean, there are
2 different ways of putting it, offensively or
3 with offensive weapons or to the terror of the
4 people. These either describe a separate
5 characterization -- a -- a separate feature that
6 not all weapons have -- that's my friend's
7 position on this -- or they describe the belief
8 that all such weapons are offensive.

9 JUSTICE ALITO: Well, I don't want to
10 belabor the point, but, of course, if any
11 possession of weapons outside the home was
12 illegal, then there would be no need to put in
13 the term "offensively," the inclusion of that
14 term.

15 MS. UNDERWOOD: Well, there are many
16 other weapon -- usually the -- there's a list
17 that's -- it's not in this particular
18 instruction, but there would be a list of
19 weapons. They were talking about much more than
20 guns, and it was guns that were said over and
21 over again to be offensive --

22 JUSTICE ALITO: All right. Well,
23 thank you.

24 MS. UNDERWOOD: -- weapons.

25 JUSTICE ALITO: Thank you.

1 MS. UNDERWOOD: But that's the
2 explanation. I'm --

3 CHIEF JUSTICE ROBERTS: Justice
4 Sotomayor?

5 Justice Kagan?

6 JUSTICE KAGAN: You -- you started a
7 thought and then you were taken off someplace
8 else, so I just wanted to allow you to finish
9 the thought. You -- this -- what you said was
10 that there was a reason why the sensitive -- a
11 sensitive place regime cannot serve as a
12 replacement, and then you were not given an
13 opportunity to say why. So why?

14 MS. UNDERWOOD: Well, essentially,
15 because there are -- it -- it is -- it would be
16 very hard in the first instance and I think also
17 not very acceptable in the second -- to -- to my
18 adversaries, on the -- in the second instance,
19 to specify in advance all the places that ought
20 properly to be understood as sensitive.

21 So it sounds like a very convenient
22 alternative, but, for example, we were talking
23 about Times Square on New Year's Eve. Times
24 Square on -- when the theater district -- when
25 -- when -- when commerce is in full swing, Times

1 Square almost every night is
2 shoulder-to-shoulder people.

3 So then you -- you end up having a
4 very big difficulty in specifying what all the
5 places are that have the characteristics that
6 should make them sensitive. It -- it's -- it
7 has a -- in principle, it has an attractive
8 quality to it, but, in implementation, I think
9 it would be unsuccessful.

10 CHIEF JUSTICE ROBERTS: Justice
11 Gorsuch?

12 JUSTICE GORSUCH: No further
13 questions. Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Kavanaugh?

16 JUSTICE KAVANAUGH: No. Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett?

19 JUSTICE BARRETT: Yes, I have one.

20 General Underwood, do you think Heller
21 was rightly decided?

22 MS. UNDERWOOD: I think there is a lot
23 of support historically and otherwise for it, so
24 I'm -- I'm quite content to treat it as rightly
25 decided. I think there was an argument on the

1 other side too, but that's true about many of --
2 maybe most of the difficult questions that come
3 before this Court. I have no quarrel with
4 Heller.

5 JUSTICE BARRETT: Do you think that we
6 are bound by the way that we characterized
7 history in that opinion? You know, Mr. Clement
8 has pointed out that in some respects the way
9 that we treated, say, the Statute of Northampton
10 is different from the way that you argue that we
11 should interpret that and the follow-on, you
12 know, statutes, and the colonies, you argue that
13 we should understand those and some other cases
14 differently than we did in Heller.

15 Are we free to do that?

16 MS. UNDERWOOD: I think you are
17 because I think the Heller decision made very
18 clear that it was not deciding anything other
19 than the right to keep arms in the home.

20 In the course of arriving at that
21 decision, it necessarily said a lot of other
22 things that led to that decision, but I don't
23 think they are controlling or they -- I think
24 the opinion itself says we're not trying to do a
25 full exegesis of the whole Second Amendment

1 right, and there's more to be -- there's more to
2 be done, and it would be odd and really
3 inconsistent with general practice to treat
4 every -- every sentence or every reference to a
5 historical source as controlling for all time as
6 distinguished from for the purposes for which it
7 was invoked.

8 JUSTICE BARRETT: Thank you, General.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 General.

11 Mr. Fletcher.

12 ORAL ARGUMENT OF BRIAN H. FLETCHER,
13 FOR THE UNITED STATES, AS AMICUS CURIAE,
14 SUPPORTING THE RESPONDENTS

15 MR. FLETCHER: Thank you, Mr. Chief
16 Justice, and may it please the Court:

17 New York's proper cause requirement is
18 consistent with the Second Amendment because it
19 is firmly grounded in our nation's history and
20 tradition of gun regulation.

21 As Justice Alito said, there's a lot
22 of history floating around this morning, and so
23 I want to be clear that, when I say that, I am
24 putting to the side all of the disputed bits
25 about the Statute of Northampton, about the

1 surety laws, and I'm putting to the side laws
2 that restricted concealed carry but do not
3 restrict open carry, and I am focusing on laws
4 that either prohibited or required a showing of
5 good cause to carry a concealable weapon, like a
6 pistol.

7 Tennessee enacted one of those laws in
8 1821. Texas followed in 1871. New Mexico and
9 Arkansas likewise enacted such laws in the years
10 immediately after the ratification of the
11 Fourteenth Amendment. And over the decades that
12 followed, more than a dozen other states enacted
13 other laws that were at least as restrictive as
14 New York's. Like my friends from New York, I
15 count about 20 laws in total that fit that
16 description.

17 Those laws remain in force in seven
18 states today, and more than 80 million Americans
19 live under their protection. They are, in
20 short, both traditional and common regulations.

21 I'd welcome the Court's questions or
22 I'm happy to continue.

23 JUSTICE THOMAS: How do we determine
24 which states we should look to? And these are
25 -- and you -- you -- you focus a lot on western

1 states, but the west is different.

2 MR. FLETCHER: I agree, Justice
3 Thomas, and I think there might be reason to be
4 skeptical about a tradition that's only
5 reflected in one state.

6 I think that's a problem for Mr.
7 Clement in relying on some of the cases
8 exclusively from the antebellum south. But the
9 cases that we're relying on come from the south,
10 like the Tennessee, Arkansas, and Texas law I
11 described. West Virginia had a similar law, as
12 did Alabama, New York, Massachusetts,
13 California, Hawaii.

14 The tradition that I am drawing on
15 spans two centuries going back to the Tennessee
16 law, spans 150 years when you broaden it out to
17 many states, and spans all regions or virtually
18 all regions of the country.

19 So I think that's the sort of
20 tradition that you can look to when defining a
21 national tradition of gun regulation.

22 CHIEF JUSTICE ROBERTS: I mean, what
23 is the appropriate analysis? I mean, you sort
24 of -- we -- we, I think, generally don't
25 reinvent the wheel. I mean, the first thing I

1 would look to in answering this question is not
2 the Statute of Northampton, it's Heller, and
3 Heller has gone through all this stuff and,
4 obviously, in a somewhat different context,
5 although that's part of the debate, self-defense
6 at home. You know, this is different.

7 But I still think that you have to
8 begin with -- with Heller and its recognition
9 that the Second Amendment, you know, it -- it
10 has its own limitations, but it is to be
11 interpreted the same way you'd interpret other
12 provisions of the Constitution.

13 And I wonder what your best answer is
14 to the point that Mr. Clement makes in his
15 brief, which is that, for example, if you're
16 asserting a claim to confront the witnesses
17 against you under the Constitution, you don't
18 have to say I've got a special reason, this is
19 why I think it's important to my -- my defense.

20 The Constitution gives you that right.
21 And if someone's going to take it away from you,
22 they have to justify it. You don't have to say
23 when you're looking for a permit to speak on a
24 street corner or whatever that, you know, your
25 speech is particularly important.

1 So why do you have to show in this
2 case, convince somebody, that you're entitled to
3 exercise your Second Amendment right?

4 MR. FLETCHER: So let me start with
5 the general question and then get to that --

6 CHIEF JUSTICE ROBERTS: Sure.

7 MR. FLETCHER: -- specific point for
8 Mr. Clement.

9 As to the general question about
10 Heller, we agree completely that the Court ought
11 to apply the method from Heller, which we, like
12 I think all the parties, take to be look to the
13 text, history, and tradition of the Second
14 Amendment right, and we're applying that now to
15 a somewhat different issue with the benefit of
16 somewhat broader materials.

17 Now, as to the question about why you
18 have to have a showing of need, I think the
19 problem with Mr. Clement's formulation is that
20 it assumes the conclusion.

21 If you had a right, the Second
22 Amendment conferred a right to carry around a
23 weapon for possible self-defense just because an
24 individual wants to have one available, then,
25 obviously, you couldn't take away that right or

1 make it contingent upon a discretionary
2 determination.

3 But the whole question is whether the
4 Second Amendment right to keep and bear arms
5 confers that right to have a pistol with you for
6 self-defense even absent a showing of
7 demonstrated need.

8 CHIEF JUSTICE ROBERTS: Well, I'm not
9 sure that's right. I mean, you would --
10 regardless of what the right is, it would be
11 surprising to have it depend upon a permit
12 system. You can say that the right is limited
13 in a particular way, just as First Amendment
14 rights are limited, but the idea that you need a
15 license to exercise the right, I think, is
16 unusual in the context of the Bill of Rights.

17 MR. FLETCHER: So I -- I agree with
18 that, but I think I heard even Mr. Clement in
19 response to a question from Justice Kavanaugh
20 say he doesn't have a quarrel with licensing
21 regimes in general.

22 And I think what that is one
23 illustration of is that the Second Amendment has
24 a distinct history and tradition and that the
25 way to be faithful to the Second Amendment is to

1 be faithful to that history and tradition and
2 not to draw analogies to other rights with --
3 with their own histories and traditions.

4 CHIEF JUSTICE ROBERTS: Well, there's
5 licensing and there's licensing. Maybe it's one
6 thing to say we need to check, make sure you
7 don't have a criminal record, make sure that --
8 all the --

9 MR. FLETCHER: Right.

10 CHIEF JUSTICE ROBERTS: -- all the
11 other things you can check on, but not that we
12 assume you don't have a right to exercise your
13 -- your --

14 MR. FLETCHER: So I guess --

15 CHIEF JUSTICE ROBERTS: It's hard to
16 say it without saying it, exercise your right
17 under the Second Amendment, and you've got to
18 show us that -- that you do.

19 MR. FLETCHER: So we would ask that
20 question by looking to the history and tradition
21 of the Second Amendment. And in Tennessee, in
22 1821, you couldn't carry a pistol at all. In
23 Texas, in 1871, you had to have a showing of
24 need if you were going to carry a pistol.

25 And that showing of need was actually

1 much less favorable than the New York regime.
2 In Texas, in West Virginia, and in Alabama, in
3 those laws that we cite, need to carry a firearm
4 was a need that you had to show when you were
5 prosecuted for violating the law. It was
6 essentially a self-defense requirement. And you
7 had to persuade a jury in a criminal trial that
8 you had an immediate pressing need to be
9 carrying the gun when you were carrying it.

10 The laws, of which New York's is one
11 but by no means the only example that began to
12 become more prevalent in the 20th Century, said
13 we're going to make that determination of need
14 ex ante. We're going to require a showing of
15 good cause.

16 JUSTICE KAVANAUGH: Can --

17 MR. FLETCHER: New York has done that
18 for a century. I'm sorry, Justice Kavanaugh.

19 JUSTICE KAVANAUGH: This might be a
20 level of generality issue, but I think Mr.
21 Clement responded to what -- some of what you're
22 saying on history and tradition by saying you
23 have to look at carry laws more generally. And
24 there was open carry traditions in a lot of
25 those states.

1 And so I think he followed up by
2 saying so open carry is one option. Shall carry
3 permit regimes for concealed carry, another
4 option. But what you can't have is no open
5 carry and simply a may issue discretionary
6 regime that will, in practice, he says, limit
7 the right.

8 So can you respond to that?

9 MR. FLETCHER: Yeah. I meant to be
10 taking that into account in the history --
11 account of history that I'm giving you. So the
12 Tennessee laws refer specifically to carry
13 publicly or privately. Texas, the same story.

14 If I were here defending a regime that
15 just prohibited concealed carry and allowed open
16 carry, I would have many, many, many more
17 states. But I'm focused on just this type of
18 law, and even there, our submission is there's a
19 substantial history and tradition of that kind
20 of regulation. It's not the sort of outlier
21 that the Court confronted in Heller and
22 McDonald.

23 And if I -- I could speak to -- Mr.
24 Clement has spoken some about the case law from
25 the 19th Century and has suggested that laws

1 like these were struck down. And with all
2 respect to my friend, that's not correct.

3 The cases that he is relying on are
4 primarily dicta. The two cases he has that
5 actually struck down laws -- or, I'm sorry, the
6 three cases that he has that actually struck
7 down laws are the Nunn decision from Georgia,
8 which struck down a law that was -- banned even
9 the keeping of pistols. The Court did say in
10 dicta that open carry was required, but that
11 would -- that would -- the law was actually much
12 more restrictive than that.

13 The Andrews case that he relies on and
14 that Heller relies on as well is actually more
15 helpful to us because the Court upheld a
16 prohibition on the carrying of belt or pocket
17 pistols, and it prohibited a ban on revolvers
18 only because the Court construed that ban to be
19 so broad that it would prohibit even carrying it
20 around your house.

21 And in the very next sentence, the
22 Court said: But, of course, the legislature, if
23 it wanted to, could regulate the carrying of
24 that firearm publicly.

25 And then, when you turn to laws like

1 the ones that we have here, which include some
2 sort of self-defense exception, either ex-ante
3 or ex-post, the trend in the cases is in favor
4 of -- of upholding their constitutionality.

5 We've cited about six decisions from
6 the 1800s and the early 1900s, including the
7 Duke and English cases from Texas, the Isaiah
8 case from Alabama, the Haley and Fife cases from
9 Arkansas, and the Workman case from West
10 Virginia, all of which upheld those laws.

11 And Mr. Clement's answer to those
12 decisions is that they rested on the erroneous
13 understanding that the Second Amendment or its
14 state equivalents protected only the right to
15 use arms in the militia.

16 But that is not what those cases say.
17 They do not stop by saying that the defendants
18 were not militiamen and so had no rights. The
19 Texas cases in particular, in Duke and English,
20 say that the law makes all necessary allowances
21 for self-defense by including the type of -- of
22 exception we described earlier.

23 And so our submission is that that
24 body of case law that New York law carries
25 forward is part of our nation's history and

1 tradition of firearms regulation and that New
2 York ought to be allowed to continue to make the
3 choice that it has made.

4 Now we understand, and there's force
5 to Mr. Clement's argument, that other states
6 have made other choices. Justice Alito made
7 powerful points about how some individuals have
8 a powerful claim to have a gun for self-defense.
9 But the question before the Court is, of all of
10 the different approaches to these difficult
11 issues that states and other jurisdictions have
12 taken over our nation's history, is this one
13 that the Second Amendment takes off the table?

14 And our submission is that when it's
15 an option that New York has and other states
16 have had for a century or more and that traces
17 as far back as some of the laws that I've been
18 discussing into our nation's history, that's an
19 option that is consistent with our tradition of
20 gun regulation and is an option that ought to be
21 available to the states.

22 CHIEF JUSTICE ROBERTS: Justice
23 Thomas?

24 JUSTICE THOMAS: No.

25 CHIEF JUSTICE ROBERTS: Justice

1 Breyer, any?

2 Justice Alito?

3 JUSTICE ALITO: Is it correct that the
4 Sullivan Law was an innovation when it was
5 adopted?

6 MR. FLETCHER: It was relatively new.
7 I think the Sullivan Law was 1911. The
8 licensing requirement at issue here was 1913. I
9 think Massachusetts had done something similar
10 in 1906. Hawaii did its as well in 1913. And
11 we view those as lineal descendents and, in
12 fact, improvements upon the sort of Texas laws
13 which made you prove self-defense at the back
14 end rather than giving you a chance to
15 demonstrate it up front.

16 JUSTICE ALITO: There's a -- there's a
17 debate about the -- the impetus for the
18 enactment of the Sullivan Law, is there not?
19 There's -- there are those who argue, and they
20 cite -- they cite support for this
21 interpretation -- that a major reason for the
22 enactment of the Sullivan Law was the belief
23 that certain disfavored groups, members of labor
24 unions, Blacks and Italians, were carrying guns
25 and they were dangerous people and they wanted

1 them disarmed.

2 MR. FLETCHER: There have been those
3 arguments made, and there's certainly evidence
4 that those sentiments existed in New York at the
5 time. I have not seen things that persuade me
6 that those were the impetus for the Sullivan
7 Law.

8 And to the extent that that was a
9 question, I think the fact that similar laws
10 have been enacted and maintained not just in New
11 York and not just at that moment in time but in
12 a number of different states throughout the
13 country throughout large swaths of our nation's
14 history is -- is good reason to believe that
15 this is not just prejudice, that this is a
16 legitimate regulation.

17 JUSTICE ALITO: I think one more
18 question about the major point that you've made
19 this morning, which is that there are scattered
20 statutes, local ordinances, judicial decisions
21 from various points in the 19th Century
22 extending into the 20th Century, the early 20th
23 Century, with the Sullivan Law and the other
24 laws that you mentioned that are inconsistent
25 with Mr. Clement's argument.

1 But what does that show about the
2 original understanding of the right that's
3 protected by the Second Amendment? Would --
4 would we be receptive to arguments like that if
5 we were interpreting, let's say, the First
6 Amendment or the Confrontation Clause of the
7 Sixth Amendment? Would we say, well, you know,
8 you can find a lot of state laws and state court
9 decisions from the late -- from the 19th
10 Century, early 20th Century, that are
11 inconsistent with a claim that is made based on
12 the original meaning of -- of a provision of the
13 Bill of Rights, and that shows that that's what
14 that was understood to mean at the time?

15 MR. FLETCHER: Well, Justice Alito, I
16 think Heller was receptive to those types of
17 arguments and conducted a review of history
18 through the 20th Century and rightly so, I
19 think. It's not unusual to look to the nation's
20 tradition to understand the meaning of
21 constitutional rights. I think that's
22 especially appropriate here for a couple of
23 reasons.

24 One is that I think everyone agrees
25 that the right codified in the Second Amendment

1 is a right that is subject to some reasonable
2 regulations, and in deciding what regulations
3 are reasonable, we think the fact that they've
4 been prevalent throughout our history is a good
5 sign that they are. We think that's especially
6 so because of a point that this Court made in
7 McDonald, which is that throughout the nation's
8 history, this is a right that's been recognized
9 and codified in state constitutions as well.
10 It's not something that people were not aware
11 of.

12 And so the fact that this type of
13 regulation coexisted for so long with that
14 understanding, we think, is a particularly
15 strong indication of its consistency.

16 JUSTICE ALITO: Well, Heller -- and --
17 and I will stop after this -- Heller cited
18 decisions going into the 19th Century as
19 confirmation of what it had already concluded
20 based on text and history at or before the time
21 of the adoption of the Second Amendment and said
22 this is what it was understood to mean at the
23 time and it's further evidence that this is what
24 this right was understood to mean because it
25 kept being reaffirmed by decisions that came

1 after.

2 But I find it hard to understand how
3 later decisions and statutes, particularly when
4 you start to get into the late 19th Century and
5 the early 20th Century, can be used as a
6 substitute for evidence about what the right was
7 understood to mean in 1791 or 1868 if you think
8 that's the relevant date.

9 MR. FLETCHER: So you're certainly
10 right about the way that Heller looked to
11 decisions to -- on its core holding of does the
12 Second Amendment protect only a militia-focused
13 right or an individual right.

14 But, when Heller turned to the
15 question presented here, which is what sorts of
16 regulations are consistent with the right that
17 it was recognizing, I think it's fairly read to
18 extend the analysis into the 20th Century for
19 the reason that Justice Kagan identified, that
20 it validated as presumptively lawful
21 felon-in-possession requirements, bans on the
22 possession of firearms by the mentally ill that
23 date to much later than the 19th Century.

24 JUSTICE ALITO: All right. Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 JUSTICE SOTOMAYOR: What do you do
3 with Heller and its recognition of categories of
4 exclusion? Mentally ill, felons, domestic
5 violence, presumably, although it didn't mention
6 it. Can any of those pass strict scrutiny on
7 their face?

8 MR. FLETCHER: I don't know. I -- I
9 think what -- the lesson from Heller, though, is
10 that you don't need to apply strict scrutiny or
11 any other level of scrutiny because those are
12 the types of regulations that are validated by
13 our nation's history and tradition of gun
14 regulations. And so we would take that lesson
15 from Heller as exemplifying the proper mode of
16 analysis and apply it here as well.

17 JUSTICE SOTOMAYOR: So what do you do
18 with the -- the view of your -- Mr. Clement's
19 view that the essence that Heller says is that
20 you do have some sort of right outside of the
21 home to guns for self-defense? So how do you
22 finish what you think that right is or how do
23 you describe it?

24 MR. FLETCHER: So we don't quarrel at
25 all with the notion that the Second Amendment

1 has something to say outside the home. Our
2 submission is just that to understand how it
3 applies outside the home, one has to look to the
4 history and tradition of regulations.

5 And what we've tried to argue in our
6 brief and this morning is that there is a
7 substantial history and tradition of the
8 regulation of the public carrying of concealable
9 weapons, including pistols, because of the
10 dangers that they present and that regulations
11 of that type, of which New York's is one, are
12 consistent with the right recognized in the
13 Second Amendment.

14 JUSTICE SOTOMAYOR: How about -- let's
15 go to the extreme. There's no exception for
16 good cause, there's no exception for long -- no
17 exceptions whatsoever, no rifles for hunting, no
18 -- nothing. Outside the home, you can't possess
19 any kind of ammunition-driven weapon.

20 MR. FLETCHER: Yeah.

21 JUSTICE SOTOMAYOR: Where would we be
22 with that?

23 MR. FLETCHER: I think that is an -- a
24 type of regulation that fortunately no state has
25 today and that I don't think there's any

1 historical precedent for. I don't think you
2 could make this sort of argument --

3 JUSTICE SOTOMAYOR: So --

4 MR. FLETCHER: -- for that sort of
5 law.

6 JUSTICE SOTOMAYOR: -- so give me the
7 limiting principle of what regulations and how
8 far they can go that don't achieve that.

9 MR. FLETCHER: Right. So I think,
10 like Mr. Clement, it's -- it's going to be
11 difficult for me to give you definitive answers
12 because, in our view, this is an inquiry that
13 has to be driven by history and tradition, and
14 that requires a careful examination of history
15 and tradition.

16 But let me give you a couple of
17 guideposts. I think there is a tradition of
18 laws like the Tennessee law that I alluded to
19 earlier and others that prohibit the carrying of
20 concealable weapons without any exception for
21 self-defense or -- or any good cause exception
22 like the one that you have in the New York law.

23 So we think, and -- and Judge Bybee
24 for the en banc Ninth Circuit concluded after an
25 exhaustive historical analysis, that those types

1 of regulations are consistent with the Second
2 Amendment. But I acknowledge that that's a
3 tougher historical case to make than the case
4 that you can make with respect to laws like New
5 York's that include self-defense exceptions.

6 JUSTICE SOTOMAYOR: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice Kagan?

8 JUSTICE KAGAN: Mr. Fletcher, I -- I
9 think I probably should have asked General
10 Underwood this question, but I forgot, so here
11 you are.

12 And the United States also has law
13 enforcement officers, even though they operate
14 differently from sort of the cop on the beat,
15 but I'm just wondering if there is anything that
16 you can say, any evidence that you can share,
17 are there studies, is there information about
18 how this actually affects how getting rid of --
19 of this regime in the way that Mr. Clement would
20 want this Court to do, how it affects policing,
21 how it affects the ability of police officers to
22 keep the streets safe and -- and how it affects
23 their own safety?

24 Is there information about that? Is
25 there -- are there studies?

1 MR. FLETCHER: There are. I think the
2 -- the best place I can point you to for studies
3 are some of the amicus briefs, including the
4 social scientists' brief that Justice Breyer
5 discussed with my colleague, General Underwood.

6 In terms of sort of the United States'
7 perspective specifically, I don't have any sort
8 of quantifiable statistics. What I can tell you
9 is that we do share the concern behind the New
10 York law, which is the concern that having more
11 guns on the street does escalate -- does
12 complicate and increase the danger inherent in
13 citizen/law enforcement encounters. We do think
14 that's a real concern and it's one of a number
15 of real concerns that are reflected in the law
16 that New York has.

17 JUSTICE KAGAN: I mean, do police
18 officers stop people in the same way in --
19 notwithstanding what -- whether there are --
20 whether it's a -- a New York regime or -- or a
21 more permissive regime?

22 MR. FLETCHER: I -- you know, I
23 apologize, I don't have studies on that. All
24 that I can give you is my own sense that if I
25 were a police officer, I would certainly think

1 prominently in my mind about what are the odds
2 that the person that I'm stopping or approaching
3 in the middle of the highway, you know, late at
4 night is likely to be armed. And the licensing
5 regime in the state is going to be an important
6 factor in the risk that that's the situation.

7 JUSTICE KAGAN: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Gorsuch?

10 JUSTICE GORSUCH: Mr. Fletcher, in --
11 in your brief, you -- you suggest that the New
12 York law passes both the history -- text and
13 history approach and -- and intermediate
14 scrutiny should we apply that.

15 And I guess I'd like to pose the same
16 question to you that I did to Mr. Clement, and
17 that is, what is the appropriate test between
18 those two or others?

19 The lower courts seem very divided
20 over how to approach Second Amendment questions.
21 Some apply the text and history approach to the
22 challenge before them. Others say, yes, text
23 and history is appropriate, but we're not going
24 to extend the Heller right until and unless the
25 Court first does so through its own text and

1 history analysis. We're not going to do it
2 ourselves. Others have applied intermediate
3 scrutiny. Others have applied what might be
4 described as a watered down version of immediate
5 -- intermediate scrutiny. And some have
6 suggested strict scrutiny or some modification
7 of it should apply.

8 I -- I -- I'd just be grateful for
9 your thoughts.

10 MR. FLETCHER: I appreciate the
11 question, Justice Gorsuch, and I think our view
12 is that courts ought to follow what we
13 understand to be the lesson from Heller, which
14 is that you start with text, history, and
15 tradition, and when those sources provide you an
16 answer one way or the other, either that the law
17 is valid or that it's invalid, you end there and
18 that's the end of the inquiry.

19 We take that approach to be consistent
20 with the approach described by Justice Kavanaugh
21 in his dissent in Heller II. I think the one
22 place where we might differ from him a little
23 bit is that we think there may come a point,
24 especially as -- when courts confront new
25 regulations, where history gives out, where it's

1 not possible to draw those historical analogies
2 anymore.

3 And at that point, our suggestion is
4 that the way to be faithful to history and
5 tradition is to look to the broader method that
6 you find in that history and tradition. And the
7 method that we find in a half dozen or so cases
8 from the mid-1800s that we cite is to ask
9 whether the law is a reasonable regulation. And
10 as we explained in our brief, we think that the
11 modern judicial method that is most faithful to
12 that approach is a form of intermediate
13 scrutiny.

14 JUSTICE GORSUCH: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Kavanaugh.

17 JUSTICE KAVANAUGH: Thank you.

18 Mr. Fletcher, appreciate your focus on
19 history and tradition and want to explore that
20 and get your thoughts on one thing. As you say,
21 there is a history and tradition, and it exists
22 to the present day, of permitting regimes, and
23 so the issue before us will have effects, but
24 it's a narrow legal issue of "shall issue"
25 versus "may issue." And it'll have substantial

1 effects, but there is a tradition of permitting
2 regimes.

3 But how do we think about, do you
4 think, kind of a separate tradition that the
5 Chief Justice and others have referred to in our
6 constitutional law of concern about too much
7 discretion in exercise of authority over
8 constitutional rights and that too much
9 discretion can lead to all sorts of problems, as
10 our history shows?

11 So you've got the tradition of
12 permitting, but how -- how do we think about,
13 fold in, just a general concern about too much
14 discretion?

15 MR. FLETCHER: So I -- I appreciate
16 that concern, and I think here's how I would
17 think about it.

18 First, I would say you -- there is a
19 substantial history of discretion in this
20 particular area, starting out with juries in the
21 Texas and West Virginia type regimes that I
22 talked about now moving into permitting
23 officers. And I think that's inherent in any
24 system if you say a permit is going to be
25 conditioned upon a showing that you have a

1 genuine, specific need for self-defense, then
2 someone's got to make the decision about whether
3 or not you've made that showing. New York has
4 decided it's best to do that by delegating the
5 authority to local officers, local judges, who
6 are most familiar with local conditions.

7 I do appreciate the concern about
8 discretion, and I think, if the Court were to
9 conclude that some sort of good cause sort of
10 self-defense-based exception is -- is required,
11 then the Court might conclude that some more
12 predictable or stringent or prescriptive
13 guidelines are required, that you can't have
14 that much discretion if the Court concludes that
15 that sort of good cause exception is actually
16 constitutionally required.

17 JUSTICE KAVANAUGH: Thank you.
18 Appreciate it.

19 CHIEF JUSTICE ROBERTS: Justice
20 Barrett?

21 JUSTICE BARRETT: No.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Rebuttal, Mr. Clement?

25

1 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

2 ON BEHALF OF THE PETITIONERS

3 MR. CLEMENT: Thank you, Mr. Chief
4 Justice. Just a few quick points in rebuttal.

5 First of all, I want to highlight that
6 when the government was asked for its interest
7 behind this permitting regime, it said that if
8 it went to a different regime, it would multiply
9 the number of firearms in circulation.

10 In a country with the Second Amendment
11 as a fundamental right, simply having more
12 firearms cannot be a problem and can't be a
13 government interest just to put a cap on the --
14 the number of firearms.

15 And that just underscores how
16 completely non-tailored this law is. It might
17 be well tailored to keeping the number of
18 handguns down, but it's not well tailored to
19 identifying people who pose a particular risk or
20 anything else because it deprives a typical New
21 Yorker of their right to carry for self-defense.

22 The second point I want to make is
23 just about population density. There's been a
24 lot of discussion about that, but it's very much
25 a double-edged sword because, when there's

1 population density, that's an awful lot of
2 people who all have Second Amendment rights, and
3 so you can't just simply say we're not going to
4 have Second Amendment rights in the areas where
5 there's dense population.

6 And I would say, here, experience does
7 tell you a lot. By my count, seven of the 10
8 largest cities in America, measured by
9 population, are in shall issue jurisdictions.
10 And I've mentioned them, cities like Phoenix,
11 Chicago, Houston. These are large cities where
12 it hasn't been a problem.

13 If you want to look at the empirical
14 evidence -- and I know, Justice Breyer, you
15 asked about this -- please also look at the
16 English brief on the top side because it's a
17 very rigorous statistical analysis that shows
18 that, as a matter of actually doing statistics
19 right, there's no difference here, and what --
20 the only difference you really see is that
21 people who have a handgun for self-defense end
22 up with a better outcome. They're not shot.
23 They're -- they're not made victims. But the
24 English brief, I think, is really worth taking a
25 look at.

1 I want to say a quick word just about
2 permitting. There may be limiting permitting in
3 other contexts, like parade permitting, but I'm
4 not aware of any context whatsoever where, in
5 order to get a permit, you have to show that you
6 have a particularly good need to exercise your
7 constitutional right. And I think that is the
8 absolute central defect with New York's regime
9 here.

10 I want to say a quick word about the
11 history that my friend from the Solicitor
12 General's Office emphasized. It's telling that
13 his first example is Tennessee. If you look at
14 the Heller decision, Tennessee is a problematic
15 state in terms of its history. The court gave
16 -- that Tennessee Supreme Court first came out
17 with the Aymette decision, which the majority
18 opinion in Heller criticized. It then came out
19 with the Simpson decision and the Andrews
20 decision, both of which protected Second
21 Amendment rights, and the majority opinion in
22 Heller praised those decisions at the same time
23 that it criticized Aymette. So, to the extent
24 there was an 1821 statute, I would put it in the
25 same box as the Aymette decision.

1 Texas, which is their next example and
2 their only other 19th Century example if I heard
3 my friend correctly, is even more problematic to
4 rely on because Texas had a specific
5 constitutional amendment that was similar to the
6 English Bill of Rights but differed from the
7 Second Amendment, that allowed the legislature
8 to put specific restrictions on the right. So
9 relying on 1871 Texas is highly problematic from
10 a historical perspective.

11 And that just leaves them with 20th
12 Century examples, which we concede, but, by that
13 point, the collective rights view of the Second
14 Amendment was everywhere.

15 Let me finish just by saying there's
16 absolutely no need for a remand here. There are
17 interesting statistics that could be developed,
18 but none of them are relevant to the two central
19 defects in this regime.

20 First, that in order to exercise a
21 constitutional right that New York is willing to
22 concede extends outside the home, you have to
23 show that you have an atypical need to exercise
24 the right that distinguishes you from the
25 general community. That describes a privilege.

1 It does not describe a constitutional right.
2 That is a sufficient basis to invalidate the
3 law.

4 But then there's the discretion, and
5 the discretion here has real-world costs. If
6 you want to look at it, look at the amicus brief
7 in our support by the Bronx Public Defenders and
8 other public defenders. The cost of this kind
9 of discretion is that people are charged with
10 violent crimes even though they have no private
11 -- no prior record just because they are trying
12 to exercise their constitutional right to
13 self-defense.

14 And if you want to know how this
15 impacts policing, one of the ways essentially
16 making everybody in New York City a presumptive
17 person who is unlawfully carrying is that leads
18 to stopping and frisking everybody.

19 The framers, I think, had a different
20 vision of the Fourth Amendment and the Second
21 Amendment, and that is that individuals get to
22 make their decision about whether or not they
23 want to carry a firearm outside the home for
24 self-defense.

25 In 43 states, people are able to do

1 that. It has not -- it doesn't mean everybody
2 ends up carrying, and it doesn't mean that those
3 43 states have any more problems with violent
4 crimes or anything else than the six or seven
5 jurisdictions that don't honor the text, the
6 history of the Second Amendment, and Heller.

7 Thank you, Your Honors.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel. The case is submitted.

10 (Whereupon, at 11:58 a.m., the case
11 was submitted.)

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