

# PROPER CAUSE FOR CONCERN: *NEW YORK STATE RIFLE & PISTOL ASSOCIATION V. BRUEN*

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## INTRODUCTION

Gun rights and gun control advocates alike are watching the Supreme Court,<sup>1</sup> to see what happens in *New York State Rifle & Pistol Association, Inc. v. Bruen*.<sup>2</sup> In this pivotal Second Amendment case, the Court finds its first opportunity to substantially extend its 2008 decision in *District of Columbia v. Heller*,<sup>3</sup> and to define the scope of the Second Amendment right to bear arms outside the home.<sup>4</sup>

The Court can decide this case narrowly by limiting its decision to the statutes at issue, New York’s “proper cause” regime (the “New York law”).<sup>5</sup> Alternatively, the Court can rule broadly and use this case to shift Second Amendment doctrine away from the predominant “two-part inquiry” to the “text, history, and tradition” (“THT”) approach, which has been relied upon in Second Amendment jurisprudence when these three types of sources provide reasonably

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1. See *U.S. Supreme Court Grants Cert in NYSRPA’s Second Amendment Concealed Carry Case*, N.Y. ST. RIFLE & PISTOL ASS’N (Apr. 30, 2021), <https://www.nysrpa.org/u-s-supreme-court-grants-cert-in-nysrpa-second-amendment-concealed-carry-case/> (describing the possible impact of the case on gun rights advocates). See generally Brief for Everytown for Gun Safety as Amicus Curiae Supporting Respondents, *N.Y. St. Rifle & Pistol Ass’n, Inc. v. Bruen*, No. 20-843 (filed Sept. 21, 2021) (advocating as gun control activists in favor of upholding the law).

2. *N.Y. St. Rifle & Pistol Ass’n, Inc. v. Beach*, 818 F.App’x 99 (2d Cir. 2020), cert. granted *sub nom.*, 141 S.Ct. 2566 (mem) (2021). The case originally named George P. Beach II, followed by Keith M. Corlett, and eventually Richard Bruen—adjusting with the changing superintendents of the New York State Police.

3. 554 U.S. 570 (2008).

4. See generally *id.* (finding the Amendment grants individuals the right to keep and bear arms in the home for self-defense, but not deciding the scope of the right outside the home).

5. See discussion *infra* Part I.

clear guidance.<sup>6</sup> Second Amendment advocates hope the Court will use the “text, history, and tradition” approach to affirm that arms kept and born outside the home (“public carry”) are constitutionally protected.<sup>7</sup>

Since *Heller*, there has been some debate about which interpretive approach to apply when analyzing Second Amendment cases. The *Heller* Court concluded that the Amendment granted individuals the right to keep and bear arms, and found self-defense *in the home* to be a hallmark of Second Amendment protections.<sup>8</sup> Yet, in coming to this conclusion, the Court failed to provide guidance on what type of analytical test lower courts should employ when faced with Second Amendment challenges to gun regulations.<sup>9</sup> Most lower courts have since established a two-part inquiry,<sup>10</sup> while others have endorsed an alternative approach that focuses on “text, history, and tradition.”<sup>11</sup>

Given its current composition, the Court will likely strike down the New York law.<sup>12</sup> Additionally, with Justice Kavanaugh, a key advocate of the THT approach now on the Court,<sup>13</sup> it appears the Court may also adopt this interpretive framework. Nevertheless, both of these outcomes would be inappropriate because neither would be consistent with *Heller*.

## I. FACTS

New York generally prohibits possession of firearms without a license,<sup>14</sup> and bans open carry of handguns completely.<sup>15</sup> Yet, with a license, individuals may possess handguns in public if they are concealed (“concealed carry”).<sup>16</sup> To obtain this license, applicants must

6. See discussion *infra* Part III.B.

7. See Petition for Writ of Certiorari at 15, *N.Y. St. Rifle & Pistol Ass’n, Inc. v. Bruen*, No. 20-843 (filed Dec. 17, 2020) (“Text, history, and tradition readily confirm that the Second Amendment protects a right to carry a firearm outside the home for self-defense.”).

8. *Heller*, 544 U.S. at 628.

9. See *infra* note 78 an accompanying text.

10. See discussion *infra* Part III.B.2.

11. See discussion *infra* Part III.B.3.

12. See discussion *infra* Part VI.B.

13. See *Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J. dissenting) (endorsing the “text, history, and tradition” approach).

14. N.Y. PENAL LAW § 265.01-04 (McKinney 2021) (criminalizing possession of a weapon to varying degrees depending on the circumstances). Note that references to New York in text refer to the state, rather than the city. New York City’s specific firearms laws are beyond the purview of this commentary.

15. *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 86 (2d Cir. 2012) (citing N.Y. PENAL LAW § 400.00(2)(f) (McKinney)).

16. §§ 400.00(2)(c)–(f) (McKinney).

meet certain requirements such as reaching a minimum age, possessing no felony convictions, and being a United States citizen.<sup>17</sup> A license to concealed carry in public, however, will only be granted “when proper cause exists for the issuance thereof.”<sup>18</sup>

The New York State Assembly did not clearly define “proper cause.” In the absence of legislative guidance, New York courts have interpreted proper cause to mean that one has “a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.”<sup>19</sup> This heightened requirement denotes more than a general desire to concealed carry for protection of self and property.<sup>20</sup> Furthermore, living or working in a “high crime area” by itself does not establish “proper cause” either.<sup>21</sup> Rather, as Petitioners underscore in their Petition for Writ of Certiorari, the standard requires “a particularized ‘finding’ of *need*” to obtain a license.<sup>22</sup>

Given these requirements, New York joins eight other jurisdictions as “may issue” jurisdictions,<sup>23</sup> and seven states which require applicants to show cause in order to receive a license.<sup>24</sup> New York grants licensing officials discretion to decide which applicants qualify for a license.<sup>25</sup> By contrast, twenty-one states with “shall issue” regimes provide limited or no discretion to officials if an applicant meets basic qualifications.<sup>26</sup>

In 2014, New York resident Robert Nash tested the New York law

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17. §§ 400.00(1)(a), (c), (f), (h) (McKinney).

18. § 400.00(2)(f) (McKinney).

19. *Kachalsky*, 701 F.3d at 86 (quoting *Klenosky v. N.Y. City Police Dep’t*, 428 N.Y.S.2d 256, 257 (N.Y. App. Div. 1980)) (internal quotation marks omitted).

20. *Id.*

21. *Id.* at 87 (citations omitted).

22. Petition for Writ of Certiorari, *supra* note 7, at 8.

23. California, Connecticut, Delaware, the District of Columbia, Hawaii, Maryland, Massachusetts, New Jersey, and New York are “may issue” jurisdictions. *Concealed Carry*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/concealed-carry/> (last visited Jan. 7, 2021), [hereinafter *Concealed Carry Laws*].

24. California, Delaware, Hawaii, Maryland, Massachusetts, New Jersey and Rhode Island also require applicants to show cause to receive a gun license. Eric Ruben, *Supreme Court About to Hear Major Case on Gun Restrictions*, BRENNAN CTR. FOR JUST. (Oct. 21, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/supreme-court-about-hear-major-case-gun-restrictions>. See, e.g., CAL. PENAL CODE § 26150(a)(2) (West 2016) (“[T]he sheriff of a county may issue a license to that person upon proof [that] . . . [g]ood cause exists for issuance of the license.”); MD. CODE ANN., PUB. SAFETY § 5-306(a)(6)(ii) (West 2013) (requiring “a finding that [a] permit is necessary as a reasonable precaution against apprehended danger”).

25. § 400.00(1) (McKinney).

26. Ten states are limited discretion “shall issue” jurisdictions, while eleven are no-discretion “shall issue” ones. *Concealed Carry Laws*, *supra* note 23.

when he applied for a public carry license in Rensselaer County.<sup>27</sup> Though the licensing officer, Richard J. McNally, Jr., granted Nash a license six months later, it was marked just for hunting.<sup>28</sup> Nash was not permitted to carry a handgun beyond the confines of his home for self-defense purposes.<sup>29</sup> On appeal to McNally, Nash requested a license that permitted public carry for self-defense.<sup>30</sup> Nash supported his request with evidence of recent robberies in his neighborhood and his completion of a firearm safety training course.<sup>31</sup> In 2016, McNally denied this request because Nash failed to adequately show “proper cause.”<sup>32</sup>

A year later, Brandon Koch, another New York resident, also tested the proper cause regime. Koch already held a license to publicly carry a handgun for hunting and target practice purposes.<sup>33</sup> Though this license allowed him to carry his firearm to and from work, Koch was unable to publicly carry for self-defense. Koch appealed to McNally in 2017 to remove the restrictions.<sup>34</sup> On appeal, Koch cited his experience with safely handling and operating firearms, as well as his completion of safety training.<sup>35</sup> McNally denied Koch’s appeal in 2018 for failure to show proper cause.<sup>36</sup>

The New York State Rifle & Pistol Association, Inc. (“NYSRPA”) is “a group organized to defend the right of New York residents to keep and bear arms.”<sup>37</sup> Both Nash and Koch are members of NYSRPA.<sup>38</sup> Before *Bruen*, the group had filed other lawsuits that challenged New York gun laws and regulations.<sup>39</sup> One lawsuit that challenged New York City restrictions on the transport of firearms outside the home was actually granted certiorari by the Supreme Court; but the Court

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27. N.Y. St. Rifle & Pistol Ass’n, Inc. v. Beach, 354 F.Supp.3d 143, 146 (N.D.N.Y. 2018), *aff’d*, N.Y. St. Rifle & Pistol Ass’n, Inc. v. Beach, 818 F.App’x 99 (2d Cir. 2020), *cert. granted sub nom.*, 141 S.Ct. 2566 (mem) (2021).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 146–47.

35. *Id.* at 147.

36. *Id.*

37. *Id.*

38. *Id.* at 146.

39. See N.Y. St. Rifle & Pistol Ass’n, Inc. v. Cuomo, 804 F.3d 242 (2d Cir. 2015) (challenging a New York state law prohibiting possession of certain semiautomatic “assault weapons.”), *cert. denied*, 579 U.S. 917 (mem) (2016).

disposed of the case as moot because the restrictions were altered before the Court could reach a decision.<sup>40</sup>

## II. PROCEDURAL HISTORY

The individual Petitioners, Koch and Nash, brought suit under 42 U.S.C. § 1983 in the Northern District of New York after they had been denied licenses.<sup>41</sup> NYSRPA joined Koch and Nash as co-plaintiffs.<sup>42</sup> Together, they sued George P. Beach II in his official capacity as superintendent of the New York State Police.<sup>43</sup> Petitioners also named McNally in his official capacity as both a Justice of the New York Supreme Court, Third Judicial District, and as the licensing officer for Rensselaer County,<sup>44</sup> where the Petitioners' applications were rejected.<sup>45</sup>

Petitioners alleged that Respondents violated the Second Amendment “when they refused to grant them licenses to carry a firearm outside the home for self-defense.”<sup>46</sup> Respondents filed a motion to dismiss under Rule 12(b)(6) on the grounds that the Petitioners' claims contradict the Second Circuit's holding in *Kachalsky v. County of Westchester*.<sup>47</sup> The District Court granted the motion to dismiss, finding the facts of *Kachalsky* “substantially identical to the facts presently before the [c]ourt.”<sup>48</sup> Petitioners submitted a timely appeal of this dismissal to the Second Circuit, which issued a short opinion affirming the decision because Petitioners' argument “fails under . . . precedents.”<sup>49</sup>

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40. N.Y. St. Rifle & Pistol Ass'n, Inc. v. City of New York, 140 S.Ct. 1525 (2020).

41. *Beach*, 354 F.Supp.3d at 145.

42. *Id.* at 146.

43. *Id.* at 143.

44. *Id.*

45. *Id.* at 147. Rensselaer County lies north of New York City and adjacent to the capitol, Albany. Its biggest city is Troy. The total county population is around 160,000 as of 2018, and the total area is 665 square miles. N.Y. ST., *Rensselaer*, <https://www.ny.gov/counties/renselaer> (last visited Dec. 21, 2021). By contrast, New York County which holds Manhattan has a population of about 1.7 million as of 2018 and is 33 square miles. N.Y. ST., *New York*, <https://www.ny.gov/counties/new-york> (last visited Dec. 21, 2021). During oral arguments, the justices paid particular attention to the needs of New York City. See *infra* notes 185–86 and accompanying text.

46. *Beach*, 354 F.Supp.3d at 145.

47. *Id.*

48. *Id.* at 148.

49. N.Y. St. Rifle & Pistol Ass'n, Inc. v. Beach, 818 F.App'x 99, 100 (2d Cir. 2020) (“As this [c]ourt has recently affirmed, New York's proper cause requirement does not violate the Second Amendment.”), *cert. granted sub nom.*, 141 S.Ct. 2566 (mem) (2021).

### III. LEGAL BACKGROUND

The right to keep and bear arms is enshrined in the Second Amendment of the United States Constitution: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”<sup>50</sup> Uncertainties regarding the scope of the right persist, and include which individuals the right applies to, where it applies, and which firearms it covers.<sup>51</sup>

Most of the Second Amendment’s modern legal framework stems from the Supreme Court’s *District of Columbia v. Heller* decision in 2008.<sup>52</sup> Understanding *Heller* is essential to understanding the arguments in *Bruen*. This Part explains the *Heller* decision and the interpretive approaches taken by lower courts in the post-*Heller* landscape. As seen in the following Part IV, Petitioners’ and Respondents’ arguments are heavily informed by this precedent.

In *Heller*, the Court endorsed an “individuals rights” framework, meaning that it found the Amendment protects an individual’s right to keep and bear arms, particularly for self-defense in the home.<sup>53</sup> Beyond this holding, the Court did not offer clear instructions for lower courts on how to decide future cases.<sup>54</sup> The majority opinion made clear, however, what interpretative methods it did *not* endorse, condemning a “freestanding interest-balancing approach” like that proposed by Justice Breyer in dissent.<sup>55</sup> In light of *Heller*, most lower courts have adopted a two-step inquiry that determines: 1) whether the law at issue impacts a right within the Second Amendment’s scope; and 2) what level of scrutiny is applicable.<sup>56</sup> Circuits that have adopted this approach have split on how “proper cause” (also known as “good cause”) regimes fair under the Second Amendment.<sup>57</sup> A minority of judges have advocated for an alternative approach altogether, centered on the “text, history, and tradition” of the Amendment.<sup>58</sup>

50. U.S. CONST. amend. II.

51. *See, e.g.*, *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121 (10th Cir. 2015) (analyzing a prohibition on firearms in a U.S. Postal Service parking lot); *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019) (examining a felon-in-possession law for nonviolent offenders).

52. 544 U.S. 570, 592 (2008).

53. *See id.* at 628 (“[T]he inherent right of self-defense has been central to the Second Amendment right.”).

54. *See id.* at 628–29 (finding that the handgun ban would fail under any standard of scrutiny without endorsing a particular level of scrutiny to apply).

55. *Id.* at 635 (internal quotations omitted).

56. *See* discussion *infra* Part III.B.1.

57. *See* discussion *infra* Part III.C.

58. *See* discussion *infra* Part III.B.3.

### A. *Heller* & its Precedents

Before *Heller*, the Supreme Court supported a militia-based interpretation of the Amendment. In the 1939 case *United States v. Miller*, the Court noted that the Second Amendment was created “[w]ith [the] obvious purpose to assure the continuation and render possible the effectiveness of [the Militia],” and that “[i]t must be interpreted and applied with that end in view.”<sup>59</sup> Nearly seventy years later, the Supreme Court altered course in *Heller*, declaring that the Second Amendment also extends to individuals outside of militia contexts.<sup>60</sup> In so doing, the Court transformed Second Amendment doctrine.<sup>61</sup> The Court subsequently extended its ruling to apply to state and local government gun regulations in *McDonald v. City of Chicago*.<sup>62</sup>

*Heller* marked a shift in jurisprudence by not only endorsing the individual-rights view, but by also identifying self-defense as a core Second Amendment principle.<sup>63</sup> To this end, the *Heller* Court noted the need for self-defense was “most acute” in the home.<sup>64</sup> But the opinion recognized that, like most rights, the Second Amendment is not absolute.<sup>65</sup> For example, the Court noted that most, but not all, nineteenth century courts that evaluated concealed carry prohibitions held them lawful.<sup>66</sup> In a footnote, the Court explained that although it identified “presumptively lawful regulatory measures,” its list of such lawful regulations was not exhaustive.<sup>67</sup>

Post-*Heller* and post-*McDonald*, it is clear that “Second Amendment guarantees are at their zenith within the home.”<sup>68</sup> But the

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59. *United States v. Miller*, 307 U.S. 174, 178 (1939).

60. *See Heller*, 544 U.S. at 592 (discussing “the individual right to possess and carry weapons in case of confrontation.”).

61. *See* JOSEPH BLOCHER & DARRELL A.H. MILLER, *THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF HELLER* 51 (2018) (“[T]he modern Second Amendment was created on . . . the day the Supreme Court held in . . . *Heller* that the right to keep and bear arms covers private purpose such as self-defense.”) (emphasis added).

62. 561 U.S. 742, 750 (2010) (finding the right endorsed in *Heller* “fully applicable to the States.”).

63. *Heller*, 544 U.S. at 628.

64. *Id.*

65. *See id.* at 626–27 (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms.”).

66. *Id.* at 626.

67. *Id.* at 627, n.26.

68. *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) (citing *Heller*, 544 U.S. at 628–29). *See also McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010) (extending *Heller* to also apply to state and local government actions).

Court did not clarify either the scope of the Second Amendment right outside of the home or the standards for determining when and how the government can regulate the right.<sup>69</sup> More test cases are needed for further clarification.<sup>70</sup>

### *B. Analyzing Post-Heller Second Amendment Caselaw*

The *Heller* majority did not say what analytical test lower courts should use when faced with Second Amendment challenges to gun regulations.<sup>71</sup> Most courts have since adopted a two-step inquiry,<sup>72</sup> asking whether a regulation implicates the Second Amendment and, if so, whether the regulation passes some level of means-end scrutiny.<sup>73</sup> But utilizing this approach has led courts to divergent results.<sup>74</sup> And Justice Kavanaugh has in the past endorsed the alternative THT framework as a judge on the D.C. Circuit Court of Appeals.<sup>75</sup> Now on the Supreme Court, he may advocate for THT once again.<sup>76</sup>

#### 1. Lingering Ambiguities

The *Heller* Court stated that an interest-balancing test would not be appropriate for Second Amendment cases,<sup>77</sup> but withheld clearer guidance on the proper test to use by determining the law at issue would be unconstitutional under *any* possible standard of scrutiny.<sup>78</sup> There are three basic tiers of scrutiny for analyzing constitutional law cases: Rational basis review, intermediate scrutiny, and strict scrutiny.<sup>79</sup>

69. *McDonald*, 561 U.S. at 750 (2010).

70. See *Kachalsky*, 701 F.3d at 88 (“[I]n many ways, [*Heller*] raises more questions than it answers.”).

71. See *infra* note 78 and accompanying text.

72. See Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433, 1507 (2018) (noting “[a] steadily increasing percentage of courts . . . have applied the two-part test or a levels-of-scrutiny analysis familiar to other areas of constitutional law.”).

73. See e.g. *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011); *Ezell v. City of Chicago*, 651 F.3d 684, 701–04 (7th Cir. 2011); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800–01 (10th Cir. 2010); *United States v. Marzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (adopting the two-step inquiry).

74. See discussion *infra* Part III.B.2.

75. *Heller*, 670 F.3d at 1271–73 (Kavanaugh, J. dissenting).

76. See discussion *infra* Part VI.B.

77. *District of Columbia v. Heller*, 544 U.S. 570, 635 (2008).

78. *Id.* at 573.

79. *Wrenn v. District of Columbia*, 864 F.3d 650, 656 (D.C. Cir. 2017) (“[R]ational basis review requires the challenged law to bear a rational link to a legitimate public interest. Intermediate scrutiny looks for a substantial link to an important interest. And strict scrutiny demands that a law be narrowly tailored to a compelling public interest.”).



It has been left to the lower courts to determine the way forward in analyzing Second Amendment challenges,<sup>80</sup> and most of these courts have coalesced around a two-step inquiry.<sup>81</sup>

## 2. Majority Approach: Two-Step Inquiry

When called upon to assess the constitutionality of various firearm regulations, most lower courts first look at the Second Amendment's scope and then, if applicable, determine what tier of scrutiny applies.<sup>82</sup> The first step in this test asks whether the “challenged law burdens conduct that falls within the scope of the Second Amendment right, as historically understood.”<sup>83</sup> To determine historical understanding, judges must analyze whether the right at issue “was understood to be within the scope of the [Second Amendment] at the time of ratification.”<sup>84</sup> When examining a state law, courts have indicated the “pertinent point in time” for analysis is 1868, the year of the Fourteenth Amendment's ratification.<sup>85</sup> If the contested law implicates conduct outside the Second Amendment's scope, the law is constitutional and the inquiry ends.<sup>86</sup>

Courts advance to step two when historical evidence “is inconclusive or suggests that the regulated activity is *not* categorically unprotected.”<sup>87</sup> For this step, courts determine the appropriate level of scrutiny to apply.<sup>88</sup> If the law at issue regulates conduct at the “core” of

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80. See Ruben & Blocher, *supra* note 72, at 1433 (providing an empirical analysis of post-*Heller* Second Amendment doctrine in the federal appellate and state courts); *Post-Heller Litigation Summary*, GIFFORDS L. CTR. (Aug. 25, 2020), <https://giffords.org/lawcenter/gun-laws/litigation/post-heller-litigation-summary/> (detailing the different Second Amendment issues that have arisen in over 1,400 lower court cases).

81. See Ruben & Blocher, *supra* note 72, at 1452 (“[S]cholars generally agree that some version of the two-part test predominates throughout the lower courts.”).

82. See *supra* Part III.B.

83. *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); see also *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012) (citing *Chester*, 628 F.3d 673, 680 (4th Cir. 2010)).

84. *Chester*, 628 F.3d at 680. See also *Gould v. Morgan*, 907 F.3d 659, 668–69 (1st Cir. 2018), *cert. denied*, 141 S.Ct. 108 (2020) (reiterating the message in *Chester*).

85. *Gould*, 907 F.3d at 669.

86. *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 195 (5th Cir. 2012).

87. *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011). Some courts also proceed by assuming the first prong has been met and thus only address step two. See, e.g., *Worman v. Healey*, 922 F.3d 26, 36 (1st Cir. 2019) (“[W]e simply assume, albeit without deciding, that the [law] burdens conduct that falls somewhere within the compass of the Second Amendment.”); *Mai v. United States*, 974 F.3d 1082, 1098–99 (9th Cir. 2020) (noting how the district court assumed the statute burdened the defendant's Second Amendment rights, without deciding the question).

88. See *Ezell*, 651 F.3d at 703. (“Borrowing from the Court's First Amendment doctrine, the rigor of this judicial review will depend on how close the law comes to the core of the Second Amendment right and the severity of the law's burden on the right.”).

the Second Amendment right, courts utilize “a correspondingly strict level of scrutiny,” whereas they use “a less demanding level of scrutiny” for laws regulating conduct at the “periphery” of the right.<sup>89</sup> As the D.C. Circuit has elaborated, at the core of the Second Amendment is “the [] right of self-defense.”<sup>90</sup> The First Circuit has more precisely defined the core of the Second Amendment as “the right of law-abiding, responsible citizens to use arms in defense of *hearth and home*,” meaning public carry for self-defense falls to the periphery.<sup>91</sup>

To pass “constitutional muster” under intermediate scrutiny, there must be a substantial relationship between the law at issue and “one or more important governmental interests.”<sup>92</sup> The government need not prove there was *no burden* whatsoever on the Second Amendment; the fit need not be perfect.<sup>93</sup> But there is a higher bar to satisfy strict scrutiny: The regulation at issue must be “narrowly tailored to advance a compelling government interest.”<sup>94</sup>

Application of intermediate scrutiny has predominated in post-*Heller* decisions nationwide, as lower courts have found many regulations do *not* strike at the Second Amendment’s core.<sup>95</sup> For example, the Fifth Circuit found that a law preventing gun sales to individuals under twenty-one did not strike at the core because the law “[did] not prevent [eighteen]-to-[twenty]-year-olds from possessing and using handguns in defense of hearth and home.”<sup>96</sup> The D.C. Circuit believes that intermediate scrutiny is the more appropriate standard for gun registration laws writ large.<sup>97</sup> And the Tenth Circuit has explained that intermediate scrutiny is preferable for Second Amendment cases because the right to carry firearms for self-defense “poses inherent risk to others,” distinguishing this right from other

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89. *Gould*, 907 F.3d at 671. *See, e.g., id.* at 670–71 (“The appropriate level of scrutiny must turn on how closely a particular law or policy approaches the core of the Second Amendment right and how heavily it burdens that right.”); *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (noting how “moving outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.”).

90. *Heller v. District of Columbia*, 670 F.3d 1244, 1257 (D.C. Cir. 2011).

91. *Gould*, 907 F.3d at 672 (emphasis added).

92. *Id.* at 673. *See also* *Woollard v. Gallagher*, 712 F.3d 865, 878 (4th Cir. 2013) (holding the government’s important interest should be “substantially served” by enforcing the law at issue).

93. *Woollard*, 712 F.3d at 878.

94. *United States v. Masciandaro*, 638 F.3d 458, 469 (4th Cir. 2010).

95. *Ruben & Blocher*, *supra* note 72, at 1496.

96. *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 206 (5th Cir. 2012) (internal quotation marks omitted).

97. *Heller v. District of Columbia*, 670 F.3d 1244, 1257 (D.C. Cir. 2011).

fundamental rights analyzed under strict scrutiny.<sup>98</sup>

### 3. “Text, History, and Tradition” Approach

In lieu of utilizing the standard tiers of scrutiny at step-two, other judges and legal scholars have proposed a different analytical approach. This alternative “text, history, and tradition” approach (“THT”) falls in line with the originalist and textualist approaches to constitutional law, grounding interpretation in history and text.<sup>99</sup> Under this approach, traditional firearms bans and regulations would be deemed “consistent with the Second Amendment individual right.”<sup>100</sup> Conversely, bans and regulations “[in]sufficiently rooted” in THT would not be consistent.<sup>101</sup>

Justice Kavanaugh, a newer addition to the Supreme Court, is a key proponent of the THT framework. As a D.C. Circuit judge, he argued that gun regulations ought to be “analyzed based on the Second Amendment’s text, history, and tradition.”<sup>102</sup> Though *Heller* and *McDonald* were silent on THT as an interpretative method, Justice Kavanaugh made the leap to argue these cases “leave little doubt” that courts ought to use the THT method.<sup>103</sup> For support, Justice Kavanaugh pointed to the back and forth between the *Heller* majority and Justice Breyer’s dissent, and how the majority concluded “the scope of the right was determined by historical justifications.”<sup>104</sup> An amicus brief, however, from Second Amendment legal scholars submitted in *Bruen* critiques THT.<sup>105</sup> Namely, the authors believe that THT can easily devolve into an “analogue test,” which could be “difficult for courts to apply, unpredictable to government actors and opaque to the people.”<sup>106</sup> The authors contrast this with a “sounder and more

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98. *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015).

99. *See Tyler v. Hillsdale Cnty. Sheriff’s Dep’t*, 837 F.3d 678, 702 (6th Cir. 2016) (Batchelder, J. concurring) (finding the two-step approach “fails to give adequate attention to the Second Amendment’s original public meaning.”).

100. *Heller v. District of Columbia*, 670 F.3d 1244, 1285 (D.C. Cir. 2011) (Kavanaugh, J. dissenting).

101. *Id.*

102. *Id.* at 1271.

103. *Id.*

104. *Id.* at 1276–77 (quoting *District of Columbia v. Heller*, 544 F.3d 570, 634–35) (internal quotation marks omitted).

105. *See Brief for Second Amendment Law Professors as Amicus Curiae Supporting Neither Party at 8*, *N.Y. St. Rifle & Pistol Ass’n, Inc. v. Bruen*, No. 20-843 (filed Jul. 20, 2021) [hereinafter *Law Professors’ Brief*] (arguing that “[b]ereft of any administrable way to decide cases based on history and tradition where they provide no clear precedent or analogs, courts will tend to stray into covert, ad hoc interest balancing.”).

106. *Id.*

transparent framework” using “means-end scrutiny.”<sup>107</sup>

### *C. Proper Cause Regimes in the Post-Heller World*

This section more closely examines how the doctrine laid out in Sections A and B has been applied by lower courts to public carry laws. The Supreme Court has never definitively taken a stance on any public carry law and has yet to address “whether the Second Amendment creates a right of self-defense outside the home.”<sup>108</sup> As a result, lower courts are divided on whether the right to public carry exists and, if so, how broad the right to public carry is, and whether it implicates the core of Second Amendment protections. Applying *Heller* and relying largely upon the two-step inquiry, the circuits have split on how proper cause laws fare constitutionally.

#### 1. Majority View: Proper Cause Laws Upheld

The First, Second, Third, Fourth, and Ninth Circuits have upheld laws similar to New York’s proper cause regime for public carry.<sup>109</sup> Both the Ninth and Third Circuits upheld proper cause requirements for public carry as constitutional at step one of the two-step inquiry. The Ninth Circuit focused on the consistent historical laws prohibiting concealed weapons “since at least 1541” in concluding that the Second Amendment does not include the right to publicly carry concealed firearms.<sup>110</sup> Similarly, the Third Circuit found that a proper cause law “qualifies as a longstanding, presumptively lawful regulation that regulates conduct falling outside the scope of the Second Amendment’s guarantee.”<sup>111</sup>

Alternatively, the First, Second, and Fourth Circuits approved of similar proper cause requirements by applying both steps of the two-step inquiry. These courts began by *assuming* the laws met step one of the inquiry because they burdened the Second Amendment, and then

107. *Id.*

108. *Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012).

109. *See, e.g., Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 101 (2d Cir. 2012) (upholding New York’s “proper cause” requirement when previously challenged); *Drake v. Filko*, 724 F.3d 426, 440 (3d Cir. 2013) (upholding New Jersey’s “justifiable need” requirement); *Woollard v. Gallagher*, 712 F.3d 865, 882 (4th Cir. 2013) (upholding Maryland’s “good and substantial reason” requirement); *Gould v. Morgan*, 907 F.3d 659, 669 (1st Cir. 2018), *cert. denied*, 141 S.Ct. 108 (2020). (upholding Massachusetts’ “proper purpose” pre-requisite); *Peruta v. Cty. of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (finding no Second Amendment right to carry concealed weapons), *cert denied*, 137 S.Ct. 1995.

110. *Peruta*, 824 F.3d at 939.

111. *Drake*, 724 F.3d at 434 (internal quotation marks omitted).

proceeded to analyze the laws under intermediate scrutiny in step two.<sup>112</sup> For example, the First Circuit noted that the “challenged regime bears a substantial relationship to important governmental interests in promoting public safety and crime prevention” which did not “offend[] Second Amendment rights.”<sup>113</sup> Similarly, the Fourth Circuit found a proper cause law “reasonably adapted to a substantial governmental interest,”<sup>114</sup> noting that the government’s concern with violent crimes involving the use of handguns was “substantial.”<sup>115</sup>

## 2. Minority View: Proper Cause Laws Struck Down

Of the circuit courts that have ruled on the issue of public carry regulations, only the D.C. and Seventh Circuits have actually struck down such laws. The D.C. Circuit rejected a law that “prohibit[ed] law-abiding citizens from carrying a handgun outside the home unless they showed a special need for self-defense” and affirmed the “right of responsible citizens to carry firearms for personal self-defense beyond the home.”<sup>116</sup> Similarly, the Seventh Circuit recognized that “the interest in self-protection is as great outside as inside the home.”<sup>117</sup>

## IV. ARGUMENTS

Petitioners advocate for the Court to adopt THT and rule that New York’s law violates the Second Amendment. Petitioners claim that the circuit courts which upheld similar proper cause laws did so by misconstruing the Second Amendment. Respondents contend that any disagreements between circuits are illusory, that all the courts agree the Second Amendment is not unlimited, and that reasonable regulations are allowed. Furthermore, Respondents contend history supports regional variation in firearm regulations.

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112. See *Woollard*, 712 F.3d at 880 (Finding that while “the *Heller* right exists outside the home” the law at issue was “a reasonable fit between the good-and-substantial-reason requirement and Maryland’s objectives of protecting public safety and preventing crime.”); *Gould*, 907 F.3d at 670, 673–77 (“In the absence of [Supreme Court] guidance, we decline to parse this distinction . . . and proceed on the assumption that the [restrictions] burden the Second Amendment right to carry a firearm for self-defense.”).

113. *Gould*, 907 F.3d at 662.

114. *Woollard*, 712 F.3d at 876 (quoting *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2010)).

115. *Id.*

116. *Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017).

117. *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012).

### A. *Petitioners' Arguments*

On the substantive question, Petitioners believe that lawful citizens ought to be able to carry firearms for self-defense beyond their homes.<sup>118</sup> Under their readings of *Heller* and *McDonald*, the Second Amendment guarantees “the individual right to keep arms” for self-defense both inside and outside the home.<sup>119</sup> Petitioners argue the Second Amendment does not allow state officials to either restrict the right of self-defense to a “chosen few” or to confine said right to the home,<sup>120</sup> implying that this is what has occurred in New York.

Petitioners believe the Court should resolve circuit differences by finding that the Second Amendment protects a right to carry a handgun outside the home.<sup>121</sup> Petitioners assert that the New York law is “materially indistinguishable” from the laws that were at issue in *Wrenn v. District of Columbia*, *Young v. Hawaii*, and *Peruta v. County of San Diego*.<sup>122</sup> In each of those cases, the Petitioners point out, the respective court found the Second Amendment right to apply outside the home for self-defense purposes.<sup>123</sup> By contrast, Petitioners highlight how the other circuit courts wrongly upheld proper cause laws when they “refused to recognize the Second Amendment’s applicability outside the home or refused to give it any meaningful force.”<sup>124</sup>

Petitioners also take a “[t]ext, history, and tradition” approach to argue New York’s law violates the Second Amendment.<sup>125</sup> Regarding text, Petitioners point to how the term “bear” appears to mean carrying outside the home and thus to restrict the “bearing of arms” to homes “would be nonsensical.”<sup>126</sup> Petitioners also argue self-defense is the core of the right to keep and bear arms<sup>127</sup> and that the need for self-defense arises outside the home.<sup>128</sup> And they further point to the Second Amendment’s mention of “the Militia” as evidence of the text’s intent to encompass the right to bear arms outside the home.<sup>129</sup>

118. Petition for Writ of Certiorari, *supra* note 7, at 11.

119. *Id.* at 9.

120. *Id.*

121. *Id.*

122. *Id.* at 10.

123. *Id.* at 11.

124. *Id.* at 12.

125. *Id.* at 15.

126. *Id.* at 16–17.

127. *Id.* at 13 (concluding that “the core lawful purpose” of the right is self-defense both inside and outside the home).

128. *Id.* 11.

129. *Id.* at 18 (“Militia service, of course, necessarily includes bearing arms outside the

Turning to history, Petitioners argue the Second Amendment right traditionally extended to public spaces.<sup>130</sup> In colonial America, many Founding Fathers carried publicly and spoke in favor of the right thereof.<sup>131</sup> Early state court cases upheld the right outside the home.<sup>132</sup> Petitioners reject the Respondents' historical account, particularly that of the Statute of Northampton,<sup>133</sup> which was a medieval English gun regulation that has been influential in the United States gun debate.<sup>134</sup> They note that while the statute prohibited most people from causing "force in affray of peace," the statute did not make the mere act of carrying a firearm a crime.<sup>135</sup>

Refocusing on modern times, Petitioners cite *Heller* and its reasoning in support of establishing a right to carry outside the home. Though *Heller* was specifically about the need for self-defense *in the home*, Petitioners contend its central issue was the general individual right to self-defense.<sup>136</sup> Indeed, they argue, portions of *Heller* would not make sense if the Second Amendment right were restricted by location.<sup>137</sup>

Consequently, Petitioners claim that circuits that upheld laws restricting public carry misconstrued the foundation of the Second Amendment; that these circuits mistakenly cited the core of the Second Amendment as the right to defense of the home, when the core is indeed self-defense *everywhere*.<sup>138</sup> Whereas the circuits striking down

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home.").

130. *Id.* at 19.

131. *Id.* at 19.

132. *See Id.* at 20–22 (detailing the tradition of upholding the right to bear arms outside the home across various state courts). *See also* *Nunn v. State*, 1 Ga. 243, 251 (1846) (finding a statute "valid inasmuch as it does not deprive the citizen of his *natural* right of self-defen[s]e, or of his constitutional right to keep and bear arms . . . [a statute that] contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void*." (emphasis in original); *State v. Chandler*, 5 La. Ann. 489, 490 (1850) (noting that public carry "is [a] right guaranteed by the Constitution of the United States.").

133. Reply Brief for Petitioners at 7, *N.Y. St. Rifle & Pistol Ass'n, Inc. v. Bruen* (filed Mar. 10, 2021) (No. 20-843).

134. *See* Bernd Debusmann, Jr., *How a Medieval English Law Affects the US Gun Control Debate*, BBC NEWS (Nov. 4, 2021), <https://www.bbc.com/news/world-us-canada-59158248>.

135. Reply Brief for Petitioners, *supra* note 133, at 7.

136. Petition for Writ of Certiorari, *supra* note 7, at 24 ("The central issue in *Heller* persists here: the individual and fundamental right of self-defense.").

137. *See Id.* at 25 ("[S]everal portions of *Heller* make sense only upon the understanding that the right to keep and bear arms is not home-bound . . . [t]hat caveat about places beyond the home makes sense only if the Second Amendment applies beyond the home.").

138. *See id.* at 13 (noting that each of the First, Second, Third, and Fourth Circuits focused on "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." (citing *Gould v. Morgan*, 907 F.3d 659, 672 (1st Cir. 2018), *cert. denied*, 141 S.Ct. 108 (2020))).

restrictive public carry regimes stayed true to *Heller* and *McDonald*.<sup>139</sup> Petitioners believe the New York law “is indistinguishable from the [District of Columbia] regime” that was struck down in *Wrenn v. District of Columbia*.<sup>140</sup> The “constitutional defect[s]” of both are identical because “law-abiding citizens” cannot obtain a handgun for self-defense under either one.<sup>141</sup>

### *B. Respondents’ Arguments*

Respondents’ principal argument centers on their claim that the perceived circuit disagreements are “illusory.”<sup>142</sup> They contend that the lower courts that have ruled on similar laws have all acknowledged “that the right to carry firearms in public is not unlimited and can be subject to regulatory measures consistent with longstanding limitations on that right.”<sup>143</sup> Respondents further note that the First, Second, Third, and Fourth Circuits approved of licensing schemes similar to the one in *Bruen* in that they limited grants of licenses to individuals “who can demonstrate good or proper cause.”<sup>144</sup> In doing so, Respondents argue, these circuit courts followed *Heller*’s guidance that the Second Amendment “is not unlimited and that regulatory measures that are part of a longstanding tradition are presumptively lawful.”<sup>145</sup> Furthermore, Respondents highlight that these courts all “looked to the centuries-long history” of public carry regulations “to conclude that [proper] cause licensing schemes are consistent with the historical scope of the Second Amendment.”<sup>146</sup>

Respondents question the Petitioners’ readings of the Seventh and D.C. Circuits’ decisions on this matter as well. Respondents highlight how the Seventh Circuit distinguished the law it struck down from New York’s “measured licensing scheme [that] . . . [found] a proper balance” between self-defense interests and public safety.<sup>147</sup> Similarly,

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139. *Id.* at 10–11 (referencing *Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017); *Young v. Hawaii*, 896 F.3d 1044, 1048 (9th Cir. 2018); *Peruta v. Cty. of San Diego*, 742 F.3d 1144, 1148 (9th Cir. 2014), *cert denied*, 137 S.Ct. 1995).

140. Reply Brief for Petitioners, *supra* note 133, at 3–4.

141. *Id.* at 4.

142. Respondents’ Brief in Opposition at 8, *N.Y. St. Rifle & Pistol Ass’n, Inc. v. Bruen* (filed Feb. 22, 2021) (No. 20-843).

143. *Id.*

144. *Id.* at 9.

145. *Id.* at 10 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 595, 626–27, n.26 (2008)) (internal quotation marks omitted).

146. *Id.*

147. *Id.* at 11–12 (quoting *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012)).



Respondents emphasize that the D.C. Circuit’s case “involved a regulatory scheme that was far more restrictive than New York’s.”<sup>148</sup>

Respondents answer the Petitioners’ recantation of history with a telling of their own. They note how public carry laws trace back to colonial America, with conceptual origins in Fourteenth Century England.<sup>149</sup> Additionally, they note the history of regional variation of such laws. Respondents argue this historical variation supports their position because it shows that state and local authorities have traditionally executed laws adapted to unique local circumstances.<sup>150</sup>

Lastly, Respondents underscore how the New York law advances the state’s “compelling interests in public safety and crime prevention.”<sup>151</sup> They note empirical evidence and studies showing how imposing controls of public carry can reduce gun-related homicides and violence.<sup>152</sup> According to Respondents, the legislature is best equipped for policy judgments on complex empirical questions.<sup>153</sup> And the New York law at issue, Respondents note, “restricts no more conduct than is necessary to advance its public safety objectives.”<sup>154</sup>

Overall, Petitioners utilize THT to conclude that New York’s proper cause law violates the Second Amendment. Respondents, on the other hand, focus on how consistent the circuit courts have been in upholding proper cause laws, and that New York’s law is less stringent than laws struck down by some circuits.

## V. ORAL ARGUMENTS

Oral arguments for *Bruen*, held on November 3, 2021, seemed to indicate that the Court will strike down the New York law. Yet, the breadth of the Court’s ruling remains unclear. Some of the conservative justices appeared ready to engage in a fundamental discussion of THT (the “Conservative Group”).<sup>155</sup> The liberal justices, however, wanted to

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148. *Id.* at 13.

149. *Id.* at 20 (“Such laws include the Statute of Northampton in 1328, the English Bill of Rights in 1689 and multiple colonial laws in America.”).

150. *Id.* at 24–25.

151. *Id.* at 26.

152. *Id.* at 28 (noting “lower rates of gun-related homicides and other violent crimes, including shootings of law enforcement officers.”).

153. *Id.* at 30.

154. *Id.* at 30.

155. This Group included Justices Thomas, Gorsuch, and Alito. Justice Thomas asked about an analysis based on “history, tradition, [and] the text of the Second Amendment.” Transcript of Oral Argument at 6, 8, *N.Y. St. Rifle & Pistol Ass’n, Inc. v. Bruen*, (2021) (No. 20-843) [hereinafter Transcript of Oral Argument]. Justice Kavanaugh recounted the “text, history, and

narrow the Court's focus to just the New York law (the "Liberal Group").<sup>156</sup>

History was a major theme for the Conservative Group. For instance, Justice Thomas focused in on whether proper Second Amendment analysis traces history to the founding or the adoption of the Fourteenth Amendment.<sup>157</sup> Justice Kavanaugh affirmed the need to look to "historical practice," though noting that "the baseline is always the right established in the text."<sup>158</sup> Justice Alito challenged the notion that later judicial decisions and statutes could "substitute for evidence about what the right was understood to mean in 1791 or 1868. . . ."<sup>159</sup> Justice Alito also highlighted the racialized history of the New York law noting it was passed with "the belief that certain disfavored groups, members of labor unions, [B]lacks, and Italians were carrying guns . . . and they wanted them disarmed."<sup>160</sup> Inquiring about the Statute of Northampton,<sup>161</sup> Justice Gorsuch fell in line with this questioning as well.<sup>162</sup>

By contrast, the Liberal Group questioned the utility of the history-heavy approach and challenged the Petitioners' reading of history. Justice Breyer pointed out that historical testimonies in the briefs were in conflict.<sup>163</sup> Justice Kagan underscored the uncertainties of historical analysis, noting that if one were to "look to the history, [one] end[s] up with a completely different set of rules" regarding concealed weapons.<sup>164</sup> Justice Sotomayor highlighted how history supports both deference to the states on their gun regulations, as well as different requirements for concealed arms outside the home.<sup>165</sup>

Building off the Petitioners' oral argument, some justices from the Conservative Group sought to contrast the Second Amendment with

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tradition" approach in his questioning too. *Id.* at 52.

156. This Group included Justices Kagan, Sotomayor, and Breyer.

157. Transcript of Oral Argument, *supra* note 155, at 6, 8.

158. *Id.* at 52.

159. *Id.* at 106.

160. *Id.* at 103.

161. Under this statute, no man other than the King's servants and ministers could "with force and arms" come before the King or cause a "force in affray of the peace." 2 Edw. 3, ch.3 (Eng. 1328). Both Petitioners and Respondents raised the Statute of Northampton in their arguments. Reply Brief for Petitioners, *supra* note 133, at 7; Respondents' Brief, *supra* note 142, at 20.

162. Transcript of Oral Argument, *supra* note 155, at 48.

163. *Id.* at 11.

164. *Id.* at 40–41.

165. *Id.* at 18–19.

other constitutional rights.<sup>166</sup> Seeming to assert that no other constitutional right is being chipped away at like the Second Amendment is, Justice Alito theorized whether the Court would be receptive to like arguments about First Amendment interpretation.<sup>167</sup> Some justices from the Liberal Group reacted to this line of questioning: For instance, Justice Kagan asked Respondents' counsel, "what justification is there for allowing greater flexibility [with the Second Amendment]?"<sup>168</sup> Justice Sotomayor attempted to distinguish the Second Amendment, asking, perhaps rhetorically, whether "we have any other constitutional right whose exercise in history has been as varied as gun possession and use?"<sup>169</sup> Respondents' counsel agreed with Justice Sotomayor on this point.<sup>170</sup>

During Petitioners' oral argument, justices from both Groups wanted to focus on an alternative "sensitive places" gun regulation,<sup>171</sup> despite the reticence of Petitioners' counsel to litigate this point.<sup>172</sup> Justice Kagan asked for the thoughts of Petitioners' counsel on allowing guns on the New York City Subway, or on the campuses of Columbia University or New York University.<sup>173</sup> Justice Barrett similarly inquired about restrictions placed on a crowded Times Square on New Year's Eve.<sup>174</sup>

There was also cross-Group interest in the discretion provided to officials by the New York law. Indeed, Justice Kavanaugh asked whether the main problem was this discretion.<sup>175</sup> Justice Sotomayor asked why the proper cause discretion was "any different" than the discretion local officials had to deny licenses to, for example, people with mental illnesses.<sup>176</sup> Petitioners' counsel brought up the "real-world costs" of this discretion in rebuttal: Citing an amicus brief submitted by

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166. *See id.* at 96 (As Justice Roberts pointed out, "the idea that you need a license to exercise [a] right . . . is unusual in the context of the Bill of Rights.").

167. *Id.* at 104–05.

168. *Id.* at 75.

169. *Id.* at 76–77.

170. *See id.* at 77 (acknowledging there is a "strong history [] of a range of responses from state-to-state that is based on local conditions and local concerns.").

171. *See* *District of Columbia v. Heller*, 544 U.S. 626, n.26 (finding "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" to be "presumptively lawful.").

172. *See* Transcript of Oral Argument, *supra* note 155, at 26 (distinguishing sensitive place restrictions as "really [] a different animal than carry restriction[s].").

173. *Id.* at 27–29.

174. *Id.* at 31.

175. *Id.* at 50.

176. *Id.* at 22.

public defenders, he mentioned that this discretion has led to people being charged with violent offenses, despite not having a prior record, and impacted police activity, possibly increasing ‘stop and frisk.’<sup>177</sup>

## VI. ANALYSIS

It seems very likely the Supreme Court will strike down the New York law, but a key variable bearing on the outcome is what kind of analysis the Court will use in doing so. Given its current composition, this Court will likely utilize THT. Unfortunately, striking down the New York law and adopting this new interpretive approach would be flawed, and would potentially create a sea of negative change for proper cause regimes, may issue jurisdictions, and gun laws overall.

### A. Utilizing the Two-Part Inquiry Versus “Text, History, and Tradition”

Although *Heller* explicitly named regulations like felon-in-possession laws as presumptively lawful prohibitions, it stopped short of deciding the legal status of public carry prohibitions.<sup>178</sup> The Court thus cannot read *Heller* as dispositive in *Bruen*, and will have to proceed with some other method of analysis. In this way, *Bruen* offers the Court an opportunity to fill in doctrinal gaps that *Heller* left behind.<sup>179</sup> The Court could affirm the approach taken by most post-*Heller* lower courts by adopting the two-part inquiry.<sup>180</sup> Alternatively, the Court could reject this system and adopt the notably less popular THT.<sup>181</sup>

Assuming adoption of the two-part inquiry, the Court would first need to determine whether the New York law burdens the Second Amendment.<sup>182</sup> Looking to historical evidence for guidance,<sup>183</sup> there is some indication that the right to public carry falls within the Amendment’s scope. As written, the Second Amendment recognizes the need for the right to bear arms in light of the need for a well-

177. *Id.* at 121–22.

178. *District of Columbia v. Heller*, 544 U.S. 570, 626–28 (2008).

179. *Id.*

180. *See* discussion *supra* Part III.B.

181. “Text, history, and tradition” is not a foregone conclusion, though, as the Respondents underscored during their oral argument. *See* discussion *supra* Part III.B, Part V.

182. *See United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (explaining the first question).

183. *See Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011) (noting the question of scope involves looking at how the right was understood at the “relevant historical moment.”).

regulated militia, implying the need to carry arms *beyond* the home.<sup>184</sup> Petitioners also highlight how the right to possess a firearm traditionally extended beyond the home, a position that was endorsed by both colonial-era leaders and early state courts.<sup>185</sup> But Respondents' understanding of history underscores that public carry restrictions trace back to colonial times as well.<sup>186</sup> Regardless of colonial understandings, however, the law at issue is a state law, so the reference point for the historical analysis should be 1868, when the Fourteenth Amendment was ratified.<sup>187</sup> Both colonial history as well as pre-1868 caselaw are thus of little analytical importance here. The post-1868 history presented does not show that public carry is categorically protected. But because it also fails to show that public carry has been categorically *unprotected*, the Court would need to proceed to step two of the inquiry.<sup>188</sup>

For step two, the Court would have to determine the appropriate level of scrutiny, looking at whether the right falls at the core or periphery of Second Amendment protections.<sup>189</sup> The New York law burdens the right to carry outside the home for self-defense. Second Amendment jurisprudence shows that at the “zenith” of the Amendment is the right to keep a gun *in the home* for self-defense.<sup>190</sup> Petitioners' argument that self-defense is not location dependent is incorrect<sup>191</sup> The core of the Second Amendment is the right to keep a gun at home, rendering the right to bear arms outside the home for self-defense a peripheral one.<sup>192</sup> Similar to the law upheld by the Sixth Circuit that prevented firearm sales to those under twenty-one,<sup>193</sup> New York's law does not strike the Second Amendment's core because it does not impede individuals from defending their homes. Thus, intermediate scrutiny would be the proper standard to apply in *Bruen*.

To apply intermediate scrutiny, the Court would need to identify an

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184. U.S. CONST. amend. II.

185. Petition for Writ of Certiorari, *supra* note 7, at 19.

186. Respondents' Brief in Opposition, *supra* note 142, at 20.

187. See *Ezell*, 651 F.3d at 706 (examining the question of scope by looking to how “the Second Amendment was understood when incorporated as a limitation on the States.”).

188. *Id.* at 703.

189. *Gould v. Morgan*, 907 F.3d 659, 670–71 (1st Cir. 2018), *cert. denied*, 141 S.Ct. 108 (2020)..

190. *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012).

191. Petition for Writ of Certiorari, *supra* note 7, at 13.

192. See *Gould v. Morgan*, 907 F.3d 659, 672 (1st Cir. 2018) (noting the core of the Second Amendment is the right to use arms in defense of one's home).

193. See *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 206 (5th Cir. 2012) (upholding the law because it did not prevent individuals from defending their homes).

important government interest and find a substantial fit between such interest and the New York law.<sup>194</sup> Other courts have consistently found a legitimate government interest in preventing crime and violence,<sup>195</sup> and it is doubtful that the Court would challenge this point. More analysis would likely go into determining how reasonable of a fit the New York law is. As Respondents point out, other lower courts have remarked that the New York law, which does not operate as an outright ban, is “measured” and “stri[k]e[s] a proper balance.”<sup>196</sup> If properly applying the two-step inquiry, it is likely that the Court would find a substantial fit between the compelling interest of public safety and the New York law.

Interestingly, while under the two-step inquiry public carry laws are not categorically prohibited, they may not fare well under the alternative THT approach. But the Court will likely toss the two-part analysis to the wayside and proceed with the flawed THT framework anyway.<sup>197</sup> Petitioners map out how the Court could, *and likely would*, proceed.<sup>198</sup>

Beginning with the Second Amendment itself and its reference to a “[m]ilitia,” a “text, history, and tradition” analysis would likely lead to the conclusion that self-defense, core to the Amendment, is largely needed outside the home. The Court could lean more heavily on early American history to confirm a “*natural* right to self-defen[s]e,”<sup>199</sup> since this analysis does not restrict judges to certain eras of history as the two-part inquiry does. With the ability to be more expansive in how much history it may consider, the Court can more easily strike down the New York law. The justices could find that public carry has long been a part of American culture and is at the core of the Second Amendment. From there, they would find this right cannot be infringed by a law that restricts who may exercise it.

194. *Ezell v. City of Chicago*, 651 F.3d 684, 707 (7th Cir. 2011).

195. *See, e.g., Gould v. Morgan*, 907 F.3d 659, 673 (1st Cir. 2018), *cert. denied*, 141 S.Ct. 108 (2020) (“[F]ew interests are more central to a state government than protecting the safety and well-being of its citizens.”); *United States v. Morrison*, 529 U.S. 598, 618 (2000) (“[W]e can think of no better example of the police power . . . than the suppression of violent crime.”).

196. Respondents’ Brief in Opposition, *supra* note 142, at 11–13 (noting how the D.C. Circuit dealt with a more restrictive ban in *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017)).

197. *See* Law Professors’ Brief, *supra* note 105, at 7 (highlighting limitations on the “text, history, and tradition” test, particularly where there is no clear precedent, and concluding that “courts required to decide cases based solely on history and tradition would tend to either shroud their policy preferences in selective historiography or resort to abstruse analogies.”).

198. *See* discussion *supra* notes 137–48 and accompanying text.

199. *Nunn v. State*, 1 Ga. 243, 251 (1846).

### *B. Understanding the Composition of the Roberts Court*

Of the current Supreme Court justices, four were present for *Heller*. Three (Justices Roberts, Alito, and Thomas) joined Justice Scalia's majority opinion while one (Justice Breyer) dissented. Justice Breyer's *Heller* dissent showcased a consequentialist approach by focusing heavily on the policy implications and real-world impact of the Court's decision.<sup>200</sup> This dissent indicates he may pay similar attention to policy implications in *Bruen*. Five current justices were present for the subsequent *McDonald* decision, with the same majority group as *Heller*. In *McDonald*, Justice Alito wrote the controlling opinion, taking issue with what he saw as the government's disregard for the Second Amendment.<sup>201</sup> Justice Thomas wrote a concurrence,<sup>202</sup> while Justice Breyer wrote another dissent which Justice Sotomayor joined.<sup>203</sup>

In his *McDonald* concurrence, Justice Thomas made his opinion on the Second Amendment clear, and he has wanted the Court to take up another case ever since.<sup>204</sup> Justice Thomas focused on the racialized history of gun regulations as support for extending bolstered gun rights.<sup>205</sup> It would not be surprising if Justice Thomas wrote an opinion in *Bruen* in which he cites the brief from the public defenders for the contention that the New York law has a racially disparate impact.<sup>206</sup>

The newest members of the Supreme Court have made their views known both through their prior decisions and their confirmation processes. As a judge on the D.C. Circuit, Justice Kavanaugh called for courts to adopt THT for Second Amendment cases.<sup>207</sup> Justice Barrett,

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200. See generally *District of Columbia v. Heller*, 544 U.S. 570, 659, 681–723 (2008) (Breyer, J. dissenting).

201. See *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (“Respondents, in effect, ask us to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause.”).

202. *Id.* at 742.

203. *Id.*

204. See *Peruta v. California*, *cert. denied*, 137 S.Ct. 1995, 1999 (2017) (Thomas, J. dissenting) (“The Court’s decision to deny certiorari in this case reflects a distressing trend: the treatment of the Second Amendment as a disfavored right.”).

205. See *McDonald*, 561 U.S. at 843–45, 857 (Thomas, J. concurring in part and judgment) (noting that pre-Civil War state legislatures prohibited slaves and freedmen alike from carrying firearms and how, post-War, “[t]he use of firearms for self-defense was often the only way black citizens could protect themselves from mob violence.”).

206. Brief of the Black Attorneys of Legal Aid, The Bronx Defenders, Brooklyn Defender Services, et al. as Amici Curiae Supporting Petitioners at 5–6, *N.Y. St. Rifle & Pistol Ass’n, Inc. v. Bruen*, No. 20-843 (filed Jul. 20, 2021) [hereinafter Public Defenders’ Brief].

207. *Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J. dissenting).

as a Seventh Circuit judge, showed disdain for broad-based regulations when she wrote in dissent in *Kanter v. Barr* that the “dispossession of all felons,” rather than just violent ones, of the right to own a gun is unconstitutional.<sup>208</sup> She argued that felon dispossession went to the “core” of the Second Amendment and thus required heightened scrutiny,<sup>209</sup> despite the Supreme Court recognizing felon dispossession as a longstanding and presumptively lawful prohibition.<sup>210</sup> Indeed, Justice Barrett said during her Supreme Court confirmation process that *Kanter* was the most significant case over which she sat.<sup>211</sup> She further noted that her dissent in the case reflects her judicial philosophy and is an example of how she understands the Second Amendment’s “original meaning.”<sup>212</sup>

A majority of the Court thus appears ready to rule in favor of the Petitioners. The only question that remains unclear is how narrow or broad that ruling will be, and the Court could do away with the two-part inquiry used by lower courts altogether. There readily appears a group of justices that would dissent in a ruling favoring the Petitioners, arguing that the law be upheld. Furthermore, it seems these dissenting justices would oppose an adoption of THT; it is not entirely clear, though, whether they would endorse the two-part inquiry.

### C. Policy Implications

Policy implications will provide little sway for the majority of the Court, but will likely be a motivator for Justice Breyer, given his previous, decidedly consequentialist, dissents.<sup>213</sup> A variety of amici in support of Respondents have raised concerns over the possible result of increased targeted harm based on race or gender.<sup>214</sup> By contrast, the

208. *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J. dissenting).

209. *Id.* at 465 (Barrett, J. dissenting).

210. *District of Columbia v. Heller*, 544 U.S. 570, 628, n. 26 (2008).

211. STAFF OF S. COMM. ON THE JUDICIARY, 116TH CONG., QUESTIONNAIRE FOR NOMINEE TO THE SUPREME COURT 30 (Comm. Print 2021).

212. C-SPAN, *Barrett Confirmation Hearing, Day 2 Part 1* (Oct. 13, 2021), <https://www.c-span.org/video/?476316-1/barrett-confirmation-hearing-day-2-part-1&event=476316&playEvent>.

213. *See generally Heller*, 544 U.S. at 681–723 (2008) (Breyer, J. dissenting) (focusing the thrust of this dissent on the policy implications that would stem from the majority opinion).

214. Brief of Lambda Legal Defense and Education Fund, Inc., et al. as Amici Curiae Supporting Respondents, *N.Y. St. Rifle & Pistol Ass’n, Inc. v. Bruen*, No. 20-843 (filed Sept. 21, 2021); Brief of NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae Supporting Respondents, *N.Y. St. Rifle & Pistol Ass’n, Inc. v. Bruen*, No. 20-843 (filed Sept. 21, 2021); Brief of National Coalition Against Domestic Violence as Amicus Curiae Supporting Respondents, *N.Y. St. Rifle & Pistol Ass’n, Inc. v. Bruen*, No. 20-843 (filed Sept. 21, 2021).



public defenders underscore the adverse and racialized impact of the New York law as it currently stands, and that it disproportionately criminalizes people of color.<sup>215</sup> Other briefs for the Petitioners echo this sentiment and argue that gun regulations like New York’s have disparate impacts on communities of color.<sup>216</sup>

New York’s “proper cause” licensing regime is not the only regulation at risk in this case. Depending on how the Supreme Court rules, its decision could impact the other “proper cause” regimes,<sup>217</sup> and as Petitioners’ Counsel recognized during his clients’ oral argument, licensing regimes more broadly.<sup>218</sup> It is plausible that a broad ruling could “constitutionally mandate[] a ‘shall issue’ regime for public carrying licenses,”<sup>219</sup> that would affect over a quarter of the country’s population.<sup>220</sup> Furthermore, if the Court uses this opportunity to adopt THT, the result could be an overhaul of lower court precedent. Licensing requirements for public carry are crucial to gun regulations in the United States.<sup>221</sup> As courts have noted, states with more stringent public carry restrictions can reduce gun-related homicide and crime.<sup>222</sup> Striking down the New York law could therefore have an adverse effect on public safety in vast swaths of the country.

#### *D. The New York Law Should be Upheld*

It would be incorrect for the Court to strike down the New York law as unconstitutional. The right decision, on the other hand, could be made using either the two-step inquiry or a “text, history, and tradition” analysis. Under the former, the Court could find concealed carry

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215. See Public Defenders’ Brief, *supra* note 206, at 12–14 (noting how the city “aggressively sends its police. . . [to] take firearms away from minority men and deter them from carrying” and underscoring the racial disparities in the “penal consequences” that result).

216. Darrell A.H. Miller, *Conservatives Sound Like Anti-racists – When the Cause is Gun Rights*, WASH. POST (Oct. 27, 2021), <https://www.washingtonpost.com/outlook/2021/10/27/gun-rights-anti-racism-bruen-conservative-hypocrisy/>.

217. See *supra* note 26 and accompanying text.

218. See Joseph Blocher, *Good Cause Requirements for Carrying Guns in Public*, 127 HARV. L. REV. 218, 219 (2014) (“[T]heir challenges could effectively compel states to issue public carrying licenses to anyone who is . . . excluded from the scope of Second Amendment coverage.”).

219. *Id.*

220. See Concealed Carry Laws, *supra* note 23. Calculated from the total population of current “may issue” states. See *supra* note 23 and accompanying text. See also U.S. Census Bureau, *Annual Estimates of Resident Population for the Nation and States*, <https://www.census.gov/programs-surveys/popest/technical-documentation/research/evaluation-estimates/2020-evaluation-estimates/2010s-state-total.html> (last visited Jan. 11, 2022).

221. Blocher, *supra* note 218, at 219. See also Concealed Carry Laws, *supra* note 23.

222. *Gould v. Morgan*, 907 F.3d 659, 675 (1st Cir. 2018), *cert. denied*, 141 S.Ct. 108 (2020).

outside the scope of the Second Amendment, as the Third and Ninth Circuits did.<sup>223</sup> Alternatively, the Court could either determine that the right to concealed carry falls within the scope, or could just assume it does like the First, Second, and Fourth Circuits did.<sup>224</sup> If the Court proceeds to the second step, intermediate scrutiny would be appropriate. The core of the Second Amendment right, as declared in *Heller*, is the right to self-defense in the home.<sup>225</sup> Thus, carrying outside the home falls to the periphery of the right. Under intermediate scrutiny,<sup>226</sup> the Court could find a substantial fit between the government's objective here and the means chosen. Here, a law restricting guns outside the home to those most in need of such instruments is a *reasonable* fit to New York's objectives to protect public safety and minimize risk of crime. Unlike other states' total bans, the New York law allows for a subset of the population to access a weapon outside the home if they can demonstrate a serious need. This regime thus does not infringe on the Amendment's core right to self-defense in the home.

Applying the THT framework, the law should also still remain. There have long been restrictions on concealed carry.<sup>227</sup> Indeed, New York has a long history of concealed carry restrictions that laid the foundations for the current law.<sup>228</sup> Nevertheless, choosing THT would be wrong because the approach itself is flawed. History cannot be clearly discerned; there has long been regional variation in gun laws, public carry in particular. Furthermore, THT relies on analogical reasoning which, in light of technological advances in firearms that the founders could not have predicted, is reaching its logical limit in the gun context.<sup>229</sup> Lastly, adopting this approach has the potential to massively disrupt Second Amendment doctrine. The majority of the circuit courts have already adopted the two-step inquiry,<sup>230</sup> an inquiry

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223. See *supra* notes 121–22 and accompanying text.

224. See *supra* Part III.C.1.

225. See discussion *supra* Part III.A.

226. See *supra* notes 101–03 and accompanying text.

227. See *Peruta v. Cty. of San Diego*, 824 F.3d 919, 929–33 (9th Cir. 2016) (recounting the history of public carry laws in the United States), *cert denied*, 137 S.Ct. 1995.

228. See *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 92 (2d Cir. 2012) (“The proper cause requirement has existed in New York since 1913. . .”); see also *id.* at 97 (noting how New York enacted the Sullivan Law in 1911 in recognition of “the dangers inherent in the carrying of handguns in public.”).

229. See generally Law Professors’ Brief, *supra* note 105 (advocating for the two-part inquiry given the shortcomings of the other analytical framework).

230. See discussion *supra* Part III.B.2.

in line with other constitutional legal doctrine.<sup>231</sup> Adopting THT could threaten not only proper cause regimes, but other laws providing for registration requirements, thus leading to the proliferation of guns. The Court should not readily endorse a mode of analysis that has a rocky foundation and that could lead to calamitous outcomes.

#### CONCLUSION

After over a decade of letting lower courts interpret *Heller* and develop their own Second Amendment jurisprudence, the Supreme Court is stepping back into the fray. In deciding *Bruen*, the Court will at the very least decide whether “proper cause” regimes like the New York law can be constitutional. The Court should uphold the New York law, because it is grounded in history, tailored to a substantial and compelling government interest in public safety, and avoids adverse policy implications.

Alternatively, should the Court find the law unconstitutional, as it is likely to do, it should not go as far as to threaten all “may issue” jurisdictions. If the Court will choose to dictate *how* lower courts should be analyzing Second Amendment challenges, it will likely adopt the “text, history, and tradition” approach which could throw lower court precedent into question. The Court should refrain from so altering the jurisprudence. The two-part inquiry is in line with other constitutional rights analyses. To discard it would put Second Amendment doctrine out of step with that of other constitutional rights and send shockwaves through both lower courts and state legislatures. While it seems predictable that the Court in *Bruen* will strike down the New York law and may adopt the THT framework, it would be a mistake to do so.

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231. See *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (“[A]s has been the experience under the First Amendment, we might expect that courts will employ different types of scrutiny in assessing burdens on Second Amendment rights, depending on the character of the Second Amendment question presented.”).