

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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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
Official Reporters
1220 L Street, N.W., Suite 206
Washington, D.C. 20005
(202) 628-4888
www.hrccourtreporters.com

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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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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.

25 So, you know, the -- the -- the need

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

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

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

24 JUSTICE BREYER: Well, I have two --
25 two questions. One -- one is on history. I

1 mean, it's law office history. In McDonald, we
2 had professors of history ran departments in the
3 English Civil War and they all said the history
4 in Heller was wrong.

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

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

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

1 including to one of your clients, they give a
2 license to carry a concealed weapon? So there
3 are concealed weapon licenses all over the
4 place.

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

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

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

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

1 trials, but you had before you two individuals
2 who were clearly denied the right to confront
3 the witnesses against them, you wouldn't worry
4 about the other 95 percent --

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

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

7 JUSTICE KAGAN: -- Mr. Clement --

8 MR. CLEMENT: -- 90 percent.

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

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

1 MR. CLEMENT: Well, Justice Kagan, two
2 points.

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

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

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

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

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

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

15 JUSTICE BREYER: So 40,000 --

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

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

25 MR. CLEMENT: Well, certainly, New

1 York is entitled to have laws that say that you
2 can't have weapons in sensitive places, in
3 addition to whatever regulation --

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

6 MR. CLEMENT: -- for carrying that.

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

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

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

23 JUSTICE BREYER: Yeah. Well, the
24 difference, of course, you have a concealed
25 weapon to go hunting. You're out with an intent

1 to shoot, say, a deer or a rabbit, which has its
2 problems. But, here, when you have a
3 self-defense just for whatever you want to carry
4 a concealed weapon, you go shooting it around
5 and somebody gets killed.

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

14 JUSTICE SOTOMAYOR: Mr. Clement --

15 MR. CLEMENT: -- have ever done.

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

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

1 now, those 43 states that you're talking about,
2 most of them didn't give unrestricted rights to
3 carry in one form or another until recent times.

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

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

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

25 It seems to me that if we're looking

1 at that history and tradition with respect to
2 concealed arms that there is not the same
3 requirement that there is in the home.

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

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

14 MR. CLEMENT: Well, Justice --

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

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

24 I mean, you know, let's start with
25 concealed carry restrictions. I mean, it is

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

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

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

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

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

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

25 But, in framing our relief in the

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

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

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

1 D.C. restriction in Heller that was invalidated.

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

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

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

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

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

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

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

1 of posting a surety, and then they can continue
2 to possess their firearm.

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

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

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

22 CHIEF JUSTICE ROBERTS: Well, what
23 sort of place do you think they could be
24 excluded from? In other words, you can get a
25 permit, but the state can impose certain

1 restrictions, for example, any place in which
2 alcohol is served.

3 MR. CLEMENT: So --

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

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

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

22 CHIEF JUSTICE ROBERTS: What about a
23 football stadium?

24 MR. CLEMENT: I -- I -- I -- I think,
25 again, football stadium, you probably take it on

1 its own and -- and look to the historical
2 analogs. But here's -- I guess, if I could
3 offer some general principles, I think there's
4 two principles.

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

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

24 And then the third point that I would
25 say -- and this is just an analogy, but I think

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

10 JUSTICE KAGAN: So -- but --

11 MR. CLEMENT: -- where the state can
12 say --

13 JUSTICE KAGAN: -- but I think --

14 JUSTICE BARRETT: But what --

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

19 MR. CLEMENT: So, you know, I -- I
20 think that the -- the question of whether you
21 could restrict arms in the subways, you know, I
22 mean, you -- you'd have to go through the
23 analysis, I think, and say, you know, is there a
24 restriction on access generally? I suppose it's
25 --

1 JUSTICE KAGAN: No, I mean, I got the
2 analysis --

3 MR. CLEMENT: Okay.

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

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

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

17 JUSTICE KAGAN: The Chief Justice --

18 MR. CLEMENT: They're in Rensselaer
19 County.

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

23 MR. CLEMENT: Yeah, I -- I -- I --
24 yes, I -- I -- I --

25 JUSTICE KAGAN: Because --

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

2 JUSTICE KAGAN: -- because -- because
3 that's open for -- you know, anybody can walk
4 around the NYU campus.

5 MR. CLEMENT: Well, NYU doesn't have
6 much of a campus.

7 (Laughter.)

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

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

19 The point I'm trying to make, though
20 --

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

1 -- you couldn't -- the -- the -- the city or the
2 state couldn't do that?

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

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

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

21 JUSTICE BARRETT: But why not?

22 MR. CLEMENT: -- restriction.

23 JUSTICE BARRETT: I mean, I guess it's
24 about the level of generality, all these
25 questions that Justice Kagan's asking you or

1 that the Chief asked you, if -- if you concede,
2 as I think the historical record requires you
3 to, that states did outlaw guns in sensitive
4 places, can't we just say Times Square on New
5 Year's Eve is a sensitive place because now
6 we've seen, you know, people are on top of each
7 other, we've -- we've had experience with
8 violence, so we're making a judgment, it's a
9 sensitive place.

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

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

24 And I think it's probably worth
25 thinking about rallies in Times Square, that

1 there may be restrictions, but they would be
2 done --

3 JUSTICE ALITO: Well, Mr. Clement --

4 MR. CLEMENT: -- under the rubric of
5 --

6 JUSTICE ALITO: -- could we --

7 MR. CLEMENT: -- time, place, and
8 manner.

9 JUSTICE ALITO: -- could we start with
10 the purpose of the personal right to keep and
11 bear arms? And the core purpose of that right,
12 putting aside the military aspect, is
13 self-defense.

14 So starting with that, could we
15 analyze the sensitive place question by asking
16 whether this is a place where the state has
17 taken alternative means to safeguard those who
18 frequent that place?

19 If it's a -- if it's a place like a
20 courthouse, for example, a government building,
21 where everybody has to go through a magnetometer
22 and there are security officials there, that
23 would qualify as a sensitive place.

24 Now that doesn't provide a mechanical
25 answer to every question, and -- but it -- would

1 that be a way of analyzing -- of -- of beginning
2 to analyze this?

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

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

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

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

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

24 And I -- I -- I think there are a lot
25 of people in New York, and New York may have a

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

7 JUSTICE BREYER: So how --

8 MR. CLEMENT: -- rights.

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

10 JUSTICE KAGAN: But you just said --

11 JUSTICE BREYER: How --

12 CHIEF JUSTICE ROBERTS: Justice

13 Breyer.

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

17 (Laughter.)

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

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

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

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

1 that have the regime that New York has.

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

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

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

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

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

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

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

5 JUSTICE SOTOMAYOR: Mr. Clement?

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

8 Justice Thomas, anything further?

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

11 MR. CLEMENT: Mr. Nash live in
12 Rensselaer County, New York.

13 JUSTICE THOMAS: Is that close to NYU?

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

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

24 Justice Alito?

25 Justice Sotomayor?

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

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

10 MR. CLEMENT: Well --

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

19 MR. CLEMENT: Well --

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

23 MR. CLEMENT: So, Justice Sotomayor,
24 just so we start on the same wavelength or the
25 same page, literally, page 41 of the Joint

1 Appendix, this tells Mr. Nash where he can carry
2 concealed.

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

9 Now I would submit --

10 JUSTICE SOTOMAYOR: That's the point.

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

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

23 And at the end of the day, I think
24 what it means to give somebody a constitutional
25 right is that they don't have to satisfy a

1 government official that they have a really good
2 need to exercise it or they face atypical risks.

3 CHIEF JUSTICE ROBERTS: Justice Kagan,
4 anything further?

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

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

14 JUSTICE KAGAN: How is it consistent
15 with the history? I mean, the history seems
16 very clear to me that it's sort of like the
17 exact opposite of how we think about it now.

18 in other words, that there are lots of
19 places that wanted people to display their arms
20 as a matter of transparency, and what they
21 prohibited was the concealed carry.

22 So I'm thinking, like, if you look to
23 the history, you end up with a completely
24 different set of rules from the ones that you're
25 suggesting with respect to concealed versus

1 open. And it's a -- it's an example, I think,
2 of -- of the difficulties of looking to history,
3 where people were operating on such different,
4 to use your term, wavelengths.

5 MR. CLEMENT: So, Justice Kagan, first
6 of all, I would have thought that, you know, we
7 sort of crossed the bridge to use history in
8 this context in Heller. But, if we're going to
9 look to history --

10 JUSTICE KAGAN: No, I think --

11 MR. CLEMENT: -- I actually think if
12 --

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

21 Another question is, you know, with
22 what sense of flexibility do you look? And I
23 think that this is an example of that. It's
24 like, no, we're not going to ask for an exact
25 analog because we realize that the world has

1 changed and regulatory schemes are very
2 different because regulatory interests are very
3 different.

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

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

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

1 directly applied to the state, which is
2 interesting, but -- but they said that's not
3 consistent with the Second Amendment to prohibit
4 any means for carrying.

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

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

25 But I think that's the way you can use

1 the history, and you can use it with some
2 contextual sensitivity, but you cannot sort of,
3 you know, throw it all out, because I do think
4 the analogy is pretty clean between a law that
5 prohibits any form of carry and what New York is
6 doing here.

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

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

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

25 MR. CLEMENT: So I think, in terms of

1 -- I'm not going to tell you that the context
2 doesn't matter at all. I mean, take the
3 sensitive places law, right? They just -- they
4 don't really affect the keep right the way that
5 they affect the carry right, unless you try to
6 say the entirety of Manhattan is a sensitive
7 place, and then they might affect both. But, in
8 general, the -- the analysis is going to be
9 slightly different.

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

24 JUSTICE KAGAN: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch?

2 JUSTICE GORSUCH: Mr. Clement, are you
3 -- are you able to hear me?

4 MR. CLEMENT: Loud and clear.

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

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

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

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

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

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

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

22 And a law like this that takes a
23 person who has no proclivity whatsoever, unlike
24 the surety laws, to misuse firearms and says you
25 simply can't carry them for self-defense

1 anywhere frequented by the public because you
2 haven't demonstrated an atypical need, I mean,
3 that's about as untailored a law as I can
4 imagine.

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

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

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

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

1 on either carrying unusual and dangerous weapons
2 or using common weapons in a way that terrorized
3 the public. And so I don't think that that
4 supports the other side's position here.

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

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

23 JUSTICE GORSUCH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Kavanaugh.

1 JUSTICE KAVANAUGH: Mr. Clement, I
2 have several questions.

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

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

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

23 But the thrust of this case is, you
24 know, we -- we'd like what they're having. We'd
25 like what the people in the other 43 states are

1 allowed to do and exercise their rights, and in
2 many of those states, it's shall issue.

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

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

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

20 MR. CLEMENT: Exactly.

21 JUSTICE KAVANAUGH: Yeah.

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

25 JUSTICE KAVANAUGH: Okay. And the

1 issue before us, as I understand it, is the
2 permitting regime, we don't have to answer all
3 the sensitive places questions in this case,
4 some of which will be challenging no doubt, is
5 that accurate?

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

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

24 MR. CLEMENT: That -- that -- that's
25 absolutely right, Justice Kavanaugh. And, of

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

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

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

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

1 MR. CLEMENT: So, Justice Kavanaugh,
2 two points just in response to that.

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

9 But the second --

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

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

25 And in -- in our view, you know,

1 they've made a muddle of it and, you know, it's
2 -- it's probably -- the experience of the last
3 13 years is probably a very good reason to
4 prefer a text, history, and tradition approach
5 to this area of the law.

6 JUSTICE KAVANAUGH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett?

9 JUSTICE BARRETT: Mr. Clement, I have
10 one question. So a couple times in response to
11 my question about Times Square and New Year's
12 Eve and then just now as well to Justice
13 Kavanaugh you made reference to the First
14 Amendment.

15 And, obviously, a lot of the questions
16 that have been asked have been focused on how do
17 we -- how can the state fairly regulate, because
18 everybody agrees there have to be some
19 regulations, and it might not be the case that
20 we can always find exact historical analogs, so
21 we're turning to the First Amendment.

22 In response to me, you said, well,
23 that might be analogous to a time, place, and
24 manner restriction. So do you think the First
25 Amendment and the, you know, edifices that we

1 have structured around it would be a helpful
2 place to look? Is that what you're suggesting?

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

8 But, you know, I mean, going back, you
9 know, well over 100 years to, like, Robertson,
10 when the Court was just talking in dictum about
11 the First and the Second Amendment, it drew the
12 analogy between allowing some restrictions on
13 the Second Amendment and, in the First Amendment
14 context, the First Amendment being consistent
15 with libel and defamation.

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

21 You know, if you focus on the nature
22 of the location, you might say this is
23 inappropriate for weapons. But, in the same way
24 as in the First Amendment, you just don't get to
25 say, well, we're going to make it a nonpublic

1 forum by saying no First Amendment activity
2 there. You can't just take a location and say
3 we're going to make this a sensitive place by
4 saying no Second Amendment activity there.

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

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

17 JUSTICE BARRETT: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 General Underwood.

21 ORAL ARGUMENT OF BARBARA D. UNDERWOOD

22 ON BEHALF OF THE RESPONDENTS

23 MS. UNDERWOOD: Mr. Chief Justice, and
24 may it please the Court:

25 For centuries, English and American

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

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

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

1 prohibiting in some cases the open carrying of
2 handguns.

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

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

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

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

25 JUSTICE THOMAS: General Underwood,

1 you seem to rely a bit on the density of the
2 population. You say, I think, that states like
3 New York have high density areas.

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

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

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

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

1 campus. It's another to talk about rural
2 upstate New York.

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

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

16 JUSTICE THOMAS: Thank you.

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

21 MS. UNDERWOOD: Unrestricted permits
22 --

23 CHIEF JUSTICE ROBERTS: Unrestricted
24 permits.

25 MS. UNDERWOOD: -- are -- are more

1 readily available in less populated areas, yes.

2 CHIEF JUSTICE ROBERTS: Now Heller
3 relied on the right to defense as a basis for
4 its reading of the -- of the Second Amendment,
5 or that was its reading.

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

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

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

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

1 One, we -- if you go right to history
2 and tradition, the history was to regulate most
3 strenuously in densely populated places. That's
4 what fairs and markets are. So we have history.

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

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

20 MS. UNDERWOOD: Well, and the other
21 thing is that this is -- that these regulations
22 are all an effort to accommodate the right, to
23 -- to recognize and -- and respect the right of
24 self-defense while regulating it to protect the
25 public safety. And in areas where people are

1 packed densely together, as the questioning that
2 just happened displays, the risks of harm from
3 people who are packed shoulder to shoulder all
4 having guns are much more acute than they are
5 at --

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

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

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

21 CHIEF JUSTICE ROBERTS: Yeah, deer.

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

1 CHIEF JUSTICE ROBERTS: Well, how many
2 muggings take place in the forest?

3 (Laughter.)

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

5 CHIEF JUSTICE ROBERTS: How many do
6 you think?

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

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

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

25 But what Mr. Nash did was convince the

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

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

20 JUSTICE KAVANAUGH: I don't --

21 MS. UNDERWOOD: -- that's -- that's
22 what meant by something non-speculative.

23 JUSTICE ALITO: Could I -- could I --
24 could I explore what that means for ordinary
25 law-abiding citizens who feel they need to carry

1 a firearm for self-defense?

2 So I want you to think about people
3 like this, people who work late at night in
4 Manhattan, it might be somebody who cleans
5 offices, it might be a doorman at an apartment,
6 it might be a nurse or an orderly, it might be
7 somebody who washes dishes. None of these
8 people has a criminal record. They're all
9 law-abiding citizens.

10 They get off work around midnight,
11 maybe even after midnight. They have to commute
12 home by subway, maybe by bus. When they arrive
13 at the subway station or the bus stop, they have
14 to walk some distance through a high-crime area.
15 And they apply for a license, and they say:
16 Look, nobody has told -- has said I'm going to
17 mug you next Thursday. However, there have been
18 a lot of muggings in this area, and I am scared
19 to death.

20 They do not get licenses, is that
21 right?

22 MS. UNDERWOOD: That is in general
23 right, yes. If there's nothing particular to
24 them, that's right.

25 JUSTICE ALITO: But how is that

1 consistent with the core right to self-defense,
2 which is protected by the Second Amendment?

3 MS. UNDERWOOD: Because the core right
4 to self-defense doesn't -- as -- as this Court
5 said, doesn't allow for all to -- to be armed
6 for all possible confrontations in all places.

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

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

23 JUSTICE ALITO: There are -- there are
24 a lot of armed people on the streets of New York
25 and in the subways late at night right now,

1 aren't there?

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

4 JUSTICE ALITO: No?

5 MS. UNDERWOOD: I think there are
6 people --

7 JUSTICE ALITO: How many -- how many
8 --

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

11 JUSTICE ALITO: Yeah, that's what I'm
12 talking about.

13 MS. UNDERWOOD: -- referring to.
14 Yeah.

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

19 MS. UNDERWOOD: I don't have that
20 number, but I'm sure there's a -- it's a
21 substantial number.

22 JUSTICE ALITO: But the people -- all
23 -- all these people with illegal guns, they're
24 on the subway --

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

1 JUSTICE ALITO: -- they're walking
2 around the streets, but the ordinary
3 hard-working, law-abiding people I mentioned,
4 no, they can't be armed?

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

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

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

25 MS. UNDERWOOD: Well, what happens in

1 these license hearings is that a question is
2 asked: What -- what exactly do you mean?
3 Because it --

4 JUSTICE KAVANAUGH: Well, the
5 statistics.

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

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

23 So what I know happens is that those
24 claims are examined by a licensing officer.
25 Now, this gets to your -- to questions about

1 discretion and whether that's effectively
2 handled. But --

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

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

13 MS. UNDERWOOD: Probably. I mean,
14 that's -- that's the -- that's the other part to
15 Nash's -- Nash's claim, but --

16 JUSTICE KAVANAUGH: Probably, though
17 --

18 MS. UNDERWOOD: -- if that's the
19 question, that -- that is not the way this case
20 was tried. That's not the way this claim was
21 framed. And if the question is does the system
22 actually operate in the way that we're
23 describing, then this case should be remanded
24 for a hearing to determine whether it does.

25 JUSTICE KAVANAUGH: And what's the

1 problem with the shall issue regimes from your
2 perspective that exists in many other states,
3 including very populous states like Florida,
4 Illinois?

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

14 JUSTICE KAVANAUGH: But --

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

16 JUSTICE KAVANAUGH: -- has that
17 happened in those states, I mean, can you make a
18 comparative judgment, because it seems like
19 before you impose more restrictions on
20 individual citizens and infringe their
21 constitutional rights, based on this theory, you
22 should have to show, well, in those other states
23 that have shall issue regimes, actually there is
24 a lot more accidents, crime, and I don't see any
25 real evidence of that.

1 MS. UNDERWOOD: Yeah, I think the --
2 there is a brief from the social scientists that
3 addresses this, but this law has been in place
4 since 19 -- for over 100 years. Starting when
5 the -- at -- at a time when the -- when the law
6 was not as well understood in this area, as --
7 as -- as it is now.

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

17 JUSTICE KAGAN: General, you know, one
18 of the things that strikes me about this area is
19 that, on the one hand, it seems completely
20 intuitive to me, and I think to many people, I
21 mean, if you think about Justice Thomas's
22 questions about less populated areas, the rural
23 areas of New York versus the cities, I mean, it
24 seems completely intuitive that there should be
25 different gun regimes in -- in New York than in

1 Wyoming or that there should be different gun
2 regimes in New York City than in rural counties
3 upstate.

4 But it's a -- it's -- it's a hard
5 thing to -- to match with our notion of
6 constitutional rights generally.

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

14 So I guess I just want to hear you say
15 why you think that is, you know, what
16 justification is there for allowing greater
17 flexibility here?

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

23 And so delegating the decision-making
24 with appropriate criteria to somebody who is
25 local, which is what this is, these are local

1 judges, in most of the states they're -- they're
2 judges, to make the relevant fact-findings, to
3 make the relevant inquiry. This is a -- this is
4 an interactive process in which these
5 individuals and others are told I'm not going to
6 lift the restrictions now, but if you come back,
7 if you have more to -- to say about this, you
8 know, feel free to come back.

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

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

20 JUSTICE SOTOMAYOR: I don't think that
21 was Justice Kagan's question.

22 MS. UNDERWOOD: I'm sorry.

23 JUSTICE SOTOMAYOR: It was on a
24 broader level, I believe. She can correct me if
25 I'm wrong. The issue is no other constitutional

1 right do we condition on permitting different
2 jurisdictions to pass different regulations or
3 -- but do we have any other constitutional right
4 whose exercise in history has been as varied as
5 gun possession and use?

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

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

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

21 There is, after all, appellate review
22 available here, all the way to the central, you
23 know, to the highest state court.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Thomas, anything further?

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

9 MS. UNDERWOOD: Including Rensselaer
10 County, yes.

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

19 MS. UNDERWOOD: Well, hunting permits
20 work for particular locations, for particular
21 areas, and -- but it's all one state-wide
22 regime. I mean, and so to here licenses are
23 handled locally. It's not exactly the same, but
24 it's the same model that licensing of -- of --
25 of -- of handguns, to carry a handgun for

1 self-defense is handled locally, under a single
2 set of criteria but with reference to local
3 conditions. I think that's my answer.

4 CHIEF JUSTICE ROBERTS: Justice
5 Breyer?

6 JUSTICE BREYER: Are we considering
7 here just the Upper State New York law? We're
8 not considering New York City, are we?

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

11 JUSTICE BREYER: Okay. So it's not in
12 the case.

13 MS. UNDERWOOD: The Petitioners are
14 not from --

15 JUSTICE BREYER: They're -- they're
16 not, okay. All right.

17 MS. UNDERWOOD: Yeah.

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

23 MS. UNDERWOOD: Yes.

24 JUSTICE BREYER: So it's not special?

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

1 --

2 JUSTICE BREYER: Can -- can you think
3 of --

4 MS. UNDERWOOD: In the areas where
5 permitting happens, which includes First
6 Amendment areas, it could be parades, it could
7 be solicitation for charity, there are various
8 areas where First Amendment activity is --

9 JUSTICE BREYER: All right. So is --
10 so my -- what I'm driving towards -- and I --
11 and I thought also there is a brief here -- I
12 think it is the social scientists'; I don't
13 remember the name of it -- which says in
14 instances where -- and they do it
15 statistically -- they are more liberal in
16 allowing people to carry concealed weapons who
17 are good character people and there is a greater
18 risk of -- of crime or harm, where that happens,
19 there are more deaths of innocent people.

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

22 MS. UNDERWOOD: Yeah, I believe it is
23 --

24 JUSTICE BREYER: Do you know?

25 MS. UNDERWOOD: -- a brief of Social

1 Scientists, but --

2 JUSTICE BREYER: All right. I'll find
3 it.

4 MS. UNDERWOOD: Yeah.

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

12 What are they? What are those rules?

13 MS. UNDERWOOD: Well, I think they
14 would end up being factors that have to be taken
15 into account because the range of situations is
16 so different both on the -- on the need side, on
17 the -- and on the -- on the -- on the counter-
18 -- on the public safety side.

19 So I think it's very hard. In fact,
20 that's one of the things that I think is hard
21 about the suggestion that a sensitive place
22 regime could replace a system like this.

23 JUSTICE BREYER: All right, if you had
24 to guess on how many carry -- conceal carry
25 licenses are given in the area under

1 consideration, upstate New York or outside of
2 New York City in a given year or around --
3 anyway you want to put it, are they in the tens
4 of thousands?

5 MS. UNDERWOOD: Well, in --

6 JUSTICE BREYER: Are they in the five
7 --

8 MS. UNDERWOOD: So I can't do it
9 statewide -- I have statewide estimates --

10 JUSTICE BREYER: Yeah. Uh-huh.

11 MS. UNDERWOOD: -- not estimates, I
12 have permits I -- for Rensselaer County and for
13 statewide. It would be possible to get more,
14 but we don't -- I don't have that.

15 JUSTICE BREYER: Are they -- are they
16 rough? What are they?

17 MS. UNDERWOOD: So -- so -- and in
18 this, this is in footnote 10 of our brief. In
19 the two-year period, 2018 to 2019, in -- in the
20 state there were approximately 37,800 grants.

21 JUSTICE BREYER: Okay. I get the --
22 the rough idea. And if, in fact, it were
23 remanded, I guess we could go into that in more
24 depth?

25 MS. UNDERWOOD: That's correct.

1 That's correct. We have the grants. Of course,
2 there are licenses that weren't granted in those
3 years that are still valid. So that doesn't
4 tell you how many -- how many licenses there are
5 out there all together. The thing we had to
6 estimate was the grant rate because we don't
7 have application data. We had to -- we had to
8 estimate that from other information, but we
9 have the permits.

10 CHIEF JUSTICE ROBERTS: Justice Alito?

11 JUSTICE ALITO: Is it correct that the
12 non-speculative standard applies throughout the
13 state?

14 MS. UNDERWOOD: It --

15 JUSTICE ALITO: It applies equally in
16 New York City and in the most rural location in
17 Upstate New York?

18 MS. UNDERWOOD: Well, it has been --
19 the law has been interpreted to mean that,
20 although the experience of granting licenses,
21 the experience with license applications is that
22 it is apparently more readily satisfied upstate.

23 JUSTICE ALITO: So the -- the
24 individual officers have a degree of discretion?

25 MS. UNDERWOOD: Well, yes, they are

1 asked -- like -- like judges on many issues,
2 they are asked to take into account certain
3 factors. They can be reversed if they took the
4 wrong factors into account or if they failed to
5 take the specified factors into account.

6 It's not unguided discretion, but it
7 is discretion --

8 JUSTICE ALITO: What --

9 MS. UNDERWOOD: In the sense that --

10 JUSTICE ALITO: What guarantees, if
11 any, are there in your regime that a licensing
12 officer is not taking into account improper
13 factors?

14 MS. UNDERWOOD: I mean, this is a
15 question about the judicial system generally.
16 If he correctly records the factors that he took
17 into account, they -- they write letters or
18 opinions which may or may not fully disclose --
19 one assumes will disclose what they thought was
20 important. When there's a -- there's a --
21 often -- there are not just the papers, but
22 there are the -- if he denies the license, he
23 will say why. He has to say why.

24 JUSTICE ALITO: We've been presented
25 in your brief and all the other briefs in this

1 case with an enormous amount of history,
2 citations to all sorts of statutes and other
3 sources.

4 Would you be willing to concede that
5 maybe you got a little bit overly enthusiastic
6 in your summary of some of the historical
7 sources that you cited in your brief?

8 I'm going to give you an --

9 MS. UNDERWOOD: We did our best to be
10 accurate --

11 JUSTICE ALITO: I'm going to give you
12 -- well, I'm going to give you an --

13 MS. UNDERWOOD: -- in recording what
14 we reported. I don't know what you have in
15 mind.

16 JUSTICE ALITO: Yeah, well, I'm going
17 to give you an example, which is -- you know,
18 it's troubling. I can see how it would slip
19 through. I'm not accusing you personally of
20 anything.

21 But on page 23, you say that in
22 founding-era America, legal reference guides
23 advised local officials to "arrest all such
24 persons as in your sight shall ride or go
25 armed." And this is a citation to John Haywood,

1 A Manual of the Laws of North Carolina, 1814.

2 So I looked at this manual, and what
3 it actually says is "you shall arrest all such
4 persons as in your sight shall ride or go armed
5 offensively." And somehow that word
6 "offensively" got dropped --

7 MS. UNDERWOOD: Well, our --

8 JUSTICE ALITO: -- from your brief.

9 MS. UNDERWOOD: I will --

10 JUSTICE ALITO: Do you think that's an
11 irrelevant word?

12 MS. UNDERWOOD: I think it would have
13 been better to put it in and make an
14 explanation, but I do think it's an irrelevant
15 word because we have substantial authority for
16 the proposition that guns were deemed to be
17 offensive weapons.

18 And that's why we have this dispute
19 about whether saying -- I mean, there are
20 different ways of putting it, offensively or
21 with offensive weapons or to the terror of the
22 people. These either describe a separate
23 characterization -- a -- a separate feature that
24 not all weapons have -- that's my friend's
25 position on this -- or they describe the belief

1 that all such weapons are often offensive.

2 JUSTICE ALITO: Well, I don't want to
3 belabor the point, but, of course, if any
4 possession of weapons outside the home was
5 illegal, then there would be no need to put in
6 the term "offensively," the inclusion of that
7 term.

8 MS. UNDERWOOD: Well, there are many
9 other weapon -- usually the -- there's a list
10 that's -- it's not in this particular
11 instruction, but there would be a list of
12 weapons. They were talking about much more than
13 guns, and it was guns that were said over and
14 over again to be offensive.

15 JUSTICE ALITO: All right. Well,
16 thank you.

17 MS. UNDERWOOD: -- weapons.

18 JUSTICE ALITO: Thank you.

19 MS. UNDERWOOD: But that's the
20 explanation. I'm --

21 CHIEF JUSTICE ROBERTS: Justice
22 Sotomayor?

23 Justice Kagan?

24 JUSTICE KAGAN: You -- you started a
25 thought and then you were taken off someplace

1 else. So I just wanted to allow you to finish
2 the thought. You -- this -- what you said was
3 that there was a reason why the sensitive -- a
4 sensitive place regime cannot serve as a
5 replacement, and then you were not given an
6 opportunity to say why. So why?

7 MS. UNDERWOOD: Well, essentially,
8 because there are -- it -- it is -- it would be
9 very hard in the first instance, and I think
10 also not very acceptable in the second -- to my
11 adversaries, on the -- in the second instance,
12 to specify in advance all the places that ought
13 properly to be understood as sensitive.

14 So it sounds like a very convenient
15 alternative, but, for example, we were talking
16 about Times Square on New Year's Eve. Times
17 Square on -- when the theater district -- when
18 -- when -- when commerce is in full swing, Times
19 Square almost every night is
20 shoulder-to-shoulder, people.

21 So then you end up having a very big
22 difficulty in specifying what all the places are
23 that have the characteristics that should make
24 them sensitive. It's -- it has -- in principle,
25 it has an attractive quality to it, but in

1 implementation, I think it would be
2 unsuccessful.

3 CHIEF JUSTICE ROBERTS: Justice
4 Gorsuch?

5 JUSTICE GORSUCH: No further
6 questions. Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh?

9 JUSTICE KAVANAUGH: No. Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Barrett?

12 JUSTICE BARRETT: I have one. General
13 Underwood, do you think Heller was rightly
14 decided?

15 MS. UNDERWOOD: I think there is a lot
16 of support historically and otherwise for it, so
17 I'm -- I'm quite content to treat it as rightly
18 decided. I think there was an argument on the
19 other side too, but that's true about many of --
20 maybe most of the difficult questions that come
21 before this Court. I have no quarrel with
22 Heller.

23 JUSTICE BARRETT: Do you think that we
24 are bound by the way that we characterized
25 history in that opinion? You know, Mr. Clement

1 has pointed out that in some respects the way
2 that we treated, say, the Statute of Northampton
3 is different from the way that you argue that we
4 should interpret that and the follow-on, you
5 know, statutes, and the colonies, you argue that
6 we should understand those and some other cases
7 differently than we did in Heller.

8 Are we free to do that?

9 MS. UNDERWOOD: I think you are
10 because I think the Heller decision made very
11 clear that it was not deciding anything other
12 than the right to keep arms in the home.

13 In the course of arriving at that
14 decision, it necessarily said a lot of other
15 things that led to that decision, but I don't
16 think they are controlling or they -- I think
17 the opinion itself says we're not trying to do a
18 full exegesis of the whole Second Amendment
19 right, and there's more to be -- there's more to
20 be done, and it would be odd and really
21 inconsistent with general practice to treat
22 every -- every sentence or every reference to a
23 historical source as controlling for all time as
24 distinguished from for the purposes for which it
25 was invoked.

1 JUSTICE BARRETT: Thank you, General.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 General.

4 Mr. Fletcher.

5 ORAL ARGUMENT OF BRIAN H. FLETCHER,
6 FOR THE UNITED STATES, AS AMICUS CURIAE,
7 SUPPORTING THE RESPONDENTS

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

10 New York's proper cause requirement is
11 consistent with the Second Amendment because it
12 is firmly grounded in our nation's history and
13 tradition of gun regulation.

14 As Justice Alito said, there's a lot
15 of history floating around this morning, and so
16 I want to be clear that, when I say that, I am
17 putting to the side all of the disputed bits
18 about the Statute of Northampton, about the
19 surety laws, and I'm putting to the side laws
20 that restricted concealed carry but do not
21 restrict open carry.

22 And I am focusing on laws that either
23 prohibited or required a showing of good cause
24 to carry a concealable weapon like a pistol.

25 Tennessee enacted one of those laws in

1 1821. Texas followed in 1871. New Mexico and
2 Arkansas likewise enacted such laws in the years
3 immediately after the ratification of the
4 Fourteenth Amendment. And over the decades that
5 followed, more than a dozen other states enacted
6 other laws that were at least as restrictive as
7 New York's. Like my friends from New York, I
8 count about 20 laws in total that fit that
9 description.

10 Those laws remain in force in seven
11 states today, and more than 80 million Americans
12 live under their protection. They are, in
13 short, both traditional and common regulations.

14 I'd welcome the Court's questions or
15 I'm happy to continue.

16 JUSTICE THOMAS: How do we determine
17 which states we should look to? And these are
18 -- and you -- you -- you focus a lot on western
19 states, but the west is different.

20 MR. FLETCHER: I agree, Justice
21 Thomas, and I think there might be reason to be
22 skeptical about a tradition that's only
23 reflected in one state.

24 I think that's a problem for Mr.
25 Clement in relying on some of the cases

1 exclusively from the antebellum south. But the
2 cases that we're relying on come from the south,
3 like the Tennessee, Arkansas, and Texas law I
4 described. West Virginia had a similar law, as
5 did Alabama, New York, Massachusetts,
6 California, Hawaii.

7 The tradition that I am drawing on
8 spans two centuries going back to the Tennessee
9 law, spans 150 years when you broaden it out to
10 many states, and spans all regions or virtually
11 all regions of the country.

12 So I think that's the sort of
13 tradition that you can look to when defining a
14 national tradition of gun regulation.

15 CHIEF JUSTICE ROBERTS: I mean, what
16 is the appropriate analysis? I mean, you sort
17 of -- we -- we, I think, generally don't
18 reinvent the wheel. I mean, the first thing I
19 would look to in answering this question is not
20 the Statute of Northampton, it's Heller, and
21 Heller has gone through all this stuff.

22 And, obviously, in a somewhat
23 different context, although that's part of the
24 debate, self-defense at home, you know, this is
25 different, but I still think that you have to

1 begin with -- with Heller and its recognition
2 that the Second Amendment, you know, it -- it
3 has its own limitations, but it is to be
4 interpreted the same way you'd interpret other
5 provisions of the Constitution.

6 And I wonder what your best answer is
7 to the point that Mr. Clement makes in his
8 brief, which is that, for example, if you're
9 asserting a claim to confront the witnesses
10 against you under the Constitution, you don't
11 have to say I've got a special reason, this is
12 why I think it's important to my -- my defense.

13 The Constitution gives you that right.
14 And if someone's going to take it away from you,
15 they have to justify it. You don't have to say
16 when you're looking for a permit to speak on a
17 street corner or whatever that, you know, your
18 speech is particularly important.

19 So why do you have to show in this
20 case, convince somebody, that you're entitled to
21 exercise your Second Amendment right?

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

24 CHIEF JUSTICE ROBERTS: Sure.

25 MR. FLETCHER: -- specific point for

1 Mr. Clement.

2 As to the general question about
3 Heller, we agree completely that the Court ought
4 to apply the method from Heller, which we, like
5 I think all the parties, take to be look to the
6 text, history, and tradition of the Second
7 Amendment right, and we're applying that now to
8 a somewhat different issue with the benefit of
9 somewhat broader materials.

10 Now, as to the question about why you
11 have to have a showing of need, I think the
12 problem with Mr. Clement's formulation is that
13 it assumes the conclusion.

14 If you had a right, the Second
15 Amendment conferred a right to carry around a
16 weapon for possible self-defense just because an
17 individual wants to have one available, then,
18 obviously, you couldn't take away that right or
19 make it contingent upon a discretionary
20 determination.

21 But the whole question is whether the
22 Second Amendment right to keep and bear arms
23 confers that right to have a pistol with you for
24 self-defense even absent a showing of
25 demonstrated need.

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

10 MR. FLETCHER: So I -- I agree with
11 that, but I think I heard even Mr. Clement in
12 response to a question from Justice Kavanaugh
13 say he doesn't have a quarrel with licensing
14 regimes in general.

15 And I think what that is one
16 illustration of is that the Second Amendment has
17 a distinct history and tradition and that the
18 way to be faithful to the Second Amendment is to
19 be faithful to that history and tradition and
20 not to draw analogies to other rights with --
21 with their own histories and traditions.

22 CHIEF JUSTICE ROBERTS: Well, there's
23 licensing and there's licensing. Maybe it's one
24 thing to say we need to check, make sure you
25 don't have a criminal record, make sure that --

1 all the --

2 MR. FLETCHER: Right.

3 CHIEF JUSTICE ROBERTS: -- all the
4 other things you can check on, but not that we
5 assume you don't have a right to exercise your
6 -- your --

7 MR. FLETCHER: So I guess --

8 CHIEF JUSTICE ROBERTS: It's hard to
9 say it without saying it, exercise your right
10 under the Second Amendment, and you've got to
11 show us that -- that you do.

12 MR. FLETCHER: So we would ask that
13 question by looking to the history and tradition
14 of the Second Amendment. And in Tennessee, in
15 1821, you couldn't carry a pistol at all. In
16 Texas, in 1871, you had to have a showing of
17 need if you were going to carry a pistol.

18 And that showing of need was actually
19 much less favorable than the New York regime.
20 In Texas, in West Virginia, and in Alabama, in
21 those laws that we cite, need to carry a firearm
22 was a need that you had to show when you were
23 prosecuted for violating the law. It was
24 essentially a self-defense requirement. And you
25 had to persuade a jury in a criminal trial that

1 you had an immediate pressing need to be
2 carrying the gun when you were carrying it.

3 The laws, of which New York's is one
4 but by no means the only example that began to
5 become more prevalent in the 20th Century, said
6 we're going to make that determination of need
7 ex ante. We're going to require a showing of
8 good cause.

9 JUSTICE KAVANAUGH: Can --

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

12 JUSTICE KAVANAUGH: This might be a
13 level of generality issue, but I think Mr.
14 Clement responded to what -- some of what you're
15 saying on history and tradition by saying you
16 have to look at carry laws more generally. And
17 there was open carry traditions in a lot of
18 those states.

19 And so I think he followed up by
20 saying so open carry is one option. Shall carry
21 permit regimes for concealed carry, another
22 option. But what you can't have is no open
23 carry and simply a may issue discretionary
24 regime that will, in practice, he says, limit
25 the right.

1 So can you respond to that?

2 MR. FLETCHER: Yeah. I meant to be
3 taking that into account in the history --
4 account of history that I'm giving you. So the
5 Tennessee laws refer specifically to carry
6 publicly or privately. Texas, the same story.

7 If I were here defending a regime that
8 just prohibited concealed carry and allowed open
9 carry, I would have many, many, many more
10 states. But I'm focused on just this type of
11 law, and even there, our submission is there's a
12 substantial history and tradition of that kind
13 of regulation. It's not the sort of outlier
14 that the Court confronted in Heller and
15 McDonald.

16 And if I -- I could speak to -- Mr.
17 Clement has spoken some about the case law from
18 the 19th Century and has suggested that laws
19 like these were struck down. And with all
20 respect to my friend, that's not correct.

21 The cases that he is relying on are
22 primarily dicta. The two cases he has that
23 actually struck down laws -- or, I'm sorry, the
24 three cases that he has that actually struck
25 down laws are the Nunn decision from Georgia,

1 which struck down a law that was -- banned even
2 the keeping of pistols. The Court did say in
3 dicta that open carry was required, but that
4 would -- that would -- the law was actually much
5 more restrictive than that.

6 The Andrews case that he relies on and
7 that Heller relies on as well is actually more
8 helpful to us because the Court upheld a
9 prohibition on the carrying of belt or pocket
10 pistols, and it prohibited a ban on revolvers
11 only because the Court construed that ban to be
12 so broad that it would prohibit even carrying it
13 around your house.

14 And in the very next sentence, the
15 Court said: But, of course, the legislature, if
16 it wanted to, could regulate the carrying of
17 that firearm publicly.

18 And then, when you turn to laws like
19 the ones that we have here, which include some
20 sort of self-defense exception, either ex-ante
21 or ex-post, the trend in the cases is in favor
22 of -- of upholding their constitutionality.

23 We've cited about six decisions from
24 the 1800s and the early 1900s, including the
25 Duke and English cases from Texas, the Isaiah

1 case from Alabama, the Haley and Fife cases from
2 Arkansas, and the Workman case from West
3 Virginia, all of which upheld those laws.

4 And Mr. Clement's answer to those
5 decisions is that they rested on the erroneous
6 understanding that the Second Amendment or its
7 state equivalents protected only the right to
8 use arms in the militia. But that is not what
9 those cases say. They do not stop by saying
10 that the defendants were not militia men or so
11 had no rights. The Texas cases, in particular,
12 in Duke and English, say that the law makes no
13 necessary allowances for self-defense by
14 including the type of exception we described
15 earlier.

16 And so our submission is that that
17 body of case law that New York law carries
18 forward is part of our nation's history and
19 tradition of firearms regulation and that New
20 York ought to be allowed to continue to make the
21 choice that it has made.

22 Now, we understand, and there's force
23 to Mr. Clement's argument, that other states
24 have made other choices. Justice Alito made
25 powerful points about how some individuals have

1 a powerful claim to have a gun for self-defense.
2 But the question before the Court is, of all of
3 the different approaches to these difficult
4 issues that states and other jurisdictions have
5 taken over our nation's history, is this one
6 that the Second Amendment takes off the table?

7 And our submission is that when it's
8 an option that New York has and other states
9 have had for a century or more and that traces
10 as far back as some of the laws that I've been
11 discussing into our nation's history, that's an
12 option that is consistent with our tradition of
13 gun regulation and is an option that ought to be
14 available to the states.

15 CHIEF JUSTICE ROBERTS: Justice Thomas
16 as?

17 Justice Breyer? No?

18 Justice Alito?

19 JUSTICE ALITO: Is it correct that the
20 Sullivan Law was an innovation when it was
21 adopted?

22 MR. FLETCHER: It was relatively new.
23 I think the Sullivan Law was 1911. The
24 licensing requirement at issue here was 1913. I
25 think Massachusetts had done something similar

1 in 1906. Hawaii did its as well in 1913. And
2 we view those as lineal descendents and, in
3 fact, improvements upon the sort of Texas laws
4 which made you prove self-defense at the back
5 end, rather than giving you a chance to
6 demonstrate it up front.

7 JUSTICE ALITO: There's a -- there's a
8 debate about the -- the impetus for the
9 enactment of the Sullivan Law, is there not?
10 There's -- there are those who argue, and they
11 cite -- they cite support for this
12 interpretation that a major reason for the
13 enactment of the Sullivan Law was the belief
14 that certain disfavored groups, members of labor
15 unions, blacks, and Italians were carrying guns
16 and they were dangerous people and they wanted
17 them disarmed.

18 MR. FLETCHER: There have been those
19 arguments made, and there's certainly evidence
20 that those sentiments existed in New York at the
21 time. I have not seen things that persuade me
22 that those were the impetus for the Sullivan
23 Law.

24 And to the extent that that was a
25 question, I think the fact that similar laws

1 have been enacted and maintained, not just in
2 New York and not just at that moment in time,
3 but in a number of different states throughout
4 the country throughout large swaths of our
5 nation's history, is -- is good reason to
6 believe that this is not just prejudice; that
7 this is a legitimate regulation.

8 JUSTICE ALITO: I think one more
9 question about the major point that you've made
10 this morning, which is that there are scattered
11 statutes, local ordinances, judicial decisions
12 from various points in the 19th century
13 extending into the 20th century, the early 20th
14 century with the Sullivan Law and the other laws
15 that you mentioned, that are inconsistent with
16 Mr. Clement's argument.

17 But what does that show about the
18 original understanding of the right that's
19 protected by the Second Amendment? Would --
20 would we be receptive to arguments like that if
21 we were interpreting, let's say, the First
22 Amendment or the Confrontation Clause of the
23 Sixth Amendment? Would we say, well, you know,
24 you can find a lot of state laws and state court
25 decisions from the late -- from the 19th

1 century, early 20th century, that are
2 inconsistent with a claim that is made based on
3 the original meaning of -- of a provision of the
4 Bill of Rights, and that shows that's what that
5 was understood to mean at the time?

6 MR. FLETCHER: Well, Justice Alito, I
7 think Heller was receptive to those types of
8 arguments and conducted a review of history
9 through the 20th century. And rightly so, I
10 think. It's not unusual to look to the nation's
11 tradition to understand the meaning of
12 constitutional rights. I think that's
13 especially appropriate here for a couple of
14 reasons.

15 One is that I think everyone agrees
16 that the right codified in the Second Amendment
17 is a right that is subject to some reasonable
18 regulations, and in deciding what regulations
19 are reasonable, we think the fact that they've
20 been prevalent throughout our history is a good
21 sign that they are. We think that's especially
22 so because of a point that this Court made in
23 McDonald, which is that throughout the nation's
24 history, this is a right that's been recognized
25 and codified in state constitutions as well.

1 It's not something that people were not aware
2 of.

3 And so the fact that this type of
4 regulation coexisted for so long with that
5 understanding, we think, is a particularly
6 strong indication of its consistency.

7 JUSTICE ALITO: Well, Heller -- and --
8 and I will stop after this -- Heller cited
9 decisions going into the 19th century as
10 confirmation of what it had already concluded
11 based on text and history at or before the time
12 of the adoption of the Second Amendment and said
13 this is what it was understood to mean at the
14 time and it's further evidence that this is what
15 this right was understood to mean because it
16 kept being reaffirmed by decisions that came
17 after.

18 But I find it hard to understand how
19 later decisions and statutes, particularly when
20 you start to get into the late 19th century and
21 the early 20th century, can be used as a
22 substitute for evidence about what the right was
23 understood to mean in 1791 or 1868, if you think
24 that's the relevant date.

25 MR. FLETCHER: So you're certainly

1 right about the way that Heller looked to
2 decisions to -- on its core holding of does the
3 Second Amendment protect only a militia-focused
4 right or an individual right. But when Heller
5 turned to the question presented here, which is
6 what sorts of regulations are consistent with
7 the right that it was recognizing, I think it's
8 fairly read to extend the analysis into the 20th
9 century for the reason that Justice Kagan
10 identified, that it validated as presumptively
11 lawful felon-in-possession requirements, bans on
12 the possession of firearms by the mentally ill
13 that date to much later than the 19th century.

14 JUSTICE ALITO: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Sotomayor?

17 JUSTICE SOTOMAYOR: What do you do
18 with Heller and its recognition of categories of
19 exclusion? Mentally ill, felons, domestic
20 violence, presumably, although it didn't mention
21 it. Can any of those pass scrutiny on their
22 face?

23 MR. FLETCHER: I don't know. I think
24 what -- the lesson from Heller, though, is that
25 you don't need to apply strict scrutiny or any

1 other level of scrutiny because those are the
2 types of regulations that are validated by our
3 nation's history and tradition of gun
4 regulations.

5 And so we would take that lesson from
6 Heller as exemplifying the proper mode of
7 analysis and apply it here as well.

8 JUSTICE SOTOMAYOR: So what do you do
9 with the -- the view of your -- Mr. Clement's
10 view that the essence that Heller says is that
11 you do have some sort of right outside of the
12 home to guns for self-defense? So how do you
13 finish what you think that right is or how do
14 you describe it?

15 MR. FLETCHER: So we don't quarrel at
16 all with the notion that the Second Amendment
17 has something to say outside the home. Our
18 submission is just that to understand how it
19 applies outside the home, one has to look to the
20 history and tradition of regulations.

21 And what we've tried to argue in our
22 brief and this morning is that there is a
23 substantial history and tradition of the
24 regulation of the public carrying of concealable
25 weapons, including pistols, because of the

1 dangers that they present, and that regulations
2 of that type, of which New York's is one, are
3 consistent with the right recognized in the
4 Second Amendment.

5 JUSTICE SOTOMAYOR: How about -- let's
6 go to the extreme. There's no exception for
7 good cause, there's no exception for long -- no
8 exceptions whatsoever, no rifles for hunting, no
9 -- nothing. Outside the home, you can't possess
10 any kind of ammunition-driven weapon.

11 MR. FLETCHER: Yeah.

12 JUSTICE SOTOMAYOR: Where would we be
13 with that?

14 MR. FLETCHER: I think that is an -- a
15 type of regulation that fortunately no state has
16 today and that I don't think there's any
17 historical precedent for. I don't think you
18 could make this sort of argument --

19 JUSTICE SOTOMAYOR: So --

20 MR. FLETCHER: -- for that sort of
21 law.

22 JUSTICE SOTOMAYOR: So give me the
23 limiting principle of what regulations and how
24 far they can go that don't achieve that.

25 MR. FLETCHER: Right. So I think,

1 like Mr. Clement, it's -- it's going to be
2 difficult for me to give you definitive answers
3 because, in our view, this is an inquiry that
4 has to be driven by history and tradition, and
5 that requires a careful examination of history
6 and tradition.

7 But let me give you a couple of
8 guideposts. I think there is a tradition of
9 laws like the Tennessee law that I alluded to
10 earlier and others that prohibit the carrying of
11 concealable weapons without any exception for
12 self-defense or -- or any good cause exception
13 like the one that you have in the New York law.

14 So we think and -- and Judge Bybee for
15 the en banc Ninth Circuit concluded after an
16 exhaustive historical analysis, that those types
17 of regulations are consistent with the Second
18 Amendment. But I acknowledge that that's a
19 tougher historical case to make than the case
20 that you can make with respect to laws like New
21 York's, that include self-defense exceptions.

22 JUSTICE SOTOMAYOR: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice Kagan?

24 JUSTICE KAGAN: Mr. Fletcher, I -- I
25 think I should have asked General Underwood this

1 question, but I forgot, so here you are.

2 And the United States also has law
3 enforcement officers, even though they operate
4 differently from sort of the cop on the beat,
5 but I'm just wondering if there is anything that
6 you can say, any evidence that you can share,
7 are there studies, is there information about
8 how this actually affects how getting rid of --
9 of this regime in the way that Mr. Clement would
10 want this Court to do, how it affects policing?
11 How it affects the ability of police officers to
12 keep the streets safe and -- and how it affects
13 their own safety?

14 Is there information about that? Is
15 there -- are there studies?

16 MR. FLETCHER: There are. I think the
17 -- the best place I can point you to for studies
18 are some of the amicus briefs, including the
19 social scientists' brief that Justice Breyer
20 discussed with my colleague, General Underwood.

21 In terms of sort of the United States'
22 perspective specifically, I don't have any sort
23 of quantifiable statistics. What I can tell you
24 is that we do share the concern behind the New
25 York law, which is the concern that having more

1 guns on the street does escalate -- does
2 complicate and increase the danger inherent in
3 citizen/law enforcement encounters. We do think
4 that's a real concern and it's one of a number
5 of real concerns that are reflected in the law
6 that New York has.

7 JUSTICE KAGAN: I mean, do police
8 officers stop people in the same way in --
9 notwithstanding what -- whether there are --
10 whether it's a New York regime or -- or a more
11 permissive regime?

12 MR. FLETCHER: I -- you know, I
13 apologize, I don't have studies on that. All
14 that I can give you is my own sense that if I
15 were a police officer, I would certainly think
16 prominently in my mind about what are the odds
17 that the person that I'm stopping or approaching
18 in the middle of the highway, you know, late at
19 night is likely to be armed. And the licensing
20 regime in the state is going to be an important
21 factor in the risk that that's the situation.

22 JUSTICE KAGAN: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Gorsuch?

25 JUSTICE GORSUCH: Mr. Fletcher, in --

1 in your brief, you -- you suggest that the New
2 York law passes both the history -- text and
3 history approach and -- and intermediate
4 scrutiny should we apply that.

5 And I guess I'd like to pose the same
6 question to you that I did to Mr. Clement, and
7 that is, what is the appropriate test between
8 those two or others?

9 The lower courts seem very divided
10 over how to approach Second Amendment questions.
11 Some apply the text and history approach to the
12 challenge before them. Others say, yes, text
13 and history is appropriate, but we're not going
14 to extend the Heller right until and unless the
15 Court first does so through its own text and
16 history analysis. We're not going to do it
17 ourselves. Others have applied intermediate
18 scrutiny. Others have applied what might be
19 described as a water-downed version of immediate
20 -- intermediate scrutiny. And some have
21 suggested strict scrutiny or some modification
22 of it should apply.

23 I -- I -- I'd just be grateful for
24 your thoughts.

25 MR. FLETCHER: I appreciate the

1 question, Justice Gorsuch, and I think our view
2 is that courts ought to follow what we
3 understand to be the lesson from Heller, which
4 is that you start with text, history, and
5 tradition, and when those sources provide you an
6 answer one way or the other, either that the law
7 is valid or that it's invalid, you end there and
8 that's the end of the inquiry.

9 We take that approach to be consistent
10 with the approach described by Justice Kavanaugh
11 in his dissent in Heller II. I think the one
12 place where we might differ from him a little
13 bit is that we think there may come a point,
14 especially as -- when courts confront new
15 regulations, where history gives out, where it's
16 not possible to draw those historical analogies
17 anymore.

18 And at that point, our suggestion is
19 that the way to be faithful to history and
20 tradition is to look to the broader method that
21 you find in that history and tradition. And the
22 method that we find in a half dozen or so cases
23 from the mid-1800s that we cite is to ask
24 whether the law is a reasonable regulation. And
25 as we explained in our brief, we think that the

1 modern judicial method that is most faithful to
2 that approach is a form of intermediate
3 scrutiny.

4 JUSTICE GORSUCH: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Kavanaugh.

7 JUSTICE KAVANAUGH: Thank you.

8 Mr. Fletcher, appreciate your focus on
9 history and tradition and want to explore that
10 and get your thoughts on one thing. As you say,
11 there is a history and tradition, and it exists
12 to the present day, of permitting regimes. And
13 so the issue before us will have effects, but
14 it's a narrow legal issue of "shall issue"
15 versus "may issue." And it'll have substantial
16 effects, but there is a tradition of permitting
17 regimes.

18 But how do we think about, do you
19 think, kind of a separate tradition that the
20 Chief Justice and others have referred to in our
21 constitutional law of concern about too much
22 discretion in exercise of authority over
23 constitutional rights and that too much
24 discretion can lead to all sorts of problems, as
25 our history shows?

1 So you've got the tradition of
2 permitting, but how -- how do we think about,
3 fold in, just a general concern about too much
4 discretion?

5 MR. FLETCHER: So I -- I appreciate
6 that concern, and I think here's how I would
7 think about it.

8 First, I would say you -- there is a
9 substantial history of discretion in this
10 particular area, starting out with juries in the
11 Texas and West Virginia type regimes that I
12 talked about now moving into permitting
13 officers. And I think that's inherent in any
14 system if you say a permit is going to be
15 conditioned upon a showing that you have a
16 genuine, a specific need for self-defense, then
17 someone's got to make the decision about whether
18 or not you've made that showing. New York has
19 decided it's best to do that by delegating the
20 authority to local officers, local judges, who
21 are most familiar with local conditions.

22 I do appreciate the concern about
23 discretion, and I think, if the Court were to
24 conclude that some sort of good cause sort of
25 self-defense-based exception is -- is required,

1 then the Court might conclude that some more
2 predictable or stringent or prescriptive
3 guidelines are required, that you can't have
4 that much discretion if the Court concludes that
5 that sort of good cause exception is actually
6 constitutionally required.

7 JUSTICE KAVANAUGH: Thank you.
8 Appreciate it.

9 CHIEF JUSTICE ROBERTS: Justice
10 Barrett?

11 JUSTICE BARRETT: No.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Rebuttal, Mr. Clement?

15 REBUTTAL ARGUMENT OF PAUL D. CLEMENT
16 ON BEHALF OF THE PETITIONERS

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

19 First of all, I want to highlight that
20 when the government was asked for its interest
21 behind this permitting regime, it said that if
22 it went to a different regime, it would multiply
23 the number of firearms in circulation.

24 In a country with the Second Amendment
25 as a fundamental right, simply having more

1 firearms cannot be a problem and can't be a
2 government interest just to put a cap on the --
3 the number of firearms.

4 And that just underscores how
5 completely non-tailored this law is. It might
6 be well tailored to keeping the number of
7 handguns down, but it's not well tailored to
8 identifying people who pose a particular risk or
9 anything else because it deprives a typical New
10 Yorker of their right to carry for self-defense.

11 The second point I want to make is
12 just about population density. There's been a
13 lot of discussion about that, but it's very much
14 a double-edged sword because, when there's
15 population density, that's an awful lot of
16 people who all have Second Amendment rights.
17 And so you can't just simply say we're not going
18 to have Second Amendment rights in the areas
19 where there's dense population.

20 And I would say here experience does
21 tell you a lot. By my count, seven of the 10
22 largest cities in America, measured by
23 population, are in shall issue jurisdictions.
24 And I've mentioned them, cities like Phoenix,
25 Chicago, Houston. These are large cities where

1 it hasn't been a problem.

2 If you want to look at the empirical
3 evidence -- and I know, Justice Breyer, you
4 asked about this - please also look at the
5 English brief on the top side because it's a
6 very rigorous statistical analysis that shows
7 that, as a matter of actually doing statistics
8 right, there's no difference here and what --
9 the only difference you really see is that
10 people who have a handgun for self-defense end
11 up with a better outcome. They're not shot.
12 They're -- they're not made victims. But the
13 English brief, I think, is really worth taking a
14 look at.

15 I want to say a quick word just about
16 permitting. There may be limiting permitting in
17 other contexts, like parade permitting, but I'm
18 not aware of any context whatsoever where, in
19 order to get a permit, you have to show that you
20 have a particularly good need to exercise your
21 constitutional right. And I think that is the
22 absolute central defect with New York's regime
23 here.

24 I want to say a quick word about the
25 history that my friend from the Solicitor

1 General's Office emphasized. It's telling that
2 his first example is Tennessee. If you look at
3 the Heller decision, Tennessee is a problematic
4 state in terms of its history. The court gave
5 -- that Tennessee Supreme Court first came out
6 with the Aymette decision, which the majority
7 opinion in Heller criticized. It then came out
8 with the Simpson decision and the Andrews
9 decision, both of which protected Second
10 Amendment rights, and the majority opinion in
11 Heller praised those decisions at the same time
12 that it criticized Aymette. So, to the extent
13 there was an 1821 statute, I would put it in the
14 same box as the Aymette decision.

15 Texas, which is their next example and
16 their only other 19th Century example if I heard
17 my friend correctly, is even more problematic to
18 rely on because Texas had a specific
19 constitutional amendment that was similar to the
20 English Bill of Rights but differed from the
21 Second Amendment, that allowed the legislature
22 to put specific restrictions on the right. So
23 relying on 1871 Texas is highly problematic from
24 a historical perspective.

25 And that just leaves them with 20th

1 Century examples, which we concede, but, by that
2 point, the collective rights view of the Second
3 Amendment was everywhere.

4 Let me finish just by saying there's
5 absolutely no need for a remand here. There are
6 interesting statistics that could be developed,
7 but none of them are relevant to the two central
8 defects in this regime.

9 First, that in order to exercise a
10 constitutional right that New York is willing to
11 concede extends outside the home, you have to
12 show that you have an atypical need to exercise
13 the right that distinguishes you from the
14 general community. That describes a privilege.
15 It does not describe a constitutional right.
16 That is a sufficient basis to invalidate the
17 law.

18 But then there's the discretion, and
19 the discretion here has real-world costs. If
20 you want to look at it, look at the amicus brief
21 in our support by the Bronx Public Defenders and
22 other public defenders. The cost of this kind
23 of discretion is that people are charged with
24 violent crimes even though they have no private
25 -- no prior record just because they are trying

1 to exercise their constitutional right to
2 self-defense.

3 And if you want to know how this
4 impacts policing, one of the ways essentially
5 making everybody in New York City a presumptive
6 person who is unlawfully carrying is that leads
7 to stopping and frisking everybody.

8 The framers, I think, had a different
9 vision of the Fourth Amendment and the Second
10 Amendment, and that is that individuals get to
11 make their decision about whether or not they
12 want to carry a firearm outside the home for
13 self-defense.

14 In 43 states, people are able to do
15 that. It has not -- it doesn't mean everybody
16 ends up carrying, and it doesn't mean that those
17 43 states have any more problems with violent
18 crimes or anything else than the six or seven
19 jurisdictions that don't honor the text, the
20 history of the Second Amendment, and Heller.

21 Thank you, Your Honors.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel. The case is submitted.

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

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