No. 16-7025

In the United States Court of Appeals for the District of Columbia Circuit

BRIAN WRENN, et al.,
Plaintiffs-Appellants,

v.

DISTRICT OF COLUMBIA, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
CASE NO. 1:15-CV-162-CKK (THE HON. COLLEEN KOLLAR-KOTELLY)

BRIEF OF AMICUS CURIAE EVERYTOWN FOR GUN SAFETY IN SUPPORT OF REHEARING EN BANC

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COMBINED CERTIFICATES

Certificate as to Parties, Rulings, and Related Cases

A. Parties and Amici. As far as amicus is aware, all parties, intervenors, and amici appearing before the district court and this Court are listed in the Brief for Appellees.

B. Rulings under Review. References to the rulings under review appear in the Brief for Appellees.

C. Related Cases. The District of Columbia and Metropolitan Police Department Chief Peter Newsham have filed identical petitions for rehearing en banc arising out of two related cases in this Court: *Wrenn v. District of Columbia*, No. 16-7025, and *Grace v. District of Columbia*, No. 16-7067.

Certificate of Amicus Curiae Under Circuit Rule 29(d)

Amicus Everytown for Gun Safety, the nation's largest gun-violence-prevention organization, has devoted substantial resources to researching historical firearms legislation. This amicus brief is necessary to present the Court with relevant, overlooked historical materials showing that the District of Columbia statute at issue carries forward a seven-century Anglo-American tradition of restrictions on the public carry of firearms. No other amicus brief contains this material.

Corporate Disclosure Statement

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

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INTRODUCTION AND INTEREST OF AMICUS CURIAE[1]

The importance of these cases is hard to overstate. By a two-to-one vote, a single panel of this Court has deprived the District of Columbia of its power to regulate the public carrying of guns on the streets of Washington, DC. In so doing, the panel has alienated this Court from other circuits' unanimous view of the Second Amendment, disregarded the informed judgment of the people's representatives on a matter of vital public safety, and increased the risk of deadly violence in the nation's capital. And the panel has done all this without even engaging in the historical analysis of the Second Amendment's scope required by *District of Columbia v. Heller*, 554 U.S. 570 (2008). For all these reasons, as the District's petition demonstrates, the panel's decision cries out for en banc review.

To those reasons, amicus Everytown for Gun Safety adds one more. In *Grace v. District of Columbia,* Everytown's brief (available online at https://goo.gl/Mjfcus) surveyed the robust seven-century Anglo-American tradition of restricting public carry in populated areas—a tradition that includes many early American laws that were *more* restrictive than the District's. And, in *Wrenn v. District of Columbia*, Everytown's brief (available at https://goo.gl/gbNCCQ) offered a detailed response to the challengers' primary historical arguments.

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[1] All parties consent to the filing of this brief, and no counsel for any party authored it in whole or part. Apart from amicus curiae, no person contributed money intended to fund the brief's preparation and submission.

Drawing upon these previous submissions, Everytown files this brief because the panel's decision to "sidestep the historical debate" (Panel Op. 17) not only contradicts *Heller* but also breaks with centuries of Anglo-American history. This history shows that, from our nation's founding to its reconstruction, many states and cities enacted laws prohibiting carrying, or requiring good cause to carry, a firearm in populated public places. The handful of contrary 19th-century cases on which the panel relies (Panel Op. 12) emanate from the slaveholding South—a part of the country that took an outlier approach to public carry, and that included wide variability even within that region.

The panel's reading of the Second Amendment would render dozens of state and local laws—enacted both before and after the Fourteenth Amendment's ratification—unconstitutional. And yet neither the plaintiffs nor the panel can identify a single historical example of a successful challenge to a good-cause requirement like the District's—much less a challenge to a requirement applying exclusively to an area as highly urbanized as modern-day Washington. This Court should grant the petition and bring this circuit's law into conformity with the uniform national consensus.

ARGUMENT

I. The panel's failure to engage in the required historical analysis is inconsistent with precedent of both the Supreme Court and this Court and alone justifies en banc review.

The question here is not whether the Second Amendment— which, under *Heller*, protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home," 554 U.S. at 635—applies outside the home. Rather, it is whether the District's public-carry regime is consistent with the Amendment's historical protections. To answer that question, this Court uses "a two-step approach," first asking whether the law "impinges upon a right protected by the Second Amendment," and then, "if it does," whether the law "passes muster under the appropriate level of constitutional scrutiny." *Heller v. District of Columbia*, 670 F.3d 1244, 1252 (D.C. Cir. 2011) (*Heller II*). Although the District's law would satisfy scrutiny, the analysis needn't go that far: This law survives at step one.

The panel, however, disregarded the two-step framework entirely and abdicated its duty to conduct any threshold historical analysis of its own. Instead, concluding that the historical arguments each have an "equal and opposite counterpoint," the panel threw up its hands and decided that it could "sidestep the historical debate" solely by drawing inferences from *Heller*. Panel Op. 15-16.

That approach cannot be reconciled with *Heller* itself. As *Heller* shows, the main method for determining whether a law burdens the Second Amendment right

is to assess the law based on a "historical understanding of the scope of the right," *Heller*, 554 U.S. at 625, and, among other things, to consider whether the law is one of the "prohibitions 'that have been historically unprotected,'" *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014), *cert. denied* 135 S. Ct. 2799 (2015). *Heller* identified several "examples" of such regulations, including "prohibitions on the possession of firearms by felons and the mentally ill" and "laws imposing conditions and qualifications on the commercial sale of arms," which are "presum[ed]" not to violate the Amendment because of their historical acceptance as consistent with its protections. 554 U.S. at 626-27 & n.26.

Such "longstanding" laws, the Court explained, are treated as tradition-based "exceptions" by virtue of their "historical justifications." *Id.* at 635. Or put in this Court's words: Longstanding laws "are presumed not to burden conduct within the scope of the Second Amendment" because they have "long been accepted by the public" as consistent with its protections. *Heller II*, 670 F.3d at 1253. The only way to determine what falls into the category of "longstanding" regulations is to actually get into the "dense historical weeds." Panel Op. 14.

II. The panel's decision breaks with, and fails to meaningfully confront, centuries of Anglo-American history.

A. English history. If any law is longstanding under *Heller*, it is the District's public-carry law. For centuries, English and American laws have restricted public carry in populated areas, much like (and indeed *more* than) the

District does today. The Statute of Northampton, first enacted in 1328, trained its prohibition on "fairs," "markets," and other populous places, 2 Edw. 3, 258, ch. 3 (1328), while a royal declaration from a century later specifically directed "the mayor and sheriffs of London" to enforce the prohibition against "any man of whatsoever estate or condition [who] go[es] armed within the city and suburbs." 3 *Calendar of the Close Rolls*, *Henry IV* 485 (Jan. 30, 1409). One century after that, Queen Elizabeth spoke of the need to focus enforcement in the areas where the "great multitude of people do live, reside, and trav[el]." Charles, *The Faces of the Second Amendment Outside the Home*, 60 Clev. St. L. Rev. 1, 21 (2012); *see Peruta v. San Diego*, 824 F.3d 919, 929-932 (9th Cir. 2016) (en banc) (recounting history of English public-carry prohibitions).

Likening Northampton and other English sources to medieval literature studied only for its literary value, the panel concluded that they were "not decisive here" because, in its view, the self-defense right applied "more broadly" by the time of the Constitution's ratification. Panel Op. 14-15. But that approach contradicts *Heller*, which drew extensively on English history and remarked that "it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right." 554 U.S. at 592.

The panel also skipped over the most contemporaneous English history. In the late 17th century, William and Mary enshrined the right to have arms in the

Declaration of Rights, later codified in the English Bill of Rights in 1689. This right—which "has long been understood to be the predecessor to our Second Amendment," *id.* at 593—ensured that subjects "may have arms for their defence suitable to their conditions, and as allowed by law." 1 W. & M. st. 2. ch. 2. As Blackstone later wrote, this right was understood to be subject to "due restrictions." 1 Blackstone, *Commentaries on the Laws of England* 144 (1769). One of these was Northampton's prohibition on public carry, which remained in effect *after* the right to bear arms was codified in 1689. *See* 4 Blackstone, *Commentaries* 148–49; Gardiner, *The Compleat Constable* 18 (1692); *Rex v. Edward Mullins* (K.B. 1751), https://goo.gl/oeSAhR (reporting a conviction under the statute in 1751).

B. American history. The panel likewise gave short shrift to the long history of laws limiting public-carry in America. Around the time that the English Bill of Rights was adopted, America began its own long history of regulation "limiting gun use for public safety reasons"—especially public carry in populated areas. Meltzer, *Open Carry for All*, 123 Yale L.J. 1486, 1523 (2014). As against this history, "there are no examples from the Founding era of anyone espousing the concept of a general right to carry." *Id.*

From 1795 to 1870, at least twelve states and the District of Columbia incorporated a broad Northampton-style public-carry prohibition into their laws at some point. *See* Everytown *Grace* Br. 11-13, 18-19 & n.12. By 1890, New Mexico,

Wyoming, Idaho, Kansas, and Arizona had all enacted laws broadly prohibiting public carry in cities, towns, and villages. *Id.* at 19-20. And numerous local governments imposed similar restrictions around the same time—from New Haven to Nashville, Dallas to Los Angeles, and even in Wild West towns like Dodge City and Tombstone. *Id.* at 20 n.13.

These laws illustrate "how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century." *Heller*, 554 U.S. at 605. Because they help "determine *the public understanding* of a legal text in the period after its enactment or ratification," they are "a critical tool of constitutional interpretation." *Id.* And they unmistakably show that large swaths of the American public considered public-carry prohibitions to be permissible in populated areas and consonant with the right to bear arms. Although not all states and cities enacted such laws in the 19th century, "the Constitution establishes a federal republic where local differences are cherished as elements of liberty, rather than eliminated in a search for national uniformity." *Friedman v. Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015) (Easterbrook, J.).

Despite this robust and longstanding history of prohibition, the District has chosen to adopt a more permissive public-carry regime—one that has its own longstanding historical pedigree: allowing public carry only by those with "good reason" to do so. In the mid-19th century, nine states enacted laws containing such

a requirement. *See* Everytown *Grace* Br. 14-16, 18-19. Virginia, for example, made it unlawful for anyone to "go armed" with a gun "without reasonable cause to fear an assault or other injury." 1847 Va. Laws 129, § 16.

The panel's contrary account of American history ignores all this and relies heavily on a handful of 19th-century cases from the South. Panel Op. 12-13.[2] But, as we explained in our *Grace* brief (at 16-18), some states in the South adopted a more permissive approach to public carry than the rest of the country, generally allowing white citizens to carry firearms in public so long as the firearms were not concealed. *See generally* Cramer, *Concealed Weapon Laws of the Early Republic* (1999). This alternative (and minority) tradition owes itself to the South's peculiar history and the prominent institution of slavery. *See generally* Ruben & Cornell, 125 Yale L.J. Forum 121 (2015). It reflects "a time, place, and culture where slavery, honor, violence, and the public carrying of weapons were intertwined," *id.* at 125—a divergent set of societal norms that shaped cases and legislation alike.

But even if this Court were to focus on just the South, and to ignore the rest of the country, it would see that courts and legislatures throughout the region took

[2] Alongside these Southern cases, the panel cited just one very revealing Northern case: *Johnson v. Tompkins*, 13 F. Cas. 840, 852 (C.C. Pa. 1833). But this was a jury charge, and not a case about guns at all. Instead, it was an intentional tort suit against officials who allegedly *interfered with the recovery of a slave*. The charge states that the slave "Jack was the property of the plaintiff," who had "a right to secure him from escape" and "carry arms in defence of his property or person." *Id.* This sort of analysis has no place in modern American constitutional law.

varying stances toward public carry. *See* Everytown *Grace* Br. 18. Although a few pre-Civil-War decisions interpreted state constitutions in a way that can be read to support a right to carry openly, even in populated public places without good cause, other cases held the opposite. The Texas Supreme Court, for instance, twice upheld that state's good-cause requirement. *English v. State*, 35 Tex. 473 (1871); *State v. Duke*, 42 Tex. 455 (1874). The court explained that the law thus made "all necessary exceptions," and noted that it would be "little short of ridiculous" for a citizen to "claim the right to carry" a pistol in "place[s] where ladies and gentlemen are congregated together." *English*, 35 Tex. at 477-79. Further, the court observed, the good-cause requirement was "not peculiar to our own state," for nearly "every one of the states of this Union ha[d] a similar law upon their statute books," and many had laws that were "more rigorous than the act under consideration." *Id.* at 479.

The District of Columbia has not violated our Constitution by continuing this tradition. Nor have the other states that currently have similar laws. Although such a lengthy historical pedigree is not needed to satisfy the Second Amendment, it is sufficient to do so. Whatever else the Second Amendment permits, it surely allows a law that traces back to 14th-century England, has been accepted in America for well over "a century in diverse states and cities," and is "now applicable to more than one fourth of the Nation by population." *Heller II*, 670

F.3d at 1254. Isolated snippets from a few state-court decisions issued decades after the Framing cannot trump the considered judgments of countless courts and legislatures throughout our nation's history.

III. The upshot of the panel decision is that dozens of state and local laws—enacted both before and after the Fourteenth Amendment's ratification—were all unconstitutional.

The panel's decision is not only wrong but extreme. To appreciate how extreme, consider that the panel decision struck down a law that was once championed by the National Rifle Association, that was twice passed by Congress to apply to the District of Columbia, and that was endorsed by the National Conference of Commissioners on Uniform State Laws as a national model for firearms legislation. *See* Everytown *Wrenn* Br. 16.

The panel, however, failed to confront the implication of its decision: that *dozens* of state and local laws—passed both before and after ratification of the Fourteenth Amendment—were unconstitutional. *See id.* at 23-24. As discussed above and in our briefing at the panel stage, during and after Reconstruction, several legislatures enacted criminal prohibitions on public carry in cities and other populated areas, and numerous cities enacted local ordinances prohibiting the public carrying of guns within city limits, ranging from Washington, D.C. itself, to New Haven, San Antonio, and Los Angeles. *See* Everytown *Grace* Br. 20-21 & n.13. Adding up the Northampton-style, good-cause, and post-Fourteenth-Amendment

laws described above and in our panel briefing, 20 states and territories had enacted public-carry laws by the turn of the century that were at least as restrictive as the District's law here. And several more did so in the early part of the 20th century. *See* Everytown *Wrenn* Br. 23-24.

What the panel majority and the challengers do not deny is that *all* of these well-recognized 19th-century laws—both state and local—would have been unconstitutional under their reading of the Second Amendment. This Court should reject that untenable position, grant rehearing en banc, and uphold the District's law as a longstanding constitutional regulation under *Heller*.

CONCLUSION

The petition for rehearing en banc should be granted.

Respectfully submitted,

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August 31, 2017

CERTIFICATE OF COMPLIANCE WITH RULE 32(g)(1)

I hereby certify that my word processing program, Microsoft Word, counted 2,592 words in the foregoing brief, exclusive of the portions excluded by Rule 32(g)(1).

/s/ Deepak Gupta
Deepak Gupta

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2017, I electronically filed the foregoing Brief of Amicus Curiae Everytown for Gun Safety in Support of Rehearing en banc with the Clerk of the Court of the U.S. Court of Appeals for the D.C. Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

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