No. 18-280

In the
Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., *et al.*,
Petitioners,

v.

CITY OF NEW YORK, NEW YORK, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE AMERICAN CIVIL RIGHTS UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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May 14, 2019

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QUESTION PRESENTED

Whether the City's ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the Commerce Clause, and the constitutional right to travel.

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INTEREST OF *AMICUS CURIAE*[1]

The American Civil Rights Union (ACRU) is a nonpartisan 501(c)(3) nonprofit public-policy organization dedicated to protecting constitutional liberty. Incorporated in Washington, D.C., the ACRU is dedicated to promoting originalism: that in the United States' democratic republic, the only legitimate way for politically unaccountable federal judges to interpret the law is in accordance with the original public meaning of its terms. Courts ascertain the original meaning of the Constitution and lesser laws by consulting the text, structure, and history of the document to determine the meaning that ordinary American citizens of reasonable education and public awareness would have understood those terms to mean at the time they were democratically adopted.

The ACRU Policy Board sets the policy priorities of the organization. Members include former Attorney General Edwin Meese III, Assistant Attorney General William Bradford Reynolds, Assistant Attorney General Charles Cooper, and former U.S. Ambassador J. Kenneth Blackwell.

The ACRU has championed the Second Amendment, a right that has not yet been effectively recognized as having the importance and respect afforded to the First Amendment and other widely exercised constitutional rights. After *Heller* and

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[1] All parties have consented to the filing of this brief, and were timely notified. No party or counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* contributed any money for its preparation or submission.

McDonald, one of the most basic questions the judiciary must answer regarding this fundamental right is how it is exercised beyond the narrow confines of a citizen's home.

SUMMARY OF ARGUMENT

This Court commands that the Second Amendment must not be treated as second-class constitutional right, but that is precisely what the Second Circuit here—and other circuits as well—have done with a toothless form of judicial review when deciding Second Amendment cases. They call it intermediate scrutiny, but it is not what this Court refers to by that name.

The Second Circuit below upheld New York City's law, which forbids a law-abiding citizen from exercising the right to bear arms at all outside the confines of his home. This is not regulation of a right. It is instead the abolition of that right, done under the guise of regulation.

The court declared that it reached this conclusion after applying what it called intermediate scrutiny. Instead, it is a form of the "interest balancing" advocated by Justice Breyer in *Heller*. Unfortunately for that approach, Justice Breyer's opinion was a dissenting opinion. But a person reading the Second Circuit's decision below would have thought that Justice Breyer's opinion was controlling, and knowledgable scholars have published careful observations looking at prior decisions from the court below here, and other circuits, concluding that one of *Heller*'s dissenting opinions is being treated as the majority opinion.

At least three other circuits have taken the same approach as the Second Circuit. The Third Circuit upheld a New Jersey law violating Second Amendment rights outside the home, albeit in a less-absolute manner. The Fourth Circuit did likewise regarding a Maryland law. Recently, the First Circuit followed suit to uphold a local variation of Massachusetts law. And prior to this case, the Second Circuit upheld a New York statewide law functionally identical to the ones upheld by these other circuits. Each court claims to be applying intermediate scrutiny. But instead of misapplying a robust rule, they each instead adopt a deferential rule of decision that does not meet this Court's criteria for heightened scrutiny.

Most laws are subject to rational-basis review, under which courts presume they are valid, and uphold them if they are rationally related to any legitimate public interest. On the other end of the scale is strict scrutiny. Between the two is intermediate scrutiny. Under this middle standard, the law is presumed invalid, and the government must present persuasive evidence that the law is substantially related to an important government interest. This Court's precedents show intermediate scrutiny to be a rigorous standard that many statutes do not satisfy.

That is not what the Second Circuit did here, nor is it what three other circuits are doing. They explicitly declare that they are deferring to the legislature, and appear to presume the challenged laws to be valid. These courts effectively place the burden on the plaintiffs to prove their case. In the end, the courts uphold these statutes, even though the government

never explains how disarming law-abiding citizens in public is substantially related to advancing the important state interest in public safety. In short, these courts are applying de facto rational-basis review.

The Sixth Circuit illustrates this same confusion over the proper rule of decision in a recent *en banc* decision. While a majority of the judges in the Sixth Circuit concluded that intermediate scrutiny should apply in a Second Amendment case there, they divided over whether that demanding standard was met. What is more, several judges declined to weigh in on what standard of review should apply at all in such cases. Yet another judge insisted the court should apply strict scrutiny. And still another judge wrote that this Court's precedents require applying the original public meaning of the Second Amendment to the restriction in question.

The circuits are divided over how to decide cases involving the right to bear arms. For those that believe the traditional levels of scrutiny apply, they are divided over which one to apply. And even among those that agree that intermediate scrutiny should apply to cases like the present case, involving bearing arms in public, those that have upheld prohibitions do so applying a minimal standard of review that this Court has held does not apply to enumerated rights.

While this Court need not resolve all of those questions in this case, it should make clear that intermediate scrutiny is far more demanding than the Second Circuit makes it look, and that intermediate scrutiny is not the proper standard for a categorical

ban on an enumerated constitutional right—here, the right to *bear* arms, not merely keep them.

Because the purpose of licensing schemes is to regulate the exercise of a right, a system that satisfies intermediate scrutiny should facilitate the right's exercise, not discourage it. For example, a parade permit regulates time, place, and manner to enable the parade in question, not make it so difficult that the organizers call it off. New York City's firearm permits are designed to thwart the Second Amendment, not facilitate its exercise.

This Court should reverse.

ARGUMENT

I. NEW YORK CITY'S LAW BARS THE EXERCISE OF THE SECOND AMENDMENT OUTSIDE THE HOME UNDER THE GUISE OF REGULATING THE EXERCISE.

The Second Amendment guarantees "the right to keep *and bear* arms." U.S. CONST. amend. II (emphasis added). New York City has decided that American citizens living within its borders cannot exercise the Second Amendment in any meaningful sense when they go beyond the curtilage of their primary residence. The challenged enactment at issue here, 38 RCNY § 5-23 *et al.*, purports to be a regulation of firearm ownership, but is actually a functional ban on firearm ownership outside the home.

The fact that a citizen is permitted to practice at a city-approved firing range does not qualify that assertion. A person seeking to practice with a firearm

to become proficient in its use for with the purpose of self-defense within the home cannot engage in such practice within the confines of that home. A citizen attempting to do so could risk prosecution under New York statutes regarding the discharge of firearms. *See, e.g.*, N.Y. PENAL CODE § 265.35. Therefore it is necessary to carry out that component of the home-bound exercise of the Second Amendment at the alternative location of the firing range, thereby functionally rendering those ranges as a quasi-extension of the citizen's home for the short time period in which the citizen is training with his firearm, rather than a truly independent extra-residential location for exercising the Second Amendment. The entire endeavor is about being proficient with a firearm for purposes of home-defense only.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Court held that the Second Amendment right to keep and bear arms is a right held by private American citizens. *Id.* at 595. In *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Court held that the scope of that right applies to States and their political subdivisions, *id.* at 750, and that the contours of the right against the States are coextensive and coterminous with the contours a citizen can assert against the federal government, *id.* at 778–80. But even though nothing about those core holdings implicitly apply only within the home, the home-bound facts of both cases left wiggle room for the lower courts, leading to erroneous decisions like the one below here.

The government may not eviscerate an enumerated right under the guise of regulation. *See Heller*, 554

U.S. at 629. Yet that is precisely what New York City has done. The Second Circuit's rationale for employing intermediate scrutiny here is that it characterized New York City's law as analogous to a regulation on the time, place, or manner of speech. *See* Pet. App. 10–15; *see also id.* at 64–67 (district court opinion). This line of Second Circuit precedent—which began in earnest in 2012 and is discussed later in Part III—purports to follow this Court's lead regarding judicial review of such content-neutral speech regulations under the First Amendment.

But that premise is false at a foundational level when the issue is correctly framed as whether a citizen can bear arms outside the home. The City's law is not a regulation of the "time" a citizen can exercise the Second Amendment outside his home, because the City's answer is "never." Nor is it a regulation of the "place" where the right can be exercised outside the home, because the answer is "nowhere." Nor is it a regulation of the "manner" of which a citizen can exercise the right to bear arms, because the answer is "none." At bottom, after this Court settled the matter beyond dispute that a citizen can exercise the Second Amendment inside that citizen's home, New York City has decided that the Second Amendment does not apply outside the home in any meaningful sense.

II. *HELLER* REJECTED THE SECOND CIRCUIT'S APPROACH HERE, WHICH IS ROOTED IN A *HELLER* DISSENTING OPINION.

This Court need not resolve in this case the broad question of when—or whether—courts should employ traditional tiers of judicial scrutiny in Second Amendment cases. But the Court should take the opportunity to clearly hold that intermediate scrutiny does *not* apply in a case like this.

Reading the Second Circuit's opinion below, one would think that Justice Breyer's dissent in *Heller*, rather than Justice Scalia's opinion for the Court in *Heller*, is controlling. *Heller* rejected the contention that courts should apply rational-basis review for firearms regulations. *Heller*, 554 U.S. at 628 n.27. Justice Breyer's response was to advocate a means-ends scrutiny whereby a court determines if a public interest is sufficiently important, and balancing that against the purported rights of the individual. *See id.* at 689–90 (Breyer, J., dissenting). As seen shortly in Part III here, that is one way to describe the concept of intermediate scrutiny.

Yet several lower courts flocked to such an intermediate approach. So much so, that only four years after *Heller*, one gun-control supporter hailed the Second Amendment's trajectory in the lower courts as one where Justice Breyer's dissent was becoming the controlling rule. *See* Allen Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703 (2012).

The professor begins: "History shows that one can lose significant battles but still win the war." *Id.* at 704. He noted that *Heller* and *McDonald* were only the beginning of this jurisprudential area, and could in the final analysis be of only limited significance. "Although the Supreme Court's rulings in *Heller* and *McDonald* naturally garnered enormous attention, this third battle, playing out in the lower courts, ultimately is of even greater importance." *Id.* at 706. Instead, "lower court's decisions strongly reflect . . . the dissenting opinions that Justice Stephen Breyer wrote in *Heller* and *McDonald*." *Id.* at 707.

Such "interest-balancing" is so elastic and easily manipulated that it is "no constitutional guarantee at all." *Heller*, 554 U.S. at 634. The Second Circuit's decision here is the proof of this Court's pronouncement, as the decision below completely strips millions of American citizens of their right to bear arms as they cross the threshold of their homes into the rest of their daily lives.

"The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon." *Heller*, 554 U.S. at 634. The New York City's law is inconsistent with the enumeration of the right to keep and bear arms codified in the Second Amendment. The Court must strike down the City's enactment.

III. THE SECOND CIRCUIT IS ONE OF FOUR CIRCUITS INVOKING "INTERMEDIATE SCRUTINY," BUT ACTUALLY APPLYING RATIONAL-BASIS REVIEW.

A. The First, Second, Third, and Fourth Circuits invented a novel form of judicial review for the Second Amendment and called it "intermediate scrutiny."

1. No court may "treat the right recognized in *Heller* as a second-class right," afforded less stature than other provisions in the Bill of Rights. *McDonald*, 561 U.S. at 780 (opinion of Alito, J.). As noted in Part II above, *Heller* rejected the idea that gun control laws are subject to rational-basis review. 554 U.S. at 629 n.27 (holding that subjecting burdens on the Second Amendment merely to a rational-basis test "would be redundant with the separate constitutional prohibitions on irrational laws"). Looking to more demanding forms of judicial review, heightened scrutiny for burdens on enumerated rights often comes in two forms: strict and intermediate. *See* Kenneth A. Klukowski, *Making Second Amendment Law with First Amendment Rules: The Five-Tier Free Speech Framework and Public Forum Doctrine in Second Amendment Jurisprudence*, 93 NEB. L. REV. 429, 463 (2014). Four circuits have gravitated toward the latter to uphold "good-cause" permitting laws, of which New York's version became the foundation upon which New York City enacted the law challenged in this case.

2. The Second Circuit here applied what it called "intermediate scrutiny" to laws forbidding law-abiding Americans from exercising their Second Amendment

right to bear arms outside the home. But what it actually applied is a weak medicine unrecognizable as any form of heightened scrutiny.

The court below here began applying a faux form of rigorous judicial scrutiny in *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012). *Kachalsky* was a challenge to New York's statewide concealed-carry licensing law, which required "proper cause" for obtaining a permit. *Id.* at 84. Earlier that year, the Second Circuit held that "heightened scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes)." *United States v. DeCastro*, 682 F.3d 160, 166 (2d Cir. 2012). *Kachalsky* acknowledged that *Heller* rejected rational-basis review for burdens on the Second Amendment. *Kachalsky*, 701 F.3d at 99. Consequently, *Kachalsky* acknowledged that heightened scrutiny is appropriate for good-cause permit restrictions such as New York's. *Id.* at 93.

3. New Jersey requires a citizen who wishes to carry a firearm outside the home to get a permit. N.J. STAT. ANN. §§ 2C:39-5(b), 2C:58-4. One of the criteria for a permit is that the applicant must show "a justifiable need to carry a handgun," *id.* § 2C:58-4(c), meaning that he must demonstrate special threats to his safety beyond a generalized concern for self-defense, N.J. ADMIN. CODE § 13:54-2.4(d)(1).

In *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), the Third Circuit held that this requirement of showing a

special justification to carry a firearm outside the home is consistent with the Second Amendment. *Id.* at 440. A divided panel held that such a law is subject to intermediate scrutiny, under which the statute must be substantially related to an important government interest. *Id.* at 436–37.[2]

4. The Fourth Circuit was the next circuit to follow this approach for good-cause requirements in *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013). *Woollard* challenged Maryland's licensing law—needed for concealed carry, open carry, wearing, or transporting—which allows issuing a permit only for "good and substantial reason." *Id.* at 868. A generalized concern for self-defense does not constitute a "good and substantial reason." *Id.* at 870. The Fourth Circuit held that any assertion of Second Amendment rights outside the home is reviewed under intermediate scrutiny rather than strict scrutiny. *Id.* at 876.

5. Finally, the First Circuit adopted a similar approach in *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018). Massachusetts law allows issuing a carry permit if, *inter alia*, "the applicant has good reason to fear injury . . . or for any other good reason, including . . . use in sport or target practice." MASS. GEN. LAWS

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[2] The statute challenged in *Drake* is also the basis for a petition for certiorari currently pending before this Court. *See Rogers v. Grewal*, No. 18-824. If this Court invalidates the New York City law in this case, the Court should next consider the issue raised in *Rogers* regarding the breadth of the Second Amendment outside the home.

ch. 140, § 131(d).[3] The statute thus requires "that the applicant must identify a specific need, that is, a need above and beyond a generalized desire to be safe." *Gould*, 907 F.3d at 663. For the *Gould* plaintiffs, each licensing authority (i.e., the municipal chief of police) interprets the statute as requiring an applicant's "reason to fear injury to himself or his property that distinguishes him from the general population." *Id.* at 664. Massachusetts law "allows (but does not compel) local licensing authorities to issue licenses." *Id.* at 673.

The First Circuit held that "the core Second Amendment right is limited to self-defense within the home." *Id.* at 671. "Societal considerations also suggest that the public carriage of firearms, even for purposes of self-defense, should be regarded as falling outside the core of the Second Amendment." *Id.* It concluded a state action "that restricts the right to carry a firearm in public for self-defense will withstand a Second Amendment challenge so long as it survives intermediate scrutiny." *Id.* at 673.

6. In addition to these examples, cases where circuit courts claim they are applying intermediate scrutiny—but then breezily uphold various other forms of gun controls as satisfying a test that in other contexts truly is a rigorous standard—have become legion. *See, e.g.*, *Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 965 (9th Cir. 2014) (upholding local firearm home-storage regulations); *NRA v. BATFE*, 700 F.3d

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[3] Officials with authority to issue licenses are additionally empowered to grant some licenses that are more restrictive than others. *Gould*, 907 F.3d at 663–64 (discussing §§ 131(a), (d)).

185, 207 (5th Cir. 2012) (upholding 18 U.S.C. § 922(b)(1), prohibiting licensed firearms dealers from selling handguns to law-abiding adult citizens under age 21); *United States v. Mahin*, 668 F.3d 119, 124 (4th Cir. 2012) (upholding 18 U.S.C. § 922(g)(8), prohibiting firearms if a domestic protection order is in force); *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (upholding 18 U.S.C. § 922(g)(9), prohibiting firearms to domestic violence misdemeanants); *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (same); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (upholding 18 U.S.C. § 922(k), prohibiting firearms with removed serial numbers); *United States v. Reese*, 627 F.3d 792, 807 (10th Cir. 2010) (upholding 18 U.S.C. § 922(g)(8)); *United States v. Skoien*, 614 F.3d 638, 641–42 (7th Cir. 2010) (en banc) (18 U.S.C. § 922(g)(9)).

Space prohibits exploring each of these cases in any depth, and the list above is not exhaustive, either. Suffice it to say that this is a recurring problem that plagues—and divides—the circuits. Whether intermediate scrutiny—or other forms of ends-means analysis—are ever appropriate in Second Amendment cases, and if so, in which ones, are ubiquitous issues in cases nationwide. This Court must resolve at minimum that intermediate scrutiny has no place in cases such as this one.

B. Intermediate scrutiny is a demanding standard, unlike rational-basis review.

Three levels of scrutiny constitute widely used tiers of judicial review. Each entails a presumption, an

ends-means assessment regarding government interests and tailoring, and an evidentiary burden.

1. Courts review most laws under rational-basis review. Under that lenient standard, the challenged law is presumed valid, and the court will uphold it so long as it is rationally related to a legitimate public interest. *Heller v. Doe*, 509 U.S. 312, 319–20 (1993).

This permissive standard is exceedingly deferential to political bodies. It mandates that "it is for the legislature, not the courts, to balance the advantages and disadvantages" of possible legislation. *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 487 (1955). Courts will not invalidate laws under this standard merely for being "unwise" or "improvident." *Id.* at 488. Rather than require that the government produce evidence supporting its decision, the courts defer to legislative factfinding. *See id.* at 489. Courts allow legislators to resolve "debatable questions as to reasonableness." *Ferguson v. Skrupa*, 372 U.S. 726, 730 n.7 (1963) (internal quotation marks omitted).

2. At the high end of judicial review, courts employ strict scrutiny. Under that demanding standard, laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). The government must prove by a "strong basis in evidence" that its chosen means advances its purported objective. *See, e.g.*, *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989). The government bears the burden of proving that its action satisfies strict

scrutiny. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2377 (2018).

3. Between those two standards, courts sometimes apply intermediate scrutiny. Under this rigorous standard, the law is still presumed invalid, and will only be sustained if the government shows it to be substantially related to an important public interest. *See Craig v. Boren*, 429 U.S. 190, 197 (1976).

a. Recently the Court applied intermediate scrutiny when invalidating an abortion clinic buffer-zone law. *See McCullen v. Coakley*, 573 U.S. 464, 485, 497 (2014). The Court held the statute was a content-neutral speech restriction subject to intermediate scrutiny. *Id.* at 477.[4] *McCullen* held that ensuring public safety, along with other interests, satisfied the means component of intermediate scrutiny. *Id.* at 486–87. On the tailoring aspect, government "must not burden substantially more speech than is necessary to further the government's interests." *Id.* at 486 (internal

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[4] *McCullen* defines intermediate scrutiny as requiring the law to be "narrowly tailored to serve a significant governmental interest." *McCullen*, 573 U.S. at 486. The Second Amendment cases discussed here articulate the means-ends requirements as being substantially related to advancing important public interests. *See, e.g.*, *Heller v. District of Columbia*, 670 F.3d 1244, 1252–53 (D.C. Cir. 2011). This is generally the equal-protection formulation of intermediate scrutiny. *See, e.g.*, *Craig*, 429 U.S. at 197. But none of these cases parse this Court's case law as thereby drawing the line for intermediate scrutiny under the First Amendment in a different place than under the Equal Protection Clause. Consequently, *amicus* regards *McCullen* as a recent example intermediate scrutiny that is sufficiently analogous to that often employed in Second Amendment contexts to be useful in this case.

quotation marks omitted). While not as demanding as strict scrutiny, under intermediate scrutiny "the government may not regulate [the right] in such a manner that a substantial portion of the burden . . . does not serve to advance its goals." *Id.* (internal quotation marks omitted).

"The buffer zones burden substantially more speech than necessary to achieve the Commonwealth's asserted interests," the Court held. *Id.* at 490. The Court also noted that other statutes provided additional protections against the ills the buffer-zone law purported to address, such as statutes against assault and trespass. *Id.* at 492. *McCullen* also rejected the State's argument that case-by-case prosecutions of troublemakers are insufficient as an alternative means to advance the State's interests. *Id.* at 494.

b. The vitality of this robust scrutiny also resulted in invalidation of a males-only admissions policy at a military academy. *United States v. Virginia*, 518 U.S. 515, 534 (1996). The Court applied intermediate scrutiny, emphasizing that this rigorous standard amounts to "skeptical scrutiny of official action," and requires that the government "must demonstrate an exceedingly persuasive justification." *Id.* at 531 (internal quotation marks omitted).

When intermediate scrutiny is at bar, there is a "strong presumption" that the State's action is unconstitutional. *Id.* at 532. "The burden of justification is demanding and rests entirely on the State." *Id.* at 533. "The justification must be genuine, not hypothesized or invented *ad hoc* in response to

litigation." *Id.* The State's argument also "must not rely on overbroad generalizations." *Id.* Although not as demanding as strict scrutiny, satisfying intermediate scrutiny is a daunting challenge for the government.

c. In addition to employing means that are substantially related to important interests, the government must look for less restrictive means, because it cannot burden fundamental rights significantly more than necessary to achieve permissible goals. "Under intermediate scrutiny, the Government may employ the means of its choosing so long as the . . . regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation, *and* does not burden substantially more speech than is necessary to further that interest." *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 213–14 (1997) (internal quotation marks omitted) (emphasis added) (ellipsis in original).

Other courts of appeals show how this principle applies in Second Amendment contexts. The D.C. Circuit noted that "bans on carrying only in small pockets of the outside world (e.g., near "sensitive" sites, [*Heller*], 554 U.S. at 626–27) impose only lightly on most people's right to "bear arms" in public." *Wrenn v. District of Columbia*, 864 F.3d 650, 662 (D.C. Cir. 2017). As the Seventh Circuit explained the same concept, "When a state bans guns merely in particular places, such a public schools, a person can preserve an undiminished right of self-defense by not entering those places . . . ." *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012).

d. Although the Court has never specified the evidentiary burden the government must satisfy when applying the intermediate level of scrutiny, significant evidence must be required, because the court does not deferentially take the State at its word when heightened scrutiny is at bar.[5] That is the standard that the Second Circuit claims to apply in cases such as this, but a cursory glance at this Court's precedent shows the Second Circuit's "intermediate scrutiny" is nothing of the sort.

This Court has stated, "We have required proof by clear and convincing evidence where particularly important individual interests or rights are at stake." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983). *Heller* made clear that the right to keep *and bear* arms is such a right.

Nor can the State rely upon outdated data or other evidence that may not reveal precisely what the situation is that the government's action attempts to address. Statutes that were once appropriate to combat certain ills may no longer be necessary. Current burdens on constitutional rights "must be justified by current needs." *Shelby Cty. v. Holder*, 570 U.S. 529, 536 (2013).

The court below would thus face a high hurdle if it were truly applying intermediate scrutiny, as would the other circuits upholding good-cause carry laws under what they insist is the same standard.

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[5] The lower courts have characterized the evidentiary requirement by terms such as "sufficient probative evidence," *Danskine v. Miami Dade Fire Dep't*, 253 F.3d 1288, 1294 (11th Cir. 2001).

C. These courts are actually applying de facto rational-basis review, not intermediate scrutiny.

All of the courts discussed here—including the Second Circuit—assert that one part of intermediate scrutiny is readily satisfied by these laws because public safety is an important government interest. *Amicus* does not contest that point, because this Court has held that "ensuring public safety and order" meets the intermediate-scrutiny standard. *Schenk v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 372 (1997).

Even so, courts must not cede too much too readily on that score. For example, the Fourth Circuit previously held that "outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense." *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011). While public safety is of paramount importance, courts must not be hasty to accept such *ipse dixit* without citing to any authority, and this Court should serve as a check on these assertions to confirm that the lower courts fully justify their reasoning.

However, the court below adopted an incorrect rule on the other three elements of true intermediate scrutiny, and so this Court's review is needed to articulate the correct rule for Second Amendment cases.

1. The court presumed the challenged law to be valid, not invalid.

The Second Circuit in *Kackalsky* held, "The Supreme Court has long granted deference to legislative findings regarding matters that are beyond the competence of the courts," and that firearms regulations fit in this category. *Kachalsky*, 701 F.3d at 97. The Second Circuit concluded that New York's statute did not violate the Second Amendment because its "review of the history and tradition of firearm regulation does not 'clearly demonstrate' that limiting handgun possession in public to those who show a special need for self-protection is inconsistent with the Second Amendment." *Id.* at 101 (alterations omitted). The court claims to rest on *Turner*—discussed in Part III.B—quoting that "courts must accord substantial deference to the predictive judgments of [legislatures]." *Id.* The court fails to note that *Turner* coupled that language with the requirement that the State not burden rights more than necessary to advance permissible interests.

The other mistaken circuits commit the same error.

The Third Circuit flatly admitted that it was treating New Jersey's statute as a "presumptively lawful" restriction, citing *dictum* from *Heller*. *Drake*, 724 F.3d at 429. This Court should clarify in this case that *Heller*'s *dictum* did not reverse heightened scrutiny's presumption of invalidity.

The Fourth Circuit does the same. *Woollard* casually cast aside the challenger's arguments for why law-abiding citizens would benefit from having

handguns, claiming it "cannot substitute those views for the considered judgment of [lawmakers]." 712 F.3d at 881.

The First Circuit acknowledges that "the defendant must show" that the law satisfies intermediate scrutiny," but then likewise quotes *Turner*, and holds that "courts ought to give substantial deference" to legislatures on firearms regulations. *Gould*, 907 F.3d at 673 (internal quotation marks omitted). "This degree of deference forecloses a court from substituting its own appraisal of the fact for a reasonable appraisal made by the legislature." *Id.*

The First Circuit cites as authority *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2009). That is extraordinary. First, that case reviewed a national security matter, id. at 8, where federal power is at its zenith, *see, e.g.*, *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). Second, the Court held that the facial First Amendment claim in that case failed because it was not so much about protecting speech as it was that the statute deprived international terrorists of funding and international dispute victories to fuel their murderous activities. *Humanitarian Law Project*, 561 U.S. at 38.

The First Circuit reasoned Massachusetts' law "falls into an area in which it is the legislature's prerogative—not [the court's]—to weigh the evidence, choose among conflicting inferences, and make the necessary policy judgments." *Gould*, 907 F.3d at 676. That deference is an attribute of rational-basis review, not heightened scrutiny.

2. These circuits are requiring only a reasonable relationship to those interests, not a substantial relationship.

These courts also fail to tailor their restrictions to their important public interests. Intermediate scrutiny requires a substantial relationship, not merely a reasonable one. The Third Circuit acknowledged that "substantially related" means a "reasonable fit . . . such that the law does not burden more conduct than is reasonably necessary." *Drake*, 724 F.3d at 436. But it does discuss the fact that New Jersey never presented arguments on why disarming law-abiding citizens in public makes the public safer, nor discussed any evidence that the State considered less burdensome alternatives.

Again, the court below here fell into the same error in the case that laid the foundational precedent for this case. *Kachalsky* refers to "[t]he connection between promoting public safety and regulating handgun possession in public." 701 F.3d at 98. The Second Circuit never explains why handgun possession of a population that is mostly law-abiding is sufficiently tailored to combatting criminals' use of firearms.

3. These circuits are not requiring the government to meet the evidentiary standard intermediate scrutiny mandates.

Though even then, the evidence must still support the means the State chose to enact. The Second Circuit said in this case:

> In light of the City's evidence that the Rule was specifically created to protect public safety and to limit the presence of firearms . . . on City streets, and the dearth of evidence presented by Plaintiffs in support of their arguments that the Rule imposes substantial burdens on their protected rights, we find that the City has met its burden of showing a substantial fit between the Rule and the City's interest in promoting public safety.

Pet. App. 29. That is evidence of an attempt to limit firearms, not to limit firearms in the hands of criminals or unsafe persons. Evidence must be in support of the government's arguments regarding substantial tailoring or important interests. It cannot be evidence of impermissible objectives, like limiting the exercise of a constitutional right.

Likewise, the Third Circuit did not require the State to meet the evidentiary burden that attends true intermediate scrutiny. "New Jersey has not presented us with much evidence to show how or why its legislators arrived at its predictive judgment." *Drake*, 724 F.3d at 437. To the contrary, the Third Circuit adopted the astoundingly permissive rule that "anecdotes, . . . consensus, and simple common sense" are three bases that can constitute a sufficient evidentiary basis to satisfy intermediate scrutiny. *Id.* at 438.

The Third Circuit cavalierly added that New Jersey should not be faulted for potentially violating this constitutional right because the State had no way of knowing that the Supreme Court would someday hold

that the right to bear arms is a fundamental right applicable to the States, and therefore "refuse[d] to hold" that the lack of evidence supporting New Jersey's gun control law should imperil its validity under heightened scrutiny. *Id.* at 437–38. Such a rationale might be relevant in a habeas proceeding, *see Williams v. Taylor*, 529 U.S. 362, 413 (2000), or a qualified-immunity case, *see Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018). But it is risible to suggest the appeals court would have brushed aside purported violations of any other enumerated right with a "Who would have guessed?" excuse for a lack of supporting evidence.

Consider also the Fourth Circuit. Much of the evidence *Woollard* cited as satisfying intermediate scrutiny is data that were "adopted in 2002," but "derived without substantive change from . . . 1972." *Woollard*, 712 F.3d at 877. However, both that data and the more recent data the court cites concerns only the unlawful use of handguns by criminals. *See id.* at 877–78. None of it supports the contention that indiscriminately preventing law-abiding citizens from carrying handguns advances in any way the State's interest in public safety.

This Court should articulate a proper evidentiary standard for such cases, requiring States (or here, New York City) to carry their burden.

D. The Sixth Circuit's *Tyler* case illustrates the intractable intermediate-scrutiny problem among the circuits.

The Sixth Circuit's *en banc* decision in *Tyler v. Hilldale Cty. Sheriff's Dep't*, 837 F.3d 678 (6th Cir.

2016), illuminates the need for this Court to hold that intermediate scrutiny does not apply in this context. Clifford Tyler was a 74 year-old law-abiding citizen who had been involuntarily committed for evaluation in 1986 when he discovered that his wife had been in an adulterous affair and abandoned him and their children, taking the family's money with her. *Id.* at 683. He received a clean bill of health, continued life as a good citizen, employee, and father, but because of his moment of personal distress was unable to own a firearm under 18 U.S.C. § 922(g)(4), and Michigan, where he lived, never developed the review process authorized by federal statute to seek restoration of his gun rights. *Id.* at 684–85.

The *en banc* court held that § 922(g)(4) violated the Second Amendment as applied to Tyler's circumstances. *Id.* at 699. Seven judges opined that the statute as applied failed intermediate scrutiny. *Id.* Judge Sutton concurred, writing for other judges that it was un necessary to determine the applicable level of scrutiny in that case. *Id.* at 710 (Sutton, J., concurring in part). Judge McKeague joined both of those opinions as well as writing his own. *Id.* at 700 (McKeague, J., concurring). Judge Batchelder separately wrote that tiers of scrutiny should not apply at all, that instead the Second Amendment should be interpreted according to its original public meaning, and under that historical inquiry the government could not impose a lifetime ban on Tyler for this sort of temporary distress. *Id.* at 702–07 (Batchelder, J., concurring in part). Judge Boggs wrote that he believed that the weight of this Court's precedent required levels of scrutiny, but that the appropriate

standard there was strict scrutiny, and that § 922(g)(4) failed as applied to Tyler. *Id.* at 702 (Boggs, J., concurring in part). However, acknowledging the confusion on these matters, he agreed with the outcome under all of the three aforementioned opinions as well, and joined all of them. *Id.* Judge White agreed that the statute failed intermediate scrutiny, but wrote separately to call for remand. *Id.* at 700, 702 (White, J., concurring). Judge Moore dissented, writing for five judges that intermediate scrutiny applied, and was satisfied. *Id.* at 714 (Moore, J., dissenting). A sixth dissenting judge joined parts of that dissent, but not others. *Id.* (Rogers, J., dissenting).

That breakdown of opinions is a train wreck, evincing the need for further guidance from this Court. The Sixth Circuit had no majority opinion when striking down a federal statute to keep guns out of the hands of potentially crazy people. That should not happen. While it is clear that the Second Amendment required invalidating § 922(g)(4) as applied to Mr. Tyler, it is still not clear why. The only clear holding—which *amicus* disagrees with—is that a majority of that court thought intermediate scrutiny attached, but the Sixth Circuit could not agree even on what that intermediate analysis looks like. The Solicitor General during the previous Administration did not ask this Court to review the decision, and millions of citizens in the Sixth Circuit remain a state of confusion regarding this enumerated right.

Nor is this confusion limited to the Sixth Circuit. There are decisions like *Ezell*, where the Seventh Circuit invalidated Chicago's ban on gun ranges by

reviewing it under a standards articulated as "a more rigorous showing than that applied in *Skoien* [i.e., intermediate scrutiny] should be required, if not quite 'strict scrutiny.'" *Ezell v. City of Chi.*, 651 F.3d 684, 708 (7th Cir. 2011).

How many standards will there be? Millions of Americans regularly exercise their Second Amendment rights, under a patchwork of federal, state, and local laws. Numerous cases have already been decided by the courts, and many more will follow. Those courts are splintering in multifarious ways on matters that impact millions of citizens who are trying to be law-abiding and responsible gun owners. What a person's constitutional rights are should not depend on geography. Without further guidance from the Court—on intermediate scrutiny in this case, for starters—the lower courts will descend into chaos on an issue where disarray is the last thing this Court should want.

IV. PERMISSIBLE LICENSING SYSTEMS SEEK TO FOSTER EXERCISING RIGHTS, NOT DESTROY THOSE RIGHTS.

Finally, the permissible purpose of a licensing scheme of a constitutional right is to direct exercising those rights into channels that adequately address the various public interests implicated by those exercises. The purpose of a valid regulatory scheme of a constitutional right is to foster more exercise of that right, not less. New York City's licensing system is invalid because it is an attempt to abolish an enumerated right, not facilitate the exercise of that right in a manner that safeguards valid governmental interests.

Even when policymakers identify a public need requiring regulation, they may not choose an unconstitutional remedy to meet that need. *Citizens United v. FEC*, 558 U.S. 310, 361 (2010). Inferior authority is by definition subordinate to a superior authority. The task of government is to fulfill its duty in a way that does not run afoul of the judgment the American people made to enshrine a particular liberty in the Supreme Law of the Land.

The Court has already reasoned through these principles with the Second Amendment at least in part, as seen by *Heller*'s reference to *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977) (per curiam). *Heller*, 554 U.S. at 635. *Skokie* involved neo-Nazis parading through a town. *Skokie*, 432 U.S. at 45. If ever there was a time when government should simply try to use its regulatory authority to shut down something objectionable—in fact, appalling and

offensive to countless Americans—that would be it. Instead, in the free-speech context, "it is our law and tradition that more speech, not less, is the governing rule." *Citizens United*, 558 U.S. at 361.

Regulatory schemes should thus seek to ease and encourage the exercise of rights, not introduce burdens for the impermissible purpose of discouraging the exercise of those rights. It is time for the Court to expound upon how these principles manifest themselves in firearms regulations. The purpose for a parade-licensing system should be to make clear to would-be paraders that they are most certainly able to exercise their rights, providing broad and clear regulatory paths to exercise those rights in a manner that respects the rights of others and that leaves government fully able to accommodate public interests.

Insofar as intermediate scrutiny is often implicated in such situations by determining the time a parade will be held, the route of the parade, and the features of how it communicates its message (i.e., manner of speech), intermediate scrutiny should leave people numerous opportunities to conduct a parade. That is what intermediate scrutiny should look like: a system that actually facilitates exercising a right.

But that is not what New York City has done. A citizen in the Big Apple would not get the impression that he is welcome to have firearms and exercise his Second Amendment rights. Instead, the City has done everything to send the message that his firearms are not welcome, that the City is doing everything it can to discourage his purchase and use of firearms. In fact, for an entire part of the Second Amendment—the right

to "bear" arms, not merely "keep" them—that citizen is barred altogether from exercising a right that this Court in *McDonald* declared "fundamental."

New York City's law does not satisfy intermediate scrutiny, and should not be subjected to that test in any event. Instead it is flatly invalid as a violation of the Second Amendment.

CONCLUSION

This Court should reverse the Second Circuit.

Respectfully submitted,

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May 14, 2019