No. 20-843

# In the Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ET AL.,
*Petitioners*,

v.

KEVIN P. BRUEN, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF NEW YORK STATE POLICE, ET AL.,
*Respondents.*

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

**BRIEF OF *AMICI CURIAE* CENTER FOR DEFENSE OF FREE ENTERPRISE, INDEPENDENT FIREARMS OWNERS ASSOCIATION, UNITED STATES CONCEALED CARRY ASSOCIATION, PROTECT OUR GUN RIGHTS, AND INTERNATIONAL ASSOCIATION FOR THE PROTECTION OF CIVILIAN GUNS RIGHTS IN SUPPORT OF PETITIONERS**

JERAD WAYNE NAJVAR
*Counsel of Record*
AUSTIN M.B. WHATLEY
NAJVAR LAW FIRM, P.L.L.C.
2180 North Loop West, Ste. 255
Houston, TX 77018
(281) 404-4696
jerad@najvarlaw.com

*Counsel for Amici Curiae*

July 20, 2021

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**CONSTITUTION**



**OTHER AUTHORITIES**

## INTEREST OF THE *AMICI CURIAE*[1]

**Center for the Defense of Free Enterprise** is a non-partisan education and research organization dedicated to studies of free enterprise, public policy research, book publishing, conferences, white papers, and media outreach. The Center is a tax-exempt educational organization under Section 501(c)(3) of the United States Tax Code and has been incorporated since 1976. The Center's mission is to support the property and human rights of individuals and businesses against government intrusion. The Center has presented testimony before congressional committees on various public policy concerns.

**Protect Our Gun Rights** is a non-profit organization incorporated in Washington State to focus on Second Amendment rights and restrictions at the state level.

**International Association for the Protection of Civilian Gun Rights** is a non-profit coalition of international groups from more than 21 countries. The Association seeks to promote civilian arms rights, including the natural right of defense of self and family through the private ownership of firearms, by rebutting common misinformation.

**Independent Firearms Owners Association** is a limited liability company that represents over 250,000 supporters from all fifty states. The

---

[1] All parties have consented to the filing of this brief. No counsel for any party authored the brief in any part. Only amici funded its preparation and submission.

Association seeks to change the tone and output of criminal justice and cultural policy debates that need a thoughtful re-examination in the light of changing technology. Its core mission is to protect individuals' Second Amendment rights from ever-encroaching regulation and adverse business interests.

**United States Concealed Carry Association** is a limited liability company founded in 2004 and represents more than 500,000 members throughout the United States. The Association's mission is to advocate for the rights of law-abiding citizens to carry firearms for self-defense purposes and the implementation of national concealed carry reciprocity.

## SUMMARY OF ARGUMENT

*Amici* agree with Petitioners that the right to carry outside the home is within the core of the right to "keep and bear arms" protected by the Second Amendment. As such, strict scrutiny should apply to New York's severe curtailment of that right. However, it is unnecessary to announce a level of scrutiny because New York's law fails any *faithful* application of even intermediate constitutional scrutiny. The law, as well as other restrictions on Second Amendment rights, have only been upheld by courts purporting to apply "intermediate" scrutiny but whose analysis is not nearly as rigorous as the intermediate scrutiny applied in other contexts involving enumerated constitutional rights. In this case, the Court should declare New York's law unconstitutional, and clearly illustrate that the scrutiny to be applied when Second Amendment rights are at stake is no less demanding than the scrutiny applied to restrictions affecting other rights.

## ARGUMENT

### Lower Courts Are Applying An Unduly Permissive Review Of Government Restrictions of Second Amendment Rights That This Court Should Correct.

Whether under strict or intermediate scrutiny, the Court must analyze two fundamental questions. The first question is whether the challenged restriction furthers a legitimate governmental interest of sufficient importance. Even if the law at issue does further such an interest, the Court must analyze whether it does so in a way that is appropriately tailored—that is, whether it furthers the interest in a manner that does not unduly restrict the rights at issue. This Court has repeatedly emphasized that the rights protected under the Second Amendment are not to be treated as second-class rights. *McDonald v. City of Chicago, Ill.*, in particular, expressly rejected several bases the government suggested warranted less-preferential treatment for the Second Amendment. 561 U.S. 742, 782 (2010) (rejecting, *e.g.*, arguments that Second Amendment rights should be distinguished from other enumerated rights because they may not be recognized in all civilized societies, or because they implicate public safety); *see also District of Columbia v. Heller*, 554 U.S. 570, 634-35 (2008) (rejecting dissenters' suggestion to apply a distinct "interest-balancing-inquiry"). Despite such clear and repeated admonitions from this Court in *Heller* and *McDonald* that the Second Amendment shall not be disfavored, lower courts have done just that. Lower courts—including the Second Circuit in *Kachalsky v.*

*County of Westchester*, 701 F.3d 81 (2d Cir. 2012)—have upheld gun restrictions applying a so-called "intermediate" scrutiny that looks more like rational basis scrutiny and is far more deferential than the intermediate scrutiny applied in other areas. This unduly deferential analysis has been applied at both steps of the inquiry, as illustrated below.

**A. Government interest**

To defend a law that infringes upon enumerated rights, it is not sufficient for the government to assert a legitimate interest in general. Rather, the government must demonstrate that the challenged law *furthers* the proffered interest to some degree. *See, e.g.*, *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (describing the inquiry—in the context of content-neutral speech restrictions—as whether the law "furthers an important or substantial governmental interest"). There is no question that states and local governments have a legitimate interest in promoting public safety. But it should not be sufficient for a government defendant to advert to that general interest in defense of any particular restriction of firearms or Second Amendment rights; as in other contexts, the government must always proffer a rationale as to why and how the particular law at issue actually furthers that interest, at least to some degree.

As relevant regarding laws like New York's "proper cause" requirement, the government must assert that denying the right to carry to the vast majority of its citizens—putting the burden on them to demonstrate a special need—actually furthers the interest in public safety. In fact, it is likely that the kind of person who

would decline to carry a firearm out of simple respect for the law—the kind of person who, despite a strong desire to carry, would carry only if authorized by the government—is not the kind of person who presents a threat to public safety at all. Therefore, it is not even clear that a law like New York's furthers its interest in public safety in any way. Yet the Second Circuit simply assumed that it does without inquiry. *See* 701 F.3d at 97. In fact, to the extent *Kachalsky* identified an actual, articulated governmental interest in New York's broad ban on public carry, it relied upon a tangential interest that should never be sufficient to justify such severe curtailments of enumerated rights. The Second Circuit placed much reliance on a portion of the "legislative record"—which it block-quoted for emphasis—asserting that

> In the absence of adequate weapons legislation, under the traditional law of criminal attempt, lawful action by the police must await the last act necessary to consummate the crime.... *Adequate statutes governing firearms and weapons would make lawful intervention by police and prevention of these fatal consequences, before any could occur*.

701 F.3d at 98 (quoting Report of the N.Y. State Joint Legislative Comm. On Firearms & Ammunition, Doc. No. 6, at 12-13 (1965)) (emphasis supplied by court). In other words, the Legislature adjudged criminalizing the mere possession of handguns by "the people" at large, notwithstanding the Second Amendment, would save law enforcement the trouble of identifying and intervening in actual crimes. This is not so much based

on public safety (as in any public safety threat posed by otherwise law-abiding citizens possessing handguns in public) as on administrative convenience. Administrative convenience should not be sufficient. The Court's admonition that "the prime objective of the First Amendment is not efficiency" applies equally with respect to the Second Amendment. *American for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2387 (2021) (quoting *McCullen v. Coakley*, 573 U.S. 464, 495 (2014)). "Mere administrative convenience does not remotely reflect the seriousness of the actual burden" that New York's "proper cause" requirement imposes upon those wishing to exercise their Second Amendment rights. *See id.* (internal quotations omitted). The Fourth Circuit likewise placed undue reliance on several merely administrative benefits that Maryland argued would flow from that state's similar requirement. *Woollard v. Gallagher*, 712 F.3d 865, 879-80 (4th Cir. 2013) (reciting Maryland's reasoning that curtailing the presence of handguns in public would "[r]educ[e] the number of 'handgun sightings' that must be investigated," and "[f]acilitating the identification of those persons carrying handguns who pose a menace"). These types of administrative benefits to the state are as deficient here as they are in the First Amendment context.

### B. Tailoring to avoid unnecessary abridgment of constitutional rights

*Kachalsky* and other lower courts have also unjustifiably truncated the tailoring prong of intermediate scrutiny when Second Amendment rights are in question.

Regardless of the context in which it is applied, intermediate scrutiny has always required courts to ask the question whether the challenged law is tailored to avoid unnecessarily abridging constitutional rights. This does not require that the least restrictive means be employed, as under strict scrutiny, but still guards against laws that are substantially broader than necessary to further the governmental interest. Thus, "time, place, or manner" regulations on protected speech "need not be the least restrictive" means, "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest[.]" *Ward v. Rock Against Racism*, 491 U.S. 781, 799-800 (1989) (emphasis added). Similarly, "[a] content-neutral [speech] regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 189 (1997) (citing *O'Brien*, 391 U.S. at 377); *see also McCutcheon v. Fed. Election Com'n*, 572 U.S. 185, 199 (2014) (whether under strict or "closely drawn" scrutiny, assessing the "fit between the stated governmental objective and the means selected to achieve that objective" requires analyzing whether the law "'avoid[s] unnecessary abridgment' of First Amendment rights") (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1972) (per curiam)). *Kachalsky* (and other courts) purport to apply intermediate scrutiny but wholly ignore this crucial component of the analysis.

In *Kachalsky*, the Second Circuit fills several pages of the Federal Reporter explaining why New York's "proper cause" requirement is "substantially related" to the state's interest in public safety, but nowhere did the court even attempt to address whether the severe restriction was substantially broader than necessary. 701 F.3d at 97-100. In fact, the court expressly eschewed any such analysis, apparently laboring under the misimpression that *any* inquiry into tailoring would mean a "review bordering on strict scrutiny" and requiring the "least restrictive alternative." *Id.* at 98. Somehow—despite citing *Turner* for the relevant standard, *Kachalsky*, 701 F.3d at 97—the Second Circuit ignores the latter part of *Turner*'s formulation. In the end, *Kachalsky* simply points to the fact that *Heller* suggested "the state may ban firearm possession in sensitive places," and concludes that that supports New York's broad ban on handgun possession in substantially *all* places, without *any* inquiry into whether the state is justified in extrapolating from a particularized ban into a general ban. 701 F.3d at 99-100.

In *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013), the Fourth Circuit upheld Maryland's "good and substantial reason" predicate to public carry with similarly insufficient analysis. Just as in *Kachalsky*, the *Woollard* court's very statement of the "reasonable fit" standard betrays a novel and unjustifiable truncation of the tailoring inquiry. The Fourth Circuit writes that the tailoring test "is satisfied if Maryland's interests are 'substantially served by enforcement of the' good-and-substantial-reason requirement." 712 F.3d at 878. Thus, the very statement of the standard

focused only on whether the challenged law furthered the government interest without any consideration of whether it was substantially broader than the state could justify. And, in fact, not a word appears in *Woollard*'s "reasonable fit" analysis addressing that question. *See* 712 F.3d at 878-882. Instead, like *Kachalsky*, the Fourth Circuit erroneously thought that apparently any inquiry into whether a firearms restriction sweeps substantially more broadly than necessary was entirely inappropriate under intermediate scrutiny. Indeed, the district court in *Woollard* had subjected Maryland's law to the traditional intermediate scrutiny test, identifying several alternative measures that would serve the state's interest without unnecessarily curtailing rights, but the court of appeals discarded this analysis as "more reminiscent of strict than intermediate scrutiny." 712 F.3d at 882. In fact, the district court employed the proper analysis. *See, e.g.*, *McCutcheon*, 572 U.S. at 221 ("Importantly, there are multiple alternatives available to Congress that would serve the Government's anticircumvention interest, while avoiding unnecessary abridgment of First Amendment rights.")

The tailoring analysis employed in *Kachalsky* and *Woollard* is not, and cannot be, a proper application of the tailoring inquiry under intermediate scrutiny in any context. It would presumably be easy for the government to demonstrate that a *total ban* on protected activity would further its interest in addressing dangers from the activity—and thus satisfying the truncated version of the test used by

these courts—but that does not mean that a total ban is appropriately tailored.

## CONCLUSION

Despite this Court's clear teaching, in both *Heller* and *McDonald*, that the Second Amendment cannot be treated as a guarantee of second-class rights, the lower courts have in fact done just that. In this case, the Court should illustrate the proper—and properly rigorous—form of scrutiny applicable to Second Amendment rights. The judgment of the court of appeals should be reversed.

Respectfully submitted,

JERAD WAYNE NAJVAR
*Counsel of Record*
AUSTIN M.B. WHATLEY
NAJVAR LAW FIRM, P.L.L.C.
2180 North Loop West, Ste. 255
Houston, TX 77018
(281) 404-4696
jerad@najvarlaw.com

*Counsel for Amici Curiae*