NO. 20-843

In the
Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ROBERT NASH, BRANDON KOCH,
Petitioners,

v.

KEVIN P. BRUEN, in His Official Capacity as Superintendent of the New York State Police, RICHARD J. MCNALLY, JR., in His Official Capacity as Justice of the New York Supreme Court, Third Judicial District, and Licensing Officer for Rensselaer County,
Respondents.

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

JOINT APPENDIX

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July 13, 2021

Petition for Writ of Certiorari Filed December 17, 2020
Petition for Writ of Certiorari Granted April 26, 2021

TABLE OF CONTENTS

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following page in the appendix to the Petition for Certiorari:

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 19-156

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ROBERT NASH, BRANDON KOCH,

Plaintiffs-Appellants,

v.

GEORGE P. BEACH, II, in his official capacity as Superintendent of the New York State Police, RICHARD J. MCNALLY, JR., in his official capacity as Justice of the New York Supreme Court, Third Judicial District, and Licensing Officer for Rensselaer County,

Defendants-Appellees.

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
01/15/2019	1	NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellant Brandon Koch, Robert Nash, and New York State Rifle & Pistol Association, Inc., FILED. [2476131] [19-156] [Entered: 01/16/2019 09:59 AM]
01/15/2019	2	DISTRICT COURT MEMORANDUM-DECISION AND ORDER, dated 12/17/2018, RECEIVED.[2476138] [19-156] [Entered: 01/16/2019 10:01 AM]

01/15/2019	3	DISTRICT COURT JUDGMENT, dated 12/17/2018, RECEIVED.[2476141] [19-156] [Entered: 01/16/2019 10:02 AM]
	* * *	
01/15/2019	5	ELECTRONIC INDEX, in lieu of record, FILED.[2476144] [19-156] [Entered: 01/16/2019 10:03 AM]
	* * *	
01/18/2019	14	FORM C, on behalf of Appellant New York State Rifle & Pistol Association, Inc., Robert Nash and Brandon Koch, FILED. Service date 01/18/2019 by CM/ECF.[2478482] [19-156] [Entered: 01/18/2019 02:41 PM]
01/18/2019	15	FORM D, on behalf of Appellant Brandon Koch, Robert Nash and New York State Rifle & Pistol Association, Inc., FILED. Service date 01/18/2019 by CM/ECF.[2478486] [19-156] [Entered: 01/18/2019 02:42 PM]
	* * *	
02/01/2019	33	MOTION, to extend time, on behalf of Appellee George P. Beach, II and Richard J. McNally, Jr., FILED. Service date 02/01/2019 by CM/ECF. [2487848] [19-156] [Entered: 02/01/2019 04:56 PM]

	* * *	
02/05/2019	37	MOTION ORDER, granting motion to extend time to file Appellees brief. The Appellant's brief is due 03/20/2019 and Appellees's brief is due 04/24/2019. The appeal is dismissed effective 03/20/2019 unless a brief is filed by that date. A motion for reconsideration or other relief will not stay the effectiveness of this order. The clerk is instructed to treat this case as ready for calendaring as of 04/24/2019 whether or not the appellees' brief has been filed. [33] filed by Appellee George P. Beach, II and Richard J. McNally, Jr., by RKW, FILED. [2489662][37] [19-156] [Entered: 02/05/2019 01:34 PM]
03/20/2019	38	BRIEF, on behalf of Appellant Brandon Koch, Robert Nash and New York State Rifle & Pistol Association, Inc., FILED. Service date 03/20/2019 by CM/ECF.[2522518] [19-156] [Entered: 03/20/2019 04:51 PM]
03/20/2019	39	JOINT APPENDIX, volume 1 of 1, (pp. 1-31), on behalf of Appellant Brandon Koch, Robert Nash and New York State Rifle &

		Pistol Association, Inc., FILED. Service date 03/20/2019 by CM/ECF.[2522526] [19-156] [Entered: 03/20/2019 04:55 PM]
04/24/2019	46	BRIEF, on behalf of Appellee George P. Beach, II and Richard J. McNally, Jr., FILED. Service date 04/24/2019 by CM/ECF. [2547812] [19-156] [Entered: 04/24/2019 09:02 PM]
04/30/2019	47	ORAL ARGUMENT STATEMENT LR 34.1 (a), on behalf of filer Attorney Jennifer L. Clark, Esq. for Appellee George P. Beach, II and Richard J. McNally, Jr., FILED. Service date 04/30/2019 by CM/ECF. [2551351] [19-156] [Entered: 04/30/2019 11:10 AM]
* * *		
04/30/2019	50	ORAL ARGUMENT STATEMENT LR 34.1 (a), on behalf of filer Attorney Jennifer L. Clark, Esq. for Appellee George P. Beach, II and Richard J. McNally, Jr., FILED. Service date 04/30/2019 by CM/ECF. [2551744] [19-156] [Entered: 04/30/2019 02:21 PM]
04/30/2019	51	LETTER, on behalf of Appellee George P. Beach, II and Richard J. McNally, Jr., only schedule

		oral argument in this case after final Supreme Court in the New York City case RECEIVED. Service date 04/30/2019 by CM/ECF.[2551747] [19-156]--[Edited 05/01/2019 by WD] [Entered: 04/30/2019 02:23 PM]
05/01/2019	52	DEFECTIVE DOCUMENT, Letter, [51], on behalf of Appellee George P. Beach, II and Richard J. McNally, Jr., FILED.[2552334] [19-156] [Entered: 05/01/2019 09:04 AM]
* * *		
05/01/2019	60	AMICUS BRIEF, on behalf of Prosecutors Against Gun Violence, FILED. Service date 05/01/2019 by CM/ECF. [2553363] [19-156]--[Edited 05/02/2019 by WD] [Entered: 05/01/2019 05:07 PM]
* * *		
05/01/2019	62	AMICUS BRIEF, on behalf of Giffords Law Center to Prevent Gun Violence, FILED. Service date 05/01/2019 by CM/ECF. [2553413] [19-156]--[Edited 05/02/2019 by WD]--[Edited 05/08/2019 by WD] [Entered: 05/01/2019 07:25 PM]
05/01/2019	63	AMICUS BRIEF, on behalf of Professors of History and Law,

		FILED. Service date 05/01/2019 by CM/ECF. [2553428] [19-156]--[Edited 05/02/2019 by WD] [Entered: 05/01/2019 10:04 PM]
	* * *	
05/02/2019	68	LETTER, on behalf of Appellee George P. Beach, II and Richard J. McNally, Jr., notify the Court of U.S. Supreme Court action. RECEIVED. Service date 05/02/2019 by CM/ECF.[2553845] [19-156]--[Edited 05/02/2019 by WD] [Entered: 05/02/2019 11:46 AM]
	* * *	
05/08/2019	75	REPLY BRIEF, on behalf of Appellant Brandon Koch, Robert Nash and New York State Rifle & Pistol Association, Inc., FILED. Service date 05/08/2019 by CM/ECF. [2558651] [19-156] [Entered: 05/08/2019 10:29 AM]
05/08/2019	76	ORAL ARGUMENT STATEMENT LR 34.1 (a), on behalf of filer Attorney David Thompson, Esq. for Appellant Brandon Koch, Robert Nash and New York State Rifle & Pistol Association, Inc., FILED. Service date 05/08/2019 by CM/ECF. [2558656] [19-156] [Entered: 05/08/2019 10:30 AM]

05/16/2019	82	CURED DEFECTIVE DOCUMENT: Letter, [52], on behalf of Appellee George P. Beach, II and Richard J. McNally, Jr., FILED.[2565222] [19-156] [Entered: 05/16/2019 09:23 AM]
06/06/2019	83	CASE CALENDARING, for the week of 10/21/2019, PANEL A, PROPOSED.[2581505] [19-156] [Entered: 06/06/2019 12:15 PM]
08/13/2019	84	CASE CALENDARING, for argument on 10/24/2019, A Panel, SET.[2630873] [19-156] [Entered: 08/13/2019 11:54 AM]
		* * *
08/15/2019	87	ARGUMENT NOTICE, to attorneys/parties, TRANSMITTED.[2632692] [19-156] [Entered: 08/15/2019 09:35 AM]
08/28/2019	89	ORDER, dated 08/28/2019, adjourning oral argument set for Thursday, October 24, 2019, A Panel and directing the Appellants to notify the Court, by letter, of the Supreme Court's decision in New York State Rifle & Pistol Association, Inc. v. City of New York, Sup. Ct. No. 18-280, within 7 days of the issuance of that decision, FILED.[2642478]

		[19-156] [Entered: 08/28/2019 11:05 AM]
* * *		
09/12/2019	95	LETTER, on behalf of Appellant Brandon Koch, Robert Nash and New York State Rifle & Pistol Association, Inc. Attorney David H. Thompson, Peter A. Patterson and John D. Ohlendorf, withdrawing as counsel for Appellants, RECEIVED. Service date 09/12/2019 by CM/ECF.[2653508] [19-156]--[Edited 09/12/2019 by WD] [Entered: 09/12/2019 09:50 AM]
* * *		
05/04/2020	103	LETTER, on behalf of Appellant New York State Rifle & Pistol Association, Inc., Robert Nash and Brandon Koch, notifying, this Court that a decision was issued by the Supreme Courtt on 04/27/2020 RECEIVED. Service date 05/04/2020 by CM/ECF.[2831304] [19-156]--[Edited 05/04/2020 by WD]--[Edited 05/04/2020 by WD]--[Edited 05/04/2020 by WD] [Entered: 05/04/2020 01:56 PM]
05/18/2020	108	ORAL ARGUMENT STATEMENT LR 34.1 (a), on behalf of filer Attorney Mr. John

		Parker Sweeney, Esq. for Appellant Brandon Koch, Robert Nash and New York State Rifle & Pistol Association, Inc., FILED. Service date 05/18/2020 by CM/ECF. [2841927] [19-156] [Entered: 05/18/2020 06:07 PM]
05/21/2020	110	CASE CALENDARING, for the week of 08/17/2020, PROPOSED.[2845259] [19-156] [Entered: 05/21/2020 04:12 PM]
05/22/2020	111	LETTER, on behalf of Appellee George P. Beach, II and Richard J. McNally, Jr., in response to Appellant's letter dated 05/04/2020 RECEIVED. Service date 05/22/2020 by CM/ECF.[2845873] [19-156]--[Edited 05/22/2020 by WD] [Entered: 05/22/2020 12:24 PM]
05/22/2020	112	ORAL ARGUMENT STATEMENT LR 34.1 (a), on behalf of filer Attorney Jennifer L. Clark, Esq. for Appellee George P. Beach, II and Richard J. McNally, Jr., FILED. Service date 05/22/2020 by CM/ECF. [2845890] [19-156] [Entered: 05/22/2020 12:38 PM]
06/08/2020	114	LETTER, on behalf of Appellee George P. Beach, II and Richard J. McNally, Jr., dates unavailable for oral argument, RECEIVED.

		Service date 06/08/2020 by CM/ECF.[2857020] [19-156]--[Edited 06/09/2020 by WD] [Entered: 06/08/2020 05:18 PM]
06/15/2020	117	LETTER, on behalf of Appellee George P. Beach, II and Richard J. McNally, Jr., the dates unavailable and available for oral argument, RECEIVED. Service date 06/15/2020 by CM/ECF.[2862673] [19-156]--[Edited 06/16/2020 by WD] [Entered: 06/15/2020 11:09 PM]
06/16/2020	121	LETTER, on behalf of Appellant Brandon Koch, Robert Nash and New York State Rifle & Pistol Association, Inc., in response to Appellee's letter to the availability for oral argument and Appellant's availabilty to oral argument, RECEIVED. Service date 06/16/2020 by CM/ECF.[2863769] [19-156]--[Edited 06/17/2020 by WD] [Entered: 06/16/2020 07:08 PM]
07/01/2020	124	CASE CALENDARING, for argument on 08/17/2020, SET.[2875389] [19-156] [Entered: 07/01/2020 11:17 AM]
07/09/2020	126	ARGUMENT NOTICE, to attorneys/parties, TRANSMITTED. Note: Listed counsel must log on to CM/ECF

		in order to view the attachment. [2881331] [19-156] [Entered: 07/10/2020 09:49 AM]
07/13/2020	127	NOTICE OF HEARING DATE ACKNOWLEDGMENT, on behalf of Appellant Brandon Koch, Robert Nash and New York State Rifle & Pistol Association, Inc., FILED. Service date 07/13/2020 by CM/ECF. Note: Listed counsel must log on to CM/ECF in order to view the attachment. [2883067] [19-156] [Entered: 07/13/2020 01:51 PM]
07/13/2020	128	NOTICE OF HEARING DATE ACKNOWLEDGMENT, on behalf of Appellee George P. Beach, II and Richard J. McNally, Jr., FILED. Service date 07/13/2020 by CM/ECF. Note: Listed counsel must log on to CM/ECF in order to view the attachment. [2883391] [19-156] [Entered: 07/13/2020 04:50 PM]
08/12/2020	129	REVISED ARGUMENT NOTICE, to attorneys/parties, TRANSMITTED. Note: Listed counsel must log on to CM/ECF in order to view the attachment. [2905743] [19-156] [Entered: 08/12/2020 09:25 AM]
08/12/2020	130	NOTICE OF HEARING DATE ACKNOWLEDGMENT, on

		behalf of Appellant Brandon Koch, Robert Nash and New York State Rifle & Pistol Association, Inc., FILED. Service date 08/12/2020 by CM/ECF. Note: Listed counsel must log on to CM/ECF in order to view the attachment. [2906669] [19-156] [Entered: 08/12/2020 06:25 PM]
08/13/2020	131	NOTICE OF HEARING DATE ACKNOWLEDGMENT, on behalf of Appellee George P. Beach, II and Richard J. McNally, Jr., FILED. Service date 08/13/2020 by CM/ECF. Note: Listed counsel must log on to CM/ECF in order to view the attachment. [2906834] [19-156] [Entered: 08/13/2020 09:53 AM]
08/13/2020	132	FRAP 28(j) LETTER, dated 08/13/2020, on behalf of Appellee George P. Beach, II and Richard J. McNally, Jr., RECEIVED. Service date 08/13/2020 by CM/ECF.[2907027] [19-156] [Entered: 08/13/2020 11:26 AM]
08/13/2020	135	FRAP 28(j) LETTER, dated 08/13/2020, on behalf of Appellant Brandon Koch, Robert Nash and New York State Rifle & Pistol Association, Inc., RECEIVED. Service date 08/13/2020 by

		CM/ECF.[2907813] [19-156] [Entered: 08/13/2020 06:06 PM]
08/17/2020	138	CASE, before JON, RSP, PWH, HEARD.[2909311] [19-156] [Entered: 08/17/2020 10:26 AM]
		* * *
08/26/2020	141	SUMMARY ORDER AND JUDGMENT, affirming the district court judgment, by JON, RSP, PWH, FILED.[2916688] [19-156] [Entered: 08/26/2020 09:00 AM]
08/26/2020	142	SUMMARY ORDER AND JUDGMENT, the judgment of the district court is affirmed, by JON, RSP, PWH, FILED.[2916689] [19-156] [Entered: 08/26/2020 09:00 AM]
09/08/2020	145	ITEMIZED BILL OF COSTS, on behalf of Appellee George P. Beach, II and Richard J. McNally, Jr., FILED. Service date 09/08/2020 by CM/ECF.[2925795] [19-156] [Entered: 09/08/2020 04:34 PM]
09/16/2020	147	JUDGMENT MANDATE, ISSUED.[2932232] [19-156] [Entered: 09/16/2020 01:22 PM]
09/16/2020	148	LETTER, on behalf of Appellant Brandon Koch, Robert Nash and New York State Rifle & Pistol Association, Inc., stating no

		objection to itemized bill of costs, RECEIVED. Service date 09/16/2020 by CM/ECF.[2932573] [19-156]--[Edited 09/17/2020 by AJ] [Entered: 09/16/2020 05:04 PM]
09/17/2020	151	STATEMENT OF COSTS, on behalf of Appellee George P. Beach, II and Richard J. McNally, Jr., FILED.[2933031] [19-156] [Entered: 09/17/2020 11:29 AM]
09/17/2020	152	CERTIFIED ORDER, dated 09/17/2020, to NDNY (SYRACUSE), ISSUED.[2933039] [19-156] [Entered: 09/17/2020 11:32 AM]
12/28/2020	153	U.S. SUPREME COURT NOTICE of writ of certiorari filing, dated 12/23/2020, U.S. Supreme Court docket # 20-843, RECEIVED.[3001826] [19-156] [Entered: 12/28/2020 08:47 PM]
04/26/2021	154	U.S. SUPREME COURT NOTICE, dated 04/26/2021, U.S. Supreme Court docket # 20-843, stating the petition for writ of certiorari is granted, RECEIVED.[3086999] [19-156] [Entered: 04/26/2021 05:13 PM]

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

No. 18-CV-0134-BKS-ATB

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ROBERT NASH, BRANDON KOCH,

Plaintiffs,

v.

GEORGE P. BEACH, II, in his official capacity as Superintendent of the New York State Police, RICHARD J. MCNALLY, JR., in his official capacity as Justice of the New York Supreme Court, Third Judicial District, and Licensing Officer for Rensselaer County,

Defendants.

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
02/01/2018	1	COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF against George P. Beach, III and Richard J. McNally, Jr. (Filing fee $400 receipt number ANYNDC-4273520) filed by New York State Rifle & Pistol Association, Inc. and Robert Nash. (Attachments: # 1 Exhibit(s) 1, # 2 Exhibit(s)

		2, # 3 Civil Cover Sheet)(see) (Entered: 02/02/2018)
02/01/2018	2	Summonses Issued as to George P. Beach, III and Richard J. McNally, Jr. (Attachments: # 1 Summons for Richard J. McNally, Jr.)(see) (Entered: 02/02/2018)
02/01/2018	3	G.O. 25 FILING ORDER ISSUED: Initial Conference set for 5/2/2018 at 10:00 AM by telephone, unless the parties are specifically directed to appear, before US Magistrate Judge Andrew T. Baxter. Civil Case Management Plan must be filed and Mandatory Disclosures are to be exchanged by the parties on or before 4/25/2018. (Pursuant to Local Rule 26.2, mandatory disclosures are to be exchanged among the parties but are NOT to be filed with the Court.) (see) (Entered: 02/02/2018)
02/01/2018	4	FRCP 7.1 CORPORATE DISCLOSURE STATEMENT by New York State Rifle & Pistol Association, Inc. (see) (Entered: 02/02/2018)
02/01/2018	5	NOTICE of Admission Requirement as to Party Plaintiffs; Attorneys David H.

		Thompson, Peter A. Patterson, and John D. Ohlendorf. Phone number is 202-220-9600. Admissions due by 2/15/2018. (Letter mailed by regular mail on 2/1/2018 to all three attorneys)(see) (Entered: 02/02/2018)
		* * *
02/05/2018	9	AFFIDAVIT of Service for Summons, Complaint, Filing Order, Corporate Disclosure Statement served on George P. Beach, II, via Maureen Price, Counsel's Office/Designated to Accept on 2/2/18, filed by Robert Nash, New York State Rifle & Pistol Association, Inc.. (Baynes, Kathleen) (Entered: 02/05/2018)
02/05/2018	10	AFFIDAVIT of Service for Summons, Complaint, Filing Order, Corporate Disclosure Statement served on Richard J. McNally, Jr. on 2/2/18, filed by Robert Nash, New York State Rifle & Pistol Association, Inc.. (Baynes, Kathleen) (Entered: 02/05/2018)
		***Answer due date updated for George P. Beach, III answer due 2/23/2018; Richard J. McNally, Jr. answer due

		2/23/2018. (see) (Entered: 02/06/2018)
02/07/2018	11	TEXT ORDER: granting 6, 7 and 8 Motions for Limited Admission Pro Hac Vice. Attorneys David H. Thompson, John D. Ohlendorf and Peter A. Patterson are hereby admitted to practice in this action on behalf of New York State Rifle & Pistol Association, Inc. and Robert Nash. Counsel is hereby advised that as of January 16, 2018, the NYND has converted to NextGen. Due to this conversion, you must now register for Pro Hac Vice access through your PACER account. **This is the only notice you will receive concerning this requirement. You will not have access to electronically file in this case until your Pro Hac Vice request has been processed through the PACER system.** Step-by-step instructions on how to complete this process are available at http://www.nynd.uscourts.gov/attorney-admissions-nextgen;. So Ordered by U.S. Magistrate Judge Andrew T. Baxter on

		2/7/2018. (nmk) (Entered: 02/07/2018)
		* * *
02/08/2018	13	Letter Motion from Kelly L. Munkwitz for George P. Beach, III, Richard J. McNally, Jr. requesting an extention of time to respond to the complaint submitted to Judge Andrew T. Baxter . (Munkwitz, Kelly) (Entered: 02/08/2018)
		* * *
02/09/2018	18	TEXT ORDER: granting 13 Letter Request. The deadline for George P. Beach, III and Richard J. McNally, Jr. to answer or otherwise respond to the complaint is extended to 3/26/2018. So Ordered by U.S. Magistrate Judge Andrew T. Baxter on 2/9/2018. (nmk) (Entered: 02/09/2018)
03/26/2018	19	MOTION to Dismiss for Failure to State a Claim Motion Hearing set for 5/3/2018 10:00 AM in Syracuse before Judge Brenda K. Sannes Response to Motion due by 4/16/2018 Reply to Response to Motion due by 4/23/2018. filed by George P. Beach, III, Richard J. McNally, Jr.. (Attachments: # 1 Exhibit(s) in Support of

		Motion to Dismiss) (Munkwitz, Kelly) (Entered: 03/26/2018)
03/29/2018	20	TEXT ORDER: The Rule 16 conference set for 5/2/2018 and 4/25/2018 deadline for the submission of a joint Civil Case Management Plan and exchange of Mandatory Disclosures are ADJOURNED WITHOUT DATE. The hearing and related deadlines will be reset, if deemed necessary, after disposition of the 19 motion to dismiss. So Ordered by U.S. Magistrate Judge Andrew T. Baxter on 3/29/2018. (nmk) (Entered: 03/29/2018)
		* * *
04/01/2018	23	Consent MOTION for Leave to File *Amicus Brief in Supportof Defendants' Motion to Dismiss the Complaint* filed by Everytown for Gun Safety. (Attachments: # 1 Consent Motion of Everytown for Gun Safety for Leave to Participate as Amicus Curiae, # 2 Declaration Declaration in Support of Everytown for Gun Safety's Motion for Leave to Participate as Amicus Curiae, # 3 Exhibit(s) Memorandum of Everytown for Gun Safety as

		Amicus Curiae in Support of Defendants, # 4 Exhibit(s) [Proposed] Order Granting Motion of Everytown for Gun Safety for Leave to Participate as Amicus Curiae) Motions referred to Andrew T. Baxter. (Maazel, Ilann) (Entered: 04/02/2018)
04/03/2018	24	TEXT ORDER: The motion of Everytown for Gun Safety (Everytown) for leave to participate as amicus curiae 23 is GRANTED. Since Everytown seeks to provide historical analysis regarding firearms laws to assist the Court in resolving the Plaintiffs' constitutional challenge to a New York State firearms licensing law; the parties consent to the participation of Everytown as amicus curiae; and the motion was filed shortly after the Defendants' motion to dismiss, the Court finds that the information offered is timely and useful. See United States v. Heleniak, No. 14-CR-42A, 2015 WL 4208622, at *4, 2015 U.S. Dist. LEXIS 89728, at *9 (W.D.N.Y. July 10, 2015); Avitabile v. Beach, 277 F.Supp.

		3d 326, 330 (N.D.N.Y. 2017). Everytown is directed to file on the docket its Memorandum, which is currently attached to its motion as Exhibit 3 (23 -3). The deadline for further briefing is extended to give the parties time to respond to Everytown's memorandum. The Response to Defendants' motion is due by 5/7/18 and the Reply is due by 5/14/18. SO ORDERED by Judge Brenda K. Sannes on 4/3/18. (rjb,) (Entered: 04/03/2018)
04/03/2018		Reset Deadlines as to 19 MOTION to Dismiss for Failure to State a Claim - Response to Motion due by 5/7/2018; Reply to Response to Motion due by 5/14/2018. Motion will be heard on submission of the papers unless otherwise directed by the Court. (rjb,) (Entered: 04/03/2018)
04/03/2018	25	MEMORANDUM OF LAW re 19 Motion to Dismiss for Failure to State a Claim, *As Amicus Curiae in Support of Defendants* filed by Everytown for Gun Safety. (Attachments: # 1 Appendix Appendix of Historical Gun Las of Amicus Curiae Everytown for Gun

		Safety)(Maazel, Ilann) (Entered: 04/03/2018)
05/07/2018	26	MEMORANDUM OF LAW re 19 Motion to Dismiss for Failure to State a Claim, filed by Robert Nash, New York State Rifle & Pistol Association, Inc.. (Baynes, Kathleen) (Entered: 05/07/2018)
05/14/2018	27	REPLY to Response to Motion re 19 MOTION to Dismiss for Failure to State a Claim filed by George P. Beach, III, Richard J. McNally, Jr.. (Munkwitz, Kelly) (Entered: 05/14/2018)
05/15/2018	28	MOTION to Amend/Correct *Complaint* Motion Hearing set for 6/28/2018 09:30 AM in Syracuse before US Magistrate Judge Andrew T. Baxter Response to Motion due by 6/11/2018 filed by Robert Nash, New York State Rifle & Pistol Association, Inc.. (Attachments: # 1 Affidavit, # 2 Proposed Amended Pleading, # 3 Exhibit(s), # 4 Memorandum of Law) Motions referred to Andrew T. Baxter. (Baynes, Kathleen) (Entered: 05/15/2018)
05/15/2018	29	Letter Motion from Kathleen McCaffrey Baynes, Esq. for

		Robert Nash, New York State Rifle & Pistol Association, Inc. requesting Leave to Amend Complaint submitted to Judge Baxter . (Baynes, Kathleen) (Entered: 05/15/2018)
05/16/2018	30	TEXT ORDER: GRANTING 28 plaintiff's motion to amend/join plaintiff and 29 plaintiff's letter motion. Defendants, reportedly, do not object to the motion to amend and join an additional plaintiff. By agreement of the parties and without objection of this court, 19 defendants' motion to dismiss shall apply to the complaint as amended and the new plaintiff, without the need to re-file the motion to dismiss or any of the subsequently-filed briefs, or the need of the new plaintiff to file any further opposition to the motion to dismiss. So Ordered by U.S. Magistrate Judge Andrew T. Baxter on 5/16/2018. (nmk) (Entered: 05/16/2018)
05/16/2018	31	AMENDED COMPLAINT against All Defendants filed by New York State Rifle & Pistol Association, Inc., Robert Nash, Brandon Koch.(Baynes,

		Kathleen) (Entered: 05/16/2018)
05/17/2018		***Answer due date updated for George P. Beach, II answer due 5/30/2018; Richard J. McNally, Jr. answer due 5/30/2018. As noted in the 30 Text Order, defts' motion to dismiss shall apply to the complaint as amended and the new pltf, without the need to re-file the motion. (see) (Entered: 05/17/2018)
12/17/2018	32	ORDER granting 19 Motion to Dismiss for Failure to State a Claim and dismissing the 31 Amended Complaint with prejudice. Signed by Judge Brenda K. Sannes on 12/17/2018. (rjb,) (Entered: 12/17/2018)
12/17/2018	33	JUDGMENT in favor of George P. Beach, II, Richard J. McNally, Jr. against New York State Rifle & Pistol Association, Inc., Brandon Koch, Robert Nash. (rjb,) (Entered: 12/17/2018)
01/15/2019	34	NOTICE OF APPEAL as to 33 Judgment, 32 Order on Motion to Dismiss for Failure to State a Claim by Brandon Koch, Robert Nash, New York State Rifle & Pistol Association, Inc..

		Filing fee $ 505, receipt number ANYNDC-4618401. (Attachments: # 1 Exhibit(s) Memorandum-Decision and Order, # 2 Exhibit(s) Judgment in a Civil Case)(Baynes, Kathleen) (Entered: 01/15/2019)
01/15/2019	35	ELECTRONIC NOTICE AND CERTIFICATION sent to US Court of Appeals re 34 Notice of Appeal. (Attachments: # 1 Civil Appeals Packet)(hmr) (Entered: 01/15/2019)
09/17/2020		USCA Case Number 19-156 for 34 Notice of Appeal, filed by Brandon Koch, New York State Rifle & Pistol Association, Inc., Robert Nash. (see) (Entered: 09/17/2020)
09/17/2020	36	MANDATE of USCA (issued on 9/16/2020) affirming the judgment of the District Court, as to 34 Notice of Appeal. (see) (Entered: 09/17/2020)
09/17/2020	37	USCA STATEMENT OF COSTS: taxed in the amount of $135.00 in favor of the appellees. (see) (Entered: 09/17/2020)

Complaint (N.D.N.Y. Jan. 31, 2018)

Plaintiffs New York State Rifle & Pistol Association, Inc., and Robert Nash (collectively "Plaintiffs"), by and through the undersigned attorneys, file this Complaint against the above-captioned Defendants, in their official capacities as state and local officials responsible under New York law for administering and enforcing the State's laws and regulations governing the carrying of firearms outside the home. Plaintiffs seek declaratory and injunctive relief: a declaration that New York's limitation of the right to carry firearms to those who can satisfy licensing officials that they have "proper cause" to exercise that right is unconstitutional under the Second and Fourteenth Amendments to the United States Constitution, and an injunction compelling Defendants to refrain from enforcing that invalid limit and to issue Handgun Carry Licenses to Plaintiffs or to otherwise allow Plaintiffs to exercise their right to carry firearms outside the home. In support of their Complaint against Defendants, Plaintiffs hereby allege as follows:

INTRODUCTION

1. The Second Amendment to the United States Constitution guarantees "the right of the people to keep and bear Arms." U.S. CONST. amend. II. When the People, by enacting that amendment, enshrined in their fundamental charter the right to "carry weapons in case of confrontation" for the "core lawful purpose of self-defense," *District of Columbia v. Heller*, 554 U.S. 570, 592, 630 (2008), they did not mean to leave the freedom to exercise that right at the mercy of the

very government officials whose hands they sought to bind. No, "[t]he very enumeration of the right takes out of the hands of government ... the power to decide on a case-by-case basis whether the right is *really* worth insisting upon." *Id.* at 634.

2. In defiance of that constitutional guarantee, New York has seized precisely the power forbidden it by the Second Amendment: the power to decide, on a case-by-case basis, whether an applicant for a license to "carry weapons in case of confrontation," *id.* at 592, has, in its estimation, shown sufficiently "proper cause" that a license should be issued, N.Y. PENAL LAW §400.00(2)(f).

3. Worse still, New York has made clear that a general desire to carry a handgun for the purpose of self-defense—"the *central component*" of the Second Amendment, *Heller*, 554 U.S. at 599 (emphasis added)—is not a sufficiently good reason to exercise the right. Instead, according to New York, an ordinary citizen must establish a *special need for self-defense* which *sets him apart from the general public* to obtain a license from the State to carry a firearm in public for the purpose of self-defense. That restriction is akin to a state law concluding that the general desire to advocate for lawful political change is not sufficient "proper cause" to exercise the right to free speech, and it cuts to the very core of the Second Amendment, no less than such a restriction would gut the First.

4. Indeed, the practical effect of New York's "proper cause" requirement is to make it wholly illegal for typical law-abiding citizens to carry handguns in public for the purpose of self-defense—for by

definition, these ordinary citizens cannot show that they face a *special* danger to their safety.

5. Plaintiff Robert Nash is an ordinary, law-abiding citizen of New York who wishes to carry a firearm outside the home for the purpose of self-defense. He has passed all required background checks and met every other qualification imposed by New York on the eligibility for a license to carry a firearm in public for self-defense—except that like the vast majority of ordinary, law-abiding New York residents, he cannot establish a special need for self-protection that is distinct from the general desire for self-defense. Accordingly, Defendant McNally determined that Robert Nash has not shown "proper cause" to exercise his Second Amendment rights, and he refused to grant him a license to carry a firearm outside the home for self-defense. That result simply cannot be squared with the rights guaranteed by the Second Amendment.

6. Plaintiffs acknowledge that the result they seek is contrary to *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012), but, for the reasons explained in *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017), that case was wrongly decided. They therefore institute this litigation to vindicate their Second Amendment rights and to seek to have *Kachalsky* overruled.

JURISDICTION AND VENUE

7. This Court has subject-matter jurisdiction over Plaintiffs' claim under 28 U.S.C. §§1331 and 1343.

8. Plaintiffs seek remedies under 28 U.S.C. §§1651, 2201, and 2202 and 42 U.S.C. §§1983 and 1988.

9. Venue is proper in this Court under 28 U.S.C. §1391(b)(1) & (b)(2).

PARTIES

10. Plaintiff Robert Nash is a citizen of the United States and a resident and citizen of the State of New York. He resides in Averill Park, NY 12018.

11. Plaintiff New York State Rifle & Pistol Association, Inc. ("NYSRPA") is a group organized to support and defend the right of New York residents to keep and bear arms. The New York restrictions on the public carrying of firearms at issue in this case are thus a direct affront to NYSRPA's central mission. NYSRPA has thousands of members who reside in New York. Its official address is 90 S. Swan Street, Suite 395, Albany, New York 12210. Plaintiff Robert Nash is a member of NYSRPA. Mr. Nash is one among many NYSRPA members who have been and continue to be denied the right to carry a firearm outside of the home for the sole reason that they cannot satisfy the State's "proper cause" requirement.

12. Defendant George P. Beach II is the Superintendent of the New York State Police. As Superintendent, he exercises, delegates, or supervises all the powers and duties of the New York Division of State Police, which is responsible for executing and enforcing New York's laws and regulations governing the carrying of firearms in public, including prescribing the form for Handgun Carry License

applications. His official address is New York State Police, 1220 Washington Avenue, Building 22, Albany, NY 12226. He is being sued in his official capacity.

13. Defendant Richard J. McNally, Jr., is a Justice of the New York Supreme Court, Third Judicial District, and a Licensing Officer for Rensselaer County under N.Y. PENAL LAW §400.00. Pursuant to N.Y. PENAL LAW §265.00(10), he is responsible for receiving applications from residents of Rensselaer County for a license to carry a handgun, investigating the applicant, and either approving or denying the application. His official address is Rensselaer County Courthouse, 80 Second Street, Troy, NY 12180. He is being sued in his official capacity as a State Licensing Officer.

FACTUAL ALLEGATIONS

New York's "Proper Cause" Requirement

14. New York law generally forbids any person to "possess[ ] any firearm," N.Y. PENAL LAW §265.01(1), without first obtaining "a license therefor," *id.* §265.20(a)(3). Violating this ban is a class A misdemeanor, punishable by a fine of $1,000 or less or up to a year in prison. *Id.* §§70.15(1), 80.05(1), 265.01. Possessing a *loaded* firearm without a license is a class C felony, punishable by a fine of up to $5,000 or between one and fifteen years imprisonment. *Id.* §§70.00(2)(c) & (3)(b), 80.00(1), 265.03.

15. New York's ban is subject to minor exceptions for active duty members of the military, police officers, and the like. *Id.* §265.20. An ordinary member of the general public who wishes to carry a handgun outside

the home for purposes of self-protection, however, can only do so if he obtains a license to "have and carry [a handgun] concealed" (a "Handgun Carry License"), pursuant to Section 400.00(2)(f) of New York's Penal Law. A person seeking such a license must submit an application—on a form approved by Defendant Beach—to the Licensing Officer for the city or county where he resides. *Id.* §400.00(3)(a). No license is available to authorize the carrying of handguns within the State openly.

16. To be eligible for a Handgun Carry License, an applicant must satisfy numerous criteria. For example, he must be at least 21 years old, must not have been convicted of any felony or serious offense, must not be an unlawful user of a controlled substance, and must not have a history of mental illness. *Id.* §400.00(1). Before issuing a license, the Licensing Officer must conduct a rigorous investigation and background check, to verify that each of these statutory requirements is satisfied. *Id.* §400.00(4).

17. In addition to these rigorous eligibility and screening requirements, a law-abiding citizen may only be granted a Handgun Carry License if he demonstrates that "proper cause exists for the issuance thereof." *Id.* §400.00(2)(f).

18. In granting a license, some Licensing Officers note certain restrictions on the license, such as "hunting and target." In Rensselaer County, for instance, Licensing Officials routinely grant licenses that are marked "hunting and target," and that they refer to as "restricted licenses." These licenses allow

the licensee to carry a firearm only when engaged in those specified activities. Such a license *does not* permit the carrying of a firearm in public for the purpose of self-defense.

19. While New York law grants local Licensing Officials some discretion in determining what constitutes "proper cause" for issuance of an unrestricted Handgun Carry License, this discretion is cabined by the significant body of New York case-law defining that term. The courts have determined, for instance, that "[a] generalized desire to carry a concealed weapon to protect one's person and property does not constitute 'proper cause.' "*Application of O'Connor*, 585 N.Y.S.2d 1000, 1003 (N.Y. Co. Ct. 1992). They have further clarified that merely traveling through "high crime areas … is too vague to constitute 'proper cause' within the meaning of Penal Law §400.02(f)," *Martinek v. Kerik*, 743 N.Y.S.2d 80, 81 (1st Dep't 2002), and that instead an applicant must "demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession," *Klenosky v. New York City Police Dep't*, 428 N.Y.S.2d 256, 257 (1st Dep't 1980), *aff'd*, 53 N.Y.2d 685 (1981).

20. Accordingly, typical law-abiding citizens of New York—the vast majority of responsible citizens who cannot "demonstrate a special need for self-protection distinguishable from that of the general community," *id.*—effectively remain subject to a flat ban on carrying handguns outside the home for the purpose of self-defense.

Defendant's Refusal to Issue Plaintiffs Handgun Carry Licnses

21. Plaintiff Robert Nash is an adult citizen and resident of New York. He is not a law enforcement official or a member of the armed forces, and he does not fall within any of the other exceptions enumerated in N.Y. PENAL LAW §265.20 to New York's ban on carrying firearms in public.

22. Mr. Nash does, however, possess all of the qualifications necessary to obtain a Handgun Carry License that are enumerated in N.Y. PENAL LAW §400.00(1). For example, he is over 21 years of age, he has not been convicted of any felony or other serious offense, and he is not addicted to controlled substances or mentally infirm. He has also passed all required background checks.

23. Mr. Nash does not face any special or unique danger to his life. He does, however, desire to carry a handgun in public for the purpose of self-defense. Mr. Nash lawfully owns several handguns which he keeps in his home to defend himself and his family, and he would carry a handgun for self-defense when he is in public, were it not for Defendants' enforcement of New York's ban on the public carrying of firearms. Mr. Nash is not entitled to a Handgun Carry License by virtue of his occupation, pursuant to Penal Law §400.00(2)(b)-(e).

24. In or around September 2014, Mr. Nash applied to the Licensing Officer for the county where he resides, Rensselaer County, for a license to carry a handgun in public. After investigation, Mr. Nash's

application was granted on March 12, 2015, but he was issued a license marked "Hunting, Target only" that allowed him to carry a firearm outside the home only while hunting and target shooting.

25. Because of these restrictions, Mr. Nash is not able to carry a firearm outside of his home for the purpose of self-defense.

26. On September 5, 2016, Mr. Nash requested the Licensing Officer, Defendant Richard N. McNally, Jr., to remove the "hunting and target" restrictions from his license and issue him a license allowing him to carry a firearm for self-defense. In support of this request, Mr. Nash cited a string of recent robberies in his neighborhood and the fact that he had recently completed an advanced firearm safety training course. Letter from Robert Nash to Richard McNally, Jr. (Sept. 5, 2016) (attached as Exhibit 1).

27. On November 1, 2016, after an informal hearing, Defendant McNally denied Mr. Nash's request and "determined that the 'Hunting, Target only' restrictions [shall] remain on your carry concealed permit." Letter from Richard McNally, Jr., to Robert Nash (Nov. 1, 2016) (attached as Exhibit 2). Defendant McNally "emphasize[d] that the restrictions are intended to prohibit you from carrying concealed in ANY LOCATION typically open to and frequented by the general public." *Id.*

28. Defendant McNally did not determine that Mr. Nash was ineligible for any of the reasons enumerated in N.Y. PENAL LAW §400.00(1); indeed, his eligibility is confirmed by the fact that he continues to

hold a "restricted" license. Instead, Defendant McNally concluded that Mr. Nash had failed to show "proper cause" to carry a firearm in public for the purpose of self-defense, because he did not demonstrate a special need for self-defense that distinguished him from the general public.

29. In light of Defendant McNally's denial of his request to remove the restrictions on his license, Mr. Nash continues to refrain from carrying a firearm outside the home for self-defense in New York. Mr. Nash would carry a firearm in public for self-defense in New York were it lawful for him to do so.

30. Plaintiff NYSRPA has at least one member who has had an application for a Handgun Carry License denied solely for failure to satisfy the "proper cause" requirement. But for Defendants' continued enforcement of the New York laws and regulations set forth above, that member would forthwith carry a firearm outside the home for self-defense.

COUNT ONE

42 U.S.C. 1983 Action for Depravation of Plaintiffs' Rights under U.S. CONST. amends. II and XIV

31. Plaintiffs incorporate by reference the allegations of the preceding paragraphs.

32. The Second Amendment's guarantee of "the right of the people to keep and bear Arms" secures to law-abiding, responsible, adult citizens the fundamental constitutional right to bear arms outside the home. U.S. CONST. amend. II.

33. This Second Amendment right to bear arms in public applies against the State of New York under U.S. CONST. amend. XIV.

34. This Second Amendment right to bear arms in public cannot be subject to a government official's discretionary determination of whether a law-abiding citizen has "proper cause" to exercise that right.

35. A government restriction that limits the right to bear arms in public for the purpose of self-defense to only those few, favored citizens who can demonstrate that they face a special danger to their life effectively operates as a flat ban on the carrying of firearms by *typical* lawabiding citizens, who by definition cannot demonstrate this kind of *atypical* need to bear arms.

36. By infringing the Second Amendment right to bear arms in public in these ways, the New York laws and regulations discussed in the foregoing allegations violate the Second Amendment, which applies to Defendants by operation of the Fourteenth Amendment, both facially and as applied to Plaintiff Robert Nash and members of the New York State Rifle & Pistol Association, Inc., and they are therefore invalid.

PRAYER FOR RELIEF

37. WHEREFORE, Plaintiffs pray for an order and judgment:

a. Declaring that New York's "proper cause" requirement, as set forth in statutes and regulations including but not limited to N.Y. PENAL LAW §400.00(2)(f), violates the Second and

Fourteenth Amendments and is thus devoid of any legal force or effect;

b. Enjoining Defendants and their employees and agents from denying unrestricted Handgun Carry Licenses to applicants on the basis of New York's "proper cause" requirement, as set forth in statutes and regulations including but not limited to N.Y. PENAL LAW §400.00(2)(f);

c. Enjoining Defendants and their employees and agents from enforcing the New York laws and regulations establishing and defining the "proper cause" requirement, including N.Y. PENAL LAW §400.00(2)(f);

d. Ordering Defendants and their employees and agents to issue unrestricted Handgun Carry Licenses to Plaintiff Robert Nash and members of Plaintiff New York State Rifle & Pistol Association, Inc.;

e. Awarding Plaintiffs their reasonable costs, including attorneys' fees, incurred in bringing this action, pursuant to 42 U.S.C. §1988; and

f. Granting such other and further relief as this Court deems just and proper.

Dated: January 31, 2018

Respectfully submitted,

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s/Kathleen McCaffrey Baynes
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Attorneys for Plaintiffs

Exhibit 1 to Complaint,
Letter from R. Nash to Judge R. J. McNally, Jr.
(Sept. 5, 2016)

Dear Honorable Judge Richard J McNally Jr.,

I am writing this letter to request that the restrictions be removed from my pistol permit. I intend to use my pistol for personal protection where legally permitted. The recent string of robberies in the area has prompted me to go ahead and ask for this request, most recently, on my street at 35 Alps Mountain Road on August 15th 2016.

I have and continue to be a law abiding citizen of Rensselaer County. I have spent the last year and a half improving my proficiency with my pistol in a safe manner. My shooting continues to become more accurate the more I practice. My cousin Tim Osborn, a former marksman in the US Army, has been a big part of this working on handling techniques, sight alignment, stance, breathing techniques, and trigger control with me.

The basic pistol class and, most recently, the advanced safety and evaluation pistol class (on 8/31/2016 at American Tactical Systems) that I have taken have also taught me a lot about law, safety and technique.

I understand fully the immense responsibility as well as the possible ramifications of carrying a firearm concealed on my person for lawful purposes.

Thank you for considering my request.

Sincerely,
Robert Nash

Exhibit 2 to Complaint,
Letter from Judge R. J. McNally, Jr. to R. Nash
(Nov. 1, 2016)

Dear Mr. Nash:

This letter reflects that on October 31, 2016 the Court held a hearing for the request that your restrictions be removed from your pistol/revolver license application.

While the Court has determined that the "Hunting, Target only" restrictions remain on your carry concealed permit, I note that the restrictions DO ALLOW you to carry concealed for purposes of off road back country, outdoor activities similar to hunting, for example fishing, hiking & camping etc.

I emphasize that the restrictions are intended to *prohibit* you from carrying concealed in ANY LOCATION typically open to and frequented by the general public.

I would suggest you keep a copy of this letter for your records.

Sincerely,

[handwritten: signature]
Richard J. McNally, Jr.
Supreme Court

RJM/mjs

cc: Charles Daniels
Pistol Permit Clerk

Exhibit 3 to Complaint, Civil Cover Sheet

I. (a) PLAINTIFFS New York State Rifle & Pistol Association, Inc.; and Nash, Robert (b) County of Residence of First Listed Plaintiff Albany (*EXCEPT IN U.S. PLAINTIFF CASES)* (c) Attorneys (Firm Name, Address, and Telephone Number) See Attachment 2	**DEFENDANTS** See Attachment 1 County of Residence of First Listed Defendant _____ (*IN U.S. PLAINTIFF CASES ONLY*) NOTE: IN LAND OF CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED Attorneys (*If Known*)
II. BASIS OF JURISDICTION (*Place an "X" in One Box Only*) □ 1 U.S. Government Plaintiff □ 2 U.S. Government Defendant □**X** Federal Question (*U.S. Government Not a Party*) □ Diversity (*Indicate Citizenship of Parties in Item III*)	**III. CITIZENSHIP OF PRINCIPAL PARTIES** (*For Diversity Cases Only*) (*Place an "X" in One Box for Plaintiff and One Box for Defendant*) PTF DEF Citizen of This State □1 □1 Citizen of Another State □2 □2 Citizen or Subject of a Foreign Country □3 □3 Incorporated or Principal Place of Business In This State □4 □4 Incorporated and Principal Place of Business In Another State □5 □5 Foreign Nation □6 □6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*
*** * ***
OTHER STATUTES
□ 375 False Claims Act □ 376 Qui Tam (31 USC 3729(a) □ 400 State Reapportionment □ 410 Antitrust □ 430 Banks and Banking □ 450 Commerce □ 460 Deportation □ 470 Racketeer Influenced and Corrupt Organizations □ 480 Consumer Credit □ 490 Cable/Sat TV □ 850 Securities/Commodities/Exchange □ 890 Other Statutory Actions □ 891 Agricultural Acts □ 893 Environmental Matters □ 895 Freedom of Information Act □ 896 Arbitration □ 899 Administrative Procedure Act/Review or Appeal of Agency Decision □**X** 950 Constitutionality of State Statutes
V. ORIGIN *(Place an "X" in One Box Only)* □**X** 1. Original Proceeding □ 2. Removed from State Court □ 3. Remanded from Appellate Court □ 4. Reinstated or Reopened □ 5. Transferred from Another District *(specify)* □ 6. Multidistrict Litigation - Transfer □ 8 Multidistrict Litigation - Direct File
VI. CAUSE OF ACTION Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*: 42 U.S.C. 1983 Brief description of cause: Second Amendment challenge to New York's restrictions on carrying firearms outside the home

VII. REQUESTED IN COMPLAINT:
□ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R. Cv.P. DEMAND $ CHECK YES only if demanded in complaint: JURY DEMAND: □ Yes □**X** No
VIII. RELATED CASE(S) IF ANY *(See instructions)*: JUDGE _____ DOCKET NUMBER _____
DATE 01/31/2018 SIGNATURE OF ATTORNEY OF RECORD s/Kathleen McCaffrey Baynes, Bar Roll No. 507154
FOR OFFICE USE ONLY ANYNDC4273520 RECIEPT#_____ AMOUNT $400.00 APPLYING IFP _____ JUDGE BKS MAG. JUDGE ATB

ATTACHMENT 1 -DEFENDANTS

New York State Police, Beach, George P., II,

Superintendent

McNally, Richard J., Jr., Licensing Officer

ATTACHMENT 2 - ATTORNEYS FOR PLAINTIFFS

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Notice of Motion To Dismiss (March 26, 2018)

PLEASE TAKE NOTICE that upon the Complaint and the accompanying Memorandum of Law; and upon all prior proceedings, Defendants George P. Beach and Richard J. McNally, on May 3, 2018 at 10:00 a.m., or as soon thereafter as counsel can be heard, will make a motion at the United States District Court, Northern District of New York, Syracuse, New York, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing the Complaint in its entirety, together with such other or further relief as may be just.

Dated: Albany, New York
March 26, 2018

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Defendants, George P. Beach and Richard J. McNally
The Capitol
Albany, New York 12224-0341

By: [handwritten: signature]
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Exhibit 1 to Motion To Dismiss, Memorandum in Support of Motion (March 26, 2018)

PRELIMINARY STATEMENT

This Memorandum of Law is respectfully submitted on behalf of defendants New York State Police Superintendent George P. Beach II and the Honorable Richard J. McNally, Jr. (collectively "defendants") and in support of their motion to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). In *Kachalsky v. County of Westchester*, the Second Circuit definitively held that New York's handgun licensing scheme, which requires an applicant to demonstrate "proper cause" to obtain a license to carry a concealed handgun in public, does not violate the Second Amendment to the United States Constitution. Despite the Second Circuit's ruling, plaintiffs now mount a facial challenge to the constitutionality of New York's Penal Law section 400.00(2)(f)-the very statute at issue in *Kachalsky*. Because *Kachalsky*, which was properly decided, is binding precedent, the Complaint fails to state a cause of action and must be dismissed.

FACTS

Plaintiff New York State Rifle & Pistol Association, Inc. (NYSRPA) is a "group organized to support and defend the right of New York residents to keep and bear arms." Complaint, Dkt. # 1, ¶ 11. It purports to have thousands of members who live in New York, including plaintiff Robert Nash. Id. Plaintiff Nash lives in Averill Park, New York and owns several handguns. Complaint, Dkt. # 1, ¶¶ 10, 23. As of March 12, 2015, plaintiff Nash also possesses

a firearm[1] for home possession and which is marked "Hunting, Target only." Complaint, Dkt. # 1, ¶ 24. Plaintiff Nash's permit allows him to carry a handgun outside of his home for hunting and target shooting, including "carrying concealed for the purposes of off road back country, outdoor activities similar to hunting, for example, fishing, hiking & camping, etc." Dkt. # 1, Ex. 2. According to the Complaint, plaintiff Nash does not face any special or unique danger to his life. Dkt. # 1, ¶ 23.

Defendant Richard J. McNally, Jr. is a Justice of the New York Supreme Court, Third Judicial District. Complaint, Dkt. #1, ¶ 13. He is sued in his official capacity. Justice McNally is a Licensing Officer for Rensselaer County under Penal Law section 400.00. In that role, "he is responsible for receiving applications, investigating the applicant, and either approving or denying the application" for a handgun license. Complaint, Dkt. #1, ¶ 13. Defendant George P. Beach II is the Superintendent of the New York State Police. He is sued in his official capacity, presumably because his agency is one of the law enforcement agencies in New York State that enforces the New York Penal Law. *See* Complaint, Dkt. # 1, ¶ 12.

---

[1] A "firearm" is defined under New York law to include pistols and revolvers; shotguns with barrels less than eighteen inches in length; rifles with barrels less than sixteen inches in length; "any weapon made from a shotgun or rifle" with an overall length of less than twenty-six inches; and assault weapons. Penal Law §265.00(3); *see Kachalsky*, 701 F.3d at 85. Rifles and shotguns are otherwise not subject to New York's licensing provisions. Penal Law §265.00(3); *see Kachalsky*, 701 F.3d at 85. Plaintiff may have long guns which he is free to keep at home or to carry without a license.

Superintendent Beach also approves the form that a person seeking a license to carry a concealed handgun must submit. Complaint, Dkt. #1, ¶ 15.

On September 5, 2016, plaintiff Nash applied to Justice McNally to have the hunting and target restrictions removed from his license and have Judge McNally issue plaintiff Nash a license that would permit him to carry a concealed handgun in public. Complaint, Dkt. #1, ¶ 26. Although plaintiff Nash owns handguns that he "keeps in his home to defend himself and his family", he cited "a string of recent robberies in his neighborhood" as justification for his application. Complaint, Dkt. #1, ¶¶23, 26. Justice McNally held an informal hearing to determine whether plaintiff Nash could establish "proper cause". Complaint, Dkt. #1, ¶¶ 27-28. Section 400.00(2)(f) of New York's Penal Law requires a finding of proper cause before a Licensing Officer may issue a permit to carry a concealed firearm in public. Complaint, Dkt. #1, ¶¶ 15-17. Justice McNally found that plaintiff did not establish proper cause because he "did not demonstrate a special need for self-defense that distinguishes him from the general public." Complaint, Dkt. #1, ¶ 28. Plaintiff Nash continues to maintain his license that permits him to use his handguns for hunting and target use, as well as protection in the home. Complaint, Dkt. #1, ¶ 27.

Plaintiffs now challenge the constitutionality of New York Penal Law section 400.00(2)(f), citing to *Wrenn v. District of Columbia*, a recent case out of the D.C. Circuit. Because the Second Circuit has established that the statute is constitutional, the Complaint must be dismissed.

ARGUMENT

In deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court should "draw all reasonable inferences in Plaintiff['s] favor, assume all well-pleaded factual allegations to be true, and determine whether they plausibly give rise to an entitlement to relief." *Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011) (internal quotation marks omitted).

"'To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Reeve v. Murabito*, No. 13-cv-712, 2013 U.S. Dist. LEXIS 163359, at *4 (N.D.N.Y. Nov. 15, 2013) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (internal quotation marks omitted). "'A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* The complaint must "allege 'more than a sheer possibility that a defendant has acted unlawfully' and more than 'facts that are merely consistent with a defendant's liability.'" *Id.* (internal quotation marks omitted). Determining whether a complaint plausibly states a claim for relief is "a context specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679; *accord Harris v. Mills*, 572 F.3d 66, 71-72 (2d Cir. 2009). Here, plaintiffs acknowledge that the Complaint is contrary to the Second Circuit's decision in *Kachalsky*. By the very language of the Complaint, plaintiffs fail to state a claim for relief.

POINT I

BECAUSE THE HOLDING IN *KACHALSKY* IS CONTROLLING, THE COMPLAINT MUST BE DISMISSED

Plaintiffs assert that the Second Circuit wrongly decided *Kachalsky* for the reasons explained in *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017), and seek from this Court a declaration that New York Penal Law section 400.00(2)(f) violates the Second Amendment to the United States Constitution. They further seek injunctive relief and attorney fees. This Court may not provide the relief sought. *Newsom-Lang v. Warren Int'l*, 129 F. Supp.2d 662, 664 (S.D.N.Y. 2001).

District courts are bound by the applicable Circuit precedent. *Id.*; *Monsanto v. United States*, 348 F.3d 345, 351 (2d Cir. 2003). "This Court must follow binding precedent from the Second Circuit." *Preston v. Berryhill*, 254 F. Supp. 3d 379, 384-385 (N.D.N.Y. 2017) (citing *United States ex rel. Schnitzler v. Follette*, 406 F.2d 319, 322 (2d Cir. 1969)). Even if this Court finds the holding in *Wrenn* more persuasive, it may not substitute its own judgment for that of the Second Circuit. "'Rather, lower courts should follow the case which directly controls, leaving to [the Circuit] Court the prerogative of overruling its own decisions.'" *Windsor v. United States*, 699 F.3d 169, 195 (2d Cir. 2012) (quoting *Agostini v. Felton*, 521 U.S. 203, 207, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997)) (alteration added); *see also United States v. Diaz*. 122 F. Supp.3d 135, 168 (S.D.N.Y. 2015), *aff'd* 2017 U.S. App. LEXIS 6579 (2d Cir. Apr. 18, 2017).

It is undisputed that the holding in *Kachalsky* is controlling here. *See* Complaint, Dkt. #1, ¶ 6 (noting

the relief sought is contrary to *Kachalsky*); ¶¶ 5, 15-19 (setting forth facts that challenge section 400.00(2)(f) of New York's Penal Law, specifically the requirement that an applicant show "proper cause" to obtain a license to carry a concealed firearm); *Kachalsky v. County of Westchester*, 864 F.3d 81, (2d Cir. 2012) (finding the issue to be whether New York's firearm licensing scheme, which requires an applicant to demonstrate "proper cause" to obtain a license to carry a concealed handgun in public, violates the Second Amendment).

While this Court's inquiry necessarily ends upon review of the Complaint and the decision in *Kachalsky*, it is noteworthy that the D.C. Circuit's decision in *Wrenn* adds nothing to the Second Circuit's decision in *Kachalsky*. Indeed, the arguments accepted by the *Wrenn* court were considered and rejected by the Second Circuit. For example, the D.C. Circuit found that the ability to carry a firearm outside of the home was a central or core component to the Second Amendment's right to keep and bear arms. *Wrenn v. District of Columbia*, 864 F.3d 650, 657 (D.C. Cir. 2017). The Second Circuit flatly rejected that same argument, finding that the ability to carry weapons outside of the home did not constitute a "core" component to the Second Amendment. *Kachalsky v. District of Columbia*, 701 F.3d 81, 93 (2d Cir. 2012)("Heller explains that the 'core' protection of the Second Amendment is the 'right of law-abiding, responsible citizens to use arms in defense of hearth and home.'"); *see also McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 791 (2010).

The Second Circuit and the D.C. Circuit also differ in the manner they view the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L.Ed.2d 637 (2008) and the manner in which they treat the various states' historic regulation of weapons. *See Wrenn*, 864 F.3d at 662 (distinguishing *Kachalsky*). While *Wrenn* was decided after *Kachalsky*, the Second Circuit (and courts within it) continues to rely upon *Kachalsky* as controlling. *See, e.g.*, *New York State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45 (2d Cir. 2018); *Libertarian Party v. Cuomo*, 2018 U.S. Dist. LEXIS 4543, 2018 WL 353181 (W.D.N.Y. 2018). In fact, the Second Circuit specifically considered and rejected the reasoning in *Wrenn*. In *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, the Second Circuit stated:

> We are aware that a divided panel of the Seventh Circuit and a divided panel of the District of Columbia Circuit have disagreed with Kachalsky. *See Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012); *Wrenn v. District of Columbia*, 864 F.3d 650, 662 (D.C. Cir. 2017). After giving careful and respectful attention to the reasoning of those opinions, we reaffirm our prior holding, by which this panel is, in any event, bound. We also recognize that the Third and Fourth Circuits have adopted reasoning similar to ours in upholding various state regulations on the carrying of firearms outside the home. *See Drake v. Filko*, 724 F.3d 426, 433 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 880-81 (4th Cir. 2013). The Ninth Circuit upheld a similar regulation on other grounds.

> *Peruta v. Cty. of San Diego*, 824 F.3d 919, 924 (9th Cir. 2016) (en banc) (holding that "the Second Amendment does not ... protect a right of a member of the general public to carry concealed firearms in public"), cert. denied sub nom. *Peruta v. California*, --- U.S. ----, 137 S.Ct. 1995, 198 L.Ed.2d 746 (2017).

883 F.3d at 56 n.5. Plaintiffs' argument that after the *Wrenn* decision, the Second Circuit should revisit *Kachalsky* as it was "wrongly decided" is unfounded.

The Second Circuit's well-reasoned analysis in *Kachalsky* includes discussion of New York's longstanding history of firearm regulation, 701 F.3d at 84-85, the Supreme Court's decision in *Heller*, *id.* at 88-94, various states' historical regulation of firearms in public places, *id.* at 89-90, 95-96, and historical and current studies that address the potential danger of concealed handguns in public places, *id.* at 84-85, 99. While not relevant to the issue before this Court, as the *Kachalsky* decision is controlling, it is noteworthy that more recent studies are even more compelling than those considered by the Second Circuit in *Kachalsky*.

Plaintiffs essentially ask that New York move to become a "shall issue" state, where licensing officials have little to no discretion and where applicants need not show "proper cause" to have unrestricted license to carry concealed handguns in public. Recent studies have shown that violent crime increases 12.3% after states move from laws requiring a showing of a need to carry firearms in public places to a more permissive system, with the effect increasing by 1.1% each year

thereafter.[2] John Donohue Study discussed in Webster, et al. *Firearms on College Campuses: Research Evidence and Policy Implications* (2016) (available at https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-andresearch/_ pdfs/GunsOnCampus.pdf).

Other recent empirical evidence also strongly demonstrates that licensing laws regulating the public carrying of guns, like New York's, substantially advance the state's compelling interests in protecting its citizens from gun violence. Research now shows that handgun permit and licensing laws are "[t]he type of firearm policy most consistently associated with curtailing the diversion of guns to criminals and for which some evidence indicates protective effects against gun violence." Daniel W. Webster & Garen J. Wintemute, *Effects of Policies Designed to Keep Firearms from High-Risk Individuals*, 36 Ann. Rev. Pub. Health 21, 34 (2015)(available at https://www.annualreviews.org/doi/full/10.1146/annurev-publhealth-031914-122516).

The vast majority of firearms-related homicides—approximately 90% in 2015—are committed with handguns. States where handgun licensing laws leave licensing officials with little or no discretion (referred to as "shall-issue states") are associated with

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[2] The Court may properly take judicial notice of "studies and data" in assessing Plaintiffs' Second Amendment claim. *Kachalsky*, 701 F.3d at 97-99; *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo, 804 F.3d at 261-62*; *see also, e.g.*, *Snell* v. *Suffolk Cnty.*, 782 F.2d 1094, 1105-06 (2d Cir. 1986) (holding that social science studies can be reviewed by courts as "legislative facts").

significantly higher rates of total (6.5%), firearm-related (8.6%), and handgun-related (10.6%) homicide when compared with "may-issue" states like New York. *See, e.g.,* Michael Siegel, et. al., *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States* (2017) (available at http://ajph.aphapublications.org/doi/full/10.2105/AJPH.2017.304057). In those states that move from handgun licenses to "right to carry" handgun laws, violent crime increases an average of 12.3%, with the effect increasing by 1.1% each year the change is in effect. Another comprehensive study found that shall-issue laws increase violent crime and murder, including a 13-15% increase in violent crime after ten years and small increases in property crime and homicide. John Donohue, *Right to Carry laws and Violent Crime: a Comprehensive Assessment Using Panel Data and a State Level Synthetic Controls Analysis* (2017). Shall-issue laws are also associated with an increase in aggravated assault generally and a 33% increase in gun-related aggravated assault. Abhey Aneja & John Donohue, *The Impact of Right to Carry Laws and the NRC report: the Latest Lessons for the Empirical Evaluation of Law and Policy* (2012)(available at http://www.nber.org/papers/w18294.pdf).

Two important examples of the import of handgun licensing laws are found in the experiences in Missouri and Connecticut. Missouri's repeal of its handgun licensing law, in 2007, was associated with a 14% increase in the state's annual murder rate and an increase of 25% in its rate of firearm homicides. Daniel Webster et al., *Effects of the Repeal of Missouri's Handgun Purchaser Licensing Law on Homicides*, 91

J. Urban Health 293 (2014) (erratum: 91 J. Urban Health 598 (2014)) (available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3978146/ and https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4074329/). Yet another study examined the impact of Connecticut's handgun licensing law and found that it was associated with a 40% reduction in that state's firearm homicide rate. Kara E. Rudolph et al., *Association Between Connecticut's Permit-to-Purchase Handgun Law and Homicides*, 105 Am. J. Pub. Health e49 (2015)(available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4504296/). Notably, in both Missouri and Connecticut, no "substitution effect" was observed, meaning criminals did not just switch to other weapons when they failed to obtain firearms.

These recent studies are not dispositive here. This Court is bound by the Second Circuit's previous decisions in *Kachalsky* and *NYSRPA v. City of New York*, 883 F.3d at 57. Nevertheless, it is perhaps because of the strength of the empirical evidence showing that New York's licensing laws, including the "proper cause" requirement, substantially advance the State's compelling interest in public safety that the plaintiffs simply ask the Court to set aside *Kachalsky* as "wrongly decided" and to blindly follow *Wrenn*.

POINT II

THE CLAIM BROUGHT BY NYSRPA SHOULD BE DISMISSED ON THE ADDITIONAL BASIS THAT NYSRPA LACKS STANDING TO PURSUE FACIAL CONSTITUTIONAL CHALLENGES LIKE THIS ONE.

The organizational plaintiff, NYSRPA, lacks standing. NYSRPA alleges in the Complaint that that the challenged statutes are "a direct affront" to its "central mission" and that it brings suit to "support and defend" that rights of New York residents and its members to carry firearms outside the home. Dkt. # 1, ¶ 11. But in a 42 U.S.C. §1983 action like this one, an organization may bring suit only "on its own behalf, rather than that of its members." *N.Y. State Citizens' Coal. for Children v. Velez*, No. 14-2919-cv, 2015 U.S. App. LEXIS 18805, at *3 (2d Cir. Oct. 29, 2015) (summary order); *see, e.g.*, *Knife Rights Inc. v. Vance*, 802 F.3d 377, 387-89 (2d Cir. 2015); *Nnebe v. Daus*, 644 F.3d 147, 156 (2d Cir. 2011). The Complaint is silent as to any injury that NYSRPA itself has sustained, let alone one that would give rise to standing in this case. *See, e.g.*, *Kachalsky*, 817 F. Supp. 2d at 251 (holding that an organizational plaintiff's allegations "that it 'promote[s] the exercise of the right to keep and bear arms and engages in 'education, research, publishing and legal action focusing on the [c]onstitutional right to privately own and possess firearms' ... are plainly insufficient to give rise to standing").

CONCLUSION

By its own terms, the Complaint runs counter to the Second Circuit Court of Appeals decision in *Kachalsky v. County of Westchester*. Because *Kachalsky* is binding precedent on this Court, the Complaint must be dismissed.

Dated: Albany, New York
March 26, 2018

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Plaintiffs' Memorandum in Opposition To Defendants' Motion to Dismiss (May 7, 2018)

INTRODUCTION

At the core of the Second Amendment lies "the individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). When the people elevated that right into the Nation's fundamental charter, they did not intend to leave the freedom to exercise it at the mercy of the very government officials whose hands they sought to bind. No, "[t]he very enumeration of the right takes out of the hands of government ... the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* at 634. Defendants—state and local officials responsible for administering and enforcing New York's regulations governing carrying firearms outside the home—have imposed limits on "the right of the people to ... bear Arms," U.S. CONST. amend. II, that flout these basic constitutional principles at every turn. New York has seized the very power forbidden it by the Second Amendment: the power to decide, on a case-by-case basis, whether an applicant for a license to "carry weapons in case of confrontation," *Heller*, 554 U.S. at 592, has, in the estimation of its local licensing authorities, shown a sufficiently "proper cause" to exercise that right, N.Y. PENAL LAW §400.00(2)(f). Worse still, the State has determined that a general desire to carry a weapon for selfdefense is not a sufficiently good reason—demanding, instead, proof that a law-abiding citizen wishing to exercise the right has "a special need for self-protection distinguishable from that of the general community," *Klenosky v. New*

York City Police Dep't, 428 N.Y.S.2d 256, 257 (1st Dep't 1980), *aff'd*, 53 N.Y.2d 685 (1981). Defendants have thus struck a balance *directly contrary* to the Constitution's demand that the right to self-defense—"the *central component*" of the Second Amendment, *Heller*, 554 U.S. at 599—must be "elevate[d] above all other interests." *Id.* at 635.

To be sure, as New York points out, the Second Circuit—in precedent we concede is binding on this Court at this stage in the litigation—has upheld New York's "proper cause" limit. *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012). But *Kachalsky* is deeply flawed, and it should be overturned at the first opportunity by a court competent to do so. *Kachalsky* does not meaningfully acknowledge the extensive textual and historical evidence demonstrating that the right to carry firearms for self-protection outside the home is at the very core of the Second Amendment. It adopts merely "intermediate" constitutional scrutiny, effectively relegating the right to bear arms to second-class status. And even if the choice of intermediate scrutiny were defensible, *Kachalsky*'s application of it—essentially deferring to the State's judgment without discussing or even *identifying* the empirical evidence on which that judgment was supposedly based—is not.

In sum, although this Court is presently bound by Second Circuit precedent to uphold it, New York's "proper cause" restriction is unconstitutional.

STATEMENT

I. New York's "Proper Cause" requirement

Under New York law, an ordinary member of the general public who wishes to carry a handgun outside

the home must first obtain a license to "have and carry [a handgun] concealed" (a "Handgun Carry License") pursuant to Section 400.00(2)(f) of New York's Penal Law. A person seeking such a license must submit an application to the Licensing Officer for the city or county where the applicant resides, on an application form approved by the Superintendent of the New York State Police, Defendant Beach. N.Y. PENAL LAW §400.00(3)(a).

New York imposes a number of objective restrictions on the eligibility for a Handgun Carry License. For example, an applicant must be at least 21 years old, must not have been convicted of any felony or serious offense, must not be an unlawful user of a controlled substance, and must not have a history of mental illness. *Id. §*400.00(1). Before issuing a license, the Licensing Officer must conduct a rigorous investigation and background check to verify that each of these statutory requirements is satisfied. *Id. §*400.00(4).

In addition to these eligibility requirements, New York law also imposes a more subjective restriction on the availability of Handgun Carry Licenses: an applicant must demonstrate that "proper cause exists for the issuance thereof." *Id. §*400.00(2)(f). While Licensing Officials retain some discretion in determining what constitutes "proper cause" under this standard, a significant body of New York case-law provides several examples of reasons that *do not* qualify. The courts have determined, for instance, that "[a] generalized desire to carry a concealed weapon to protect one's person and property does not constitute 'proper cause.' " *Application of O'Connor*, 585 N.Y.S.2d

1000, 1003 (Sup. Ct. West. Cty. 1992). They have further clarified that merely traveling through "high crime areas ... is too vague to constitute 'proper cause' within the meaning of Penal Law §400.00(2)(f)," *Martinek v. Kerik*, 743 N.Y.S.2d 80, 81 (1st Dep't 2002); instead, an applicant must "demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession," *Klenosky*, 428 N.Y.S.2d at 257.[1]

Accordingly, typical New Yorkers—the vast majority of citizens who cannot "demonstrate a special need for self-protection distinguishable from that of the general community," *id.*—effectively remain subject to a ban on carrying handguns outside the home for self-defense.

II. Defendants' refusal to issue handgun carry licenses to Plaintiffs

Pursuant to this restriction, Defendants denied a request by Plaintiff Nash for a Handgun Carry License that would allow him to carry a handgun in public for self-defense. Mr. Nash, a resident of Rensselaer County, applied to his local Licensing Officer for a Handgun Carry License in late 2014. Complaint for Declaratory & Injunctive Relief ¶ 24 (Feb. 1, 2018), Doc. 1 ("Compl."). The Licensing Officer

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[1] Some Licensing Officers grant what they call "restricted licenses," which are licenses that are marked by certain restrictions, such as "hunting and target." These licenses may be granted without a showing of a special need for self-defense, but they allow the licensee to carry a firearm *only* when engaged in the specified activities. Such a license thus *does not* permit the carrying of a firearm in public for the purpose of self-defense.

determined that Mr. Nash met all of the eligibility and training requirements imposed by New York law and granted his application on March 12, 2015. *Id.* But the license Mr. Nash was issued was marked "Hunting, Target only," and it thus allowed him to carry a firearm outside the home only while hunting and target shooting—not for the general purpose of selfprotection. *Id.* ¶¶ 24-25.

Because he wanted to carry a firearm for self-defense, Mr. Nash requested the Licensing Officer, Defendant Richard N. McNally, Jr., to remove the "hunting and target" restrictions from his license and issue him a license allowing him to carry a firearm for self-protection. *Id.* ¶ 26. In support of this request, Mr. Nash cited a string of recent robberies in his neighborhood and the fact that he had recently completed an advanced firearm safety training course. *Id.* On November 1, 2016, after an informal hearing, Defendant McNally denied Mr. Nash's request and "determined that the 'Hunting, Target only' restrictions [shall] remain on your carry concealed permit." *Id* ¶ 27; *see also id.* at Ex. 2. Those restrictions, Defendant McNally emphasized, "are intended to *prohibit* you from carrying concealed in ANY LOCATION typically open to and frequented by the general public." *Id* ¶ 27; *see also id.* at Ex. 2. While Mr. Nash met all of New York's eligibility requirements, Defendant McNally concluded that he had failed to show "proper cause" because he did not demonstrate a special need for self-defense that distinguished him from the general public. *Id.* ¶ 28.[2]

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[2] Defendants have also refused, on the basis of the "proper cause" requirement, to grant at least one member of organizational

ARGUMENT

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Myun-Uk Choi v. Tower Research Capital LLC*, 886 F.3d 229, 234 (2d Cir. 2018) (quotation marks omitted). "[T]he only facts to be considered are those alleged in the complaint, and the court must accept them, drawing all reasonable inferences in the plaintiff's favor, in deciding whether the complaint alleges sufficient facts to survive." *Doe v. Columbia Univ.*, 831 F.3d 46, 48 (2d Cir. 2016).

As Defendants point out, the Second Circuit held in *Kachalsky* that New York's "proper cause" restriction on the issuance of Handgun Carry Licenses is consistent with the Second Amendment. Because this Court "is required to follow precedent established by higher courts," *United States v. Hildenbrandt*, 378 F. Supp. 2d 44, 48 (N.D.N.Y. 2005), *aff'd*, 207 F. App'x 50 (2d Cir. 2006), Plaintiffs do not dispute that it must follow the controlling decision in *Kachalsky*, at this point in the proceedings. But *Kachalsky*'s ruling is deeply flawed, and as we show below, it should be overruled at the first opportunity by a court with authority to do so.

I. The conduct restricted by New York's "proper cause" requirement lies at the core of the Second Amendment.

Plaintiff New York State Rifle and Pistol Association a license that would allow them to carry a firearm outside the home for self-defense. *Id.* ¶ 30.

A. Text, history, precedent, and purpose all confirm that the right to keep and bear arms extends outside the home.

In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." 554 U.S. 570, 592 (2008). And although that landmark ruling did not purport to "clarify the entire field" of Second Amendment jurisprudence, *id.* at 635, *Heller* did set forth clear guidance about *the methodology* for deciding future disputes over the right to keep and bear arms. Because "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them," *id.* at 634-35, deciding whether a government restriction challenged on Second Amendment grounds can be squared with that provision involves a close "textual and historical analysis." *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 253 (2d Cir. 2015). Here, text, precedent, purpose, and history uniformly show that the carrying of firearms outside the home for self-defense is squarely protected by the Second Amendment right.

1. As even the *Kachalsky* court recognized, "[t]he plain text of the Second Amendment does not limit the right to bear arms to the home." 701 F.3d at 89 n.10. The substance of the Second Amendment right reposes in the twin verbs of the operative clause: "the right of the people to keep *and bear* Arms, shall not be infringed." U.S. CONST. amend. II (emphasis added). Because "[t]o speak of 'bearing' arms within one's home would at all times have been an awkward usage," the Constitution's explicit inclusion of the

"right to bear arms thus implies a right to carry a loaded gun outside the home." *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012). Indeed, interpreting the Second Amendment as confined to the home would read the second of these guarantees—the right to bear arms—out of the Constitution's text altogether, for the right to keep arms, standing alone, would be sufficient to protect the right to have arms in the home.

2. Confining the right to keep and bear arms to the home would also be at war with precedent. The Supreme Court's decision in "*Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one's home." *Id.* at 935-36. For instance, *Heller* squarely holds that the Second Amendment "guarantee[s] the individual right to possess *and carry* weapons in case of confrontation," 554 U.S. at 592 (emphasis added), and it defines the key constitutional phrase "bear arms" as to " 'wear, bear, or carry ... upon the person or in the clothing or in a pocket, for the purpose ... of being armed and ready for offensive or defensive action in a case of conflict with another person,' " *id.* at 584 (alteration in original) (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)). *Heller*'s indication that "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" are "presumptively lawful" also implicitly recognizes a general right to bear arms in public; otherwise, there would be no need to identify exceptions. *Id.* at 626, 627 n.26. Moreover, *Heller* extensively cites and significantly relies upon *Nunn v. State*, a nineteenth-century Georgia case that "struck down a ban on carrying pistols openly" under the Second Amendment. *Id.* at 612; *see also Caetano v.*

Massachusetts, 136 S. Ct. 1027 (2016) (vacating state court ruling that the Second Amendment does not protect the right to carry a stun gun in public).

While the Second Circuit in *Kachalsky* did not squarely address whether the Second Amendment applies outside the home, it assumed for the sake of analysis "that the Amendment must have *some* application" in public. 701 F.3d at 89. That assumption is consistent with the persuasive authority from other federal courts. Two circuit courts have directly held that the Second Amendment right to armed self-defense does not give out at the doorstep. *See Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017); *Moore*, 702 F.3d at 935, 942. And *no* federal court of appeals has held that the Amendment *does not* apply outside the home.

3. The very purposes behind the Second Amendment's codification show that it must protect the carrying of arms outside the home. As announced by its "prefatory" clause, the Amendment was designed in part "to prevent elimination of the militia." *Heller*, 554 U.S. at 599. A right to bear arms limited to the home would be ill-suited to "rearing up and qualifying a wellregulated militia," *id.* at 612 (quoting *Nunn v. State*, 1 Ga. 243, 251 (1846)), for if citizens could be prohibited from carrying arms in public, they simply could not act as the militia at all.

Of course, the militia was not "the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting." *Id.* at 599. Hunting obviously cannot be conducted by those bearing arms only within their homes. And the same reasoning applies with even

more force to the "the *central component*" of the Second Amendment right: self-defense. *Id.* at 599. There is nothing in the Court's language to suggest that this core purpose may only be pursued in the home. Nor is there any such suggestion in the Amendment's text. And "one doesn't have to be a historian to realize that a right to keep and bear arms for personal self-defense in the eighteenth century could not rationally have been limited to the home." *Moore*, 702 F.3d at 936. "The Supreme Court has decided that the [Second Amendment] confers a right to bear arms for self-defense, which is as important outside the home as inside." *Id.* at 942. Indeed, according to the latest nationwide data from the Bureau of Justice Statistics, 18.4% of violent crimes occur at or in the victim's home, while 26.5% occur on the street or in a parking lot or garage.[3] Thus, "[t]o confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*." *Moore*, 702 F.3d at 937.

4. Finally, the historical understanding of the right to keep and bear arms conclusively confirms that it extends outside the home.

As *McDonald v. City of Chicago* explains, "[s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day." 561 U.S. 742, 767 (2010). And because the need for self-defense may *arise* in public, it has long been recognized that the right to self-defense may be *exercised* in public. Thus, "[i]f any person attempts a

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[3] BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2008 STATISTICAL TABLES tbl. 61 (2010), http://goo.gl/6NAuIB.

robbery or murder of another, *or* attempts to break open a house in the night time, ... and shall be killed in such attempt, the slayer shall be acquitted and discharged." 4 WILLIAM BLACKSTONE, COMMENTARIES *180 (emphasis added). "Sergeant William Hawkins's widely read Treatise of the Pleas of the Crown," *Atwater v. City of Lago Vista*, 532 U.S. 318, 331 (2001), likewise explained that "the killing of a Wrong-doer ... may be justified ... where a Man kills one who assaults him in the Highway to rob or murder him," 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 71 (1716).

Because the right to self-defense was understood to extend beyond the home, the right to *armed* self-defense naturally was as well. Accordingly, by the late seventeenth century the English courts recognized that it was the practice and privilege of "gentlemen to ride armed for their security." *Rex v. Knight*, 90 Eng. Rep. 330 (K.B. 1686). A century later, the Recorder of London—a judge and "the foremost legal advisor to the city," *Parker v. District of Columbia*, 478 F.3d 370, 382 n.8 (D.C. Cir. 2007)—opined that "the right of his majesty's Protestant subjects, to have arms for their own defence, and to use them for lawful purposes, is most clear and undeniable," *Legality of the London Military Foot-Association* (1780), *reprinted in* WILLIAM BLIZZARD, DESULTORY REFLECTIONS ON POLICE 59 (1785). These "lawful purposes, for which arms may be used," were not limited to the home, for they included "immediate self-defence, ... suppression of violent and felonious breaches of the peace, the assistance of the civil magistrate in the execution of the laws, and the defence of the kingdom against foreign invaders." *Id.* at 63.

That understanding was shared on this side of the Atlantic. Indeed, "about half the colonies had laws *requiring* arms-carrying in certain circumstances," such as when traveling. NICHOLAS J. JOHNSON & DAVID B. KOPEL ET AL., FIREARMS LAW & THE SECOND AMENDMENT 106-08 (2012) (emphasis added). Plainly, if the law imposed on individuals a duty to bear arms "for public-safety reasons," *Heller*, 554 U.S. at 601, it necessarily conferred a corresponding right to do so. And that understanding endured in the next century, both before and after the Revolution. Indeed, as Judge St. George Tucker observed in 1803, "[i]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side." 5 WILLIAM BLACKSTONE, COMMENTARIES App. n.B, at 19 (St. George Tucker ed., 1803). And Tucker made clear that Congress would exceed its authority were it to "pass a law prohibiting any person from bearing arms." 1 *id.* App. n.D, at 289.

The practices of the Founding generation confirm that the right to carry arms was well-established. George Washington, for example, carried a firearm on an expedition into the Ohio Country. WILLIAM M. DARLINGTON, CHRISTOPHER GIST'S JOURNALS 85-86 (1893). Thomas Jefferson advised his nephew to "[l]et your gun ... be the constant companion of your walks," 1 THE WORKS OF THOMAS JEFFERSON 398 (letter of Aug. 19, 1785) (H. A. Washington ed., 1884), and Jefferson himself traveled with pistols for self-protection and designed a holster to allow for their ready retrieval, *see Firearms*, Monticello, https://goo.gl/W6FSpM. Even in defending the British

soldiers charged in the Boston Massacre, John Adams conceded that, in this country, "every private person is authorized to arm himself; and on the strength of this authority I do not deny the inhabitants had a right to arm themselves at that time for their defence." John Adams, *First Day's Speech in Defence of the British Soldiers Accused of Murdering Attucks, Gray and Others, in the Boston Riot of 1770*, *in* 6 MASTERPIECES OF ELOQUENCE 2569, 2578 (Hazeltine et al. eds., 1905). And as an attorney, Patrick Henry regularly carried a firearm while walking from his home to the courthouse. HARLOW GILES UNGER, LION OF LIBERTY 30 (2010). This understanding was also reflected in contemporary judicial decisions. As the panel decision in *Peruta v. County of San Diego* concluded after an exhaustive survey of the early-American case law, although "some courts approved limitations on the manner of carry outside the home, none approved a total destruction of the right to carry in public." 742 F.3d 1144, 1160 (9th Cir. 2014), *vacated*, 781 F.3d 1106 (9th Cir. 2015) (en banc); *see also, e.g.*, *Nunn*, 1 Ga. at 243, 249-51; *State v. Reid*, 1 Ala. 612, 616-17 (1840); *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 91-93 (1822).

To be sure, the right to bear arms is not a right to "carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626. For example, in the prehistory of the Second Amendment, the medieval Statute of Northampton provided that "no man great nor small" shall "go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere." 2 Edw. 3, 258, c. 3 (1328). But contrary to amicus Everytown for Gun

Safety's revisionist version of history, Northampton—and the analogues adopted on this side of the Atlantic—did not "broadly prohibit[ ] public carry in populated places." Mem. of Everytown for Gun Safety as Amicus Curiae 7 (Apr. 2, 2018), Doc. 23-3 ("Everytown Amicus"). To the contrary, by the seventeenth century the courts and commentators had conclusively interpreted the provision as limited to "prohibiting the carrying of 'dangerous and unusual weapons,' " *Heller*, 554 U.S. at 627—weapons not protected by the right to keep and bear arms, *id.* at 623-24, 627—or otherwise "go[ing] armed to terrify the King's subjects," *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1686). And this rule against "*riding* or *going armed*, with dangerous or unusual weapons" and thereby "terrifying the good people of the land," 4 WILLIAM BLACKSTONE, COMMENTARIES *148-49, was not understood as extending to the ordinary carrying of weapons "usually worne and borne," WILLIAM LAMBARD, EIRENARCHA 135 (1588), unless "accompanied with such circumstances as are apt to terrify the people," 1 HAWKINS, *supra*, at 136.

Early American courts and commentators shared this understanding of the scope of the right to bear arms in self-defense. For instance, James Wilson, a leading Framer and Supreme Court Justice, explained in his widely read Lectures on Law that it was unlawful only to carry "dangerous and unusual weapons, in such a manner, as will naturally diffuse a terrour among the people." 3 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON 79 (1804). After all, as another commentator explained, "in this country the constitution guaranties to all persons the right to bear arms; then it can only be a crime to

exercise this right in such a manner, as to terrify the people unnecessarily." CHARLES HUMPHREYS, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY 482 (1822); *see also State v. Huntly*, 25 N.C. 418, 422-23 (1843); *Simpson v. State*, 13 Tenn. 356, 359-60 (1833).[4]

This reading of the Second Amendment persisted throughout the nineteenth century. Reconstruction Era views are "instructive" evidence of the Second Amendment's scope because they reflect "*the public understanding* of [the Amendment] in the period after its enactment." *Heller*, 554 U.S. at 605, 614. And those who wrote and ratified the Fourteenth Amendment clearly understood the right to bear arms to protect the carrying of firearms outside the home for self-defense.

For decades before the Civil War, the southern States had schemed at every turn to prevent their enslaved and free black populations from bearing arms. An 1832 Delaware law, for example, forbade any

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[4] Everytown also cites a handful of laws enacted in the mid-1800s that required any person who bore arms in public to post a deposit or "surety" "for keeping the peace" upon complaint of "any person having reasonable cause to fear an injury, or breach of the peace," unless he himself could show that he had "reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property." 1836 Mass. Laws 748, 750, ch. 134, §16; *see* Everytown Amicus 11-13. But these surety-style laws "did not deny a responsible person carrying rights unless he showed a special need for self-defense. They only burdened someone reasonably accused of posing a threat. And even he could go on carrying without criminal penalty. He simply had to post money that would be forfeited if he breached the peace or injured others—a requirement from which he was exempt if *he* needed self-defense." *Wrenn*, 864 F.3d at 661.

"free negroes [or] free mulattoes to have own keep or possess any Gun [or] Pistol," unless they first received a permit from "the Justice of the Peace" certifying "that the circumstances of his case justify his keeping and using a gun." Act of Feb. 10, 1832, sec. 1, Del. Laws 180 (1832); *see also* Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro- Americanist Reconsideration*, 80 GEO. L.J. 309, 336-38 (1991) (citing similar laws in Texas, Mississippi, Louisiana, South Carolina, Maryland, Virginia, and Georgia). Indeed, Chief Justice Taney recoiled so strongly from recognizing African Americans as citizens in the infamous *Dred Scott* case precisely because he understood that doing so would entitle them "to keep and carry arms wherever they went." *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 417 (1857).

After the Civil War, these noxious efforts to suppress the rights of former slaves to carry arms for self-defense continued. Mississippi's notorious "Black Code," for example, forbade any "freedman, free negro or mulatto" to "keep or carry fire-arms of any kind." An Act To Punish Certain Offences Therein Named, and for Other Purposes, ch. 23, §1, 1865 Miss. Laws 165. Parallel restrictions were enacted in Louisiana and Alabama. Cottrol & Diamond, *supra*, at 344-45. And in an ordinance strikingly similar in operation to New York's "proper cause" law, several Louisiana towns provided that no freedman "shall be allowed to carry fire-arms, or any kind of weapons, within the parish" without the approval of "the nearest and most convenient chief of patrol." 1 WALTER L. FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 279-80 (1906).

As the Supreme Court explained at length in *McDonald*, the Reconstruction Congress labored mightily to entomb this legacy of prejudice. *See* 561 U.S. at 770-77. Congress's efforts culminated in the adoption of the Fourteenth Amendment, which ensured the right of every American, regardless of race, to "bear arms for the defense of himself and family and his homestead." CONG. GLOBE, 39th Cong., 1st Sess. 1182 (1866) (statement of Sen. Pomeroy); *see also McDonald*, 561 U.S. at 775-76.

B. *Kachalsky* erred in concluding that the right to carry firearms outside the home is not at the core of the Second Amendment.

The right to "carry weapons in case of confrontation," *Heller*, 554 U.S. at 592, is not only within the scope of the Second Amendment, it lies at the very core of that guarantee. *Heller* makes clear that the right to individual self-defense is "the *central component*" of the Second Amendment. *Id.* at 599. Given that the Second Amendment's text, history, and purposes all show that its protections extend outside the home, the right to carry firearms "for the core lawful purpose of selfdefense" necessarily extends beyond those four walls as well. *Id.* at 630. "Thus, the Amendment's core generally covers carrying in public for self-defense." *Wrenn*, 864 F.3d at 659.

Kachalsky disagreed with this conclusion. While assuming for the sake of argument "that the Amendment must have *some* application in the ... context of the public possession of firearms," the Second Circuit held that bearing arms in public "falls outside the core Second Amendment protections

identified in *Heller*." *Kachalsky*, 701 F.3d at 89, 94. That reasoning fails for multiple reasons. To begin, because *Kachalsky* failed to conduct any meaningful textual and historical analysis of whether the Second Amendment applies outside the home, it had little basis for concluding that the right to bear arms outside the home "falls outside the core" of the Second Amendment. *Id.* at 94. While the Second Circuit's decision to "proceed[ ] on this assumption" that the Second Amendment applies in public, *id.* at 89, may have been "meant to be generous to the plaintiffs, by granting a premise in their favor," its effect was to sweep under the rug the overwhelming historical and textual support, discussed above, for the conclusion that the right to bear arms in public lies at the very heart of the Second Amendment. *Wrenn*, 864 F.3d at 663.

Instead of grappling with the historical evidence discussed above, *Kachalsky* instead cited a series of laws, dating from the nineteenth century and later, which targeted the carrying of *concealed* weapons.[5]

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[5] The only historical restrictions cited by *Kachalsky* that date to the founding period—the most relevant historical time frame for determining the scope of the Second Amendment, *see Heller*, 554 U.S. at 614—are: (1) scattered eighteenth-century state laws "prohibit[ing] the use of firearms on certain occasions and in certain locations" and regulating "the storage of gun powder"; and (2) the versions of the Statute of Northampton enacted in North Carolina, Massachusetts, and Virginia. *Kachalsky*, 701 F.3d at 95 & n.19. The first type of colonial-era restrictions were also a cornerstone of Justice Breyer's *dissent* in *Heller*, *see* 554 U.S. at 683-84 (Breyer, J., dissenting), and the majority *expressly rejected* the relevance of these narrow and minor limits on firing arms in certain situations (such as during New Year's Day celebrations), concluding that they "provide no support" for

These laws, according to the Second Circuit, evinced "a longstanding tradition of states regulating firearm possession and use in public because of the dangers posed to public safety." *Kachalsky*, 701 F.3d at 94-95. Not so. While these laws limited the carrying of *concealed* firearms—a practice that was considered dishonorable and especially dangerous by the social mores of the day—they did so against the background of *freely allowing* the *open* carrying of arms, thus "le[aving] ample opportunities for bearing arms." *Wrenn*, 864 F.3d at 662.

The fact that these laws left intact the background right to carry firearms in *some* manner was absolutely *critical* to most of the judicial opinions assessing their constitutionality. The distinction was relied upon by courts that upheld this type of law against constitutional challenge. *See State v. Chandler*, 5 La. Ann. 489, 490 (1850) (concealed carry ban "interfered with no man's right to carry arms ... 'in full open view,' " and thus did not interfere with "the right guaranteed by the Constitution of the United States"); *Aymette v. State*, 21 Tenn. 154, 160-61 (1840); *State v. Reid*, 1 Ala. 612, 616-17 (1840). And it was also endorsed by the opinions *striking down* limitations on carrying firearms that cut too close to the core. *See Nunn*, 1 Ga. at 251 (limitation on "the practice of carrying certain weapons *secretly*" was "valid, inasmuch as it does not

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across-the-board, significant restrictions, like New York's here, *id.* at 631-33 (majority). And for the reasons discussed above, *see supra*, pp. 10-12, Northampton and its colonial and state analogues were simply not understood as applying to the carrying of weapons "usually worne and borne" for otherwise lawful purposes like self-defense. EIRENARCHA, *supra*, at 135.

deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms," but "prohibition against bearing arms *openly*" was "in conflict with the Constitution, and *void*"); *see also Bliss*, 12 Ky. at 91-94.[6] These laws thus provide no historical pedigree for restrictions, like New York's, which prohibit *both* open and concealed carrying and thus add up to "a denial of the right altogether." *Aymette*, 21 Tenn. at 161. Had *Kachalsky* fairly engaged in the textual and historical analysis required by *Heller*, it would have reached the same conclusion as the two circuits that *have* treated seriously with the Second Amendment's text and history. *See Wrenn*, 864 F.3d at 661; *Moore*, 702 F.3d at 937, 942. For as shown above, these sources of authority leave no doubt that this constitutional guarantee extends outside the home. *See supra*, Part I.A. And because that is so, the right to *bear* arms "for the core lawful purpose of self-defense," *Heller*, 554 U.S. at 630, can be no further from the heartland of the Second Amendment than the right to *keep* them.

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[6] A few courts from this era upheld concealed carry bans without relying on this distinction, but as *Kachalsky* itself notes, they did so "on the basis of an interpretation of the Second Amendment ... that conflicts with [*Heller*.]" 701 F.3d at 91 n.14. Those outlier decisions are thus "sapped of authority by *Heller*," and cannot be cited as reliable guides to the Second Amendment's scope. *Wrenn*, 864 F.3d at 658.

II. Under *Heller*, Defendants' requirement that law-abiding citizens demonstrate a special need for self-defense to exercise their Second Amendment rights is categorically unconstitutional.

Given that the core of the Second Amendment extends to armed self-defense outside the home, *Heller* makes the next analytical steps clear. Because "[t]he 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," wholesale infringements upon the Amendment's "core protection" must be held unconstitutional categorically, not "subjected to a freestanding 'interest-balancing' approach." *Heller*, 554 U.S. at 634. Defendants' prohibition is just such an infringement of core Second Amendment conduct. Accordingly, it is flatly unconstitutional.

Heller requires *per se* invalidation of broad bans that strike at the heart of the Second Amendment. In *Heller*, the Supreme Court declined the invitation to analyze the ban on possessing handguns at issue under "an interest-balancing inquiry" based on the "approach ... the Court has applied ... in various constitutional contexts, including election-law cases, speech cases, and due process cases," 554 U.S. at 689-90 (Breyer, J., dissenting), ruling instead that the right to keep and bear arms was "elevate[d] above all other interests" the moment that the People chose to enshrine it in the Constitution's text, *id.* at 635 (majority opinion). And in *McDonald*, the Court reaffirmed that *Heller* "expressly rejected the

argument that the scope of the Second Amendment right should be determined by judicial interest balancing." 561 U.S. at 785 (plurality opinion).

Defendants' demand that applicants show a need for self-defense that is "distinguishable from that of the general community," *Klenosky*, 428 N.Y.S.2d at 257, *extinguishes* the core Second Amendment rights of *typical* citizens—who, by definition, cannot distinguish their need for self-defense from that of the general population. To be sure, Defendants' limits allow individuals who can show "a special need for self-protection" to carry firearms, if they can demonstrate that need in advance to the satisfaction of the government. *Id.* But the Second Amendment does not set up a race between law-abiding citizens and their assailants to the license bureau. For those whose lives or safety are being threatened, it is cold comfort to know that they could have carried a firearm *if only they could have documented their "special need for self-protection" in advance*. Surely under the Second Amendment—which protects the right to bear arms "*in case* of confrontation," *Heller*, 554 U.S. at 592 (emphasis added)—that scheme turns the right to bear arms on its head.

Indeed, the State's demand that a citizen prove to its satisfaction that he has a good enough reason to carry a handgun is flatly inconsistent with the very nature of the Second Amendment right. The existence of that right is itself reason enough for its exercise. It is thus no surprise that courts have rejected this kind of "ask-permission-first" regime across a wide variety of constitutional rights, reasoning that the government has failed to honor a right if it demands

to know—and assess *de novo*—the reasons justifying each occasion of its exercise. *See, e.g.*, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (government cannot condition speech on "a requirement that the speaker have a sufficiently great interest in the subject to justify communication"); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (prior restraint presumptively unconstitutional); *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 887 (1990) (government cannot "question the centrality" or "plausibility" of religious convictions); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014).

In short, as the D.C. Circuit persuasively concluded, a proper-cause-type requirement that limits the carrying of firearms outside the home to those with a "heightened need" for self-defense "is necessarily a total ban on most ... residents' right to carry a gun in the face of ordinary selfdefense needs." *Wrenn*, 864 F.3d at 666. Indeed, such a restriction "destroys the ordinarily situated citizen's right to bear arms not as a side effect of applying other, reasonable regulations ... , but by design: it looks precisely for needs 'distinguishable' from those of the community." *Id.* Such a prohibition is unconstitutional *per se*.

III. *Kachalsky* was wrong to uphold Defendants' "proper cause" restriction under intermediate scrutiny.

A. Strict scrutiny should apply.

Even if Defendants' restrictions were not *categorically* unconstitutional, they should at the least be subjected to the highest level of constitutional scrutiny. As the Supreme Court has explained, "strict

judicial scrutiny [is] required" whenever a law "impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). And the right to bear arms is not only enumerated in the constitutional text; it was also counted "among those fundamental rights necessary to our system of ordered liberty" by "those who drafted and ratified the Bill of Rights." *McDonald*, 561 U.S. at 768, 778. *Kachalsky*'s application of merely intermediate scrutiny, by contrast, relegates the Second Amendment to "a second-class right." *Id.* at 780 (plurality).

B. Defendants' "proper cause" restriction fails even intermediate scrutiny, properly applied.

Ultimately determining the correct standard of scrutiny is immaterial, however, because the "proper cause" restriction should be struck down under *any* level of heightened scrutiny.

1. That is so, first, as a matter of law. By design, Defendants' restrictions will reduce Case 1:18-cv-00134-BKS-ATB Document 26 Filed 05/07/18 Page 24 of 32 19 firearm violence *only by reducing the quantity of firearms in public*. That is "not a permissible strategy"—even if used as a means to the further end of increasing public safety. *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 148 (D.D.C. 2016), *aff'd sub nom. Wrenn v. District of Columbia*, 864 F.3d 650. That conclusion follows directly from the Supreme Court's precedents in the secondary-effects area of free speech doctrine.

The Supreme Court has held that government restrictions on certain types of expressive conduct—most commonly, zoning ordinances that apply specifically to establishments offering adult entertainment—are subject to merely intermediate scrutiny even though they are contentbased. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-51 (1986). But this lesser scrutiny applies only so long as the *purpose and effect* of the restrictions is to reduce the negative "secondary effects" of the expression—such as the increased crime that occurs in neighborhoods with a high concentration of adult theaters—rather than to suppress the expression itself. *Id.* at 49. As Justice Kennedy's controlling opinion in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), makes clear, in defending a restriction as narrowly tailored to further an important or substantial governmental interest, the government may not rely on the proposition "that it will reduce secondary effects by reducing speech in the same proportion." *Id.* at 449. "It is no trick to reduce secondary effects by reducing speech or its audience; but [the government] may not attack secondary effects indirectly by attacking speech." *Id.* at 450; *see also Heller v. District of Columbia (Heller III)*, 801 F.3d 264, 280 (D.C. Cir. 2015); *Grace*, 187 F. Supp. 3d at 148.

But that is precisely what Defendants have done here. Their restrictive licensing policies do not regulate the *manner* of bearing arms or impose reasonable training and safety requirements. No, their purpose and effect is to *limit the number of arms borne in public*, and to the extent this leads to a reduction of gun crime, that is only a byproduct of this

suppression of the quantity of core Second Amendment conduct. As the D.C. Circuit concluded, limits like Defendants' "proper cause" restriction "destroy[ ] the ordinarily situated citizen's right to bear arms not as a side effect of applying other, reasonable regulations ... but by design." *Wrenn*, 864 F.3d at 666. That is "not a permissible strategy," *Grace*, 187 F. Supp. 3d at 148, under any level of heightened scrutiny.

2. Even if these objections are set aside, the heightened need requirement still flunks intermediate scrutiny, and *Kachalsky* was still wrong to uphold it. To survive intermediate scrutiny, a restriction must be "substantially related to the achievement" of the government's objective. *United States v. Virginia*, 518 U.S. 515, 533 (1996). "The burden of justification is demanding and it rests entirely on the State." *Id.* As Judge Posner concluded after surveying "the empirical literature on the effects of allowing the carriage of guns in public," that data does not provide "more than merely a rational basis for believing that [a ban on public carriage] is justified by an increase in public safety." *Moore*, 702 F.3d at 939, 942. This is confirmed by experience. Forty-two States do not restrict the carrying of firearms to a privileged few. *See Gun Laws*, NRA-ILA, https://goo.gl/Nggx50. Yet "many years of evidence across different states and time periods overwhelmingly rejects" the claim that "permit holders will use their guns to commit crimes instead of using their guns for self-defense." David B. Mustard, *Comment*, *in* EVALUATING GUN POLICY 325, 330 (Jens Ludwig & Philip J. Cook eds., 2003); *see also id.* at 330-31. As social scientists who favor gun control have acknowledged, there would be "relatively little

public safety impact if courts invalidate laws that prohibit gun carrying outside the home, assuming that some sort of permit system for public carry is allowed to stand," since "[t]he available data about permit holders ... imply that they are at fairly low risk of misusing guns." Philip J. Cook et al., *Gun Control After* Heller, 56 UCLA L. REV. 1041, 1082 (2009).

Further, even if laws that more freely grant permits have not been shown to decrease crime, there is no persuasive evidence that they *increase* crime—and that is the proposition Defendants must substantiate. For instance, in 2004 the National Academy of Sciences' National Research Council ("NRC") conducted an exhaustive review of the relevant social-scientific literature. The NRC concluded that "with the current evidence it is not possible to determine that there is a causal link between the passage of right-to-carry laws and crime rates." National Research Council, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 150 (Charles F. Wellford, John V. Pepper, & Carol V. Petrie eds., 2005), http://goo.gl/WO1ZNZ. *See also* Robert Hahn et al., *Firearms Laws and the Reduction of Violence: A Systematic Review*, 28 AM. J. PREVENTATIVE MED. 40, 53-54 (2005), http://goo.gl/zOpJFL (CDC study concluding that existing evidence does not establish that more permissive carry regimes "increases rates of unintended and intended injury").

Defendants cite several studies in an effort to shore up the public-safety justification of their ban, but they fall short. New York's primary piece of evidence is an unpublished 2014 study by Abhey Aneja, John Donahue III, and Alexandria Zhang. But

the 2014 Donohue study in fact *explicitly affirms* the NRC's judgment that the evidence is not sufficient to show *any causal link* between laws limiting public carrying of firearms and crime rates. Abhay Aneja, John J. Donohue III, & Alexandria Zhang, The Impact of Right to Carry Laws and the NRC Report 80 (Dec. 1, 2014) (unpublished manuscript), *available at* http://goo.gl/UOzB9H; *see also* John J. Donohue et al., Right-to-Carry Laws and Violent Crime 44 (June 12, 2017) (unpublished manuscript).

The other studies cited by Defendants add little. Most concern gun control measures *other* than restrictions on the right to carry—such as permitting requirements for the *purchase* of firearms—and thus do not even *purport* to address carrying outside the home. *See* Kara E. Rudolph et al., *Association Between Connecticut's Permit-to-Purchase Handgun Law and Homicides*, 105 AM. J. PUB. HEALTH 49 (2015); Daniel Webster et al., *Effects of the Repeal of Missouri's Handgun Purchaser Licensing Law on Homicides*, 91 J. URBAN HEALTH 293 (2014).[7] Another paper is merely a recapitulation of other research—on the issue of public carrying, principally the unpublished Aneja and Donohue study—and thus contributes

[7] Defendants characterize these studies as showing that Missouri and Connecticut's repeal of their "handgun licensing laws" was associated with dramatic increases in firearm homicide rates. Mem. of Law in Supp. of Defs.' Mot. to Dismiss the Compl. at 8 (Mar. 26, 2018), Doc. 19-1. What Defendants somewhat surprisingly fail to mention is that the "handgun licensing laws" in question governed *purchasing* firearms, not carrying them in public—and imposed objective eligibility requirements, not a discretionary "proper cause"-type restriction like the one challenged here. These studies are utterly irrelevant.

nothing to the debate. Webster, et al., Firearms on College Campuses 15 (Oct. 15, 2016) (unpublished manuscript). And while the remaining study—Michael Siegel, et. al., *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, 107 AM. J. PUB. HEALTH 1923 (2017)—does at least concern public carrying, like the NRC and the Donohue study, it explicitly cautions that it does *not* find *any causal link* between more permissive carry regimes and violent crime. *See id.* at 1928.

The cursory discussion of the empirical evidence offered by *Kachalsky* is even less convincing. The sum total of the "evidence" discussed by the court in purportedly conducting intermediate scrutiny was confined to: (1) naked assertions about "the dangers inherent in the carrying of handguns in public" that were "made one-hundred years ago" by New York's legislature, 701 F.3d at 97, and (2) unnamed "studies and data demonstrating that widespread access to handguns in public increases the likelihood that felonies will result in death," *id.* at 99, that New York submitted in its briefing—studies which the court did not feel the need to discuss or *even specifically identify*. But a law that "imposes current burdens and must be justified by current needs," *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 536 (2013)—not by assumptions a legislature made over a hundred years ago. And merely invoking the fact that the State "submitted studies and data" supporting its law in its briefing, *with no actual analysis of those studies or data*, hardly discharges the court's duty to "assure that, in formulating its judgments, [the State] has drawn reasonable inferences based on substantial evidence." *Kachalsky*, 701 F.3d at 97, 99.

The lack of evidence that these laws advance public safety should not be surprising, because violent criminals will continue to carry guns in public regardless. As the Supreme Court recently held in the context of abortion restrictions, "[d]etermined wrongdoers, already ignoring existing statutes and safety measures, are unlikely to be convinced to [change their conduct] by a new overlay of regulations." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2313-14 (2016). This is not a novel proposition. In a passage Thomas Jefferson copied into his personal quotation book, the influential Italian criminologist Cesare Beccaria reasoned that laws forbidding the

> wear[ing of] arms ... disarm[] those only who are not disposed to commit the crime which the laws mean to prevent. Can it be supposed, that those who have the courage to violate the most sacred laws of humanity, and the most important of the code, will respect the less considerable and arbitrary injunctions, the violation of which is so easy, and of so little comparative importance? ... [Such a law] certainly makes the situation of the assaulted worse, and of the assailants better, and rather encourages than prevents murder.

See Stephen P. Halbrook, *What the Framers Intended: A Linguistic Analysis of the Right To "Bear Arms,"* 49 LAW & CONTEMP. PROBS. 151, 154 (1986).

Instead of criminals, it is primarily the *law-abiding* who are affected by Defendants' restrictions. And that effect has very real public-safety *costs*—costs that Defendants entirely ignore. Although the number

of defensive gun uses is difficult to measure, the leading study on the issue "indicate[s] that each year in the U.S. there are about 2.2 to 2.5 million [defensive uses of guns] of all types by civilians against humans." Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense With a Gun*, 86 J. CRIM. L. & CRIMINOLOGY 150, 164 (1995). "At least 19 other surveys have resulted in [similar] estimated numbers of defensive gun uses." NATIONAL RESEARCH COUNCIL, *supra*, at 103. Many of these defensive gun uses involve carrying firearms in public. The National Self-Defense Survey indicates that "anywhere from 670,000 to 1,570,000 [defensive gun uses] a year occur in connection with gun carrying in a public place." Gary Kleck & Marc Gertz, *Carrying Guns for Protection: Results from the National Self-Defense Survey*, 35 J. RESEARCH IN CRIME & DELINQUENCY 193, 195 (1998). Any realistic appraisal of existing social-scientific data thus leads inexorably to the conclusion that the "good reason" requirement cannot be shown to benefit public safety—but it may well harm it.

3. Finally, even if Defendants' "proper cause" restriction did advance public safety, it independently fails heightened scrutiny because it is not properly tailored to the government's asserted goals. While laws subject to intermediate scrutiny "need not be the least restrictive or least intrusive means of serving the government's interests," they still must be narrowly tailored, possessing "a close fit between ends and means." *McCullen v. Coakley*, 134 S. Ct. 2518, 2534-35 (2014) (quotation marks omitted). Here, there is an utter lack of fit between Defendants' restrictions and their purported objective of public safety. After all,

"the fact that a person can demonstrate a heightened need for self-defense says nothing about whether he or she is more or less likely to misuse a gun." *Grace*, 187 F. Supp. 3d at 149. "This limitation will neither make it less likely that those who meet the [good reason] requirement will accidentally shoot themselves or others, nor make it less likely that they will turn to a life of crime. Put simply, the solution is unrelated to the problem it intends to solve." *Drake v. Filko*, 724 F.3d 426, 454 (3d Cir. 2013) (Hardiman, J., dissenting).

IV. The Second Circuit's rule against associational standing is plainly inconsistent with Supreme Court precedent.

There is no dispute that Plaintiff Nash has standing. *See* Compl. ¶¶ 23, 28-29. "Where, as here, at least one plaintiff has standing, jurisdiction is secure," and the Court thus need not address NYSRPA's standing to bring suit on behalf of its members. *Kachalsky*, 701 F.3d at 84 n.2.

To the extent the Court does reach the issue of NYSRPA's standing, Plaintiffs acknowledge that the Second Circuit's case law does hold "that an organization does not have standing to assert the rights of its members in a case brought under 42 U.S.C. §1983," *Nnebe v. Daus*, 644 F.3d 147, 156 (2d Cir. 2011), and that this Court is not free to depart from that precedent, *see Hildenbrandt*, 378 F. Supp. 2d at 48. Plaintiffs contend, however, that this rule is flatly contrary to the Supreme Court's precedent. The Supreme Court has squarely held that "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing

to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). What is more, it has held this *in a case brought under Section 1983*. *Warth v. Seldin*, 422 U.S. 490, 493, 511, 515 (1975). The Second Circuit's outlier approach to associational standing directly contradicts this binding Supreme Court precedent and should be repudiated at the earliest opportunity, by a court with authority to correct it.

CONCLUSION

For the foregoing reasons, *Kachalsky* should be overruled by a court competent to do so.

Dated: May 7, 2018

Respectfully submitted,

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Attorneys for Plaintiffs

Reply to Response to Motion to Dismiss, Letter from Assistant Attorney General of New York to Judge B. K. Sannes (May 14, 2018)

Dear Judge Sannes:

Defendants decline to submit a reply Memorandum of Law. I respectfully point out to the Court that plaintiffs acknowledge that this Court is bound by the Second Circuit's decision in *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012). *See, e.g.*, Dkt. #1, ¶6; Dkt. #26, Plaintiffs Memorandum in Opposition to Defendants' Motion to Dismiss, pp. 1, 5, 24-25. For that reason, those stated in defendants' opening Memorandum of Law and those set forth in the Memorandum of Everytown for Gun Safety as Amicus Curiae in Support of Defendants (Dkt. #25), defendants' motion to dismiss should be granted.

The Court's attention to this matter is appreciated.

Respectfully,
[handwritten: signature]
Kelly L. Munkwitz
Assistant Attorney General
Bar Roll No. 509910
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c: Kathleen McCaffrey Baynes, Esq. (via ECF)
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Unopposed Motion for Leave to Amend Complaint (May 15, 2018)

Pursuant to FED. R. CIV. P. 15 and 21 and Local Rule 7.1(a)(4), and for the reasons articulated in the accompanying Affidavit and Memorandum, Plaintiffs on June 28, 2018, or as soon thereafter as counsel can be heard, will respectfully move this Court for leave to amend their Complaint in this action to add Mr. Brandon Koch as an additional plaintiff. An unsigned copy of the proposed Amended Complaint is attached as Attachment A. A redline version of the Amended Complaint showing the amendments Plaintiffs seek to make from the current operative Complaint is attached as Attachment B.

Plaintiffs have consulted with counsel for the defendants concerning this motion, and the defendants do not oppose it.

Dated: May 15, 2018

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Affidavit of John D. Ohlendorf (May 15, 2018)

I, John D. Ohlendorf, being duly sworn, hereby depose and state as follows:

1. I am a citizen of the United States and a resident and citizen of Virginia. I am over the age of 18, competent to testify, and I make this affidavit upon personal knowledge.

2. I am appearing in the above-captioned action *pro hac vice,* by leave of the Court, as an attorney for the Plaintiffs.

3. Plaintiffs New York State Rifle and Pistol Association, Inc. ("NYSRPA") and Robert Nash brought this suit on February 1, 2018, to challenge New York's restrictions on the right to carry firearms in public.

4. The Defendants moved to dismiss the Complaint on March 26, and the Parties have recently completed briefing that motion.

5. In the accompanying motion, Plaintiffs seek leave to amend their Complaint to add an additional plaintiff, Brandon Koch. As shown in the proposed Amended Complaint, which is attached to Plaintiffs' motion as Attachment A, Mr. Koch alleges facts that are substantively identical to those alleged by the current individual Plaintiff, Robert Nash.

6. Also attached to Plaintiffs' motion, as Attachment B, is a true and correct redline showing the changes that Plaintiffs are requesting permission to make to their Complaint.

7. On May 2, 2018, I reached out to Defendants' counsel of record, Kelly L. Munkwitz, to inform her of our intent to seek leave amend our Complaint and to

ask Defendants' position on that request. Ms. Munkwitz authorized me to represent that Defendants do no oppose Plaintiffs' motion for leave to amend.

8. Given the substantive identity between Mr. Koch's allegations and claims and those in the original Complaint, Plaintiffs submit that the pending Motion to Dismiss and accompanying briefs would apply to the Amended Complaint to the same extent as the current operative Complaint.

[handwritten: signature]

John D. Ohlendorf

Subscribed and sworn before me this 15th day of May, 2018

[handwritten: signature]

NOTARY PUBLIC

John C. Brown
Notary Public,
District of Columbia
My Commission Expires
6/14/2022

[SEAL]

Proposed Amended Complaint (May 15, 2018)

Plaintiffs New York State Rifle & Pistol Association, Inc., Robert Nash, and Brandon Koch (collectively "Plaintiffs"), by and through the undersigned attorneys, file this Complaint against the above-captioned Defendants, in their official capacities as state and local officials responsible under New York law for administering and enforcing the State's laws and regulations governing the carrying of firearms outside the home. Plaintiffs seek declaratory and injunctive relief: a declaration that New York's limitation of the right to carry firearms to those who can satisfy licensing officials that they have "proper cause" to exercise that right is unconstitutional under the Second and Fourteenth Amendments to the United States Constitution, and an injunction compelling Defendants to refrain from enforcing that invalid limit and to issue Handgun Carry Licenses to Plaintiffs or to otherwise allow Plaintiffs to exercise their right to carry firearms outside the home. In support of their Complaint against Defendants, Plaintiffs hereby allege as follows:

INTRODUCTION

1. The Second Amendment to the United States Constitution guarantees "the right of the people to keep and bear Arms." U.S. CONST. amend. II. When the People, by enacting that amendment, enshrined in their fundamental charter the right to "carry weapons in case of confrontation" for the "core lawful purpose of self-defense," *District of Columbia v. Heller*, 554 U.S. 570, 592, 630 (2008), they did not mean to leave the freedom to exercise that right at the mercy of the very government officials whose hands they sought to

bind. No, "[t]he very enumeration of the right takes out of the hands of government ... the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* at 634.

2. In defiance of that constitutional guarantee, New York has seized precisely the power forbidden it by the Second Amendment: the power to decide, on a case-by-case basis, whether an applicant for a license to "carry weapons in case of confrontation," *id.* at 592, has, in its estimation, shown sufficiently "proper cause" that a license should be issued, N.Y. PENAL LAW §400.00(2)(f).

3. Worse still, New York has made clear that a general desire to carry a handgun for the purpose of self-defense—"the *central component*" of the Second Amendment, *Heller*, 554 U.S. at 599 (emphasis added)—is not a sufficiently good reason to exercise the right. Instead, according to New York, an ordinary citizen must establish a *special need for self-defense* which *sets him apart from the general public* to obtain a license from the State to carry a firearm in public for the purpose of self-defense. That restriction is akin to a state law concluding that the general desire to advocate for lawful political change is not sufficient "proper cause" to exercise the right to free speech, and it cuts to the very core of the Second Amendment, no less than such a restriction would gut the First.

4. Indeed, the practical effect of New York's "proper cause" requirement is to make it wholly illegal for *typical* law-abiding citizens to carry handguns in public for the purpose of self-defense—for by definition, these ordinary citizens cannot show that they face a *special* danger to their safety.

5. Plaintiffs Robert Nash and Brandon Koch are ordinary, law-abiding citizens of New York who wish to carry firearms outside the home for the purpose of self-defense. They have passed all required background checks and met every other qualification imposed by New York on the eligibility for a license to carry a firearm in public for self-defense—except that like the vast majority of ordinary, law-abiding New York residents, they cannot establish a special need for self-protection that is distinct from the general desire for self-defense. Accordingly, Defendant McNally determined that Plaintiffs Nash and Koch have not shown "proper cause" to exercise their Second Amendment rights, and he refused to grant them licenses to carry a firearm outside the home for self-defense. That result simply cannot be squared with the rights guaranteed by the Second Amendment.

6. Plaintiffs acknowledge that the result they seek is contrary to *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012), but, for the reasons explained in *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017), that case was wrongly decided. They therefore institute this litigation to vindicate their Second Amendment rights and to seek to have *Kachalsky* overruled.

JURISDICTION AND VENUE

7. This Court has subject-matter jurisdiction over Plaintiffs' claim under 28 U.S.C. §§1331 and 1343.

8. Plaintiffs seek remedies under 28 U.S.C. §§1651, 2201, and 2202 and 42 U.S.C. §§1983 and 1988.

9. Venue is proper in this Court under 28 U.S.C. §1391(b)(1) & (b)(2).

PARTIES

10. Plaintiff Robert Nash is a citizen of the United States and a resident and citizen of the State of New York. He resides in Averill Park, NY 12018.

11. Plaintiff Brandon Koch is a citizen of the United States and a resident and citizen of the State of New York. He resides in Troy, NY 12180.

12. Plaintiff New York State Rifle & Pistol Association, Inc. ("NYSRPA") is a group organized to support and defend the right of New York residents to keep and bear arms. The New York restrictions on the public carrying of firearms at issue in this case are thus a direct affront to NYSRPA's central mission. NYSRPA has thousands of members who reside in New York. Its official address is 90 S. Swan Street, Suite 395, Albany, New York 12210. Plaintiffs Nash and Koch are members of NYSRPA. They are two among many NYSRPA members who have been and continue to be denied the right to carry a firearm outside of the home for the sole reason that they cannot satisfy the State's "proper cause" requirement.

13. Defendant George P. Beach II is the Superintendent of the New York State Police. As Superintendent, he exercises, delegates, or supervises all the powers and duties of the New York Division of State Police, which is responsible for executing and enforcing New York's laws and regulations governing the carrying of firearms in public, including prescribing the form for Handgun Carry License applications. His official address is New York State Police, 1220 Washington Avenue, Building 22, Albany, NY 12226. He is being sued in his official capacity.

14. Defendant Richard J. McNally, Jr., is a Justice of the New York Supreme Court, Third Judicial District, and a Licensing Officer for Rensselaer County under N.Y. PENAL LAW §400.00. Pursuant to N.Y. PENAL LAW §265.00(10), he is responsible for receiving applications from residents of Rensselaer County for a license to carry a handgun, investigating the applicant, and either approving or denying the application. His official address is Rensselaer County Courthouse, 80 Second Street, Troy, NY 12180. He is being sued in his official capacity as a State Licensing Officer.

FACTUAL ALLEGATIONS

New York's "Proper Cause" Requirement

15. New York law generally forbids any person to "possess[ ] any firearm," N.Y. PENAL LAW §265.01(1), without first obtaining "a license therefor," *id.* §265.20(a)(3). Violating this ban is a class A misdemeanor, punishable by a fine of $1,000 or less or up to a year in prison. *Id.* §§70.15(1), 80.05(1), 265.01. Possessing a *loaded* firearm without a license is a class C felony, punishable by a fine of up to $5,000 or between one and fifteen years imprisonment. *Id.* §§70.00(2)(c) & (3)(b), 80.00(1), 265.03.

16. New York's ban is subject to minor exceptions for active duty members of the military, police officers, and the like. *Id.* §265.20. An ordinary member of the general public who wishes to carry a handgun outside the home for purposes of self-protection, however, can only do so if he obtains a license to "have and carry [a handgun] concealed" (a "Handgun Carry License"), pursuant to Section 400.00(2)(f) of New York's Penal Law. A person seeking such a license must submit an

application—on a form approved by Defendant Beach—to the Licensing Officer for the city or county where he resides. *Id.* §400.00(3)(a). No license is available to authorize the carrying of handguns within the State openly.

17. To be eligible for a Handgun Carry License, an applicant must satisfy numerous criteria. For example, he must be at least 21 years old, must not have been convicted of any felony or serious offense, must not be an unlawful user of a controlled substance, and must not have a history of mental illness. *Id.* §400.00(1). Before issuing a license, the Licensing Officer must conduct a rigorous investigation and background check, to verify that each of these statutory requirements is satisfied. *Id.* §400.00(4).

18. In addition to these rigorous eligibility and screening requirements, a law-abiding citizen may only be granted a Handgun Carry License if he demonstrates that "proper cause exists for the issuance thereof." *Id.* §400.00(2)(f).

19. In granting a license, some Licensing Officers note certain restrictions on the license, such as "hunting and target." In Rensselaer County, for instance, Licensing Officials routinely grant licenses that are marked "hunting and target," and that they refer to as "restricted licenses." These licenses allow the licensee to carry a firearm only when engaged in those specified activities. Such a license *does not* permit the carrying of a firearm in public for the purpose of self-defense.

20. While New York law grants local Licensing Officials some discretion in determining what

constitutes "proper cause" for issuance of an unrestricted Handgun Carry License, this discretion is cabined by the significant body of New York case-law defining that term. The courts have determined, for instance, that "[a] generalized desire to carry a concealed weapon to protect one's person and property does not constitute 'proper cause.' "*Application of O'Connor*, 585 N.Y.S.2d 1000, 1003 (N.Y. Co. Ct. 1992). They have further clarified that merely traveling through "high crime areas ... is too vague to constitute 'proper cause' within the meaning of Penal Law §400.02(f)," *Martinek v. Kerik*, 743 N.Y.S.2d 80, 81 (1st Dep't 2002), and that instead an applicant must "demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession," *Klenosky v. New York City Police Dep't*, 428 N.Y.S.2d 256, 257 (1st Dep't 1980), *aff'd,* 53 N.Y.2d 685 (1981).

21. Accordingly, typical law-abiding citizens of New York—the vast majority of responsible citizens who cannot "demonstrate a special need for self-protection distinguishable from that of the general community," *id.*—effectively remain subject to a flat ban on carrying handguns outside the home for the purpose of self-defense.

Defendants' Refusal to Issue Plaintiffs Handgun Carry Licenses

22. Plaintiff Robert Nash is an adult citizen and resident of New York. He is not a law enforcement official or a member of the armed forces, and he does not fall within any of the other exceptions enumerated in N.Y. PENAL LAW §265.20 to New York's ban on carrying firearms in public.

23. Mr. Nash does, however, possess all of the qualifications necessary to obtain a Handgun Carry License that are enumerated in N.Y. PENAL LAW §400.00(1). For example, he is over 21 years of age, he has not been convicted of any felony or other serious offense, and he is not addicted to controlled substances or mentally infirm. He has also passed all required background checks.

24. Mr. Nash does not face any special or unique danger to his life. He does, however, desire to carry a handgun in public for the purpose of self-defense. Mr. Nash lawfully owns several handguns which he keeps in his home to defend himself and his family, and he would carry a handgun for self-defense when he is in public, were it not for Defendants' enforcement of New York's ban on the public carrying of firearms. Mr. Nash is not entitled to a Handgun Carry License by virtue of his occupation, pursuant to Penal Law §400.00(2)(b)-(e).

25. In or around September 2014, Mr. Nash applied to the Licensing Officer for the county where he resides, Rensselaer County, for a license to carry a handgun in public. After investigation, Mr. Nash's application was granted on March 12, 2015, but he was issued a license marked "Hunting, Target only" that allowed him to carry a firearm outside the home only while hunting and target shooting.

26. Because of these restrictions, Mr. Nash is not able to carry a firearm outside of his home for the purpose of self-defense.

27. On September 5, 2016, Mr. Nash requested the Licensing Officer, Defendant Richard N. McNally, Jr., to remove the "hunting and target" restrictions

from his license and issue him a license allowing him to carry a firearm for self-defense. In support of this request, Mr. Nash cited a string of recent robberies in his neighborhood and the fact that he had recently completed an advanced firearm safety training course. Letter from Robert Nash to Richard McNally, Jr. (Sept. 5, 2016) (attached as Exhibit 1).

28. On November 1, 2016, after an informal hearing, Defendant McNally denied Mr. Nash's request and "determined that the 'Hunting, Target only' restrictions [shall] remain on your carry concealed permit." Letter from Richard McNally, Jr., to Robert Nash (Nov. 1, 2016) (attached as Exhibit 2). Defendant McNally "emphasize[d] that the restrictions are intended to prohibit you from carrying concealed in ANY LOCATION typically open to and frequented by the general public." *Id.*

29. Defendant McNally did not determine that Mr. Nash was ineligible for any of the reasons enumerated in N.Y. PENAL LAW §400.00(1); indeed, his eligibility is confirmed by the fact that he continues to hold a "restricted" license. Instead, Defendant McNally concluded that Mr. Nash had failed to show "proper cause" to carry a firearm in public for the purpose of self-defense, because he did not demonstrate a special need for self-defense that distinguished him from the general public.

30. In light of Defendant McNally's denial of his request to remove the restrictions on his license, Mr. Nash continues to refrain from carrying a firearm outside the home for self-defense in New York. Mr. Nash would carry a firearm in public for self-defense in New York were it lawful for him to do so.

31. Plaintiff Brandon Koch is an adult citizen and resident of New York. He is not a law enforcement official or a member of the armed forces, and he does not fall within any of the other exceptions enumerated in N.Y. PENAL LAW §265.20 to New York's ban on carrying firearms in public.

32. Mr. Koch does, however, possess all of the qualifications necessary to obtain a Handgun Carry License that are enumerated in N.Y. PENAL LAW §400.00(1). For example, he is over 21 years of age, he has not been convicted of any felony or other serious offense, and he is not addicted to controlled substances or mentally infirm. He has also passed all required background checks.

33. Mr. Koch does not face any special or unique danger to his life. He does, however, desire to carry a handgun in public for the purpose of self-defense. Mr. Koch lawfully owns at least one handgun which he keeps in his home to defend himself and his family, and he would carry a handgun for self-defense when he is in public, were it not for Defendants' enforcement of New York's ban on the public carrying of firearms. Mr. Koch is not entitled to a Handgun Carry License by virtue of his occupation, pursuant to Penal Law §400.00(2)(b)-(e).

34. In 2008, Mr. Koch was granted a license to carry a handgun in public by the Licensing Officer for the county where he resides, Rensselaer County. However, he was issued a license marked "Hunting & Target" that allowed him to carry a firearm outside the home only while hunting and target shooting.

35. Because of these restrictions, Mr. Koch is not able to carry a firearm outside of his home for the purpose of self-defense.

36. In November of 2017, Mr. Koch requested the Licensing Officer, Defendant Richard N. McNally, Jr., to remove the "hunting and target" restrictions from his license and issue him a license allowing him to carry a firearm for self-defense. In support of this request, Mr. Koch cited his extensive experience in the safe handling and operation of firearms and the many safety training courses he had completed. Letter from Brandon Koch to Richard McNally, Jr. (attached as Exhibit 3).

37. On January 16, 2018, after an informal hearing, Defendant McNally denied Mr. Koch's request and "determined that the 'Hunting, Target only' restrictions [shall] remain on your carry concealed permit." Letter from Richard McNally, Jr., to Brandon Koch (Jan. 16, 2018) (attached as Exhibit 4).

38. Defendant McNally did not determine that Mr. Koch was ineligible for any of the reasons enumerated in N.Y. PENAL LAW §400.00(1); indeed, his eligibility is confirmed by the fact that he continues to hold a "restricted" license. Instead, Defendant McNally concluded that Mr. Koch had failed to show "proper cause" to carry a firearm in public for the purpose of selfdefense, because he did not demonstrate a special need for self-defense that distinguished him from the general public.

39. In light of Defendant McNally's denial of his request to remove the restrictions on his license, Mr. Koch continues to refrain from carrying a firearm

outside the home for self-defense in New York. Mr. Koch would carry a firearm in public for self-defense in New York were it lawful for him to do so.

40. Plaintiff NYSRPA has at least one member who has had an application for a Handgun Carry License denied solely for failure to satisfy the "proper cause" requirement. But for Defendants' continued enforcement of the New York laws and regulations set forth above, that member would forthwith carry a firearm outside the home for self-defense.

COUNT ONE

42 U.S.C. §1983 Action for Depravation of Plaintiffs' Rights under U.S. CONST. amends. II and XIV

41. Plaintiffs incorporate by reference the allegations of the preceding paragraphs.

42. The Second Amendment's guarantee of "the right of the people to keep and bear Arms" secures to law-abiding, responsible, adult citizens the fundamental constitutional right to bear arms outside the home. U.S. CONST. amend. II.

43. This Second Amendment right to bear arms in public applies against the State of New York under U.S. CONST. amend. XIV.

44. This Second Amendment right to bear arms in public cannot be subject to a government official's discretionary determination of whether a law-abiding citizen has "proper cause" to exercise that right.

45. A government restriction that limits the right to bear arms in public for the purpose of self-defense to only those few, favored citizens who can demonstrate that they face a special danger to their

life effectively operates as a flat ban on the carrying of firearms by *typical* lawabiding citizens, who by definition cannot demonstrate this kind of *atypical* need to bear arms.

46. By infringing the Second Amendment right to bear arms in public in these ways, the New York laws and regulations discussed in the foregoing allegations violate the Second Amendment, which applies to Defendants by operation of the Fourteenth Amendment, both facially and as applied to Plaintiffs Nash and Koch and members of the New York State Rifle & Pistol Association, Inc., and they are therefore invalid.

PRAYER FOR RELIEF

47. WHEREFORE, Plaintiffs pray for an order and judgment:

a. Declaring that New York's "proper cause" requirement, as set forth in statutes and regulations including but not limited to N.Y. PENAL LAW §400.00(2)(f), violates the Second and Fourteenth Amendments and is thus devoid of any legal force or effect;

b. Enjoining Defendants and their employees and agents from denying unrestricted Handgun Carry Licenses to applicants on the basis of New York's "proper cause" requirement, as set forth in statutes and regulations including but not limited to N.Y. PENAL LAW §400.00(2)(f);

c. Enjoining Defendants and their employees and agents from enforcing the New York laws and regulations establishing and defining the "proper

cause" requirement, including N.Y. PENAL LAW §400.00(2)(f);

d. Ordering Defendants and their employees and agents to issue unrestricted Handgun Carry Licenses to Plaintiffs Robert Nash and Brandon Koch and members of Plaintiff New York State Rifle & Pistol Association, Inc.;

e. Awarding Plaintiffs their reasonable costs, including attorneys' fees, incurred in bringing this action, pursuant to 42 U.S.C. §1988; and

f. Granting such other and further relief as this Court deems just and proper.

Dated: May 15, 2018

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Exhibit 3 to Proposed Amended Complaint, Letter from B. Koch to Hon. R. J. McNally, Jr.

Dear Honorable Judge

My name is Brandon Koch. I write in regard to having the "HUNTING & TARGET" restrictions removed from my New York State Pistol License #C30014 issued by Rensselaer County in January of 2015.

I have resided in Rensselear County since 2011 and have been employed in Rensselear County since 2008 with the NYS Unified Court System Office of Court Administration Division of Technology. Before moving to the capital region I studied at the Rochester Institute of Technology where I earned a Bachelors of Science in Information Technology for computer networking and network programming. I was born and grew up in Batavia NY in Genesse County. I was introduced to the safe handling and operation of rifles and shotguns at the age of 10 under the supervision of my father and both grandfathers whom were lifetime hunters. I graduated from Batavia High School in 2001 with a New York State Regents Diploma.

I have and continue to be a responsible and law-abiding citizen of Rensselaer County. I understand that carrying a weapon of any kind is a tremendous responsibility and is not a decision that should be taken lightly. Since acquiring my pistol license, I have taken it upon myself to become proficient with the safe usage of handguns by utilizing multiple training courses, personal training sessions and weekly target practice at "American Tactical Systems", a local gun range in Green Island since October 2016. I have taken the following courses that were taught by NRA

certified instructors, NYS Basic Pistol Safety Course, NYS Advanced Pistol Safety course with a focus on Article 35 and live fire evaluation, Practical Tactics for Carry Conceal, Utah non-resident pistol permit safety course, Florida non-resident permit pistol safety course with live fire evaluation, South Carolina non-resident pistol permit safety course with written test and live fire evaluation and qualification. I currently hold non-resident carry conceal permits for the states of Utah, Florida, South Carolina and New Hampshire. These permits allow me to carry a concealed firearm in 33 states.

I fully understand that some circumstances will dictate that I not carry concealed such as in those areas prohibited by State or Federal law. I have consequently purchased a trigger lock and a lockable storage device specifically designed for handguns that will allow me to leave my firearm in my vehicle in a safe manner should the need arise. To protect my handguns from theft inside my apartment I have purchased a security safe and have attached it to the wall framing with two-and-a-half-inch lag screws. Ammunition is stored separately in locked containers.

I understand fully the immense responsibility as well as the possible ramifications of carrying a firearm concealed on my person for lawful purposes. The use thereof must only be as an absolute last resort. Because of my t raining, competency and my firm belief that I am of good moral and ethical character, I would like to respectfully request my Pistol License be amended to remove the "HUNTING & TARGET" restrictions thus allowing for unrestricted carry for personal protection and all lawful purposes in

Rensselear County as well as other counties where it is also acceptable by law to do so.

Thank you for considering this request.

Sincerely,

Brandon Koch

Exhibit 4 to Proposed Amended Complaint, Letter from Hon. R. J. McNally, Jr. to B. Koch (Jan. 16., 2018)

Dear Mr. Koch:

This letter reflects that on January 16, 2018 the Court held a conference for the request that your restrictions be removed from your pistol/revolver license application.

While the Court has determined that the "Hunting, Target only" restrictions remain on your carry concealed permit, I note that the restrictions DO ALLOW you to carry concealed for purposes of off road back country, outdoor activities similar to hunting, for example fishing, hiking & camping. And you may also carry to and from work.

Please contact the Pistol Permit Clerk who will prepare a new permit.

Sincerely,

[handwritten: signature]
Richard J. McNally, Jr.
Supreme Court

RJM/mjs

cc: Pistol Permit Clerk

Amended Complaint (N.D.N.Y. May 16, 2018)

Plaintiffs New York State Rifle & Pistol Association, Inc., Robert Nash, and Brandon Koch (collectively "Plaintiffs"), by and through the undersigned attorneys, file this Complaint against the above-captioned Defendants, in their official capacities as state and local officials responsible under New York law for administering and enforcing the State's laws and regulations governing the carrying of firearms outside the home. Plaintiffs seek declaratory and injunctive relief: a declaration that New York's limitation of the right to carry firearms to those who can satisfy licensing officials that they have "proper cause" to exercise that right is unconstitutional under the Second and Fourteenth Amendments to the United States Constitution, and an injunction compelling Defendants to refrain from enforcing that invalid limit and to issue Handgun Carry Licenses to Plaintiffs or to otherwise allow Plaintiffs to exercise their right to carry firearms outside the home. In support of their Complaint against Defendants, Plaintiffs hereby allege as follows:

INTRODUCTION

1. The Second Amendment to the United States Constitution guarantees "the right of the people to keep and bear Arms." U.S. CONST. amend. II. When the People, by enacting that amendment, enshrined in their fundamental charter the right to "carry weapons in case of confrontation" for the "core lawful purpose of self-defense," *District of Columbia v. Heller*, 554 U.S. 570, 592, 630 (2008), they did not mean to leave the freedom to exercise that right at the mercy of the very government officials whose hands they sought to

bind. No, "[t]he very enumeration of the right takes out of the hands of government ... the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* at 634.

2. In defiance of that constitutional guarantee, New York has seized precisely the power forbidden it by the Second Amendment: the power to decide, on a case-by-case basis, whether an applicant for a license to "carry weapons in case of confrontation," *id.* at 592, has, in its estimation, shown sufficiently "proper cause" that a license should be issued, N.Y. PENAL LAW §400.00(2)(f).

3. Worse still, New York has made clear that a general desire to carry a handgun for the purpose of self-defense—"the *central component*" of the Second Amendment, *Heller*, 554 U.S. at 599 (emphasis added)—is not a sufficiently good reason to exercise the right. Instead, according to New York, an ordinary citizen must establish a *special need for self-defense* which *sets him apart from the general public* to obtain a license from the State to carry a firearm in public for the purpose of self-defense. That restriction is akin to a state law concluding that the general desire to advocate for lawful political change is not sufficient "proper cause" to exercise the right to free speech, and it cuts to the very core of the Second Amendment, no less than such a restriction would gut the First.

4. Indeed, the practical effect of New York's "proper cause" requirement is to make it wholly illegal for *typical* law-abiding citizens to carry handguns in public for the purpose of self-defense—for by definition, these ordinary citizens cannot show that they face a *special* danger to their safety.

5. Plaintiffs Robert Nash and Brandon Koch are ordinary, law-abiding citizens of New York who wish to carry firearms outside the home for the purpose of self-defense. They have passed all required background checks and met every other qualification imposed by New York on the eligibility for a license to carry a firearm in public for self-defense—except that like the vast majority of ordinary, law-abiding New York residents, they cannot establish a special need for self-protection that is distinct from the general desire for self-defense. Accordingly, Defendant McNally determined that Plaintiffs Nash and Koch have not shown "proper cause" to exercise their Second Amendment rights, and he refused to grant them licenses to carry a firearm outside the home for self-defense. That result simply cannot be squared with the rights guaranteed by the Second Amendment.

6. Plaintiffs acknowledge that the result they seek is contrary to *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012), but, for the reasons explained in *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017), that case was wrongly decided. They therefore institute this litigation to vindicate their Second Amendment rights and to seek to have *Kachalsky* overruled.

JURISDICTION AND VENUE

7. This Court has subject-matter jurisdiction over Plaintiffs' claim under 28 U.S.C. §§1331 and 1343.

8. Plaintiffs seek remedies under 28 U.S.C. §§1651, 2201, and 2202 and 42 U.S.C.§§1983 and 1988.

9. Venue is proper in this Court under 28 U.S.C. §1391(b)(1) & (b)(2).

PARTIES

10. Plaintiff Robert Nash is a citizen of the United States and a resident and citizen of the State of New York. He resides in Averill Park, NY 12018.

11. Plaintiff Brandon Koch is a citizen of the United States and a resident and citizen of the State of New York. He resides in Troy, NY 12180.

12. Plaintiff New York State Rifle & Pistol Association, Inc. ("NYSRPA") is a group organized to support and defend the right of New York residents to keep and bear arms. The New York restrictions on the public carrying of firearms at issue in this case are thus a direct affront to NYSRPA's central mission. NYSRPA has thousands of members who reside in New York. Its official address is 90 S. Swan Street, Suite 395, Albany, New York 12210. Plaintiffs Nash and Koch are members of NYSRPA. They are two among many NYSRPA members who have been and continue to be denied the right to carry a firearm outside of the home for the sole reason that they cannot satisfy the State's "proper cause" requirement.

13. Defendant George P. Beach II is the Superintendent of the New York State Police. As Superintendent, he exercises, delegates, or supervises all the powers and duties of the New York Division of State Police, which is responsible for executing and enforcing New York's laws and regulations governing the carrying of firearms in public, including prescribing the form for Handgun Carry License applications. His official address is New York State Police, 1220 Washington Avenue, Building 22, Albany, NY 12226. He is being sued in his official capacity.

14. Defendant Richard J. McNally, Jr., is a Justice of the New York Supreme Court, Third Judicial District, and a Licensing Officer for Rensselaer County under N.Y. PENAL LAW §400.00. Pursuant to N.Y. PENAL LAW §265.00(10), he is responsible for receiving applications from residents of Rensselaer County for a license to carry a handgun, investigating the applicant, and either approving or denying the application. His official address is Rensselaer County Courthouse, 80 Second Street, Troy, NY 12180. He is being sued in his official capacity as a State Licensing Officer.

FACTUAL ALLEGATIONS

New York's "Proper Cause" Requirement

15. New York law generally forbids any person to "possess[ ] any firearm," N.Y. PENAL LAW §265.01(1), without first obtaining "a license therefor," *id.* §265.20(a)(3). Violating this ban is a class A misdemeanor, punishable by a fine of $1,000 or less or up to a year in prison. *Id.* §§70.15(1), 80.05(1), 265.01. Possessing a *loaded* firearm without a license is a class C felony, punishable by a fine of up to $5,000 or between one and fifteen years imprisonment. *Id.* §§70.00(2)(c) & (3)(b), 80.00(1), 265.03.

16. New York's ban is subject to minor exceptions for active duty members of the military, police officers, and the like. *Id.* §265.20. An ordinary member of the general public who wishes to carry a handgun outside the home for purposes of self-protection, however, can only do so if he obtains a license to "have and carry [a handgun] concealed" (a "Handgun Carry License"), pursuant to Section 400.00(2)(f) of New York's Penal Law. A person seeking such a license must submit an

application—on a form approved by Defendant Beach—to the Licensing Officer for the city or county where he resides. *Id.* §400.00(3)(a). No license is available to authorize the carrying of handguns within the State openly.

17. To be eligible for a Handgun Carry License, an applicant must satisfy numerous criteria. For example, he must be at least 21 years old, must not have been convicted of any felony or serious offense, must not be an unlawful user of a controlled substance, and must not have a history of mental illness. *Id.* §400.00(1). Before issuing a license, the Licensing Officer must conduct a rigorous investigation and background check, to verify that each of these statutory requirements is satisfied. *Id.* §400.00(4).

18. In addition to these rigorous eligibility and screening requirements, a law-abiding citizen may only be granted a Handgun Carry License if he demonstrates that "proper cause exists for the issuance thereof." *Id.* §400.00(2)(f).

19. In granting a license, some Licensing Officers note certain restrictions on the license, such as "hunting and target." In Rensselaer County, for instance, Licensing Officials routinely grant licenses that are marked "hunting and target," and that they refer to as "restricted licenses." These licenses allow the licensee to carry a firearm only when engaged in those specified activities. Such a license *does not* permit the carrying of a firearm in public for the purpose of self-defense.

20. While New York law grants local Licensing Officials some discretion in determining what

constitutes "proper cause" for issuance of an unrestricted Handgun Carry License, this discretion is cabined by the significant body of New York case-law defining that term. The courts have determined, for instance, that "[a] generalized desire to carry a concealed weapon to protect one's person and property does not constitute 'proper cause.' "*Application of O'Connor*, 585 N.Y.S.2d 1000, 1003 (N.Y. Co. Ct. 1992). They have further clarified that merely traveling through "high crime areas ... is too vague to constitute 'proper cause' within the meaning of Penal Law §400.02(f)," *Martinek v. Kerik*, 743 N.Y.S.2d 80, 81 (1st Dep't 2002), and that instead an applicant must "demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession," *Klenosky v. New York City Police Dep't*, 428 N.Y.S.2d 256, 257 (1st Dep't 1980), *aff'd,* 53 N.Y.2d 685 (1981).

21. Accordingly, typical law-abiding citizens of New York—the vast majority of responsible citizens who cannot "demonstrate a special need for self-protection distinguishable from that of the general community," *id.*—effectively remain subject to a flat ban on carrying handguns outside the home for the purpose of self-defense.

Defendant's Refusal to Issue Plaintiff's Handgun Carry Licenses

22. Plaintiff Robert Nash is an adult citizen and resident of New York. He is not a law enforcement official or a member of the armed forces, and he does not fall within any of the other exceptions enumerated in N.Y. PENAL LAW §265.20 to New York's ban on carrying firearms in public.

23. Mr. Nash does, however, possess all of the qualifications necessary to obtain a Handgun Carry License that are enumerated in N.Y. PENAL LAW §400.00(1). For example, he is over 21 years of age, he has not been convicted of any felony or other serious offense, and he is not addicted to controlled substances or mentally infirm. He has also passed all required background checks.

24. Mr. Nash does not face any special or unique danger to his life. He does, however, desire to carry a handgun in public for the purpose of self-defense. Mr. Nash lawfully owns several handguns which he keeps in his home to defend himself and his family, and he would carry a handgun for self-defense when he is in public, were it not for Defendants' enforcement of New York's ban on the public carrying of firearms. Mr. Nash is not entitled to a Handgun Carry License by virtue of his occupation, pursuant to Penal Law §400.00(2)(b)-(e).

25. In or around September 2014, Mr. Nash applied to the Licensing Officer for the county where he resides, Rensselaer County, for a license to carry a handgun in public. After investigation, Mr. Nash's application was granted on March 12, 2015, but he was issued a license marked "Hunting, Target only" that allowed him to carry a firearm outside the home only while hunting and target shooting.

26. Because of these restrictions, Mr. Nash is not able to carry a firearm outside of his home for the purpose of self-defense.

27. On September 5, 2016, Mr. Nash requested the Licensing Officer, Defendant Richard N. McNally, Jr., to remove the "hunting and target" restrictions

from his license and issue him a license allowing him to carry a firearm for self-defense. In support of this request, Mr. Nash cited a string of recent robberies in his neighborhood and the fact that he had recently completed an advanced firearm safety training course. Letter from Robert Nash to Richard McNally, Jr. (Sept. 5, 2016) (attached as Exhibit 1).

28. On November 1, 2016, after an informal hearing, Defendant McNally denied Mr. Nash's request and "determined that the 'Hunting, Target only' restrictions [shall] remain on your carry concealed permit." Letter from Richard McNally, Jr., to Robert Nash (Nov. 1, 2016) (attached as Exhibit 2). Defendant McNally "emphasize[d] that the restrictions are intended to *prohibit* you from carrying concealed in ANY LOCATION typically open to and frequented by the general public." *Id.*

29. Defendant McNally did not determine that Mr. Nash was ineligible for any of the reasons enumerated in N.Y. PENAL LAW §400.00(1); indeed, his eligibility is confirmed by the fact that he continues to hold a "restricted" license. Instead, Defendant McNally concluded that Mr. Nash had failed to show "proper cause" to carry a firearm in public for the purpose of self-defense, because he did not demonstrate a special need for self-defense that distinguished him from the general public.

30. In light of Defendant McNally's denial of his request to remove the restrictions on his license, Mr. Nash continues to refrain from carrying a firearm outside the home for self-defense in New York. Mr. Nash would carry a firearm in public for self-defense in New York were it lawful for him to do so.

31. Plaintiff Brandon Koch is an adult citizen and resident of New York. He is not a law enforcement official or a member of the armed forces, and he does not fall within any of the other exceptions enumerated in N.Y. PENAL LAW §265.20 to New York's ban on carrying firearms in public.

32. Mr. Koch does, however, possess all of the qualifications necessary to obtain a Handgun Carry License that are enumerated in N.Y. PENAL LAW §400.00(1). For example, he is over 21 years of age, he has not been convicted of any felony or other serious offense, and he is not addicted to controlled substances or mentally infirm. He has also passed all required background checks.

33. Mr. Koch does not face any special or unique danger to his life. He does, however, desire to carry a handgun in public for the purpose of self-defense. Mr. Koch lawfully owns at least one handgun which he keeps in his home to defend himself and his family, and he would carry a handgun for self-defense when he is in public, were it not for Defendants' enforcement of New York's ban on the public carrying of firearms. Mr. Koch is not entitled to a Handgun Carry License by virtue of his occupation, pursuant to Penal Law §400.00(2)(b)-(e).

34. In 2008, Mr. Koch was granted a license to carry a handgun in public by the Licensing Officer for the county where he resides, Rensselaer County. However, he was issued a license marked "Hunting & Target" that allowed him to carry a firearm outside the home only while hunting and target shooting.

35. Because of these restrictions, Mr. Koch is not able to carry a firearm outside of his home for the purpose of self-defense.

36. In November of 2017, Mr. Koch requested the Licensing Officer, Defendant Richard N. McNally, Jr., to remove the "hunting and target" restrictions from his license and issue him a license allowing him to carry a firearm for self-defense. In support of this request, Mr. Koch cited his extensive experience in the safe handling and operation of firearms and the many safety training courses he had completed. Letter from Brandon Koch to Richard McNally, Jr. (attached as Exhibit 3).

37. On January 16, 2018, after an informal hearing, Defendant McNally denied Mr. Koch's request and "determined that the 'Hunting, Target only' restrictions [shall] remain on your carry concealed permit." Letter from Richard McNally, Jr., to Brandon Koch (Jan. 16, 2018) (attached as Exhibit 4).

38. Defendant McNally did not determine that Mr. Koch was ineligible for any of the reasons enumerated in N.Y. PENAL LAW §400.00(1); indeed, his eligibility is confirmed by the fact that he continues to hold a "restricted" license. Instead, Defendant McNally concluded that Mr. Koch had failed to show "proper cause" to carry a firearm in public for the purpose of self-defense, because he did not demonstrate a special need for self-defense that distinguished him from the general public.

39. In light of Defendant McNally's denial of his request to remove the restrictions on his license, Mr. Koch continues to refrain from carrying a firearm

outside the home for self-defense in New York. Mr. Koch would carry a firearm in public for self-defense in New York were it lawful for him to do so.

40. Plaintiff NYSRPA has at least one member who has had an application for a Handgun Carry License denied solely for failure to satisfy the "proper cause" requirement. But for Defendants' continued enforcement of the New York laws and regulations set forth above, that member would forthwith carry a firearm outside the home for self-defense.

COUNT ONE

42 U.S.C. §1983 Action for Depravation of Plaintiffs' Rights under U.S. CONST. amends. II and XIV

41. Plaintiffs incorporate by reference the allegations of the preceding paragraphs.

42. The Second Amendment's guarantee of "the right of the people to keep and bear Arms" secures to law-abiding, responsible, adult citizens the fundamental constitutional right to bear arms outside the home. U.S. CONST. amend. II.

43. This Second Amendment right to bear arms in public applies against the State of New York under U.S. CONST. amend. XIV.

44. This Second Amendment right to bear arms in public cannot be subject to a government official's discretionary determination of whether a law-abiding citizen has "proper cause" to exercise that right.

45. A government restriction that limits the right to bear arms in public for the purpose of self-defense to only those few, favored citizens who can demonstrate that they face a special danger to their

life effectively operates as a flat ban on the carrying of firearms by *typical* law-abiding citizens, who by definition cannot demonstrate this kind of *atypical* need to bear arms.

46. By infringing the Second Amendment right to bear arms in public in these ways, the New York laws and regulations discussed in the foregoing allegations violate the Second Amendment, which applies to Defendants by operation of the Fourteenth Amendment, both facially and as applied to Plaintiffs Nash and Koch and members of the New York State Rifle & Pistol Association, Inc., and they are therefore invalid.

PRAYER FOR RELIEF

47. WHEREFORE, Plaintiffs pray for an order and judgment:

a. Declaring that New York's "proper cause" requirement, as set forth in statutes and regulations including but not limited to N.Y. PENAL LAW §400.00(2)(f), violates the Second and Fourteenth Amendments and is thus devoid of any legal force or effect;

b. Enjoining Defendants and their employees and agents from denying unrestricted Handgun Carry Licenses to applicants on the basis of New York's "proper cause" requirement, as set forth in statutes and regulations including but not limited to N.Y. PENAL LAW §400.00(2)(f);

c. Enjoining Defendants and their employees and agents from enforcing the New York laws and regulations establishing and defining the "proper

cause" requirement, including N.Y. PENAL LAW §400.00(2)(f);

d. Ordering Defendants and their employees and agents to issue unrestricted Handgun Carry Licenses to Plaintiffs Robert Nash and Brandon Koch and members of Plaintiff New York State Rifle & Pistol Association, Inc.;

e. Awarding Plaintiffs their reasonable costs, including attorneys' fees, incurred in bringing this action, pursuant to 42 U.S.C. §1988; and

f. Granting such other and further relief as this Court deems just and proper.

Dated: May 16, 2018

Respectfully submitted,

s/Kathleen McCaffrey Baynes

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**Pro hac vice* application forthcoming

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