No. 20-843

In the

Supreme Court of the United States

NEW YORK RIFLE & PISTOL ASS'N, ET AL.,
Petitioners,

v.

KEVIN P. BRUEN, ET AL.,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

BRIEF OF *AMICUS CURIAE* THE CLAREMONT INSTITUTE'S CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life. This includes the principle at issue in this case that the preexisting fundamental right of armed self-defense is protected by the Second Amendment against state regulation not supported by a compelling interest. The Center has previously participated in a number of cases before this Court addressing the Second Amendment, including *Peruta v. California*, 137 S. Ct. 1995 (2017), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

SUMMARY OF ARGUMENT

The State of New York bans law-abiding citizens (other than those engaged in certain specialized employments not at issue here) from carrying handguns in public other than for the limited purpose of hunting and target practice, unless they can demonstrate to the discretionary satisfaction of a government licensing official that they have "proper cause"—i.e., "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession"—for obtaining a concealed carry license. N.Y. Penal Law § 400.00(2)(f); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 86 (2d Cir. 2012).

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[1] Pursuant to Rule 37.3(a), all parties have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

This restriction prohibits most members of the public from exercising their pre-constitutional natural right to self-defense—a right codified by the Second Amendment and recognized by this Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008).

The Second Circuit's decision below, like those of several other Circuit Courts of Appeal, erroneously treated the fundamental right to keep and bear arms as though it were limited to self-defense in the home, merely because the statute struck down in *Heller* involved a ban on handguns in the home. It then held, again erroneously, that the carrying of handguns outside the home was therefore subject only to intermediate scrutiny (and even then, applied a deferential form of intermediate scrutiny that is more akin to rational basis review), and that New York's complete ban on carrying of handguns in public was therefore permissible. But the reasoning of *Heller*, as well as the historical understanding of the right that the Second Amendment recognizes, applies to self-defense more broadly—self-defense not only in the home but in non-sensitive public places as well. And because the right recognized by this Court in *Heller* is fundamental, strict scrutiny, rather than intermediate scrutiny, is the appropriate level of review. And under that standard (and even under a properly-applied intermediate scrutiny standard), New York's complete ban for a large portion of the law-abiding population is unconstitutional.

ARGUMENT

I. The Right to Bear Arms Protected by the Second Amendment Is a Codification of the Natural Right of Self-Defense.

This Court has held, twice, that the Second Amendment protects an "individual right to keep and bear arms for the purpose of self-defense." *McDonald*, 561 U.S. at 748; *Heller*, 554 U.S. at 599.

This Court's decision in *Heller* explored the right's origins, noting that the 1689 English Bill of Rights explicitly protected a right to keep arms for self-defense. 554 U.S. at 593. In fact, by 1765, Blackstone was able to assert that the right to keep and bear arms was "one of the fundamental rights of Englishmen." *Id.* at 594. These principles were not unique to England as "Blackstone's assessment was shared by the American colonists." *Id.*; *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2013).

This Court in *Heller* acknowledged that the Second Amendment's protection of the right to "bear arms" was a right to "carry" a weapon. 554 U.S. at 584. This right to "carry" a weapon is inextricably linked to the right of self-defense. *Id.* at 585 and n.10. (citing 2 Collected Works of James Wilson at 1142 (K. Hall M. Hall ed. 2007) (citing Pa. Const., Art. IX § 21 (1790)). The early state constitutions of Pennsylvania, Vermont, Indiana, Mississippi, Connecticut, Alabama Missouri, and Ohio explicitly protect the right to bear arms for this purpose.[2]

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[2] *Heller*, 554 U.S. at 585 and n.8, 602 (citing Pa. Declaration of Rights § 13 (1776) ("That the people have a right to bear arms for the defence of themselves and the state."); Vt. Declaration of Rights § 15 ("That the people have a right to bear arms for the

The founders of the American Republic did not originate the concept of a right to bear arms in self-defense of persons and the community.[3] The fundamental right of self-defense has long been recognized. Even Aristotle stated that "arms bearing" was an essential aspect of each citizen's proper role. Stephen P. Halbrook, THAT EVERY MAN BE ARMED (Univ. of New Mexico Press 2013) at 9.

The right to self-defense is a basic human right recognized throughout history. Hugo Grotius, THE RIGHTS OF WAR AND PEACE 76-77, 83 (A.C. Campbell trans., 1901) ("When our lives are threatened with immediate danger, it is lawful to kill the aggressor"); Marcus Tullis Cicero, SELECTED SPEECHES OF CICERO 222, 234 (Michael Grant ed. and trans., 1969) ("[Natural law lays] down that, if our lives are endangered

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defence of themselves and the State."); Ky. Const. of 1792, art. XII, § 23 ("That the right of the citizens to bear arms in defence of themselves and the State shall not be questioned."); Ohio Const. of 1802, art. VIII, § 20 ("That the people have a right to bear arms for the defence of themselves and the State."); Ind. Const. of 1816, art. I, § 20 ("That the people have a right to bear arms for the defense of themselves and the State."); Miss. Const. of 1817, art. I, § 23 ("Every citizen has a right to bear arms, in defence of himself and the State."); Conn. Const. of 1818, art. I, § 17 ("Every citizen has a right to bear arms in defence of himself and the state."); Ala. Const. of 1819, art. I, § 23 ("Every citizen has a right to bear arms in defence of himself and the State."); Mo. Const. of 1820, art. XIII, § 3 ("That [the people's] right to bear arms in defence of themselves and of the State cannot be questioned.")).

[3] The Second Amendment also serves as a check against government tyranny. *See, e.g.*, Joseph Story, 3 COMMENTARIES ON THE CONSTITUTION § 1890 (1833) ("The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers").

by plots or violence or armed robbers or enemies, any and every method of protecting ourselves is morally right"); *see also* David Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self Defense*, 22 BYU J. Pub. Law 43, 58-92 (2007-2008) (detailing writings of early philosophers regarding the right and duty of self-defense).

John Locke identified this natural right of self-defense as the "fundamental, sacred, and unalterable law of self-preservation." John Locke, SECOND TREATISE OF CIVIL GOVERNMENT § 149 (1690). Locke understood, and subsequently argued, that the right to use force in self-defense is a necessity. *Id*. at § 207. Thomas Hobbes also recognized the right to self-defense as a self-evident proposition: "[a] covenant not to defend my selfe from force, by force, is always voyd." Thomas Hobbes, LEVIATHAN 98 (Richard Tuck ed., 1991).

There should not be a need to repeat these authorities. This Court already recognized that armed self-defense is a fundamental natural right. The Second Amendment codifies this pre-existing right. *Heller*, 554 U.S. at 592. It is not a right "granted" by the Congress that proposed and the states that ratified the Bill of Rights. *United States v. Cruikshank*, 92 U.S. 542, 553 (1876).

II. Infringement of a Textually Explicit Fundamental Right Should Be Reviewed Under Strict Scrutiny.

In *United States v. Carolene Products*, 304 U.S. 144 (1938), this Court noted that enhanced scrutiny is especially appropriate when legislation trenches on "a specific prohibition of the Constitution, such as those

of the first ten Amendments." *Id*. at 152 n.4. Thus, this Court has long recognized that the appropriate test for government action that burdens fundamental constitutional rights is strict scrutiny. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973); *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 101-02 (1972); *Dunn v. Blumstein*, 405 U.S. 330, 335-36 (1972). Even regulations limiting non-textual fundamental rights are tested by strict scrutiny. *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969).

Identification of a compelling interest alone is not sufficient when fundamental rights are at stake. The state must also prove that the regulation or ordinance is narrowly tailored to further that interest. *Aptheker v. Secretary of State*, 378 U.S. 500, 508 (1964). This analysis applies when the regulation interferes with a constitutional right or a liberty interest recognized as "fundamental." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457-58 (1988); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983).

The Second Circuit, however, has chosen to apply what it terms "intermediate scrutiny," requiring merely that the government show that the restriction "is substantially related to the achievement of an important governmental interest." *Kachalsky*, 701 F.3d at 96.[4] That court has found that New York meets this

[4] The specific decision of the Second Circuit at issue here merely reaffirmed its prior decision in *Kachalsky*. App. at 2. The Second Circuit also reaffirmed *Kachalsky* in *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45 (2d Cir. 2018), but that decision was vacated by this Court after New York modified its law in the wake of this Court's grant of the petition for writ of

test because New York has *reasonably* "determined that limiting handgun possession to persons who have an articulable basis for believing they will need the weapon for self-defense is in the best interest of public safety and outweighs the need to have a handgun for an unexpected confrontation." *Id.* at 100. This is consistent with the resistance to this Court's decisions in *Heller* and *McDonald* that seems to underlie several decisions of the various Courts of Appeals. None apply strict scrutiny, notwithstanding that the laws they consider infringe on a textually explicit constitutional right. Instead, they, like the Second Circuit here, apply what they term "intermediate" scrutiny.[5] *E.g.*, *Jackson v. City and County of San Francisco*, 746 F.3d 953, 965 (9th Cir. 2014); *National Rifle Ass'n v. BATF*, 700 F.3d 185, 207 (5th Cir. 2012); *Heller v. District of Columbia*, 670 F.3d 1244, 1262 (D.C. Cir. 2011).

Worse, what these courts, including the Second Circuit below, applied was not even "intermediate scrutiny" as that term has been applied by this Court. In *Kachalsky*, for example, the Second Circuit gave "substantial deference" to the New York legislature. *Kachalsky*, 701 F.3d at 97 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) ("*Turner II*")). And it defined its own role as merely "to assure that, in formulating its judgments, [New York] has

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certiorari in the case. *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 139 S. Ct. 939 (cert. granted Jan. 22, 2019), *vacated and remanded as moot*, 140 S. Ct. 1525 (April 27, 2020).

[5] Even the decision of the Seventh Circuit striking down a ban on carrying a weapon did not apply strict scrutiny. *Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012) ("[O]ur analysis is not based on degrees of scrutiny, but on Illinois's failure to justify the most restrictive gun law of any of the 50 states.")

drawn reasonable inferences based on substantial evidence." *Kachalsky*, 701 F.3d at 97 (quoting *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 665 (1994) ("*Turner I*"). But the two *Turner Broadcasting* cases relied upon by the Second Circuit were Free Speech cases, and "the intermediate level of scrutiny" applied in them was that which is applicable to content-neutral restrictions that impose [only] an *incidental burden on speech*." *Turner I*, 512 U.S. at 662 (emphasis added).

New York's complete ban on the public carrying of handguns by most citizens is hardly an "incidental burden" on the exercise of Second Amendment rights, as the Second Circuit itself has recognized. *See Kachalsky,* 701 F.3d at 93 ("New York's proper cause requirement places substantial limits on the ability of law-abiding citizens to possess firearms for self-defense in public"); *see also Wrenn v. D.C.*, 864 F.3d 650, 666 (D.C. Cir. 2017) (noting that D.C.'s "good-reason law is necessarily a total ban on most D.C. residents' right to carry a gun in the face of ordinary self-defense needs"). And the "deference" the Second Circuit gave to the legislature is more akin to rational basis review than to the lack of deference that this Court gives, even when applying intermediate scrutiny, when more than an "incidental burden" on rights is involved. *Cf.*, *e.g.*, *McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (describing, in First Amendment context, that intermediate scrutiny requires that a restriction "still must be 'narrowly tailored to serve a significant governmental interest'" and that "the government still 'may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.'" (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 796, 799 (1989));

see also Frazier v. Heebe, 482 U.S. 641, 644 n.2 (1987) (recognizing distinction between "intermediate" and "deferential" scrutiny); *Silvester v. Becerra*, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from denial of cert.) (noting that the "deferential analysis" applied by the court below "was indistinguishable from rational-basis review").

Moreover, even under the more deferential "intermediate scrutiny" applied by the Second Circuit, it is not enough to posit a public safety rationale. Instead, the state must demonstrate that the regulation at issue "advances the Government's interest in a direct and material way." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 624 (1995). This standard cannot be satisfied by unnamed studies and data, cited by the Second Circuit in *Kachalsky*, 701 F.3d at 99, particularly when the various studies "do not provide more than a rational basis for believing that [a ban on public carriage] is justified by an increase in public safety," as Judge Posner rightly concluded in *Moore*, 702 F.3d at 939, 942. Instead, the government must demonstrate that the restriction will actually alleviate some real harm in a material way. *Florida Bar*, 515 U.S. at 626.

In *Heller*, this Court indicated that its decision should not be taken to cast doubt on restrictions limited to particularly "sensitive places such as schools and government buildings" (which, as an aside, only makes sense if the right to keep *and bear* arms applies outside the home). But to move from that acknowledgement to a complete ban for most citizens in all public places, as the New York law does, requires, even under intermediate scrutiny, more definitive demonstration than the government has provided.

This is particularly the case in light of Plaintiffs' contentions—which in the procedural posture of a motion to dismiss should be taken as true—that public safety is not only not materially advanced but is actually undermined when law-abiding citizens are barred from defending themselves with firearms in public. *See* Br. of Plaintiffs/Appellants, *New York State Rifle & Pistol Ass'n v. Beach*, No. 19-156, Dkt. #47 (2nd Cir. March 20, 2019) (citing, *inter alia*, David B. Kopel, *Pretend "Gun-Free" School Zones: A Deadly Legal Fiction*, 42 Conn. L. Rev. 515, 564-70, 572 (2009); H. Sterling Burnett, National Center For Policy Analysis, TEXAS CONCEALED HANDGUN CARRIERS: LAW-ABIDING PUBLIC BENEFACTORS 1 (2000), https://goo.gl/7MvkD9; Florida Dep't of Agric. & Consumer Servs., Division of Licensing, CONCEALED WEAPON OR FIREARM LICENSE SUMMARY REPORT (Oct. 1, 1987–FEB. 28, 2019), http://goo.gl/yFzIwv; Gary Kleck & Marc Gertz, *Carrying Guns for Protection: Results from the National Self-Defense Survey*, 35 J. Research In Crime & Delinquency 193, 195 (1998). A proper application of even "intermediate" scrutiny should have led the court to find the law in violation of the Second Amendment.

CONCLUSION

It is apparent that many legislators and judges are uncomfortable with guns. They do not share the desire of many Americans to own a weapon for self-protection or even just recreation. Yet the New York legislators who enacted the ban and the judges that upheld it "work in marbled halls, guarded constantly by a vigilant and dedicated police force." *Peruta*, 137 S. Ct. at 1999-2000 (Thomas, J., dissenting from denial of certiorari). Ordinary Americans do not have

that luxury. This Court should give full effect to the Second Amendment's "right to keep and bear arms," and the natural right to self-defense that it codifies, by reversing the decision below.

July 2021 Respectfully submitted,

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