19-2152

United States Court Of Appeals
for the Second Circuit

JONATHAN CORBETT,
Plaintiff-Appellant

v.

CITY OF NEW YORK,
THOMAS M. PRASSO,
Defendant-Appellees

On Appeal from the United States District Court for the Southern District of New York (Hon. Katherine Polk Failla)

OPENING BRIEF FOR PLAINTIFF-APPELLANT

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INTRODUCTION

Plaintiff-Appellant Jonathan Corbett appeals the dismissal of three distinct challenges to the gun licensing scheme implemented by Defendant-Appellee City of New York and its senior licensing officer Defendant-Appellee Thomas M. Prasso[1].

The first is one that has not yet reached this Court: whether refusal to answer certain questions on the application to apply for any type[2] of gun license valid within the City of New York may constitutionally result in automatic denial of the application. In particular, the City of New York requires applicants to answer invasive questions into their medical, employment, and legal history that are entirely untailored to whether the applicant can safely and lawfully possess a firearm. For example, the questions effectively require an applicant to list every surgery they have ever had in their life, and declining to answer results in automatic denial of an application. It is Plaintiff-Appellant's position that the true purpose of these questions is to discourage applications and to provide plausible but bad-faith reasons for the denial of applications.

[1] To the extent that the district court complaint raised additional issues (*e.g.*, due process), those claims are abandoned.

[2] Relevant to this appeal, we should distinguish between "premise" license, which allow gun ownership inside the home without permission to carry such weapon in public, and "carry" licenses which additionally allow the licensee to possess a concealed weapon in public. We should also note that statutory and decisional law interchange the term "pistol permit" and "gun license," and for the purposes of this appeal the terms are equivalent.

The second has also not reached this Court: whether the City's practice of exempting retired police officers from the "proper cause" requirement violates the equal protection rights of non-police officers. The district court found that Corbett was not similarly situated to retired police officers and thus no equal protection analysis is due. For reasons discussed *infra,* this reasoning does not hold.

The final challenge has reached this Court many times: whether the City of New York may require an applicant for a carry license to demonstrate "greater need than the average citizen" in order to exercise their right to bear arms. While the Court has responded in the affirmative, Plaintiff-Appellant brings the issue back before the Court in light of the disagreement of several sister circuits with the reasoning and result of this Court, and in anticipation of the rejection of the means-end scrutiny used by the Second Circuit in a U.S. Supreme Court case to be argued this fall, *New York State Rifle & Pistol Association Inc. v. City of New York*, Case No. 18-280. Since the Court is currently bound by its prior panel decision, a petition to hear this case *en banc* is filed along with this brief.

JURISDICTIONAL STATEMENT

This case was brought to the district court as a challenge under the United States Constitution, and thus jurisdiction was proper under 28 U.S.C. § 1331. When the district court dismissed Plaintiff-Appellant's case, the order also denied leave to amend. This is an appeal from a denial of a timely Fed. R. Civ. P. Rule 59 motion for reconsideration of the denial of leave to amend. The motion was denied as futile on July 18th, 2019, and an amended notice of appeal was filed the same day. The amended notice of appeal was timely pursuant to Fed. R. App P. Rule 4(a)(4)(B)(ii).

The Court has "jurisdiction of appeals from all final decisions of the district courts of the United States" under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1) May a citizen be automatically denied every type of gun license for refusing to answer Questions 11, 12, and 13[3] of the gun license application required by the City of New York?

[3] Question 11: "Have you ever… [b]een discharged from employment?"

Question 12: "Have you ever… [u]sed narcotics or tranquilizers?"

Question 13: "Have you ever… [b]een subpoenaed to, or testified at, a hearing or inquiry conducted by an executive, legislative, or judicial body?"

2) Has the city violated the equal protection clause of the U.S. Constitution by automatically exempting retired police officers from the "proper cause" requirement?

3) May a citizen be required to demonstrate a need greater than that of the average citizen in order to exercise their right to bear arms[4]?

STATEMENT OF THE CASE

I. Nature of the Case

New York City diverges from most of the rest of the rest of New York State, and from all but New Jersey, Hawaii, and a few counties in California nationally, by requiring its citizens to demonstrate "need" *greater than the average citizen* before granting a license to exercise a constitutional right. That is, your average, upstanding, law-abiding citizen cannot be licensed to carry a handgun ("bear arms") in New York City. Carrying a handgun in public without a license is

[4] The Second Amendment speaks of the right to both "keep" and "bear" arms. Most courts to consider the question have agreed that these are two separate rights, the former discussing ownership or possession in the home, while the latter contemplates possession of arms in public. *N.Y.S. Rifle & Pistol Ass'n, Inc. v. City of N.Y.*, 883 F.3d 45, 58, fn. 8 (2nd Cir. 2018). The three challenged application questions 11 – 13 are required even for "premise" licenses and are thus relevant to the "keeping" prong, while the "proper cause" requirement applies only to "carry" licenses and is thus relevant to the "bearing" prong.

subject to steep criminal penalties, including mandatory minimum prison sentences. N.Y. Penal Law §§ 400.00(2), 265.01(1), 265.20(a)(3).

In New York City, there is a background of corruption surrounding gun licensing. For the 100+ years that New York has regulated gun possession, those reviewing gun license applications have found "proper cause" for those who pay bribes, are politically connected, or are connected to the police department, and absent extraordinary circumstances, all others are found to have insufficient cause. *See*, *e.g.*, Knapp Commission. "The Knapp Commission Report on Police Corruption." George Brazille (Pub.) (1973). Marzuli, John. "Gun Licensing Boss Suspended by NYPD." N.Y. Daily News (Jan. 23rd, 1997). http://www.nydailynews.com/archives/news/gun-licensing-boss-suspended-nypd-article-1.76699. Messing, Philip. "NYPD Under Fire in Aerosmith 'Got a Gun' Scandal." New York Post (Nov. 24th, 2002). http://nypost.com/ 2002/11/24/nypd-big-under-fire-in-aerosmith-got-a-gun-scandal/. Eustachewich et al. "Orthodox Jewish leader allegedly bragged about NYPD bribes for pistol permits." N.Y. Post (Apr. 18th, 2016). http://nypost.com/2016/04/18/shomrim-leader-busted-amid-nypd-corruption-probe/.

The City of New York uses the "proper cause" requirement, as well as an invasive application designed to elicit an excuse to deny an application, in furtherance of their unconstitutional ant-gun policies, while giving the decision on

license applications to its police department that has shown it cannot help itself from accepting cash and perks in exchange for licenses. In fairness, when officials are given authority to decide what is and is not a "good reason" to exercise a constitutional right, we should be not the least bit surprised when the result is corruption.

As a result of the licensing scheme described here, Plaintiff-Appellant Jonathan Corbett, despite being at least as qualified as the average, upstanding, law-abiding citizen, cannot obtain a gun license. In other words, Corbett has been totally banned from his constitutional right to "bear arms" within the City of New York despite having done nothing wrong.

II. Proceedings in the Courts Below

Corbett first challenged the denial of his application in the state court system using an "Article 78" petition[5]. A detailed discussion of state court proceedings is unnecessary here because the challenge does not relate to state court proceedings, but as a brief overview, the New York County Supreme Court denied Corbett's petition, the Supreme Court, Appellate Division dismissed Corbett's appeal, and the New York Court of Appeals declined to review the case. Dist. Ct. Opinion,

[5] Article 78 of the New York Civil Practice Law & Rules provides the framework for challenges to actions by administrative agencies in New York.

Joint Appendix (hereafter, "JA") 251, 252. What is relevant to this proceeding, however, is that money damages are not recoverable in an Article 78 petition as they would be in a 42 U.S.C. § 1983 claim. N.Y. C.P.L.R. § 7806 (no damages permitted against officer in personal capacity).

Corbett then brought his challenge to the United States District Court for the Southern District of New York on August 6th, 2018. Dist. Ct. Opinion, JA 252. Defendant-Appellees filed a motion to dismiss on November 2nd, 2018, which was granted on June 17th, 2019. *Id*. The opinion of the lower court had two alternative bases for dismissal: first, that *res judicata* applied and precluded bringing the claim in federal court, and second that Corbett's claim failed on the merits because the City of New York's licensing scheme was constitutional. *Id*. The opinion also denied leave to amend the complaint. *Id*. at JA 271, 272.

Corbett moved the Court to reconsider its denial of leave to amend on July 9th, 2019. Dist. Ct. Denial of Reconsideration, JA 274. Corbett argued that the *res judicata* issue could be easily cured by a technical amendment: amending the complaint to bring a facial challenge to New York's licensing scheme, or alternatively, asking for money damages under 42 U.S.C § 1983, would destroy claim preclusion because money damages were not available in the state court proceedings. The court below conceded that Corbett could cure the *res judicata* issue, but denied the motion as futile because its analysis of the merits would still

defeat Corbett's claim. *Id*. at JA 274, 275. Corbett therefore challenges in this appeal only the part of the lower court's opinion relating to the merits, as a successful appeal of the court below's findings on the merits would render his motion for leave to amend (or a renewed version on remand) no longer futile and allow district court proceedings to resume[6].

STATEMENT OF THE FACTS

Jonathan Corbett, at all times relevant, is a U.S. citizen without a criminal record or any other disqualifying factors for gun licensure in the State of New York. Dist. Ct. Complaint, JA 013, ¶¶ 24, 28. Corbett is licensed to carry firearms in other states and is also a licensed attorney admitted to the Bar of this Court. Id., JA 012, fn. 6. In December 2015, Corbett applied for a "carry" gun license[7] at the Licensing Division of the New York Police Department ("NYPD"), the agency that the City of New York has designated to process all such applications.

Corbett's application was complete with two exceptions. First, instead of providing a substantive answer to three questions about his background, Corbett

[6] To leave no doubt, Corbett does not intend to proceed with the claims that were barred by *res judicata*. if this Court reverses the district court on any part of its decision on the merits, Corbett intends to renew his motion for leave to amend his district court complaint to continue an objective challenge to New York's gun laws that prevent him from re-applying for a gun license, as well as to ask for money damages for the infringement on his rights pursuant to 42 U.S.C. § 1983.

[7] New York calls this license a "business carry" license. The license is so named despite being the only type of carry license available to non-police/security and despite there being no business purpose actually required.

provided an objection to the requirement that he provide such answers. Second, Corbett did not provide a meaningful "reason" for licensure greater than that of the average citizen, a requirement known in New York as "proper cause."

After processing Corbett's application, the NYPD conceded that Corbett met all requirements for approval save for his refusal to answer 3 questions and provide proper cause. *Id.*, JA 013, ¶ 29. However, the NYPD denied Corbett's application, indicating that each of those two issues was an independent basis for denial. *Id.* Accordingly, Corbett could not even be approved a "premise" license, because although proper cause is required only for a "carry" license, the disputed application questions are required for all license types.

SUMMARY OF THE ARGUMENT

First, the court below erred in ruling that requiring an answer to Questions 11 – 13 in order to obtain any type of gun license in New York City meets intermediate scrutiny. While the district court found that the questions were proper because "they help shape the scope and direction of the background investigation," the court below gave undue deference to the government's "assessment" that the questions were "substantially related" to the government's interest without any independent analysis of (or allowing discovery regarding) the same.

Second, the court below erred in determining that Corbett did not plausibly allege an equal protection claim because he does not have a "high degree of similarity" with retired police officers. But since retired police officers are ordinary citizens just like Corbett, there is no reason to presume dissimilarity, and that burden should be placed on the government, not on the plaintiff.

Finally, this Court should take another look at *Kachalsky v. Cnty. of Westchester*, 701 F.3d 81 (2nd Cir. 2012) – indeed, a first *en banc* look – in light of the strong disagreement by several sister circuits and overrule Second Circuit precedent on the matter of whether a citizen may be required to demonstrate greater than average need before being licensed to bear arms.

STANDARD OF REVIEW

The Court reviews the granting of a motion to dismiss on the pleadings *de novo*. *Karedes v. Ackerley Group, Inc.*, 423 F.3d 107, 113 (2nd Cir. 2005) ("We apply a de novo standard of review to the grant of a motion to dismiss on the pleadings, accepting as true the complaint's factual allegations and drawing all inferences in the plaintiff's favor."). "A claim is facially plausible when the plaintiff pleads factual content that allows the court to draw the reasonable

inference that the defendant is liable for the misconduct alleged." *Progressive Credit Union v. City of New York*, 889 F.3d 40, 48 (2nd Cir. 2018).

ARGUMENT

I. *Questions 11 – 13 Are Not "Substantially Related" to the Government's Interest Because They Are Completely Unbounded in Scope and Time*

The Court below assumed without finding that intermediate scrutiny applies to Corbett's challenge to Questions 11 – 13 of the gun license application[8]. Dist. Ct. Opinion, JA 265. Intermediate scrutiny requires that the burden imposed by the government "substantially relate[s] to the achievement of an important governmental interest" *N.Y.S. Rifle & Pistol Ass'n, Inc. v. City of N.Y.*, 883 F.3d 45, 62 (2nd Cir. 2018) (*cert granted*) (hereafter, "*NYSPRA*"). For intermediate (and strict) scrutiny, a court must assess *both* the strength of the government's interest *and* "the fit between the stated governmental objective and the means selected to achieve that objective." *McCutcheon v. FEC*, 572 U.S. 185, 199 (2014) (plurality

[8] It should not create great controversy to see that intermediate scrutiny is indeed the standard required here, at least under this Court's test of whether the government "impinge[s] on conduct protected by the Second Amendment." *See* Dist. Ct. Opinion, JA 265 (discussing how the court would go about deciding whether intermediate scrutiny applies before finding it unnecessary to do so). Absent providing an answer to Question 11 – 13, one may not possess or carry a firearm within New York city *at all*. Rational basis scrutiny simply won't do here: "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws." *District of Columbia et al. v. Heller*, 554 U.S. 570, 628-29, n.27 (2008)

op.). In other words, the question is not just whether the means advance the government's stated end, but whether they do so in a way that "avoid[s] unnecessary abridgement" of constitutional rights. *McCutcheon* at 199. And both strict and intermediate scrutiny "place[] the burden of establishing the required fit"—which is to say the burden of proving narrow tailoring—"squarely upon the government." *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (*citing Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480-81 (1989)). Courts may "not truncate this tailoring test" based on their perception that the interest imprecisely pursued is very important. *McCutcheon* at 206.

Corbett does not challenge the importance of the government's interest here, nor has he done so in prior proceedings. Instead, Corbett has asked the courts to determine whether an answer to these questions "substantially relates" to that interest.

What does it mean to "substantially relate" to a government interest? The test contemplates whether and how much a burden is "tailored" to solve the problem the government seeks to solve (or as the district court phrased it, the "fit between the means and the governmental objective"). Dist. Ct. Opinion, JA 268. Under the three tried-and-true tiers of scrutiny – rational basis, intermediate, and strict – the first of those tiers requires no more tailoring than an articulable reason,

while the latter requires nearly as tight of a fit as possible: little, if any, way to accomplish the government without a less restrictive or alternative way to do so.

It is perhaps the case that the middle tier is the hardest to describe in an objective way. It is clear that it requires some tailoring: more than just an articulable reason, but also some consideration for whether there is a less-restrictive means. It is also clear that it does not require the *least* restrictive means.

But here, the district court engaged in no analysis of whether there was any tailoring at all, and the questions on their face do not have *even the slightest* of boundaries. Why would it be at all relevant if an applicant was terminated from his or her employment *10 or more years ago*? What use is it to the NYPD to know that an applicant was prescribed a week of painkillers *for a wisdom tooth removal*? How could it possibly be relevant that an applicant *once testified before Congress*? Yet all of these situation would be required to be disclosed by an applicant for a gun license in New York City.

Surely there is a line somewhere: can the government require the names of every person an applicant has ever dated? Former lovers would most assuredly be able to provide insight into the moral character of applicants, possibly with more detail than could be obtained via any other source. What about requiring a look through cell phone text messages and social media? Surely that would help "shape

the scope and direction of the background investigation." Dist. Ct. Opinion, JA 267.

Yes, the NYPD may prefer to have the broadest possible fishing expedition when conducting its background checks, but the U.S. Supreme Court's decisions in *District of Columbia et al. v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010) impose restrictions upon the state that require them to conduct at least some sort of tailoring of the questions that they make mandatory on their applications. *There is a line somewhere*, and the court below failed to even attempt to determine where that line is by conducting an analysis of how close of a fit the means were to the ends. Instead, the court below afforded "considerable deference" to the threadbare assertions by the government that these questions were necessary.

Absolutely zero evidence was provided to the district court that would tend to show that any sort of boundaries upon these questions would cause a threat to public safety. Further, Corbett's opposition to the motion to dismiss pointed out that he had not had access to any of the benefits of discovery yet and should have been entitled to try to disprove that these questions cannot be tailored without unnecessarily restricting the government's interest. Dist. Ct. D.E. #15, p. 11.

If the government wishes to demonstrate that sometimes they do find that disclosure of employment history more than 10 years prior, wisdom tooth surgery details, or legislative testimony lead background investigators to uncover details that resulted in the denial of an application that would otherwise have been approved, they should be free to do that – on remand, in the district court.

II. *Retired Police Officers Do Not "Need" a Firearm Any More Than Any Other Citizen*

Corbett alleged in his complaint that there is one group of citizens that is given an exemption to the proper cause requirement: retired police officers. Dist. Ct. Compl., JA 016, ¶¶ 47 – 49. The practice of the NYPD is that retired police can ask their supervisors for a letter indicating that they left the department on good terms – said letter known as a "good guy letter" – and no further "need" be demonstrated before a full carry license is granted. *Id*.

It may be true that retired police are better trained with how to use a weapon safely and therefore should not have to take safety courses. It may be true that retired police officers have been effectively "vetted" for 20+ years and therefore no further background check is needed. But there is flatly no reason to think that all retired police officers automatically have a "need" for a firearm that is "greater

than that of the average citizen." It is on this basis that Corbett brings an equal protection claim.

Certainly *some* officers may have a legitimate fear of retaliation by criminals whom they had arrested, and should be issued licenses to protect themselves and their families. But therein lies the rub: these officers genuinely have "proper cause" and need no special exemption from the proper cause requirement in order to be licensed. On the other hand, the retired Captain or Deputy Inspector who hasn't personally arrested a criminal in more than a decade, or the desk duty officer in the personnel bureau, in strategic initiatives, in SCUBA, or in bee keeping[9], clearly merits no presumption of need – nor has the government proffered any evidence at all that the average cop who works the beat for 20 years faces any credible risk of being targeted for his or her past job.

The court below started its analysis by declaring that Corbett presented a "class of one" type equal protection claim[10]. Dist. Ct. Opinion, JA 269. Such a claim requires a *prima facie* showing of being similarly situated. *Id*. This Court has explained that a plaintiff has made such a showing if: "(i) no rational person

[9] Yes, the NYPD has sworn officers, with badge, gun, and powers of arrest, who are beekeepers with no other duties and would be entitled to bypass proper cause upon retirement with a "good guy letter." *See* New York Post. "Meet the NYPD's badass bee cops." https://nypost.com/2019/05/30/meet-the-nypds-badass-bee-cops/

[10] To be clear, Corbett is not alleging that the NYPD is treating him any differently than they treat other ordinary, non-former law enforcement citizens. There are millions of "classes of one" here in New York under this approach; the term is perhaps inartful.

could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy; and (ii) the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendant acted on the basis of a mistake." *Hu v. City of New York*, Docket No. 18-737, *18-19 (2nd Cir., Jun. 13, 2019).

The district court found Corbett's complaint to be "too conclusory" and thus failed to plausibly allege that he is similarly situated to the retired police officers that are given the free pass on proper cause. Dist. Ct. Opinion, JA 270. It seems the court below found it to be self-evident that ordinary citizens are not the same as retired police for the purpose of a proper cause exemption, as it did not feel the need to explain itself, but such a proposition leaves Plaintiff-Appellant flummoxed. Once a police officer retires, he or she resumes his or her status as an ordinary citizen in every respect. If these retirees are not similarly situated to Corbett, it is Defendant-Appellee's duty to point out how.

To the extent that the district court simply wanted Corbett to literally include the words "similarly situated" in his complaint, leave to amend should have been granted. But it cannot be said that the complaint did not allege the jist of such a position at all. Dist. Ct. Compl., JA 018, ¶ 70 and fn. 8 (spelling out in a paragraph that the allegation is that retired police officers do not have a "need" more than the

average citizen). To the extent that the district court wanted Corbett to provide more detail than that, it is asking for proof of a negative. Once Corbett indicated that he was comparing himself to other ordinary citizens for which no relevant (to "proper cause") distinction was readily apparent, his *prima facie* showing had been completed and the burden shifts to the government to show dissimilarities or otherwise defend.

III. *The Court Should Re-Consider* Kachalsky En Banc

As the U.S. Supreme Court affirmed a decade ago in *Heller*, "both text and history" leave "no doubt" "that the Second Amendment confer[s] an individual right to keep and bear arms," not a collective right reserved only to those in the "Militia." *Heller* at 595. And as the Court confirmed in *McDonald*, that individual right is "fundamental" and applies with full force against state and local governments. *McDonald* at 750, 778.

Since those cases, the Second Circuit appears not to have considered the matter *en banc*; rather, a panel in *Kachalsky* quickly found that intermediate scrutiny is appropriate and that "[r]estricting handgun possession in public to those who have a reason to possess the weapon for a lawful purpose is substantially

related to New York's interests in public safety and crime prevention." *Kachalsky* at 98. The panel in *NYSPRA*, recently "reaffirmed" *Kachalsky*[11].

Two changes to the legal landscape counsel reconsideration of the exceptional proposition that the government may decide if a citizen has a good "reason" to exercise a constitutional right.

First, there are now at least three circuits that have held that a state "proper cause" type requirement cannot stand:

- *Young v. Hawaii*, 896 F.3d 1044, 1068 (9th Cir. 2018)[12] – "Concluding our analysis of text and review of history, we remain unpersuaded by the County's and the State's argument that the Second Amendment only has force within the home. Once identified as an individual right focused on self-defense, the right to bear arms must guarantee some right to self-defense in public. While the concealed carry of firearms categorically falls outside such protection[13], we are satisfied that the Second

[11] It is unclear to Plaintiff-Appellant what the panel meant by "reaffirm," as the panel also recognized that it was "bound" by the prior ruling and thus had no discretion to affirm or reject it. *Id.* It appears this footnote is *dicta* in its entirety, merely expressing that the panel *would* reaffirm *Kachalsky* if it had the opportunity to do so.

[12] The 9th Circuit will be reconsidering *Young en banc* following the Supreme Court's decision on *NYSPRA*. *See* *Young v. Hawaii*, 915 F.3d 681 (9th Cir. 2019)

[13] Courts and scholars have sometimes, as in *Young*, opined that the government may preclude concealed carry or open carry, but not both – in other words, that there must be *some* means for ordinary citizens to "bear" arms in public. New York law categorically bans open carry; thus, Corbett's right to bear arms in either fashion has been denied.

Amendment encompasses a right to carry a firearm openly in public for self-defense" (internal citation omitted).

- *Wrenn v. District of Columbia*, 864 F.3d 650, 666 (D.C. Cir. 2017) – "This point brings into focus the legally decisive fact: the 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, where these residents are no more dangerous with a gun than the next law-abiding citizen. We say "necessarily" because the law destroys the ordinarily situated citizen's right to bear arms not as a side effect of applying other, reasonable regulations (like those upheld in *Heller II* and *Heller III*), but by design: it looks precisely for needs "distinguishable" from those of the community. So we needn't pause to apply tiers of scrutiny, as if strong enough showings of public benefits could save this destruction of so many commonly situated D.C. residents' constitutional right to bear common arms for self-defense in any fashion at all. Bans on the ability of most citizens to exercise an enumerated right would have to flunk any judicial test that was appropriately written and applied, so we strike down the District's law here apart from any particular balancing test."

- *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012) – "The Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside."

Given that yet another circuit (the Ninth Circuit in *Young*) has disagreed with this Court since the 2018 "reaffirm[ing]" *Kachalsky* in *NYSPRA*, this is an issue that is ripe for *en banc* consideration. A petition to consider this appeal *en banc* shall be filed contemporaneous with the filing of this brief.

Second, the U.S. Supreme Court's granting of a petition for *certiorari* on *NYSPRA* (S. Ct. Case No. 18-280) indicates that in several months, we will have new clarity on issues relevant to this case. In particular, the proper test for determining the constitutionality of restrictions on firearms outside the home is likely to be announced. Determining how any such rulings should be applied to New York's gun licensing scheme is of sufficient public importance and contention that it would be appropriate for the Court to address *en banc*. A request to defer judgment until after *NYSPRA* is decided (as the Ninth Circuit has ordered for its en banc reconsideration of *Young*) is included within the petition to consider this appeal *en banc*.

Upon reconsideration, the Court should take note that intermediate scrutiny is not the correct test when reviewing a law that implicates the totality of the right

to "bear" arms. At the least, strict scrutiny is required; however, it seems more likely that the U.S. Supreme Court would look at this under the lens of a "total ban," *Heller* at 576, for which means-ends scrutiny does not apply *at all*, and a law is automatically unconstitutional. The *Kachalsky* court found that the fact that the government allows a small group of people (mostly: security guards, former police, *etc*.) to bear arms means that the government has imposed less than a total ban, *Kachalsky* at 91, but that proposition has found little support in the other Courts of Appeals. When the ordinary, law-abiding citizen who has submitted to extensive and expensive regulation cannot do something, it is no longer a right.

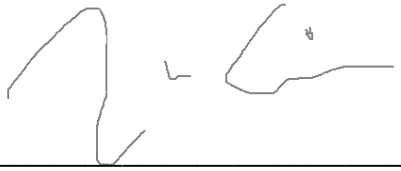
CONCLUSION

The right to own a firearm in this country is not absolute, but neither is the authority of the government to regulate firearm ownership. Where the City of New York has stepped over the line by denying the ordinary citizen any possibility of bearing arms, by granting privileges to some citizens but not others, and by requiring background checks that intrude beyond reason, the Court should correct the government.

Dated: New York, New York

October 15th, 2019

Respectfully submitted,



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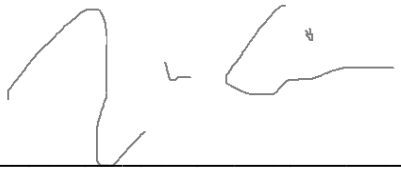
RULE 32(a)(7) CERTIFICATE

This brief complies with Fed. R. App. P. Rule 32(a)(7) because it contains approximately 5,200 words.

Dated: New York, New York

October 15th, 2019

Respectfully submitted,



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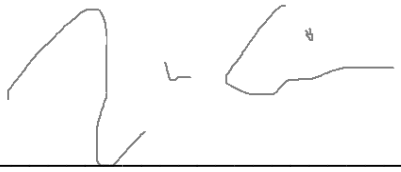
CERTIFICATE OF SERVICE

I certify that this document was served on all defendants via the CM/ECF system on October 15th, 2019.

Dated: New York, New York

October 15th, 2019

Respectfully submitted,



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