No. 18-824

In the Supreme Court of the United States

THOMAS ROGERS, *et al.*,
Petitioners,
v.
GURBIR GREWAL, Attorney General of New Jersey, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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

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QUESTIONS PRESENTED

1. Whether the Second Amendment protects the right to carry a firearm outside the home for self-defense.

2. Whether the government may deny categorically the right to carry a firearm outside the home to typical law-abiding citizens by conditioning the exercise of the right on a showing of a special need to carry a firearm.

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INTEREST OF *AMICUS CURIAE*[1]

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

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

The ACRU has championed the Second Amendment, a right that has not yet been effectively recognized as having the importance and respect afforded to the First Amendment and other widely exercised constitutional rights. After *Heller* and *McDonald*, one of the most basic questions the judiciary must answer regarding this fundamental

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

right is how it is exercised beyond the narrow confines of a citizen's home.

SUMMARY OF ARGUMENT

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

The Third Circuit below upheld New Jersey's law, which forbids a law-abiding citizen from bearing arms outside his home unless the government grants him a permit upon a showing that he has unusual circumstances to fear for his safety. The court declared that it reached this conclusion after applying what it called intermediate scrutiny.

At least three other circuits have done the same. The Second Circuit upheld a New York law forbidding Second Amendment rights outside the home. The Fourth Circuit did likewise regarding a Maryland law. Recently, the First Circuit followed suit to uphold a local variation of Massachusetts' law. Each court claims to be applying intermediate scrutiny. But instead of misapplying a robust rule, they each instead adopt a deferential rule of decision that does not meet this Court's criteria for heightened scrutiny.

Most laws are subject to rational-basis review, under which courts presume they are valid, and uphold them if rationally related to any legitimate public interest. On the other end of the scale is strict scrutiny. Between the two is intermediate scrutiny.

Under this standard, the law is presumed invalid, and the government must present persuasive evidence that the law is substantially related to an important government interest. This Court's precedents show intermediate scrutiny to be a rigorous standard that many statutes do not satisfy.

That is not what the Third Circuit applied here, nor is it what three other circuits are doing. They explicitly declare that they are deferring to the legislature, and appear to presume the challenged laws to be valid. These courts effectively place the burden on the plaintiffs to prove their case. In the end, the courts uphold these statutes, even though the government never explains how disarming law-abiding citizens in public is substantially related to advancing the important state interest in public safety. In short, these courts are applying de facto rational-basis review.

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

The circuits are divided over how to decide cases involving the right to bear arms. For those that believe

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

This Court should grant certiorari to correct the court below and provide guidance to the Nation.

ARGUMENT

I. THE THIRD CIRCUIT INVENTED A NOVEL FORM OF JUDICIAL REVIEW FOR THE SECOND AMENDMENT AND CALLED IT "INTERMEDIATE SCRUTINY."

A. The Second Amendment provides that "the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. The Court recognized this individual right in *District of Columbia v. Heller*, 554 U.S. 570 (2008). No court may "treat the right recognized in *Heller* as a second-class right," afforded less stature than other provisions in the Bill of Rights. *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (opinion of Alito, J.).

Heller rejected the idea that gun control laws are subject to rational-basis review. 554 U.S. at 629 n.27 (holding that subjecting burdens on the Second Amendment merely to a rational-basis test "would be redundant with the separate constitutional prohibitions on irrational laws"). Looking to more demanding forms of judicial review, heightened scrutiny for burdens on enumerated rights often comes in two forms: strict and intermediate. *See* Kenneth A.

Klukowski, *Making Second Amendment Law with First Amendment Rules: The Five-Tier Free Speech Framework and Public Forum Doctrine in Second Amendment Jurisprudence*, 93 NEB. L. REV. 429, 463 (2014).

B. The Third Circuit here applied what it called "intermediate scrutiny" to laws forbidding law-abiding Americans from exercising their Second Amendment right to bear arms outside the home. But what it actually applied is a weak medicine unrecognizable as any form of heightened scrutiny.

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

In *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013), the Third Circuit held that this requirement of showing a special justification to carry a firearm outside the home is consistent with the Second Amendment. *Id.* at 440. A divided panel held that such a law is subject to intermediate scrutiny, under which the statute must be substantially related to an important government interest. *Id.* at 436–37. *Drake* was the controlling precedent in the decision below here, and thoroughly discussed in the petition for certiorari. *See* Pet. 16, 25–28, 35–38.

II. THREE OTHER CIRCUITS LIKEWISE ADOPTED A FAUX FORM OF HEIGHTENED SCRUTINY TO JUSTIFY DENYING CITIZENS THEIR RIGHT TO BEAR ARMS OUTSIDE THE HOME.

Three other circuits have likewise adopted a minimal standard of review for good-cause gun-carry statutes, and likewise call it a form of intermediate scrutiny.

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

The Second Circuit continued this trend in *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d

45 (2d Cir. 2018).[2] That city's local laws added restrictions beyond the state statute, such that unless a home owner has a special permit, he may only transport a handgun outside his home to travel to approved city shooting ranges. *Id.* at 51–53. The appeals court mused on "whether some form of non-heightened scrutiny exists that is more exacting than rational basis review," which might apply to a "regulation that does not impose a substantial burden" on the Second Amendment, or perhaps that such insubstantial burdens are subject merely to the rational-basis test. *Id.* at 55–56 (internal quotation marks omitted). The appeals court explained that strict scrutiny applies to burdens on the Amendment's "core," that intermediate scrutiny attends substantial burdens are not beyond that core, and again that some lesser scrutiny might attach to insubstantial burdens. *Id.* at 56. The Second Circuit upheld the city's regulatory requirements against the various constitutional challenges the plaintiffs raised. *Id.* at 68.

B. The Fourth Circuit was the next circuit to follow this approach for good-cause requirements in *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013). *Woollard* challenged Maryland's licensing law—needed for concealed carry, open carry, wearing, or transporting—which allows issuing a permit only for "good and substantial reason." *Id.* at 868. A

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[2] This Court granted certiorari in *N.Y. State Rifle* on Jan. 22, 2019. (No. 18-280.) That case need not resolve the questions ultimately at issue in this case, however, so there is a substantial likelihood that certiorari will still be warranted in this case following the Court's disposition of *N.Y. State Rifle*.

generalized concern for self-defense does not constitute a "good and substantial reason." *Id.* at 870. The Fourth Circuit held that any assertion of Second Amendment rights outside the home is reviewed under intermediate scrutiny rather than strict scrutiny. *Id.* at 876.

C. Finally, the First Circuit adopted a similar approach in *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018). Massachusetts law allows issuing a carry permit if, *inter alia*, "the applicant has good reason to fear injury . . . or for any other good reason, including . . . use in sport or target practice." MASS. GEN. LAWS ch. 140, § 131(d).[3] The statute thus requires "that the applicant must identify a specific need, that is, a need above and beyond a generalized desire to be safe." *Gould*, 907 F.3d at 663. For the *Gould* plaintiffs, each licensing authority (i.e., the municipal chief of police) interprets the statute as requiring an applicant's "reason to fear injury to himself or his property that distinguishes him from the general population." *Id.* at 664. Massachusetts law "allows (but does not compel) local licensing authorities to issue licenses." *Id.* at 673.

The First Circuit held that "the core Second Amendment right is limited to self-defense within the home." *Id.* at 671. "Societal considerations also suggest that the public carriage of firearms, even for purposes of self-defense, should be regarded as falling outside the core of the Second Amendment." *Id.*

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[3] Issuing authorities are empowered to grant licenses that are more restrictive than others. *Gould*, 907 F.3d at 663–64 (discussing §§ 131(a), (d)).

It concluded a state action "that restricts the right to carry a firearm in public for self-defense will withstand a Second Amendment challenge so long as it survives intermediate scrutiny." *Id.* at 673.

D. In addition to these examples, cases where circuit courts claim they are applying intermediate scrutiny—but then uphold various other forms of gun controls as satisfying what it in other contexts a rigorous standard—are now legion. *See, e.g.*, *Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 965 (9th Cir. 2014) (upholding local firearm home-storage regulations); *NRA v. BATFE*, 700 F.3d 185, 207 (5th Cir. 2012) (upholding 18 U.S.C. § 922(b)(1), prohibiting licensed firearms dealers from selling handguns to law-abiding adult citizens under age 21); *United States v. Mahin*, 668 F.3d 119, 124 (4th Cir. 2012) (upholding 18 U.S.C. § 922(g)(8), prohibiting firearms if a domestic protection order is in force); *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (upholding 18 U.S.C. § 922(g)(9), prohibiting firearms to domestic violence misdemeanants); *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (same); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (upholding 18 U.S.C. § 922(k), prohibiting firearms with removed serial numbers); *United States v. Reese*, 627 F.3d 792, 807 (10th Cir. 2010) (upholding 18 U.S.C. § 922(g)(8)); *United States v. Skoien*, 614 F.3d 638, 641–42 (7th Cir. 2010) (en banc) (18 U.S.C. § 922(g)(9)).

Space prohibits exploring each of these cases in any depth, and the list above is not exhaustive, either. Suffice it to say that this is a recurring problem that plagues—and divides—the circuits. Whether intermediate scrutiny or other forms of ends-means

analysis are ever appropriate in Second Amendment cases, and if so, in which ones, are ubiquitous issues in numerous cases nationwide. This ongoing and divisive legal controversy on a question central to the exercise of a constitutional right by millions of American citizens warrants this Court's immediate review.

III. INTERMEDIATE SCRUTINY IS A DEMANDING STANDARD, UNLIKE RATIONAL-BASIS REVIEW.

Three levels of scrutiny constitute widely used tiers of judicial review. Each entails a presumption, an ends-means assessment regarding government interests and tailoring, and an evidentiary burden.

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

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

B. At the high end of judicial review, courts employ strict scrutiny. Under that demanding standard, laws

"are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). The government must prove by a "strong basis in evidence" that its chosen means advances its purported objective. *See, e.g.*, *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989). The government bears the burden of proving that its action satisfies strict scrutiny. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2377 (2018).

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

1. Recently the Court applied intermediate scrutiny when invalidating an abortion clinic buffer-zone law. *McCullen v. Coakley*, 134 S. Ct. 2518, 2541 (2014). The Court held the statute was a content-neutral speech restriction subject to intermediate scrutiny. *Id.* at 2529.[4] *McCullen* held that ensuring public safety, along with other interests, sufficed for the means component of intermediate scrutiny. *Id.* at 2535. On

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[4] *McCullen* defines intermediate scrutiny as requiring the law to be "narrowly tailored to serve a significant governmental interest." *McCullen*, 134 S. Ct. at 2534. The Second Amendment cases' use of "substantially relating" to "important interests" is actually the equal-protection formulation. *See, e.g.*, *Craig*, 429 U.S. at 197. But none of these cases parse this Court's case law as thereby drawing the lines in different places, so *amicus* regards *McCullen* as a recent example of application of the correct doctrine.

the tailoring aspect, government "must not burden substantially more speech than is necessary to further the government's interests." *Id.* (internal quotation marks omitted). While not as demanding as strict scrutiny, under intermediate scrutiny "the government may not regulate [the right] in such a manner that a substantial portion of the burden . . . does not serve to advance its goals." *Id.* (internal quotation marks omitted).

"The buffer zones burden substantially more speech than necessary to achieve the Commonwealth's asserted interests," the Court held. *Id.* at 2537. The Court also noted that other statutes provided additional protections against the ills the buffer-zone law purported to address, such as statutes against assault and trespass. *Id.* at 2538. *McCullen* also rejected the State's argument that case-by-case prosecutions of troublemakers are insufficient as an alternative means to advance the State's interests. *Id.* at 2539–40.

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

When intermediate scrutiny is at bar, there is a "strong presumption" that the State's action is unconstitutional. *Id.* at 532. "The burden of justification is demanding and rests entirely on the

State." *Id.* at 533. "The justification must be genuine, not hypothesized or invented *ad hoc* in response to litigation." *Id.* The State's argument also "must not rely on overbroad generalizations." *Id.* Although not as demanding as strict scrutiny, satisfying intermediate scrutiny is a daunting challenge for the government.

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

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

those places . . . ." *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012).

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

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

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

The court below would thus face a high hurdle if it were truly applying intermediate scrutiny, as would

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

the other circuits upholding good-cause carry laws under what they insist is the same standard.

IV. THE THIRD CIRCUIT IS ACTUALLY APPLYING DE FACTO RATIONAL-BASIS REVIEW, NOT INTERMEDIATE SCRUTINY.

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

Even so, courts must not cede too much too readily on that score. For example, the Fourth Circuit previously held that "outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense." *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011). Courts must not be hasty to accept such *ipse dixit* without citing to any authority, and this Court should serve as a check on these assertions to confirm that the lower courts fully justify their reasoning. But the Third Circuit did not make such a broad declaration here, so this Court may assume that the Third Circuit's judgment is correct regarding the government-means element of intermediate scrutiny.

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

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

The Third Circuit flatly admitted that it was treating New Jersey's statute as a "presumptively lawful" restriction, citing *dictum* from *Heller*. *Drake*, 724 F.3d at 429. This Court should review this case if for no other reason than to clarify that *Heller*'s *dictum* did not reverse heightened scrutiny's presumption of invalidity.

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

The Fourth Circuit does the same. *Woollard* breezily cast aside the challenger's arguments for why law-abiding citizens would benefit from having handguns, claiming it "cannot substitute those views

for the considered judgment of [lawmakers]." 712 F.3d at 881.

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

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

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

B. Four circuits are requiring only a reasonable relationship to public interests, not a substantial relationship.

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

Again, the same is found with the other courts. *Kachalsky* refers to "[t]he connection between promoting public safety and regulating handgun possession in public." 701 F.3d at 98. The Second Circuit never explains why handgun possession of a population that is mostly law-abiding is sufficiently tailored to combatting criminals' use of firearms.

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

Nor did the court below require the State to meet the evidentiary burden that attends true intermediate scrutiny. "New Jersey has not presented us with much evidence to show how or why its legislators arrived at its predictive judgment." *Drake*, 724 F.3d at 437. To the contrary, the Third Circuit adopted the

astoundingly permissive rule that "anecdotes, . . . consensus, and simple common sense" are three bases that can constitute a sufficient evidentiary basis to satisfy intermediate scrutiny. *Id.* at 438.

The Third Circuit cavalierly added that New Jersey should not be faulted for potentially violating this constitutional right because the State had no way of knowing that the Supreme Court would someday hold that the right to bear arms is a fundamental right applicable to the States, and therefore "refuse[d] to hold" that the lack of evidence supporting New Jersey's gun control law should imperil its validity under heightened scrutiny. *Id.* at 437–38. Such a rationale might be relevant in a habeas proceeding, *see Williams v. Taylor*, 529 U.S. 362, 413 (2000), or a qualified-immunity case, *see Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018). But it is risible to suggest the appeals court would have brushed aside purported violations of any other enumerated right with a "Who would have guessed?" excuse for a lack of supporting evidence.

Even the errant circuits discussed here have not fallen into the Third Circuit's error. *Kachalsky* quoted as the rule this Court's statement that when applying intermediate scrutiny, a court requires evidence "to assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence." *Turner*, 512 U.S. at 666. The Second Circuit admitted that it "recognize[s] the existence of studies and data challenging the relationship between handgun ownership by lawful citizens and violent crime. We also recognize that many violent crimes occur without any warning to the victims." *Id.* at 99. Noting that the State offered

counter-evidence, the court held, "It is the legislature's job, not ours, to weigh conflicting evidence and make policy judgments." *Id.*

Though even then, the evidence must still support the means the State chose to enact. The Second Circuit said in a case currently under review by this Court:

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

N.Y. State Rifle, 883 F.3d at 64. That is evidence of an attempt to limit firearms, not to limit firearms in the hands of criminals or unsafe persons. Evidence must be in support of the government's arguments regarding substantial tailoring and important interests. It cannot be evidence of impermissible objectives, like limiting the exercise of a constitutional right.

Consider also the Fourth Circuit. Much of evidence *Woollard* cited as satisfying intermediate scrutiny is data that were "adopted in 2002," but "derived without substantive change from . . . 1972." *Woollard*, 712 F.3d at 877. However, both that data and the more recent data the court cites concern only the unlawful use of handguns by criminals. *See id.* at 877–78. None of it supports the contention that indiscriminately

preventing law-abiding citizens from carrying handguns advances in any way the State's interest in public safety.

The Third Circuit did not fault New Jersey for not carrying a significant evidentiary burden, and the other errant circuits considered evidence, but not evidence that spoke to government restrictions that were adequately tailored to advancing public safety. This Court should articulate a proper legal standard for such cases nationwide by reviewing this case.

V. THE SIXTH CIRCUIT'S *TYLER* CASE ILLUSTRATES THE INTRACTABLE PROBLEM AMONG THE CIRCUITS WARRANTING THIS COURT'S REVIEW.

The Sixth Circuit's *en banc* decision in *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678 (6th Cir. 2016), illuminates the need for this Court to grant review of the applicability of intermediate scrutiny in Second Amendment cases. Clifford Tyler was a 74 year-old law-abiding citizen who had been involuntarily committed for evaluation in 1986 when he discovered that his wife had been in an adulterous affair and abandoned him and their children, taking the family's money with her. *Id.* at 683. He received a clean bill of health, continued life as a good citizen, employee, and father, but because of his moment of personal distress was unable to own a firearm under 18 U.S.C. § 922(g)(4), and Michigan, where he lived, never developed the review process authorized by federal statute to seek restoration of his gun rights. *Id.* at 684–85.

The *en banc* court held that § 922(g)(4) violated the Second Amendment as applied to Tyler's circumstances. *Id.* at 699. Seven judges opined that the statute as applied failed intermediate scrutiny. *Id.*

Judge Sutton concurred, writing for other judges that it was un necessary to determine the applicable level of scrutiny in that case. *Id.* at 710 (Sutton, J., concurring in part). Judge McKeague joined both of those opinions and well and writing his own. *Id.* at 700 (McKeague, J., concurring). Judge Batchelder separately wrote that tiers of scrutiny should not apply at all, that instead the Second Amendment should be interpreted according to its original public meaning, and under that historical inquiry the government could not impose a lifetime ban on Tyler for this sort of temporary distress. *Id.* at 702–07 (Batchelder, J., concurring in part). Judge Boggs wrote that he believed that the weight of this Court's precedent required levels of scrutiny, but that the appropriate standard there was strict scrutiny, and that § 922(g)(4) failed as applied to Tyler. *Id.* at 702 (Boggs, J., concurring in part). However, acknowledging the confusion on these matters, he agreed with the outcome under all of the three aforementioned opinions as well, and joined all of them. *Id.* Judge White agreed that the statute failed intermediate scrutiny, but wrote separately to call for remand. *Id.* at 700, 702 (White, J., concurring). Judge Moore dissented, writing for five judges that intermediate scrutiny applied, and was satisfied. *Id.* at 714 (Moore, J., dissenting). A sixth dissenting judge joined parts of that dissent, but not others. *Id.* (Rogers, J., dissenting).

That breakdown of opinions is a train wreck, evincing the need for further guidance from this Court. The Sixth Circuit had no majority opinion when striking down a federal statute to keep guns out of the hands of potentially crazy people. That should not be. While it is clear that the Second Amendment required

invalidating § 922(g)(4) as applied to Tyler, it is still not clear why. The only clear holding—which *amicus* disagrees with—is that a majority of that court thought intermediate scrutiny attached, but the Sixth Circuit could not agree even on what that intermediate analysis looks like. The Solicitor General did not ask this Court to review the decision, and millions of citizens in the Sixth Circuit remain in a state of confusion regarding this enumerated right.

Nor is this confusion limited to the Sixth Circuit. There are decisions like *Ezell*, where the Seventh Circuit invalidated Chicago's ban on gun ranges by reviewing it under a standard articulated as "a more rigorous showing than that applied in *Skoien* [i.e., intermediate scrutiny] should be required, if not quite 'strict scrutiny.'" *Ezell v. City of Chi.*, 651 F.3d 684, 708 (7th Cir. 2011).

* * * * *

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

The petition for certiorari should be granted.

CONCLUSION

The Court's review is urgently needed to determinate the applicability of levels of scrutiny in Second Amendment cases, especially intermediate scrutiny. The Court should therefore grant the petition.

Respectfully submitted,

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