No. 18-280

In the Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ROMOLO COLANTONE, EFRAIN ALVAREZ, and JOSE ANTHONY IRIZARRY,

Petitioners,

v.

THE CITY OF NEW YORK and THE NEW YORK CITY POLICE DEPARTMENT-LICENSE DIVISION,

Respondents.

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

BRIEF OF FIREARMS POLICY FOUNDATION, FIREARMS POLICY COALITION, AND THE CALGUNS FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the City's ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the Commerce Clause, and the constitutional right to travel.

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INTEREST OF *AMICI CURIAE* [1]

Firearms Policy Foundation is a non-profit organization that serves the public through research, education, legal efforts, and other programs, with a focus on advancing the fundamental right to keep and bear arms.

Firearms Policy Coalition, Inc. is a grassroots nonprofit organization that works to defend the Constitution and promote individual liberty, including and especially the right to keep and bear arms, through direct and grassroots advocacy, legal efforts, outreach, and education.

The Calguns Foundation is a non-profit organization dedicated to defending the constitutional rights of California gun owners and educating the public about federal, state, and local laws. The purposes of Calguns include supporting the California firearms community by promoting education for all stakeholders about firearm laws, rights and privileges, and securing the civil and constitutional rights of California gun owners, who are among its members and supporters.

Each are interested in this case because the analysis of the court below, and of many appellate courts

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[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution intended to fund the preparation or submission of this brief. This brief is submitted pursuant to the written blanket consent of all parties, on file with this Court.

around the country, threatens to rob the Second Amendment of any practical meaning.

INTRODUCTION

It is no secret that many federal courts around the country have been hostile to the point of contempt toward claims under the Second Amendment and have engaged in systematic resistance to this Court's *Heller* and *McDonald* decisions. See *Silvester v. Becerra*, 138 S. Ct. 945 (2018) (Thomas, J., dissenting from denial of cert.) (the Ninth Circuit's "deferential analysis was indistinguishable from rational-basis review. And it is symptomatic of the lower courts' general failure to afford the Second Amendment the respect due an enumerated constitutional right"); *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1033 (2016) (Alito, J., concurring) ("Although the Supreme Judicial Court [of Massachusetts] professed to apply *Heller*, each step of its analysis defied *Heller*'s reasoning.").[2]

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[2] See also *Peruta v. California*, 137 S. Ct. 1995, 1997, 1999 (2017) (Thomas, J., dissenting from denial of cert.) ("The approach taken by the *en banc* court is indefensible"; "The Court's decision to deny certiorari in this case reflects a distressing trend: the treatment of the Second Amendment as a disfavored right."); *Voisine v. United States*, 136 S. Ct. 2272, 2291 (2016) (Thomas, J., dissenting) ("We treat no other constitutional right so cavalierly"); *Silveira v. Lockyer*, 328 F.3d 567, 568-69 (2003) (Kozinski, J., dissenting from the denial of rehearing *en banc*) ("It is wrong to use some constitutional provisions as springboards for major social change while treating others like senile relatives to be cooped up in a nursing home until they quit annoying us. * * * Expanding some to gargantuan proportions while discarding others like a crumpled gum wrapper is not faithfully applying the Constitution; it's using our power as fed-

Such courts have been relentless and creative in their efforts to uphold virtually any restriction on keeping or bearing arms, short of a complete ban of any and all arms kept in the home.

This case is a good example of a court using a myriad of excuses and sleights of hand to avoid the rigorous protection ordinarily provided for fundamental individual constitutional rights. The individual rights at stake were minimized, the infringements both ignored and downplayed, the scrutiny lowered in name and then completely ignored in practice, and the facts (or lack thereof) simply blinked away.

Amici agree with Petitioners that New York City's premises-only license and related transport ban are not even remotely sustainable under any level of Second Amendment scrutiny. Pet. Br. 1-2, 15, 26, 29-46. Indeed, had virtually any private litigant taken a position in court as baseless as the City's it would be defending a motion for sanctions, not a favorable decision. And that is exactly the problem – too many lower courts lack the clear and firm guidance required for them to follow the law, rather than their predilections.

Amici write separately to encourage this Court to use this case as a concrete example of the proper and required standards for analyzing Second Amendment claims and for respecting constitutional rights. A clear example with clear standards will perhaps reduce the room for circumvention or, at a minimum,

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eral judges to constitutionalize our personal preferences."), *cert. denied*, 540 U.S. 1046 (2003).

make it easier for this Court to police such circumvention when it occurs.

SUMMARY OF ARGUMENT

1. The efforts of the court below to divide and conquer Second Amendment rights by limiting what it deems to be "core" rights and relegating the remainder to the "periphery" are destructive of constitutional protections and should be firmly rejected. *Amici* agree with Petitioners that the proper approach should be to give full and undiluted protection to conduct falling within the expressly protected individual "right of the people to keep and bear Arms" as defined by the text read in light of the history and traditions giving public meaning to that language at the times of the adoptions of the Second and Fourteenth Amendments. The restriction here limiting the transport of weapons to lawful destinations squarely infringes the right to keep and "bear" arms in circumstances readily within the historical and traditional understanding of those words at the relevant times.

Faced with restrictions on protected conduct within the plain language of Second Amendment, courts should *not* speculate whether such conduct is differentially covered by more favored, important, socially desirable, or otherwise "core" rights, or instead only by disfavored, unimportant, undesirable, or otherwise "peripheral" rights. That is simply a recipe for substituting the modern policy judgments of judges for the collective and lawfully adopted judgment of the Framers regarding the scope and strength of the rights at issue.

The very point of a written constitution is to guard the agreed-upon protections against later erosion by politicians and judges seeking to alter the constitutional judgment without benefit of the same supermajoritarian processes by which we insulate important protections against political vagaries. Accordingly, if activity falls within the terms of the Second Amendment it is important, "core," and protected, by definition.

The analysis of the court of appeals illustrates precisely how dividing and segregating the rights protected by the Second Amendment undermines the protections of that Amendment. In reaching its decision in this case, this Court should expressly reject such manipulations.

2. While direct and unflinching protection should be the order of the day for conduct directly covered by the text of the Second Amendment, read in light of history and tradition to resolve any potential ambiguity in meaning, there may, of course, be situations where such coverage remains uncertain even after full textual analysis. In such situations, or in situations where Second-Amendment-protected conduct is burdened only indirectly or incidentally, there may be room for the more familiar tiers of scrutiny found in First Amendment and other jurisprudence protecting enumerated individual rights.

Even then, however, courts must apply heightened scrutiny in order to give even the most basic meaning to the enumeration of the express and fundamental individual right. *Amici* suggest that where a burden, even if indirect, singles out arms, it would either be covered by the text or it should be subject to strict

scrutiny. Cf. *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional."). Where a generally applicable law does not single out arms, but nonetheless burdens the exercise of Second Amendment rights, it should be subject, at a minimum, to intermediate scrutiny. See *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (standard of scrutiny of facially neutral law burdening speech); *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (standards for intermediate scrutiny of commercial speech). When using intermediate scrutiny, however, the application of such scrutiny should be genuine, not merely a beard for a pre-ordained conclusion as in this case. This Court should clarify that the minimum standard for heightened scrutiny for Second Amendment burdens not within the specific constitutional prohibition should be the same standard and applied with the same rigor as intermediate scrutiny under the First Amendment.

Such scrutiny requires that the challenged restriction must not be substantially broader than necessary to achieve the government's interest, the government cannot rely on "mere speculation or conjecture," a restriction "may not be sustained if it provides only ineffective or remote support for the government's purpose," and there must be an indication that the regulation will alleviate the asserted harms to a "material degree." *Edenfield*, 507 U.S. at 770-71.

As the decision below reflects, the court of appeals did not even come close to applying intermediate

scrutiny. Had it done so, the restriction on transporting handguns would have readily failed.

ARGUMENT

I. Excluding Most Exercises of the Right To Keep and Bear Arms from the Supposed "Core" of the Second Amendment Improperly Dilutes Constitutional Protections.

The decision below discounted and diminished Second Amendment rights in a variety of ways, but one of the more damaging was in excluding the conduct at issue from the supposed "core" of the Second Amendment, thus justifying the abandonment of meaningful scrutiny. Pet. App. 23-24. While the analysis leading to the downgrading of the rights in this case was itself a marvel of creativity, the larger problem lies in the very taxonomic exercise itself.

Rights covered by the text of the Second Amendment – as interpreted and understood according to history, practice, and public meaning when it and the Fourteenth Amendment were adopted – are not divided into lesser and greater categories. The Constitution itself has done the categorizing and those rights covered "shall not be infringed." Period. There is no further clause beginning with "except * * *." No qualification of the prohibition saying *some* of those rights can be infringed a little, or if the government *really* feels strongly about it, or has reconsidered the costs and benefits of protecting such rights. *District of Columbia v. Heller*, 554 U.S. 570, 635-36 (2008).

The proper approach, therefore, would be to examine the text of the Second Amendment in light of the

history, tradition and public meaning at the time of its adoption or incorporation into the Fourteenth Amendment, and if the regulated conduct falls within the protection of such text, the regulation should be struck down. See *Heller v. District of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny").

Such a textual and categorical approach – government action forbidden by the Second Amendment is actually forbidden – is more faithful to the Constitution and would avoid much, if not all, of the gamesmanship now used by the courts applying watered-down versions of tiered scrutiny. While this Court obviously has been applying tiered scrutiny to individual rights for many decades, it is worth recalling that such scrutiny is a wholly judicial invention and should be viewed with skepticism when applied to conduct directly protected by the constitutional text.[3]

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[3] In footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938), this Court distinguished rational basis scrutiny from the type of analysis that "may" be required for legislation within a specific prohibition of the constitution or that restricts various political processes or is directed at discrete and insular minorities facing prejudice. It is far from clear that this Court's reference to "more exacting judicial scrutiny" – setting the stage for subsequent jurisprudence applying tiered scrutiny – was meant to apply to direct constitutional prohibitions at all, rather than to the more "general prohibitions of the Fourteenth Amendment" that are less concrete in their language. In any event, that historical call for *greater* scrutiny should not be used to *dilute* or make exceptions to the more concrete express protections of the Constitution, such as the Second Amendment.

The very point of constitutional protection is to guard against what the Framers understood would be strong temptation to restrict certain conduct and a tendency to rebalance the interests for and against protection of certain conduct. That is why conduct that would frequently find disfavor was nonetheless protected as a right rather than merely a privilege. Conduct that the government can be expected to favor, or at least be neutral towards, needs no special protection at the constitutional level. The essence of the decision to protect something as a right is that it *does* have a cost, and often a significant cost, but is so important that it must be protected even in the face of such costs and a strong desire to restrict the conduct. Cf. *McDonald v. Chicago*, 561 U.S. 742, 783 (2010) (noting other individual rights in the criminal law context with significant public safety costs).

By relegating subcategories of the conduct protected by the Second Amendment to the hinterlands of the right, and then using a debilitated version of judicial scrutiny, the approach below seeks to justify rebalancing the choices made by the Framers. The proper means for any such rebalancing of those constitutional choices, however, is Article V's amendment process, not judicial policymaking or recalcitrance. See *Heller*, 554 U.S. at 634-35 ("The 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. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the

scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.").

The inevitable result of dividing a now-disfavored textual right into an arbitrarily selected "core" and "periphery" is that the core of the right will progressively shrink and the periphery will grow, until the core right has no practical meaning and the periphery is subject to *ad hoc* judicial balancing in accordance with the fashions of the times.

That outcome from the divide-and-conquer strategy was amply demonstrated by the decision below. At the outset, the lack of clear standards guiding and constraining the lower courts was happily noted by the court below, as precursor to its dismantling of any meaningful protection of Second Amendment rights. Quoting its own earlier precedent, the court observed that "[n]either *Heller* nor *McDonald* * * * delineated the precise scope of the Second Amendment or the standards by which lower courts should assess the constitutionality of firearms restrictions." Pet. App. 9 (citation omitted).

It then set forth a procedure whereby the court would determine whether a restriction "impinges upon conduct protected by the Second Amendment" and, if so, it would then determine and apply the "appropriate" level of scrutiny. Pet. App. 10.

Although one would have thought that the answer to the first question would itself be sufficient to decide the case – after all the rights protected by the Second Amendment "*shall not* be infringed" – the court below apparently perceived ample daylight be-

tween rules that "impinge" and rules that "infringe" protected rights.

The court then, in cheeky minimization of *Heller*, debated whether to apply any form of heightened scrutiny, claiming that "a form of non-heightened scrutiny may be applied in some Second Amendment cases." *Id.* Its supposed justification for such defiance would be the lack of a "substantial burden" on the ability to use arms for self-defense, which seems to confuse the standard to be applied with the analysis under any such standard.[4] While the court could not bring itself to hold that heightened scrutiny was *required*, it nonetheless assumed that something more was required and concluded that intermediate, rather than strict, scrutiny sufficed. Pet. App. 11.

The court's justification for rejecting strict scrutiny was that the burden on protected activity was not "substantial" and the activity so burdened was not at the "core" of Second Amendment protections in any event. But the Second Circuit's notion that a prohibition on virtually all transportation of arms beyond a single licensed residence is "at most trivial," Pet. App. 13, is simply a fabricated value judgment with no ba-

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[4] If the government could meet its burden of proof that the burden on rights was modest and the government interest important and meaningfully served, that presumably would make considerable headway toward surviving some types of heightened scrutiny (assuming no alternatives that were less burdensome still). But to use the bare and conclusory assertion of minimal burden to water down the analysis *ab initio* circumvents the very point of structured scrutiny – preventing judges from assuming their preferred conclusion and thereby avoiding the rigorous analysis that would in fact test the accuracy of that conclusion.

sis in text, history, tradition, or anything else of constitutional import. As Petitioners correctly observe, Pet. Br. 14, the people have the right to "bear" arms, not merely keep them in a single location designated by the government. That Petitioners could seek another permit for a different residence, or borrow another gun to practice with, Pet. App. 14, 22, are nonsequiturs as to whether their right to transport their existing arms is protected by the Second Amendment or has been infringed by the City's prohibitions.

The further flaw in the court's analysis is the carving away of protected conduct as non-core activity. Thus, using an arm for the lawful purpose of a shooting competition was called non-core, without even an attempt at textual or historical justification. Transporting an arm outside the single premises likewise was deemed non-core, with no consideration of why such bearing of an arm misses the constitutional mark. The only conduct the court deemed at the core of the Second Amendment was the possession and use of an arm in the home for protection. And the only burdens on that right deemed substantial are burdens that rendered such possession and defensive use virtually impossible. But such circumstances would violate *Heller* directly, thus limiting the "core" of the Amendment, and hence strict scrutiny, to matters needing no structured scrutiny at all given they are already covered by *Heller*.

If any restriction that does not essentially render home possession and defense impossible is deemed non-core, and any alternative to the restricted conduct makes the burden insubstantial, it is hard to imagine what restrictions would warrant strict scru-

tiny. The right to transport an arm could never be protected by strict scrutiny under such reasoning because one could always buy a second arm for a different location or borrow an arm for practicing. Rather than ask whether there is a less restrictive alternative to any given restriction, the analysis below automatically lowers scrutiny so long as the restriction is not the *most* restrictive alternative. That gets the entire process backwards and, not surprisingly, is designed and operates to avoid enforcing Second Amendment rights.

Amici maintain that the better methodology is to apply the categorical approach based on the constitutional text, using the history, tradition, and other indicia of original public meaning as necessary to clarify the meaning and scope of such text. Restrictions on activity within the protective bounds of the text should be struct down without further interest balancing or tiered scrutiny.

If this Court nonetheless is committed to applying tiered scrutiny as it does with various other individual constitutional rights, it should hold that restrictions on activity within the bounds of the Second Amendment's text are subject to strict scrutiny, with no judicial leeway for deeming some covered activity to be core and some to be peripheral. The *core* of the Second Amendment is defined by the *text* of the Second Amendment.

To the extent something less than strict scrutiny is permissible, it should be limited to restrictions on activity where there is some uncertainty or ambiguity about coverage, or a restriction that only indirectly impacts the exercise of Second Amendment rights.

And even then, this Court should insist on genuine intermediate scrutiny, not the false pretense of intermediate scrutiny applied by the court below and far too many others.

II. Beyond the Text, Genuine Intermediate Scrutiny Should Be the Minimum Protection Afforded by the Second Amendment Where Coverage Is Ambiguous or the Burden Indirect.

While *Amici* agree with Petitioners, Pet. Br. 29, that the categorical text-based approach is the best and proper means of enforcing Second Amendment rights they recognize that this Court may be inclined toward the sort of interest-balancing levels of scrutiny applied to restrictions on other individual rights. Indeed, in cases where history and practice offer ambiguous or incomplete guidance whether some regulated conduct is within the right to keep and bear arms or whether some other law indirectly burdens protected conduct, it may be appropriate to look to the jurisprudence of other amendments as a guide. *Amici* suggest that in most cases the proper level of scrutiny would be strict scrutiny, as understood in ordinary First Amendment cases. For restrictions that do not operate directly on conduct covered by the Second Amendment, but nonetheless indirectly infringe on such conduct, intermediate scrutiny might be appropriate. Cf. *O'Brien*, 391 U.S. at 376-77 (1968) (incidental limitations on speech due to a regulation aimed at other conduct "is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is

unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest"). In no instance, however, should the level of judicial review be merely rational basis scrutiny, as this Court has already recognized. *Heller*, 554 U.S. at 628-28 n. 27.

Apart from decisions regarding the level of scrutiny to be applied, what ultimately will be important is that whatever level is selected must be applied genuinely and vigorously. While many courts purport to apply First-Amendment-derived intermediate scrutiny in Second Amendment cases, in reality they do no such thing. Such scrutiny, when genuinely applied, is rigorous and meaningful. This Court should demand and require at least that much

A. Intermediate Scrutiny Imposes Meaningful Limits on Government Authority To Infringe on Constitutionally Protected Conduct.

In the First Amendment context, intermediate scrutiny requires that restrictions on speech must be "tailored in a reasonable manner to serve a substantial state interest." *Edenfield*, 507 U.S. at 767. But this Court has made abundantly clear that such "reasonable" tailoring requires a considerably closer fit than mere rational basis scrutiny and requires evidence that the restriction directly and materially advances a *bona fide* state interest.

The test under intermediate scrutiny for whether a regulation is reasonably tailored to substantial state interests is "whether the challenged regulation ad-

vances these interests in a direct and material way, and whether the extent of the restriction on protected speech is in reasonable proportion to the interests served." *Id.* Under the tailoring element of intermediate scrutiny, " 'the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose.' " *Id.* at 770 (quoting *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980)).

Furthermore, the government bears the burden of justifying its restriction on constitutional rights, and that "burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 507 U.S. at 770-71.

When analyzing both the genuineness of the purported dangers and the effectiveness of the proposed restrictions in alleviating those dangers, this Court has further emphasized the need for precision rather than vague generalities or overbroad supposed evidence. Under intermediate scrutiny restrictions on constitutional rights must be analyzed in their specific context, and "will depend upon the identity of the parties and the precise circumstances of the" protected activity. *Edenfield*, 507 U.S. at 774. Even where this Court has spoken of the general potential dangers of a protected activity, it has emphasized that generalized risk does not warrant restrictions as to *all* persons. Instead, "a preventative rule" aimed at such generic hazards "was justified only in situations 'inherently conducive to' " the specific dangers identi-

fied. *Id.* (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978)).[5]

Similarly, in *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 185-95 (1999), this Court emphasized that while there may be interests that are important and substantial in the abstract, they still may not be used as a basis for restricting rights where the government does not pursue them consistently. Thus, although this Court assumed the accuracy of a causal chain from casino advertising to the social ills resulting from increased gambling, the government had ignored numerous confounding factors and its own inconsistent policies towards gambling, failed to distinguish between the advertising it allowed and the advertising it restricted, and accordingly could not show that its policy had "directly and materially furthered the asserted interest." 527 U.S. at 189.

The above requirements of intermediate scrutiny, faithfully applied, would give such scrutiny teeth and in most instances invalidate weakly conceived and justified laws burdening the right to keep and bear

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[5] It is worth noting that the interest in public safety relative to arms was hardly an unknown concern to the Framers of the Second and Fourteenth Amendments. Indeed, in many instances the potential danger from arms is also the exact thing that makes them valuable and protected – their ability to do damage to a person at whom they are directed. If that person is an assailant, an invader, or the agents of a tyrant, such projection of force is the point. If the target of such force is an innocent, the projection of force is a serious cost and potentially a crime or tort. But even knowing that arms can be misused, the Framers adopted a strongly worded amendment protecting the right to keep and bear arms. The inherent costs of that choice cannot be used by courts to unmake the choice.

arms. In this case, the travel restriction would have failed miserably.

B. The Court of Appeals Did Not Faithfully Apply Intermediate Scrutiny.

Even a brief review of the decision below reveals that the court applied nothing remotely resembling genuine intermediate scrutiny. Indeed, the court expressly rejected any need to show that the restriction was narrowly tailored, the harms genuine, and the supposed solution effective. Pet. App. 25. Rather, it required only evidence that "fairly supports" the rationale for regulation, and then didn't even bother enforcing that requirement. *Id*.

Relying exclusively on the armchair sociology of the City's former Commander of the License Division, the court accepted his speculation about the risks associated with transporting arms. Pet. App. 26. There was not a shred of evidence that such risks were real, not a single example of the harm alleged, and no attempt to tie the harm to the specific conduct and situations at issue – transport of locked, unloaded, and inaccessible arms to places outside the city where it is lawful to possess and use such arms.

Under intermediate scrutiny the City retains "the obligation to demonstrate that it is regulating [protected activity] in order to address what is in fact a serious problem and that the preventative measure it proposes will contribute in a material way to solving that problem." *Edenfield*, 507 U.S. 776.

Just as the regulators in *Edenfield* and *Greater New Orleans Broadcasting* failed to distinguish between general claims of harm and remedy or to pro-

vide specific evidence that the group being regulated posed a threat or would add to the solution, so too the City has failed here. Persons with their guns unloaded, stored separate from their ammunition, locked away, and inaccessible from the driving compartment pose no risk of the dangers the City claims it is addressing. Indeed, there are no studies suggesting any such person has ever caused the harms with which the City claims concern, no anecdotes or examples of such harm, and not even a coherent theory as to how such harm might occur. Indeed, the only supposed examples were persons simply *violating* prior travel restrictions, Pet. App. 27, suggesting that such restrictions are ineffective in general, not that more are needed. In any event, the City does not even have a theory as to why such violations are more likely if persons transport their arms outside the City but less likely if restricted to in-City transportation.

This Court has rejected such inadequate proof and speculation under intermediate scrutiny. In *Edenfield*, the regulatory body presented "no studies that suggest personal solicitation of prospective business clients by CPAs creates the dangers of fraud, overreaching, or compromised independence that the Board claims to fear." 507 U.S. at 771. The lack of comparative data from other States was significant in *Edenfield*, *id*., and is likewise significant here. Given that the restriction in this case is virtually unique throughout the country, one would think the City could manage some comparative data from other jurisdictions to corroborate its claimed dangers and to show how its law materially mitigates such danger.

Yet the City offered none and the court of appeals required none.

Ultimately, there simply is no evidence that the harm alleged in this case is real, and no evidence that the challenged application of the full waiting period materially advances the State's alleged interests in a " 'direct and effective way.' " *Edenfield*, 507 U.S. at 773 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989)).

Furthermore, the exceptions to the rule – for travel to gun ranges within the City – cuts against the claimed interest and renders it suspect. *Greater New Orleans Broadcasting*, 527 U.S. at 190. Indeed, in many instances, persons travelling to in-City venues may be on City roads transporting their arms for more time and more miles than if there were leaving the City. A person living on the West Side would have a longer trip to Brooklyn that to New Jersey. Similarly, the City has never explained why individuals with carry licenses carrying loaded guns on their person pose less of a risk than persons transporting locked, unloaded, and inaccessible arms to second homes or firing ranges. Those exceptions amply suggest that the City's claimed interest is not genuine given that it pursues that interest in such an inconsistent and irrational manner.

In this case, the City offers literally nothing to demonstrate that there is *any* problem with the activity it restricts, much less a serious problem. And it offers literally nothing to demonstrate that its restrictions would actually improve rather than worsen the supposed problem, much less that the claimed improvement would be material. In short, the nature

and substance of the City's evidence is so deficient, so illogical, and so speculative that it is a marvel that it could survive rational basis scrutiny, much less genuine intermediate scrutiny.

That the court of appeals nonetheless felt free to claim that it was applying intermediate scrutiny and that the restriction survived such scrutiny demonstrates that more is needed from this Court than a bare reversal. What is needed is firm guidance, clear standards, and confidence that, going forward such standards will be enforced. This case can provide such a guidance and a clear signal to lower courts that they must apply the law, not their own policy preferences.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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