

# 18-386

---

IN THE

## United States Court of Appeals FOR THE SECOND CIRCUIT

---

LIBERTARIAN PARTY OF ERIE COUNTY, MICHAEL KUZMA, RICHARD COOPER,  
GINNY ROBER, PHILIP M. MAYOR, MICHAEL REBMANN, EDWARD L. GARRETT,  
DAVID MONGIELO, JOHN MURTARI, WILLIAM CUTHBERT,

*Plaintiffs-Appellants,*

v.

ANDREW M. CUOMO, as Governor of the State of New York,  
BARBARA D. UNDERWOOD, as Attorney General of the State of New York,  
JOSEPH A. D'AMICO, as Superintendent of the New York State Police,  
DENNIS M. KEHOE, individually and as Wayne County pistol permit licensing officer,  
M. WILLIAM BOLLER, individually and as Erie County pistol permit licensing officer,  
MATTHEW J. MURPHY, III,

*Defendants-Appellees.*

---

On Appeal from the United States District Court for the Western District of New York

---

### **BRIEF OF *AMICUS CURIAE* GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE IN SUPPORT OF APPELLEES AND AFFIRMANCE**

---

Giffords Law Center to Prevent Gun Violence

Hannah Shearer  
268 Bush St. # 555  
San Francisco, CA 94104  
(415) 433-2062

J. Adam Skaggs  
David M. Pucino  
223 West 38th St. # 90  
New York, NY 10018  
(917) 680-3473

MORRISON & FOERSTER LLP

Jamie A. Levitt  
Jayson L. Cohen  
Rhiannon N. Batchelder  
250 West 55th St.  
New York, NY 10019  
(212) 468.8000

Counsel for *Amicus Curiae* Giffords Law  
Center to Prevent Gun Violence

## TABLE OF CONTENTS

	<b>Page</b>
INTEREST OF THE AMICUS CURIAE .....	1
INTRODUCTION AND SUMMARY OF ARGUMENT .....	2
ARGUMENT .....	5
I. New York’s Pistol Licensing Law Easily Passes Constitutional Muster Under Intermediate Scrutiny, the Applicable Standard Of Review .....	5
A. At Most, Intermediate Scrutiny Applies to the Pistol Licensing Law .....	5
B. Social Science Evidence Supports the Challenged Law Under Intermediate Scrutiny .....	8
1. Firearm Licensing Laws Reduce Gun Homicides .....	8
2. Firearm Licensing Laws Reduce Gun Suicides .....	12
3. Firearm Licensing Laws Reduce Gun Access by Criminals .....	14
C. The State’s Gun Policy Choices Are Entitled to Deference .....	16
II. Compelling New Evidence Confirms the Constitutionality of New York’s Proper-Cause Requirement For Public Carry Permits .....	18
A. Permissive Concealed Carry Permitting Laws Are Associated With Higher Levels of Violent Crime .....	19
B. Firearms Are Rarely Used in Self-Defense and Do Not Increase Safety .....	21
CONCLUSION .....	24
CERTIFICATE OF COMPLIANCE .....	26

**TABLE OF AUTHORITIES**

<b>Cases</b>	<b>Page(s)</b>
<i>Berron v. Ill. Concealed Carry Licensing Review Bd.</i> , 825 F.3d 843 (7th Cir. 2016), cert. denied, 137 S. Ct. 843 (2017) .....	7
<i>Bonidy v. U.S. Postal Serv.</i> , 790 F.3d 1121 (10th Cir. 2015) .....	7
<i>City of Los Angeles v. Alameda Books</i> , 535 U.S. 425 (2002).....	17
<i>City of New York v. Beretta U.S.A. Corp.</i> , 524 F.3d 384 (2d Cir. 2008) .....	1
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).....	1, 3, 6
<i>Kachalsky v. County of Westchester</i> , 701 F.3d 81 (2d Cir. 2012) .....	<i>passim</i>
<i>Libertarian Party v. Cuomo</i> , 300 F. Supp. 3d 424 (W.D.N.Y. 2018).....	6
<i>Lorillard Tobacco Co. v. Reilly</i> , 533 U.S. 525 (2001).....	17
<i>McDonald v. City of Chicago</i> , 561 U.S. 742 (2010).....	1
<i>N.Y. State Rifle &amp; Pistol Ass’n v. City of N.Y.</i> , 883 F.3d 45 (2d Cir. 2018) .....	5, 6
<i>N.Y. State Rifle &amp; Pistol Ass’n v. Cuomo</i> , 804 F.3d 242 (2d Cir. 2015) .....	1
<i>Paris Adult Theatre I v. Slaton</i> , 413 U.S. 49 (1973).....	17

**Statutes**

N.Y. Penal Law § 400.00 .....9  
 N.Y. Penal Law § 400.01 .....9

**Other Authorities**

Agency for Healthcare Research and Quality’s HCUPnet Query System, <https://hcupnet.ahrq.gov/#setup> .....2

Michael D. Anestis, *et al.*, *Association Between State Laws Regulating Handgun Ownership and Statewide Suicide Rates*, 105 AM. J. PUB. HEALTH 2059, 2059 (2015) .....13

Charles C. Branas, *et al.*, *Investigating the Link Between Gun Possession and Gun Assault*, 99 AM. J. PUB. HEALTH 2034, 2037 (Nov. 2009) .....22

Centers for Disease Control and Prevention’s WISQARS Fatal Injury Reports, <https://www.cdc.gov/injury/wisqars/fatal.html> .....2

Christina Carrega, *Off-Duty NYPD Cop Who Pistol-Whipped Driver in Brooklyn Road-Rage Incident Indicted*, N.Y. DAILY NEWS, May 9, 2018, <http://www.nydailynews.com/new-york/nyc-crime/fuming-off-duty-nypd-pistol-whipped-driver-indicted-article-1.3980768> .....24

Cassandra K. Crifasi, *et al.*, *Association between Firearm Laws and Homicide in Urban Counties*, 95 J. URBAN HEALTH 383, 384, 387 (2018) .....11

Cassandra K. Crifasi, *et al.*, *Correction to: Association between Firearm Laws and Homicide in Urban Counties*, J. URBAN HEALTH (2018), <https://link.springer.com/article/10.1007%2Fs11524-018-0306-y> .....11

Cassandra K. Crifasi, *et al.*, *Effects of Changes in Permit-to-Purchase Handgun Laws in Connecticut and Missouri on Suicide Rates*, 79 PREV. MED. 43, 43 (2015).....12, 13

John J. Donohue, *et al.*, *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data, the LASSO, and a State-Level Synthetic Controls Analysis*, NAT’L BUREAU ECON. RES. 3-4 (June 2017, revised Jan. 2018) .....19, 20

Giffords Law Center, *The Economic Cost of Gun Violence in New York*, Jan. 22, 2018, <http://lawcenter.giffords.org/wp-content/uploads/2018/01/Cost-of-Gun-Violence-in-New-York-1.22.18.pdf> .....2

Giffords Law Center, *Licensing*, <http://lawcenter.giffords.org/licensing> (last visited Sept. 17, 2018) .....9

Rashna Ginwalla, *et al.*, *Repeal of the Concealed Weapons Law and Its Impact on Gun-Related Injuries and Deaths*, 76 J. TRAUMA ACUTE CARE SURG. 569, 569, 573 (2014) .....21

David Hemenway & Sara J. Solnick, *The Epidemiology of Self-Defense Gun Use: Evidence from the National Crime Victimization Surveys 2007–2011*, 79 PREV. MED. 22, 23 (Oct. 2015) .....21, 22

Johns Hopkins Bloomberg School of Public Health, *Permit-to-Purchase Licensing for Handguns 1* (Mar. 2015), [https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/FactSheet\\_PermittoPurchaseLicensing.pdf](https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/FactSheet_PermittoPurchaseLicensing.pdf) .....9, 10

Christopher Mele, *Road Rage Cases With Guns More Than Double in 3 Years, Report Says*, N.Y. TIMES, Apr. 25, 2017, <https://www.nytimes.com/2017/04/25/us/road-rage-guns.html> .....23

*Police: Man Arrested for Shooting Uber Driver Thought He Was Helping*, FOX 4 NEWS, May 16, 2017, <http://www.fox4news.com/news/man-spots-gun-inadvertently-shoots-uber-driver> .....23

Press Release, Johns Hopkins Bloomberg School of Public Health, *Handgun Purchaser Licensing Laws Linked to Fewer Firearm Homicides in Large, Urban Areas* (May 31, 2018) <https://www.jhsph.edu/news/news-releases/2018/handgun-purchaser-licensing-laws-linked-to-fewer-firearm-homicides-in-large-urban-areas.html> .....4

Eric Ruben and Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433, 1496 (2018) .....8

Kara E. Rudolph, *et al.*, *Association Between Connecticut’s Permit-to-Purchase Handgun Law and Homicides*, 105 AM. J. PUB. HEALTH e49, e49 (2015) .....11

William Saletan, *Friendly Firearms: How an Armed Hero Nearly Shot the Wrong Man*, SLATE, Jan. 11, 2011, [http://www.slate.com/articles/health\\_and\\_science/human\\_nature/2011/01/friendly\\_firearms.html](http://www.slate.com/articles/health_and_science/human_nature/2011/01/friendly_firearms.html).....23

Linda E. Saltzman, *et al.*, *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 JAMA 3043-3047 (1992) .....11

Greg Sargent, *Why Expanding Background Checks Would, In Fact, Reduce Gun Crime*, WASH. POST., Apr. 3, 2013, <https://www.washingtonpost.com/blogs/plum-line/wp/2013/04/03/why-expanding-background-checks-would-in-fact-reduce-gun-crime/>.....10, 14

Michael Siegel, *et al.*, *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, 107 AM. J. PUB. HEALTH 1923, 1923 (Dec. 2017), available at <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2017.304057>.....19, 20

Eugene Volokh, *Symposium: The Second Amendment and the Right to Bear Arms After D.C. v. Heller: Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1546-47 (2009) .....7

Daniel W. Webster, *et al.*, *Effects of the Repeal of Missouri’s Handgun Purchaser Licensing Law on Homicides*, 91 J. URBAN HEALTH 598, 296-97 (2014) .....10

Daniel W. Webster, *et al.*, *Effects of State-Level Firearm Seller Accountability Policies on Firearm Trafficking*, 86 J. URBAN HEALTH 525, 526 (2009).....14

Daniel W. Webster, *et al.*, *Firearms on College Campuses: Research Evidence and Policy Implications*, JOHNS HOPKINS, BLOOMBERG SCHOOL OF PUBLIC HEALTH (Oct. 15, 2016).....21, 23

Daniel W. Webster, *et al.*, *Preventing the Diversion of Guns to Criminals Through Effective Firearm Sales Laws*, REDUCING GUN VIOLENCE IN AMERICA at 109, 117 (Daniel W. Webster & Jon S. Vernick eds., 2013).....4, 14, 15

Daniel W. Webster, *et al.*, *Relationship Between Licensing, Registration, and Other Gun Sales Laws and the Source State of Crime Guns*, 7 INJ. PREV. 184, 184 (2001).....9, 10, 15

Adam Winkler, *Fundamentally Wrong about Fundamental Rights*, 23 CONST. COMMENTARY 227, 227-28 (2006) .....7

April M. Zeoli, *et al.*, *Analysis of the Strength of Legal Firearms Restrictions for Perpetrators of Domestic Violence and Their Associations With Intimate Partner Homicide*, 187 AM. J. EPIDEMIOLOGY 1449, 1449 (2018) .....12

## INTEREST OF THE *AMICUS CURIAE*<sup>1</sup>

*Amicus curiae* Giffords Law Center to Prevent Gun Violence (“Giffords Law Center”) is a non-profit policy organization dedicated to researching, writing, enacting, and defending laws and programs that are proven to effectively reduce gun violence. The organization was founded 25 years ago following a gun massacre at a San Francisco law firm and was renamed Giffords Law Center in October 2017 after joining forces with the gun-safety organization led by former Congresswoman Gabrielle Giffords. Today, Giffords Law Center provides free assistance and expertise to lawmakers, advocates, legal professionals, law enforcement officials, and citizens who seek to improve the safety of their communities. Giffords Law Center has provided informed analysis as an *amicus* in many firearm-related cases, including in *District of Columbia v. Heller*, 554 U.S. 570 (2008), *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *New York State Rifle & Pistol Association v. Cuomo*, 804 F.3d 242 (2d Cir. 2015), and *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008).

---

<sup>1</sup> All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person other than *amicus curiae*, its members, or its counsel contributed money to fund this brief’s preparation or submission.



## INTRODUCTION AND SUMMARY OF ARGUMENT

Firearms cause many hundreds of deaths and injuries in New York every year, and the ripple effect of each gunshot leaves many more people grieving and afraid to go about their daily lives. In recent years, New York experienced an annual average of 397 gun homicides, 473 gun suicides, and hundreds more non-fatal shootings.<sup>2</sup> These all-too-frequent incidents harm communities, leave survivors traumatized, and exact an enormous economic toll, costing New York taxpayers an estimated \$433 million per year.<sup>3</sup>

This lawsuit challenges New York's authority to address the devastating violence within its borders by enforcing meaningful standards for the possession and carrying of handguns. Plaintiffs argue that New York's laws violate the Second Amendment by requiring an individual to obtain a license to possess a handgun and by setting strong permitting standards for the public carry of a concealed weapon. The District Court properly dismissed both of these claims.<sup>4</sup> In

---

<sup>2</sup> Fatal firearm injury data is from the Centers for Disease Control and Prevention's WISQARS Fatal Injury Reports (<https://www.cdc.gov/injury/wisqars/fatal.html>). Nonfatal firearm injury data is from the Agency for Healthcare Research and Quality's HCUPnet Query System (<https://hcupnet.ahrq.gov/#setup>).

<sup>3</sup> Giffords Law Center, *The Economic Cost of Gun Violence in New York*, Jan. 22, 2018, <http://lawcenter.giffords.org/wp-content/uploads/2018/01/Cost-of-Gun-Violence-in-New-York-1.22.18.pdf>.

<sup>4</sup> The State's brief correctly explains why most of the Plaintiffs lack standing, many of the defendants are immune from suit, and New York's licensing laws are (continued . . .)

*Kachalsky v. County of Westchester*, this Court previously considered and rejected Plaintiffs’ precise argument—the contention that New York may not require applicants seeking handgun-carry permits to demonstrate that they have “proper cause” to carry a weapon. 701 F.3d 81, 83-84 (2d Cir. 2012). Moreover, the Supreme Court’s decision in *District of Columbia v. Heller* forecloses Plaintiffs’ challenge to other licensing requirements in New York for the home possession and public carry of firearms, which aim to screen out dangerous, irresponsible applicants. The *Heller* Court emphasized that the Second Amendment applies to “law-abiding, responsible citizens . . . ,” 554 U.S. at 635, and explained that courts throughout American history have concluded that the Second Amendment does not protect carrying concealed guns in public. *Id.* at 626.

This brief presents additional reasons why Plaintiffs’ Second Amendment claims fail as a matter of law. It also demonstrates that New York’s licensing and permitting laws pose, at most, a minimal burden on responsible, law-abiding citizens and easily satisfy intermediate scrutiny, which is the appropriate standard of review here should the Court proceed to the second step of its Second Amendment analysis.

*First*, social science research shows that laws that require a license to

---

not unconstitutionally vague. While this *amicus* brief only addresses Plaintiffs’ Second Amendment claims, Giffords Law Center joins the State’s other arguments in full.

purchase or possess handguns bolster public safety by dramatically reducing gun deaths and deterring gun trafficking by criminals. The effects of these laws are powerful—experts comparing the impact of various regulations on gun sales have concluded that comprehensive licensing laws are the single most effective way to keep guns out of the hands of criminal traffickers.<sup>5</sup>

*Second*, even if Plaintiffs’ Second Amendment challenge to New York’s concealed carry law were not foreclosed by binding Second Circuit precedent, significant new empirical evidence that proves the State’s permitting standards survive intermediate scrutiny has become available since *Kachalsky* was decided six years ago. Were this Court to apply intermediate scrutiny afresh, the Court should find New York’s concealed carry permitting law to be constitutional because the social science evidence confirms the dangers of the unrestricted public carry of firearms.

---

<sup>5</sup> Daniel W. Webster, *et al.*, *Preventing the Diversion of Guns to Criminals Through Effective Firearm Sales Laws*, REDUCING GUN VIOLENCE IN AMERICA at 109, 117 (Daniel W. Webster & Jon S. Vernick eds., 2013) (firearm permit-to-purchase laws are the single “most dramatic deterrent to interstate gun trafficking[]”); *see also* Press Release, Johns Hopkins Bloomberg School of Public Health, Handgun Purchaser Licensing Laws Linked to Fewer Firearm Homicides in Large, Urban Areas (May 31, 2018), <https://www.jhsph.edu/news/news-releases/2018/handgun-purchaser-licensing-laws-linked-to-fewer-firearm-homicides-in-large-urban-areas.html> (summarizing study finding that licensing laws reduce gun homicides more effectively than laws merely requiring a point-of-sale background check).

## ARGUMENT

### I. New York's Pistol Licensing Law Easily Passes Constitutional Muster Under Intermediate Scrutiny, the Applicable Standard of Review

#### A. At Most, Intermediate Scrutiny Applies to the Pistol Licensing Law.

The State's brief correctly explains that licensing laws for home handgun possession fall outside the scope of the Second Amendment because they are longstanding regulatory measures that pose no burden to individuals who pose no threat to public safety.<sup>6</sup> But should the Court conclude otherwise, at most, the Court should apply intermediate scrutiny to Plaintiffs' claim because New York's pistol licensing law does not substantially burden rights of law-abiding, responsible citizens. This Court recently clarified that it is a *plaintiff's* burden to show that a regulation challenged under the Second Amendment "substantially encumbers [the plaintiff's] core rights," thereby warranting a higher level of scrutiny. *N.Y. State Rifle & Pistol Ass'n v. City of N.Y.*, 883 F.3d 45, 62 n.11 (2d Cir. 2018) ("we determine[] what level of scrutiny to apply by assessing the Plaintiffs' proffered evidence in support of their position that the Rule substantially encumbers their core rights."). Once plaintiffs make the requisite showing to support a form of heightened scrutiny, the burden shifts to the State to justify the regulation under the applicable level of scrutiny. *Id.*

---

<sup>6</sup> Defs.' Br. at 35-40.

Here, Plaintiffs did not meet their threshold burden to show that New York's pistol licensing law *substantially* encumbers the right of law-abiding, responsible citizens to keep a handgun in the home for self-defense, as would be necessary to warrant strict scrutiny. *See N.Y. State Rifle & Pistol Ass'n*, 883 F.3d at 57-62, n.11. Like the plaintiffs in *New York State Rifle & Pistol Association v. City of New York*, Plaintiffs in this case described the perceived expenses and inconveniences of obtaining a license, but failed to present actual "evidence that the costs, either financial or administrative . . . would be so high as to be exclusionary or prohibitive." *Id.* at 57. As the District Court determined, the Plaintiffs have only alleged a prohibitive burden for *unsuccessful* applicants, like the Plaintiff in this case who was denied a license because he had been "arrested approximately fifty times" and "had received four jail sentences." *Libertarian Party v. Cuomo*, 300 F. Supp. 3d 424, 443 (W.D.N.Y. 2018).

Plaintiffs' appellate brief also fails to present competent evidence of a prohibitive burden that would justify a stricter standard of scrutiny.<sup>7</sup> Plaintiffs instead claim throughout their brief that licensing laws are *per se* invalid because the government may not require a license to exercise an enumerated constitutional right.<sup>8</sup> This claim is at odds with *Heller*. As the Seventh Circuit explained, *Heller*

---

<sup>7</sup> *See, e.g.*, Pls.' Br. at 44-45.

<sup>8</sup> Pls.' Br. at 14-15.

affirmed that states “may set substantive requirements for [gun] ownership,” necessarily authorizing states to “use a licensing system to enforce[.]” substantive criteria for ownership. *Berron v. Ill. Concealed Carry Licensing Review Bd.*, 825 F.3d 843, 847 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 843 (2017).<sup>9</sup>

Plaintiffs also incorrectly suggest that “as with other fundamental rights, strict scrutiny should apply[.]” automatically to Second Amendment challenges.<sup>10</sup> Strict scrutiny is actually applied relatively rarely in fundamental rights cases,<sup>11</sup> but even if this were not so, there is good reason not to establish a presumption in favor of strict scrutiny in Second Amendment jurisprudence. Unlike other fundamental rights that “can be exercised without creating a direct risk to others[.]” firearms physically injure and kill people, making intermediate scrutiny appropriate for gun laws that do not substantially burden a core right. *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015).<sup>12</sup>

---

<sup>9</sup> Plaintiffs are also wrong that other enumerated rights may not be subject to a licensing requirement. Licensing and registration laws have been upheld as a condition of exercising First Amendment and other enumerated rights. See Eugene Volokh, *Symposium: The Second Amendment and the Right to Bear Arms After D.C. v. Heller: Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1546-47 (2009).

<sup>10</sup> Pls.’ Br. at 24.

<sup>11</sup> See generally Adam Winkler, *Fundamentally Wrong about Fundamental Rights*, 23 CONST. COMMENTARY 227, 227-28 (2006).

<sup>12</sup> The Court need not linger on Plaintiffs’ argument that it should reject application (continued . . .)

In sum, Plaintiffs have offered no basis to disturb the District Court’s determination that, at most, intermediate scrutiny governs their constitutional challenge to the pistol licensing law.

**B. Social Science Evidence Supports the Challenged Law Under Intermediate Scrutiny.**

To satisfy intermediate scrutiny, New York must show that its pistol licensing law is “substantially related to the state’s important public safety interest[s].” *Kachalsky*, 701 F.3d at 98. The weight of empirical evidence shows that licensing laws like New York’s are highly effective at reducing gun homicides and suicides and at decreasing gun purchases by criminals. These laws are therefore substantially related to New York’s interests in lowering violence and preventing gun access by irresponsible, dangerous people within the State, and easily survive intermediate scrutiny.

**1. Firearm Licensing Laws Reduce Gun Homicides.**

Firearm licensing laws can reduce gun homicides statewide. New York’s pistol licensing law requires prospective gun owners to apply to county judges or

---

of intermediate scrutiny because the standard “essentially predetermines the rejection of virtually any Second Amendment challenge against virtually any statute.” Pls.’ Br. at 17. This argument is refuted, *inter alia*, by the leading empirical analysis of post-*Heller* Second Amendment decisions, which found that challenges subject to intermediate scrutiny prevailed at a slightly *higher* rate “than the overall success rate for Second Amendment claims . . . .” Eric Ruben and Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller*, 67 DUKE L.J. 1433, 1496 (2018).

local police, pass a background check, submit fingerprints and photographs, and identify the weapon they are seeking to license, among other conditions.<sup>13</sup> Twelve other states and Washington D.C. have similar laws that require a license to purchase or possess handguns or other firearms, often called permit-to-purchase or license-to-own laws.<sup>14</sup>

These licensing laws have important advantages over other regulations that intend to verify eligibility for firearm possession. Unlike background check laws that only require gun sellers to perform criminal history checks at the point of sale, licensing laws “require prospective gun purchasers to have direct contact with law enforcement or judicial authorities that scrutinize purchase applications[]” before a proposed gun purchase.<sup>15</sup> Laws that require contact with judges or police and the submission of fingerprints can deter straw purchasers and reduce the risk that negligent or fraudulent gun sellers will fail to comply with background check laws.<sup>16</sup> Finally, licensing laws give permit-issuing authorities more time to conduct

---

<sup>13</sup> See N.Y. Penal Law §§ 400.00, 400.01.

<sup>14</sup> New York’s law is an example of a license-to-own law. See Giffords Law Center, *Licensing*, <http://lawcenter.giffords.org/licensing> (last visited Sept. 17, 2018).

<sup>15</sup> Daniel W. Webster, *et al.*, *Relationship Between Licensing, Registration, and Other Gun Sales Laws and the Source State of Crime Guns*, 7 INJ. PREV. 184, 184 (2001).

<sup>16</sup> See, e.g., Johns Hopkins Bloomberg School of Public Health, *Permit-to-Purchase Licensing for Handguns* 1 (Mar. 2015), (continued . . .)



comprehensive background checks and enable law enforcement to quickly investigate illegal transfers.<sup>17</sup> Because of these advantages, licensing laws have the “potential to significantly restrict gun acquisition by high risk individuals” and deter people intent on doing harm.<sup>18</sup>

Social science research confirms that licensing laws effectively restrict gun access by wrongdoers by demonstrating that these laws have been responsible for substantial reductions in gun homicides. Numerous studies have persuasively substantiated this association. One such study, from researchers at Johns Hopkins, found that Missouri’s repeal of a handgun licensing law in 2007 led to dramatically more gun homicides.<sup>19</sup> The study’s lead author explained that from 2008 to 2010, “the rate of homicides with guns increased 25 percent in Missouri while nationally there was a 10 percent decline.”<sup>20</sup> Another study found that after Connecticut adopted a handgun licensing law in 1995, the state experienced a staggering

---

[https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/FactSheet\\_PermittoPurchaseLicensing.pdf](https://www.jhsph.edu/research/centers-and-institutes/johns-hopkins-center-for-gun-policy-and-research/publications/FactSheet_PermittoPurchaseLicensing.pdf).

<sup>17</sup> Webster, *Relationship Between Licensing, Registration, and Other Gun Sales Laws*, 7 INJ. PREV. at 184.

<sup>18</sup> *Id.*

<sup>19</sup> Daniel W. Webster, *et al.*, *Effects of the Repeal of Missouri’s Handgun Purchaser Licensing Law on Homicides*, 91 J. URBAN HEALTH 598, 296-97 (2014).

<sup>20</sup> Greg Sargent, *Why Expanding Background Checks Would, In Fact, Reduce Gun Crime*, WASH. POST, Apr. 3, 2013, <https://www.washingtonpost.com/blogs/plum-line/wp/2013/04/03/why-expanding-background-checks-would-in-fact-reduce-gun-crime/>.

40% reduction in gun homicides over the following ten years.<sup>21</sup>

A May 2018 study—published after the District Court issued its opinion in this case—augmented this earlier research. It found that statewide permit-to-purchase and license-to-own laws reduced gun homicides by 11% in populous urban counties, where homicides tend to be concentrated.<sup>22</sup> This lifesaving effect was not observed in states that require gun sellers to perform background checks but do not require purchasers to submit fingerprints and obtain a permit or license from local licensing officers.<sup>23</sup> This study suggests that these additional features of firearm licensing laws like New York’s are responsible for decreased gun homicides.<sup>24</sup>

Licensing laws have also been shown to reduce domestic violence homicides. Domestic assaults involving a gun are 12 times more likely to result in death than those involving other weapons or bodily force.<sup>25</sup> By requiring abusers to

---

<sup>21</sup> Kara E. Rudolph, *et al.*, *Association Between Connecticut’s Permit-to-Purchase Handgun Law and Homicides*, 105 AM. J. PUB. HEALTH e49, e49 (2015).

<sup>22</sup> Cassandra K. Crifasi, *et al.*, *Correction to: Association between Firearm Laws and Homicide in Urban Counties*, J. URBAN HEALTH (2018), <https://link.springer.com/article/10.1007%2Fs11524-018-0306-y>.

<sup>23</sup> Cassandra K. Crifasi, *et al.*, *Association between Firearm Laws and Homicide in Urban Counties*, 95 J. URBAN HEALTH 383, 384, 387 (2018).

<sup>24</sup> *Id.* at 387.

<sup>25</sup> Linda E. Saltzman, *et al.*, *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 JAMA 3043-3047 (1992).

contact local licensing authorities before they can legally purchase firearms, licensing laws can deter the acquisition of deadly weapons by people at high risk of killing their partners. A recent analysis published in the *American Journal of Epidemiology* confirmed this expectation, finding that licensing laws are associated with a 10% reduction in intimate partner homicides.<sup>26</sup>

The strong link between licensing laws and decreased gun homicides in urban counties, as well as reduced rates of domestic violence homicides, supports the State’s position that New York’s pistol licensing law substantially furthers public safety by reducing gun murders.

## **2. Firearm Licensing Laws Reduce Gun Suicides.**

Research also shows that handgun licensing laws are effective in reducing firearm suicides. Because “suicidal ideation is often transient,” suicide attempts can be prevented if a suicidal person’s immediate access to a firearm is “restricted during periods of distress or impulsivity”—such as through a law requiring non-gun owners to apply to police officers or judges for a gun license.<sup>27</sup>

Unsurprisingly, research suggests that licensing or registration laws are “associated

---

<sup>26</sup> April M. Zeoli, *et al.*, *Analysis of the Strength of Legal Firearms Restrictions for Perpetrators of Domestic Violence and Their Associations With Intimate Partner Homicide*, 187 *AM. J. EPIDEMIOLOGY* 1449, 1449 (2018).

<sup>27</sup> Cassandra K. Crifasi, *et al.*, *Effects of Changes in Permit-to-Purchase Handgun Laws in Connecticut and Missouri on Suicide Rates*, 79 *PREV. MED.* 43, 43 (2015).

with fewer suicide attempts overall, a tendency for those who attempt to use less-lethal means, or both.”<sup>28</sup>

A 2015 Johns Hopkins study confirmed the effect of licensing laws on firearm safety by comparing gun suicide rates in Connecticut, which adopted a handgun permit-to-purchase law in 1995, and Missouri, which repealed its version of the same law in 2007.<sup>29</sup> The study found that after adoption of its licensing law, “Connecticut experienced a drop in its firearm suicide rate . . . that was greater than nearly all of the 39 other states that did not have such a law at that time . . . .”<sup>30</sup> Conversely, “Missouri experienced an increase in its firearm suicide rate . . . that was larger than all states that retained” their licensing laws.<sup>31</sup> The measurable reduction in gun suicides after Connecticut’s adoption of a licensing law and the spike in gun suicides after Missouri repealed such a law further show that New York’s pistol licensing law substantially advances public safety—and thereby satisfies intermediate scrutiny.

---

<sup>28</sup> Michael D. Anestis, *et al.*, *Association Between State Laws Regulating Handgun Ownership and Statewide Suicide Rates*, 105 AM. J. PUB. HEALTH 2059, 2059 (2015).

<sup>29</sup> Crifasi, *Connecticut and Missouri Suicide Rates*, 79 PREV. MED. at 43-44.

<sup>30</sup> *Id.* at 47.

<sup>31</sup> *Id.*

### 3. Firearm Licensing Laws Reduce Gun Access by Criminals.

Licensing laws also lessen criminals' ability to gain access to firearms. Guns trafficked from lawful commerce into the illegal market are the leading source of guns used to commit crimes.<sup>32</sup> Firearm licensing laws are expected to reduce this flow of illegal guns since they help restrict gun access by people at risk of engaging in criminal trafficking.<sup>33</sup> Further, these laws ensure that traffickers can be prosecuted.<sup>34</sup>

Two studies demonstrate that there is, in fact, an incredibly strong link between firearm licensing laws and the reduced availability of guns to criminal traffickers. In 2013, public health researchers assessed the effect of state gun-sale regulations on interstate gun trafficking in the 48 contiguous states. This study concluded that, among all of the policies examined, firearm licensing laws were the single "most dramatic deterrent to interstate gun trafficking."<sup>35</sup> Licensing laws were associated with significantly reduced rates of firearms trafficked to other states even after controlling for the effect of other gun laws, rates of gun

---

<sup>32</sup> Daniel W. Webster, *et al.*, *Effects of State-Level Firearm Seller Accountability Policies on Firearm Trafficking*, 86 J. URBAN HEALTH 525, 526 (2009).

<sup>33</sup> See Sargent, *supra* note 20.

<sup>34</sup> See Sargent, *supra* note 20.

<sup>35</sup> Daniel W. Webster, *et al.*, *Preventing the Diversion of Guns to Criminals Through Effective Firearm Sales Laws*, REDUCING GUN VIOLENCE IN AMERICA 109, 117 (Daniel W. Webster & Jon S. Vernick eds., 2013).

ownership, and geography.<sup>36</sup> Moreover, the study observed a sharp increase in the number of guns diverted to criminals in Missouri after the 2007 repeal of its licensing law.<sup>37</sup>

A 2001 study used crime gun trace records from 27 cities to calculate the percentage of guns used to commit crimes that came from inside the state (as opposed to from a different state), which it concluded is “an important measure of how hard it is for criminals to get guns” in a state.<sup>38</sup> The study found that cities in states with firearm licensing and registration laws “have a much smaller proportion of their crime guns coming from in-state[,]” meaning that such laws indeed make it more difficult for criminals to access guns within the state.<sup>39</sup> The 2001 study also found that of the five cities with the *lowest* rate of crime guns obtained in-state, four of those cities are in states with handgun licensing laws.<sup>40</sup> One of these was New York City, which had the second-lowest rate of crime guns coming from inside the state of all 27 cities examined.<sup>41</sup>

\* \* \* \* \*

---

<sup>36</sup> *Id.* at 118.

<sup>37</sup> *Id.* at 112-14.

<sup>38</sup> Webster, *Relationship Between Licensing, Registration, and Other Gun Sales Laws*, 7 INJ. PREV., at 187.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 186.

<sup>41</sup> *Id.*

The research discussed in Section I.B above demonstrates that New York’s pistol licensing law directly and substantially furthers three critical public safety interests. This type of law is associated with fewer gun homicides, lower gun suicide rates, and the reduced availability of guns to criminal traffickers—including in New York City. This evidence is more than sufficient to show that the State’s licensing law is “substantially related to the state’s important public safety interest[]” and is therefore constitutional under the Second Amendment.

*Kachalsky*, 701 F.3d at 98.

**C. The State’s Gun Policy Choices Are Entitled to Deference.**

Social science research overwhelmingly confirms that firearm licensing laws are among the best-informed policy choices that the State could make to shield New Yorkers from increased gun violence. The evidence of these laws’ effectiveness is not equivocal, but even if it were, social science may not be ignored simply because it is “difficult to prove” social science effects with the specificity that Plaintiffs demand.<sup>42</sup> Rather, as this Court explained in *Kachalsky*, even if there is conflicting evidence regarding whether a regulation furthers public safety, courts should defer to the legislature’s authority “to weigh conflicting evidence and make policy judgments[]” within constitutional bounds. 701 F.3d at 99.

---

<sup>42</sup> See Pls.’ Br. at 28-29.

Deference to the legislature’s judgment is an established principle of constitutional jurisprudence. And, deference to the legislature’s judgment is especially critical in Second Amendment cases because “[i]n the context of firearm regulation, the legislature is ‘far better equipped than the judiciary’ to make sensitive public policy judgments” about safety risks and benefits. *Id.* at 97 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994)). The Supreme Court has repeatedly explained that even heightened means-end scrutiny does not require legislatures to furnish exact empirical justifications for regulations that burden constitutional rights, but rather, demands that the legislature make informed judgment calls based on the available evidence.<sup>43</sup>

Here, social science research provides multiple empirical justifications for New York’s pistol licensing law by demonstrating a strong link between pistol licensing laws and reduced gun violence. But even if the empirical link were not as

---

<sup>43</sup> The Supreme Court has “permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and ‘simple common sense.’” *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 555 (2001) (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995)); *see also Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60 (1973) (“We do not demand of legislatures ‘scientifically certain criteria of legislation.’”) (internal citation and quotation omitted). In a First Amendment case involving a crime-reduction measure that targeted secondary effects of protected speech, the Court credited city officials’ informed judgment even where the city failed to furnish specific “empirical data, that its ordinance will successfully lower crime.” *City of L.A. v. Alameda Books*, 535 U.S. 425, 439 (2002).



compelling, New York’s decision to adopt a licensing law would at the very least represent a “reasonable inference[] based on substantial evidence” that the law reduces gun violence, and therefore withstands intermediate scrutiny. *Kachalsky*, 701 F.3d at 97 (citation omitted).

## **II. Compelling New Evidence Confirms the Constitutionality of New York’s Proper-Cause Requirement for Public Carry Permits**

Plaintiffs’ other Second Amendment claim recycles the same challenge to New York’s “proper-cause” requirement for obtaining a concealed handgun permit that this Court rejected six years ago in *Kachalsky*. Deference to New York’s reasonable and informed legislative policy choices is warranted in this area as well, and *Kachalsky* controls the outcome here. But even if the Court were writing on a blank slate and evaluating the policy choices made by New York’s legislature more critically than the above precedents require, the Court should still reject Plaintiffs’ Second Amendment challenge. New evidence convincingly demonstrates that states that allow public concealed carry of guns without imposing meaningful standards on this practice have experienced increased rates of violent crime and homicide. This growing body of evidence justifies New York’s choice to apply the proper-cause requirement by providing strong, specific data that New York’s concealed carry permitting law will reduce crime.

**A. Permissive Concealed Carry Permitting Laws Are Associated With Higher Levels of Violent Crime.**

Empirics confirm the common-sense idea that carrying firearms in public increases the risk of injury for the carrier and others. In the past year, persuasive new social science evidence has shown that permissive “shall-issue” concealed carry laws fuel violent crime and homicide.<sup>44</sup> First, a 2017 study by Stanford professor John Donohue and colleagues shows persistent increases in rates of assaults and other violent crimes in states with more lenient “shall-issue” concealed carry permitting systems (deemed “right-to-carry” states by the study’s authors).<sup>45</sup> The study found that right-to-carry laws are associated with higher aggregate violent crime rates, and that the magnitude of deleterious effects associated with the passage of right-to-carry laws increases over time.<sup>46</sup>

Right-to-carry laws led to about a 7% increase in violent crime within five years

---

<sup>44</sup> “Shall-issue” states require officials to grant handgun carry permits as long as an applicant satisfies basic criteria (e.g., the applicant does not have a felony conviction), in contrast to “may issue” regimes, like New York’s, which provide permitting officials more discretion in issuing carry permits. *See* Michael Siegel, *et al.*, *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, 107 AM. J. PUB. HEALTH 1923, 1923 (Dec. 2017), available at <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2017.304057>.

<sup>45</sup> John J. Donohue, *et al.*, *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data, the LASSO, and a State-Level Synthetic Controls Analysis*, NAT’L BUREAU ECON. RES. 3-4 (June 2017, revised Jan. 2018).

<sup>46</sup> *Id.* at 53.

beyond what would have been expected without the laws, and this increase jumped to approximately 14% after ten years.<sup>47</sup>

The Stanford study also discussed the mechanisms by which right-to-carry laws may increase violent crime, explaining: that the increase might result from right-to-carry permit holders committing crimes they would not have committed had they not been licensed to carry; that criminals may have easier access to guns in right-to-carry states; and that more criminals are arming themselves as more civilians carry concealed weapons.<sup>48</sup> The study concluded that “the statistical evidence shows us that whatever beneficial effects right-to-carry laws have in reducing violence, they are outweighed by greater harmful effects.”<sup>49</sup>

A second study by researchers at Boston University and Duke University supports and complements the findings of the Stanford study.<sup>50</sup> Whereas the Stanford study focused on violent crime, this study focused specifically on homicide, finding that shall-issue concealed carry laws were associated with a 6.5% higher total homicide rate, an 8.6% higher firearm homicide rate, and a

---

<sup>47</sup> *Id.* at 48.

<sup>48</sup> *Id.* at 6-14.

<sup>49</sup> *Id.* at 37.

<sup>50</sup> *See Siegel, et al., supra* note 44.

10.6% higher handgun homicide rate.<sup>51</sup> This study, however, did *not* find that these laws were significantly associated with increased long-gun or non-firearm homicide rates.<sup>52</sup> That the increased homicide rates were found to be specifically and significantly attributable to handguns—not other types of firearms or weapons—tends to prove the study’s hypothesis that lax handgun carry laws drive up homicide rates.

Other researchers have similarly found a strong connection between lax concealed carry permitting laws and increased gun violence.<sup>53</sup> The strong, specific empirical evidence that has emerged since the Court decided *Kachalsky* is more than enough to support the conclusion that New York’s proper-cause requirement substantially furthers public safety and reduces the risk of armed violence.

**B. Firearms Are Rarely Used in Self-Defense and Do Not Increase Safety.**

There is a growing consensus that carrying firearms for self-defense

---

<sup>51</sup> *Id.* at 1923.

<sup>52</sup> *Id.*

<sup>53</sup> *E.g.*, Rashna Ginwalla, *et al.*, *Repeal of the Concealed Weapons Law and Its Impact on Gun-Related Injuries and Deaths*, 76 J. TRAUMA ACUTE CARE SURG. 569, 569, 573 (2014) (lax concealed carry laws are associated with increased gun fatalities); Daniel W. Webster, *et al.*, *Firearms on College Campuses: Research Evidence and Policy Implications*, JOHNS HOPKINS, BLOOMBERG SCHOOL OF PUBLIC HEALTH (Oct. 15, 2016) (in the 41 states with right-to-carry laws or no concealed carry regulations, average death toll in high-fatality mass shootings increased following implementation of a right-to-carry law).

produces negligible safety benefits and likely exposes gun carriers to greater harm. Recent research confirms that crime victims rarely use guns in self-defense and that persons carrying firearms are no safer than other crime victims. A 2015 study found that victims of violent crimes use firearms in less than 1% of all criminal incidents.<sup>54</sup> Compared to other self-protective actions that do not involve a firearm, data from the National Crime Victimization Surveys provides little evidence that defensive gun use is beneficial in reducing the likelihood of injury or property loss.<sup>55</sup>

This research is consistent with the findings of an influential 2009 study that concluded that carrying a firearm may *increase* a victim's risk of injury during the commission of a crime. In an analysis of 677 shootings over a two-and-a-half-year period in Philadelphia, researchers found that individuals carrying a gun were nearly 4.5 times more likely to be shot in an assault than those not carrying a gun and were more than 4.2 times as likely to be fatally shot. The figures are higher for assaults in which it was confirmed that the victim had some opportunity to resist—in these cases, individuals carrying guns were 5.45 times more likely to be shot.<sup>56</sup>

---

<sup>54</sup> David Hemenway & Sara J. Solnick, *The Epidemiology of Self-Defense Gun Use: Evidence from the National Crime Victimization Surveys 2007–2011*, 79 *PREV. MED.* 22, 23 (Oct. 2015).

<sup>55</sup> *Id.* at 23-24.

<sup>56</sup> Charles C. Branas, *et al.*, *Investigating the Link Between Gun Possession and* (continued . . .)

A 2016 Johns Hopkins report complemented these findings and observed that defending oneself with a gun in public requires skills that few possess. “Shooting accurately and making appropriate judgments about when and how to shoot in chaotic, high-stress situations requires a high level of familiarity with tactics and the ability to manage stress under intense pressure.”<sup>57</sup> The report found that most people simply do not have the tactical ability to successfully use a gun for self-defense, particularly in an urban or densely populated public area, and may end up “wounding or killing innocent victims” in the process.<sup>58</sup>

Moreover, regardless of the degree of tactical training, recent examples demonstrate that when individuals carry guns in public, there is an increased risk that they will wield their firearms in situations that actually place themselves and others in greater danger. Gun carriers—even those with training—have injured innocent people after mistakenly perceiving a threat.<sup>59</sup> The presence of a gun can

---

*Gun Assault*, 99 AM. J. PUB. HEALTH 2034, 2037 (Nov. 2009).

<sup>57</sup> Webster, *supra* note 53, at 10.

<sup>58</sup> *Id.*

<sup>59</sup> *Police: Man Arrested for Shooting Uber Driver Thought He Was Helping*, FOX 4 NEWS, May 16, 2017, <http://www.fox4news.com/news/man-spots-gun-inadvertently-shoots-uber-driver> (army veteran shot a driver mistakenly believing he was stopping a robbery); William Saletan, *Friendly Firearms: How an Armed Hero Nearly Shot the Wrong Man*, SLATE, Jan. 11, 2011, [http://www.slate.com/articles/health\\_and\\_science/human\\_nature/2011/01/friendly\\_firearms.html](http://www.slate.com/articles/health_and_science/human_nature/2011/01/friendly_firearms.html) (during the 2011 mass shooting in Tucson perpetrated by a gunman targeting U.S. Congresswoman Gabrielle Giffords, a bystander with a concealed (continued . . .))

exacerbate everyday disputes into lethal confrontations. In recent years, reported “road rage” incidents involving gun carriers have more than doubled.<sup>60</sup>

As demonstrated above, there is increasingly strong evidence that lenient concealed carry permitting regimes increase gun violence. And there is no methodologically sound research to refute that evidence. These developments mean that *Kachalsky* stands on empirically-firm ground. It is more apparent than ever that New York’s concealed carry permitting regime is substantially related to the State’s important interest in protecting the public from gun violence and that it is constitutional.

## CONCLUSION

Plaintiffs have offered no basis for concluding that New York’s pistol licensing law violates the Second Amendment, nor any reason to depart from sound, binding Circuit precedent holding that New York’s “proper-cause” standard for concealed carry permits is constitutional. There is a growing consensus that

---

gun assaulted and nearly shot the man who had grabbed the shooter’s weapon).

<sup>60</sup> Christopher Mele, *Road Rage Cases With Guns More Than Double in 3 Years, Report Says*, N.Y. TIMES, Apr. 25, 2017, <https://www.nytimes.com/2017/04/25/us/road-rage-guns.html>. Even law enforcement officers have drawn guns in road-rage incidents, suggesting the presence of a gun can dangerously escalate disputes no matter how well-trained the carrier is. *See, e.g.*, Christina Carrega, *Off-Duty NYPD Cop Who Pistol-Whipped Driver in Brooklyn Road-Rage Incident Indicted*, N.Y. DAILY NEWS, May 9, 2018, <http://www.nydailynews.com/new-york/nyc-crime/fuming-off-duty-nypd-pistol-whipped-driver-indicted-article-1.3980768>.

licensing and permitting laws like New York's save lives. In accordance with this evidence and its own precedents, the Court should affirm the decision below.

Respectfully submitted,

/s/ Jamie A. Levitt

Jamie A. Levitt  
Jayson L. Cohen  
Rhiannon N. Batchelder  
MORRISON & FOERSTER LLP  
250 West 55th St.  
New York, New York 10019-9601  
(212) 468-8000

J. Adam Skaggs  
David M. Pucino  
Giffords Law Center to Prevent Gun  
Violence  
223 West 38th St. # 90  
New York, NY 10018  
(917) 680-3473

Hannah Shearer  
Giffords Law Center to Prevent Gun  
Violence  
268 Bush St. # 555  
San Francisco, CA 94104  
(415) 433-2062

Attorneys for *Amicus Curiae* Giffords Law  
Center to Prevent Gun Violence



## CERTIFICATE OF COMPLIANCE

I certify that pursuant to Second Circuit L.R. 29.1, Fed. R. App. P. 29(a)(4)(G), and Fed. R. App. P. 32, the attached *amicus curiae* brief is proportionately spaced, has a typeface of 14 points or more, and contains 5,495 words.

Dated: September 20, 2018

/s/ Jamie A. Levitt  
Jamie A. Levitt  
MORRISON & FOERSTER LLP  
250 West 55th Street  
New York, New York 10019-9601  
Telephone: (212) 468-8000

## CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2018, I electronically filed the foregoing *amicus curiae* brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in this case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

Dated: September 20, 2018

/s/ Jamie A. Levitt

Jamie A. Levitt

MORRISON & FOERSTER LLP

250 West 55th Street

New York, New York 10019-9601

Telephone: (212) 468-8000