To be argued by:
ELINA DRUKER

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New York Supreme Court
Appellate Division: First Department

In the Matter of the Application of

JONATHAN CORBETT,

Petitioner-Appellant,

For a Judgment under Article 78 of the Civil Practice Laws and Rules and for Declaratory Relief

against

THE CITY OF NEW YORK and THOMAS M. PRASSO,

Respondents-Respondents.

BRIEF FOR RESPONDENTS

ZACHARY W. CARTER
Corporation Counsel
of the City of New York
Attorney for Respondents
100 Church Street
New York, New York 10007
212-356-2609 or -2502
edruker@law.nyc.gov

CLAUDE S. PLATTON
ELINA DRUKER
of Counsel

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PRELIMINARY STATEMENT

Jonathan Corbett, an advocate for gun rights, applied for a permit that would allow him to carry a loaded concealed handgun anywhere in New York. NYPD denied his application because he refused to complete part of the standard background questionnaire and, in any event, failed to demonstrate eligibility for the permit. Corbett then brought this hybrid Article 78 proceeding and declaratory judgment action claiming that the denial was arbitrary and capricious and that the requirements for obtaining a permit violate his Second Amendment right to bear arms. Supreme Court, New York County (Edmead, J.) dismissed Corbett's claims. This Court should affirm.

Before issuing a permit authorizing a person to possess a handgun anywhere in New York, NYPD conducts a background investigation to ensure that the applicant is law-abiding and of good moral character. Corbett's refusal to provide information required for this vetting process amply supported the denial of his application. Corbett mistakenly claims that the Second Amendment bars NYPD from inquiring about his job history, his lawful use of narcotics or tranquilizers, or the truthfulness of any of his prior sworn testimony before issuing a

handgun permit. It is well-settled that the right to bear arms is not unfettered. The City may—indeed, must—investigate applicants' criminal histories, mental health, and moral character before permitting them to carry concealed handguns.

Although this Court need not reach Corbett's second objection to the licensing decision, NYPD also properly denied his application for failing to show "proper cause" to carry a concealed handgun. Corbett admits that he lacks proper cause, but mistakenly argues that the requirement itself violates his right to bear arms. The proper cause requirement has withstood identical constitutional challenges. As courts have recognized, it serves critical governmental interests in preventing gun violence without overburdening the right to bear arms.

Corbett also challenges the separate preliminary denial of his Freedom of Information Law request for records relating to other people's permit applications. His administrative appeal, which was pending when he brought this action, has since been partially granted. As he has obtained many of the records he sought, this portion of his petition should be dismissed as moot and any further objection should be lodged at the final determination.

QUESTIONS PRESENTED

1. Did NYPD rationally and constitutionally deny his application for a permit to carry a concealed handgun in New York City on the grounds that (1) he deliberately refused to fill out Questions 11, 12, and 13 of the background questionnaire, thereby preventing NYPD from conducting a thorough background investigation, and (2) he failed to demonstrate "proper cause" for a concealed carry handgun permit?

2. Was petitioner's premature Article 78 proceeding seeking review of NYPD's denial of his FOIL request, which he commenced before a decision had been rendered in his administrative appeal, rendered moot when NYPD partially granted his administrative appeal and provided him with many documents responsive to his request?

STATEMENT OF THE CASE

A. Regulatory Landscape

NYPD is tasked with the grave responsibility of protecting New York City's 8.5 million residents and over 50 million annual visitors from senseless gun violence and accidental shootings. *See* Admin. Code § 131. It achieves this critical public mission by dutifully administering New York State's handgun laws within the city's boundaries. Among the most important and longstanding of these laws are the licensure

requirements for handgun possession. Without an applicable handgun permit from NYPD, it is a crime to keep or carry a handgun anywhere in the city, a restriction that dates back to 1911, when the Sullivan Law was enacted. Penal Law § 265.00; 38 RCNY § 5-10; Ch. 195, 1911 N.Y. Laws 442-43, §§ 1896-97. By 1913, New York had adopted statewide licensing standards, including a "good moral character" requirement that survives through the present day. Ch. 608, 1913 N.Y. Laws 1627-30, §1987. Accordingly, NYPD conducts a robust background investigation into each applicant's moral character before issuing any person a permit to keep or carry a handgun in the city.

There are several types of handgun licenses. The easiest to get, a "premises license," authorizes the holder to possess a handgun in his or her home or place of business for purposes of self-defense. Penal Law § 400.00(2)(a), (b). "[A] license to possess a handgun in one's home [is not] difficult to come by." *People v. Hughes*, 22 N.Y.3d 44, 50 (2013). The Penal Law also creates both restricted and unrestricted "business carry licenses"—colloquially referred to as "concealed carry" permits—which authorize the holder to carry concealed handguns in public places, whether for business or other purposes. Penal Law § 400.00(2)(c)-(f).

Concealed carry permits are issued for specific purposes, such as for particular employment, and can be tailored to the purposes that justify their issuance. *Matter of O'Connor v. Scarpino*, 83 N.Y.2d 919, 921 (1994).

State law requires NYPD to conduct a background investigation into all handgun permit applicants and to investigate the accuracy of all statements made in handgun permit applications before issuing or renewing permits. Penal Law § 400.00(4). Under the Penal Law, to be eligible for any type of handgun permit, an applicant must, among other things, disclose various personal background information, be at least twenty-one years old, "possess good moral character," not have any serious criminal history, and not be "an unlawful user of or addicted to any controlled substance." Penal Law § 400.00(1)(a)-(n). NYPD has promulgated regulations closely tracking the Penal Law to govern its review of handgun permit applications. 38 RCNY Chap. 5.

NYPD's regulations set out a non-exhaustive and non-dispositive list of factors to be considered by its licensing officers in assessing the qualifications of all handgun permit applicants, including whether the applicant refuses to provide information requested by the License

Division, refuses to cooperate with the Division's background investigation, or exhibits "a lack of candor towards lawful authorities." 38 RCNY § 5-10(m), (n). In addition to satisfying the general qualifications for any handgun permit, an applicant for a full-carry permit allowing the holder to carry a concealed handgun without any restrictions (the type of permit Corbett seeks) must also show that there is "proper cause" for issuance of the permit. Penal Law § 400.00(2)(f); 38 RCNY § 5-03. Applicants have proper cause when they have "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." *Matter of Klenosky v. N.Y City Police Dep't*, 75 A.D.2d 793, 793 (1st Dep't 1980), *aff'd on op. below*, 53 N.Y.2d 685 (1981); *accord Martinek v. Kerik*, 294 A.D.2d 221, 222 (1st Dep't 2002).

B. Factual Background

1. Corbett's incomplete application for a concealed carry permit

In December 2015, Jonathan Corbett applied to NYPD's Licensing Division for a permit to carry a concealed handgun (R.56-67). Section B of the standard-form handgun license application states: "Applicants

must answer questions 10 through 24," and directs applicants to complete an addendum "to explain such answer(s) in detail" (R.57). Corbett did not answer all of the questions in Section B; he declined to check either the "yes" or "no" boxes for questions 11, 12, and 13, which ask whether the applicant has ever:

> 11. Been discharged from any employment?
>
> 12. Used narcotics or tranquilizers? List doctor's name, address, telephone number, in explanation.
>
> 13. Been subpoenaed to, or testified at, a hearing or inquiry conducted by any executive, legislative or judicial body?

(R.57). In an attached addendum, Corbett wrote that he "refuse[d] to answer questions 11, 12, and 13 because they are entirely irrelevant as to whether [he is] qualified to carry a handgun." (R.61). He refused to reveal whether he had ever taken narcotics or tranquilizers because he believes the question is a "subterfuge to allow NYPD to unlawfully deny licenses" and "NYPD does not have the qualifications, nor any appropriate procedure, to determine if the usage of such medication is an indicator that a license should not be granted." (*id.*).

As required by the standard-form application, he also submitted a "Letter of Necessity," purporting to explain his need for a license to not

only possess a handgun at home, but to carry a concealed handgun in public. Corbett wrote that he needs to carry a concealed handgun because he "conducts business as a civil rights advocate," and "to exercise his civil rights fully, he needs a carry license" (R.59). He made no attempt to show that he has a special, or indeed, any, need to carry a handgun in public for self-defense. After reviewing his application materials, NYPD requested additional documents, which Corbett provided (R.83, 68-79). An officer assigned to NYPD's Licensing Division interviewed Corbett in person—a mandatory part of NYPD's application review process (R.85-89).

In April 2016, NYPD denied Corbett's application. The denial letter cited two reasons for this decision: first, because Corbett refused to complete the application form as required by 38 RCNY § 5-05(a)—by refusing to answer three of the questions on the standard form—and second, because he failed to demonstrate "proper cause" as required by 38 RCNY § 5-03 (R.93).

Corbett appealed to NYPD's Appeal Unit (R.95). With respect to his failure to fully complete the application, he claimed that he could not constitutionally be required to answer questions 11, 12, or 13

because the questions do not have a "'substantial relationship' to the city's interest in protection of the public" (R.95). Regarding his failure to demonstrate "proper cause," he challenged the constitutionality of the proper cause requirement. Corbett acknowledged that the Second Circuit Court of Appeals had upheld the constitutionality of New York's proper cause requirement in *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012). He claimed, however, that there is a "split of authority on the matter" because "other courts" reviewing other state's gun licensing statutes have "disagreed" (R.95).

NYPD denied his appeal in May 2016 (R.14).

2. Corbett's FOIL request, administrative appeal, and this action

After his application for a concealed carry permit was denied, Corbett filed a FOIL request seeking the disclosure of documents relating to all applications for concealed carry permits filed in the final three months of 2015.[1] Around the same time, the United States

[1] Corbett had filed an earlier FOIL request in July 2013 seeking "any document that provides guidance on how the NYPD and its officers decide whether to accept or reject pistol permit applications," in response to which the NYPD sent him all

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Attorney's Office for the Southern District of New York announced its investigation into corruption and bribery in handgun permitting in the NYPD's Licensing Division. *See U.S. v. Lichtenstein, et. al*, 1:16-cr-00342-SHS; *U.S. v. Chambers*, 1:17-cr-00396-WHP (R.38).[2] Corbett's request was denied under Public Officers Law § 87(2)(e)(i) because the records, if disclosed, would interfere with law enforcement investigations or judicial proceedings (R.101).

Corbett appealed to the Records Access Appeals Officer in June 2016, but did not await a determination of that appeal. Rather, he filed this hybrid Article 78 petition and declaratory judgment action seeking review of NYPD's final denial of his concealed carry handgun permit application and the non-final determination of his FOIL request (R.1-13). In support of NYPD's answer to Corbett's Article 78 petition, the head of NYPD's licensing unit affirmed that the ongoing federal investigation into corruption in the unit had delayed the adjudication of

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responsive documents: three internal memoranda on processing handgun permit applications (R.16-20). This appeal does not concern that request.

[2] This Court can take judicial notice of the pending criminal prosecutions in the United States District Court for the Southern District of New York of some former members of NYPD's Licensing Division and an attorney who allegedly bribed them. *See People v. Alnutt*, 107 A.D.3d 1139, 1141, n.6 (3d Dep't 2013) (taking judicial notice of federal indictment).

his FOIL appeal because it complicated the response, given the need to evaluate potential interference with the federal investigation (R.38).

During the pendency of this appeal, on January 26, 2018, NYPD's Records Access Appeals Officer partially granted Corbett's appeal and produced all non-exempt documents responsive to his request. NYPD is prepared to supplement the record with a copy of the appeal decision or an affirmation of the Records Access Appeals Officer at the Court's request.

3. The decision on appeal

Supreme Court, New York County (Edmead, J.) denied Corbett's hybrid petition and dismissed the proceeding. The court found that Corbett's refusal to complete the handgun permit background questionnaire, as well as his failure to demonstrate proper cause for a concealed carry permit, provided a rational basis to deny his application (R.160-164). The court rejected Corbett's constitutional challenges to the requirement that applicants answer questions 11, 12, and 13 and demonstrate proper cause, holding that the entire licensing scheme passed constitutional muster under intermediate scrutiny (R.164).

The court held that Corbett's FOIL challenge was premature, given that his administrative appeal was still pending. The court also concluded that the ongoing federal investigation and prosecution of police officers in the Licensing Division provided a basis to withhold the documents under FOIL's law-enforcement-interference exemption. Public Officers Law § 87(2)(e)(i) (R.164).

ARGUMENT

POINT I

NYPD RATIONALLY AND CONSTITUTIONALLY DENIED CORBETT'S APPLICATION FOR AN UNRESTRICTED PERMIT TO CARRY A CONCEALED HANDGUN IN NEW YORK CITY

NYPD rationally denied Corbett's application for an unrestricted permit to carry a concealed handgun. That determination is due considerable deference and should be affirmed. CPLR 7803(3); *Hughes v. Doherty*, 5 N.Y.3d 100, 107 (2005) (the judicial function is exhausted when the reviewing court finds a rational basis for the administrative determination); *Matter of Nash v. Nassau County*, 150 A.D.3d 1120, 1121 (2d Dep't 2017) (judicial review of a denial of a handgun permit renewal application "is limited to determining whether the [licensor's]

determination was arbitrary and capricious or was instead supported by a rational basis in the record").

Corbett was disqualified from carrying a concealed handgun because he obstructed NYPD's mandatory background investigation. Without complete and accurate information about an applicant, NYPD cannot conduct its statutorily required background investigation. Corbett's refusal to answer three threshold background questions was, alone, a sufficient basis to deny his application. His belief that these questions were constitutionally impermissible reflects an absolutist view of the Second Amendment that is not grounded in the law.

Corbett's refusal to provide this required information was a sufficient basis to deny his application, and the Court need not address his objections to the other basis of the denial—his failure to show proper cause for issuance of a concealed carry permit. His constitutional challenge to the proper cause requirement fails in any event because the requirement is substantially related to the City's important interest in public safety.

As a threshold matter, Corbett objects to the standard of review that Supreme Court employed, claiming that the court's finding that

NYPD's denial had a "rational basis" gave impermissibly short shrift to his constitutional claims (App. Br. at 18-19, 24). But he conflates the standard of review of administrative action applied in Article 78 proceedings (arbitrary and capricious) with the standard of scrutiny applied when reviewing the constitutionality of legislation that purportedly burdens the federal right to bear arms (at most intermediate scrutiny). *See* CPLR 7803; *Hughes*, 22 N.Y.3d 44, 51 (2013) (Second Amendment challenges are reviewed under intermediate scrutiny). Supreme Court applied exactly the right standard: it concluded that NYPD had a rational basis to deny Corbett's application, *i.e.*, that its determination was not arbitrary or capricious, and that the state's handgun licensing scheme and NYPD's implementation of it do not impermissibly burden Corbett's Second Amendment rights under immediate scrutiny.

A. Corbett's refusal to answer questions on NYPD's handgun permit application evinced a lack of candor and warranted denial of his application.

As part of its standard-form application, NYPD requires applicants to reveal a variety of personal background information, such as whether they have ever been arrested, even for a minor infraction;

have been prescribed narcotics or tranquilizers; or have suffered from a mental illness (R.57). An affirmative answer is not automatically disqualifying, Penal Law § 400.00, but applicants are nonetheless required to answer each question truthfully, because the information steers NYPD's mandatory background investigation. That investigation is designed to determine if an applicant has "good moral character." 38 RCNY § 5-10.

Here, NYPD rationally denied Corbett's application for a handgun permit because he refused to fully complete the required application form and cooperate with the background investigation. As in any permitting scheme, a "petitioner's failure to complete the application form prescribed by [the permitting authority]"—standing alone—is a rational basis to deny the application. *Matter of Mapama Corp. v. N.Y. City Loft Bd.*, 95 A.D.3d 785, 786 (1st Dep't 2012) (failure to complete Loft Board's application form was grounds for denying the application).

Moreover, Corbett's refusal to cooperate with NYPD demonstrated a lack of "good moral character" that justified denying his handgun permit application. 38 RCNY § 5-10(m), (n); *see Conciatori v. Brown*, 201 A.D.2d 323 (1st Dep't 1994) (false statement on concealed carry

application "was by itself a sufficient ground to deny the application"); *see also Matter of Gurnett v. Bargnesi*, 147 A.D.3d 1319, 1320 (4th Dep't 2017) (upholding denial of handgun permit, where "petitioner lacked credibility and was not forthcoming about his history of mental health treatment and his apparently ongoing treatment for depression"); *Romanoff v. Lange*, 281 A.D.2d 551, 552 (2d Dep't 2001) (upholding denial of handgun permit renewal, where "petitioner did not honestly answer the question on the application … regarding whether he had been arrested since the time the original licenses were issued"). NYPD rationally denied Corbett's handgun application based on his failure to answer questions 11, 12, and 13 of the standard form background questionnaire.

B. The background questionnaire that is required as part of NYPD's handgun licensing scheme does not encroach on the constitutional right to bear arms.

Corbett asserts that he was entitled to refuse to complete the questionnaire because some of the questions asked as part of NYPD's background investigation impinge on his Second Amendment right to bear arms (App. Br. at 21-24). That assertion is meritless.

Faced with a constitutional challenge to a firearm regulation, New York's state and federal courts employ a two-step inquiry. *N.Y. State Rifle & Pistol Assn. v. Cuomo*, 804 F.3d 242, 253 (2d Cir. 2015) (setting out two-step inquiry); *Schulz v. State of N.Y. Exec.*, 134 A.D.3d 52, 56 (3rd Dep't 2015) (applying two-step inquiry in Second Amendment challenge to New York's prohibition of assault weapons and large-capacity magazines).

At the first step, courts ask whether the regulation implicates the Second Amendment. A regulation may do so because it limits the exercise of the "core" Second Amendment "right of law-abiding, responsible citizens to use arms in defense of hearth and home"—a right not at issue here. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). Alternatively, a regulation may implicate the Second Amendment because it "substantially burdens" peripheral Second Amendment rights that apply outside the home. *See United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012) (holding that handgun regulations trigger a heightened degree of scrutiny only if they substantially burden the Second Amendment right). If the Second

Amendment is not implicated, the "analysis ends and the [regulation] stands." *N.Y. State Rifle & Pistol Assn.*, 804 F.3d at 254.

If a regulation substantially burdens Second Amendment rights, courts move to the second step of the inquiry. Here, they apply intermediate scrutiny to the regulation, asking whether the restriction of the Second Amendment right is "substantially related to the achievement of the governmental interest in public safety and crime prevention." *Id.* at 253.

Corbett's challenge to NYPD's background questionnaire and questions 11, 12, and 13 fails at each step. First, Corbett has no protected Second Amendment right to opt out of NYPD's standard-form application questionnaire, which is an integral part of New York's longstanding regulatory scheme and does not substantially burden his right to bear arms. But even if his Second Amendment rights were substantially burdened by having to answer these questions, each of them passes constitutional muster under intermediate scrutiny because the questions aim to uncover information relevant to an applicant's fitness to carry a concealed handgun in public.

1. There is no Second Amendment right to opt out of NYPD's background investigation.

Corbett has not identified any NYPD regulation that impinges on his Second Amendment right to bear arms. Nor could he. NYPD's requirement that applicants complete a minimally invasive background questionnaire is part of a presumptively lawful regulatory measure that does not substantially burden Corbett's right to bear arms.

There is no unfettered "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[3] *Heller*, 554 U.S. at 626. In *Heller*, the Supreme Court held that a total ban on all handguns in all homes impinges on Second Amendment rights. But in the course of doing so, the Court also confirmed that certain longstanding laws—such as those that prohibit felons or the mentally ill from possessing handguns—are "presumptively lawful

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[3] Corbett mistakenly argues throughout his brief that the law does not "tolerate" any restrictions on constitutional rights (*see, e.g.*, App. Br. at 20). But, of course, it is well-settled in a wide variety of contexts that public safety concerns can justify restrictions on individual liberties. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (First Amendment free speech rights); *Brigham City v. Stuart*, 547 U.S. 398, 403-404 (2006) (Fourth Amendment protection of the home); *United States v. Salerno*, 481 U.S. 739, 755 (1987) (Eighth Amendment bail rights). And restrictions of Second Amendment rights have "always been more robust than of other enumerated rights." *Kachalsky v. County of Westchester*, 701 F.3d 81, 100 (2d Cir. 2012) (noting that a state could not abridge the free exercise or free speech rights of felons or the mentally ill, but could restrict their right to bear arms).

regulatory measures" that fall entirely outside the scope of the Second Amendment. *Id*. at 626-27 & n.26; *see also McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010) (reiterating that longstanding regulations on handguns are presumptively lawful).

Licensing requirements for handguns may be among these longstanding, presumptively lawful regulations. Indeed, *Heller* appears to presuppose that a state or local licensing agency may vet applicants' qualifications before authorizing them to possess handguns. Although *Heller* found a Second Amendment right to possess firearms in the home for self-defense, it suggested that the plaintiff himself would not be able to exercise that right if he was found unsuitable to possess a firearm. The Court explained that the District was required to allow him to register his handgun, and issue him a license for its possession in the home, "*[a]ssuming that Heller is not disqualified from the exercise of Second Amendment rights*." *Heller*, 554 U.S. at 636 (emphasis added).

Corbett does not dispute that NYPD's mandatory background investigation is part of New York's historically rooted regulatory architecture designed to limit possession of handguns to qualified persons. New York's Sullivan Law has regulated who may carry a

handgun in the state since 1911 and has imposed statewide standards for the issuance of licenses since 1913. *See* Ch. 195, 1911 N.Y. Laws 442-43; Ch. 608, 1913 N.Y. Laws 1627-30. Instead, he contends that NYPD has exceeded its constitutional authority by asking questions 11, 12, and 13 on the background questionnaire. The Court therefore need not decide whether the City's licensing scheme for handguns even implicates Corbett's rights under the Second Amendment. If it does, merely having to honestly answer non-intrusive background questions does not burden Corbett's constitutional rights.

The questions about Corbett's job history, prescription drug history, and prior sworn testimony are not particularly intrusive. Indeed, while the law recognizes that certain information is so deeply personal that it should be shielded from disclosure by the constitutional rights of privacy and confidentiality, none of the information sought by NYPD is of such an "excruciatingly private and intimate nature" to implicate those rights. *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999); *see also Paul v. Davis*, 424 U.S. 693, 713 (1976) (no right of privacy in having been arrested but not tried for shoplifting); *Barry v. New York*, 712 F.2d 1554, 1562 (2d Cir. 1983) (no right of privacy in

public employees' financial information); *Miron v. Town of Stratford*, 976 F. Supp. 2d 120, 139 (D. Conn. 2013) (no privacy right with regard to a diagnosis of fibromyalgia). Given that this information is not of a fundamentally private or personal nature, there is no plausible reason that disclosing it to NYPD for the limited purposes of shaping its mandatory background investigation would impinge on an applicant's Second Amendment right. *See* Penal Law § 400.00(5)(d) (handgun applications are confidential and "excepted from disclosure").

If the questions did impose a burden, though, it would not be a substantial one. The entire "burden" is having to answer non-intrusive questions truthfully; the answers are not dispositive of the outcome of the application. Indeed, the applicable regulations make clear that "in evaluating incidents or circumstances pursuant to this section, the License Division shall consider all relevant factors, including but not limited to the number, recency and severity of incidents and the outcome of any judicial or administrative proceedings." 38 RCNY § 5-10. So, having a spotty employment record, for example, would not necessarily preclude an applicant from obtaining a license to keep or carry a handgun. The applicant's answers merely guide the direction of

the background investigation—an investigation that NYPD indisputably is authorized to undertake. Corbett has no Second Amendment right to evade the questions.

2. In any event, the questions Corbett challenges pass constitutional muster.

Even if having to honestly answer questions 11, 12, and 13 substantially burdened Corbett's Second Amendment rights, the questions nonetheless satisfy the requisite constitutional standard, intermediate scrutiny, because they are each justified by substantial public safety considerations. *Matter of Delgado v. Kelly*, 127 A.D.3d 644, 644 (1st Dep't 2015) (applying intermediate scrutiny, upholding denial of premises permit where petitioner made untruthful statements on his permit application).

Corbett argues that his challenge to the questionnaire should be evaluated under strict scrutiny because the questions are asked of *other* applicants who seek to exercise their "core" Second Amendment right to keep handguns at home (App. Br. at 21-22). Corbett, however, does not seek to exercise any "core" Second Amendment right; he seeks a permit to carry a concealed handgun in public—a right decidedly outside of the

core of the Second Amendment. *See Kachalsky*, 701 F.3d at 94 (finding no core right to carry a handgun, except for purposes of self-defense in the home). The hypothetical objections of nonparties who might seek permission to engage in a different activity than Corbett are not before the Court. *See Soc'y of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 773 (1991) (describing the "general prohibition on one litigant raising the legal rights of another"); *Matter of Fleischer v. N.Y. State Liq. Auth.*, 103 A.D.3d 581, 583 (1st Dep't 2013) (same).

Corbett's argument is also wrong: a firearm regulation does not trigger strict scrutiny just because it applies within the home. To the contrary, New York's courts apply intermediate scrutiny to eligibility restrictions that regulate handguns at "home or elsewhere." *Hughes*, 22 N.Y.3d at 51-52 (intermediate scrutiny applies to law that makes it a felony "for anyone previously convicted of any crime to possess an unlicensed, loaded firearm in his home or elsewhere"); *see also Mishtaku v. Espada*, 669 F. App'x 35, 35-36 (2d Cir. 2016) (summary order) (intermediate scrutiny applies to challenge to NYPD's "moral character" requirement, which requires applicants for all types of handgun permits to pass a background check). As the Tenth Circuit

Court of Appeals has explained, intermediate scrutiny in the context of the Second Amendment "makes sense" because handguns pose "inherent risks" that the government has a compelling baseline interest in mitigating. *Bonidy v. United States Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir 2015). The right is thus unlike other fundamental rights, "which can be exercised without creating a direct risk to others." *See id.* (rejecting argument that strict scrutiny applies to handgun eligibility restrictions).

Here, NYPD's questionnaire "satisfies the requisite constitutional standard, intermediate scrutiny, as it serves a governmental interest in maintaining public safety." *Delgado*, 127 A.D.3d at 644. NYPD has a strong interest "in insuring the safety of the general public from individuals who, by their conduct, have shown themselves to be lacking the essential temperament or character which should be present in one entrusted with a dangerous instrument." *Pelose v. County Court of Westchester County*, 53 A.D.2d 645, 645 (2d Dep't 1976), *appeal dismissed*, 41 N.Y.2d 1008 (1977).

Questions 11 (job history), 12 (drug history), and 13 (prior sworn testimony) are substantially related to that significant governmental

objective because they help shape the scope and direction of the ensuing background investigation. So, for example, if a person has been fired from a large number of jobs, this pattern might be a red flag for an investigator to look more closely into the applicant's mental health. Likewise, it is no secret that there is an opioid epidemic in our country; if an applicant has a history of using narcotics or tranquilizers—even with a prescription—the background investigation might focus on possible side effects, drug interactions, or even addictions. And, to test a person's moral character, an investigator might delve into the truthfulness of the applicant's prior sworn testimony. More generally, a person's prior sworn testimony can help the investigator learn important information about the applicant's background to shape the investigation.

Corbett disagrees that these are the right questions to ask. He contends that the three questions that he refused to answer are "designed to embarrass or invade the privacy of the applicant" and are a "subterfuge" for denying applications (App. Br. at 22). But Corbett is not an expert on conducting effective background investigations. NYPD, in contrast, has the institutional competence to make judgments about

what information is probative of an applicant's good moral character, and thus suitability to possess a concealed firearm. And "where, as here, the judgment of the agency involves factual evaluations in the area of the agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference." *Flacke v. Onondaga Landfill Sys., Inc.*, 69 N.Y.2d 355, 363 (1987); *Cf. Kachalsky*, 701 F.3d at 97 ("In the context of firearm regulation, the legislature is 'far better equipped than the judiciary' to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks").

Although Corbett may disagree, NYPD considers each of the questions that he refused to answer to be substantially related to its background investigation. That assessment is due considerable deference. *Kachalsky*, 701 F.3d at 98 ("New York's law need only be *substantially related* to the state's important public safety interest. A perfect fit between the means and the governmental objective is not required") (emphasis in original). Corbett's challenge to these questions does not withstand scrutiny.

C. Corbett failed to demonstrate "proper cause," a long-standing and constitutionally sound requirement.

Given that Corbett's application for any type of handgun permit was rationally denied for his failure to complete the background investigation questionnaire, this Court need not and ought not reach Corbett's constitutional challenge to the second basis for NYPD's denial of his application—his failure to show proper cause for issuance of a concealed carry permit. *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 261 (1991) (Simons, J. concurring) ("Traditional doctrine holds that a court should decide no more than necessary to resolve the dispute before it. Constitutional questions should be avoided if possible."). In any event, there is no merit to Corbett's flawed challenges to the proper cause requirement—that it vests individual NYPD officers with too much discretion or that it is in itself an impermissible "per se" ban (App. Br. at 19-21).

In *Kachalsky*, the Second Circuit expressly rejected the very same argument that Corbett advances (App. Br. at 20-21): that the "proper cause" requirement lacks objective standards and thereby grants officials "unbridled discretion" in violation of his Second Amendment

rights. 701 F.3d. at 92. As the Second Circuit recognized, this argument is a red herring. Like the plaintiff in *Kachalsky*, Corbett does contend that the proper cause requirement is "standardless." Rather, he "simply do[es] not like the standard—that licenses are limited to those with a special need for self-protection"—a need that he indisputably lacks. *Id.*

At times during these proceedings, Corbett has cabined his objections to NYPD's implementation of the proper cause requirement and expressly disclaimed any facial challenge to the State's law (R.143; App. Br. at 20). But, because he has never seriously contended that he can meet the statutory proper cause requirement, he would not be eligible for a concealed carry permit regardless of how the requirement were implemented. For this reason, he lacks standing to complain about NYPD's implementation standards or lack thereof. *Soc'y of Plastics Indus.*, 77 N.Y.2d at 773 (standing to challenge limited to those who have the legal right).

Corbett also insists, without any analysis, that the proper cause requirement is a "*per se* unconstitutional total ban" (App. Br. at 19). But, again, in *Kachalsky*, the Second Circuit considered precisely this challenge in the wake of *Heller* and *McDonald*, and upheld the proper

cause requirement under intermediate scrutiny as an eligibility restriction justified by the particular safety challenges posed by handguns in public. *Kachalsky*, 701 F.3d at 94-99.

Lest there be any doubt, *Kachalsky* was correctly decided.[4] First, as a hallmark of New York's century-old legislation, the deeply rooted proper cause requirement is among those regulations of vintage pedigree that are enshrined within the right to bear arms. *Id.* at 97; Ch. 608, 1913 N.Y. Laws 1627-30. Second, the proper cause requirement is "substantially related" to the achievement of "substantial, indeed compelling, governmental interest in public safety and crime prevention." *Id.* at 97. Handguns in public pose particular safety risks to the public and law enforcement, and the Legislature reasonably limited their public possession "to those individuals who have an actual reason ('proper cause') to carry the weapon." *Id.* at 98. Finally, as a restriction (as opposed to a total ban) that operates only at the periphery of the right to bear arms in public, rather than at its "core" in

[4] Although the Second Circuit's interpretation of the federal constitutional question is not binding on this Court, its decision "serve[s] as useful and persuasive authority." *People v. Kin Kan*, 78 N.Y.2d 54, 60 (1991).

the home, the proper cause requirement is within the realm of permissible policy choices left open after *Heller*. *Id.* at 98-100.

Kachalsky is not an outlier. In fact, eligibility restrictions on concealed carrying permits, some quite similar to New York's proper cause requirement, have been upheld by nearly every federal court of appeals. *See, e.g.*, *Peruta v. Cnty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc) (upholding California's "good cause" eligibility requirement for concealed carry permit); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013) (upholding New Jersey's "justifiable need" requirement for concealed carry permit); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013) (upholding Maryland's "good-and-substantial-reason" requirement for concealed carry permit).[5]

Even in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), while rejecting Illinois' total ban on concealed carrying, the Seventh Circuit

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[5] *See also NRA of Am., Inc. v. McCraw*, 719 F.3d 338, 342-43 (5th Cir. 2013) (upholding Texas's eligibility requirement that applicants be at least 21 years of age for concealed carry permit); *Peterson v. Martinez*, 707 F.3d 1197, 1209 (10th Cir. 2013) (upholding residency requirement that bars non-Coloradoans from carrying concealed firearms); *Hightower v. City of Boston*, 693 F.3d 61, 74 (1st Cir 2012) (upholding Massachusetts' suitability requirement which allowed for revocation of concealed carry permit for providing false information as to the existence of pending complaints or charges on a license renewal application).

explained that "Illinois has lots of options for protecting its people from being shot without having to eliminate all possibility of armed self-defense in public," and touted, as an example of such options, "jurisdictions like New York State, where officials have broad discretion to deny applications for gun permits," but do not ban them entirely. 702 F.3d at 940. Indeed, since *Moore*, the Seventh Circuit has repeatedly upheld various aspects of Illinois' newly enacted concealed carry permitting regime. *See Berron v. Ill. Concealed Carry Licensing Review Bd.*, 825 F.3d 843, 847 (7th Cir. 2016) (upholding authority of licensing agency to withhold concealed carry permits for public safety reasons); *Culp v. Madigan*, 840 F.3d 800 (7th Cir. 2016) (upholding residency restrictions on concealed carry permits).

Corbett cites only one case to the contrary, *Wrenn v. District of Columbia*, an outlier that flatly rejects the overwhelming consensus articulated by every other circuit court to have considered a challenge to eligibility restrictions on concealed carry permits. 864 F.3d 650 (D.C. Cir. 2017). In *Wrenn*, a split D.C. Circuit parted from its sister courts, over Judge Henderson's dissent, and held that the District of Columbia's "good reason" requirement impermissibly impinged on what

the majority saw as a virtually unfettered Second Amendment right to keep *and carry* handguns throughout the city. *Id.* at 661, 667 (An "individual right to carry common firearms beyond the home for self-defense—even in densely populated areas, even for those lacking special self-defense needs—falls within the core of the Second Amendment's protections."). *Wrenn* was wrongly decided. The majority split from the well-established consensus that the Second Amendment does not create an unfettered right and failed to heed *Heller*'s guidance that the Second Amendment is "*most* acute in the home," which necessarily implies that it is "*less* acute outside the home." *Id.* at 669 (Henderson, dissenting) (quoting *Heller*, 554 U.S. at 628); *see also Kachalsky*, 701 F.3d at 94.

POINT II

CORBETT'S PREMATURE CHALLENGE TO NYPD'S INITIAL DENIAL OF HIS FOIL REQUEST IS MOOT

This case is a textbook illustration of the practical impetus behind the administrative exhaustion requirement. *Matter of Carty v. New York City Police Dep't*, 41 A.D.3d 150, 150 (1st Dep't 2007). In the FOIL context, Article 78 litigation is premature until the petitioner has submitted an administrative appeal of the agency's response to the

FOIL request and the agency has rendered a final adverse determination of that appeal. *Id*.

Corbett failed to exhaust his administrative remedies before challenging NYPD's determination in this Article 78 proceeding. Instead, he commenced this proceeding while the administrative appeal from his FOIL denial was still pending. His petition was rendered moot during the pendency of this appeal when NYPD granted his administrative appeal in part, directed its FOIL unit to conduct a search for documents, and produced to him the non-exempt responsive documents that were found (*see* supra at p.11).

For this reason, this branch of his Article 78 petition should be dismissed as academic. *Matter of Madeiros v. Department*, 30 N.Y.3d 67, 73, n.1 (2017) (disclosures during the pendency of the appeal rendered petitioner's request academic); *Fappiano v. New York City Police Dep't*, 95 N.Y.2d 738, 749 (2001) (dismissing claim for disclosure that was rendered moot as a result of production); *Matter of Babi v. David*, 35 A.D.3d 266, 266-267 (1st Dep't 2006) ("proceeding, which was commenced while petitioner's administrative appeal was still pending … was rendered moot by respondent's issuance of a determination

granting petitioner's FOIL requests to the extent of remanding the matter for a further document search by the FOIL Unit"); *Matter of Taylor v. New York City Police Dep't FOIL Unit*, 25 A.D.3d 347 (1st Dep't 2006), *lv denied* 7 N.Y.3d 714 (2006) (proceeding rendered moot by respondents' production of responsive records as part of their motion to dismiss); *see also Matter of Bernstein Family LP v. Sovereign Partners, LP*, 66 A.D.3d 1, 8-9 (1st Dep't 2009) ("a judicial determination resolving a dispute over the lawfulness of an earlier denial of the request would entail an unnecessary exercise of the judicial power to decide disputes.").

CONCLUSION

This Court should affirm Supreme Court's judgment with respect to Corbett's challenge to the denial of his handgun permit application. The portion of his Article 78 petition that prematurely challenged the denial of his FOIL request before the request was administratively exhausted should be dismissed as moot.

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Respectfully submitted,

ZACHARY W. CARTER
Corporation Counsel
of the City of New York
Attorney for Respondents

By: _____
ELINA DRUKER
Assistant Corporation Counsel

100 Church Street
New York, NY 10007
212-356-2609
edruker@law.nyc.gov

CLAUDE S. PLATTON
ELINA DRUKER
of Counsel

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