To Be Argued By:
Jonathan Corbett

New York County Clerk Index No. 158273/2016

New York Supreme Court

APPELLATE DIVISION – FIRST DEPARTMENT

JONATHAN CORBETT,
Petitioner-Appellant

v.

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

ON APPEAL FROM THE SUPREME COURT, NEW YORK COUNTY

REPLY BRIEF OF PETITIONER-APPELLANT JONATHAN CORBETT

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I. The Correct Standard Is At Least Intermediate Scrutiny, Whether Applied to Written Law or Its Implementation

Respondent's brief vacillates wildly between admitting that intermediate scrutiny is necessary and requesting that the Court approve its actions because they were "rational." *Cf*. Respondent's Brief, pp. 3, 12, 13 *with* pp. 23 (citing intermediate scrutiny in *Delgado*), 24 (same citing *Hughes* and *Espada*). They attempt to justify the distinction in two ways, both of which must fail.

First, they suggest that there should be a different standard of review when considering "administrative action" versus "legislation." Respondent's Brief, p. 14. This distinction has no basis in law. The Constitution applies equally regardless of which branch of government seeks to violate the rights of its citizens, and regardless of whether the law is challenged as written or as applied[1].

Second, they suggest that if there is not a "substantial burden" on a Second Amendment right, lower scrutiny may be used. This interpretation has some support

[1] Respondent later suggests that Petitioner is actually challenging the law, rather than the agency implementation, because "he would not be eligible for a concealed carry permit regardless of how the [proper cause] requirement were implemented." Respondent's Brief, p. 29. This is simply not the case – the vast majority of the counties in New York State interpret the proper cause requirement in a way that allows ordinary citizens to be granted a full carry license. This also invalidates Respondent's argument that *Moore v. Madigan* supports New York's gun restrictions. Respondent's Brief, pp. 31, 32. The *Moore* court specifically cited New York *State* law, not New York City's perversion of it.

in the Second Circuit: "this Court and our sister Circuits have suggested that heightened scrutiny is not always appropriate." *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 258 (2nd Cir. 2015). Two problems. Problem One is that the U.S. Supreme Court has approved no such distinction, and the Second Circuit, while claiming that its sister circuits have followed suit, is perhaps imagining more support than it actually had – and has seen that support evaporate over the last 3 years. *Cf. Ezell v. City of Chicago*, 846 F.3d 888 (7th Cir. 2017) ("burdens on Second Amendment rights are *always* subject to heightened scrutiny") (emphasis added). Insertion of the word "substantial" is, perhaps, novel to the Second Circuit and does not appear to have been repeated in the last couple of years, as best Petitioner can find. Problem Two is that while Respondent frames Petitioner's dispute as the "right to opt out of [a] questionnaire," this is disingenuous. Respondent's Brief, p. 18. Petitioner's right to carry a gun is the right in question, and not being able to have a gun *at all* unless he answers invasive questions[2] is clearly a substantial burden. As mentioned in Petitioner's brief, "Questions 11 – 13" are required not just for those who seek a carry license, but also for those requesting only a premises (home) license.

The law is not as the Second Circuit, legislature of New York, and NYPD would prefer it. They would clearly prefer that gun license decisions be rubber stamped as

[2] Respondent submits that the questions are not invasive. Respondent's Brief, p. 21. If answering questions about your medical history or potentially most embarrassing moments in your employment history is not invasive, Petitioner does not know what is. Petitioner invites attorneys for Respondents to answer Questions 11 – 13 in a public forum if they wish to demonstrate how benign they are.

long as they are rational. But the U.S. Supreme Court has spoken, clearly and unambiguously, that rational basis will not do. When the government burdens Second Amendment rights, they must do so in a way that passes at least intermediate scrutiny.

Finally, it should be noted that Respondent's assertion that only in-home possession is a part of the "core" of the Second Amendment is also unsupported by law. While home possession is *a* core part of the Second Amendment, no post-*Heller* appellate court of which Petitioner is aware has declared home possession to be the *sole* core of the Second Amendment. Accordingly, strict scrutiny may be appropriate if the Court finds that Petitioner's challenge involves a core right, and it would seem to Petitioner that both *keeping* (in the home) and *bearing* (outside the home) are core rights.

II. The Government Has The Burden Under Intermediate Scrutiny, and Failed to Meet It

It is black letter law that when intermediate scrutiny applies, it is the government that has the burden of showing that their actions are substantially tailored to an important government interest. *Ezell* at 892. ("In all cases the government bears the burden of justifying its law under a heightened standard of scrutiny.") The importance of the government's interest is not in dispute; rather, the Court is asked only whether Respondent's procedures are sufficiently tailored to that interest.

Notwithstanding that burden, Respondent speaks in terms of deference and expertise without explaining themselves in any detail whatsoever. Respondent's Brief, pp. 25, 26 (spending less than a full page explaining how Questions 11 – 13 could possibly be useful to an investigator). The few lines they do provide about potential hypothetical situations in which the questions could possibly be useful are a far cry from carrying a burden of showing substantial tailoring. For example, how often does being fired from a job correlate to lack of fitness to possess a weapon? And, why can't the question be tailored to include only times when one has been "fired" rather than merely "discharged" as the question has asked, or time-bounded to include only the last, *e.g.*, 7 years?

"[O]n intermediate scrutiny review, the state cannot get away with shoddy data or reasoning. To survive intermediate scrutiny, the defendants must show reasonable inferences based on substantial evidence." *N.Y. State Rifle & Pistol Assn.* at 264. Here, the government has shown dubious hypotheticals that cannot even be called "inferences" because they present zero *evidence* upon which those hypotheticals are based. Even under the Second Circuit's extraordinarily permissive view, the government has failed to meet its burden: assertions without evidence are speculation, not inferences.

III. Respondents Failed to Address the Effect of Blatant, Persistent Corruption in Gun Licensing on Due Process & Constitutionality

Petitioner extensively chronicled the history of corruption within the NYPD's Licensing Division, culminating in the transfer of the commanding officer who personally rejected Petitioner's gun license application. Petitioner's Brief, pp. 8 – 12. Respondent did acknowledge that its licensing officers were indeed under investigation as an excuse for delaying its FOIL reply. Respondent's Brief, p. 10. But it entirely failed to comment on Petitioner's argument that the corruption renders the NYPD's implementation of the "proper cause" requirement unconstitutional.

Cases like *Kachalsky* certainly indicate some judicial tolerance of the NYPD's licensing scheme. But, in addition to new developments in the U.S. Supreme Court and Court of Appeals (aside from the Second Circuit) which cast doubt on *Kachalsky*'s correctness, the *Kachalsky* court also did not have knowledge of the extent of continuing modern-day corruption within the NYPD's Licensing Division. Given this update in perspective, the non-binding nature of *Kachalsky* upon this Court, and the trend of other courts over the passage of time since *Kachalsky*, the Court should re-evaluate anew whether the current system still has constitutional legs upon which to stand.

IV. Respondent Conflates Petitioner's Argument with an "Absolutist View," "Candor" with "Open Refusal," and "Good Moral Character" with "Obedience"

Contrary to the impression one may get reading Respondent's brief, Petitioner is not a *pro se* "gun nut" asking the Court to invalidate all regulations on gun ownership. Respondent's Brief accuses Petitioner of taking an "absolutist view" (p. 13) that argues that the constitution does not allow for any restrictions on constitutional rights (p. 19, fn. 3). Petitioner has no such absolutist view and made no such argument. Petitioner is not arguing for the right to carry a rocket launcher through Times Square, nor that "the Second Amendment is his gun license." Petitioner simply asks that government restrictions on gun rights resulting in an effective total ban on the carrying of guns by ordinary, law-abiding citizens be invalidated, and requests that the background check be as unintrusive as practical.

Respondent's Brief also seems to conflate Petitioner's open challenge to the NYPD's licensing scheme with lack of candor (pp. 6, 15), a false statement (p. 15), a lack of credibility (p. 15), dishonesty (p. 15), and evasiveness (p. 23).

Petitioner is presently finishing his final year of law school and studying for the Multistate Professional Responsibility Examination. As such, the ABA's Model Rules of Professional Conduct are fresh in his mind, which specifically permit lawyers to challenge the law via *open refusal*. *See, e.g.*, Model Rules of Prof'l Conduct R. 3.4(c).

That is precisely what Petitioner has done here. Refusing to answer a question with a note that the refusal is based on a constitutional challenge is not lack of candor. It's not a false statement. It doesn't demonstrate lack of credibility. And it's not dishonest or evasive. The NYPD may not like having its procedures challenged, but tough luck: Petitioner has a constitutional right to do so, and will not have his good moral character impugned for mounting such a challenge.

V. Partial Compliance with the Law Moots Nothing

Respondent contends that it has "partially granted" Petitioner's FOIL request. Respondent's Brief, pp. 2, 11. Petitioner has received documents by mail, contemporaneous with the filing of their opposition brief just over a week ago, and has not had the opportunity to review these documents for compliance before the creation of this reply brief.

Nevertheless, Respondents concede that they have only "partially" provided the public records that Petitioner has requested. "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." *Id.*, p. 2 (emphasis added).

There is no support in law for the proposition that providing some of the relief asked for in a civil proceeding makes the entire proceeding moot. Knowing that this

argument will not win the day, Respondent continues to allege that Petitioner's request for judicial review of the matter was "premature." *Id.*, pp. 33 – 35. Petitioner's opening brief clearly articulates his position that the City of New York had 10 days to reply and Petitioner waited 8 months and received nothing, which amounted to a constructive denial. Petitioner's Brief, p. 26.

If 8 months is not long enough to wait, how long is long enough? Respondent's brief provides no guidance. If the government actually needed more time to process Petitioner's appeal, they could have avoided litigation by explaining the need for more time in a letter to Petitioner. Instead, they seek to place the blame on Petitioner for "jumping the gun," so to speak, when the fact remains that they completely ignored Petitioner for 8 months until he finally asked a court to intervene. Are we *really* to believe that if Petitioner had not filed this case, the government would have *ever* responded?

CONCLUSION

For the foregoing reason, Petitioner prays that the Court put an end to the corruption in the NYPD's Licensing Division and restore the rights of the people.

Dated: New York, NY
February 9th, 2018

Respectfully submitted,

_____

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CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 670.10.3(f)

I, Jonathan Corbett, *pro se* Petitioner in the above captioned case, hereby affirm that this Petition contains approximately 2,200 words according to the word count function of the computer program used to prepare the document.

Dated: New York, NY
February 9th, 2018

Respectfully submitted,

_____

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