20-2725

United States Court of Appeals for the Second Circuit

DARK STORM INDUSTRIES LLC, BRIAN DOHERTY, KEVIN SCHMUCKER,

Plaintiffs-Appellants,

v.

ANDREW M. CUOMO, in his official capacity as Governor of the State of New York, EMPIRE STATE DEVELOPMENT CORPORATION, ELIZABETH RUTH FINE, ESQ,

Defendants-Appellees.

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

BRIEF FOR DEFENDANTS-APPELLEES

BARBARA D. UNDERWOOD
Solicitor General
JEFFREY W. LANG
Deputy Solicitor General
DUSTIN J. BROCKNER
Assistant Solicitor General
Of Counsel

LETITIA JAMES
Attorney General
State of New York
Attorney for Defendants-Appellees
The Capitol
Albany, New York 12224
(518) 776-2017
dustin.brockner@ag.ny.gov

March 29, 2021

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PRELIMINARY STATEMENT

In March 2020, COVID-19 swept through New York State. Cases and fatalities skyrocketed, and the State instituted various measures to combat the virus's spread. At issue in this appeal is one of those measures: the requirement, in effect for two months at the outset of the pandemic, that businesses that did not provide services deemed essential eliminate their in-person workforce. Plaintiffs-appellants are a Long Island firearm retailer, Dark Storm Industries LLC ("Dark Storm"), and two of its customers. Because firearm retailers were not deemed essential, Dark Storm could not conduct in-person sales with the public. Plaintiffs brought this action in the U.S. District Court for the Northern District of New York alleging that this restriction violated their rights under the Second Amendment. The parties filed cross-motions for summary judgment, and the district court (Kahn, J.) granted judgment in the State's favor.

This Court should dismiss the appeal as moot. The challenged restriction has not been in effect since May 2020, when non-essential retailers were allowed to have their workforce return to fulfill in-person sales. And for the reasons explained below, there is no reasonable

prospect that this restriction—a complete statewide ban on non-essential businesses' in-person operations—will be reimposed.

If this Court reaches the merits, it should affirm. As the district court correctly held, the challenged restriction did not substantially burden the Second Amendment rights of Dark Storm's actual or potential customers. Even when the restriction was in effect, there were numerous other retailers that sold firearms and other items that remained open to the public, including multiple retailers located in close proximity to Dark Storm. Further, because the restriction did not impose a substantial burden, it does not trigger anything more than intermediate scrutiny. The restriction readily satisfies such scrutiny, as it was substantially related to achieving the compelling state interest of curbing the spread of COVID-19.

JURISDICTIONAL STATEMENT

As explained below, this Court lacks subject-matter jurisdiction over the appeal because plaintiffs' claim for relief, which seeks declaratory and injunctive relief only, is moot.

QUESTIONS PRESENTED

1. Is this appeal moot because the State lifted the challenged restriction in May 2020, has not reimposed it notwithstanding a resurgence in cases, and has refined its COVID-19 response to allow all retailers to transact with the public through at least curbside pickup?

2. Alternatively, is the challenged restriction valid because it did not substantially burden plaintiffs' rights under the Second Amendment, and it satisfied intermediate scrutiny?

STATEMENT OF THE CASE

A. The State's Initial Response to the COVID-19 Pandemic

On March 1, 2020, New York confirmed its first case of COVID-19. (Appendix ("A.") 247.) Cases immediately surged, and, on March 7, Governor Andrew M. Cuomo declared a state of emergency. (A. 247, 265.) N.Y. Exec. Order 202 (Mar. 7, 2020). The next week, the President of the United States declared a national emergency. (A. 122-23.)

COVID-19 is caused by a highly contagious and novel coronavirus that principally spreads through face-to-face interactions. (A. 102, 111, 138, 289.) As was understood at the time, the virus's incubation period—the time from exposure to the start of symptoms—could last 14 days. (A.

249, 290, 294.) As a result, a person could carry and transmit the virus for days before any symptoms develop. (A. 138-39, 294, 298.)

By March 20, the State had identified close to 10,000 cases. (A. 247, 285-86.) However, because testing was performed "on a very limited basis," the full extent of the virus's spread was "unknown." (A. 135-36.) As the Governor noted, the virus may have already infected "tens of thousands" of New Yorkers. (A. 135-36.) Other aspects of the virus were also unknown, including "how long the air inside a room occupied" by an infected person remained potentially infectious and the extent to which the virus spread by touch given that it could remain viable on surfaces for hours or days. (A. 294.)

The surge in cases strained the State's health care system. As new cases and hospitalizations increased, hospitals faced a shortage of beds, ventilators, and personal protective equipment. (A. 248.) The State was bracing for further devastation. On March 18, for example, the Governor estimated that by the end of May 2020, 110,000 New Yorkers would have to be hospitalized due to the virus, 37,000 of whom would need treatment

in intensive care units; statewide, however, there were only 53,000 hospital beds, just 3,000 of which were in intensive care units.[1]

Against this backdrop, on March 20, the Governor announced the "New York on PAUSE" initiative, which aimed to slow the virus's spread through measures that limited person-to-person contact. (A. 124.) At a time when there was no known vaccine or treatment, density reduction measures were the only effective way to curb transmission. (A. 113, 125, 298.) Therefore, non-essential gatherings of any size were prohibited, and people were required to maintain social distancing of six feet when in public. (A. 126.)

Further, under Executive Order 202.8, businesses deemed non-essential were required, by March 22, to eliminate their in-person workforce. (A. 222.) Businesses deemed essential, such as hospitals and grocery stores, were exempt from this requirement, provided that they complied with social distancing and other health protocols. (A. 194-95, 222, 236.) As a result, "hundreds of categories of businesses" closed for

[1] Gov. Andrew M. Cuomo, *Governor Cuomo Announces Deployment of 1,000-Bed Hospital Ship "USNS Comfort" to New York Harbor*, 01:41-02:11 (Mar. 18, 2020), https://www.youtube.com/watch?v=jnEdL8lj-hM.

in-person operations. (A. 104 (the State's Rule 56.1 statement); D. Ct. Dkt. No. 26-1 (plaintiffs' Rule 56.1 response).)

Executive Order 202.6 directed the Empire State Development Corporation ("ESD") to "issue guidance as to which businesses are determined to be essential" and thus exempt from the workforce reduction requirements. (A. 218.)[2] That guidance allowed businesses to request that they be treated as essential if the guidance did not already designate them as such. (A. 198, 241-43.) The guidance did not designate firearm retailers as an essential business. (A. 237-41.)

B. Dark Storm's Temporary Closure and this Lawsuit

Plaintiff-appellant Dark Storm manufactures and sells firearms. (A. 53.) It operates a manufacturing facility and "retail showroom" in Oakdale, New York, located in Suffolk County on Long Island. (A. 54, 62.)

On March 20, 2020, Dark Storm sent ESD a request that its business function—"firearm and ammo supply"—be deemed essential.

[2] "Empire State Development" is the name used to describe collectively two distinct entities: (i) a state agency, the New York State Department of Economic Development ("DED"), N.Y. Econ. Dev. Law § 10, and (ii) a public benefit corporation, the New York State Urban Development Corporation. (A. 192, 197.) The guidance at issue expressly states that it was "issued by [DED] d/b/a Empire State Development (ESD)." (A. 196-97; *see* A. 236.)

(A. 66, 200.) The next day, ESD responded that Dark Storm was deemed essential to the extent it supported law enforcement and national security-related operations, which ESD's guidance had designated as essential. (A. 66, 240.) Dark Storm responded, "[s]o to be clear we may continue to conduct business with law enforcement and military but not civilians?" (A. 66.) ESD replied that this statement was accurate. (A. 66.)

On March 30, 2020, Dark Storm and two individuals, plaintiffs-appellants Brian Doherty and Kevin Schmucker, commenced this lawsuit under 42 U.S.C. § 1983 in the U.S. District Court for the Northern District of New York against the Governor, ESD, and Elizabeth Ruth Fine. (A. 5, 8.) Fine is an ESD employee who was alleged to be involved in the response to Dark Storm's request to be deemed as an essential business. (A. 8.)

The complaint alleged that Doherty and Schmucker did not own any firearms and had contacted Dark Storm about "purchasing a long gun"—i.e., "any rifle[] or shotgun[]"—"for home defense." (A. 6-7.) The complaint further alleged that the workforce reduction requirement imposed on businesses not deemed essential under Executive Orders 202.6 and 202.8 (collectively, the "Executive Orders") prevented Doherty

and Schmucker from taking delivery of or purchasing a long gun from Dark Storm. (A. 12.)

According to the complaint, the Executive Orders violated the Second Amendment of the U.S. Constitution by "depriv[ing] American citizens residing in New York of their ability to purchase arms for the defense of their home."[3] (A. 12.) The complaint requested a declaratory judgment and injunctive relief that ordered defendants to allow Dark Storm "to remain open" as an essential business. (A. 14.) It did not seek any money damages. (A. 14.)

C. The State's Phased Reopening and the Lifting of the Challenged Restriction

In late April 2020, as the State's infection and death rates began to stabilize and then decline, Governor Cuomo announced "New York FORWARD," a plan for reopening the sectors of the economy affected by New York on PAUSE. (A. 201.) Under this plan, the State was divided into geographic regions. (A. 201.) As each region attained seven health-

[3] The complaint also asserted claims under two other provisions of the U.S. Constitution but, as the district court held and plaintiffs do not dispute on appeal, plaintiffs has abandoned these claims by failing to defend them in the district court. (Special Appendix ("S.A." 32-33.) *See, e.g.*, *Hansen v. Watkins Glen Cent. Sch. Dist.*, 832 F. App'x 709, 714 n.2 (2d Cir. 2020) (summary order).

related statistical benchmarks concerning COVID-19 containment, it advanced through four "phases" in which increasingly more activities were allowed, subject to social distancing and other health protocols. (A. 201.) Beginning with Phase One, "the reductions and restrictions on the in-person workforce at non-essential businesses"—which included the restriction at issue here—"shall no longer apply" for certain businesses. N.Y. Exec. Order 202.31 (May 14, 2020). Retailers under Phase One were allowed to fulfill orders through "curbside or in-store pick up or drop off." *Id.* (A. 201.)

On May 27, 2020, the Long Island region—where Dark Storm was located—entered Phase One because it had met the seven health-related metrics. (A. 201.) N.Y. Exec. Order 202.34 (May 28, 2020).[4] This enabled Dark Storm to resume in-person sales of firearms and ammunitions to

[4] Gov. Andrew M. Cuomo, *Amid Ongoing COVID-19 Pandemic, Governor Cuomo Calls On U.S. Senate to Pass a Coronavirus Relief Bill That Helps All Americans* (May 27, 2020), https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-calls-us-senate-pass-coronavirus-relief-bill.

the public through curbside or in-store pickup. (A. 56-57, 103; D. Ct. Dkt. No. 27 at 3-4.)[5]

D. The Cross-Motions for Summary Judgment

Plaintiffs moved for summary judgment as to ESD only, asserting that they were entitled to a declaration that ESD's failure to designate firearms retailers as an essential business, coupled with Executive Order 202.8's workforce reduction requirement, violated the Second Amendment because they had "the effect of *completely preventing* New Yorkers from acquiring arms and ammunition." (A. 37 (emphasis added); *see* A. 33 (arguing that the challenged restriction "wholly prevented" New Yorkers from acquiring firearms).)

Plaintiffs failed to submit any sworn statement from either individual plaintiff, Doherty and Schmucker. Rather, the only evidence regarding these two—or any individual customer—was a statement from a Dark Storm employee that the challenged restriction prevented Dark

[5] Federal and New York law generally require a licensed firearm dealer to deliver a firearm to a customer on the property at the address listed on the dealer's license. *See* 18 U.S.C. § 923(d)(1); N.Y. Penal Law § 400.00(8). (A. 58-60 (guidance letter from the Bureau of Alcohol, Tobacco, Firearms and Explosives clarifying that federal firearm licensees may deliver firearms in the "parking lot or other exterior location on the licensee's property at the address listed on the license").)

Storm from fulfilling "any and all existing outstanding purchase orders, including but not limited to that of one of the individual plaintiffs." (A. 54.) Plaintiffs introduced no evidence specifying what these customers purchased or even what kind of firearms or ammunitions Dark Storm sold. (*See, e.g.*, A. 53-67.)

In its cross-motion for summary judgment, the State first argued that the case was moot because the challenged restriction ceased to have effect when, in May 2020, Long Island entered Phase One, thus allowing Dark Storm to fulfill its customers' orders. (A. 77-78.)

On the merits, the State argued that plaintiffs' claim failed as a matter of law because plaintiffs cited no evidence to suggest the challenged restriction violated plaintiffs' Second Amendment rights. The Stated argued that any burden that the restriction imposed was insubstantial because, even before the phased reopening began, there were ample alternatives for citizens to acquire firearms for self-defense. (A. 85-86.) Specifically, businesses that were deemed essential because they sold items such as groceries, like Wal-Mart, remained open to the public for in-person shopping and could sell firearms and ammunitions

that they had in stock. (A. 86 (citing A. 363-82 (declarations identifying over 20 such stores)); A. 198.)[6]

Plaintiffs' opposition to the State's cross-motion—like their motion for summary judgment—rested on a single factual premise: under the challenged restriction, "persons throughout the state were (and may again become) *wholly unable* to purchase firearms or ammunition." (D. Ct. Dkt. No. 27, at 3-4 (emphasis added).) Yet plaintiffs introduced no evidence to refute the State's evidence demonstrating that, even when the restriction was in effect, numerous retailers that sold firearms and ammunitions remained open to the public for in-person shopping, including retailers on Long Island. (*Compare* A. 104-106, *with* D. Ct. Dkt. No. 26-1.)

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[6] The State also argued that plaintiffs' claim against ESD in particular was barred by immunity under the Eleventh Amendment. (A. 79.) This was because plaintiffs challenged ESD's guidance to the extent it did not deem firearm retailers essential and that guidance was issued by the branch of ESD that was a state agency, the Department of Economic Development. (A. 196.) Thus, plaintiffs' claim was in substance against a state agency and barred by the Eleventh Amendment. *Cf. Vega v. Semple*, 963 F.3d 259, 282 (2d Cir. 2020) (observing that Eleventh Amendment immunity requires courts to "look to the substance rather than to the form of the relief sought"). The Court assumed—without deciding—that plaintiffs had raised a genuine factual dispute as to whether the Eleventh Amendment barred plaintiffs' claim against ESD (S.A. 16), and the State does not contest that holding on this appeal.

E. The District Court Decision

On July 8, 2020, the district court denied plaintiffs' motion, granted the State's cross-motion, and entered judgment in the State's favor. (Special Appendix ("S.A.") 1-2.) The district court first declined to dismiss the case as moot, citing the "voluntary cessation" exception to mootness. (S.A. 14.) It observed that, given the then-current uptick in cases in other states, "there is a reasonable expectation that New York might be forced to shut down again." (S.A. 15.)

Turning to the merits, the court assumed—without deciding—that plaintiffs had raised a triable issue as to whether the Executive Orders "burden conduct protected by the Second Amendment." (S.A. 18.) The court held, however, that any such burden was not substantial because "adequate alternatives remained for [p]laintiffs and others like them in New York to acquire firearms for self-defense." (S.A. 20.) It noted that, even when Dark Storm was subject to the challenged restriction, other retailers that sold firearms were open to the public throughout New York. (S.A. 20.) This included three retailers that were within a half hour's drive of Oakdale, where Dark Storm is located. (S.A. 20.)

The court noted that plaintiffs opposed summary judgment on the ground that the challenged restrictions "wholly" prevented all New Yorkers from acquiring firearms (S.A. 22 (quoting D. Ct. Dkt. No. 27, at 4), yet offered "no evidence to controvert" the evidence establishing that "numerous businesses selling firearms remained open during the shutdown" (S.A. 22). Nor had plaintiffs argued that these retailers failed to provide adequate alternatives for "law-abiding citizens to acquire a firearm for self-defense." (S.A. 22.) The court held that given the "insubstantial" nature of any burden, there is "no need to apply any form of heightened scrutiny to the Executive Orders." (S.A. 22.)

The court further held that even assuming some form of heightened scrutiny was appropriate, it would be intermediate scrutiny, not strict scrutiny. (S.A. 22.) The court concluded that the State easily met this standard because the Executive Orders were substantially related to achieving the important governmental interest of curbing COVID-19 transmission. (S.A. 22-25.) The court explained that by requiring all businesses to operate remotely, except for those deemed essential, the challenged restriction indisputably "slow[ed] the spread of virus by limiting physical interaction and the risk of exposure." (S.A. 25 (citing

A. 104, D. Ct. Dkt. No. 26-1) (ellipses omitted).) Thus, as the court held, the restriction "fit tightly with the state's goal of slowing the spread of the disease." (S.A. 26.)

This appeal followed. (A. 383.)

F. Subsequent Developments

By July 2020, all regions in New York had advanced to Phase Four, the final and least restrictive phase under New York FORWARD, where each region has remained.[7]

In the fall of 2020, the State experienced a COVID-19 resurgence. At its peak, in January 2021, the State reported a record number of new

[7] Gov. Andrew M. Cuomo, *Governor Cuomo Announces New York City Cleared by Global Health Experts to Enter Phase Four of Reopening Monday, July 20th* (July 17, 2020), https://www.governor.ny.gov/news/governor-cuomo-announces-new-york-city-cleared-global-health-experts-enter-phase-four-reopening; State of New York, *New York Forward: Phase Four Industries*, https://forward.ny.gov/phase-four-industries (last visited Mar. 29, 2021).

cases each day;[8] hospitalizations and deaths increased dramatically.[9] Even then, however, the State did not impose a "shut down" as the district court had predicted it might. (S.A. 15.) It did not impose *any* new statewide or regionwide restriction on retailers' operating capacity, let alone any restriction that would have barred in-person shopping.

Indeed, as testing capabilities have increased and a better understanding of the virus has developed, the State has refined its COVID-19 response. For instance, in October 2020, the Governor announced the Cluster Action Initiative. N.Y. Exec. Order 202.68 (Oct. 6,

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[8] Between January 4 and January 24, 2021, the State was reporting between roughly 12,000 and 20,000 new cases per day. By contrast, the single day high in the spring of 2020, on April 14, was 11,571. *See* New York State Department of Health ("DOH"), *Daily Totals: Persons Tested and Persons Tested Positive*, https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-DailyTracker?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n#/views/NYS%2dCOVID19%2dTracker/NYSDOHCOVID%2d19Tracker%2dDailyTracker (last visited Mar. 29, 2021).

[9] *See, e.g.*, State of New York, *Daily Hospitalization Summary By Region: All Regions*, https://forward.ny.gov/daily-hospitalization-summary-region (last visited Mar. 29, 2021); Gov. Andrew M. Cuomo, *Governor Cuomo Updates New Yorkers on State's Progress During COVID-19 Pandemic* (Jan. 11, 2021), https://www.governor.ny.gov/news/governor-cuomo-updates-new-yorkers-states-progress-during-covid-19-pandemic-101.

2020).[10] While that initiative includes time-limited restrictions on gatherings and businesses, those restrictions do not apply statewide. Rather, they are confined to the discrete geographic areas experiencing dangerous spikes in new infections. *Id.* Areas designated as red zones, which contain the most alarming COVID-19 hotspots, are subject to the strictest restrictions, including workforce reduction requirements for businesses deemed non-essential. *Id.* Even then, however, retailers deemed non-essential may "operate for curbside pick-up or delivery" provided that only one employee is "physically present to fulfill orders."[11] Areas designated as orange or yellow zones are also subject to additional

[10] Gov. Andrew Cuomo, *Video, Audio, Photos & Rush Transcript: Governor Cuomo Announces New Cluster Action Initiative* (Oct. 6, 2020), https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-cuomo-announces-new-cluster-action-initiative.

[11] Empire State Development, *Essential Business Guidance Related to Determining Whether a Business Enterprise Is Subject to a Workforce Reduction Under Executive Order 202.68* (last updated Dec. 15, 2020), https://esd.ny.gov/ny-cluster-action-initiative-guidance.

restrictions, albeit none that would apply to retailers deemed non-essential. *See* N.Y. Exec. Order 202.68.[12]

Between October 6 and November 9, 2020, only three areas—roughly one mile in diameter—were designated as a red zone. Since then, no area has been designated as a red zone.[13]

Dark Storm is not located in an area that has ever been designated as a cluster zone.[14] And even if Dark Storm were to be placed in a cluster

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[12] *See* Gov. Andrew M. Cuomo, *Governor Cuomo Announces Updated Zone Metrics, Hospital Directives and Business Guidelines* (Dec. 11, 2020), https://www.governor.ny.gov/news/governor-cuomo-announces-updated-zone-metrics-hospital-directives-and-business-guidelines.

[13] *Governor Cuomo Announces New Cluster Action Initiative*, *supra* at 17 n.10; Gov. Andrew M. Cuomo, *Governor Cuomo Announces Updated COVID-19 Micro-Cluster Focus Zones* (Nov. 9, 2020), https://www.governor.ny.gov/news/governor-cuomo-announces-updated-covid-19-micro-cluster-focus-zones-0.

[14] Between November 23, 2020 and January 27, 2021, there were two yellow zones in Suffolk County, neither of which included Oakdale, where Dark Storm is located. *See* Gov. Andrew M. Cuomo, *Governor Cuomo Announces Updated COVID-19 Micro-Cluster Focus Zones* (Nov. 23, 2020), https://www.governor.ny.gov/news/governor-cuomo-announces-updated-covid-19-micro-cluster-focus-zones-4; Briana Bonfiglio, *Covid-19 Yellow Zone Restrictions Lifted in Four Long Island Communities*, Long Island Press (Jan. 27, 2021), https://www.longislandpress.com/2021/01/27/covid-19-yellow-zone-restrictions-lifted-in-four-long-island-communities/.

zone at some point in the future, it would still be able to deliver firearms and ammunitions to its customers. Even in red zones—the most restrictive of zone designations—Dark Storm's customers would be able to order firearms through its website and take possession of them via curbside pickup while a Dark Storm employee performs "the necessary administrative steps on a WiFi-enabled tablet or laptop" in the parking lot. (A. 57 (affidavit of Dark Storm employee).)

The State continues to make progress in combatting the pandemic. Beginning in late January 2021, the rate of infections in New York began to drop while the rate of vaccinations increased.[15] In February 2021, a third COVID-19 vaccine was authorized for use in the United States; unlike the other two approved vaccines, it requires only a single shot.[16]

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[15] Gov. Andrew M. Cuomo, *Governor Cuomo Announces New York's COVID-19 Positivity Rate Has Declined for 23 Straight Days* (Jan. 31, 2021), https://www.governor.ny.gov/news/governor-cuomo-announces-new-yorks-covid-19-positivity-rate-has-declined-23-straight-days; Gov. Andrew M. Cuomo, *Governor Cuomo Updates New Yorkers on State Vaccination Program* (Jan. 31, 2021), https://www.governor.ny.gov/news/governor-cuomo-updates-new-yorkers-state-vaccination-program-6.

[16] Johnson & Johnson, *Johnson & Johnson COVID-19 Vaccine Authorized by U.S. FDA For Emergency Use First Single-Shot Vaccine in Fight Against Global Pandemic* (Feb. 27, 2021), https://www.jnj.com/

Evidence indicates that each authorized vaccine is highly effective at preventing a wide range of COVID-19 related outcomes, most notably, hospitalizations or fatalities.[17] Mass vaccination sites have opened across the State.[18] As of March 29, 2021, over 3.3 million New Yorkers have been fully vaccinated with more than 1 million doses being administered each week.[19]

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johnson-johnson-covid-19-vaccine-authorized-by-u-s-fda-for-emergency-usefirst-single-shot-vaccine-in-fight-against-global-pandemic.

[17] *See, e.g.*, U.S. Centers for Disease Control and Prevention, *Interim Estimates of Vaccine Effectiveness of BNT162b2 and mRNA-1273 COVID-19 Vaccines in Preventing SARS-CoV-2 Infection Among Health Care Personnel, First Responders, and Other Essential and Frontline Workers* (Mar. 29, 2021), https://www.cdc.gov/mmwr/volumes/70/wr/mm7013e3.htm?s_cid=mm7013e3_w; Ronald Bailey, *Vaccines Are 100% Effective at Preventing COVID-19 Hospitalizations and Deaths*, Reason (Feb. 23, 2021), https://reason.com/2021/02/23/vaccines-are-100-effective-at-preventing-covid-19-hospitalizations-and-deaths/.

[18] Gov. Andrew M. Cuomo, *Governor Cuomo Announces 10 Additional State-Run Mass Vaccination Sites to Open in Coming Weeks* (Mar. 8, 2021), https://www.governor.ny.gov/news/governor-cuomo-announces-10-additional-state-run-mass-vaccination-sites-open-coming-weeks.

[19] DOH, *New York State COVID-19 Vaccine Tracker*, https://covid19vaccine.health.ny.gov/covid-19-vaccine-tracker (last visited March 29, 2021); Gov. Andrew M. Cuomo, *Governor Cuomo Announces New York Exceeds 200,000 Doses Administered over 24 Hours for the First Time* (Mar. 25, 2021), https://www.governor.ny.gov/news/governor-cuomo-

STANDARD OF REVIEW

This Court reviews summary judgment decisions de novo. *Garcia v. Hartford Police Dep't*, 706 F.3d 120, 126 (2d Cir. 2013). Summary judgment is warranted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). To show a genuine dispute, the non-movant must provide "hard evidence" from which "a reasonable inference in [its] favor may be drawn." *Hayes v. Dahlke*, 976 F.3d 259, 267 (2d Cir. 2020) (internal quotation marks omitted). "Conclusory allegations, conjecture, and speculation," *id.* (internal quotation marks omitted), as well as the existence of a mere "scintilla of evidence in support of the [non-movant's] position," *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986), are insufficient to create a genuinely disputed fact.

SUMMARY OF ARGUMENT

This appeal is moot. The challenged restriction, which applied statewide and did not allow for curbside or in-store pickup, has not been in effect since May 2020, and plaintiffs do not seek damages. Nor does

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announces-new-york-exceeds-200000-doses-administered-over-24-hours-first-time.

the "voluntary cessation" exception to mootness apply because there is no reasonable prospect that the State will reimpose another statewide ban on non-essential businesses' in-person operations. As testing capabilities have increased and a better understanding of the virus has developed, the State has refined its COVID-19 response such that any new limits on retailers have been confined to only those geographically discrete areas experiencing a surge in cases and, even at their most stringent, these limits allow retailers to use curbside pickup. For these reasons, as well as the substantial progress in vaccinating New Yorkers, there is no reasonable expectation that the challenged restriction will be reimposed.

If this Court reaches the merits, it should affirm. The district court correctly held that the State was entitled to summary judgment because plaintiffs failed to create any genuine factual dispute on their Second Amendment claim. The challenged restriction did not substantially burden the core Second Amendment right of self-defense and, thus, is subject to intermediate scrutiny at most. Even when this temporary limit on the maintenance of an in-person workforce was in effect, it left ample alternatives for Dark Storm's actual or potential customers to acquire firearms for self-defense. Numerous large retailers throughout New York

that sold goods deemed essential, like groceries, remained open for in-person shopping and could sell the firearms and ammunitions that they had in stock.

While plaintiffs on appeal make several arguments for why these retailers did not provide a constitutionally adequate alternative and why strict scrutiny applies, they waived these arguments by failing to raise them in the district court. Even if considered, these arguments are meritless. Lastly, the challenged restriction satisfies intermediate scrutiny because the undisputed record evidence establishes that it was substantially related to achieving the compelling state interest of combatting the COVID-19 pandemic.

ARGUMENT

POINT I

THIS APPEAL IS MOOT BECAUSE THE CHALLENGED RESTRICTION IS NO LONGER IN EFFECT AND THE "VOLUNTARY CESSATION" EXCEPTION DOES NOT APPLY.

"The mootness doctrine derives from Article III of the Constitution, which limits federal jurisdiction only to live cases or controversies." *Fuller v. Bd. of Immigr. Appeals*, 702 F.3d 83, 86 (2d Cir. 2012). A case becomes moot, and must be dismissed, when intervening events render

"it impossible for the court to grant any effectual relief whatever to a prevailing party." *Id.* (internal quotation marks omitted).

This appeal is moot because a federal court cannot grant plaintiffs any effectual relief. The restriction that plaintiffs challenged ceased to have effect over ten months ago when, on May 27, 2020, the Long Island region, where Dark Storm is located, entered Phase One of the State's reopening plan. *See supra* at 8-10. And plaintiffs do not seek damages. This Court should therefore dismiss the appeal "rather than issue an advisory opinion." *Fuller*, 702 F.3d at 86.

Contrary to the district court's holding (S.A. 13-14), the "voluntary cessation" exception to mootness is inapplicable. This exception is designed to "eliminate the incentive for a defendant to strategically alter its conduct in order to prevent or undo a ruling adverse to its interest." *E.I. Dupont de Nemours & Co. v. Invista B.V.*, 473 F.3d 44, 46-47 (2d Cir. 2006). Thus, as this Court has held, the exception does not require courts to entertain otherwise moot claims where there is no possibility that the cessation was a "last-minute attempt to evade federal court jurisdiction." *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 59 (2d Cir. 1992) (internal citations marks omitted); *see also, e.g.*, *Sze v.*

I.N.S., 153 F.3d 1005, 1008 (9th Cir. 1998) (noting that the exception requires the voluntary cessation to "have arisen *because of* the litigation") (emphasis in original), *abrogated on other grounds by United States v. Hovsepian*, 359 F.3d 1144 (9th Cir. 2004); *Leonard v. U.S. Dep't of Def.*, 598 F. App'x 9, 10 (D.C. Cir. 2015) (similar).

That principle applies here. Plaintiffs' lawsuit did not influence the Long Island region's entry into Phase One. Rather, this occurred because the spread of COVID-19 in the region had declined such that it met the seven health-related metrics, such as those relating to hospital capacity and new cases, set forth in the State's phased reopening plan. (A. 103.) The cases cited by the district court are thus distinguishable. Unlike here, they involve circumstances that suggest that a defendant may have ceased the challenged practice in a strategic attempt to avoid an adverse court decision. (S.A. 16.) *See Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 604 (2d Cir. 2016) (finding exception inapplicable where "suspicious timing and circumstances pervade" the cessation); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) (same where defendant had previously responded to litigation by repealing legislation and then later reenacting it).

Further, the "voluntary cessation" exception does not apply because—whatever may have been the case when the district court issued its decision in July 2020—there is no longer any "reasonable expectation" that the State would reimpose the challenged restriction. *Lamar Advert. of Penn, LLC v. Town of Orchard Park, New York*, 356 F.3d 365, 375 (2d Cir. 2004) (internal quotation marks omitted). This Court generally defers to a state's representation that the conduct at issue is not "reasonably likely to recur." *Lillbask ex rel. Mauclaire v. State of Conn. Dep't of Educ.*, 397 F.3d 77, 89 (2d Cir. 2005). And, in this case, there is no reasonable prospect that the challenged restriction—a statewide ban on non-essential businesses' in-person operations which did not allow for curbside pickup—will recur. *See id.*

First, as the pandemic and knowledge of the virus has evolved, so too has the State's response. The challenged restriction was in effect only for a two-month period at the start of the pandemic. Since lifting the restriction in May 2020, the State has not reimposed it—even during the resurgence of COVID-19 that began in the fall of 2020. At its peak, the number of new cases reached all-time highs, and hospitalizations and fatalities surged. *See supra* at 15-16. Yet, contrary to the district court's

prediction, this "second wave" did not force New York "to shut down once again." (S.A. 15.) Indeed, throughout the resurgence, the State refrained from imposing *any* new statewide or regionwide limit that would have required retailers to reduce their in-person workforce, much less close for in-person shopping. These events demonstrate "more than a mere voluntary cessation of allegedly illegal conduct." *Preiser v. Newkirk*, 422 U.S. 395, 402 (1975) (internal quotation marks and alterations omitted).

Second, and relatedly, another intervening development—namely, increased testing capabilities—has enabled the State to further refine its COVID-19 response. Under the State's Cluster Action Initiative, instituted in October 2020, the State employs testing data to pinpoint COVID-19 clusters and confine additional restrictions to those discrete geographic areas. Indeed, Dark Storm, like most businesses, has never been subject to that initiative. And even if the initiative's limits were to apply to Dark Storm, those limits would not prevent it from transacting with the public. In areas designated orange and yellow zones, the initiative imposes *no* additional restrictions on retailers. *See supra* at 17-18. And in red zone restrictions, which have not been implemented since early November 2020, retailers may operate for curbside pick-up—a

method that would allow Dark Storm to continue transacting with its customers *See supra* at 17, 19. The emergence of this calibrated approach reinforces that there is no reasonable prospect that the State will revert to a total statewide bar on non-essential businesses' in-person workforce.

Third, this conclusion is reinforced by still another development since the district court's July 2020 decision: there are now authorized COVID-19 vaccines. The evidence indicates that the vaccines are highly effective, especially at preventing COVID-19 cases that lead to hospitalizations and deaths—namely, the kinds of cases that necessitate additional limitations. (*See* A. 248 (emphasizing that COVID-19 measures are designed to prevent a surge in cases that could overwhelm New York's health care system).) As more vaccines are administered, they are expected to blunt, if not prevent, future resurgences in hospitalizations and deaths. Indeed, as of March 29, 2021, over 3.3 million New Yorkers have been fully vaccinated, and more than 1 million vaccine doses are being administered each week. *See supra* at 19-20. The rollout of mass vaccinations makes the possibility that the State will revert to the challenged restriction all the more "theoretical and speculative." *Lillbask*, 397 F.3d at 87.

Accordingly, this appeal does not fit within the "voluntary cessation" exception and should be dismissed as moot.

POINT II

PLAINTIFFS' CLAIM FAILS ON THE MERITS BECAUSE THE CHALLENGED RESTRICTION DID NOT VIOLATE THE SECOND AMENDMENT

If this Court reaches the merits, it should affirm the holding that plaintiffs' claim under the Second Amendment fails as a matter of law. To evaluate a Second Amendment claim, this Court applies a two-step inquiry. *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo* (*NYSPRA*), 804 F.3d 242, 254 (2d Cir. 2015). At the first step, the Court asks "whether the restriction burdens conduct protect by the Second Amendment." *Id.* If not, the inquiry ends, and the challenged measure is upheld. *Id.* Otherwise, this Court proceeds to the second step, in which it "must determine and apply the appropriate level of scrutiny." *Id.*

In applying this framework, this Court has "routinely" refrained from resolving under the inquiry's first step whether a restriction actually burdens a Second Amendment right if, under the second step, the challenged restriction withstands the highest level of scrutiny that could potentially apply. *United States v. Jimenez*, 895 F.3d 228, 234 (2d

Cir. 2018) (collecting cases). The same course is appropriate here. As explained below, even assuming that the challenged restriction imposed a non-nominal burden on the Second Amendment rights of Dark Storms' actual or potential customers, it is constitutional because it passes muster under the highest level of scrutiny appropriate. *Id.*

A. The challenged restriction is subject to intermediate scrutiny at most.

To determine the appropriate level of scrutiny, this Court considers "(1) how close the law comes to the core of the Second Amendment right and (2) the severity of the law's burden on the right." *NYSPRA*, 804 F.3d at 254 (internal quotation marks omitted). Following the Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), this Court has interpreted the core of the Second Amendment to include the right of "law-abiding citizens" to use firearms "in common use" for self-defense. *NYSPRA*, 804 F.3d at 254-55 (quoting *Heller*, 554 U.S. at 625, 627).

A measure that places only an insubstantial burden on the core right—or a substantial burden on non-core rights—does not trigger strict scrutiny. *Libertarian Party of Erie Cty. v. Cuomo*, 970 F.3d 106, 127 (2d Cir. 2020), *petition for cert. filed*, No. 20-1151 (U.S. Feb. 9, 2021). In such

instances, intermediate scrutiny is "the highest level of review potentially appropriate." *Id.*; *see, e.g.*, *Kwong v. Bloomberg*, 723 F.3d 160, 167 (2d Cir. 2013) (assuming without deciding that intermediate scrutiny applies to non-substantial burden on core right). Put differently, "heightened scrutiny is triggered only by those restrictions that (like the complete prohibition on handguns struck down in *Heller*) operate as a substantial burden on the ability of law-abiding citizens to possess and use a firearm for self-defense (or for other lawful purposes)." *Libertarian Party*, 970 F.3d at 127 (emphasis omitted) (quoting *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012)). A "marginal, incremental, or even appreciable restraint on the right to keep and bear arms" does not constitute a substantial burden. *Id.* (internal quotation marks omitted); *accord, e.g.*, *Kwong*, 723 F.3d at 167.

1. The challenged restriction did not impose a substantial burden on plaintiffs' Second Amendment rights.

Here, the challenged restriction on non-essential businesses' in-person operations is not subject to anything more than intermediate scrutiny because it did not substantially burden the rights of Dark

Storm's actual or potential customers to keep and bear arms.[20] That is because "adequate alternatives remain[ed] for law-abiding citizens to acquire a firearm for self-defense." *NYSPRA*, 804 F.3d at 259 (quoting *Decastro*, 682 F.3d at 168).

It is undisputed that, even when the restriction was in effect, the individual plaintiffs and others like them had access to numerous retailers where they could acquire firearms and ammunitions. (S.A. 20-23.) These retailers—which were deemed essential because, for example, they operated as grocery store—remained open to the public for in-person shopping and could sell firearms and ammunitions they had in stock. (A. 198.) Numerous such retailers were located throughout the State (A. 363-382), including at least three that were within a half-hour drive of Oakdale, New York, where Dark Storm was located (S.A. 20-21). *See, e.g.*, *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 678-80 (9th Cir. 2017) (en banc) (holding that prospective gun store failed to allege that ordinances

[20] Although Dark Storm itself does not enjoy Second Amendment rights, assuming it has derivative standing to assert the rights of others, that standing is limited to asserting the rights of its actual or potential customers. *See, e.g.*, *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 679 (9th Cir. 2017) (en banc).

burdened Second Amendment rights where potential customers of the store had access to various other gun stores).

Two additional circumstances lessened the severity of any burden that the challenged restriction may have caused. First, the restriction was temporary: it applied for two months at the outset of the pandemic and then ceased to have effect. (A. 201.) Second, it did not "prevent, restrict, or place any conditions on how guns are stored or used after a purchaser takes possession." *Silvester v. Harris*, 843 F.3d 816, 827 (9th Cir. 2016) (holding that ten-day waiting period did not impose a substantial burden). At most, the challenged restriction may have delayed the time it took for a Dark Storm customer to take possession of a firearm. But there is "nothing new in having to wait for the delivery of a weapon." *Id.* For "our 18th and 19th century forebears," "delays of a week or more" were "routinely accepted as part of doing business." *Id.* Citizens from that time would have also been accustomed to the significant disruptions to daily life wrought by epidemics and attendant health measures. *See generally* John Fabian Witt, *American Contagions: Epidemics and the Law from Smallpox to COVID-19* 13-26 (2020) (cataloguing "formidable measures to guard against disease," including

quarantines, enacted by state legislatures and officials throughout the 18th and 19th centuries).

Indeed, the courts that have addressed challenges to COVID-19-related orders that have closed businesses, including firearm retailers, have reasoned that that such time-limited measures do not impose a substantial burden on Second Amendment rights, even when—unlike here—they did not provide alternatives for acquiring firearms. *See Altman v. Cty. of Santa Clara*, 464 F. Supp. 3d 1106, 1126 (N.D. Cal. 2020); *McDougall v. Cty. of Ventura*, __ F. Supp. 3d __, 2020 WL 6532871, at *8 (C.D. Cal. Oct. 21, 2020), *appeal docketed*, No. 20-56220 (9th Cir. 2020); *Brandy v. Villanueva*, No. 20 Civ. 2874, 2020 WL 3628709, at *3 (C.D. Cal. Apr. 6, 2020). As the district court in *McDougall* explained, the challenged order—in effect from March to May 2020—did not "substantially burden the core right of the Second Amendment," and was subject to intermediate scrutiny, because it was "temporary," did not "specifically target Second Amendment activities," and did not

categorically ban "the ownership of arms." 2020 WL 6532871, at *2, *8. The same is true here.

2. Plaintiffs waived their arguments for the application of strict scrutiny and, in any event, these arguments are meritless.

Plaintiffs' arguments for subjecting the challenged restriction to strict scrutiny are unavailing. As a threshold matter, plaintiffs waived these arguments by not raising them below. *See In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 133 (2d Cir. 2008). As the district court noted, plaintiffs "fail[ed] to argue for *any* form of heightened scrutiny." (S.A. 9 (citing A. 36-37) (emphasis added); *see also* D. Ct. Dkt. No. 27, at 3-6.) Rather, they asserted that the challenged restriction was per se unconstitutional and rested this assertion on a single factual claim: under the restriction, "persons throughout the state were . . . *wholly unable* to purchase firearms or ammunition." (D. Ct. Dkt. No. 27 at 4 (emphasis added); A. 33, 36-37.) But this claim was false. The district court correctly found that the undisputed record evidence demonstrated that "numerous businesses selling firearms remained open during the shutdown." (S.A. 18, 22.)

On appeal, plaintiffs concede that the challenged restriction did not bar all New Yorkers from acquiring firearms. (Br. at 8-9.) Yet they raise three arguments for why strict scrutiny should nonetheless apply, none of which they raised in the district court. Plaintiffs do not explain their failure to raise these arguments below and this Court should not consider them. *See Sczepanski v. Saul*, 946 F.3d 152, 161 (2d Cir. 2020). Regardless, all three arguments are meritless.

First, plaintiffs assert that, although Dark Storm's customers could have acquired firearms from numerous other retailers, the challenged restriction still imposed a substantial burden because such retailers did not provide "adequate alternatives." (Br. at 9-10.) But plaintiffs fail to support the claim that these alternatives were inadequate. *See Kwong*, 723 F.3d at 168 n.15 (holding that, to avoid summary judgment, a plaintiff must "put forth *at least some* evidence to suggest that a [restriction] operates as a 'substantial burden' on Second Amendment rights"). The record contains no evidence indicating (i) what types of constitutionally protected firearms Dark Storm sells to the public, (ii) whether the numerous retailers that remained open for in-person transactions did not sell those items, or (iii) whether Dark Storm's actual

or potential customers lacked access to these retailers. Although the record suggests that Dark Storm, unlike other stores that were open and sold firearms, is a "dedicated gun shop" (Br. at 10), the Second Amendment does not "guarantee[] a certain type of retail experience." *Teixeira*, 873 F.3d at 680 n.13. Nor does it "elevate convenience and preference over all other considerations." *Id.*

Second, plaintiffs argue that the challenged restriction imposed a substantial burden because, while in effect, it prevented one of the individual plaintiffs, Kevin Schmucker, from "tak[ing] delivery of the shotgun he had bought" from Dark Storm before the restriction was implemented. (Br. at 11.) To support this claim, plaintiffs cite to an allegation in their complaint that Schmucker had bought a shotgun from Dark Storm. (Br. at 4, 9 (citing A. 7).) But unsworn allegations are not evidence and cannot defeat summary judgment. *See Hayes*, 976 F.3d at 267 (to create a genuine fact dispute, non-movant must cite evidence, not allegations).

Even if plaintiffs had supported this argument with competent evidence, it is baseless. That a Dark Storm customer may have been temporarily delayed in taking delivery of an already-purchased firearm

fails to suggest that the challenged restriction substantially burdened the core of the Second Amendment right. This one-time delay was time limited and, in the interim, that customer could have gone shopping at one of the many retailers that sold firearms and were open for in-person purchase, including retailers on Long Island. *See supra* at 32-33.[21] *See, e.g.*, *Kwong*, 723 F.3d at 167-68 (noting that the fact that a measure "makes the exercise of one's Second Amendment rights more expensive does not necessarily mean that it 'substantially burdens' that right").

Third, plaintiffs argue that strict scrutiny applies because the restriction resulted in "disparate treatment" of "gun stores as compared to other types of business," namely, those that were deemed essential and thus exempt from the ban on maintaining any in-person workforce. (Br. at 7, 13.) To make this argument, plaintiffs attempt to import the analysis applicable to free exercise claims under the First Amendment, specifically the principle that a law that substantially burdens religious

[21] Indeed, plaintiffs' own complaint further undercuts their argument. It alleges that Schmucker wished to buy a "long gun," which is defined as "any rifle[] or shotgun[]." (A. 6-7.) *See Juzumas v. Nassau Cty.*, 417 F. Supp. 3d 178, 180 (E.D.N.Y. 2019) ("Rifles and shotguns are known as long guns or longarms."). Yet, even when the challenged restrictions were in effect, at least three retailers near Dark Storm were open for in-person shopping and sold "long guns." (S.A. 20, R. 365.)

exercise triggers strict scrutiny, unless it is neutral and generally applicable. *See, e.g.*, *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020); *Employment Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 879, 883 (1990).

This argument is without merit. As noted by the district court, the record contains "no evidence" that the State sought to "target Second Amendment (or any other) rights." (S.A. 30.) Nor should the Free Exercise Clause's neutrality principle be used to displace settled Second Amendment doctrine. While this Court consults First Amendment principles to assess "whether a law substantially burdens Second Amendment rights," it has cautioned against "'import[ing] substantive First Amendment principles wholesale into Second Amendment jurisprudence." *NYSRPA*, 804 F.3d at 259; *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 91 (2d Cir. 2012) (declining to extend First Amendment prior-restraint doctrine into the Second Amendment arena); *accord, e.g.*, *United States v. Focia*, 869 F.3d 1269, 1284 (11th Cir. 2017). And subjecting to strict scrutiny *any* law that regulates firearm retailers more strictly than other retailers would contravene the presumption of

lawfulness that attaches to "laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626-27 & n.26.

Plaintiffs' reliance on First Amendment principles must be rejected on its own terms because they fail to make the threshold showing of a substantial burden on the exercise of the constitutional right at issue. As courts have emphasized, the Second Amendment does not "independently protect proprietors' right to *sell* firearms." *Teixeira*, 873 F.3d at 673 (emphasis added); *see also, e.g.*, *United States v. Chafin*, 423 F. App'x 342, 344 (4th Cir. 2011). Rather, Dark Storm is at most a "mere prox[y] arguing another's constitutional rights." *Teixeira*, 873 F.3d at 689 (internal quotation marks omitted). Consequently, the Second Amendment inquiry turns not on the seller of firearms, but rather the "individual right to keep and bear arms." *Heller*, 554 U.S. at 595. Where, as here, any burden on that right is not substantial, intermediate scrutiny is "the highest level of review potentially appropriate." *Libertarian Party*, 970 F.3d at 127.

B. The challenged restriction passes intermediate scrutiny because it was substantially related to curbing the spread of COVID-19.

As the district court held, the challenged restriction easily passes muster under intermediate scrutiny. (S.A. 23-32.) Plaintiffs on appeal do not challenge this holding. (Br. at 12-13.) Thus, they have waived the issue and this Court should decline to address it on this ground alone. *See Gachette v. Metro-N. Commuter R.R. Co.*, 804 F. App'x 65, 67 (2d Cir. 2020) (summary order).

Regardless, the district court correctly held that plaintiffs had failed to create a genuine fact dispute as to whether the challenged restriction satisfies intermediate scrutiny. A measure passes such scrutiny if it is "substantially related to the achievement of an important governmental interest." *Libertarian Party*, 970 F.3d at 128 (internal quotation marks omitted). Unlike with strict scrutiny, the measure need not be "narrowly tailored" or the "least restrictive available means to serve the stated governmental interest." *NYSRPA*, 804 F.3d at 261. As long as the State produce evidences that "fairly supports" its rationale, the challenged measure "will pass constitutional muster." *Id.* (internal quotation marks and alterations omitted).

The challenged restriction satisfies this standard. The State has a compelling interest in combatting the spread of COVID-19. *See Roman Catholic Diocese*, 141 S. Ct. at 67. And the restriction was substantially related to that interest. By requiring businesses to close in-person operations, other than those select businesses deemed essential, the challenged restriction sought to limit the primary mode of COVID-19 transmission: face-to-face interactions, especially among people from different households. (A. 298.) Plaintiffs, in fact, admit that "[c]losing stores slows the spread of the virus by limiting physical interaction," "both in the businesses and at other locations by limiting the risk of exposure." (*Compare* A. 104, *with* D. Ct. Dkt. No. 26-1.)

The undisputed public health evidence amply supported the State's rationale. *See NYSRPA*, 804 F.3d at 261. At the start of the pandemic, there was no known vaccine or treatment. (A. 113, 138.) Given the virus's two-week incubation period, people could spread the virus for days before they realize that they were sick. (A. 294, 298.) And the lack of adequate testing supplies further inhibited the State's ability to identify where and how the virus spread. (A. 135-36.)

Thus, as was undisputed below, density reduction measures that limited the opportunity for in-person interactions—like the challenged restriction—were accepted as the most effective way, and potentially only way, to curb COVID-19 transmission. (A. 102, 125-26, 299; D. Ct. Dkt. No. 26-1.) Indeed, guidance from the U.S. Centers for Disease Control and Prevention advised people to "work from home when possible" and cautioned against in-person shopping. (A. 298.) It explained, "it is important to stay away from others when possible, even if you—or they—have no symptoms." (A. 299-300.)

Plaintiffs' only counterargument—again raised for the first time on appeal—appears to be that by closing some, but not all, firearm retailers to the public, the challenged restriction "require[d] prospective purchasers of firearms to travel additional distances," which "is directly contrary to the goal of reducing transmission of the virus." (Br. at 9.) Because plaintiffs failed to make this argument below, it is waived and should not be considered. *See In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d at 133.

In any event, plaintiffs' assertion is not supported by evidence. The "mere possibility that some subset of people" may have responded to the

challenged restriction by engaging in behavior that may have increased the risk of spreading the virus does not make the restriction unconstitutional. *NYSPRA*, 804 F.3d at 263 (rejecting argument that measures "impair[ed] the very public-safety objectives they were designed to achieve" where argument was made "without record evidence"). Rather, to pass intermediate scrutiny, the fit between the challenged measure and the government interest "need only be substantial, not perfect." *Kachalsky*, 701 F.3d at 97 (internal quotation marks omitted). Viewed in its full context, the temporary restriction on the in-person operations for businesses deemed non-essential fit well within the State's goal of curbing COVID-19. It applied to "hundreds of categories of businesses" (A. 104) and, as the district court held, "necessarily reduce[d] person-to-person interactions—and, concomitantly, the risk of spread—below what they would otherwise be." (S.A. 28-29.) For these reasons, the challenged restriction readily satisfies intermediate scrutiny.

CONCLUSION

The Court should dismiss the appeal as moot. Alternatively, the Court should affirm the district court's order granting summary judgment in favor of defendants-appellees.

Dated: Albany, New York
March 29, 2021

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for Defendants-Appellees

By:
/s/ *Dustin J. Brockner*
DUSTIN J. BROCKNER
Assistant Solicitor General
The Capitol
Albany, New York 12224
(518) 776-2017
dustin.brockner@ag.ny.gov

BARBARA D. UNDERWOOD
Solicitor General
JEFFREY W. LANG
Deputy Solicitor General
DUSTIN J. BROCKNER
Assistant Solicitor General
Of Counsel

CERTIFICATE OF COMPLIANCE

The foregoing Brief for Defendants-Appellees complies with Federal Rule of Appellate Procedure 32(a)(7)(B) and Local Rule 32.1(a)(4)(A) because it is proportionately spaced, has a typeface of 14 points, and contains **8,431** words, not counting the words excepted by Federal Rule of Appellate Procedure 32(f).

/s/ *Dustin J. Brockner*
DUSTIN J. BROCKNER
Assistant Solicitor General
The Capitol
Albany, New York 12224
(518) 776-2017
dustin.brockner @ag.ny.gov