

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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BENJAMIN HEETER, *et al.*,

*Plaintiffs,*

v.

LETITIA JAMES, *et al.*,

*Defendants.*

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Civil Action No.:

1:24-cv-00623-JLS

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO  
DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT AND  
REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

Respectfully Submitted,

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### PRELIMINARY STATEMENT

The individual right to self-defense is the “central component” of the Second Amendment. *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008). Americans’ right to purchase, possess, and use arms for self-defense, including purely defensive arms, is explicitly protected against government infringement. New York’s ban on ordinarily, law abiding citizens purchasing purely defensive arms is not just morally bankrupt, it is unconstitutional.

Plaintiffs’ motion for summary judgment should be granted. Plaintiffs have proved there are no triable issues of fact, and they are entitled to judgment as a matter of law, on these points: (1) “Arms” encompasses armor; (2) body armor is in common use for lawful purposes; (3) there is no well-established mainstream American tradition banning armor; and (4) body armor—a purely defensive arm—is not “unusually dangerous.” ***First***, the Defendants provided no persuasive reason why this Court should ignore the United States Supreme Court’s definition of “Arms.” ***Second***, Plaintiffs submitted evidence on which a reasonable fact finder can conclude that body armor is in common use, because it is legal in every state other than New York, and the market demand for civilian body armor—served by at least 70 manufacturers—is substantial and growing. The State Defendants did not raise a fact issue by responding with evidence that body armor is “highly unusual,” and conceded that body armor is commonly used by law enforcement and “eligible professions,” which is sufficient for constitutional purposes. ***Third***, Defendants did not identify a well-established tradition to rebut Plaintiffs’ prima facie case that none exists. ***Fourth***, Defendants did not proffer evidence to raise a triable issue of fact on whether a purely defensive tool like body armor itself is dangerous, let alone “unusually dangerous.” Defendants failed to submit

evidence sufficient to raise triable issues of material fact, and lose on these points as a matter of law. Plaintiffs' motion for summary judgment should be granted.

By contrast, the State Defendants' motion for summary judgment should be denied. They have not carried their burden. To prevail on their cross-motion, they would have needed to prove there are no triable issues of fact, and they are entitled to judgment as a matter of law, on these points: (1) "Arms" does not encompass armor (even though the Supreme Court says it does); (2) body armor is not in common use for lawful purposes (but is instead highly unusual in society at large); (3) the Body Armor Ban fits within a well-established mainstream American tradition of arms regulation (even though it is an outlier); and (4) body armor is "unusually dangerous" (even though it is purely defensive).

The State Defendants do not succeed on any of these points. *First*, the Supreme Court defined "Arms" for purposes of the Second Amendment to include "armour of defence." *Heller*, 554 U.S. at 581. *Second*, the State Defendants submitted no evidence on which a reasonable fact finder could conclude that body armor is "highly unusual," and conceded that it is commonly used for lawful purposes. *Third*, the State Defendants did not identify a well-established American tradition, satisfying the "how" and "why" criteria, into which the Body Armor Ban fits. Instead, they relied on Ancient Greece and the monarchs of Medieval England, because in America, the Body Armor Ban is the first of its kind. *Fourth*, the State Defendants submitted no evidence on which a reasonable fact finder could conclude that body armor—a purely defensive arm—is "uniquely designed to create mayhem," *Nat'l Ass'n for Gun Rts. v. Lamont*, 153 F.4th 213, 223, 242 (2d Cir. 2025) ("*NAGR*"), and therefore cannot show that body armor is "unusually dangerous." Because the State Defendants have not met the summary judgment standard on any of these points, their motion should be denied.

**ARGUMENT****POINT I****PLAINTIFFS HAVE STANDING TO CHALLENGE THE BODY ARMOR BAN**

The State Defendants and District Attorney Keane assert that neither FPC nor the Individual Plaintiffs have standing to obtain an injunction against enforcement of the Body Armor Ban.<sup>1</sup> State Defs.’ Resp., at 2, 6–8. They are wrong under binding precedent.

To bring a “pre-enforcement challenge” to a criminal statute, Plaintiffs must show only that they harbor: “(1) ‘an intention to engage in a course of conduct arguably affected with a constitutional interest’; (2) that the intended conduct is ‘proscribed by’ the challenged law; and (3) that ‘there exists a credible threat of prosecution thereunder.’” *Vitagliano v. Cnty. of Westchester*, 71 F.4th 130, 136 (2d Cir. 2023) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014)); accord *Knight v. City of New York*, 164 F.4th 173, 179 (2d Cir. 2026) (applying the same analysis to a pre-enforcement challenge to gun regulations); *Frey v. City of New York*, 157 F.4th 118, 137 (2d Cir. 2025) (same); *Antonyuk v. James*, 120 F.4th 941, 1005 (2d Cir. 2024) (same).

The State Defendants do not dispute that neither Mr. Heeter (a medical device salesman) nor Mr. Wurtenberg (a 9-1-1 operator) can purchase body armor in New York, despite their averred intent to do so, because of the Body Armor Ban. *See* State Defs.’ Resp. to SOF, ¶¶ 3, 17, 18. Nor have the State Defendants disclaimed that there is a credible threat of prosecution under the Body Armor Ban were Plaintiffs to purchase body armor, conceding it “has been consistently enforced by the State Police.” *Id.* ¶¶ 13, 14. Instead, the State Defendants raise a potpourri of “standing” objections, none of which disputes that the

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<sup>1</sup> Unless otherwise noted herein, defined terms are as used in Plaintiffs’ Opening Brief.

Individual Plaintiffs are foregoing the purchase of body armor in the face of a credible threat that all Defendants will enforce the Body Armor Ban against them.

The Court should reject those arguments in full.

**A. The Individual Plaintiffs’ present intent to purchase more body armor satisfies standing.**

The State Defendants raise two points in support of their argument that the Individual Plaintiffs lack standing. *First*, they maintain that an “expressed desire to purchase replacement body armor at some unspecified time in the future” is insufficient. State Defs.’ Resp., at 7. *Second*, they suggest that the desire for replacement armor is the entire predicate for the Individual Plaintiffs’ injury. *Id.* The State Defendants are wrong on both grounds.

**1. Mr. Heeter intends to purchase body armor.**

Mr. Heeter avers that he “would immediately purchase and possess,” and in fact “would have already purchased,” various types of proscribed body armor, but for the Body Armor Ban. Decl. of B. Heeter, ¶¶ 3, 4, Ex. M (ECF No. 69-4). Mr. Heeter also testified that he presently owns and uses body armor that is proscribed and has an intent to “replace” it when it expires. Decl. of R. Belka Ex. A, Dep. 19:11–25, 21:6–22 (ECF 77-6).

**2. Mr. Wurtenberg intends to purchase body armor.**

Mr. Wurtenberg likewise avers that he “would immediately purchase and possess,” and in fact “would have already purchased,” various types of proscribed body armor, but for the Body Armor Ban. Decl. of J. Wurtenberg, ¶¶ 3, 4, Ex. N (ECF No. 69-4). Mr. Wurtenberg testified to an intent to “replace” the body armor he already owned when it expires in the coming years. Decl. of R. Belka Ex. B, Dep. 61:1–13 (ECF 77-6).

**3. The Individual Plaintiffs’ declared intent is sufficient to satisfy standing.**

The undisputed evidence establishing both Individual Plaintiffs’ present intent to purchase body armor and their decision to forego that purchase to “comply with the law solely to avoid prosecution,” affords them “standing to bring a pre-enforcement challenge.” *Frey*, 157 F.4th at 137. As the Body Armor Ban is presently in effect and Plaintiffs are unwilling to hazard prosecution, it is not only unnecessary, but absurd, to require them to offer “the time and date” on which they would go ahead and (illegally) purchase body armor. *Antonyuk*, 120 F.4th at 1015. Nor does the fact that Plaintiffs also harbor an intent to purchase additional or replacement body armor in the future, as needed, render this present injury “conjectural or hypothetical.” *Dearth v. Holder*, 641 F.3d 499, 503 (D.C. Cir. 2011) (holding plaintiff was “not alleging merely an ‘injury at some indefinite future time,’ he claims he presently suffers a cognizable injury to his constitutional rights because the federal regulatory scheme thwarts his continuing desire to purchase a firearm” (internal citation omitted)) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 n.2 (1992)).

**B. The Individual Plaintiffs’ prior-owned body armor does not moot their constitutionally protected right to buy more.**

The State Defendants “dispute that Plaintiffs Heeter and Wurtenberg are injured by the ban as they both own body armor.” State Defs.’ Resp. to SOF, ¶ 16. But the right to keep and bears “arms” neither knows any numerical limitation on how many may be obtained, nor does it permit the State of New York to define such a limit based on its skewed assessment of whether its citizens “need to purchase more.” State Defs.’ Resp., at 8.

To be sure, it is undisputed that Messrs. Heeter and Wurtenberg presently own body armor.<sup>2</sup> But that does not somehow nullify their individual right to purchase “arms” or otherwise exempt the Body Armor Ban from constitutional scrutiny. The Second Amendment applies to regulations limiting the purchase, and not merely ownership, of arms. *United States v. Vereen*, 152 F.4th 89, 95 (2d Cir. 2025) (“Of course, to ‘keep’ and ‘bear’ arms, one must also be able to acquire them and maintain them in operable condition.”).

That includes regulations purporting to limit the number of arms one may possess. *Nguyen v. Bonta*, 140 F.4th 1237, 1242 (9th Cir. 2025) (“[W]e easily conclude that the plain text of the Second Amendment protects the right to possess multiple firearms” and noting that “[t]he D.C. Circuit has held that limiting the number of firearms an individual can purchase or register within a 30-day period interferes with ‘an individual’s undoubted constitutional right to keep arms (plural) in his or her home.’”) (quoting *Heller v. District of Columbia (Heller III)*, 801 F.3d 264, 280 (D.C. Cir. 2015)).

Mr. Heeter’s and Mr. Wurtenberg’s “proposed course of conduct” to buy additional body armor “is at least arguably affected with a constitutional interest,” which is all that is needed for a pre-enforcement challenge. *Knight*, 164 F.4th at 179. Because the Second Amendment does not guarantee only the right to keep and bear an “arm,” Plaintiffs’ ownership of body armor does not undermine their desire to purchase more or their standing to challenge Defendants’ efforts to infringe on their right to do so.

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<sup>2</sup> Decl. of R. Belka Ex. A, Heeter Dep. 19:11–14, 21:4 – 22; Decl. of R. Belka Ex. B, Wurtenberg Dep. 37:3–15, 42:7–10, 47:16–18, 44:4–7 (ECF 77-6).

**C. The Individual Plaintiffs need not prove job-based-risk or seek an exemption Before challenging the sweeping Body Armor Ban.**

The State Defendants also contend that the Individual Plaintiffs lack standing because they “have failed to verify whether their employment status qualifies them for an exemption under New York Executive Law § 144-a.” State Defs.’ Resp., at 8. To be sure, Plaintiffs Heeter and Wurtenberg may, theoretically, seek to have their “professions designated by the department of state,” N.Y. Penal Law § 270.21, which may “approve professions” “in which the duties may expose the individual to serious physical injury that may be prevented or mitigated by the wearing of body armor,” N.Y. Executive Law § 144-a; *see* N.Y.C.R.R. c. XIX, § 905.3. But the State Defendants’ argument falls apart for at least three reasons.

*First*, it is apparent, and the State Defendants do not dispute, that the Individual Plaintiffs’ professions as a medical device salesman and 911 operator are not among those exempt from the Body Armor Ban. Nor are those professions pending review. *See* N.Y. Dep’t of State, List of Eligible Professions, <https://dos.ny.gov/body-armor> (last visited May 29, 2026). As a result, the Individual Plaintiffs are barred from lawfully purchasing body armor.

*Second*, the State Defendants identify no reason to believe that the job duties of medical device salesmen or 911 operators meet the criteria for such an exemption. Thus, Plaintiffs have no reasonable prospect of being able to “present proof of engagement in an eligible profession,” which is necessary to purchase body armor. N.Y.C.R.R. c. XIX, § 905.6. Being ineligible to purchase body armor, and so subjected to the Body Armor Ban, Plaintiffs need not seek an exemption to challenge it.<sup>3</sup>

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<sup>3</sup> *See Bach v. Pataki*, 408 F.3d 75, 82 (2d Cir. 2005) (recognizing that a party who was “statutorily ineligible for a [] license” need not “complete an application” before challenging a gun ban); *see also Baughcum v. Jackson*, 92 F.4th 1024, 1035 (11th Cir. 2024) (“A plaintiff can satisfy the

*Third*, the objection that the Individual Plaintiffs should first persuade the government to authorize their profession to purchase body armor is not just wrong, it is “premised on . . . misapprehension of the nature of [their] claim.” *Antonyuk*, 120 F.4th at 979. Plaintiffs are not contending that they are “being denied a benefit that is not itself constitutionally guaranteed—*e.g.*, a club membership, admission to a private school, a job, a parking permit—for unconstitutional (or other unlawful) reasons.” *Brokamp v. James*, 66 F.4th 374, 387 (2d Cir. 2023). Nor is theirs a claim of discrimination in an otherwise lawful licensing program.<sup>4</sup> Rather, the constitutional affront here is created by the regime itself, which “bans ordinary citizens from purchasing . . . an entire class of arms—body armor—while authorizing the Department of State to exempt certain categories of favored groups.” Am. Compl. 20, ¶ 59.

Plaintiffs’ point is not that 911 operators and medical device salesmen have “a unique need for self-defense” or involve “duties [which] may expose the individual to serious physical injury that may be prevented or mitigated by the wearing of body armor” and so should be among the favored few. Instead, the thrust of Plaintiffs’ argument is that “no military or civil officer has the right or authority to disarm any class of people, thereby placing them at the mercy of others,” based on the State’s determination whether persons in their profession have “demonstrate[d] a unique need for self-defense.” *See N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 16, 63 (2022) (cleaned up).

Like the concealed carry regime struck down in *Bruen*, the Body Armor Ban “require[s] [professions] to show an atypical need for armed self-defense”—here, one that is

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injury-in-fact requirement even if his injury rests on a formal application he did not submit when that formal application would merely be a ‘futile gesture’ and he was otherwise ‘able and ready’ to apply.”).

<sup>4</sup> *See, e.g., Do No Harm v. Pfizer Inc.*, 126 F.4th 109, 118 (2d Cir. 2025) (“Ordinarily, to establish standing to challenge an allegedly discriminatory program, a plaintiff must apply to that program.”).

tethered to employment duties, ignoring self-defense generally—and so “necessarily prevent[s] ‘law-abiding, responsible citizens’ from exercising their Second Amendment right” to “‘bear’ arms in public for self-defense.” *Id.* at 33, 39 n.9. Just as in a speech licensing regime, “injury arises from the very fact of a licensure requirement which *presently* [disarms Plaintiffs]—under pain of criminal prosecution—from engaging in the” right to keep and bear arms. *Brokamp*, 66 F.4th at 388. Even if fairly applied, requiring that a person be in an eligible profession—or seek to show they are—to obtain body armor, is itself unconstitutional, because the Second Amendment is not a “constitutional right that an individual may exercise only after demonstrating to government officers some special need,” *Bruen*, 597 U.S. at 70. Plaintiffs contend that “the application *process* is unconstitutional,” *Antonyuk*, 120 F.4th at 979, so they are “*not* required to first apply for and be refused” an exemption.<sup>5</sup>

**D. FPC has standing to represent its members, including the individual plaintiffs.**

If this Court concludes “that the individual plaintiffs have standing to challenge” the Body Armor Ban, it “can proceed to the merits without considering whether” FPC, as an organizational Plaintiff, “has standing to advance the same challenges.” *New York State Firearms Ass’n v. James*, 157 F.4th 232, 243 n.2 (2d Cir. 2025). While one line of Second Circuit cases disapproves of representational standing under § 1983,<sup>6</sup> nothing prohibits such a holding

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<sup>5</sup> *Id.* at 980; *cf. Wilson v. Hawaii*, 145 S. Ct. 18, 21 (2024) (Statement of Thomas, J., joined by Alito, J., respecting denial of certiorari) (noting that “because the constitutional violation occurs as soon as an individual’s right to bear arms is inhibited” by a state statute requiring “a showing of ‘special need,’” “States cannot mandate that would-be gun owners go through an unconstitutional licensing process before they may invoke their Second Amendment rights”).

<sup>6</sup> *See e.g., Nnebe v. Daus*, 644 F.3d 147, 156 (2d Cir. 2011). Plaintiffs reserve their right to seek reversal of this precedent as contrary to decisions of the Supreme Court of the United States, including, but not limited to, *Warth v. Seldin*, 422 U.S. 490 (1975). Further, in contrast to *Nnebe*, another line of Second Circuit precedent, consisting of multiple Section 1983 appeals, recites that representational standing is available in such cases. *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d Cir. 1998) (Section 1983 case; applying the *Hunt* test); *New York Civil Liberties Union v. New York City Transit Auth.*,

for a claim under *Ex parte Young*. The Second Circuit allows equitable claims outside § 1983 to obtain solely prospective relief from constitutional violations by State officials.<sup>7</sup>

Plaintiffs have asserted such a claim, as the Amended Complaint both: “(1) ‘alleges an ongoing violation of federal law’ and (2) ‘seeks relief properly characterized as prospective.’” *Silva v. Farrish*, 47 F.4th 78, 84 (2d Cir. 2022) (citation omitted); see Am. Compl. ¶¶ 56–59, 61, 63. On that right of action, FPC has standing because: “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *New York State Nat. Org. for Women v. Terry*, 886 F.2d 1339, 1348 (2d Cir. 1989) (quoting *Hunt v. Washington State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977)); see also *Alliance for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 651 F.3d 218, 228 (2d Cir. 2011); *New York Pub. Interest Rsch. Grp. v. Whitman*, 321 F.3d 316, 325 (2d Cir. 2003).

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684 F.3d 286, 294 (2d Cir. 2012) (representational standing available in Section 1983 cases); *Citizens United to Protect Our Neighborhoods v. Vill. of Chestnut Ridge, New York*, 98 F.4th 386, 395 (2d Cir. 2024) (same); *Connecticut Parents Union v. Russell-Tucker*, 8 F.4th 167, 172 (2d Cir. 2021) (same); see also *Local 3599, NYC Dep’t of Env’t Prot. Tech. Pro. Emps. v. City of New York*, No. 23-cv-1035 (JGLC), 2024 WL 966077, at \*15 (S.D.N.Y. Mar. 6, 2024) (same); *Young Am.’s Found. v. Stenger*, No. 320-cv-0822 (LEK), 2023 WL 3559619, at \*21-24 (N.D.N.Y. May 19, 2023) (same).

<sup>7</sup> *Burgio & Campofelice, Inc. v. N.Y. State Dep’t of Lab.*, 107 F.3d 1000, 1006 (2d Cir. 1997) (“[W]e agree with those commentators who have concluded that ‘[t]he best explanation of *Ex parte Young* and its progeny is that the Supremacy Clause creates an implied right of action for injunctive relief against state officers who are threatening to violate the federal Constitution or laws.’”); see also *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324–27 (2015) (affirming vitality of the doctrine, but declining to find “a right of action” generally). The cases on which the State Defendants may rely, such as *Pauk v. Board of Trustees of City Univ. of N.Y.*, involve claims against governmental units, not officers for injunctive relief. 654 F.2d 856, 865 (2d Cir. 1981) ; accord *Fenner v. City of New York*, 392 F. App’x 892 (2d Cir. 2010); see also *Williams v. New York City Hous. Auth.*, 61 F.4th 55, 70 (2d Cir. 2023). As such, they are inapposite.

The Individual Plaintiffs, as members of FPC, have standing to sue, satisfying the first prong. Contra the State Defendants, there is no requirement that the “identified member [who] had suffered or would suffer harm” must be a non-party.<sup>8</sup> *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009); *cf. New York State Psychiatric Ass’n, Inc. v. UnitedHealth Grp.*, 798 F.3d 125, 131 (2d Cir. 2015) (finding associational standing and noting that “the participation of a limited number of individual members will [not] negate standing”). The undisputed declaration of Mr. Combs, President of FPC, establishes that protecting the right to keep and bear arms, including body armor, is a core part of FPC’s mission, satisfying the second prong.<sup>9</sup>

And the “relief requested” component of the third *Hunt* prong is met because FPC “seek[s] an injunction barring enforcement of the [Body Armor Ban], which will not necessitate the participation of individual members in the lawsuit.” *Alliance for Open Soc’y Int’l*, 651 F.3d at 229. In this suit, FPC seeks a “a purely legal ruling”—whether the Body Armor Ban violates the Second Amendment rights of FPC’s members—and prospective relief that “will inure to the benefit of those members of [FPC] actually injured,” “without requesting that the federal court award individualized relief to its members.”<sup>10</sup> With all three prongs satisfied, the Court should find that FPC has standing as well.

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<sup>8</sup> If there were, Professor Mark Braiman, formerly a plaintiff, has been identified and averred his standing. Decl. of Mark Braiman ¶¶ 2–6 (Sept. 27, 2024).

<sup>9</sup> Decl. of B. Combs, ¶ 3 (ECF 69-4); *see, e.g., Baughcum v. Jackson*, 92 F.4th 1024, 1031 (11th Cir. 2024) (“The interests at stake in this lawsuit—Second Amendment rights—are germane to the FPC’s purpose as an organization.”); *Terry*, 886 F.2d at 1349 (finding germaneness satisfied where shown that organization “dedicated to assuring the constitutional right” of persons seeking “access to family planning facilities”).

<sup>10</sup> *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714-15 (2d Cir. 2004); *see also New York State Psychiatric Ass’n, Inc.*, 798 F.3d at 131 (finding prong satisfied where relief would not “require significant individual participation or proof”).

**E. Attorney General James and the District Attorneys are proper Defendants because they have authority to enforce the Body Armor Ban, and have not disavowed it; the requested injunction would afford Plaintiffs relief.**

All Defendants variously assert that the Eleventh Amendment bars suit and that any injury in fact is not “fairly traceable” to them because they lack a “specific role in implementing or enforcing” the Body Armor Ban and so cannot “provide the requested relief.” State Defs.’ Resp., at 9 (ECF 77-1); *see also* Doorley Resp., at 1, 3 (ECF 76) (standing); Keane Resp., at 2–3 (ECF 75-3) (standing and sovereign immunity).

Both objections easily fail. Whether an injury-in-fact is fairly traceable to a particular officer in a pre-enforcement challenge, and so is caused and may be redressed by an injunction against enforcement, turns on whether “there exists a credible threat of prosecution” from that official. *Antonyuk*, 120 F.4th at 1004. It is not Plaintiffs’ burden to show an “intent by the government to enforce the law,” which is “presumed in the absence of a disavowal by the government” and by the fact that “the relevant statute is recent and not moribund.” *Id.* at 1005 (quotation marks omitted). The Second Circuit is clear that when a plaintiff “seeks to enjoin a newly enacted law aimed specifically at . . . the very conduct in which she intends to engage,” the injury “is fairly traceable to the challenged . . . law and can be redressed by her requested relief,” *Vitagliano*, 71 F.4th at 139–40, even without “previous enforcement actions or a stated threat of future prosecution,” *Antonyuk*, 120 F.4th at 1006. The requirement simply screens out “imaginary or wholly speculative” fears of prosecution. *Id.* at 1004–07.

What’s more, sovereign immunity is waived for “officials who threaten and are about to commence proceedings . . . to enforce against parties affected an unconstitutional act, violating the Federal Constitution” provided “that defendant” has “some connection with the enforcement of the act that is in continued violation of federal law.” *Walden v. Kosinski*, 153

F.4th 118, 133 (2d Cir. 2025) (internal quotation marks and citation omitted). “So long as there is such a connection, it is not necessary that the officer's enforcement duties be noted in the act.” *In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367, 373 (2d Cir. 2005). And a statute conferring on an official “jurisdiction of, and . . . responsib[ility] for, the execution and enforcement of” a statute also grants them “the requisite ‘special relation’ to the contested provision” under *Ex parte Young. Schulz v. Williams*, 44 F.3d 48, 61 n.13 (2d Cir. 1994).

Part of Plaintiffs’ injury is fairly traceable to, and redressable by an injunction against Attorney General James, who is not immune under the *Ex parte Young* exception. Attorney General James has enforcement duties for the Body Armor Ban’s civil fines under GBL § 396-eee and New York Executive Law 63(12), chasing suppliers out of the state. *See* Ex. F to Pls.’ App’x. Additionally, she has demonstrated a willingness to bring enforcement actions under New York Executive Law 63(12) for firearm violations. In fact, she has touted those actions specifically as part of a broader, ongoing commitment to gun control efforts, particularly against arms used by the Buffalo Shooter.<sup>11</sup> Attorney General James has not disavowed enforcement of the Body Armor Ban or shirked its defense. Rather, besides not conceding the illegality of the Body Armor Ban or disavowing any intent to enforce GBL § 396-eee, Attorney General James has made statements indicating she believes the Body Armor Ban to be lawful and has an intent to enforce GBL § 396-eee. *See* Exs. A, C, & D to Pls’ App’x.

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<sup>11</sup> Office of the Attorney General of New York, Attorney General James Sues Gun Accessory Manufacturer for Aiding Buffalo Shooter (May 11, 2023), <https://ag.ny.gov/press-release/2023/attorney-general-james-sues-gun-accessory-manufacturer-aiding-buffalo-shooter> (noting that “this lawsuit against Mean Arms is part of our ongoing effort to pursue justice for the ten innocent lives that were unjustly taken.”); Office of the Attorney General, Attorney General James Sues National Gun Distributors for Fueling Gun Violence Crisis and Endangering New Yorkers (June 29, 2022), <https://ag.ny.gov/press-release/2022/attorney-general-james-sues-national-gun-distributors-fueling-gun-violence-crisis> (quoting Attorney General James as promising to “use every tool necessary to root [illegal guns] out”).

Given Attorney General James’s lack of disavowal, along with her stated position regarding legality of the Body Armor Ban, her “continued interest in defending the constitutionality of” the Body Armor Ban, and her “general powers to enforce that stated position,” she is not entitled to sovereign immunity. *Walden*, 153 F.4th at 133–34. Moreover, an injunction against her enforcement would remove an injury-in-fact, by lawfully permitting manufacturers to sell, Ex. O to Pls.’ App’x, body armor to the Plaintiffs (including remotely), which is a “predictable effect” on “third parties” resulting from judicial relief against enforcement of GBL § 396-eee. *See Diamond Alternative Energy, LLC v. Env’t Prot. Agency*, 606 U.S. 100, 112, 116 (2025) (explaining that the “analysis of causation and redressability . . . recognize[s] commonsense economic realities”). This may be presumed, without “evidence from expert economists or from directly regulated third parties to show how third parties would likely respond to a government regulation or invalidation thereof.” *Id.* at 120–21. Even if an injunction against Attorney General James does not remove all prosecutorial risk, or grant Plaintiffs all the relief they seek, they have standing to seek partial relief against her.<sup>12</sup>

The same analysis applies to the District Attorneys, who have criminal prosecutorial duties to enforce N.Y. Penal Law § 270.21, and so fit squarely within the *Ex parte Young* exception. *See* Ex. F to App’x; N.Y. County Law 700(1) (“[I]t shall be the duty of every district attorney to conduct all prosecutions for crimes and offenses cognizable by the courts of the county for which he or she shall have been elected or appointed”). Whatever “the prosecution

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<sup>12</sup> *See Knight v. City of New York*, 164 F.4th 173, 179 (2d Cir. 2026) (“To satisfy Article III, a plaintiff must show that his requested relief would provide meaningful redress for *an* injury, not that it would relieve him of *every* injury.”); *cf. Loggerhead Turtle v. Cnty. Council of Volusia Cnty., Fla.*, 148 F.3d 1231, 1247 (11th Cir. 1998) (“On the other hand, standing is not defeated merely because the alleged injury can be fairly traced to the actions of both parties and non-parties.”); *see also Emilee Carpenter, LLC v. James*, 575 F. Supp. 3d 353, 369 (W.D.N.Y. 2021), *aff’d in pertinent part*, 107 F.4th 92 (2d Cir. 2024).

history of the statute,” including in Monroe<sup>13</sup> or Erie Counties (which has not been proffered), *Emilee Carpenter, LLC*, 575 F. Supp. at 369, it is still presumed that the government will enforce the law, particularly where it is of recent vintage and has not been disavowed.<sup>14</sup> As this reasonable fear of prosecution is an injury in fact, and an injunction will redress it, Plaintiffs may obtain that relief against the District Attorneys.<sup>15</sup>

## **POINT II**

### **THE BODY ARMOR BAN IS BOTH FACIALLY INVALID AND UNCONSTITUTIONAL AS APPLIED TO PLAINTIFFS BECAUSE IT PROHIBITS A SUBSTANTIAL AMOUNT OF PROTECTED ARMS BEARING**

Defendants contend that “Plaintiffs’ claims are fatally flawed because they advance a pre-enforcement facial challenge” to the Body Armor Ban. State Defs.’ Resp., at 10. This is wrong for at least two reasons. *First*, facial invalidation is appropriate because the statute “prohibits a substantial amount” of Plaintiffs’ Second Amendment protected rights. *United States v. Hansen*, 599 U.S. 762, 770 (2023). The State Defendants contend that the Body Armor Ban has a “plainly legitimate sweep” because it applies to violent criminals as well as law-abiding citizens. But there is nothing in the statute limiting its application to violent criminals (and other statutes already criminalize the use of body armor while committing violent

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<sup>13</sup> Doorley Resp. Mem. at 3 (claiming “no [record] evidence of any enforcement action by the Monroe County DA”); see Doorley Statement of Add’l Material Facts ¶ 26.

<sup>14</sup> See *Antonyuk*, 120 F.4th at 1004–07 (rejecting the view that prior prosecutions, threats, or even stated intentions to enforce a new law are required to create a “credible threat of enforcement”); see *Emilee Carpenter, LLC*, 575 F. Supp. at 368–69 (finding even disavowals insufficient given duty to enforce and fact that nothing prevents a change of position).

<sup>15</sup> *Knight*, 164 F.4th at 179 (holding that relief that would “[e]liminate [a] significant threat of criminal prosecution would provide . . . a sufficiently meaningful benefit to satisfy Article III’s redressability prong.”).

crimes).<sup>16</sup> If the State Defendants’ were correct, then the Supreme Court was wrong to facially invalidate the handgun ban in *Heller*, because the same argument would have applied there. *See City of Los Angeles, Calif. v. Patel*, 576 U.S. 409, 416 (2015) (confirming that *Heller* was facial); *see also People v. Burns*, 79 N.E.3d 159, 165–66 (Ill. 2025) (rejecting similar argument against facial invalidity of Illinois carry ban). The Body Armor Ban does nothing but place additional burdens on “law-abiding citizens” who seek to possess body armor for “lawful purposes,” *Heller*, 554 U.S. at 625. Thus, it is facially unconstitutional.

*Second*, Plaintiffs are also asking this Court to hold the Body Armor Ban unconstitutional as it applies to them. Though Plaintiffs did not expressly refer to an as-applied challenge in their First Amended Complaint, they pleaded facts sufficient to give rise to one. Am. Compl. ¶¶ 48–54. And, for the reasons stated above, discovery has borne out those allegations and established that Plaintiffs have standing to bring such a claim. *See, e.g., Field Day, LLC v. Cnty. of Suffolk*, 463 F.3d 167, 17–75 (2d Cir. 2006) (“An as-applied challenge . . . requires an analysis of the facts of a particular case to determine whether the application of a statute, even one constitutional on its face, deprived the individual to whom it was applied of a protected right.”) (internal quotations omitted)).

Plaintiffs are “ordinary, law-abiding, adult citizens,” and are, therefore, “part of the ‘people’ whom the Second Amendment protects.” *Bruen*, 597 U.S. at 31–32. And both “would immediately purchase and possess,” and in fact “would have already purchased,” various types of proscribed body armor but for the State’s unconstitutional acts. *See* Decl. of B. Heeter, ¶¶ 3, 4, Ex. M (ECF No. 69-4); Decl. of J. Wurtenberg, ¶¶ 3, 4, Ex. N (ECF No. 69-4). The

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<sup>16</sup> *See, e.g.*, 18 U.S.C. § 931(a); 34 U.S.C. § 10534(d)(1); U.S.S.G. § 2K2.6; N.Y. Penal § 270.20.

Body Armor Ban, however, prevents them from doing so because neither is a member of one of the favored “eligible profession.” Decl. of B. Heeter, ¶ 2, Ex. M (ECF No. 69-4) (medical device salesman); Decl. of J. Wurtenberg, ¶ 2 Ex. N (ECF No. 69-4) (911 dispatcher). Thus, the statute violates the Second Amendment as applied to them.

What’s more, nothing prevents Plaintiffs from seeking that relief at this stage of the proceedings, because it flows from the same claim they have pursued since inception.<sup>17</sup> The Supreme Court is clear that the distinction between facial and as-applied challenges “goes to the breadth of the remedy employed by the court, *not what must be pleaded in a complaint.*” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 331 (2010) (emphases added); *Bucklew v. Precythe*, 587 U.S. 119, 138 (2019) (“Surely it would be strange for the same words of the Constitution to bear entirely different meanings depending only on how broad a remedy the plaintiff chooses to seek.”); *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010) (noting “[t]he label is not what matters” when it comes to assessing whether a plaintiff is bringing as-applied or facial challenges to statutes); cf. Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1321 (2000) (“There is no single distinctive category of facial, as opposed to as-applied litigation.”).

And the “the Supreme Court has instructed [lower courts] to consider partial invalidation (and by extension, a provision’s severability), when evaluating facial challenges.”

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<sup>17</sup> The Supreme Court has rejected Defendants’ assertion that “‘pre-enforcement’ challenge[s] to a state law . . . must be strictly construed and evaluated solely as a facial challenge.” *See Chiles v. Salazar*, 146 S. Ct. 1010, 1020 (2026) (striking down a statutory provision under the First Amendment on the plaintiff’s as-applied, pre-enforcement challenge); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 234, 148–49 (2010) (considering an as-applied pre-enforcement challenge brought under the First Amendment).; *see also DoorDash, Inc. v. City of New York*, 789 F. Supp. 3d 337, 350 n.7 (S.D.N.Y. 2025) (“Although some Circuit precedent may seem to suggest that a pre-enforcement lawsuit must be construed as a facial challenge, the Supreme Court has eschewed any such bright line rule.”).

*NAGR*, 153 F.4th at 229 n. 16 (focusing review on an as-applied challenge under the Second Amendment); *see also Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 507 (1985) (holding “the Court of Appeals should have pursued” “partial invalidation”); *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (similar).

Against that backdrop, courts regularly allow plaintiffs to pursue as-applied challenges at summary judgment even if their complaints sought full statutory invalidation. *See, e.g., Am. Fed’n of State, Cnty. & Mun. Emps. Council 79 v. Scott*, 717 F.3d 851, 863-64 (11th Cir. 2013) (noting that “courts construe a plaintiff’s challenge, if possible, to be as-applied” especially when the plaintiff is “not stating a new claim, only clarifying the scope of [the] desired remedy”); *Stupak-Thrall v. United States*, 89 F.3d 1269, 1288 (6th Cir. 1996) (Boggs, J., dissenting) (“[U]nless a plaintiff expressly disavows an ‘as-applied’ challenge, the complaint that a regulation is invalid should be construed, if possible, as an as-applied challenge.”).<sup>18</sup> This Court should do the same, if the entire Ban is not stricken.

### **POINT III**

#### **THE SECOND AMENDMENT’S USE OF THE WORD “ARMS” AND ENSHRINEMENT OF THE PREEXISTING RIGHT TO BEAR THEM FOR SELF-DEFENSE EXTENDS TO DEFENSIVE ARMOR**

The Second Amendment guarantees that “the right of the people to keep and bear Arms[] shall not be infringed,” U.S. CONST., amend. II, and is made applicable to the States through the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010); *id.* at 805 (Thomas, J., concurring in part and concurring in the judgment). Its protections are

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<sup>18</sup> The Second Circuit’s decision in *Christian v. James*, --- F.4th ---, 2026 WL 1378796 (2d Cir. 2026), does not compel a different result. *Compare id.* at \*10 (declining to consider an as-applied challenge that was not raised “until *after* the summary judgment stage” (emphases added)), *with Christian v. James*, No. 22-CV-695 (JLS), 2025 WL 50413, at \*1 (W.D.N.Y. Jan. 8, 2025) (noting the plaintiffs could “press” a “distinction” through “an as-applied challenge . . . further on appeal”).

“among the ‘fundamental rights necessary to our system of ordered liberty.’” *United States v. Rahimi*, 602 U.S. 680, 689 (2024) (quoting *McDonald*, 561 U.S. at 778).

That is because the Second Amendment protects the natural “right of self-preservation”—which is no second-class right—and so safeguards all others enshrined in the Constitution. *See Heller*, 554 U.S. at 636. As St. George Tucker observed:

[The Second Amendment] may be considered as the true palladium of liberty. . . . The right of self-defense is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible. Wherever standing armies are kept-up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.

St. George Tucker, *View of the Constitution of the United States, in 1 Blackstone’s Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* app. D at 300 (William Young Birch & Abraham Small 1803) (“St. George Tucker”); *accord* 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1890, at 746 (1833) (“The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.”).

And that same understanding animated those who fought for the Fourteenth Amendment. *McDonald*, 561 U.S. at 776 (quoting Cong. Globe, 40th Cong., 2d Sess., 1967 (1868) (statement of Rep. Stevens) (“Disarm a community and you rob them of the means of defending life. Take away their weapons of defense and you take away the inalienable right of defending liberty.”)).

Against that backdrop, the State Defendants proffer three arguments to support their contention that “the Second Amendment’s plain text,” *Bruen*, 597 U.S. at 24, does not extend

to body armor. *First*, they contend that “no court from the Founding to the present has adopted Plaintiffs’ radical interpretation” of what constitute “arms” under the Second Amendment. State Defs.’ Resp., at 11. *Second*, Defendants maintain that corpus linguistics demonstrates that “arms” did not encompass body armor in 1791. *Third*, Defendants contend that Medieval armor had fallen out of style at the time of the Founding, so armor must have been excluded from the Second Amendment’s protections.

Each point is more meritless than the last. Plaintiffs address them in turn.

**A. This Court should follow the Supreme Court’s plain meaning of “Arms” as interpreted in *Heller*, which held that it encompasses “Amour of Defence.”**

The Supreme Court is clear: “Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.” *Heller*, 554 U.S. at 634–35; *accord Bruen*, 597 U.S. at 34. Indeed, the Supreme Court held that while the Second Amendment’s “meaning is fixed according to the understandings of those who ratified it,” it “can, and must, apply to circumstances beyond those the Founders specifically anticipated.” *Bruen*, 597 U.S. at 28; *see also Lara v. Comm’r Penn. State Police*, 125 F.4th 428, 441 (3d Cir. 2025) (“[T]he constitutional right to keep and bear arms should be understood according to its public meaning in 1791, as that meaning is fixed according to the understandings of those who ratified it.” (internal quotations omitted)); *NRA v. Bondi*, 133 F.4th 1108, 1116 (11th Cir. 2025) (“The Second Amendment was ratified, and its meaning fixed, in 1791.”).

To that end, the Supreme Court has already determined what the word “Arms” means in the context of the Second Amendment. In *Heller*, when the Court analyzed “the substance of the right,” it engaged with and directly spoke on the “object” of the Second Amendment. 554 U.S. at 581. The Court observed that “[t]he 18th-century meaning” of the term “Arms”

is “not different from the meaning today.” *Id.* The Court turned to Founding Era dictionaries to assess its meaning. First was the 1773 edition of Samuel Johnson’s dictionary, which defined “arms” as “[w]eapons of offence, *or armour of defence.*” 1 *Dictionary of the English Language* 107 (4th ed. 1773) (emphasis added). Then the Court quoted Timothy Cunningham’s “important” 1771 legal dictionary: “any thing that a man *wears for his defence*, or takes into his hands, or useth in wrath to cast at or strike another.” 554 U.S. at 581 (emphases added). The Court also cited Webster’s 1828 Dictionary, which gave as its first definition of arms “weapons of offense, *or armor for defense and protection of the body.*” *American Dictionary of the English Language* (1828) (emphasis added). The plain meaning of “Arms” as held and so defined by the Supreme Court encompasses defensive body armor.

Courts across the country—including several in the Second Circuit—have concluded the Supreme Court’s definition of “Arms” in *Heller* is a conclusive holding establishing the term’s scope and application. *See, e.g., Snope v. Brown*, 145 S. Ct. 1534, 1535 (2025) (Thomas, J., dissenting from denial of certiorari) (“In [*Heller*], we held that the term ‘Arms’ in this context covers all ‘weapons of offence, or armour of defence.’ . . . Thus, the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” (cleaned up)); *Bianchi v. Brown*, 111 F.4th 438, 494 (4th Cir. 2024) (Richardson, J., dissenting) (noting the *Heller* Court “found that the word ‘Arms’ refers to all ‘weapons of offence, or armour of defence’ or ‘any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another’” (cleaned up)); *Lane v. Cacace*, No. 22-CV-10989 (KMK), 2025 WL 903766, at \*6 (S.D.N.Y. Mar. 25, 2025) (“In *Heller*, the Supreme Court defined arms by referring to the term’s 18th century meaning—‘weapons of offence, or armour of defence,’ or ‘any thing that

a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another.’”); *Nat’l Assoc. for Gun Rights v. Lamont*, 685 F. Supp. 3d 63, 79 (D. Conn. 2023) (“When interpreting” the term “arms,” the *Heller* Court “relied on dictionaries from the Founding era defining [them] as ‘weapons of offence, or armour of defence,’ or as ‘any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another’” (cleaned up)).

And *contra* the State Defendants’ cries of radicalism, Resp., at 11, other courts have held the same definition plainly encompasses body armor. *See, e.g., Barnett v. Raoul*, 756 F. Supp. 3d 564, 606 (S.D. Ill. 2024) (“The definition of ‘bearable’ clearly includes items like helmets, body armor, and the like.”). What is radical is the State’s invitation to disregard the Supreme Court’s definition of “Arms.” Because “vertical *stare decisis* is absolute,” this Court should follow both the holding and reasoning of the Supreme Court, including its reliance on historical dictionaries to assess the meaning of “Arms” to include body armor. *See, e.g., Ramos v. Louisiana*, 590 U.S. 83, n.5 (2020) (“[V]ertical *stare decisis* is absolute, as it must be in a hierarchical system with ‘one supreme court.’” (quoting U.S. CONST., Art. III, § 1)).

The Supreme Court’s definition of “Arms” also disposes of the State Defendants’ attempt to cast body armor as a “tactical accessory” instead of a “bearable arm.” Resp., at 22-23. They argue that it is not an “arm” because it “is not a mechanical component necessary for the operation of any firearm.” *Id.* Per the Supreme Court’s definition, however, body armor is an “arm” because it is a “thing that a man wears for his defence.” 554 U.S. at 581.

**B. The State Defendants’ exclusive reliance on corpus linguistics is misplaced.**

Consistent with the Supreme Court’s definition of “Arms” and the historical foundation of that holding, Plaintiffs cited the same dictionaries as the majority opinion in

*Heller*, along with a host of others ranging from 1668 to 2024, all of which included defensive armor in the broader definition of “Arms.” *See* Open. Br. 10–12. The State Defendants ignore contemporaneous dictionaries, reject the Supreme Court’s definition of “Arms,” and opt instead to rely exclusively on corpus linguistics “data.” State Defs.’ Resp., at 12–14, 16.

That flawed analysis diverges from both what the Supreme Court has already held is the term’s meaning, and how the Supreme Court interpreted the Second Amendment in *Heller*, *Bruen*, and *Rahimi*—none of which engaged with corpus linguistics and all of which affirmed the primacy of dictionary-based ordinary meaning over empirical linguistic frequency analysis.<sup>19</sup>

Courts across the country have rejected overreliance on corpus linguistics, especially where the results are contrary to the plain text analysis under contemporary dictionary definitions. For example, *Heller* itself rejected the linguistic analysis adopted by the dissent. *See, e.g.*, 554 U.S. at 588–89 (calling it “faulty” and noting that “the fact that the phrase was commonly used in a particular context does not show that it is limited to that context”). And the Fourth Circuit has described corpus linguistics as “quite a flawed tool” and a “controversial tool at best.” *United States v. Boler*, 115 F.4th 316, 325 n.5 (4th Cir. 2024). That is because, at bottom, “context matters and legal corpus linguistics largely ignores the crucial contexts in which legal language is produced, interpreted, and deployed.” *Id.* (internal quotation marks and citation omitted). Indeed, “[a] survey of novels, magazines, newspapers, popular television shows and movies is no match for legal analysis of the text, structure,

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<sup>19</sup> Defendants’ representations about Professor Baron’s research—including the notion that he personally “evaluated hundreds of millions of words to capture the everyday language of the American public”—are hyperbolic at best, absurd on their face, and reveal the shortcomings of the breadth of the assertions they make. Resp. 13.

purpose and history of the actual regulation [the Court is] considering.” *Id.*; see also *Wright v. Spaulding*, 939 F.3d 695, 700 n.1 (6th Cir. 2019) (referring to corpus linguistics as “not . . . the most helpful tool in the toolkit”); see generally Mark W. Smith & Dan. M. Peterson, *Big Data Comes for Textualism: The Use and Abuse of Corpus Linguistics in Second Amendment Litigation*, 70 DRAKE L. REV. 387 (2022).

To be sure, some jurists have reasoned that corpus linguistics’ “foremost value may come in those difficult cases where statutes split and dictionaries diverge” to “serve as a cross-check on established methods of interpretation (and vice versa).” *Wilson v. Safelite Grp., Inc.*, 930 F.3d 429, 440 (6th Cir. 2019) (Thapar, J., concurring in part and concurring in the judgment). But that is not the case here, where Defendants have identified no dictionaries excluding defensive armor from the umbrella term “Arms,” and Plaintiffs have identified numerous textual sources (in addition to dictionaries), spanning from business records to famous literature, that support the basic dictionary definition adopted in *Heller*.

Instead, the State Defendants lament that “dictionary definitions only go so far.” State Defs.’ Resp. 15. But they fail to grasp that the Supreme Court (and the Second Circuit) have already used dictionaries to define “Arms,” and they ignore that the numerous dictionaries Plaintiffs provided this Court all support the Supreme Court’s definition: “Arms” encompasses defensive armor.

**C. The Second Amendment protects the preexisting and personal right of self-defense, which necessarily includes body armor, regardless of the prevalence of its use at the Founding.**

In a last-ditch effort, the State Defendants make the bold assertion that “arms” in the Second Amendment cannot include body armor because, “[b]y the time of the Founding Era, this literal sense of ‘armor’ had become rare or even entirely obsolete in everyday American

English.” State Defs.’ Resp. 13. In other words, because “[s]oldiers of that era did not wear metal suits or chain mail, . . . civilians did not typically wear such body protection either.” *Id.* at 14.

Even if true—a point Plaintiffs do not concede, *see* Open. Br. 14–15 and *infra* at 34–35—the lack of popularity of a particular type of defensive arm does not remove it from the purview of the right protected. Courts must interpret the Constitution to afford the maximum protective reach. *See, e.g., Heller*, 554 U.S. at 636 (“[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table.”). That is especially true here, when the Supreme Court has emphasized that the Second Amendment “codified a *pre-existing*” and “individual” right—not merely a civic one—to keep and bear both offensive and defensive arms for self-defense. *Heller*, 554 U.S. at 592, 630 (emphasis added). Thus, “[t]o strip a person of the right to keep *any* arms strips him of the entire core of the right,” C. Kevin Marshall, *Why Can’t Martha Stewart Have a Gun?*, 32 HARV. J. L. & PUB. POL’Y 695, 733–34 (2009), an infringement more severe than that *Heller* disapproved, 554 U.S. at 630 (holding a law permitting possession of “firearms in the home,” provided they were “kept inoperable at all times,” was an unconstitutional infringement on “the core lawful purpose of self-defense”).

At bottom, beyond merely “preserving the militia,” the “ancient right” to keep and bear arms is also concerned with preserving “self-defense.” *Heller*, 554 U.S. at 599. In fact, “individual self-defense is . . . the *central component* of the right itself.” *Id.* (emphasis added).<sup>20</sup> To that end, “[w]hen the people ratified the Second Amendment, they surely understood an

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<sup>20</sup> *See also* St. George Tucker, at App’x 144 (“[T]he end of civil society is the procuring for the citizens whatever their necessities require, the conveniences and accommodations of life, and, in general, whatever constitutes happiness: with the peaceful possession of property, a method of obtaining justice with security; and in short, a mutual defence against all violence from without.”).

arms-bearing citizenry posed some risks. But just as surely they believed that the right protected by the Second Amendment was itself vital to the preservation of life and liberty,” and courts “have no authority to question that judgment.” *Rahimi*, 602 U.S. at 709 (Gorsuch, J., concurring).

Defendants offer no basis for this Court to conclude that body armor—a purely defensive arm that itself is not used to inflict violence on another—does not fall under the Second Amendment’s plain text.

#### **POINT IV**

#### **BODY ARMOR IS IN COMMON USE FOR LAWFUL PURPOSES**

The State Defendants contend that at the “plain” or “bare” text threshold inquiry, the Plaintiffs also bear the burden of making an empirical showing that body armor is in “common use” for lawful purposes. Smuggling this empirical test into the “plain text” threshold analysis is not called for by *Heller*, *Bruen*, or *Rahimi*,<sup>21</sup> all of which show that a plaintiff’s burden at the threshold analysis is low.

Even though Plaintiffs burden only extends to the “plain text” analysis, here they have also met this enhanced empirical burden in multiple ways. **First**, Plaintiffs demonstrated that body armor is jurisdictionally common, because it is legal in all 50 states except New York. Open. Br., at 21; *see also, e.g., Newman v. Clayton F. Summy Co.*, 133 F.2d 465, 467 n. 3 (2d Cir.1942) (“[T]he federal court in any district takes judicial notice of the laws of all states.”). **Second**, Plaintiffs identified approximately 70 body armor manufacturers who sell to non-military, non-law enforcement consumers, from which the Court can conclude that there is

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<sup>21</sup> *See e.g.,* Peter A. Patterson, *Common Use Is Not a Plain-Text Question*, Per Curiam, Harv. J. L. & Pub. Pol’y (Aug. 4, 2025).

robust consumer demand for body armor. Open. Br., at 12, 21. *Third*, and further demonstrating numerical commonality of body armor, Plaintiffs submitted multiple commercial market reports compiling data on the consumer body armor market. *Id.* at 12-13, 21. Taken as a whole, these market reports demonstrate the general magnitude and trend of the civilian body armor market: in the tens of millions of dollars annually, and growing. *Id.*; see also *Mech. Licensing Collective v. Spotify USA Inc.*, 763 F. Supp. 3d 608, 617 (S.D.N.Y. 2025) (“judicial notice . . . that there is a wide market for audiobooks in the United States” and “that audiobooks generally are products of value”).

In opposition to this *prima facie* evidence of (obvious) common use, the Defendants failed to either adduce evidence that body armor is in fact “highly unusual in society at large,” *Bruen*, 597 U.S. at 47, or that this vast market is comprised primarily of criminals obtaining body armor for unlawful purposes. Under Rule 56, the Defendants have thus failed to raise a triable issue of fact on the “common use” test.

Indeed, Defendants do not actually raise a material dispute about common use at all. The State Defendants concede—as they must—that body armor is commonly used for lawful purposes by law enforcement and members of the “eligible professions.” State Defs.’ Resp. 20-21 (“there is every reason to think that peace officers and persons in eligible professions make up the bulk of the” civilian market). And they appear to concede that ordinary (disfavored) civilians like the Individual Plaintiffs make up some portion of overall demand for body armor. *Id.* This concession that body armor is commonly used for lawful purposes by some sizeable portion of the American population (law enforcement and “eligible professions”) should dispose of the issue. That body armor is commonly used by the State’s preferred groups, however, is cold comfort to the Individual Plaintiffs and FPC’s similarly

situated members, who have a constitutionally protected right to keep and bear arms for ordinary self-defense needs, which is infringed by the Ban.

Rather than submitting evidence of their own, the State Defendants merely contend that Plaintiffs' proffered market reports are inadmissible hearsay. This is wrong, because the market reports fit squarely within the hearsay exception afforded by F. R. E. Rule 803(17) ("Market Reports and Similar Commercial Publications"). The market reports here "deal with compilations of relatively straightforward objective facts not requiring . . . a subjective analysis of other facts," which are just the sort of publications contemplated by the exception. *United States v. Arrington*, 634 F. Supp. 3d 57, 62 (W.D.N.Y. 2022) (quoting *Cordis Corp. v. Arterial Vascular Engineering, Inc.*, 97-CV-778A, 1998 U.S. Dist. LEXIS 23871, \*7–8 n.4 (W.D.N.Y. Mar. 19, 1998)).

Commercial market reports are relied on by industry participants, analysts, and investors. "The basis of trustworthiness is the . . . motivation of the compiler to foster reliance by being accurate." *King v. Wang*, 14-CV-7694 (LJL), 2021 WL 5232454, \*14 (S.D.N.Y. Nov. 9, 2021) (quoting F.R.E. 803(17) Advisory Committee Note). If these market research companies were just making it up, they would not be in business because they would have no customers. In contrast to compilations "done for litigation," which "do not contain the similar guarantees of reliability" identified by the F.R.E. Advisory Committee, these commercial market reports are used to inform actual business decisions. *Wantanabe Realty Corp. v. City of New York*, 2004 WL 188088, \*2 (S.D.N.Y. Feb. 2, 2004); *see also Elliott Assocs., L.P. v. Banco de la Nacion*, 194 F.R.D. 116, 121 (S.D.N.Y. 2000) (interest rate compilations admissible under Rule 803(17)); *Hutchinson v. Essence Commc'ns, Inc.*, 769 F. Supp. 541, 562 (S.D.N.Y. 1991) (Simmons Market Reports admissible under Rule 803(17)). In any event, the

multiple market research reports are not submitted by Plaintiffs to prove an exact sales figure or precise number of consumers, but instead to collectively indicate the general magnitude and trend of the civilian market, which is sizeable, demonstrates common use, and is subject to judicial notice. *Spotify*, 763 F. Supp. 3d at 617 (judicial notice of “wide market for audiobooks”). The State’s “gotcha” fails.

Setting that aside, whether body armor is “in common use” is a legislative fact, not an adjudicative fact, such that the Rules of Evidence do not apply. *See* F. R. E. Rule 201, 1972 Advisory Comm. Note; *see also Teter v. Lopez*, 76 F.4th 938, 946–47 (9th Cir. 2023), *vacated on reh’g en banc*, 125 F.4th 1301 (2025). Legislative facts are “general facts which help the tribunal decide questions of law,” *Langevin v. Chenango Ct., Inc.*, 447 F.2d 296, 300 (2d Cir. 1971) (Friendly, J.) (quotations omitted), and are the only kind relevant to the constitutionality of the Body Armor Ban, *see Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012). Legislative facts can be found anywhere, *Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 916 F.2d 1174, 1182 (7th Cir. 1990), and by judges at any level of the proceedings, *United States v. Hunt*, 63 F.4th 1229, 1250 (10th Cir. 2023) (“Insisting on a cramped notion of what is part of the record is particularly inappropriate” in cases involving legislative facts.). Although Plaintiffs here have submitted sufficient admissible evidence to make a *prima facie* showing of common use as an adjudicative fact, and Defendants have not proffered any contrary evidence to raise a triable issue of adjudicative fact, the Court may also reach the (common sense) finding of legislative fact that body armor is in common use for lawful purposes, and is not “highly unusual in society at large.” *Bruen*, 597 U.S. at 47.

To illustrate how the constitutional issue here may be resolved solely on legislative facts, it is important to note that the Supreme Court decided both *Heller*, 544 U.S. at 576, and

*Bruen*, 597 U.S. at 2, on motion to dismiss records. Despite having no trial court record of adjudicative facts in either case on whether handguns are in “common use” for lawful purposes, the Supreme Court found that they are.

Further, the Second Circuit expressly considered amicus filings when concluding that so-called “assault weapons” meet the common use test. *New York State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 255 (2d Cir. 2015) (“Even accepting the most conservative estimates cited by the parties and by amici, the assault weapons . . . at issue are ‘in common use’ as that term was used in *Heller*.”). Here, in support of its *amicus* interest, Armored Republic submitted not just a “conservative estimate,” but a declaration about its sales data further confirming that civilian use of body armor is numerically common (even excluding common use by law enforcement, which of course does count toward common use). Decl. of Logan Reece (ECF No. 73-2). In short, there is ample evidence to support an empirical finding of “common use” (adjudicative or legislative), and Defendants proffer no evidence otherwise.

The State Defendants feign confusion over why a citizen “outside of eligible professions” could possibly want body armor, and contend that the “subjective motives” for doing so are mysterious. State Defs.’ Resp., at 21–22. Not so. The Individual Plaintiffs want more body armor for ordinary self-defense needs, Decl. of B. Heeter, ¶¶ 3, 4, Ex. M (ECF No. 69-4); Decl. of J. Wurtenberg, ¶¶ 3, 4, Ex. N (ECF No. 69-4), just like the rest of the consumers of body armor. *E.g.*, Decl. of N. Rotsko Ex. 6, at 4 (“Rising crime rates and growing concerns about personal safety have driven increased demand for body armor among civilians, particularly in high-risk areas.”); Opening Br., at 12-13. This comes as no surprise, because body armor serves only one purpose: self-protection.

In short, even if it is Plaintiffs’ burden to demonstrate common use, they have.

**POINT V****DEFENDANTS HAVE NOT SHOWN AN AMERICAN HISTORICAL  
TRADITION PROHIBITING DEFENSIVE ARMS**

The State Defendants fail to identify an American historical tradition banning the purchase and possession of defensive armor. That is because none exists. New York’s Ban is the first. Instead, they rely on Ancient Greek and Medieval English laws, and focus on what “English monarchs” did to disarm the citizenry. State Defs.’ Resp., at 24-27. They also point to several regulations that addressed a different problem (*public terror*) and imposed a different burden (*restrictions on misuse*)—not a categorical prohibition on sale and ownership.

There is no American tradition of regulating defensive arms.<sup>22</sup> And historical prohibitions from England are improper historical analogues—especially when they were clearly not adopted in the United States. In *Bruen*, for example, the Court “explained that the surety laws were not a proper historical analogue for New York’s gun licensing regime.” *Rahimi*, 602 U.S. at 699. Moreover, the Supreme Court “has long cautioned that the English common law “is not to be taken in all respects to be that of America,” and “the language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted, not as they existed in the Middle Ages.” *Bruen*, 597 U.S. at 39.

The State Defendants claim that New York should be able to suppress wearing armor in public because “English monarchs and parliaments regularly issued laws forbidding or restricting the wearing of armor.” State Defs.’ Br. 24. Not only does that argument miss the

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<sup>22</sup> David B. Kopel & Joseph G.S. Greenlee, *The History of Bans on Types of Arms Before 1900*, 50 J. Legis. 223, 250 (2024); Joseph G.S. Greenlee, *The Tradition of Armor Use and Regulation in America*, 23 Geo. J.L. & Pub. Pol’y 1 (2025).

point, it ignores the historical reason the right to keep and bear arms is “understood to be an individual right protecting against both public and private violence.” *Bruen*, 597 U.S. at 45. That is because “ramped up efforts to disarm . . . political opponents . . . caused Englishmen . . . to be jealous of their arms.” *Id.* at 42–43. Sir John Knight, for example, was “a prominent detractor of James II,” and was charged “with violating the Statute of Northampton because he allegedly ‘did walk about the streets armed with guns, and that he went into the church of St. Michael, in Bristol, in the time of divine service, with a gun, to terrify the King’s subjects.’” *Id.* at 43–44. Chief Justice Herbert explained that evil intent or malice was required, and Knight was ultimately acquitted by the jury. *Id.* at 44.

Yet in claiming the right to ban the purchase and ownership of body armor, the State Defendants engage in a sleight of hand and suggest they may restrict its *wearing*—without any *intent* requirement. The State Defendants attempt to justify the Ban by speculating that wearing body armor is apt to terrify the public. Resp., at 33-34. Yet the reality is that the public is more likely to reach for body armor to protect themselves from terrifying circumstances. Opening Br., at 23 (sales of bulletproof backpacks spike after school shootings). And many variants of banned body armor are not even visible to the public—*e.g.*, backpack inserts, Wonderhoodies, and thin vests worn under garments.

In *Rahimi*, the Supreme Court concluded that an “individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment.” *Rahimi*, 602 U.S. at 702. Here, the State Defendants suggest that a merely broad-based suspicion over the population at large is sufficient to completely restrict the ownership of body armor by ordinary civilians—without any specific finding of

“evil intent or malice.” That must be wrong. Put another way, the State’s asserted interest cannot justify a categorical prohibition untethered from any historical tradition.

In sum, the State Defendants fail to identify analogous regulations of body armor. They ignore the “how and why the regulations burden a law-abiding citizen’s right to armed self-defense,” *Bruen*, 597 U.S. at 29, and instead point to regulations that are not analogous to the total ban they seek to defend.

Nor can Defendants fit the Body Armor Ban within the rule, derived from history, that only dangerous and unusual weapons may be banned, or its corollary that arms that are “in common use” for lawful purposes (therefore necessarily not dangerous and unusual) are protected and cannot be banned. *Christian*, 2024 WL 4458385, at \*12 n.12.<sup>23</sup> As demonstrated above, body armor is in common use, and the State Defendants concede that body armor is lawfully used by millions of Americans. Further, the State Defendants cannot show that body armor fits under this Circuit’s “unusually dangerous” standard from *NAGR*, because body armor is not itself lethal or dangerous. It is not a “novel weapon[] . . . particularly suited for criminal violence.” *NAGR*, 153 F.4th at 242. Body armor is not “uniquely designed to create mayhem.” *Id.* at 223. Armor is the least dangerous of the arms protected by the Second Amendment, because its only function is to protect the wearer. While body armor will protect a wearer from an “unusually dangerous” weapon, the armor itself is not dangerous.

The State Defendants endeavor to save the Ban by contending that “constitutional analysis must adapt when confronting ‘dramatic technological changes.’” State Defs.’ Resp., at 28. They go on, “advanced synthetic materials like Kevlar . . . did not begin to emerge until

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<sup>23</sup> The Second Circuit employs the “common use” test at both the threshold textual inquiry, *United States v. Gomez*, 159 F.4th 172, 176 (2nd Cir. 2025), and as the relevant historical tradition for regulating arms, under the historical inquiry of the *Bruen* analysis. *NAGR*, 153 F.4th at 242.

the late 19th and 20th centuries,” “was never contemplated by the Founders,” “was not possessed by early Americans,” and “descends from a historical lineage of tactical gear strictly regulated and restricted to the government’s peaceable forces.” State Defs.’ Resp., at 32. Even if true, which it is not, none of that matters. The Constitution’s protections extend to “novel challenge[s].” *Virginia v. Moore*, 553 U.S. 164, 178 (2008). The “Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated.” *Bruen*, 597 U.S. at 28. Indeed, the Supreme Court left no doubt that “the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that *were not in existence* at the time of the founding.” *Heller*, 544 U.S. at 582 (emphasis added); *Caetano v. Massachusetts*, 577 U.S. 411, 411–12 (2016) (holding that the Second Amendment applies to stun guns).

Further, like body armor, handgun technology has significantly changed since the time of the Founding, but *Bruen* distinguished colonial laws that arguably restricted the carrying of handguns by reasoning that “whatever the likelihood that handguns were considered dangerous and unusual weapons during the colonial period, they are indisputably in common use for self-defense today.” 597 U.S. at 47. And in any event, the “dramatic technological change” concept the State Defendants attempt to advance concerns wholly contemporary challenges, whereas neither body armor nor public violence were unknown at the Founding. Body armor has been an option for citizens throughout American history, from the colonial era to the present. Joseph G.S. Greenlee, *The Tradition of Armor Use and Regulation in America*, 23 GEO. J.L. & PUB. POL’Y 1, 35-40 (2025) (summarizing historical use and regulation of armor in American history). Several states even mandated that citizens keep armor for use in the militia as late as 1798. *Id.* at 25-26.

That technological advancements have occurred in armor manufacturing since the Founding does not save the Ban. “Historical regulations reveal a principle, not a mold.” *Rahimi*, 602 U.S. at 740 (Barrett, J. concurring). So it is with body armor. Though Kevlar may not have existed at the founding, that does nothing to alter the Constitutional principles that guide the inquiry. Self-defense is the core right protected by the Second Amendment. Americans are allowed to purchase, possess, and use arms for self-defense, including purely defensive arms. The Body Armor Ban is therefore unconstitutional.

### **CONCLUSION**

For these reasons and those stated in Plaintiffs’ Opening Brief, the Court should grant judgment in their favor, deny Defendants’ motions, declare the Body Armor Ban unconstitutional, and enjoin its enforcement.

Respectfully Submitted,

FLUET

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