



**28th ANNUAL
FIRST MONDAY IN OCTOBER**

October Term 2021

***New York State Rifle & Pistol
Association, Inc. v. Bruen***

OFFICE OF THE APPELLATE DEFENDER

The Office of the Appellate Defender (OAD) strives to ensure that people convicted of felonies who cannot afford legal representation receive full and equal access to justice by providing exceptional appellate representation, improving the quality of indigent defense through education and training, and advocating for systemic reform of New York City's criminal legal system.

As one of New York City's oldest providers of appellate representation, and the City's second oldest institutional indigent defense office, OAD challenges Manhattan and Bronx convictions and sentences in the New York Supreme Court, the Appellate Division of the Supreme Court, First Judicial Department, the New York State Court of Appeals, and the federal courts. OAD's Reinvestigation Project identifies potential cases of wrongful conviction and, where appropriate, files petitions for relief.

OAD pioneered the integration of social work into indigent appellate defense practice because we recognize our clients are impacted by the trauma of poverty, racism, and incarceration. OAD's Client Services Director and coordinators support clients by providing assistance and referrals in the areas of medical, mental health, substance abuse, housing, employment, public assistance benefits, and educational services. Our team also fights for decarceration through parole and clemency advocacy.

OAD is a training office that not only provides high-quality representation to individual clients, but also strives to improve the quality of indigent defense throughout the state through its Criminal Appellate Defender Clinic at New York University Law School and Volunteer Appellate Defender (VAD) program that allows attorneys at private law firms to co-counsel appeals with OAD attorneys. By dedicating itself to innovation and remaining flexible and responsive to emerging criminal justice needs while centering impacted individuals and communities, OAD has established itself as a national model for indigent appellate defense representation.





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Office of the Appellate Defender's
28th Annual
FIRST MONDAY IN OCTOBER
A Mock Supreme Court Argument

THE ADVOCATES

Benjamin Brafman
Counsel for Petitioners

Neal Kumar Katyal
Counsel for Respondents

THE BENCH

Chief Justice
Jennifer Newstead

Associate Justices
Mylan L. Denerstein
Karen L. Dunn
Sarah K. Eddy
Alphonzo Grant, Jr.
Telemachus P. Kasulis
David I. Miller
Brendan F. Quigley
Anjan Sahni

COURT CRIER

Myrna Felder

SEATING



Advocates' Podium

Associate Justices' seniority was determined alphabetically.
1—Chief Justice Newstead 2—Mylan L. Denerstein 3—Karen L. Dunn 4—Sarah K. Eddy
5—Alphonzo Grant, Jr. 6—Telemachus P. Kasulis 7—David I. Miller
8—Brendan F. Quigley 9—Anjan Sahni

WARMEST THANKS TO OUR GENEROUS SUPPORTERS

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Myrna Felder Roy L. Reardon

Host Committee

Antonia M. Apps Nicolas Bourtin Sean Hecker Tatiana R. Martins Jeffrey A. Udell

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**Debevoise
& Plimpton**

The Sullivan & Cromwell
Foundation

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Grand Iason & Anello PC

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DAY

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PROGRAM

OPENING REMARKS

Caprice R. Jenerson

President & Attorney-in-Charge
Office of the Appellate Defender

AWARDS PRESENTATION

OAD BEACON OF HOPE AWARD

Cleveland Lovett

Presented by Caprice R. Jenerson

OAD GIDEON AWARD

Debevoise & Plimpton LLP

Accepted by Jennifer R. Cowan
Presented by Nicolas Bourtin

THE ORAL ARGUMENT

Setting: The Supreme Court of the United States Courtroom

Time: Monday, October 4, 2021, 10:00 a.m. sharp

AWARDS PRESENTATION

GOULD AWARD FOR OUTSTANDING ORAL ADVOCACY

Benjamin Brafman

Brafman & Associates, P.C.
Presented by Nicolas Bourtin

Neal Kumar Katyal

Hogan Lovells
Presented by Antonia M. Apps

OAD COUNSEL FOR JUSTICE AWARD

Jennifer Newstead

Facebook
Presented by Tatiana R. Martins

THE SECRET DELIBERATIONS

Setting: The Supreme Court of the United States,

Chief Justice's Conference Room

Time: Friday, October 8, 2021, 3:00 p.m.



2021 GOULD AWARD FOR OUTSTANDING ORAL ADVOCACY

BENJAMIN BRAFMAN

Benjamin Brafman is the principal of a seven-lawyer firm, Brafman & Associates, P.C., located in Manhattan. Mr. Brafman's firm specializes in criminal law with an emphasis on White Collar criminal defense.

Mr. Brafman, a former Assistant District Attorney in the Rackets Bureau of the New York County District Attorney's Office, has been in private practice since 1980. He has represented a wide range of high-profile celebrities, business leaders, lawyers and professionals in major criminal cases throughout the country, Canada, Europe, Israel, and South Africa. Mr. Brafman's acquittal record in complex criminal trials is among the highest in New York City and he lectures widely throughout the United States on issues related to trial advocacy and in particular, the art of "cross-examination".

Mr. Brafman is a Fellow in the American College of Trial Lawyers and in 1997, was selected by New York Magazine as the "Best Criminal Defense Lawyer in New York." He was the recipient of the "Outstanding Private Criminal Defense Practitioner Award" for 2005 from the New York State Bar Association, and in March 2006, Mr. Brafman received the Norman Ostrow Award for outstanding achievement in the field of White Collar Criminal Defense by the New York Council of Defense Lawyers. In January 2007, Mr. Brafman was presented with the "first" ever Clarence Darrow Award for Distinguished Practitioner by the New York State Association of Criminal Defense Lawyers. In March 2014, he also received the Robert M. Morgenthau Award from the Police Athletic League for outstanding achievements in the field of Criminal Defense, and most recently, Mr. Brafman was awarded the Pursuit of Justice Award from The American Association of Jewish Lawyers and Jurists.

Mr. Brafman is also a fierce public advocate on behalf of the State of Israel and the greater Jewish Community, serving as the Keynote Speaker, Host, or Master of Ceremonies at more than 100 formal Programs sponsored by important charities, social, educational and/or religious organizations.

Mr. Brafman resides in Long Island, New York with his wife Lynda. They are active in a wide range of charitable and religious organizations both in the United States and Israel. The couple has two children and 16 grandchildren, who live in New York and Israel.



2021 GOULD AWARD FOR
OUTSTANDING ORAL ADVOCACY

NEAL KUMAR KATYAL

Neal Katyal is the Paul and Patricia Saunders Professor of Law at Georgetown University and a Partner at Hogan Lovells. He previously served as Acting Solicitor General of the United States.

Mr. Katyal has argued 44 cases before the Supreme Court of the United States, with 41 of them in the last decade. His cases include successfully striking down the Guantanamo military tribunals, successfully defending the constitutionality of the Voting Rights Act, successfully defending the Peace Cross in Maryland, and a landmark personal jurisdiction win for Bristol Meyers Squibb. At the age of 51, he has already argued more Supreme Court cases in U.S. history than has any minority attorney, recently breaking the record held by Thurgood Marshall.

His numerous distinctions include: the Edmund Randolph Award (the highest civilian award given by U.S. Department of Justice), The Litigator of the Year by American Lawyer (2017 and 2018, chosen as the sole Grand Prize Winner of all the lawyers in the United States), Appellate MVP by Law360 numerous times (most recently in 2017), winner of Financial Times Innovative Lawyer Award in two different categories (both private and public law) (2017), one of GQ's Men of the Year (2017), 40 Most Influential Lawyers of the Last Decade Nationwide by National Law Journal (2010), and 90 Greatest Washington Lawyers Over the Last 30 Years by Legal Times (2008).

Mr. Katyal has appeared on virtually every major American news program, as well as on Stephen Colbert and House of Cards on Netflix (where he played himself).



2021 OAD COUNSEL FOR JUSTICE AWARD

JENNIFER NEWSTEAD

Jennifer G. Newstead is Facebook’s Chief Legal Officer, overseeing all global legal and corporate governance matters on behalf of the company.

Prior to joining Facebook in 2019, Ms. Newstead served in senior roles in government, most recently as the Senate-confirmed Legal Adviser of the U.S. Department of State, advising on all issues of domestic and international law affecting the conduct of U.S foreign relations. Previously, she served as General Counsel of the White House Office of Management and Budget, and as a Principal Deputy Assistant Attorney General at the U.S. Department of Justice.

In the private sector, Ms. Newstead spent twelve years as a partner in a global law firm, Davis Polk & Wardwell LLP, advising technology, media, and financial services firms on litigation and regulatory matters.

She graduated magna cum laude from Harvard University in 1991 and from Yale Law School in 1994. Ms. Newstead clerked for Justice Stephen Breyer of the United States Supreme Court and Judge Laurence Silberman of the U.S. Court of Appeals for the D.C. Circuit. She previously served as an Adjunct Professor of Law at Georgetown University Law Center.



2021 OAD BEACON OF HOPE AWARD

CLEVELAND LOVETT

Cleveland Lovett is a proud father and a senior philosophy student at Bard College with a 3.7 GPA. Mr. Lovett recently won the Patricia Ross Weis Scholar award, which is given annually to students who have excelled in the social sciences. Mr. Lovett aspires to continue his education in a political science Ph.D. program; he is also the COO of Real Shore Developments LLC, a company for which he wrote the business plan while incarcerated.

Now almost 50 years old, Mr. Lovett has spent much of his adult life behind bars. In 2002, he led police on a high-speed car chase, resulting in him falling 70 feet from an elevated highway and sustaining permanent injuries. Following his conviction for drug possession and reckless endangerment, he was sentenced to a maximum term of over 25 years to life imprisonment. The judge stated for the record, "You are sentenced as best as possible to die in jail."

Rather than submit to despair, Mr. Lovett used his time inside to further his education, strengthen the bonds with his family, and provide comfort and community to those around him. One man wrote to the parole board on Mr. Lovett's behalf, describing how, on his first day at Eastern C.F., he heard Mr. Lovett on the saxophone and stood transfixed: "It was beautiful, it was intoxicating, and I had to thank him for allowing me to feel as if I was no longer here."

OAD began representing Mr. Lovett over 15 years ago. In court after court, his attorneys advocated for the reversal of his conviction or a lesser sentence. Relief finally came when OAD secured a new sentencing hearing, albeit with the same judge. This time, the judge granted a reduction, recognizing Mr. Lovett's accomplishments and his hopeful mentality. As a result, Mr. Lovett appeared before the parole board several years sooner, and with OAD's continuing support, he was released in May 2019.

Mr. Lovett writes: "When times seemed hopeless, when what it meant to be human felt like something forgotten and only imagined, I found inspiration and optimism through my relationships with each and every one of the staff members I met at OAD. Even beyond the legal assistance, this support and encouragement turned the seemingly impossible idea of a college education into a reality." We at OAD are similarly inspired by Mr. Lovett, who has a relentlessly positive attitude, a gift for music, and the soul of a philosopher.

2021 OAD GIDEON AWARD

Debevoise & Plimpton

Debevoise & Plimpton LLP is a premier law firm with market-leading practices, a global perspective and strong New York roots. Our clients look to us to bring a distinctively high degree of quality, intensity and creativity to resolve the most complex challenges. We draw on the strength of our deep partner commitment, industry experience and a strategic approach to deliver clear commercial judgment to every client matter and with true collaboration.

Approximately 800 lawyers work in ten offices across three continents, within integrated global practices, serving clients around the world. Our lawyers prioritize developing a deep understanding of the business of our clients and pursuing each matter with both intensity and creativity to achieve optimal results. We are committed to serving our clients through excellent lawyering and have received numerous accolades and awards recognizing this dedication and the firm's market prominence worldwide.

Since the firm's founding in 1931, our pro bono work has been central to our culture. We have focused on helping underserved and vulnerable communities tackle social problems and solve complex legal issues. Through our pro bono efforts, we fight in court to ensure laws are evenly applied. We provide our experience—both as lawyers and as members of our communities—to social service organizations working to create positive change for marginalized groups. We forge alliances with global corporations who share our dedication to increasing equality and opportunity for all. And we come to the aid of individuals who need legal assistance to overcome hurdles and start new lives. We are deeply committed to continuing the tangible progress our pro bono work has made in strengthening our communities.

PREVIOUS HONOREES

THE MILTON S. GOULD AWARD FOR OUTSTANDING ORAL ADVOCACY

is awarded annually to two of the nation's most accomplished lawyers. We have proudly presented the Gould Award to the following individuals since 1994:

ELKAN ABRAMOWITZ
FLOYD ABRAMS
MYRON BELDOCK
BARRY H. BERKE
SHEILA L. BIRNBAUM
LISA S. BLATT
DAVID BOIES
ZACHARY W. CARTER
EVAN R. CHESLER
PAUL J. CURRAN
EVAN A. DAVIS
FAITH E. GAY
HON. JOHN GLEESON
CAITLIN J. HALLIGAN
CONRAD K. HARPER
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JEH C. JOHNSON
BARRY KAMINS

ROBERTA A. KAPLAN
DANIEL F. KOLB
GERALD B. LEFCOURT
ANDREW J. LEVANDER
LEWIS J. LIMAN
MARTIN LONDON
LORETTA E. LYNCH
HENRY G. MILLER
GARY P. NAFTALIS
SHARON L. NELLES
BURT NEUBORNE
GUSTAVE H. NEWMAN
BERNARD W. NUSSBAUM
OTTO G. OBERMAIER
BETTINA B. PLEVAN
MARK F. POMERANTZ
E. JOSHUA ROSENKRANZ
PAUL C. SAUNDERS

JOHN F. SAVARESE
BARRY C. SCHECK
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KAREN PATTON SEYMOUR
SAMUEL W. SEYMOUR
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PAUL SHECHTMAN
BRYAN A. STEVENSON
CHARLES A. STILLMAN
KATHLEEN M. SULLIVAN
MICHAEL E. TIGAR
JAY TOPKIS
DONALD B. VERRILLI, JR.
ALAN VINEGRAD
HERBERT M. WACHTELL
THEODORE V. WELLS, JR.
MARY JO WHITE
DAVID M. ZORNOW

THE OAD COUNSEL FOR JUSTICE AWARD

recognizes a prominent in-house counsel who exemplifies OAD's commitment to justice. We have proudly presented the Counsel for Justice Award to the following individuals since 2014:

STACEY R. FRIEDMAN
DANIELLE C. GRAY

ELLEN ORAN KADEN
CHRISTOPHER P. REYNOLDS
TERESA WYNN ROSEBOROUGH

AUDREY STRAUSS
TONY WEST

THE OAD GIDEON AWARD

honors a law firm that has demonstrated exemplary commitment to indigent appellate defense through its participation in OAD's Volunteer Appellate Defender program. We have proudly presented the Gideon Award to the following firms since 2018:

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP
JONES DAY
WEIL, GOTSHAL & MANGES LLP

THE OAD BEACON OF HOPE AWARD

celebrates a former client whose life stands as a powerful example of the human capacity for resilience and highlights the importance of centering the administration of criminal justice around the inherent potential of every person. We have proudly presented the Beacon of Hope Award to the following individuals since 2018:

MARVIN CLARK
KHALIL A. CUMBERBATCH
FAYOLA McINTOSH

AWARDS PRESENTERS



Antonia M. Apps is a partner at Milbank LLP, a former federal prosecutor and nationally recognized trial attorney with experience in criminal and civil matters. Before joining Milbank in 2014, Antonia served as an Assistant United States Attorney for the Southern District of New York for over seven years, where she led many of the government's highest-profile securities fraud cases, including the prosecution of the hedge fund S.A.C. Capital Advisors. She is a frequent speaker at industry conferences and teaches a class at Harvard Law School on white collar criminal law and procedure. Lawdragon has named Antonia in its list of 500 Leading Lawyers in America every year since 2014. Antonia was named a 2020 Litigation Trailblazer by The National Law Journal, which recognizes lawyers who have made significant impact on legal practice, policy or technological advancements. In 2019, she was named in Crain's New York Business "Notable Women in Law" list in recognition of her distinguished career and exceptional civic and philanthropic activities. She is also highly ranked in the Chambers USA listing for White-Collar Crime & Government Investigations, where clients describe her as a "terrific trial lawyer" who "gives advice tailored to a practical approach."



Nicolas Bourtin is the Managing Partner of Sullivan & Cromwell's Criminal Defense and Investigations Group and a co-head of the FCPA and Anti-Corruption Group. His practice focuses on white collar criminal defense and internal investigations, regulatory enforcement matters, and securities and complex litigation. He has conducted numerous jury trials and has represented individuals and corporations in high-profile matters. Previously, he served as an Assistant U.S. Attorney in the Eastern District of New York. He has been recognized by The National Law Journal as a White Collar, Regulatory and Compliance Trailblazer, and by Chambers USA as a leader in White-Collar Crime & Government Investigations. Mr. Bourtin is the Chair of the Board of Directors for the Office of the Appellate Defender and serves on the Criminal Justice Act Panel of the U.S. District Court for the Eastern District of New York.



Tatiana R. Martins, a partner at Davis Polk & Wardwell LLP, represents companies and individuals in white collar defense and regulatory enforcement matters and in conducting internal investigations involving violations of the anti-bribery laws, money laundering and financial frauds. She also advises on compliance matters. An experienced trial lawyer, Tatiana has tried multiple cases to jury verdict. As an Assistant U.S. Attorney for the SDNY, she tried high-profile cases including that of former New York Assembly Speaker Sheldon Silver. As Chief of the SDNY Public Corruption Unit, she oversaw major investigations and prosecutions, including cases against Michael D. Cohen, NCAA basketball coaches and high-level U.N. officials. While at Davis Polk, Tatiana has represented large multinational corporations in connection with DOJ and SEC investigations of bribery-related allegations in Latin America, Europe and Asia, including Siemens AG and AstraZeneca. Tatiana is recognized for her white collar work by Chambers USA, where sources say she "has excellent judgment" and "always produces excellent legal analysis without losing sight of the practical and strategic implications." Tatiana is on the boards of the Office of the Appellate Defender and the Tinker Foundation.

THE BENCH

CHIEF JUSTICE

Jennifer Newstead

ASSOCIATE JUSTICES



Mylan L. Denerstein is a litigation partner in the New York office of Gibson, Dunn & Crutcher. Ms. Denerstein is Co-Chair of Gibson Dunn’s Public Policy Practice Group and a member of the Crisis Management, White Collar Defense and Investigations, Financial Institutions, Labor and Employment, Securities Litigation, and Appellate Practice Groups. Also, Ms. Denerstein is a member of the Firm’s Executive, Committee, Chair of the Firm’s Diversity Committee, and serves as the Co-Partner in Charge of the New York office.

Ms. Denerstein leads complex criminal and civil litigation and internal investigations. She represents diverse companies confronting a wide range of legal issues in their most critical times, typically involving government agencies.

Prior to joining Gibson Dunn, Ms. Denerstein served in a variety of government roles, including as Counsel to New York State, as an Executive in the New York Attorney General’s Office, as Deputy Commissioner for Legal Affairs for the New York City Fire Department, and as a federal prosecutor in the U.S. Attorney’s Office for the Southern District of New as well as Deputy Chief of the Criminal Division. Ms. Denerstein graduated from Columbia Law School.



Karen L. Dunn, a partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP, is one of the nation’s top trial lawyers. She has successfully tried some of the largest and most high-profile cases in recent years, including Epic v. Apple, Waymo v. Uber, Malden v. Uber, and Oracle v. Rimini Street. This fall, she is set to go to trial in Sines v. Kessler, a suit against the neo-Nazis and white supremacists responsible for the violence in Charlottesville, Virginia in 2017. A veteran of all three branches of government, and former debate adviser to President Obama, Secretary of State Clinton and Vice President Harris, Karen is also a skilled crisis manager helping companies and executives navigate reputation-threatening events.

Karen was recently named a “Litigator of the Year” by The American Lawyer for handling “high-stakes, high-profile and hard-fought” cases. She has also been named a “Litigator of the Week” three times; one of the National Law Journal’s “Outstanding Women Lawyers”; one of Elle Magazine’s “Most Compelling Women in Washington Now”; one of Benchmark Litigation’s “Top-10 Women in Litigation” and “Top 100 Trial Lawyers”; and Law 360 “Technology MVP” and “Trials MVP.” Earlier in her career, Karen served as a law clerk to Justice Stephen G. Breyer and Judge Merrick B. Garland.



Sarah K. Eddy is a partner in the Litigation Department at Wachtell, Lipton, Rosen & Katz. Before joining the firm, she was Chief of Appeals for the Criminal Division of the U.S. Attorney's Office for the Southern District of New York, where she began her tenure in November 2009. Before becoming Chief of Appeals, Sarah was Co-Chief of the Money Laundering and Asset Forfeiture Unit, and served as a trial attorney in the Securities and Commodities Fraud Unit and the Complex Frauds and Cybercrime Unit. She conducted some of the Office's most significant investigations of corporate misconduct, tried 11 cases to verdict, and argued numerous appeals before the U.S. Court of Appeals for the Second Circuit.

Early in her career, Sarah served as a law clerk to the Honorable Jed S. Rakoff of the U.S. District Court for the Southern District of New York, the Honorable John M. Walker of the U.S. Court of Appeals for the Second Circuit, and Justice John Paul Stevens of the U.S. Supreme Court.



Alphonzo Grant, Jr. is a Managing Director and Head of the Global Litigation Group's Special Investigation Unit for Institutional Securities and Investment Management at Morgan Stanley. In his role, Alphonzo oversees internal investigations of employee business conduct violations. He is also a member of the Legal and Compliance Division's Diversity Steering Committee.

Alphonzo is also an Adjunct Professor at Cardozo School of Law and a board member of the Eastern District Civil Litigation Fund—a non-profit that provides funding for certain expenses incurred by pro bono attorneys in connection with the representation of pro se litigants in civil matters before the U.S. District Court for the Eastern District of New York.

Prior to joining Morgan Stanley in 2011, Alphonzo was a Litigation Special Counsel and the Director of Diversity Initiatives at Sullivan & Cromwell. Alphonzo also served as a Commissioner on the N.Y.C. Civilian Complaint Review Board (2011-2014), an Assistant United States Attorney in the Eastern District of N.Y. (2002-2006), a Litigation Associate at Sullivan & Cromwell (1999-2002), and a law clerk to the Hon. Edward Korman, U.S.D.C., E.D.N.Y. (1998-1999). Alphonzo is a graduate of Stony Brook University (B.A. 1993, M.P.S. 1994) and Brooklyn Law School (J.D. 1998).



Telemachus P. Kasulis is a partner at Morvillo Abramowitz Grand Iason & Anello PC, where he specializes in white collar and regulatory defense. Tim regularly represents individuals and organizations in high-stakes criminal, civil, and regulatory matters, and in internal corporate investigations. His recent representations have included senior corporate executives in the health care and pharmaceutical sectors, traders in the securities and commodities markets, asset managers at major financial institutions, union officials, attorneys, and publicly-traded and closely-held companies under investigation by regulators and the

Department of Justice. Prior to joining Morvillo Abramowitz, Tim served for eleven years as an Assistant United States Attorney in the U.S. Attorney's Office for the Southern District of New York. While at the Office, Tim served as the Co-Chief of the Securities and Commodities Fraud Task Force and Co-Chief of the General Crimes Unit. He clerked for the Honorable Joseph M. McLaughlin on the United States Court of Appeals for the Second Circuit. Tim is a graduate of Yale University and Cornell Law School.



David I. Miller is an experienced trial lawyer, former federal prosecutor, and Chambers USA-ranked white collar litigator, is a shareholder at Greenberg Traurig where he focuses his practice on white collar criminal defense, government and internal investigations, securities and commodities enforcement, related complex civil litigation, and cryptocurrency, cybersecurity, anti-money laundering, and national security matters. Previously, David served for five years as an Assistant U.S. Attorney in the Southern District of New York (S.D.N.Y.), over half that time as a member of the Securities and Commodities Fraud Task Force. He also served

as a terrorism prosecutor with the Department of Justice in Washington, D.C., as a Special Assistant U.S. Attorney in the Eastern District of Virginia, as an Assistant General Counsel for the Central Intelligence Agency, and as a white collar, securities, and commercial litigation attorney in private practice. Before joining Greenberg Traurig, David was a partner at another global law firm.

As an experienced trial and appellate litigator with more than two decades of white collar criminal and financial litigation experience (as both a federal prosecutor and defense lawyer), David represents clients at all stages of litigation through trial and appeal. David has conducted 10 jury and bench trials, several of which were multi-defendant trials, including securities and accounting fraud trials, with guilty verdicts secured for nearly all defendants on all counts. As an appellate advocate, David has briefed and argued several appeals before the U.S. Court of Appeals for the Second Circuit.

David has been recognized as a leading New York white collar lawyer by Chambers USA, as a New York Super Lawyer in the area of white collar criminal defense, as a “key lawyer” in Greenberg Traurig’s white collar/corporate investigations and blockchain/fintech practices by The Legal 500, and as a “Future Leader” by Who’s Who Legal. He has also been recognized for his public service with Department of Justice and Central Intelligence Agency awards, is regularly quoted in the news media, and often appears on television news programs providing expert opinion. David is also a technical advisor for the popular Showtime drama series “Billions.”



Brendan F. Quigley is a partner at Baker Botts LLP in New York, where he focuses his practice on government and internal investigations and complex civil litigation. His recent representations have included individuals and entities in the fintech, energy, transportation, engineering, and financial services industries.

Before joining Baker Botts, Brendan served as an Assistant United States Attorney in the Southern District of New York for almost seven years. During this time, he prosecuted numerous high-profile, complex cases as a member of the SDNY’s Securities and Commodities Fraud Unit and its Terrorism and International Narcotics Unit, trying 12 cases to verdict in the district court, and arguing numerous appeals. Earlier in his legal career, Brendan clerked the Honorable Joseph F. Bianco, then of the Eastern District of New York, now on the Second Circuit, and was an associate at Paul, Weiss in New York.

Brendan received his undergraduate degree from Cornell University and his law degree magna cum laude from Georgetown. Between college and law school, he served four years on active duty as an officer in the U.S. Marine Corps, completing two tours of duty in Iraq.



Anjan Sahni is a partner at WilmerHale, where he serves as the Partner-in-Charge of the New York office, Vice Chair of the firm’s white collar practice, and on the firm’s Management Committee. He represents companies, boards, and individuals in federal and state government investigations and litigation and has been lead counsel in a dozen federal criminal trials, including in a recent criminal antitrust trial, in which he obtained an acquittal.

Anjan rejoined the firm in 2015, after more than a decade as a federal prosecutor in the United States Attorney’s Office for the Southern District of New York, where he served as Chief of the Securities and Commodities Fraud Unit and Co-Chief of the Terrorism and International Narcotics Unit. After graduating from Emory College and Yale Law School, he clerked for the Honorable Pierre N. Leval of the U.S. Court of Appeals for the Second Circuit.

COURT CRIER



Myrna Felder, a matrimonial attorney at both the trial and appellate level, as a member of the Board of Directors of the Office of the Appellate Defender, was one of a number of enthusiastic supporters for the creation of the First Monday in October program, for which she has served as co-chair and court crier since its inception twenty-eight years ago.

A former Chair of the New York State Bar Association’s Committee on Courts of Appellate Jurisdiction, Ms. Felder organized the State Bar’s day-long CLE program on New York appellate practice and has been a frequent lecturer on appellate practice for the Appellate Division, First Department; the New York State Bar Association; the American Bar Association; the Women’s Bar Association of the State of New York; and other bar groups. Ms. Felder serves on the Subcommittee on Appellate Practice of the New York State Office of Court Administration’s Advisory Committee on Civil Practice, of which she has been a member since 1983, and authored the chapter, “Special Considerations in Matrimonial Appeals” in Thomas Newman’s *New York Appellate Practice*.

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Tatiana R. Martins
Davis Polk & Wardwell LLP

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Chief Justice Jonathan Lippman presiding over the First Monday Bench, which featured OAD Board Member Antonia Apps. Court Crier Myrna Felder calls the session to order.

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Tom Heyman, OAD Board Chair Emeritus, addresses the audience in 2008.



2020 (Virtual) First Monday featured Board Chair Nicolas Bourtin and Chair Emeritus Sean Hecker in conversation with with Counsel for Justice Award Recipient Danielle Gray and Gould Award Recipients Sharon Nelles and Roberta Kaplan.

A SPECTATOR'S PRIMER
NO. 20-843
IN THE MOCK SUPREME COURT OF THE UNITED STATES

New York State Rifle & Pistol Association, Inc.,
Robert Nash, Brandon Koch,
Petitioners,

-v.-

Kevin Bruen, Superintendent of NY State Police,
Richard McNally, Justice of NY Supreme Court,
Respondents.

INTRODUCTION

This hypothetical case is based on an actual case scheduled for argument on Wednesday, November 3, 2021, at the United States Supreme Court. At issue is the applicability of the Second Amendment outside the home. This case is the first major gun rights case in over a decade, and it will be one of the first opportunities for the Court to address the right for individual citizens to carry firearms that are concealed while in public.

The question presented is as follows:

Whether the State's denial of Petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment.

FACTUAL & PROCEDURAL BACKGROUND

A. Brief Overview of New York's Gun Laws

In New York, the possession of a firearm absent a license is a crime. See Penal Law §§ 265.01(1); 265.20(a)(3). A violation of this ban is a class A misdemeanor, which carries a fine of up to \$1,000 and/or imprisonment of up to a year. Penal Law §§ 70.15(1); 80.05(1). If the firearm is loaded, the violation is a class C violent felony, punishable by a prison sentence in the range of 3.5 to 15 years.¹ Penal Law §§ 70.02(1)(b) & (3)(b); 265.03(3). According to an amicus brief, the NYPD's application of these statutes in New York City exacerbate the racial disparities in stops, arrests, and incarceration. The majority of those given lengthy prison time solely for exercising their rights under the Second Amendment are Black and Brown. See Amicus Brief of the Black Attorneys of Legal Aid, the Bronx

¹ A firearm is considered loaded if a person also possesses ammunition, regardless of whether the gun is in fact loaded. Penal Law § 265.00(15). Possession of a weapon is also presumptive evidence of an "intent to use the same unlawfully against another." Penal Law § 265.15(4).

Defenders, Brooklyn Defender Services, et al., at *12–15 (July 22, 2021).

To avoid these penalties, a gun owner must register under New York’s licensing regime, as laid out in section 400.00 of the Penal Law. In New York, the license to keep a gun in one’s home is distinct from a license to carry the firearm outside the dwelling. Penal Law § 400.00(2)(a). New York has no specific provisions regarding the open carry of firearms. Rather, in order for a member of the general public to “carry concealed, without regard to employment or place of possession,” an applicant must demonstrate “proper cause.” *Id.* § 400.00(2)(f). The term “proper cause” has been defined by New York courts as “a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.” *Klenosky v. New York City Police Dep’t*, 75 A.D.2d 793, 793 (1st Dep’t 1980) (emphasis added).

Before a permit is granted, a licensing officer must determine whether “proper cause” has been shown and whether the applicant has satisfied the other general statutory requirements. For example, a licensed gun owner must be of “good moral character,” and must not be an “unlawful user of or addicted to any controlled substance,” including marijuana. Penal Law § 400.00(1). The New York City Police Department is the licensing officer for all applications in the city, and application fees are a minimum of \$340. In other counties, the licensing officer may be a county court justice. Penal Law § 400.00(5).

New York’s efforts to regulate the possession and use of firearms predate the Constitution. See *Kachalsky v. County of Westchester*, 701 F.3d 81, 84–85 (2d Cir. 2012). By 1785, for example, “New York had enacted laws regulating when and where firearms could be used, as well as restricting the storage of gun powder.” *Id.* In 1881, New York prohibited the concealed carrying of any type of firearms. *Id.* And in 1911, New York passed the Sullivan Law, which contains the licensure requirements at issue in this case. *Id.* This law was based on recommendations from a State Coroner’s Report that warned of an increase of “homicide by shooting.” *Id.*; see also *In re Darling*, 154 A.D. 413, 422 (1st Dep’t 1913).

B. Plaintiffs’ Applications for Licenses to Carry Firearms

Robert Nash and Brandon Koch are both residents in Rensselaer County, New York. Both Mr. Nash and Mr. Koch have licenses to possess a handgun in their homes but may only carry the firearm outside of their homes for the limited purposes of hunting and target shooting. Both are also members of the New York State Rifle & Pistol Association, Inc. (“NYSRPA”).

In 2016, Mr. Nash requested removal of the hunting and target shooting restrictions so that he could carry on the basis of self-defense. In support of that request, Mr. Nash cited several robberies in the area. After a hearing before Judge Richard McNally, Jr., Mr. Nash’s request was denied, although the court noted that Mr. Nash’s license also permits him to carry concealed for other outdoor activities like fishing, hiking, and camping.

Mr. Koch similarly petitioned to carry his firearm for personal protection, relying on his training and proficiency. In January 2018, Mr. Koch’s request was also denied after a hearing before Judge McNally. In addition to the outdoor activities language, the court’s decision further explained that Mr. Koch was permitted to carry his weapon to and from his work.

C. Plaintiffs’ Federal Lawsuit

In February 2018, plaintiffs filed a section 1983 complaint in federal court. They asserted that New York’s gun licensing laws violate the Second Amendment’s right to bear arms, both facially and

as applied. The plaintiffs acknowledged that their argument was contrary to the Second Circuit's 2012 decision in *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012), but they claimed that the issue was wrongly decided in light of the opinion in *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017). In *Kachalsky*, the Second Circuit applied intermediate scrutiny and held that the "proper cause requirement" is substantially related to New York's compelling "governmental interests in public safety and crime prevention." 701 F.3d at 97. The D.C. Circuit, however, found that a similar requirement for "good reason to fear injury" in the District of Columbia amounted to a total and unconstitutional ban. 864 F.3d at 667.

Here, the defendants moved to dismiss, noting that a panel of the Second Circuit had recently reaffirmed its holding in *Kachalsky*. See *NYSRPA v. City of New York*, 883 F.3d 45, 56 n.5 (2d Cir. 2018). The defendants also cited social science data and research to support its policy decision for retaining a legal framework that requires good reason before issuing a license to conceal-and-carry. The group Everytown for Gun Safety also submitted an amicus to supplement the historical context for New York's framework of firearms regulation.

On December 17, 2018, the district court granted the motion to dismiss on the basis that *Kachalsky* is controlling and that plaintiffs' claims therefore are not viable as a matter of law. *NYSRPA v. Beach*, 354 F. Supp. 3d 143, 148 & n.6 (N.D.N.Y. 2018).

Plaintiffs appealed the decision to the Second Circuit, contending (1) that the right to carry a weapon for self-defense outside the home is at the core of the Second Amendment, and (2) New York's "proper cause" law is unconstitutional because it does not allow the typical citizen to exercise this right. Defendants responded that (1) regulation of firearms in public, whether concealed or open carry, is both historical and longstanding, (2) the core Second Amendment right is to keep arms inside the home for self-defense, and (3) the New York legislature has determined that the "proper cause" requirement is substantially related to its goals of public safety and crime prevention.

On August 26, 2020, the circuit court issued a summary order affirming the district court's dismissal, citing *Kachalsky*. *NYSRPA v. Beach*, 818 F. App'x 99 (2d Cir. 2020). The Supreme Court subsequently granted certiorari. *NYSRPA v. Corlett*, 2021 WL 1602643 (Apr. 26, 2021).

APPLICABLE LAW

A. Constitutional and Statutory Provisions

U.S. Const., amend. II, provides:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

N.Y. Penal Law § 400.00(2) provides, in relevant part:

. . . A license for a pistol or revolver, other than an assault weapon or a disguised gun, shall be issued to

(a) have and possess in his dwelling by a householder;

. . . (f) have and carry concealed, without regard to employment or place of possession, by any person when proper cause exists for the issuance thereof;

B. Relevant Supreme Court Decisions

- *United States v. Miller*, 307 U.S. 174 (1939).

Two defendants argued that the National Firearms Act violated the Second Amendment. The Court held that the Second Amendment ought to be interpreted with its purpose in mind, which was to “assure the continuation and render possible the effectiveness of [militias].” 307 U.S. at 178. For the next seventy years, little attention was paid to an individual’s right to possess and use firearms.

- *District of Columbia v. Heller*, 554 U.S. 570 (2008).

D.C. law prohibited, among other things, the registration of handguns (even if the handgun would be kept solely in the home). Justice Scalia, writing for the majority, held that the Second Amendment’s mention of a “Militia” did not limit its scope to a collective right or the use of guns only for military purposes. Rather, the Second Amendment’s text and contemporaneous sources confirmed that it protected an “individual right” to keep and bear arms for nonmilitary purposes, including for self-defense within the home.

The Court acknowledged this right could be limited, noting “longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 626–27.

In a dissent, Justice Breyer contended the Court should have engaged in an “interest-balancing inquiry” asking “whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.” *See id.* 689–90, 722 (Breyer, J., dissenting). The majority disagreed, concluding instead that “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to keep and use for protection of one’s home [i.e., handguns] and family would fail constitutional muster.” *Id.* at 628–29 (internal quotations omitted).

- *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

A majority of the Supreme Court held that the Second Amendment also applies to the States, by virtue of the Fourteenth Amendment. Of particular relevance to this case, a plurality reached that conclusion by reaffirming *Heller*’s holding that “individual self-defense is the central component of the Second Amendment right.” *Id.* at 767 (internal quotations omitted).

- *Caetano v. Massachusetts*, 577 U.S. 411 (2016).

In an unsigned, per curiam opinion, the Supreme Court vacated a Massachusetts decision that had exempted stun guns from Second Amendment protection because they were not in “common use” at the time of the Bill of Rights. The Court rejected that reasoning as expressly contrary to *Heller*. Justices Alito and Thomas concurred, emphasizing that the facts—in which a woman used a stun gun against her violent ex-boyfriend after he confronted her at work (or outside the home)—illustrate a connection between self-defense and the fundamental rights to keep and bear arms. *Id.* at 1028–29 (Alito, J., concurring).

- *New York State Rifle & Pistol Association, Inc. v. City of New York*, 140 S. Ct. 1525 (2020).

Last year, the Court dismissed on mootness grounds a challenge to a NYC rule barring the transport of firearms. Justices Alito, Thomas, and Gorsuch dissented, writing that the right “to bear

arms implies something more than the mere keeping of arms; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use.” *Id.* at 1541. The dissent would have found the restriction unconstitutional because the City failed to properly justify its rule. Justice Kavanaugh also concurred and noted a concern that some federal and state courts may not be properly applying *Heller* and *McDonald*.

C. Relevant Circuit Court of Appeals Decisions

- *Kachalsky v. County of Westchester*, 701 F.3d 81 (2d Cir. 2012).

The Second Circuit distinguished *Heller* by noting the opinion was silent regarding the scope of the Second Amendment “beyond the home and the standards for determining when and how the right can be regulated by a government.” *Id.* at 88–89. The court wrote that the core of the Second Amendment was for protection in the home, where the need for defense of self, family, and property was most acute. *Id.* at 94.

The court briefly discussed and then concluded that history and tradition regarding concealed-carry laws were “highly ambiguous” and did not speak with one voice. *Id.* at 90–91. The Second Circuit then determined intermediate scrutiny was proper because of a tradition that allows “a substantial role for state regulation of the carrying of firearms in public.” *Id.* at 96. Citing legislative history, the Second Circuit found that the “proper cause” requirement for licensing is substantially related to the State’s interests in public safety. *Id.* at 98. Finally, the decision concluded that the Second Amendment gave the State authority to regulate firearm possession in public, and that the right to engage in self-defense with a firearm does not exist until the circumstances justify the use of deadly force. *Id.* at 100.

- *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012).

The Seventh Circuit addressed an Illinois law that forbids the public carrying of a loaded gun. Judge Posner first reviewed the history and rationale of public gun bans, and then concluded that the need for self-defense outside the home is just as great, if not greater, than within the home. 702 F.3d at 938–40. The court distinguished New York’s law because it allowed for licensing, while Illinois’s law was a complete ban. *Id.* at 942

- *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016).

California’s concealed-carry law required a particularized reason why a firearm was necessary for self-defense. The Ninth Circuit specifically noted that it was limiting its decision to the concealed-carry question rather than whether the Second Amendment protects the ability to openly carry firearms in public. 824 F.3d at 927. After a lengthy historical analysis, the Ninth Circuit concluded that the carrying of concealed weapons was generally prohibited and should not be encompassed by the Second Amendment right. *Id.* at 939. Thus, any state restriction on the ability to concealed carry is not implicated by the Constitution. *Id.*

Certiorari to the Supreme Court was denied, but Justice Thomas, joined by Justice Gorsuch, dissented, criticizing the Ninth Circuit for side-stepping the actual complaint in the case against California’s regulatory scheme as a whole. 137 S. Ct. 1995, 1997 (2017) (Thomas, J., dissenting). Justice Thomas wrote that the Court has already suggested “the Second Amendment protects the right to carry firearms in public in some fashion,” and explained that the right to public carry is supported by history and precedent. *Id.* at 1998–99.

- *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017).

The D.C. Circuit enjoined a law requiring the showing of “good reason to fear injury” before the granting of a concealed carry license. The court disagreed that the core of the Second Amendment was about the home; rather, it cited *Heller* for its conclusion that the central component of the Amendment is “individual self-defense.” 864 F.3d at 657. After also reviewing historical sources, the D.C. Circuit concluded that the right to carry beyond the home for self-defense is core to the Second Amendment, “even in densely populated areas, [and] even for those lacking special self-defense needs.” *Id.* at 661.

Although the D.C. law was a licensing requirement, the D.C. Circuit again cited the reasoning of *Heller* to interpret the law as a total ban against the typical and common law-abiding citizen who has no specialized good-reason. Therefore, no determination of a level of scrutiny was necessary; as in *Heller*, the law violated the “typically situated citizen’s ability to carry common arms generally.” *Id.* at 667. The court concluded that “the law abiding citizen’s right to bear common arms must enable the typical citizen to carry a gun.” *Id.* at 668.

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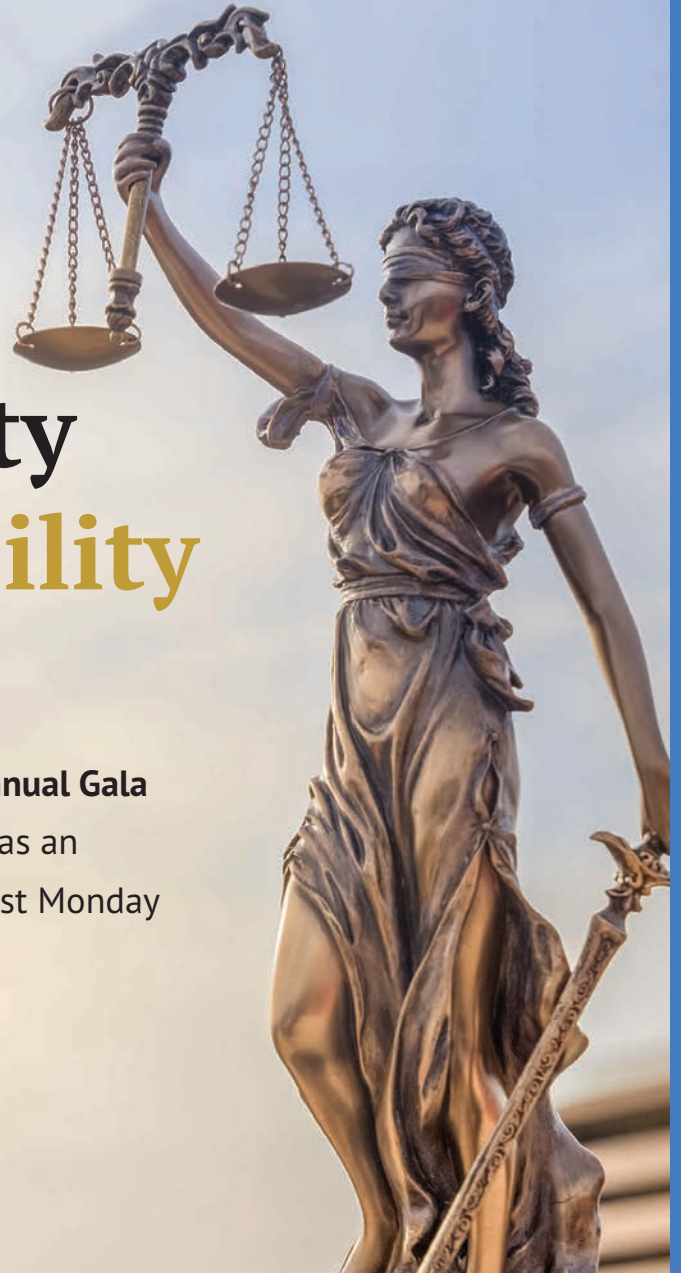
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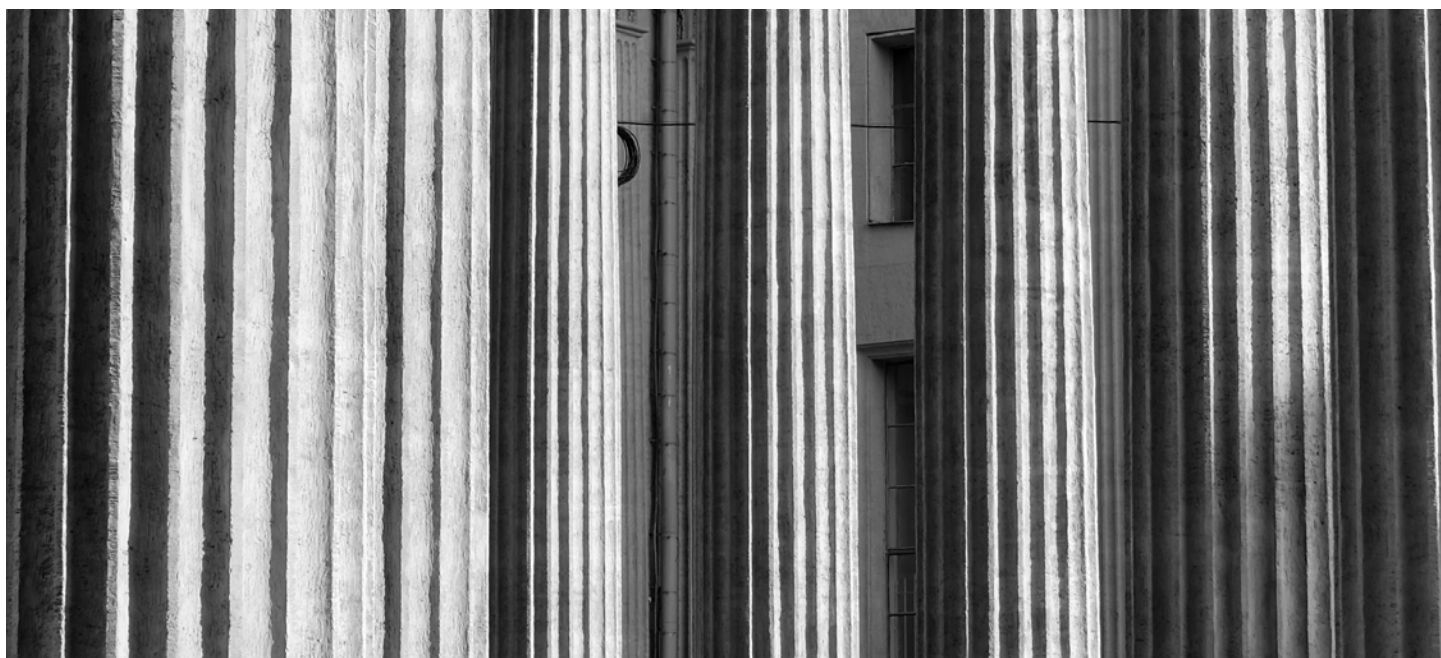
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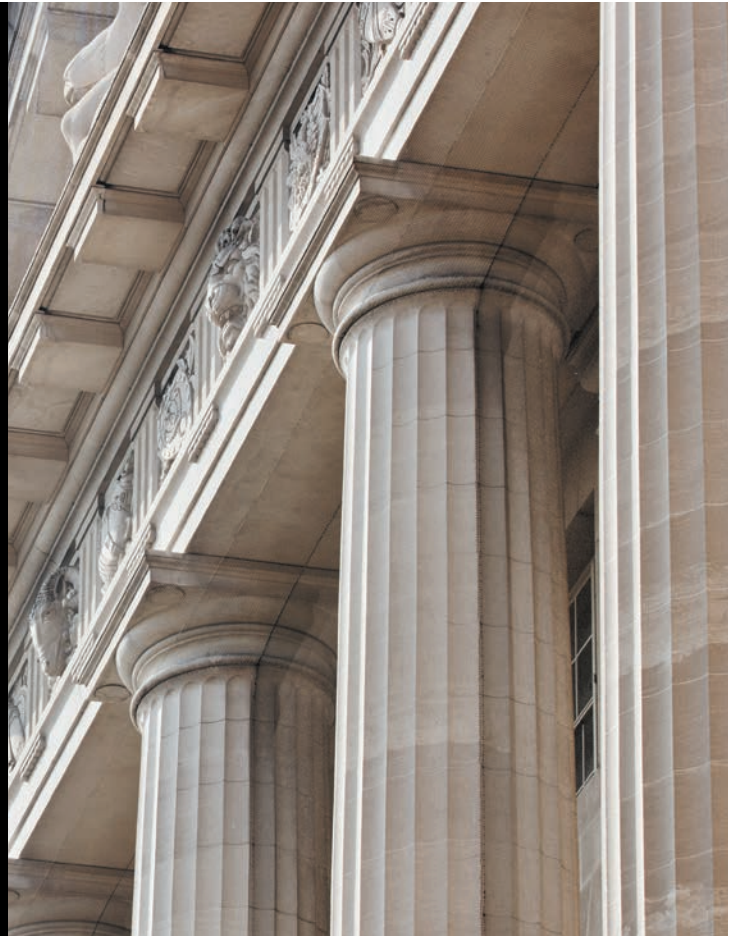
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