No. 18-280

IN THE

Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, *et al.*,

Petitioners,

v.

THE CITY OF NEW YORK, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* REPRESENTATIVE BRADLEY BYRNE AND 119 ADDITIONAL MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES IN SUPPORT OF PETITIONERS

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May 14, 2019

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are Representative Bradley Byrne and 119 additional members of the United States House of Representatives. A complete list of *amici* is set forth in the Appendix. Members of Congress swear an oath (or affirm) to support and defend the Constitution of the United States, and they have an obligation to defend the principles of liberty enshrined in that document. They, therefore, have a strong interest in ensuring that governments at all levels of our federal system comply with constitutional guarantees and do not infringe on citizens' rights.

Moreover, the Court's interpretation of the Second Amendment directly affects the fundamental right of the people to defend themselves from violence and tyranny. As duly elected representatives of the people of the United States and members of a coequal branch of government, members of Congress have an obligation to urge the Court to prevent restriction and erosion of that fundamental right.

Amici curiae submit this brief to make clear that the fundamental right to keep and bear arms is not a second-class right. Courts should protect that fundamental right from infringement, and they should confirm that generic invocations of public

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[1] The parties have filed letters giving blanket consent to the filing of *amici curiae* briefs. No counsel for any party authored this brief in whole or in part, no counsel for a party made a monetary contribution to fund the preparation or submission of this brief, and no one other than the *amici curiae* and their counsel made any such monetary contribution.

safety are not enough to justify heavy-handed restrictions.

SUMMARY OF THE ARGUMENT

In *McDonald v. City of Chicago* and *District of Columbia v. Heller*, the Court held that the right to keep and bear arms—to have and carry weapons—is an individual, natural, and fundamental right. The right predates the Second Amendment, and its central concept is the right of self-defense.

The Court has made clear that infringement on the Second Amendment right is not subject to a free-standing interest balancing. *See Heller*. Yet, in the wake of *Heller* and *McDonald*, the lower courts have been applying strict scrutiny only to restrictions that substantially burden the right of law-abiding citizens to use firearms to defend themselves in their homes. They have been applying intermediate scrutiny—or at least something they call intermediate scrutiny—to most other restrictions.

At minimum, the analysis the lower courts have been doing is wrong for two reasons. First, the lower courts have largely misinterpreted what stands at the "core" of the Second Amendment right. The core right is the right of armed self-defense, and that right extends outside the home to include the right to carry and to train with weapons. Second, the lower courts have upheld broad restrictions on the Second Amendment right based on little more than generalized and speculative interests in crime control or public safety. In doing so, the lower courts have declined to protect the right to keep and bear arms from infringement by using the ad hoc and free

standing interest-balancing the Court explicitly rejected in *Heller*.

Indeed, that appears to be precisely what happened here. The United States Court of Appeals for the Second Circuit upheld Title 38, Chapter Five, Section 23 of the Rules of the City of New York (§ 5-23). It did so even though § 5-23 places substantial and broad restrictions on the core Second Amendment right, based on little more than speculation about potential public safety and crime issues and a desire for greater administrative convenience. Those generalized concerns cannot support such a substantial burden on a fundamental right, and the Second Circuit's decision should be reversed.

ARGUMENT

I. The Second Amendment enshrines the fundamental right of citizens to protect themselves from violence and tyranny.

Twice in the last eleven years, the Court has considered the Second Amendment and the right to keep and bear arms. *See McDonald v. City of Chicago*, 561 U.S. 742 (2010); *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008). In both instances, the Court concluded that the right to keep and bear arms to protect oneself is a fundamental, natural right that predates the Second Amendment.

In *Heller*, the Court resolved that the right to keep and bear arms was an individual, not a collective, right. *See* 554 U.S. at 595. The Court set out the history of the right, tracing it to 1689 and the English Bill of Rights that followed the Glorious Revolution. *See id.* at 592–93. Through Blackstone and oth-

er commentators, the Court examined the understanding of the founding generation that their fundamental rights as Englishmen included "the natural right of resistance and self-preservation" and "the right of having and using arms for self-preservation and defence." *Id.* at 593–94 (quoting 1 William Blackstone *Commentaries on the Laws of England*, 139–40 (1765)). The Court explored state constitutions from the founding era, concluding that their analogous protections support that the Second Amendment codified an individual right to keep and bear arms in defense of self and of the state. *Heller*, 554 U.S. at 600–03. The Court went on to consider commentary from legal scholars from the founding era to after the Civil War and both case law and legislation from before and after the Civil War. *See id.* at 603–26.

Considering the language of the Second Amendment and given its historical underpinning, the Court endorsed the common understanding "that the Second Amendment, like the First and the Fourth Amendments, codified a *pre-existing* right." *Id.* at 592. That is, as the Court recognized in *United States v. Cruikshank*, the right to keep and bear arms exists as a natural right independent of the Second Amendment. *See* 92 U.S. 542, 553 (1876). And the natural right the Second Amendment codified includes the right to keep and bear arms both to defend against tyranny and in self-defense. *See Heller*, 554 U.S. at 598 (discussing the militia of those "trained in arms and organized" as a check on tyranny); *id.* at 599 (calling self-defense "the *central component*" of the Second Amendment right).

Two years later, in *McDonald*, the Court held that the Second Amendment applied to the States.[2] *See* 561 U.S. at 749. In doing so, the Court looked to *Heller*, but it also looked again to history as a guide to determine "whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty," or as the Court has also framed the inquiry, "whether this right is 'deeply rooted in Nation's history and tradition.'" *McDonald,* 561 U.S. at 767 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

The Court reasoned that recognition of the natural right of self-defense is ancient and stands as the "*central component*" of the Second Amendment. *McDonald,* 561 U.S. at 767. Relying on *Heller*, the Court again traced the right to keep and bear arms through history—from the English Bill of Rights, to Blackstone, to the debates between the Federalists and Anti-Federalists, to the debates on ratification of the Bill of Rights, to state constitutions just before and after ratification of the Bill of Rights, to the Civil War era.[3] *See id.* at 767–80. The Court held that the

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[2] A plurality held that the Second Amendment was incorporated through the Due Process Clause of the Fourteenth Amendment. *See McDonald,* 561 U.S. at 791 (plurality op.). Justice Thomas concurred separately, concluding that the right to keep and bear arms was one of the privileges and immunities of federal citizenship applicable to the states through § 1 of the Fourteenth Amendment. *See id.* at 806 (Thomas, J., concurring).

[3] In his separate opinion, Justice Thomas also discussed the history of the right to keep and bear arms as a fundamental, inalienable right. *See McDonald,* 561 U.S. at 815–19 (Thomas, J., concurring).

right to keep and bear arms codified in the Second Amendment is a fundamental right and necessary to our system of ordered liberty and thus applies to the States. *See id.* at 778.

Together, *Heller* and *McDonald* confirm that the right to keep and bear arms is a natural right. It is fundamental to the American concept of liberty. And the core of the right is the right to self-defense, not only against tyranny but also against the trials and evils of the world.

II. Courts should place a heavy burden on the government to show that a restriction on the right to keep and carry weapons does not violate the Second Amendment.

Generally, a government action that burdens a fundamental right—such as the rights the First Amendment protects—is subject to strict scrutiny. *See, e.g.*, *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983). Although the Court has compared the Second Amendment to the First Amendment, it has ruled out any sort of "freestanding interest-balancing approach" to analyzing government action that infringes on the Second Amendment right. *See Heller*, 554 U.S. at 635; *see also id.* at 579, 635 (comparing the Second Amendment to the First Amendment); *McDonald*, 561 U.S. at 802 (Scalia, J., concurring) (same).

Even so, the courts of appeals have begun fashioning an analysis that resembles the levels of scrutiny applied to other rights. Some have reasoned that restrictions on the core Second-Amendment right are

subject to strict scrutiny.[4] Those decisions have generally construed the core Second-Amendment right to be "the right of *law-abiding, responsible* citizens to use arms in defense of hearth and home." *Torres*, 911 F.3d at 1262.[5] When a legal restriction burdens something other than the right to keep a weapon in the home, courts have applied some form of intermediate (sometimes called "heightened") scrutiny.[6]

The legal analysis the courts of appeals are doing is flawed in at least two significant ways. First, those courts are defining the "core" Second Amendment right too narrowly. This Court has defined the core right the Second Amendment protects as the right of self-defense—without limiting that right to self-defense in the home. *See McDonald*, 561 U.S. at 767 ("[I]ndividual self-defense is *the central component* of the Second Amendment right." (quoting *Hel-*

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[4] *See United States v. Torres*, 911 F.3d 1253, 1262 (9th Cir. 2019); *Ass'n of N.J. Rifle & Pistol Clubs, Inc. v. Att'y Gen. of N.J.*, 910 F.3d 106, 117 (3d Cir. 2018); *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 195 (5th Cir. 2012) [*NRA*]; *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011).

[5] *Accord Ass'n of N.J. Rifle & Pistol Clubs*, 910 F.3d at 117; *NRA*, 700 F.3d at 205. *But see Kolbe v. Hogan*, 849 F.3d 114, 133–34 (4th Cir.) (en banc) (suggesting that even regulation of the right to bear arms inside the home may not always be subject to strict scrutiny), *cert. denied*, 138 S. Ct. 469 (2017).

[6] *See Gould v. Morgan*, 907 F.3d 659, 672 (1st Cir. 2018), *petition for cert. filed,* (U.S. Apr. 4, 2019) (No. 18-1212); *Pena v. Lindley*, 898 F.3d 969, 977 (9th Cir. 2018) *petition for cert. filed,* (U.S. Jan. 3, 2019) (No. 18-843); *Stimmel v. Sessions*, 879 F.3d 198, 206–07 (6th Cir. 2018); *Drake v. Filko*, 724 F.3d 426, 436 (3d Cir. 2013); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 96–97 (2d Cir. 2012).

ler, 554 U.S. at 599)); *id.* at 768 ("[C]itizens must be permitted 'to use [handguns] for the core lawful purpose of self-defense.'" (quoting *Heller*, 554 U.S. at 630)); *Heller*, 554 U.S. at 599 (describing self-defense as "the *central component* of the right itself"); *id.* at 629 ("[T]he inherent right of self-defense has been central to the Second Amendment right."); *accord Ezell*, 651 F.3d at 689 ("*Heller* held that the Amendment secures an individual right to keep and bear arms, the core component of which is the right to possess operable firearms—handguns included—for self-defense, most notably in the home."); *id.* at 708 (defining the core Second Amendment right as the "right of armed self-defense" and the "right to possess firearms for self-defense"). Further, limiting the core right to the home disregards the Court's analysis in *Heller* of the text of the Second Amendment, an analysis that determined the natural reading of the right to "keep and bear Arms" as the right to have and carry weapons. *See Heller*, 554 U.S. at 582–84; *see also Peruta v. California*, 137 S. Ct. 1995, 1998 (2017) (Thomas, J., dissenting from denial of certiorari).

Second, the courts of appeals are applying the wrong analysis altogether, no matter how the core right is defined. The Court has ruled out a freestanding interest balancing that asks judges to decide whether the government's interest in imposing restrictions outweighs the Second Amendment right. *See Heller*, 554 U.S. at 634–35. As then-Judge Kavanaugh has stated, "courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny." *Heller v. Dist. of Columbia*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); *see also Silvester v. Becerra*, 138 S. Ct. 945, 947–48

(2018) (Thomas, J., dissenting from denial of certiorari) (collecting cases in agreement).

Under this approach, courts should analyze the text of the Second Amendment and the history and traditions of *our* nation to determine whether the Second Amendment protects the person seeking protection, the activity she seeks to protect, and the weapon she seeks to use. *See, e.g.*, *Heller*, 554 U.S. at 624–25 ("[T]he Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." (citing *United States v. Miller*, 307 U.S. 174, 179 (1939))); *id.* at 626–27 ("[N]othing in our opinion should be taken to cast doubt on 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."). Courts must apply the test rigorously, must begin with a presumption that restrictions are invalid, and must place a heavy burden on the government to rebut that presumption. The Second Circuit erred by applying a different analysis.

But even if the courts of appeals were correct to apply a levels-of-scrutiny analysis, they should (at minimum) be applying strict scrutiny to any legal restriction that substantially burdens the core Second Amendment right to carry and use a weapon in self-defense—inside or outside the home. Prohibiting licensed firearm owners from transporting their firearms between residences substantially burdens that core right. *See Heller*, 554 U.S. at 635; *McDonald*, 561 U.S. at 780. Prohibiting licensed firearm owners

from transporting their firearms to practice safe gun handling or to engage in target practice at gun ranges outside the City of New York (the City) substantially burdens that core right. *See Heller*, 554 U.S. at 616, 619; *see also Ezell*, 651 F.3d at 704, 708. Thus, even if an interest-balancing test were appropriate, the district court and the Second Circuit would have still erred by applying intermediate scrutiny to § 5-23. (*See* Pet. App. 24, 59.)

III. Speculative public-safety concerns cannot justify broad restrictions on the right to bear arms.

As part of any interest-balancing analysis, the government must provide a justification for restricting the people's rights. Under intermediate scrutiny, the government's interest must be "significant" or "substantial" or "important." *See Kachalsky*, 701 F.3d at 96.[7] Under strict scrutiny, the government's interest must be compelling. *See Ezell*, 651 F.3d at 707; *see also United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000).

But the government must show more than its interest in infringing the right. It must also show a fit between the restriction it has chosen and the interest it hopes to achieve. Under intermediate scrutiny, that fit must be close, but not perfect. *See Kachalsky*, 701 F.3d at 97; *see also Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) ("In other words, the law must not burden substantially

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[7] *See also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564 (1980).

more speech than is necessary to further the government's legitimate interests." (citation omitted)). Under strict scrutiny, the government must show narrow tailoring—that the means chosen is the least restrictive means. *See Ezell*, 651 F.3d at 707; *see also Playboy Entm't Grp.*, 529 U.S. at 813.

Here, the City has sought to justify § 5-23 based on its interest in promoting public safety and crime prevention. (Pet. App. 25–28, 61–64.) As to "tailoring" it offered an affidavit from a former Commander of the License Division justifying the restrictions because license holders might get involved in a stressful situation "where it would be better to not have the presence of a firearm." (Pet. App. 26.) It also asserted that enforcing restrictions on carrying handguns is harder if licensees can "create an explanation about traveling for target practice or shooting competition." (Pet. App. 27.) The thrust of the City's justification is that, unless it can easily enforce the restrictions on licensees' ability to transport their firearms, "public safety will be compromised." (Pet. App. 26–27.)

The district court and court of appeals' acceptance of the broad restrictions in § 5-23 based on little more than speculative public-safety concerns and desires for administrative convenience should come as no surprise. Since this Court decided *Heller*, parties defending restrictions on the Second Amendment right have invoked public safety and crime prevention with a mantra-like consistency. And courts, although purporting to apply heightened scrutiny, have upheld restriction after restriction. *See Becerra*, 138 S. Ct. at 945 (Thomas, J., dissenting); *Friedman v. City of Highland Park*, 136 S. Ct.

447, 448 (2015) (Thomas, J., dissenting from denial of certiorari); *Jackson v. City & Cty. of San Francisco*, 135 S. Ct. 2799, 2799–800 (2015); (Thomas, J., dissenting from denial of certiorari); *Silvester v. Harris*, 843 F.3d 816, 823, 828 (9th Cir. 2016); *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015); *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 965 (9th Cir. 2014).

When analyzing efforts to restrict and infringe fundamental rights, courts must place a thumb (and a heavy thumb at that) on the scale in favor of protecting the people's rights. So too when courts face efforts to restrict and infringe the fundamental right to have and carry weapons. After all, the right the founding generation enshrined in the Second Amendment is not a "second-class right, subject to an entirely different body of rules than the other Bills of Rights guarantees." *McDonald*, 561 U.S. at 780.

But the lower courts have treated it as though it were. Instead of invalidating restrictions that infringe on the right to keep and bear arms, the lower courts have deferred again and again to governments' assertions about the public-safety implications the restrictions supposedly serve. The result has been to single out the Second Amendment for "special—and specially unfavorable—treatment." *Id.* at 778. After all, "[t]he right to keep and bear arms . . . is not the only constitutional right that has controversial public safety implications." *Id.* at 783. Yet only the right the Second Amendment protects is treated so cavalierly by the lower courts. *Cf. Becerra*, 138 S. Ct. at 945 (Thomas, J., dissenting) ("If a lower court treated another right so cavalierly, I have little doubt that this Court would intervene.").

This case is a quintessential example of how courts of appeals have treated the right to keep and bear arms as a second-class right by not reviewing regulations infringing on the right with any meaningful scrutiny. An analysis that upholds the restrictions on the Second Amendment right in § 5-23 based on mere speculation that the restrictions will promote public safety and prevent crime is just the "freestanding 'interest balancing'" the Court rejected in *Heller*. *See* 554 U.S. at 634–35. Indeed, doing so is nothing more than an ad hoc determination that the Second Amendment right is not worth the trouble it may cause the City.

Any such determination is probably incorrect. After all, contrary to the City's assertions, there is good reason to believe that restricting the Second Amendment right—reducing the ability of the people to defend themselves—does not promote public safety or reduce crime.[8]

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[8] *See* Don B. Kates & Alice Marie Beard, *Murder, Self-Defense, and the Right to Arms*, 45 Conn. L. Rev. 1685, 1691 (2013) ("In 2004, the National Academy of Sciences studied gun control, reviewing 253 journal articles, 99 books, 43 government publications, and some empirical research of its own about gun crime. The Academy could not identify any gun restriction that reduced violent crime, suicide, or gun accidents. A year earlier, the Centers for Disease Control and Prevention ("CDC"), which endorses banning handguns and severely restricting other guns, released an exhaustive review of all extant literature. The CDC likewise could not identify any gun control measure that had reduced murder, violent crime, suicide, or gun accidents." (footnotes omitted)); Nicholas J. Johnson, *Imagining Gun Control in America: Understanding the Remainder Problem*, 43 Wake Forest L. Rev. 837, 838 (2008) ("Stringent de jure supply restrictions actually have correlated with higher levels of gun

In any event, the American people have already performed that interest balancing. The product of that balancing was the decision to enshrine the right to have and carry weapons as a fundamental, enumerated constitutional right. *See Heller,* 554 U.S. at 634–35.

The people of the founding generation were not ignorant of the risks associated with that decision. They were no strangers to the evil men sometimes do. But the people decided that the right of armed self-defense should not subject to future evaluation by the courts. *See id.* They harnessed their collective wisdom and determined that the risk to public safety is greater in leaving the people unarmed and unable to defend themselves against the threats of the world. By taking up that yoke and exercising their ultimate sovereignty, the American people took "out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* at 634.

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crime." (citing *Heller*, 554 U.S. at 700 (2008) (Breyer, J., dissenting))).

CONCLUSION

For these reasons, *amici* request that the Court reverse the Second Circuit's decision.

Respectfully submitted,

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APPENDIX

APPENDIX

THOSE JOINING IN AMICI CURIAE BRIEF

The following members of the United States House of Representatives join in this brief:

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Representative Robert Aderholt (AL-04)
Representative Rick Allen (GA-12)
Representative Kelly Armstrong (ND-AL)
Representative Jodey Arrington (TX-19)
Representative Brian Babin (TX-36)
Representative Jim Baird (IN-04)
Representative Jim Banks (IN-03)
Representative Andy Barr (KY-06)
Representative Jaime Herrera Beutler (WA-03)
Representative Andy Biggs (AZ-05)
Representative Rob Bishop (UT-01)
Representative Mike Bost (IL-12)
Representative Mo Brooks (AL-05)
Representative Larry Bucshon, M.D. (IN-08)
Representative Ted Budd (NC-13)
Representative Michael C. Burgess, M.D. (TX-26)
Representative Bradley Byrne (AL-01)
Representative Ken Calvert (CA-42)
Representative Buddy Carter (GA-01)
Representative Steve Chabot (OH-01)
Representative Liz Cheney (WY-AL)
Representative Ben Cline (VA-06)
Representative Michael Cloud (TX-27)
Representative Chris Collins (NY-27)
Representative Doug Collins (GA-09)
Representative Mike Conaway (TX-11)
Representative Paul Cook (CA-08)

Representative Rick Crawford (AR-01)
Representative John Curtis (UT-03)
Representative Warren Davidson (OH-08)
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Representative Bill Flores (TX-17)
Representative Russ Fulcher (ID-01)
Representative Matt Gaetz (FL-01)
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Representative Bob Gibbs (OH-07)
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Representative Kevin Hern (OK-01)
Representative Jody Hice (GA-10)
Representative George Holding (NC-02)
Representative Richard Hudson (NC-08)
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Representative Duncan Hunter (CA-50)
Representative Bill Johnson (OH-06)
Representative Mike Johnson (LA-04)
Representative Jim Jordan (OH-04)
Representative John Joyce, M.D. (PA-13)
Representative Mike Kelly (PA-16)

Representative Trent Kelly (MS-01)
Representative Steve King (IA-04)
Representative Doug LaMalfa (CA-01)
Representative Doug Lamborn (CO-05)
Representative Robert E. Latta (OH-05)
Representative Debbie Lesko (AZ-08)
Representative Billy Long (MO-07)
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Representative Roger Marshall, M.D. (KS-04)
Representative Kevin McCarthy (CA-23)
Representative Tom McClintock (CA-04)
Representative David B. McKinley, P.E. (WV-01)
Representative Mark Meadows (NC-11)
Representative Carol D. Miller (WV-03)
Representative Paul Mitchell (MI-10)
Representative John R. Moolenaar (MI-04)
Representative Alex Mooney (WV-02)
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Representative Ralph Norman (SC-05)
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Representative Mark Walker (NC-06)
Representative Jackie Walorski (IN-02)
Representative Michael Waltz (FL-06)
Representative Randy Weber (TX-14)
Representative Brad Wenstrup (OH-02)
Representative Bruce Westerman (AR-04)
Representative Roger Williams (TX-25)
Representative Joe Wilson (SC-02)
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