No. 18-280

IN THE

Morris Tyler Moot Court of Appeals at Yale

NEW YORK STATE RIFLE AND PISTOL ASSOCIATION, INC., ET AL.,

Petitioners,

v.

CITY OF NEW YORK, NEW YORK, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS

ID: 911507606
Counsel of Record
127 Wall Street
New Haven, CT 06511
(203) 432-4992

Counsel for Respondents

October 23, 2019

QUESTION PRESENTED[1]

To enforce its gun laws, the City of New York has implemented a licensing scheme that limits the traffic of firearms across its borders. The question presented is:

1. Whether the Second Amendment empowers gun owners to transport weapons to out-of-city firing ranges and second homes in contravention of a local licensing scheme.

[1] Petitioners, plaintiffs-appellants below, are the New York State Rifle & Pistol Association, Romolo Colantone, Efrain Alvarez, and Jose Anthony Irizarry. Respondents, defendants-appellees below, are the City of New York and the New York City Police Department—License Division.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND CONSTITUTIONAL PROVISIONS

MISCELLANEOUS

OPINIONS BELOW

The opinion of the Second Circuit, affirming summary judgment for the City, is reported at 883 F.3d 45. The opinion of the U.S. District Court for the Southern District of New York—denying petitioners a preliminary injunction and granting the City's motion for summary judgment—is reported at 86 F. Supp. 3d 249.

JURISDICTION

The court of appeals entered judgment on February 23, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

Relevant constitutional and statutory provisions are included in the appendix.

INTRODUCTION

This Court held in *District of Columbia v. Heller* that the Second Amendment "protects the right to keep and bear arms for the purpose of self-defense." *McDonald v. City of Chicago*, 561 U.S. 742, 749-50 (2010) (citing *Heller*, 554 U.S. 570 (2008)). In the intervening decade, the circuit courts have coalesced around a workable standard for operationalizing that right in federal jurisprudence. The Second Circuit, applying a version of that standard, upheld a New York City licensing scheme regulating travel with handguns, holding that the law imposed only "insignificant and indirect costs . . . on Second Amendment interests." *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45, 64 (2d Cir. 2018).

On appeal to this Court, however, petitioners would like to turn back the clock to 2007. To them, the "ancient right of individuals to keep and bear arms" is not the solemn "individual right protecting against both public and private violence." *Heller*, 554 U.S. at 594, 599. It is instead an all-purpose vehicle to defend sport, leisure, and luxury—so long as those activities happen to

involve a firearm. Commonplace regulations from hunting restrictions to anti-trafficking laws would be swept into the core ambit of the Second Amendment. Petitioners challenge the very foundation of the states' police power.

The instant case provides the Court with a chance to reject this view and polish the framework adopted in near lockstep by the circuit courts. It offers a ready opportunity to reaffirm the constitutional validity of "presumptively lawful regulatory measures." *Id.* at 627 n.26. And most importantly, this Court's gloss on *Heller* will provide states with the legal clarity they need to reliably develop constitutionally permissible laws in furtherance of public safety: to protect their citizens, curb violent crime, and save lives.

STATEMENT OF THE CASE

Gun violence claims 40,000 American lives every year. *National Center for Health Statistics—All Injuries*, Ctr. for Disease Control & Prevention (2017), https://perma.cc/UR4Q-NWW2. Death by gunshot wound is the second-leading cause of fatalities for children in the United States, behind only automobile accidents. Sandee LaMotte, *US Leads the World in Child Gun Deaths*, CNN (Dec. 20, 2018), https://perma.cc/BS8M-4FZ7. In the past decade, mass shootings on American soil have included the slaughter of 58 attendees of a country music concert in Las Vegas, the massacre of 49 patrons of a gay nightclub in Orlando, and the murder of 20 grade-school kids at Sandy Hook Elementary School in Newtown, Connecticut. Phil Helsel & Kalhan Rosenblatt, *Horror in El Paso Another in a Long List of Mass Killings Plaguing the Nation*, NBC News (Aug. 5, 2019), https://perma.cc/8ZBL-8B54.

In response to this crisis, state and local governments have experimented with a range of approaches to regulate the means by which private citizens access and use firearms. The City of New York ("City") is one such local government. In the 1980s and early 1990s, the City faced an

unprecedented crime wave: 250 felonies committed per week on the New York City Subway; over 2,000 murders per year; and a sharply declining population and police force. *See* Albert Samaha, *The Rise and Fall of Crime in New York City: A Timeline*, Village Voice (Aug. 7, 2014), https://perma.cc/24HY-BFLZ. Three decades later, after action on multiple fronts by New York State ("New York" or "State") and City officials, New York now has the second-lowest rate of gun mortality in the country, less than one-third of the national average. *National Center for Health Statistics—Firearm Mortality by State*, Ctr. for Disease Control & Prevention (2017), https://perma.cc/MB6Q-EN3W.

One of the measures used by the City of New York to combat violent crime and gun violence is the regulatory scheme challenged in this case. Under State law, owners of handguns within New York City are required to obtain a license from the City Police Commissioner. N.Y. Penal Law §§ 265.00(10), 265.01, 265.20(a)(3). The City administers handgun licenses through codified provisions in the Rules of the City of New York ("RCNY"), which define the categories of licenses. *See* 38 RCNY § 5-01. Petitioners, residents of the City, each hold a standard "Premises License," a category "issued for the protection of a business or residence premises." *Id.* § 5-23(a); *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 86 F. Supp. 3d 249, 256 (S.D.N.Y. 2015).

The Rules, however, allow the firearm to be taken *off* the premises of "the address specified" for two purposes. 38 RCNY § 5-23(a)(1). The first is hunting: a Premises License allows the licensee to bring a handgun "to and from an authorized area designated by the New York State Fish and Wildlife Law." *Id.* § 5-23(a)(4). The second is firing range practice. Consistent with the purpose of the license—"protection of a business or residence premises," *id.* § 5-23(a)—the Rules grant licensees the ability to transport weapons to an "authorized small arms range/shooting club" in order "[t]o maintain proficiency in the use of the handgun," *id.* § 5-23(a)(3).

The City cabins these exceptions to the Premises License through anti-trafficking provisions. The hunting exception, § 5-23(a)(4), allows for transport only to hunting areas within the State. *See N.Y. State Rifle & Pistol*, 86 F. Supp. 3d at 263. And to qualify for the firing range exception, § 5-23(a)(3), an "authorized small arms range/shooting club" must be located within New York City. *N.Y. State Rifle & Pistol*, 883 F.3d at 53. The City currently has seven authorized firing ranges. *Id.* These are "places of public accommodation" that are "available to any premises license-holder." *Id.* at 60; *see also id.* at 59 ("Plaintiffs concede that seven authorized ranges are available to them, including at least one in each of the City's five boroughs."); *infra* Appendix A (mapping the authorized ranges). Below, petitioners did not allege that the City limits the number of firing ranges as "a byproduct of [38 RCNY § 23] or any burdensome zoning regulations." *N.Y. State Rifle & Pistol*, 883 F.3d at 60 n.10. That is, no party contends that "the number or location of firing ranges in the City is . . . anything more than the result of market forces." *Id.*

With only a Premises License, transporting handguns across State borders (for hunting) or past City limits (for target practice) violates the anti-trafficking provisions. This version of the rules entered force via an anti-evasion amendment in 2001. Before then, the City issued a "target license," an intermediate class between the Premises License and various carry licenses. The target license allowed licensees to transport a handgun "for regular target shooting purposes" but escape the force of the anti-trafficking provisions. *N.Y. State Rifle & Pistol*, 86 F. Supp. 3d at 255. The District Court found that the "class was eliminated in 2001 due to repeated incidents of permit holders not complying with the limitations on the target license." *Id.* Even without the target license category, New York City processes over 12,000 license applications every year. *See id.*

Petitioners challenge the anti-trafficking provisions of the Rules. They allege two Second Amendment burdens. The first is that the Rules prevent petitioners from transporting handguns to

out-of-City firing ranges and shooting competitions. *N.Y. State Rifle & Pistol*, 883 F.3d at 54. The second is that one petitioner cannot use his Premises License to carry a firearm between his City residence and his second home in upstate New York. *Id.*; *N.Y. State Rifle & Pistol*, 86 F. Supp. 3d at 257.

The U.S. District Court for the Southern District of New York denied petitioners' motion for preliminary injunction and granted summary judgment for the City. It found that all of the challenged components of the regulation were either "regulatory measure[s]" that were "substantially related to the City's substantial interest in public safety and crime prevention," or "d[id] not present a Second Amendment problem" at all. *N.Y. State Rifle & Pistol*, 86 F. Supp. 3d at 260-62. A unanimous panel of the Second Circuit affirmed:

> The Plaintiffs do not allege that the City's regulatory scheme imposes any undue burden, expense, or difficulty that impedes their ability to possess a handgun for self-protection, or even their ability to engage in sufficient practice to acquire and maintain the skills necessary to keep firearms safely and use them effectively.

N.Y. State Rifle & Pistol, 883 F.3d at 59. The Supreme Court granted certiorari on the question of whether the Second Amendment shields petitioners from compliance with the anti-trafficking provisions.

SUMMARY OF ARGUMENT

The Second Amendment does not protect the right to a second home, and it does not empower petitioners to flout state and local borders in order to take firearms to any place of their choosing. To the contrary, the right to keep and bear arms is amenable to longstanding regulations aimed at countering the trafficking of guns across state and city lines.

This Court should thus uphold the New York City anti-trafficking provisions as a "presumptively lawful regulatory measure." *Heller*, 664 U.S. at 627 n.26. The meaning of

Heller is clear: true regulatory measures are lawful so long as they stop short of disarming the people. The circuit courts, in deciding cases after *Heller*, are virtually unanimous in adopting a framework that comports with this basic principle. And the rules at issue here are paradigmatic examples of longstanding law enforcement measures, aimed at restricting the cross-border movement of firearms.

If the Court continues to one of the available "standards of scrutiny" for "enumerated constitutional rights," *id.* at 628, then intermediate scrutiny is the right test. *Heller* cleanly differentiated between the core right—"to use arms in defense of hearth and home," *id.* at 635—and other lawful purposes. Both the overwhelming weight of circuit court precedent and the Court's First Amendment jurisprudence point to the same test: apply intermediate scrutiny unless the law in question attacks that core right. The City's anti-trafficking rules, far from preventing self-defense in the home, regulate the movement of firearms *outside* the home. Petitioners ask that incidental burdens on their preferred pastimes trigger strict scrutiny—a move that would imperil the states' basic police powers, as well as analogous anti-trafficking laws at the federal level.

Even if this Court does apply strict scrutiny, however, the City's regulatory framework is permissive and compelling enough to withstand it. The City government specifically enacted the anti-trafficking provisions for the purpose of closing loopholes that enabled rampant evasion of New York's gun laws. Since then, these provisions have promoted law enforcement and public safety; they closely tailor City gun laws to the aim of protecting border integrity while still allowing ample opportunity for hunting, target practice, and competitive shooting.

The Second Circuit correctly upheld the City's regulatory scheme against a Second Amendment challenge. This Court should affirm.

ARGUMENT

I. Under *Heller*, the City's anti-trafficking provisions qualify as a presumptively lawful regulatory measure.

A. Gun laws that merely regulate firearm use are presumptively lawful unless they function to disarm the people.

The Court should follow the plain language of *Heller*: gun statutes are "presumptively lawful" when they are bona fide "regulatory measures." 554 U.S. at 627 n.26. Rebutting the presumption should require showing that a regulation functions as an effective means of "disarm[ing] the people." *Id.* at 598.

History and precedent back this principle. Since Blackstone, "commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626. The Court has always upheld restrictions on the *means* by which people bear arms. For example, bans on "parad[ing] with arms in cities" do not infringe on the Second Amendment right. *Presser v. Illinois*, 116 U.S. 252, 264 (1886). And "the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons." *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897). Similarly, laws may regulate the "*type of weapon*"—so long as they stop short of depriving the people of "the sorts of lawful weapons . . . possessed at home." *Heller*, 554 U.S. at 622, 627; *see id.* at 627 (protecting weapons "in common use at the time") (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)); *cf. Staples v. United States*, 511 U.S. 600, 611-12 (1994) (noting that "machineguns, sawed-off shotguns, and artillery pieces" have a "quasi-suspect character"). Banning individual ownership of handguns disarms the people by depriving them of "the most popular weapon chosen by Americans for self-defense in the home." *Heller*, 554 U.S. at 629. But regulatory measures,

short of disarmament, are presumptively lawful, so that the Second Amendment "does not imperil every law regulating firearms." *McDonald*, 561 U.S. at 786.

Post-*Heller*, the circuit courts have overwhelmingly applied a framework that comports with this principle. In interpreting the Court's admonition that "the right secured by the Second Amendment is not unlimited," *Heller*, 554 U.S. at 626, the circuit courts have moved in near lockstep. Eleven circuits have adopted a version of the "two-step" inquiry: first, determine whether the basis of a challenge is within the scope of "right[s] protected by the Second Amendment," and if so, then second, apply the "appropriate level of constitutional scrutiny."[2] Because presumptively lawful regulatory measures "affect individuals or conduct unprotected by the right to keep and bear arms," they should pass judicial review at step one. *United States v. Focia*, 869 F.3d 1269, 1286 (11th Cir. 2017); *accord, e.g.*, *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010). Merely regulating the means by which citizens "keep and bear arms" does not "infringe[]" on the right. U.S. Const. amend. II.

B. The City's location-based rule is consistent with the holding of *Heller* and the Court's examples of presumptively lawful regulatory measures.

Here, the City's anti-trafficking rule "merely regulate[s] rather than restrict[s]" the Second Amendment right. *N.Y. State Rifle & Pistol*, 86 F. Supp. 3d at 260 (citation omitted). The City grants exceptions to the Premises License in order to allow licensees to hunt and train, and the City cabins those exceptions through geographic limits. Nothing in the law prevents firearm ownership

[2] *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1252 (D.C. Cir. 2011); *accord Kanter v. Barr*, 919 F.3d 437, 441 (7th Cir. 2019); *Gould v. Morgan*, 907 F.3d 659, 668-69 (1st Cir. 2018); *N.Y. State Rifle & Pistol*, 883 F.3d at 55; *Stimmel v. Sessions*, 879 F.3d 198, 204 (6th Cir. 2018); *United States v. Focia*, 869 F.3d 1269, 1285 (11th Cir. 2017); *United States v. Chovan*, 735 F.3d 1127, 1136-37 (9th Cir. 2013); *Nat'l Rifle Ass'n of Am., Inc. v. ATF* (*NRA*), 700 F.3d 185, 197 (5th Cir. 2012); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 800 (10th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). The Eighth Circuit did not adopt the two-step inquiry when a concurring opinion proposed it, but that concurrence agreed that the regulation survived at step one regardless. *United States v. Adams*, 914 F.3d 602, 611 (8th Cir. 2019) (Kelly, J., concurring in the judgment). The Federal Circuit has not addressed the question.

or even target practice, hunting, and competitive shooting. It merely keeps certain activities within City limits, for a certain class of licensees, to prevent the free flow of arms in and out of the City. This policy is a far cry from the District of Columbia's handgun ban, to which "[f]ew laws in the history of our Nation have come close." *Heller*, 554 U.S. at 629.

Moreover, the anti-trafficking provisions closely track the "examples" of "presumptively lawful regulatory measures" listed by the *Heller* Court. *Id.* at 627 n.26. "[L]ongstanding prohibitions on the possession of firearms by felons and the mentally ill," *id.* at 626, for example, were first enacted in 1968. *See* Omnibus Crime Control and Safe Streets Act of 1968 (OCCSSA), Pub. L. No. 90-351, § 1202(a)(1), (3), 82 Stat. 197, 236; *see also Nat'l Rifle Ass'n of Am., Inc. v. ATF* (*NRA*), 700 F.3d 185, 196-97 (5th Cir. 2012) (finding no evidence of any Founding-Era analog to this law, and noting its 1968 vintage). In the *same statute*, Congress prohibited the unlicensed transport of out-of-state firearms across state borders. OCCSSA § 902, 82 Stat. at 226-34; *see id.* § 901, 82 Stat. at 225 (finding that federal controls of the "traffic in firearms" would "enable the States to control this traffic *within their own borders* through the exercise of their police powers" (emphasis added)); *Bryan v. United States*, 524 U.S. 184, 186 (1998) (noting congressional pre-enactment findings of the "impact of the traffic in firearms on the prevalence of lawlessness and violent crime"). Location controls on firearms traffic, then, have just as long a tenure and just as entrenched a regulatory function as felon-in-possession bans.

And more generally, Congress has long regulated cross-border movement it views as pernicious. *See, e.g.*, Mann Act, ch. 395, § 2, 36 Stat. 825, 825 (1910) (criminalizing transporting across state lines "any woman or girl for the purpose of prostitution or debauchery"); *Champion v. Ames* (*The Lottery Case*), 188 U.S. 321 (1903) (upholding an 1895 ban on the interstate movement of lottery tickets). If *interstate* anti-trafficking provisions are lawful for Congress,

comparable *intrastate* measures are lawful for the states. *See McDonald*, 561 U.S. at 788 (holding that incorporation requires that rights "must be governed by a single, neutral principle" at the state and federal levels). "[N]othing in [*Heller*] should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places . . . ." *Heller*, 554 U.S. at 626. State and local borders certainly qualify, and regulating the traffic of guns across them—without in any way temporarily or permanently disarming any person—is lawful.

II. If the Court continues to a means-end analysis, then intermediate scrutiny is the right test.

Outside the context of presumptively lawful regulatory measures, the Court in *Heller* left open which "standards of scrutiny" for "enumerated constitutional rights" apply to the Second Amendment. *Id.* at 628. The Court ruled out rational basis and "interest-balancing," *id.* at 628 n.27, 634, but it declined to adopt strict scrutiny as a one-size-fits-all test, and left intermediate scrutiny at the Court's future disposal.

A. Strict scrutiny should be limited to substantial burdens on the core right of self-defense in the home.

1. History and precedent support a clear hierarchy of Second Amendment values, with "defense of hearth and home" at the core.

"After *Heller*, the Courts of Appeals generally evaluate Second Amendment claims under intermediate scrutiny." *Silvester v. Becerra*, 138 S. Ct. 945, 947 (2018) (mem.) (Thomas, J., dissenting from denial of certiorari). Indeed, *no* circuit court has a general rule of applying strict scrutiny, *see supra* note 2, and nearly all follow variations on the same formulation: do not apply the strictest form of review unless a law "imposes a substantial burden on the core right" of the Second Amendment. *Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1257 (D.C. Cir. 2011); *accord, e.g.*, *N.Y. State Rifle & Pistol*, 883 F.3d at 57 (holding that "[s]trict scrutiny does not attach" to a law, even one related to "core rights," unless the law "substantially burden[s]" that

right); *Stimmel v. Sessions*, 879 F.3d 198, 207 (6th Cir. 2018) (applying intermediate scrutiny because the law did "not touch the Second Amendment's core," even though the burden on the right was "substantial"). In turn, every "two-step" circuit has adopted a variation of the holding that "the core Second Amendment right is limited to self-defense in the home."[3]

The circuit courts all sing the same tune because the *Heller* Court's message was clear: the level of scrutiny depends on whether a law substantially burdens the "core" right to self-defense in the home. *See* 554 U.S. at 635 (holding that the Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home"); *id.* at 628 (noting that "the home" is "where the need for defense of self, family, and property is most acute"); *id.* at 630 (explaining that disabling "firearms *in the home* . . . makes it impossible for citizens to use them for the core lawful purpose of self-defense" (emphasis added)); *see also McDonald*, 561 U.S. at 780 ("[O]ur central holding in *Heller* [was] that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, *most notably* for self-defense *within the home*." (emphasis added)).

This Court's unambiguous precedent—that the "core," "elevated," "most acute," "most notable" Second Amendment right is for self-defense within the home—is strongly supported by the historical understanding of the right to keep and bear arms. *See* Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 259, 267 (1998) (concluding that because of the deep historical commitment to "protect[ing] one's individual homestead," the constitutional right at Reconstruction was a "home-centric Second Amendment"). The *Heller* Court recognized as much: underlying the Amendment was the core assumption that militiamen "would bring the sorts of

[3] *Gould*, 907 F.3d at 671; *accord Kanter*, 919 F.3d at 441; *N.Y. State Rifle & Pistol*, 883 F.3d at 57; *Stimmel*, 879 F.3d at 203; *Focia*, 869 F.3d at 1285; *Chovan*, 735 F.3d at 1138; *NRA*, 700 F.3d at 206; *Heller II*, 670 F.3d at 1255; *Chester*, 628 F.3d at 676; *Reese*, 627 F.3d at 800; *Marzzarella*, 614 F.3d at 92.

lawful weapons *that they possessed at home* to militia duty." 554 U.S. at 627 (emphasis added). Outside substantial burdens on defense of the home, the individual right to bear arms faces less exacting scrutiny.

2. A two-tiered approach puts the Second Amendment on the same plane as the First and comports with basic principles of constitutional law.

Challenges on the basis of enumerated rights, including fundamental ones, do not automatically trigger strict scrutiny. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (applying a form of intermediate scrutiny to time, place, and manner restrictions of "protected speech"). And it would be inconsistent with the Court's levels-of-scrutiny approach to treat every gun regulation, for constitutional purposes, as equivalent to a gun law more restrictive than almost any "in the history of our Nation." *Heller*, 554 U.S. at 629.

The best rationale for tiered scrutiny comes from the *Heller* Court itself: the First Amendment. *See id.* at 635 (holding that the Second Amendment is "no different" from the First in including certain "exceptions"); *id.* at 582 (holding that the Second Amendment, like the First Amendment, applies to "modern forms" of the enumerated category); *id.* at 595 (noting that neither amendment has "unlimited" scope). As with the First Amendment, some categories are unprotected. In the First Amendment context, this includes, for example, obscenity, incitement, and provocation. *See Miller v. California*, 413 U.S. 15, 23 (1973) ("[O]bscene material is unprotected by the First Amendment."); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that the First Amendment allows states to "forbid or proscribe advocacy" in cases of "inciting or producing imminent lawless action"); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (holding that "fighting words—those which by their very utterance inflict injury" do not "raise any Constitutional problem"). Similarly, the Second Amendment does not invalidate "presumptively lawful regulatory measures"—ones that regulate the keeping and bearing of arms, rather than

disarm members of the people. *Heller*, 554 U.S. at 627 n.26. Then, the First Amendment applies only intermediate scrutiny to laws implicating speech with a "subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *see, e.g.*, *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249 (2010) (commercial speech); *Ward*, 491 U.S. at 791 (time, place, and manner restrictions). Likewise, gun laws that do not substantially burden a "core" Second Amendment right face only intermediate scrutiny. The text of the Second Amendment is "closely linked" with that of the First, Amar, *supra*, at 47, and the same tiered framework should apply.

Petitioners are wrong to suggest that intermediate scrutiny is mere "interest-balancing." In *Heller*, the Court differentiated between "interest-balancing" and "the standards of scrutiny . . . applied to enumerated constitutional rights"—that is, intermediate and strict. 554 U.S. at 628, 634; *see also Silvester*, 138 S. Ct. at 947-48 (Thomas, J., dissenting from denial of certiorari) (separately discussing interest-balancing and intermediate scrutiny, and opining that intermediate scrutiny is also "meaningfully different" from rational basis review). Intermediate scrutiny is on the table for interpretations of enumerated constitutional rights, and the Court should apply it here.

B. The challenged provisions do not in any sense burden a core Second Amendment right.

1. The anti-trafficking rules limit the transportation of weapons, not their use for self-defense in the home.

The City's anti-trafficking provisions facially do not prevent self-defense in the home: they actively enable it. The Premises License is a "handgun license, issued for the protection of a business or residence premises." 38 RCNY § 5-23(a). It places no restrictions whatsoever on the type of handgun used, its conditions of storage, or its accessibility to the owner. Handgun owners in the City are completely free, under the auspices of the Premises License, to roam their own

halls, weapon in hand, ready to defend against anyone who might intrude on "hearth and home." *Heller*, 554 U.S. at 635.

Neither of petitioners' claims shows a genuine burden on the core right, let alone substantially so. Participating in competitive shooting is clearly not "self-defense within the home," *id.* at 577, nor is target practice. To the extent that firearms training relates to the ability to effectively protect one's residence, City law allows Premises licensees to bring their weapons to City firing ranges as often as they like, prohibiting only the movement of weapons across City boundaries. But even then, it is unclear why the right to self-defense in the home would entail bringing *one's own gun* outside City limits rather than simply using an identical borrowed firearm at an out-of-City range. *See N.Y. State Rifle & Pistol*, 883 F.3d at 61. And further still, if petitioners wish to escape these mild restrictions, they are free to apply for any of the classes of carry licenses offered by the City. *See* 38 RCNY § 5-01.

The flaws are similar for the "second home" argument. Section 5-23 bans not the *possession* of firearms in a second home, but merely the movement of a particular weapon between the City and the rest of the state. The City's rule is evenhanded: when an individual takes on residency in a new locality, she may obtain a new license in order to keep firearms at her new home. As members of this Court have noted, "[l]icensing requirements . . . advance gun safety by ensuring that owners understand how to handle guns safely." *Heller II*, 670 F.3d at 1291 (Kavanaugh, J., dissenting). The same rationale applies to an individual's second license, in the relatively rare instance of residing in multiple parts of the State. Gun laws differ between the City and the rest of New York, *see, e.g.* N.Y. Penal Law § 400.00(6), and the State has a vested interest in ensuring that individuals are apprised of local law when they obtain an out-of-City residence. *Cf. Staples*, 511 U.S. at 612 (holding that at the federal level, "knowledge of a weapon's

characteristics," but not of legal registration requirements, is required for conviction). The anti-trafficking provisions do not burden possession of firearms in the home, only the transportation of guns *between* homes.

2. By suggesting that strict scrutiny attaches to any lawful purpose, petitioners' reading would elevate sport, leisure, and luxury at the expense of crucial and commonplace regulations.

Strict scrutiny is a test for, among other things, "racial classifications" and "[l]aws that burden political speech." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *Citizens United v. FEC*, 558 U.S. 310, 340 (2010). Applying strict scrutiny to incidental burdens on any lawful use of a firearm would call on the Court to employ its most stringent standard of constitutional review for the evaluation of seasonal hunting rules. This Court long ago decided against sitting as "superlegislature" for regulatory decisions, *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976), and rules against open City borders should not trigger strict scrutiny merely because a plaintiff invokes the words "bear arms."

What petitioners ask for is an expansion of the Second Amendment's core right into an all-purpose vehicle to protect sport, leisure, and luxury. To them, the City's anti-trafficking provisions are roadblocks to their pastimes. Petitioners lack the ability to bring their personally preferred weapons across City and State lines, even though they can avail themselves of identical weapons on the other side. Petitioners would attend regional shooting competitions, if only they could bring their guns directly upstate or across the Hudson River from their City apartments. And despite ownership of a second home, no petitioner can lawfully split one Premises License in two, and he must obtain a license to keep a firearm where he purchases, rents, or builds a new home—just like everyone else. These lawful activities are perfectly reasonable to pursue. But slight inconveniences to leisure activities do not call for strict scrutiny, especially when they are a part of a democratically enacted border-control regulation. A core right to travel with firearms across borders would

certainly spell doom for the Omnibus Crime Control and Safe Streets Act, which bars the unlicensed procurement of weapons across state lines. *See* OCCSSA, § 902, 82 Stat. at 226-34 (codified in relevant part at 18 U.S.C. § 922(a)(1)(A), (a)(3) (2018)); *see Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1869 (2016) (characterizing Code sections, including at § 922, as the "U.S. gun trafficking statutes"). Petitioners' rule would call for dismantling the federal anti-trafficking regime, and the Second Amendment demands nothing of the sort.

III. The City's licensing scheme, including the anti-trafficking provisions, easily survives any level of scrutiny.

This Court has "dispel[led] the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Adarand Constructors*, 515 U.S. at 237 (citation omitted). The City's provisions survive either relevant formulation—"narrowly tailored measures that further compelling governmental interests," *id.* at 227 (strict), or laws "directly advanc[ing] a substantial governmental interest" in a way "no more extensive than is necessary," *Milavetz*, 559 U.S. at 249 (citation omitted) (intermediate).

A. By enabling State police to manage firearms traffic, the regulations advance the compelling government interests of public safety and rooting out evasion of the gun laws.

The City's anti-trafficking provisions are plainly aimed at countering evasion of gun laws. That compelling interest in turn serves the core state function of promoting public safety.

Even before this litigation, the City clearly staked out its position that the 2001 amendment to Title 38 was directed at rooting out widespread evasion of State and local gun regulation. *See Sgueglia v. Kelly*, 990 N.Y.S.2d 794, 795 (Sup. Ct. 2014) (noting that the government alleged in its case "repeated abuses" of the pre-2001 target licenses), *aff'd*, 19 N.Y.S.3d 742 (App. Div. 2015). Attempted evasion of the gun laws is pervasive and popularly known. *See N.Y. State Rifle & Pistol*, 883 F.3d at 63 (detailing the evidence of target licensees "found with firearms nowhere

near the vicinity of an authorized range, licensees taking their firearms on airplanes, and licensees travel[]ing with their firearms during hours where no authorized range was open" (alteration in original) (citation omitted)); *see also Billions: Chucky Rhoades's Greatest Game* (Showtime television broadcast Mar. 17, 2019) (depicting a chain of quid pro quo bribes executed to illegally obtain a New York City concealed carry license). This background of attempted evasion—widespread, and widely known—is crucial to construing the interests advanced by the law.

The core rationale for the anti-trafficking positions is that gun laws in the City differ from those in upstate New York, Long Island, and New Jersey: taking an otherwise legal firearm through the Lincoln Tunnel or down the Taconic State Parkway from Albany may be unlawful. *See, e.g.*, N.Y. Penal Law § 400.00(6). Anti-trafficking amendments thus serve to ensure that guns do not flow freely into the City, enabling State and local law enforcement to effectively apply their limited resources to screening out illegal weapons from a smaller pool of inflowing guns. Securing the City border from gun traffic, then, protects the integrity of the City's overall regulatory scheme. Without the anti-trafficking provisions, not only would the abuses identified by the lower courts be more common, but the surge in firearms traffic into America's largest city would overwhelm law enforcement's detection efforts.

Enforcing the gun laws in their totality advances "compelling interests in public safety." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 82-83 (1946) ("Protection of the safety of persons is one of the traditional uses of the police power of the States" and so is "one of the least limitable of governmental powers . . . ."). The District Court found that the City had a "vital" interest in "limiting the permissible transport of dangerous firearms." *N.Y. State Rifle & Pistol*, 86 F. Supp. 3d at 262. It correctly identified the City's "interest in public safety and crime prevention" in developing comprehensive gun

regulation and implementing anti-trafficking provisions to enforce them. *Id.* And it found that, armed with these pointed anti-trafficking provisions, the City is "better able to investigate" cross-border gun movements, including by preserving the ability to "police and monitor" gun traffic, thereby "ensur[ing] the public safety." *Id.* Both the specific and broad provisions of City rules contribute to the fight against violent crime and gun violence.

B. The anti-trafficking provisions are narrowly tailored to allow gun owners ample room to possess and practice with arms.

In restricting the cross-border movement of firearms to a more limited class of instances, the City opted for a non-intrusive means of achieving its anti-evasion and public safety goals. Specifically, the anti-trafficking rule is narrowly tailored because it closely tracks the City's objectives while preserving the ability to compete and practice *within* the City.

Traveling to a firing range within City limits is no tall order. The Premises License allows its holders to visit "authorized small arms range[s]/shooting club[s]." 38 RCNY § 5-23(a)(3). As the court of appeals noted, "[p]laintiffs concede that seven authorized ranges are available to them, including at least one in each of the City's five boroughs." *N.Y. State Rifle & Pistol*, 883 F.3d at 59; *see infra* Appendix A. The Court should not take seriously petitioners' response that these clubs charge membership fees. The Second Amendment does not protect the right to *cost-free* arms or training provided by the government, and the lower courts found undisputed that the status quo is purely "a byproduct . . . of market forces." *Id.* at 60 n.10. The licensing scheme itself, including the anti-trafficking rule, is narrowly tailored to pose only a light burden on practice and recreation.

Holding otherwise would seriously compromise the Court's precedent in other areas, most notably abortion. *See, e.g.*, *Silvester*, 138 S. Ct. at 951 (Thomas, J., dissenting from denial of certiorari) (questioning the Court's non-parallel treatment of abortion doctrine and gun rights). If a short drive across Brooklyn is enough to fell the City's gun laws, then overturning an abortion

law for imposing a 150-mile journey is only the tip of the precedential iceberg. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2349 (2016) (Alito, J., dissenting) (reasoning from precedent that "the need to travel up to 150 miles is not an undue burden"); *id.* at 2313 (majority opinion) (noting that 290,000 Texas women would live more than 200 miles from an abortion provider); *see also June Med. Servs., L.L.C. v. Gee*, 139 S. Ct. 663 (2019) (mem.) (Kavanaugh, J., dissenting from grant of application of stay) (objecting to a stay of a policy that could further lower the number of doctors—currently at four—who provide abortions in the state of Louisiana). A right to visit a firing range in one's own backyard would make it difficult for the Court to avoid becoming enmeshed in invalidating far more modest abortion laws.

Petitioners are also wrong in their claim that *target practice* restrictions are invalid because they are stricter than the *hunting* restrictions. It is true that while Premises licensees may not leave the City for target practice, they may travel upstate for hunting at "an authorized area designated by the New York State Fish and Wildlife Law." 38 RCNY § 5-23(a)(4). But there are two crucial reasons for this. First, and most obviously, New York City is more concrete jungle than hunting ground. The City, to avoid cutting off residents from any means of recreational hunting, tailored the law to permit gun traffic upstate for purposes that cannot be met within City limits. Second, hunting and target practice do not lend themselves equally to evasion of the gun laws. As the District Court found, it is a "far more elaborate lie" to claim, when stopped in a vehicle upstate, that a driver is traveling to hunt. *N.Y. State Rifle & Pistol*, 86 F. Supp. 3d at 263. This is because, among other reasons, "designated" wildlife areas are only in certain parts of the State: firing ranges, however, can be anywhere. *See id.* To allow gun owners the same free rein to roam about the state for target practice would seriously undermine the City's interest in effective law enforcement.

CONCLUSION

For the foregoing reasons, this Court should uphold the constitutionality of 38 RCNY § 5-23 and affirm the judgment of the Second Circuit.

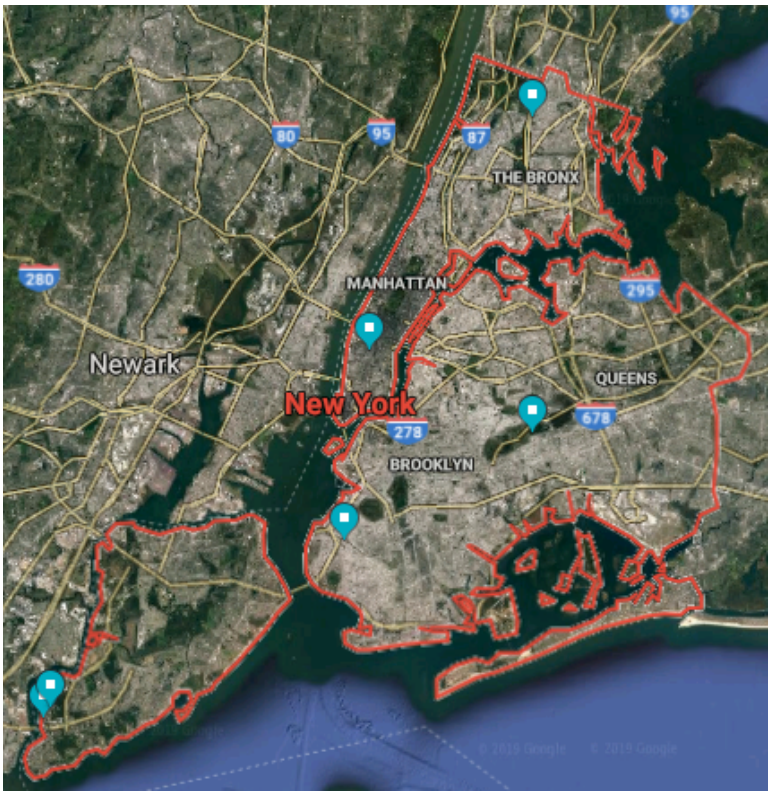
Respectfully submitted,

ID: 911507606

October 23, 2019

APPENDIX

A. Authorized Facilities



Scale:

5 mi. = ▬▬▬

The six (out of seven) authorized firing ranges named by the District Court are marked by blue pins: the Olinville Arms (the Bronx), Westside Rifle & Pistol Range (Manhattan), Bay Ridge Road and Gun Club (Brooklyn), Woodhaven Rifle & Pistol Range (Queens), Colonial Rifle & Pistol Club (Staten Island), and Richmond Borough Gun Club (Staten Island). N.Y. State Rifle & Pistol*, 86 F. Supp. 3d at 256. City limits are in red. Visualization through Google Maps.*

B. Relevant Constitutional and Statutory Provisions

U.S. Const. amend. II

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.

18 U.S.C. § 922 (2018)

(a) It shall be unlawful—
  (1) for any person
    (A) except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms, or

in the course of such business to ship, transport, or receive any firearm in interstate or foreign commerce . . .

. . .

(3) for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to transport into or receive in the State where he resides (or if the person is a corporation or other business entity, the State where it maintains a place of business) any firearm purchased or otherwise obtained by such person outside that State . . .

. . .

38 RCNY § 5-01: Types of Handgun Licenses.

As used in this chapter, the term "handgun" shall mean a pistol or revolver. . . .

(a) *Premises License – Residence or Business*. This is a restricted handgun license, issued for a specific business or residence location. The handgun shall be safeguarded at the specific address indicated on the license, except when the licensee transports or possesses such handgun consistent with these Rules.
(b) *Carry Business License.* This is an unrestricted class of license which permits the carrying of a handgun concealed on the person. In the event that an applicant is not found by the License Division to be qualified for a Carry Business License, the License Division, based on its investigation of the applicant, may offer a Limited Carry Business License or a Business Premises License to an applicant.
(c) *Limited Carry Business License.* This is a restricted handgun license which permits the licensee to carry the handgun listed on the license concealed on the person to and from specific locations during the specific days and times set forth on the license. Proper cause, as defined in 38 RCNY § 5-03, shall need to be shown only for that specific time frame that the applicant needs to carry a handgun concealed on her/his person. At all other times the handgun shall be safeguarded at the specific address indicated on the license, and secured unloaded in a locked container.
(d) *Carry Guard License/Gun Custodian License.* These are restricted types of carry licenses, valid when the holder is actually engaged in a work assignment as a security guard or gun custodian.
(e) *Special Licenses*. Special licenses are issued according to the provisions of § 400.00 of the New York State Penal Law, to persons in possession of a valid New York State County License. The revocation, cancellation, suspension or surrender of such person's County License automatically renders her/his New York City license void. The holder of a Special License shall carry her/his County License at all times when possessing a handgun pursuant to such Special License.
    (1) *Special Carry Business License*. This is a special license, permitting the carrying of a concealed handgun on the person while the licensee is in New York City.
    (2) *Special Carry Guard License/Gun Custodian License.* These are restricted types of special licenses that permit the carrying of a concealed handgun on the person only when the licensee is actually engaged in the performance of her/his duties as a security guard or gun custodian.

38 RCNY § 5-23: Types of Handgun Licenses.

(a) *Premises License – Residence or Business*. This is a restricted handgun license, issued for the protection of a business or residence premises.
    (1) The handguns listed on this license may not be removed from the address specified on the licensee except as otherwise provided in this chapter.
    (2) The possession of the handgun for protection is restricted to the inside of the premises which address is specified on the license.
    (3) To maintain proficiency in the use of the handgun, the licensee may transport her/his handgun(s) directly to and from an authorized small arms range/shooting club, unloaded, and in a locked container, the ammunition to be carried separately.
    (4) A licensee may transport his/her handgun(s) directly to and from an authorized area designated by the New York State Fish and Wildlife Law and in compliance with all pertinent hunting regulations, unloaded, in a locked container, the ammunition to be carried separately, after the licensee has requested and received a "Police Department – City of New York Hunting Authorization" Amendment attached to her/his license.

. . .